

I. L. R. (2008)

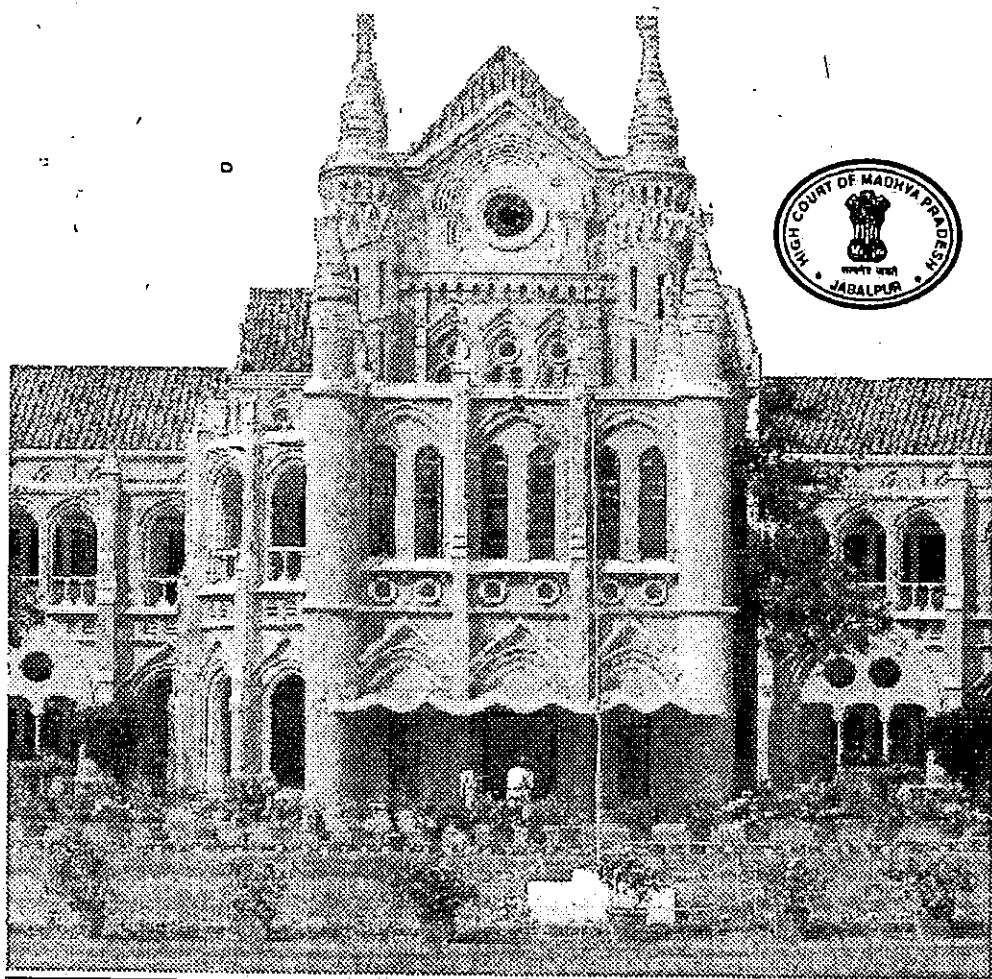
MADHYA PRADESH



THE INDIAN LAW REPORTS

M. P. SERIES

CONTAINING
CASES DECIDED BY THE SUPREME COURT OF INDIA AND
THE HIGH COURT OF MADHYA PRADESH



June

(Price Rs.30)
(pp. 1333 to 1574) * (All Rights Reserved)

2008

LAW REPORTING COMMITTEE OF ILR, M. P. SERIES
2008

PATRON

Hon'ble The Chief Justice Shri A. K. PATNAIK

PRESIDENT

Hon'ble Justice Shri ARUN MISHRA.

MEMBERS

Shri Ravi Nandan Singh, Advocate General, (*ex-officio*)

Shri Surendra Singh, Senior Advocate

Shri P. R. Bhavé, Senior Advocate

Shri Rohit Arya, Senior Advocate

Shri G.S. Ahluwalia, Advocate (*ex-officio*)

Shri Anil Kumar Sharma, Registrar (Judl.), (*ex-officio*)

SECRETARY

Shri G. S. AHLUWALIA, Advocate, Editor, (*Part-time*), (*ex-officio*)

REGISTRAR

(ILR and Exams.)

SHRI J. K. JAIN

For correspondence Contact:-

REGISTRAR

(ILR and Exams.)

Administrative Block,

High Court of M. P.

JABALPUR-482001(M. P.)

☎ : 0761-2625070

(Note An asterisk (*) denotes Note number)

SUPREME COURT OF INDIA

Bal Krishna v. Bhagwan Das	...	1340
Johar v. Mangal Prasad	...	1333

HIGH COURT OF M.P.
WRIT APPEAL

Devidayal Raikwar v. State of M.P.	...	1370
Ram Kishore Shukla v. State of M.P.	...	1364
Reshma Philip v. State of M.P.		1366
Secretary, Prime Minister National Relief Fund v. Gopal Das Nayak	...	1352
State of M.P. v. Ramesh Chandra Bajpai	...	1350
State of M.P. v. Shiv Narayan Saxena	...	1356
Umashankar Singh v. Union of India	...	1360

WRIT PETITION

Anil Jain v. Managing Director, MPRTC	...	1392
Anil v. State of M.P.	...	1469
Colorway Photo Lab v. Union of India	...	1397
Domudas Dhakate v. State of M.P.	...	1448
Hind Syntex Ltd. v. Dewas Mazdoor Sangh	...	1410
Kadir Khan v. State of M.P.	...	1375
Kalyan Singh v. State of M.P.	...	1406
M.P. Housing Board v. Smt. Jyoti Chitnis	...	1442
Madanlal v. Sub Divisional Officer (Revenue)	...	1425
Manohar Sweets v. Commissioner of Income Tax	...	1465
Manoj Kumar Pandya v. State of M.P.		1383
Mohan @ Munna Pachari v. Jagdish Chandra Dubey	...	1402
Muniraj Patel v. State of M.P.	...	1377
Ram Khiladi Gurjar v. State of M.P.	...	1428
Santosh Kumar Sharma v. State of M.P.	...	*51
Sunil Thakur v. Hindustan Petroleum Corporation	...	1452
Vinod Kumar Khare v. State of M.P.	...	1436

APPELLATE CIVIL

Kamlesh Kahar v. Ashif Khan	...	*45
Shyamlal v. Durgabai	...	1472

TABLE OF CASES REPORTED
APPELLATE CRIMINAL

(3)

Antu v. State of M.P.	...	1483
Arvind Kumar v. State of M.P.	...	1479
Babu @ Babariya v. State of M.P.	...	1495
Bhagwan Singh v. State of M.P.	...	1514
Durga Prasad v. State of M.P.	...	1475
Gopal v. State of M.P.	...	*43
Jeevan v. State of M.P.	...	1498
State of M.P. v. Ashok	...	1503
State of M.P. v. Shankerlal Soni	...	*52
V.K. Brahamankar v. Special Police Establishment	...	1511

CRIMINAL REVISION

Akbar v. State of M.P.	...	1531
Bhure Singh v. State of M.P.	...	*42
Gulab v. State of M.P.	...	1535
Kalebabu v. State of M.P.	...	*44
Sovaran Singh v. State of M.P.	...	1527

MISCELLANEOUS CIVIL CASE

Radhika Bava v. Shailesh Bava	...	*48
-------------------------------	-----	-----

MISCELLANEOUS CRIMINAL CASE

Arjun Sahu v. State of M.P.	...	1541
Chandanmal v. Suryakant	...	1554
H.S.S. Raghuvanshi v. State of M.P.	...	1569
In Reference v. Radhakrishna	...	1562
Mahesh v. State of M.P.	...	*46
Mangilal v. State of M.P.	...	1549
Meena Tiwari v. Satya Prakash Capital Investment Ltd.	...	*47
Rajesh Nandini Singh v. Rakesh Khare	...	*49
Ramnaresh v. Arjun	...	*50
Subhash Chandra Jain v. State of M.P.	...	*53

(Note An asterisk (*) denotes Note number)

Arms Act (54 of 1959), Section 25(1-B)(b) - Acquisition or possession of arms of specified description in contravention of Section 4 - Knife seized from the possession of appellant not produced before Trial Court and not marked as an article - Oral evidence regarding its size and specification not sufficient - Appellant acquitted - Appeal allowed. [Kale Babu v. State of M.P.] ...44*

Civil Procedure Code (5 of 1908), Section 24 - Transfer of Case - Husband filed suit for judicial separation at Bhopal whereas wife resides at Indore - Transfer of case from Bhopal to Indore sought on the ground that her parents on account of physical problems of old age not in a position to accompany with her for defending the case at Bhopal - She is not in a position to afford traveling and other expenses - Husband gave undertaking to pay travel and other expenses - Held - No evidence filed in support of health condition of her parents - Application dismissed with direction to husband to pay traveling and other expenses in advance to wife. [Radhika Bava v. Shailesh Bava] ...48*

Civil Procedure Code (5 of 1908), Order 9 Rule 13, Limitation Act, 1963, Section 12 Art. 123 - Application for setting aside ex-parte decree - Limitation - Application for setting aside ex-parte decree to be filed within 30 days - Provisions of Section 12 and exclusion contained therein will not apply to a proceeding under Order 9 Rule 13 C.P.C. [Mohan @ Munna Pachari v. Jagdish Chandra Dubey] ...1402

Constitution, Article 14 - Scope - Mere differentiation or inequality of treatment does not per se amount to discrimination - It is necessary to show that selection or differentiation is unreasonable or arbitrary and it does not rest on any rational basis. [Manoj Kumar Pandya v. State of M.P.] ...1383

Constitution, Article 16 - Resignation - Petitioner submitted resignation making a request for its acceptance prior to expiry of period of notice - Acceptance of resignation before expiry of period of notice not arbitrary. [Sunil Thakur v. Hindustan Petroleum Corporation] ...1452

Constitution, Article 16 - Resignation - Withdrawal of - Resignation once accepted cannot be permitted to be withdrawn as the relations of employer and employee ceases with effect from the date of its acceptance. [Sunil Thakur v. Hindustan Petroleum Corporation] ...1452

Constitution, Article 226 - Alternative Remedy - Order without jurisdiction - Order of removal passed by authority subordinate to appointing authority - Writ Petition dismissed by Single Judge holding that petitioner can avail the alternative remedy of appeal - Held - Order of removal was without jurisdiction - Alternative remedy of appeal is no bar for exercise of jurisdiction under Article 226 of the Constitution - Order of removal quashed - It will be open for Appointing authority to pass fresh order in accordance with law - Appeal allowed. [Ram Kishore Shukla v. State of M.P.] ...1364

आयुध अधिनियम (1959 का 54), धारा 25(1-बी)(बी) - धारा 4 के उल्लंघन में विनिर्दिष्ट किस्म के आयुध का अर्जन या कब्जे में रखना - अपीलार्थी के कब्जे से अभिगृहीत किया गया चाकू विचारण न्यायालय के समक्ष प्रस्तुत नहीं और उसे वस्तु के रूप में अंकित नहीं किया - उसके आकार और उसके विशिष्ट विवरण के बारे में मौखिक साक्ष्य पर्याप्त नहीं - अपीलार्थी दोषमुक्त - अपील मंजूर। [काले बाबू वि. म.प्र. राज्य] 44*

सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 - मामले का अंतरण - पति ने न्यायिक पृथक्करण का मामला भोपाल में पेश किया जबकि पत्नी इंदौर में रहती थी - पत्नी ने मामले का भोपाल से इंदौर अंतरण इस आधार पर चाहा कि उसके माता-पिता वृद्धा अवस्था के कारण शारीरिक रूप से परेशान हैं, वह उनके साथ भोपाल आकर मामले की प्रतिक्षा करने की स्थिति में नहीं है - वह यात्रा व अन्य खर्च वहन करने की स्थिति में नहीं है - पति ने यात्रा व अन्य खर्च देने का भार अपने ऊपर लिया - अभिनिर्धारित - पत्नी ने उसके माता-पिता की शारीरिक अवस्था के समर्थन में कोई साक्ष्य पेश नहीं किया - आवेदन इस निदेश के साथ खारिज किया कि पति, पत्नी को यात्रा व अन्य खर्च की राशि अग्रिम अदा करे। [राधिका बावा वि. शैलेश बावा] 48*

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13, परिसीमा अधिनियम, 1963, धारा 12, अनुच्छेद 123 - एक पक्षीय डिक्री अपास्त करने हेतु आवेदन - परिसीमा - एक पक्षीय डिक्री अपास्त करने का आवेदन 30 दिनों के भीतर प्रस्तुत होना चाहिये - धारा 12 के उपबन्ध एवं उसमें समाहित अपवर्जन आदेश 9 नियम 13 सि.प्र.सं. के अधीन कार्यवाही पर लागू नहीं होंगे। [मोहन उर्फ मुन्ना पछारी वि. जगदीश चन्द्र दुबे.] 1402

संविधान, अनुच्छेद 14 - क्षेत्र - मात्र भेदात्मकता या व्यवहार में असमानता भेदभाव की कोटि में नहीं आता - यह दर्शाना आवश्यक है कि चयन या भेदात्मकता अनुचित या मनमाना है और उनका आधार युक्तिसंगत नहीं है। [मनोज कुमार पंड्या वि. म.प्र. राज्य] 1383

संविधान, अनुच्छेद 16 - त्यागपत्र - याची ने त्यागपत्र इस निवेदन के साथ प्रस्तुत किया कि इसे सूचना अवधि की समाप्ति के पूर्व स्वीकार किया जाये-सूचना अवधि समाप्ति से पूर्व त्यागपत्र स्वीकार किया जाना मनमाना नहीं। [सुनील ठाकुर वि. हिन्दुस्तान पेट्रोलियम कॉर्पोरेशन] 1452

संविधान, अनुच्छेद 16 - त्यागपत्र - वापस लेना - एक बार स्वीकार किये गये त्यागपत्र को वापस लेने की अनुमति नहीं दी जा सकती क्योंकि त्यागपत्र स्वीकार करने की तारीख से नियोजक एवं कर्मचारी के संबंध समाप्त हो जाते हैं। [सुनील ठाकुर वि. हिन्दुस्तान पेट्रोलियम कॉर्पोरेशन] 1452

संविधान, अनुच्छेद 226 - वैकल्पिक उपचार - अधिकारिता के बिना आदेश - नियुक्ति प्राधिकारी के अधीनस्थ प्राधिकारी द्वारा सेवा से हटाये जाने का आदेश पारित - एकल पीठ द्वारा रिट याचिका यह अभिनिर्धारित करते हुये खारिज की गई कि याची अपील का वैकल्पिक उपचार का लाभ उठा सकता है - अभिनिर्धारित - सेवा से हटाये जाने का आदेश अधिकारिता के बिना दिया गया था - अपील का वैकल्पिक उपचार है, इससे संविधान के अनुच्छेद 226 के अंतर्गत अधिकारिता के प्रयोग में वर्जन नहीं - हटाये जाने का आदेश अभिखण्डित - नियुक्ति प्राधिकारी विधि अनुसार नया आदेश पारित करने के लिये स्वतंत्र - अपील मंजूर। [रामकिशोर शुक्ला वि. म.प्र. राज्य] 1364

Constitution, Article 226, Civil Procedure Code, 1908, Order 6 Rule 17 - Amendment of Petition - Provisions of C.P.C. do not strictly apply to proceedings under Article 226 - However, High Court while exercising its power have to keep in mind the principles incorporated in different provisions of C.P.C. [Reshma Philip v. State of M.P.] ... 1366

Constitution, Article 226 - Physical Training Instructor - Equal Pay for Equal Work - Similarly situated Physical Training Instructor and Teacher have already been given UGC scale - Question of Nature of duties of Physical Training Instructor with the duties of Teacher has already become fait accompli - Single Judge allowed petition with the direction to grant pay scale of UGC Teachers - DB found no ground for interference - Appeal dismissed. [State of M.P. v. Ramesh Chandra Bajpai] ... 1350

Constitution, Article 226 - Regulations of Medical Council of India, 2000, Clauses 3, 7 & Note (a) - MBBS Course - Attending classes is one thing and to become eligible in appearing in the examination is altogether different thing - Petitioners passed 1st professional examination in supplementary examination - Although they had attended classes with main batch but they were not allowed to appear in second professional examination - Held - Terminology used in clause 7 'joining of main batch' cannot be given undue emphasis - Passing in 1st professional examination is compulsory before proceeding to second professional examination - Petitioners cannot be permitted to appear in examination unless they complete 18 months regular training and pass the first MBBS Course - Petition dismissed. [Muniraj Patel v. State of M.P.] ... 1377

Constitution, Article 226 - Transfer - Petitioner challenged her transfer - Another transfer order was passed during pendency of the petition - Application for amendment of Petition dismissed as subsequent transfer order raised a fresh cause of action and writ petition dismissed as infructuous - Held - Material facts remained the same - There was only alteration of one material fact that another transfer order was issued - Amendment should be allowed for the purposes of deciding real controversy in issue between the parties - Amendment allowed and matter remitted back to Single Judge for deciding writ petition on merits. [Reshma Philip v. State of M.P.] ... 1366

Constitution, Articles 226/227 - Object of Prime Minister National Relief Fund - It is working in larger interest of public and help is being provided to needy people - A discretionary fund of PM and is being managed by trust and not bureaucratic machinery - Relief Fund is not subject matter of any review by Courts - No allegation that Relief Fund is under mismanagement or is not functioning properly or the funds are not reaching the needy persons - Observations made against fund or mismanagement of fund are expunged. [Secretary, Prime Minister National Relief Fund v. Gopal Das Nayak] ... 1352

Constitution, Articles 226/227 - Prime Minister National Relief Fund - Interest can be awarded in a case where some debt is payable or amount is

संविधान, अनुच्छेद 226, सिविल प्रक्रिया संहिता, 1908, आदेश 6 नियम 17 — याचिका में संशोधन — सि.प्र.सं. के उपबन्ध अनुच्छेद 226 की कार्यवाही में कड़ाई से लागू नहीं होते — फिर भी उच्च न्यायालय को अपनी शक्ति का प्रयोग करते समय सि.प्र.सं. के विभिन्न उपबन्धों में समाहित सिद्धान्तों का ध्यान रखना चाहिये। [रेशमा फिलिप वि. म.प्र. राज्य]....1366

संविधान, अनुच्छेद 226 — व्यायाम अनुदेशक — समान कार्य के लिये समान वेतन — समरूप स्थित व्यायाम अनुदेशक व शिक्षक को विश्वविद्यालय अनुदान आयोग का वेतनमान पूर्व से दिया गया — व्यायाम अनुदेशक एवं शिक्षक के कर्तव्यों की प्रकृति का प्रश्न पूर्व निर्धारित — एकल पीठ ने याचिका विश्वविद्यालय अनुदान आयोग द्वारा शिक्षक के लिये निर्धारित वेतनमान देने के निदेश के साथ मंजूर की — खण्डपीठ ने हस्तक्षेप का कोई आधार नहीं पाया — अपील निरस्त। [म.प्र. राज्य वि. रमेश चन्द्र बाजपेयी] 1350

संविधान, अनुच्छेद 226, भारतीय आयुर्विज्ञान परिषद विनियम, 2000, खण्ड 3, 7 और टीप (ए) — एमबीबीएस पाठ्यक्रम — कक्षा में हाजिर होना एक बात है और परीक्षा में बैठने के लिए पात्र होना बिल्कुल ही अलग बात है — याचियों ने प्रथम व्यावसायिक परीक्षा को पूरक परीक्षा में उत्तीर्ण किया — यद्यपि वे मुख्य बैच के साथ कक्षा में हाजिर हुए परन्तु उन्हें द्वितीय व्यावसायिक परीक्षा में बैठने की अनुमति नहीं दी गई — अभिनिर्धारित — खण्ड 7 में प्रयुक्त परिभाषा 'मुख्य बैच के साथ शामिल होना' को अनुचित बल नहीं दिया जा सकता — द्वितीय व्यावसायिक परीक्षा में प्रवेश के पूर्व प्रथम व्यावसायिक परीक्षा उत्तीर्ण करना अनिवार्य है — याचियों को परीक्षा में बैठने की अनुमति नहीं दी जा सकती है जब तक कि वे 18 महीनों का नियमित प्रशिक्षण और प्रथम एमबीबीएस कोर्स उत्तीर्ण न कर लें — याचिका खारिज। [मुनिराज पटेल वि. म.प्र. राज्य] 1377

संविधान, अनुच्छेद 226 — स्थानांतरण — याची ने अपने स्थानांतरण को चुनौती दी — याचिका के लंबित रहने के दौरान दूसरा स्थानांतरण आदेश पारित — याचिका में संशोधन का आवेदन खारिज क्योंकि उत्तरवर्ती स्थानांतरण के कारण नया वाद हेतुक उत्पन्न हो गया एवं रिट याचिका निष्फल होने से खारिज — अभिनिर्धारित — सारवान तथ्य यथावत रहे — केवल एक सारवान तथ्य में परिवर्तन कि दूसरा स्थानांतरण आदेश जारी किया गया — पक्षकारों के मध्य वास्तविक विवाद के विनिश्चय के प्रयोजन के लिये संशोधन मंजूर किया जाना चाहिये — संशोधन मंजूर एवं मामला एकलपीठ को रिट याचिका के गुणदोषों पर विनिश्चय के लिये वापस भेजा गया। [रेशमा फिलिप वि. म.प्र. राज्य] 1368

संविधान, अनुच्छेद 226/227 — प्रधानमंत्री राष्ट्रीय राहत कोष का उद्देश्य — यह जनता के व्यापक हित में कार्य करता है एवं जरूरतमंद व्यक्ति को सहायता प्रदान की जाती है — यह प्रधानमंत्री के विवेकाधीन कोष है एवं इसका प्रबंध न्यास द्वारा किया जाता है नौकरशाही प्रबंधन द्वारा नहीं — राहत कोष न्यायालय द्वारा पुनर्विलोकन की विषयवस्तु नहीं है — ऐसा अभिकथन नहीं कि राहत कोष कुप्रबंधन के अधीन है या उचित कार्य नहीं कर रहा है या राशि जरूरतमंद व्यक्तियों को नहीं पहुंच रही है — कोष या कोष के कुप्रबंधन के विरुद्ध टीका टिप्पणी लोप की गयी। [सचिव, प्रधानमंत्री राष्ट्रीय राहत कोष वि. गोपाल दास नायक] 1352

संविधान, अनुच्छेद 226/227 — प्रधानमंत्री राष्ट्रीय राहत कोष — ब्याज उस मामले में दिया जा सकता है जहां ऋण देय हो या राशि कानूनी तौर पर देय हो — ब्याज नहीं

legally payable - Interest cannot be awarded where amount is distributed from discretionary fund. [Secretary, Prime Minister National Relief Fund v. Gopal Das Nayak] ...1352

Constitution, Article 309, M.P. Land Revenue Code, 1959, Section 104(2)
- Disciplinary Authority - Petitioner working as Patwari - He was removed from service by Sub Divisional Magistrate after holding departmental enquiry - Held - Collector is the appointing authority and removal of Petitioner by Sub Divisional Magistrate not proper - Notification to that effect issued by State Govt. will not have the effect of damaging substantive Section 104(2) - Petitioner directed to be reinstated with 50% back wages - Competent Authority is free to pass appropriate order in accordance with law - Petition allowed. [Vinod Kumar Khare v. State of M.P.] ...1436

Constitution, Article 311 - Distinction - Suspension of sentence and conviction - *Petitioner convicted U/s 13(1)(d) r/w 13(2) of Prevention of Corruption Act - Sentence suspended in appeal - Show Cause Notice issued as to why he should not be dispensed with service - Notice challenged on the ground that sentence is suspended - Held - There is distinction between suspension of sentence and conviction - Order suspending sentence by no stretch of imagination can be said to be an order of stay of conviction - Issuance of Show Cause Notice cannot be flawed - Appeal dismissed. [Umashankar Singh v. Union of India]* ...1360

Constitution, Articles 341, 342 - Cancellation of Caste Certificate - High Power Committee cancelled caste certificate as petitioner does not belong to Halba/Halbi but Kosti community which is a backward Class - Petitioner claimed protection under Milind's Case - Held - Apex Court had extended benefit only to the Doctors who had already carried out their studies and had also obtained degree - Petitioner cannot be given protection by directing employer for not taking any action against petitioner as employment was obtained by submitting a false certificate - Petition dismissed. [Domudas Dhakate v. State of M.P.]... 1448

Co-operative Societies Act, M.P., 1960 (17 of 1961), Section 64 - Dispute - Alternative Remedy - Election in respect of District Co-operative Krishi Evam Gramin Vikas Bank Shivpuri challenged on the ground that percentage of reservation of delegates is determined to the extent of 90% - Held - Reservation of membership in the election process should not exceed more than 50% - When glaring infirmities are found in the matter of fixation of reservation over and above, the proportionate reservation, writ petition may not be dismissed on the ground of alternative remedy. [Kalyan Singh v. State of M.P.] ...1406

Criminal Law Amendment Ordinance, 1944 - Sections 3, 4 - Attachment of Property - District Judge - Special Judge has passed ad-interim order U/s 4 of Ordinance for attaching the property - No charge sheet was filed before Special Judge - Held - Special Judge is empowered with the powers of District

दिलाया जा सकता है जहां राशि विवेकाधीन कोष से वितरित की जाए। [सचिव, प्रधान मंत्री राष्ट्रीय राहत कोष वि. गोपाल दास नायक]

....1352

संविधान, अनुच्छेद 309, म.प्र. भू राजस्व संहिता, 1959, धारा 104(2) — अनुशासनात्मक प्राधिकारी — याची पटवारी के रूप में कार्यरत — उसे अनुविभागीय मजिस्ट्रेट ने विभागीय जांच करने के बाद सेवा से हटा दिया — अभिनिर्धारित — कलेक्टर नियुक्ति प्राधिकारी है और याची को अनुविभागीय मजिस्ट्रेट द्वारा सेवा से हटाया जाना उचित नहीं — राज्य सरकार द्वारा इस संबंध में जारी की गई अधिसूचना का प्रभाव सारवान धारा 104 (2) को क्षति नहीं पहुंचायेगा — याची को 50 प्रतिशत पिछले वेतन के साथ सेवा में बहाल किये जाने का निदेश दिया — सक्षम प्राधिकारी विधि के अनुसार यथोचित आदेश पारित करने के लिये स्वतंत्र है — याचिका मंजूर। [विनोद कुमार खरे वि. म.प्र. राज्य]

....1436

संविधान, अनुच्छेद 311 — अन्तर — दण्डादेश एवं दोषसिद्धि का निलंबन — याची भ्रष्टाचार निवारण अधिनियम की धारा 13 (1) (डी) सहपठित धारा 13 (2) के अधीन दोषसिद्धि — अपील में दण्डादेश का निलंबन — कारण बताओ नोटिस जारी कि क्यों न उसे नौकरी से अभिमुक्त किया जावे — नोटिस को इस आधार पर चुनौती दी कि दण्डादेश निलंबित है — अभिनिर्धारित — दण्डादेश एवं दोषसिद्धि के निलंबन में अंतर है — दण्डादेश निलंबन के आदेश को किसी भी प्रकार दोषसिद्धि को रोकने का आदेश नहीं कहा जा सकता — कारण बताओ नोटिस जारी किया जाना गलत नहीं कहा जा सकता — अपील खारिज। [उमाशंकर सिंह वि. यूनियन ऑफ इण्डिया]

....1360

संविधान, अनुच्छेद 341, 342 — जाति प्रमाण पत्र का रद्दकरण — याची का जाति प्रमाण पत्र उच्चाधिकार समिति ने रद्द किया चूंकि वह हल्बा/हल्बी जाति का नहीं था बल्कि कोष्टी समुदाय जो एक पिछड़ा वर्ग है, का है — याची ने मिलिंद के मामले के अंतर्गत संरक्षण का दावा किया — अभिनिर्धारित — उच्चतम न्यायालय ने उन्हीं डॉक्टरों को यह लाभ विस्तारित किया था जिन्होंने अपना अध्ययन पूर्ण कर लिया था और डिग्री प्राप्त कर ली थी — याची ने मिथ्या प्रमाण पत्र प्रस्तुत कर नौकरी प्राप्त की थी अतएव याची को ऐसा संरक्षण नहीं दिया जा सकता है कि उसके नियोक्ता को निदेश दिया जाये कि उसके विरुद्ध कोई कार्यवाही न करे — याचिका खारिज। [दोमूदास धकाटे वि. म.प्र. राज्य]

....1448

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 — विवाद — वैकल्पिक उपचार — जिला सहकारी कृषि एवं ग्रामीण विकास बैंक शिवपुरी, से संबंधित चुनाव को इस आधार पर चुनौती दी कि प्रतिनिधियों के आरक्षण का प्रतिशत बढ़ाकर 90 प्रतिशत निर्धारित किया — अभिनिर्धारित — चुनाव प्रक्रिया में सदस्यों का आरक्षण 50 प्रतिशत से अधिक नहीं होना चाहिए — अनुपातिक आरक्षण तय करने के मामले में जब आरक्षण अधिक तय करने की प्रत्यक्ष त्रुटियाँ पाई जायें, तो वैकल्पिक उपचार है, इस आधार पर रिट याचिका खारिज नहीं की जा सकती है। [कल्याण सिंह वि. म.प्र. राज्य]

....1406

दण्ड विधि संशोधन अध्यादेश, 1944 — धारा 3, 4 — संपत्ति की कुर्की — जिला न्यायाधीश — विशेष न्यायाधीश ने अध्यादेश की धारा 4 के अधीन सम्पत्ति को कुर्क करने का अंतरिम आदेश पारित किया — विशेष न्यायाधीश के समक्ष आरोप पत्र पेश नहीं था — अभिनिर्धारित — विशेष न्यायाधीश को 1944 के अध्यादेश के अधीन जिला न्यायाधीश के अधिकार सिर्फ तब प्राप्त

Judge under the Ordinance of 1944 only when the said Court is trying the offence punishable under Prevention of Corruption Act - No charge sheet was filed when impugned order of attachment was passed - Order passed by Special Judge without jurisdiction - Appeal allowed. [V.K. Brahamankar v. Special Police Establishment] ... 1511

Criminal Procedure Code, 1973 (2 of 1974), Section 167(2) - Compulsive release - Application for grant of bail filed after expiry of 90 days - Application not decided on the same day - Charge sheet filed on the following day - Application rejected by the Trial Court - ASJ rejected the revision - Held - Applicant's right would have been extinguished only in case if he failed to furnish bail - As no bail order was passed on the same day, therefore, applicant is entitled to be released - Application allowed. [Mahesh v. State of M.P.] ... 46*

Criminal Procedure Code, 1973 (2 of 1974), Sections 190, 319 - Charge-sheet has been filed before Magistrate for the offences exclusively triable by Court of Sessions - Application u/Ss. 190, 319(2) Cr.P.C. filed before Magistrate for proceeding against applicants - On the basis of enquiry Magistrate took cognizance against applicants - Held - Case instituted on police report which is exclusively triable by Court of Sessions, Magistrate has no option but to commit the case for trial or to order for further investigation - Holding of any enquiry by Magistrate not provided - Order taking cognizance set aside - Petition allowed. [Mangilal v. State] ... 1549

Criminal Procedure Code, 1973 (2 of 1974), Section 193 - Cognizance of Offences by Sessions Court - Committal proceedings before Special Court are mandatory - Proceedings cannot be quashed in those cases where charge sheet was filed directly before Special Court in view of judgment passed in Anand Swaroop Tiwari unless occasioned failure of justice. [Bhagwan Singh v. State of M.P.] ... 1514

Criminal Procedure Code, 1973 (2 of 1974), Sections 216, 397 - Interlocutory Order - Alteration of Charge - Prosecution filed application under Section 216 of Code for framing additional charges - Trial Court fixed the case for evidence without deciding application - Revisional Court directed Trial Court to decide the application - Held - Orders which are matters of moment and some affect or adjudicate rights of accused or a particular aspect of trial cannot be said to be interlocutory order - Revision maintainable. [Sovran Singh v. State of M.P.] ... 1527

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Power to proceed against other persons appearing to be guilty of offence - Public document or document of prosecution, filed along with charge sheet, can be considered at the time of taking cognizance against new person U/s 319. [Subhash Chandra Jain v. State of M.P.] ... 53*

Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Withdrawal

होते हैं जब वह न्यायालय भ्रष्टाचार निवारण अधिनियम के अधीन दण्डनीय अपराध का विचारण कर रहा हो — कोई आरोप पत्र पेश नहीं था जब कुर्की का आक्षेपित आदेश पारित किया था — विशेष न्यायाधीश द्वारा बिना अधिकारिता के आदेश पारित — अपील मंजूर। [व्ही.के. ब्राह्मणकर वि. स्पेशल पुलिस एस्टेब्लिशमेंट] 1511

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167 (2) — बाध्यकारी जमानत — जमानत आवेदन 90 दिन की समाप्ति के बाद पेश — आवेदन पर आदेश उसी दिन नहीं दिया — आरोप पत्र अगले दिन पेश — विचारण न्यायालय द्वारा आवेदन निरस्त — अपर सेशन न्यायाधीश ने पुनरीक्षण निरस्त की — अभिनिर्धारित — आवेदक का अधिकार सिर्फ उस दशा में समाप्त हो सकता है यदि वह जमानत प्रस्तुत करने में असफल रहता है — जमानत के आवेदन पर उसी दिन कोई आदेश पारित नहीं किया, इसलिये आवेदक जमानत पर छूटने का अधिकारी है — आवेदन मंजूर। [महेश वि. म.प्र. राज्य] 46*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 190, 319 — मजिस्ट्रेट के समक्ष अनन्यतः सेशन न्यायालय के विचारण योग्य अपराधों के लिए आरोप-पत्र पेश — मजिस्ट्रेट के समक्ष आवेदकों के विरुद्ध कार्यवाही करने के लिए द.प्र.सं. की धारा 190, 319(2) के अन्तर्गत आवेदन पेश — जांच के आधार पर मजिस्ट्रेट ने आवेदकों के विरुद्ध संज्ञान लिया — अभिनिर्धारित — पुलिस रिपोर्ट पर संस्थित मामला जो अनन्यतः सेशन न्यायालय द्वारा विचारण योग्य है, में मजिस्ट्रेट, मामला विचारण हेतु सुपुर्द करे या पुनः अनुसंधान का आदेश देवे, अन्य विकल्प नहीं — मजिस्ट्रेट द्वारा जांच करने का कोई उपबंध नहीं — संज्ञान लेने का आदेश अपास्त — याचिका मंजूर। [मांगीलाल वि. राज्य] 1549

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 193 — अपराधों का सेशन न्यायालय द्वारा संज्ञान — विशेष न्यायालय के समक्ष मामला सुपुर्दगी की कार्यवाही आज्ञापक है — आनन्द स्वरूप तिवारी वाले मामले में पारित निर्णय को ध्यान में रखकर उन मामलों में कार्यवाही अभिखण्डित नहीं की जा सकती है जहाँ आरोप पत्र सीधे विशेष न्यायालय में पेश किया गया हो जब तक कि न्याय की निष्फलता न हुई हो। [भगवान सिंह वि. म.प्र. राज्य] 1514

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216, 397 — अन्तर्वर्ती आदेश — आरोप में परिवर्तन — अभियोजन ने अतिरिक्त आरोप विरचित करने के लिए संहिता की धारा 216 के अंतर्गत आवेदन प्रस्तुत किया — विचारण न्यायालय ने आवेदन को विनिश्चय किये बिना मामला साक्ष्य के लिये नियत किया — पुनरीक्षण न्यायालय ने विचारण न्यायालय को आवेदन का विनिश्चय करने का निदेश दिया — अभिनिर्धारित — आदेश जो महत्वपूर्ण विषयों पर है और अभियुक्त के अधिकार का न्याय-निर्णय करते हैं या उनको किसी तरह प्रभावित करते हैं या विचारण के किसी विशिष्ट पहलू पर है तो ऐसे आदेशों को अन्तर्वर्ती आदेश नहीं कहा जा सकता है — पुनरीक्षण पोषणीय। [सोवरन सिंह वि. म.प्र. राज्य] 1527

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 — अपराध के दोषी प्रतीत होने वाले अन्य व्यक्तियों के विरुद्ध कार्यवाही करने की शक्ति — धारा 319 के अधीन नये व्यक्ति के विरुद्ध संज्ञान लेते समय आरोप पत्र के साथ प्रस्तुत लोक दस्तावेज या अभियोजन के दस्तावेज पर विचार किया जा सकता है। [सुभाष चन्द्र जैन वि. म.प्र. राज्य] 53*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 — अभियोजन का वापस

from prosecution - *Cross cases pending in one Court - One party facing trial U/s 325 and another U/s 326 of I.P.C. - Withdrawal of one case cannot be said to be in public interest or in the interest of justice - Compelling one party to face trial and giving benefit to other party ought not to be allowed - Order permitting withdrawal from prosecution set aside - Petition allowed.* [Ramnaresh v. Arjun] ... 50*

Criminal Procedure Code, 1973 (2 of 1974), Section 395 - Reference to High Court - *Whether Special Court constituted under M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 is empowered to try the offence punishable under Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Police filed one charge sheet for the trial of offences under the Adhiniyam 1981 and the Act 1989 - Held - Special Court constituted under one Act cannot try the cases of other Acts for which other Special Court has been constituted - Reference answered accordingly.* [In Reference v. Radhakrishna] ... 1562

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 - *Appellants were tried for offence u/s. 302/34 - Convicted by Trial Court u/s. 323/34 - State did not file appeal - High Court in revision filed by complainant appreciated the evidence and remanded case back to pass judgment - Held - High Court should have kept in mind that while exercising its revisional jurisdiction, it exercises a limited power - Judgment of High Court demonstrates that in effect and substance the finding of trial court has been reversed - Trial Court would be bound by observations made in Judgment, and have no option but to convict appellants - High Court has exceeded its jurisdiction - Appeal Allowed.* [Johar v. Mangal Prasad] ... 1333

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 - *Revision - Interlocutory order - Charge Sheet filed u/Ss. 304 & 201 I.P.C. - Magistrate took cognizance u/Ss. 302, 201 I.P.C. - Order is interlocutory in nature - Not revisable.* [Mangilal v. State] ... 1549

Criminal Procedure Code, 1973 (2 of 1974) - Section 437(6) - *Applicant practicing as an Advocate - Applicant advised the poor illiterate persons suffering from Gangrene or like disease to prepare their false claim cases in order to earn easy money - Poor persons admitted in hospital and their limbs were amputated and false vehicular accident cases were registered in connivance of Doctor and police personals - Applicant does not deserve for bail.* [Arjun Sahu v. State of M.P.] ... 1541

Criminal Procedure Code, 1973 (2 of 1974), Section 437(6) - *'Unless for reasons to be recorded in writing' - Magistrate has a right to refuse bail even after expiry of 60 days from the date of framing of charges after recording reasons in writing.* [Arjun Sahu v. State of M.P.] ... 1541

Criminal Procedure Code, 1973 (2 of 1974), Section 464 - *Effect of*

लेना — प्रतिदावों का एक न्यायालय में लंबित होना — एक पक्षकार भा.द.सं. की धारा 325 के विचारण का और दूसरा पक्षकार भा.द.सं. की धारा 326 के विचारण का सामना कर रहा है — एक मामले में अभियोजन को वापस लेना लोकहित या न्यायहित में नहीं कहा जा सकता है — एक पक्षकार को विचारण का सामना करने के लिए बाध्य करते हुए दूसरे पक्षकार को लाभ देना मंजूर नहीं किया जाना चाहिये — अभियोजन वापस लिये जाने की अनुमति का आदेश अपास्त — याचिका मंजूर। [रामनरेश वि. अर्जुन] 50*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 395 — उच्च न्यायालय को निर्देश — म.प्र. डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, 1981 के अधीन गठित विशेष न्यायालय क्या अनुसूचित जाति/अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 के अधीन दण्डनीय अपराध का विचारण करने के लिये सशक्त है — पुलिस ने अधिनियम 1981 और अधिनियम 1989 के अधीन अपराधों के विचारण के लिए एक आरोप पत्र पेश किया — अभिनिर्धारित — एक अधिनियम के अधीन गठित विशेष न्यायालय ऐसे मामलों का विचारण नहीं कर सकता है जो किसी अन्य अधिनियम के अधीन गठित विशेष न्यायालय द्वारा विचारणीय हैं — तदनुसार निर्देश उत्तरित। [इन रेफरेंस वि. राधाकृष्णा] 1562

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397, 401 — अपीलार्थीगण का धारा 302/34 के अपराध के लिये विचारण किया गया — विचारण न्यायालय ने धारा 323/34 में दोषसिद्ध पाया — राज्य द्वारा अपील नहीं की गई — उच्च न्यायालय ने परिवादी द्वारा पेश पुनरीक्षण में साक्ष्य का अभिमूल्यन करते हुए मामले में निर्णय पारित करने के लिये प्रतिप्रेषण कर दिया — अभिनिर्धारित — पुनरीक्षण क्षेत्राधिकार का प्रयोग करते समय उच्च न्यायालय को ध्यान रखना चाहिए कि वह सीमित शक्तियों का प्रयोग कर रहा है — उच्च न्यायालय का निर्णय यह दर्शाता है कि विचारण न्यायालय द्वारा दिये गये निष्कर्ष को सारवान और प्रमावी रूप से उलट दिया है — निर्णय में की गई टिप्पणीयां विचारण न्यायालय पर बाध्य होंगी और उसे अपीलार्थीगण को दोषसिद्ध करने के अलावा कोई विकल्प नहीं रहेगा — उच्च न्यायालय ने अधिकारिता का प्रयोग बढ़कर किया — अपील मंजूर। [जौहर वि. मंगल प्रसाद] 1333

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397, 401 — पुनरीक्षण — अन्तर्वर्ती आदेश — आरोप-पत्र भा.द.सं. की धारा 304 और 201 के अन्तर्गत पेश — मजिस्ट्रेट ने भा.द.सं. की धारा 302, 201 के अन्तर्गत संज्ञान लिया — आदेश अन्तर्वर्ती प्रति का है — पुनरीक्षण योग्य नहीं। [मांगीलाल वि. राज्य] 1549

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437 (6) — आवेदक अधिवक्ता के रूप में विधि व्यवसायी — आवेदक ने गरीब, अशिक्षित व्यक्तियों जो गैंगरीन या उसी तरह की बीमारी से पीड़ित थे, को सरलता से धन अर्जित करने के लिये उनके मिथ्या दावे तैयार करवाने की सलाह दी — गरीब व्यक्तियों को अस्पताल में भर्ती कराया गया और उनके अंगों का अंगविच्छेदन किया गया और डॉक्टर व पुलिस कर्मचारियों की दुरभिसंधि से मोटर यान दुर्घटना के मिथ्या दावे दर्ज कराये गये — आवेदक जमानत पाने का पात्र नहीं। [अर्जुन साहू वि. म.प्र. राज्य] 1541

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437 (6) — जब तक ऐसे कारणों से जो लेखबद्ध किये जायेंगे — मजिस्ट्रेट को आरोप विरचना की तिथि से 60 दिन समाप्त होने के बाद भी कारण लेख बद्ध करके जमानत से इंकार करने का अधिकार है। [अर्जुन साहू वि. म.प्र. राज्य]....1541

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 464 — आरोप विरचित न करने

omission to frame, or absence of, or error in, charge - *Appellants charged for offence u/s 407 I.P.C. - Convicted u/ss. 379 & 381 I.P.C. - Held - Charge contained particulars of offences and accused persons were aware of basic ingredients of offence for which they were being tried - Conviction u/ss. 379 & 381 I.P.C. is saved by provision of Section 464 as it has not resulted in failure of justice.* [Akbar v. State of M.P.] ...1531

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code, 1860, Section 406 - Quashing of complaint - Non-applicant filed complaint on the allegation that he had entrusted jewelry worth Rs. 125 crores to applicant - Applicant did not return jewelry inspite of repeated requests - Applicant alleged that property was handed over to him by way of security of loan - Held - It is not in dispute that property belonging to non-applicant is in possession of applicant - It is not a case in which allegations do not disclose commission of any offence or allegations are absurd and inherently improper or there is an express legal bar to the institution - No case made out for quashing of complaint - Application dismissed. [Chandanmal v. Suryakant] ...1554

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Prevention of Corruption Act, 1988, Section 13(1)(d) - Quashing of Proceedings on the ground of delay in lodging F.I.R. - F.I.R. lodged in the year 2006 i.e., after 6 years of incident - Applicant found guilty in departmental enquiry which had culminated in the year 2004 - Held - No general or wide proposition of law can be formulated that whenever there is inordinate delay on the part of investigating agency in completing investigation such delay would provide ground for quashing F.I.R. - Considering nature of allegations and defence in enquiry it cannot be said that delay in lodging F.I.R. would cause any prejudice to Applicant in his defence or occasion failure of justice - Petition dismissed. [H.S.S. Raghuvanshi v. State of M.P.] ...1569

Criminal trial - Duty of prosecution - Oral dying declaration was not challenged in cross-examination of a witness - Therefore it is not necessary for prosecution to ask to autopsy surgeon that despite deceased having injuries whether he was able to give dying declaration. [State of M.P. v. Ashok] ...1503

Essential Commodities Act (10 of 1955), Sections 3,7, M.P. (Khadya Padarth) Sarvajanik Nagrik Purti Vitran Scheme, 1991, Clause 6(5), 12 - Violation of Scheme - Appellant convicted for violating provisions of Scheme - Held - Scheme was not made in exercise of any power conferred by order U/s 3 of Act - Scheme is made in exercise of Executive Power of State - Appellant cannot be convicted for violating provisions of Scheme - Appellant acquitted - Appeal allowed. [Arvind Kumar v. State of M.P.] ...1479

Evidence Act (1 of 1872), Section 3 - Evidence - Examination-in-Chief of witness could not be completed as original documents were not available - Witness not produced for cross-examination - As opportunity of cross-

या उसके अभाव या उसमें गलती का प्रभाव — अपीलार्थीओं के विरुद्ध भा.द.सं. की धारा 407 के अधीन दण्डनीय अपराध के लिए आरोप विरचित — भा.द.सं. की धारा 379 व 381 के अधीन दोषसिद्ध पाया — अभिनिर्धारित — आरोप में अपराधों की विशिष्टियाँ दी गई थीं और अभियुक्तगण अपराध के मूल तत्वों से अवगत थे जिनके लिये उनका विचारण किया जा रहा था — भा.द.सं. की धारा 379 व 381 के अधीन की गई दोषसिद्धि धारा 464 के उपबंधों द्वारा सुरक्षित क्योंकि ऐसा नहीं हुआ कि इसके परिणामस्वरूप वस्तुतः कोई न्याय नहीं हो पाया हो। [अकबर वि. म.प्र. राज्य] 1531

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता, 1860, धारा 406 — परिवाद का अभिखण्डन — अनावेदक ने परिवाद यह अभिकथन करते हुए पेश किया कि उसने 125 करोड़ रुपये मूल्य के गहने आवेदक को न्यस्त किये थे — आवेदक ने बार-बार अनुरोध के बावजूद गहने वापस नहीं किये — आवेदक ने अभिकथन किया कि सम्पत्ति उसे ऋण की प्रतिभूति के रूप में सौंपी गई थी — अभिनिर्धारित — इसमें विवाद नहीं है कि अनावेदक की सम्पत्ति आवेदक के कब्जे में है — यह मामला नहीं है कि अभिकथन से किसी अपराध का कारित होना प्रगत न होता हो या अभिकथन अर्थहीन व निहायत अनुचित हों या संस्थापन करने में कोई विधिक बाधा हो — परिवाद को अभिखण्डित करने का मामला नहीं बनता है — आवेदन खारिज। [चंदनमल वि. सूर्यकांत] 1554

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, घृष्टाचार निवारण अधिनियम, 1988, धारा 13(1)(डी) — प्रथम सूचना रिपोर्ट विलंब से दर्ज कराने के आधार पर कार्यवाही का अभिखण्डन — प्रथम सूचना रिपोर्ट वर्ष 2006 में अर्थात् घटना के 6 वर्ष के बाद दर्ज कराई — आवेदक को विभागीय जांच में, जो सन् 2004 में समाप्त हुई, दोषी पाया गया — अभिनिर्धारित — विधि की कोई सामान्य या व्यापक प्रतिपादना सुनिश्चित नहीं की जा सकती है कि जब भी अनुसंधान एजेंसी द्वारा अनुसंधान को पूरा करने में अत्यधिक विलंब हुआ हो तो ऐसे विलंब के आधार पर प्रथम सूचना रिपोर्ट अभिखण्डित की जाये — जांच में अभिकथन की प्रकृति और प्रतिरक्षा पर विचार करने पर यह नहीं कहा जा सकता है कि विलंब से प्रथम सूचना रिपोर्ट दर्ज कराई इससे आवेदक को उसके प्रतिरक्षा में पूर्वाग्रह होगा या न्याय की निष्फलता का कारण बनेगा — याचिका खारिज। [एच.एस.एस. रघुवंशी वि. म.प्र. राज्य] 1569

दाण्डिक विचारण — अभियोजन का कर्तव्य — मौखिक मृत्युकालिक कथन को साक्षी के प्रतिपरीक्षण में चुनौती नहीं दी गई — इसलिये अभियोजन के लिये शव परीक्षण करने वाले सर्जन से यह पूछना आवश्यक नहीं था कि मृतक को उपहतियां होने के बावजूद क्या वह मौखिक मृत्युकालिक कथन देने की स्थिति में था। [म.प्र. राज्य वि. अशोक] 1503

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3, 7, म.प्र. (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति वितरण योजना, 1991, खण्ड 6(5), 12 — योजना का उल्लंघन — अपीलार्थी को योजना के उपबन्धों के उल्लंघन के लिये दोषसिद्ध किया गया — अभिनिर्धारित — योजना अधिनियम की धारा 3 के अंतर्गत आदेश में प्रदत्त किसी भी शक्ति के प्रयोग में नहीं बनाई गई थी — योजना राज्य की कार्यपालिक शक्तियों के प्रयोग में बनाई गई — अपीलार्थी को योजना के उपबन्धों के उल्लंघन के लिये दोषसिद्ध नहीं किया जा सकता — अपीलार्थी दोषमुक्त — अपील मंजूर। [अरविंद कुमार वि. म.प्र. राज्य] 1479

साक्ष्य अधिनियम (1872 का 1), धारा 3 — साक्ष्य — साक्षी की मुख्य परीक्षा पूर्ण नहीं हो सकी क्योंकि मूल दस्तावेज उपलब्ध नहीं थे — साक्षी को प्रतिपरीक्षण के लिये पेश नहीं

*examination not given to appellant therefore, statement of witness cannot be read over in evidence. [State of M.P. v. Shankerlal Soni] ...52**

Evidence Act (1 of 1872), Section 9 - Test Identification Parade - No Bar that Doctor cannot conduct T.I.P. - Substantive Evidence is identification in Court - T.I.P. only provides corroboration to identification by witness in Court, if required. [Bhure Singh v. State of M.P.] ...42*

Evidence Act (1 of 1872), Section 32 - Dying Declaration - Conviction can be based upon oral dying declaration if same is found to be trustworthy and reliable. [State of M.P. v. Ashok] ... 1503

Finance Act (14 of 2001), Section 65(72) - Clause z (b) - Taxable Service - Service provided to customer by Photo Studio or Agency relating to Photography - Photography is an inclusive definition and not restrictive - Any negative used for taking photograph would come under the inclusive definition of photography - When a part of work is done by Photographer and part of work is assigned to colour laboratory would in fact be a photography studio or agency - Colour laboratories are amenable to service tax - Petition dismissed. [Colorway Photo Lab v. Union of India]. ...1397

Hindu Marriage Act (25 of 1955), Section 25 - Permanent Alimony - 'At the time of passing of any decree' - Suit for grant of divorce dismissed by Trial Court - Permanent alimony to wife U/s 25 cannot be granted - Though her claim to maintenance stands preserved U/s 18(1) of the Hindu Adoptions and Maintenance Act and Section 125 Cr.P.C. [Shyamlal v. Durgabai] ...1472

Income Tax Act (43 of 1961), Section 127 (2) - Power to transfer cases - Petitioner's cases transferred from Indore to Bhopal circle of Income Tax Department without giving opportunity of hearing and assigning any reason - Held - Concerned authority has not complied the provisions of Section 127(2) - Order transferring cases quashed - However, concerned authority may take necessary steps as per provision of Section 127(2). [Manohar Sweets v. Commissioner of Income Tax] ...1465

Industrial Disputes Act, (14 of 1947), Section 25-K, 25-L, 25-N, Factory Act, 1948, Section 2(M) - Industrial Establishment - Services of respondent No. 1 terminated without the permission from the Government - Held - Construction of houses by the petitioner for the purpose of selling comes within definition of manufacturing process - As per Provision of Chapter V(B) of Act, 1947 no permission sought from Government before termination of services - Order of Tribunals directing re-instatement proper - However, respondent No.1 entitled for 25% back wages instead of 50% as directed by Tribunals. [M.P. Housing Board v. Smt. Jyoti Chitnis] ...1442

Industrial Disputes Act, (14 of 1947), Section 25-O - Procedure for closing down an undertaking - Petitioner applied to State seeking permission to close down industrial undertaking - Intended date for closure given was 15.03.2004

किया — चूंकि अपीलार्थी को प्रतिपरीक्षण का अवसर नहीं दिया गया, इसलिए साक्षी का कथन साक्ष्य में नहीं पढ़ा जा सकता है। [म.प्र. राज्य वि. शंकरलाल सोनी] 52*

साक्ष्य अधिनियम (1872 का 1), धारा 9 — शिनाख्त परेड — ऐसा वर्जन नहीं है कि डाक्टर शिनाख्त परेड संचालित नहीं कर सकता है — न्यायालय में पहचान सारवान साक्ष्य है — यदि अपेक्षित हो तो शिनाख्त परेड से केवल न्यायालय में साक्षी द्वारा की गई पहचान की पुष्टि होती है। [भूरे सिंह वि. म.प्र. राज्य] 42*

साक्ष्य अधिनियम (1872 का 1), धारा 32 — मृत्युकालिक कथन — मौखिक मृत्युकालिक कथन पर दोषसिद्धि आधारित की जा सकती है, यदि वह विश्वसनीय और भरोसेमंद हो। [म.प्र. राज्य वि. अशोक] 1503

वित्त अधिनियम (2001 का 14), धारा 65 (72) — खण्ड जेड (बी) — करयोग्य सेवा — ग्राहक को फोटो स्टूडियो अथवा एजेंसी द्वारा फोटोग्राफी के संबंध में सेवा प्रदाय करना — फोटोग्राफी एक समग्र परिभाषा है, प्रतिबंधक नहीं — किसी निगेटिव का प्रयोग फोटोग्राफ बनाने के लिए किया जायेगा तो वह फोटोग्राफी की परिभाषा में शामिल है — जब कार्य का कुछ भाग फोटोग्राफर द्वारा निष्पादित किया गया हो और कार्य का कुछ भाग कलर लैब को सौंपा गया हो तो वह फोटोग्राफी स्टूडियो अथवा एजेंसी है — कलर लैब सेवाकर के अध्याधीन हैं — याचिका खारिज। [कलरवे फोटो लेब वि. यूनियन ऑफ इण्डिया] 1397

हिन्दू विवाह अधिनियम (1955 का 25), धारा 25 — स्थायी निर्वाह व्यय — 'कोई डिग्री पारित होने के समय' — विवाह विच्छेद का वाद विचारण न्यायालय द्वारा खारिज — धारा 25 के अन्तर्गत पत्नी को स्थायी निर्वाह व्यय नहीं दिलाया जा सकता — यद्यपि उसका भरण पोषण का दावा हिन्दू दत्तक एवं भरण पोषण अधिनियम की धारा 18 (1) एवं धारा 125 दण्ड प्रक्रिया संहिता के अन्तर्गत सुरक्षित। [श्यामलाल वि. दुर्गाबाई] 1472

आयकर अधिनियम (1961 का 43), धारा 127 (2) — मामलों के अंतरण का अधिकार — याची के मामले सुनवाई का अवसर दिये बिना और कोई कारण बताये बिना आयकर विभाग के इंदौर वृत्त से भोपाल वृत्त में अंतरित कर दिये — अभिनिर्धारित — संबंधित प्राधिकारी ने धारा 127 (2) के उपबन्धों का पालन नहीं किया — मामलों के अंतरण का आदेश अभिखण्डित — तथापि संबंधित प्राधिकारी धारा 127 (2) के उपबन्ध अनुसार आवश्यक कदम उठा सकते हैं। [मनोहर स्वीट्स वि. कमिश्नर ऑफ इंकम टैक्स] 1465

औद्योगिक विवाद अधिनियम, (1947 का 14), धारा 25—के, 25—एल, 25—एन, कारखाना अधिनियम, 1948, धारा 2(एम) — औद्योगिक स्थापना — प्रत्यर्थी क्र. 1 की सेवाएँ शासन की अनुमति के बिना समाप्त कर दीं — अभिनिर्धारित — याची द्वारा मकानों का निर्माण विक्रय करने के प्रयोजन से किया यह विनिर्माण प्रक्रिया की परिभाषा में आता है — 1947 के अधिनियम के अध्याय पाँच(बी) के उपबन्ध अनुसार सेवाएँ समाप्त करने से पूर्व शासन से कोई अनुमति नहीं ली गई — अधिकरण का बहाल करने के निदेश का आदेश उचित — यद्यपि अधिकरण द्वारा निदेशित 50 प्रतिशत पिछले वेतन के स्थान पर प्रत्यर्थी क्र. 1, 25 प्रतिशत पिछला वेतन पाने का हकदार। [एम.पी. हाउसिंग बोर्ड वि. श्रीमती ज्योति चिटनिस] 1442

औद्योगिक विवाद अधिनियम, (1947 का 14), धारा 25—ओ — उपक्रम को बंद करने के लिये प्रक्रिया — याची ने औद्योगिक उपक्रम बंद करने की अनुमति के लिये राज्य को आवेदन किया — समापन की आशयित तिथि 15 03 2004 दी गई जो 90 दिनों से परे थी — राज्य

which was beyond 90 days - State Govt. did not consider application - Matter referred by State Govt. to Industrial Tribunal - Tribunal held that closure is justified - However directed for payment of full wages to workmen till date of order i.e. 06.07.2005 - Held - Section 25-O is a complete Code - Wherever decision is taken by State Govt. or Tribunal, intended date of closure specified by employer cannot be changed - Fixing of date of closure upto date of order by Tribunal is beyond its jurisdiction - Petition allowed. [Hind Syntex Ltd. v. Dewas Mazdoor Sangh] ...1410

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Sections 11, 40, 41(1)(B), M.P. Krishi Upaj Mandi (Mandi Samiti Ka Nirvachan) Rules 1997, Rules 14(b), 80, 82 - Representatives of traders holding licence - *Nomination of 4th respondent as member to Board under category of representatives of traders holding licence - 4th respondent is trader but not elected as representative of traders holding licence - Held - Post of representatives of traders holding licence can only be held on being elected as provided under rules - Nomination of 4th respondent quashed - Petition allowed. [Anil v. State of M.P.]* ...1469

Mines and Minerals (Regulation and Development) Act (67 of 1957), Sections 21, 23A - Compounding of offence - *Petitioner filed an application seeking compounding of offence - Application allowed and directed to deposit Rs. 75,000 as compounding fee - Petitioner challenged the order on the ground that he had never made any application and the clerk of Collector had obtained his signature on blank paper - Held - Application was signed by petitioner as well as his Counsel - No explanation offered by Petitioner as to why his counsel had put his signature - Petitioner cannot be allowed to turn around and say that application was blank when he signed it - Petition dismissed. [Santosh Kumar Sharma v. State of M.P.]* ...51*

Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - *Claimant hired truck in connection with purchase of garlic - Accident took place while claimant was travelling in truck to fetch garlic - It cannot be said that there was violation of terms and conditions of policy - Insurance Company liable. [Kamlesh Kahar v. Ashif Khan]* ...45*

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Permanent Disability of claimant assessed to the extent of 66% - *Income taken as Rs. 3000/- p.m. - 2/3rd loss of income comes to Rs. 2000/- p.m. - Multiplier of 18 would be applicable - Compensation Rs. 12,000/- for loss of earning of four months - Rs. 4,32,000/- for loss of future income - Rs. 50,000/- for pain and suffering - Rs. 11,000/- for medical expenditure - Rs. 20,000/- for expenditure on special diet etc. - Compensation Rs. 3,85,758/- enhanced to Rs. 5,25,000/- - Appeal allowed. [Kamlesh Kahar v. Ashif Khan]* ...45*

Municipalities Act, M.P. (37 of 1961), Sections 95, 355 - Appointment of Shiksha Karmis - *Municipality is appointing authority of Shiksha Karmi - No*

शासन ने आवेदन पर विचार नहीं किया — मामला राज्य शासन द्वारा औद्योगिक अधिकरण को निर्दिष्ट — अधिकरण ने यह अभिनिर्धारित किया कि समापन न्यायसंगत है — यद्यपि कामगार को आदेश की तिथि अर्थात् 06.07.2005 तक का पूरा बकाया वेतन देने का निदेश दिया — अभिनिर्धारित — धारा 25—ओ पूर्ण संहिता है — जहाँ राज्य शासन या अधिकरण के द्वारा निर्णय लिया जाना हो, तो नियोक्ता द्वारा समापन की आशयित विनिर्दिष्ट तिथि नहीं बदली जा सकती है — समापन की तिथि को अधिकरण द्वारा आदेश की तिथि तक नियत करना उसके क्षेत्राधिकार से परे है — याचिका मंजूर। [हिन्द सिंटेक्स लिमिटेड वि. देवास मजदूर संघ] 1410

कृषि उपज मंडी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 11,40,41(1)(बी), म.प्र. कृषि उपज मंडी (मंडी समिति का निर्वाचन) नियम 1997, नियम 14(बी), 80, 82 — अनुज्ञप्तिधारी व्यापारियों (लाइसेंसी) के प्रतिनिधि — अनुज्ञप्तिधारी व्यापारियों के प्रतिनिधियों के संवर्ग में चौथे प्रत्यर्थी को बोर्ड में सदस्य के रूप में नामांकन — चौथा प्रत्यर्थी एक व्यापारी है परन्तु अनुज्ञप्ति धारी व्यापारियों का निर्वाचित प्रतिनिधि नहीं — अभिनिर्धारित — अनुज्ञप्तिधारी व्यापारियों के प्रतिनिधि का पद केवल निर्वाचित होने पर ही धारित किया जा सकता है, जैसा की नियमों में उपबन्ध है — चौथे प्रत्यर्थी का नामांकन अभिखण्डित — याचिका मंजूर। [अनिल वि. म.प्र. राज्य] 1469

खान और खनिज (विनियमन और विकास) अधिनियम (1957 का 67), धारा 21, 23 ए — अपराध का शमन — याची ने एक आवेदन अपराध का शमन करने के लिये प्रस्तुत किया — आवेदन मंजूर हुआ और रुपये 75,000 /— शमन शुल्क जमा करने का निदेश दिया — याची ने उस आदेश को इस आधार पर चुनौती दी कि उसने कमी भी कोई आवेदन नहीं दिया और कलेक्टर के लिपिक ने उससे कौरे कागज पर हस्ताक्षर करवाये — अभिनिर्धारित — आवेदन पर याची और उसके अधिवक्ता के हस्ताक्षर थे — याची द्वारा इसका कोई स्पष्टीकरण नहीं दिया गया कि उसके अधिवक्ता ने उसके हस्ताक्षर क्यों किये — याची को अपने पक्ष से पलटने की अनुमति नहीं दी जा सकती कि आवेदन कोरा था जब उसने उस पर हस्ताक्षर किये — याचिका खारिज। [संतोष कुमार शर्मा वि. म.प्र. राज्य] 51*

मोटोरयान अधिनियम (1988 का 59), धारा 147 — बीमा कंपनी का दायित्व — दावेदार ने लहसुन खरीद कर लाने के लिए ट्रक किराये पर लिया था — जब दावेदार ट्रक पर लहसुन लाने के लिए यात्रा कर रहा था उस समय दुर्घटना घटित हुई — यह नहीं माना जा सकता है कि बीमा पॉलिसी के निबंधनों और शर्तों का उल्लंघन हुआ — बीमा कंपनी उत्तरदायी। [कमलेश कहार वि. आशिफ खान] 45*

मोटोरयान अधिनियम (1988 का 59), धारा 166 — प्रतिकर — दावेदार की स्थायी निःशक्तता 66 प्रतिशत निर्धारित की गयी — मासिक आय रुपये 3000 /— आंकी गयी — आय की 2/3 नुकसानी रुपये 2000 /— होती है — 18 का गुणक लागू होगा — प्रतिकर रुपये 12000 /— 4 माह की आय की नुकसानी — रुपये 4,32,000 /— भविष्य में होने वाली आय की नुकसानी — रुपये 50,000 /— पीड़ा एवं दर्द के लिए — रुपये 11,000 /— चिकित्सा व्यय के लिए — रुपये 20,000 /— विशेष आहार इत्यादि के व्यय के लिए — प्रतिकर रुपये 3,85,758 /— को बढ़ाकर रुपये 5,25,000 /— किया — अपील मंजूर। [कमलेश कहार वि. आशिफ खान] 45*

नगर पालिका अधिनियम, म.प्र. (1961 का 37), धारा 95, 355 — शिक्षाकर्म की नियुक्ति — नगरपालिका शिक्षाकर्म की नियोक्ता प्राधिकारी है — राज्य शासन से अनुमोदन

approval of State Government required as there is no such provision - Appointments made in accordance with Rules, 1998 - Government is liable to pay salary or to reimburse the amount to Municipal Council. [State of M.P. v. Shiv Narayan Saxena] ... 1356

Municipality Shiksha Karmi (Recruitment and Conditions of Service) Rules, M.P. 1998 - Rule 5(9)(ii) - Select List - Rule provides that select list of each category and waiting list shall be prepared which shall be valid for a period of nine months - This provision is for waiting list and not for the select list. [State of M.P. v. Shiv Narayan Saxena] ... 1356

National Security Act (65 of 1980), Section 3 - Detention - Public Order - 20 cases registered against petitioner out of them one is registered U/ss 336 & 347 of IPC for indiscriminate firing in public - Even if it is taken as a single act would enough to hold that public order was affected - A single act can be considered for detaining a person - Advisory Board on due consideration upheld the detention - No interference can be made in writ petition on the basis of material on record. [Ram Khiladi Gurjar v. State of M.P.] ... 1428

Negotiable Instruments Act (26 of 1881), Section 138, Evidence Act, 1872, Section 45 - Handwriting Expert - Applicant alleged that complainant had interpolated cheque by adding '9' in front of Rs. 6785/- - Sought permission to get cheque examined by Handwriting Expert - Held - If permission is refused it may put applicant in inconvenience and irreparable loss - Applicant permitted to examine the cheque by handwriting expert. [Meena Tiwari v. Satya Prakash Capital Investment Ltd.] ... 47*

Panchayats (Election Petitions, Corruption Practices and Disqualification for Membership) Rules, M.P. 1995 - Rule 21(d)(iii) - Grounds for declaring election to be void - Amendment of Election Petition - Election Petitioner has to plead all material facts which have affected result of election - Election petitioner cannot be permitted to introduce new facts by way of amendment after limitation - Order allowing application for amendment quashed - Petition allowed. [Madanlal v. Sub Divisional Officer (Revenue)] ... 1425

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994); Sections 70, 69(1), 91 - Appointment of Panchayat Karmi - Whether appealable - Panchayat Karmi is appointed U/s 70 of Adhiniyam - It does not provide that appointment shall be made by passing a resolution - Scheme provides for resolution - Resolution means formal expression of opinion or will of a body - Appointment order is issued by Sarpanch to carry out resolution of General Body - Appointment order can be challenged by filing appeal under Section 91 - Appointment of Panchayat Karmi pursuant to resolution is appealable. [Devidayal Raikwar v. State of M.P.] ... 1370

Panchayat Samvida Shala Shikshak (Employment and Condition of Contract) Rules, M.P., 2005 - Explanation 5 Rule 9(b) - Marks for different

अपेक्षित नहीं क्योंकि ऐसा कोई उपबन्ध नहीं है - नियुक्तियाँ 1998 के नियमों के अनुसार की गई - सरकार वेतन देना या राशि की प्रतिपूर्ति नगरपालिका परिषद को करने के लिये दायी है।
[म.प्र. राज्य वि. शिवनारायण सकसेना] 1356

नगर पालिका शिक्षाकर्म (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1998 - नियम 5(9)(पप) - चयन सूची - नियम में उपबन्ध है कि प्रत्येक वर्ग की चयन सूची और प्रतीक्षा सूची तैयार की जायेगी जो 9 माह की अवधि के लिये वैध रहेगी - यह उपबन्ध प्रतीक्षा सूची के लिये है न कि चयन सूची के लिये। [म.प्र. राज्य वि. शिवनारायण सकसेना] 1356

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 - निरोध - लोक व्यवस्था - याची के विरुद्ध 20 मामले पंजीबद्ध उनमें से एक मामला लोक स्थान पर अंधाधुंध गोली चलाने के लिए भा.द.सं. की धारा 336 व 347 के अन्तर्गत पंजीबद्ध - यदि इस एकमात्र कृत्य को ही लिया जावे तो यह भी लोक व्यवस्था प्रभावित करने के लिए पर्याप्त पाया जायेगा - एक कृत्य भी व्यक्ति को निरोधित करने के लिए विचार में लाया जा सकता है - सलाहकार बोर्ड ने मलीमाति विचार करने के बाद निरोध आदेश की पुष्टि की - अभिलेख पर उपलब्ध तथ्यों के आधार पर रिट याचिका में कोई हस्तक्षेप नहीं किया जा सकता है। [राम खिलाड़ी गुर्जर वि. म.प्र. राज्य] 1428

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138, साक्ष्य अधिनियम, 1872, धारा 45 - हस्तलेख विशेषज्ञ - आवेदक ने अभिकथन किया कि परिवादी ने चेक का क्षेपण (इन्टरपोलेटेड) रुपये 6785/- के आगे '9' जोड़कर किया - चेक का परीक्षण हस्तलेख विशेषज्ञ द्वारा कराने की अनुमति चाही - अभिनिर्धारित - यदि अनुमति अस्वीकृत की जाती है तो आवेदक को असुविधा एवं अपूरणीय हानि होगी - आवेदक को चेक का परीक्षण हस्तलेख विशेषज्ञ द्वारा कराने की अनुमति दी गई। [मीना तिवारी वि. सत्य प्रकाश कैपिटल इन्वेस्टमेंट लि.] 47*

पंचायत (निर्वाचन याचिका, भ्रष्ट आचरण एवं सदस्यता के लिये अपात्रता) नियम, म.प्र. 1995 - नियम 21 (डी)(पपप) - निर्वाचन को शून्य घोषित करने के आधार - निर्वाचन याचिका में संशोधन - निर्वाचन याची को, सभी सारवान तथ्य जिन्होंने निर्वाचन के परिणाम को प्रभावित किया, का अभिवचन करना था - निर्वाचन याची को परिसीमा के बाद संशोधन द्वारा नये तथ्यों को जोड़ने की अनुमति नहीं दी जा सकती - संशोधन का आवेदन स्वीकार करने का आदेश अभिखण्डित - याचिका मंजूर। [मदनलाल वि. सब डिवीजनल ऑफीसर (रेवेन्यू)] 1425

पंचायत राज एवम ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 70, 69(1), 91 - पंचायत कर्म की नियुक्ति - क्या अपील योग्य है - पंचायत कर्म की नियुक्ति अधिनियम की धारा 70 के अंतर्गत होती है - ऐसा कोई उपबन्ध नहीं है कि नियुक्ति के लिये प्रस्ताव पारित किया जायेगा - योजना में प्रस्ताव का उपबन्ध है - प्रस्ताव का अर्थ है निकाय की राय या इच्छा की औपचारिक अभिव्यक्ति - आम सभा के प्रस्ताव के क्रियान्वयन के लिये सरपंच द्वारा नियुक्ति आदेश जारी किया गया - नियुक्ति आदेश को धारा 91 के अंतर्गत अपील पेश कर चुनौती दी जा सकती है - प्रस्ताव के अनुसरण में की गई पंचायत कर्म की नियुक्ति अपील योग्य है। [देवीदयाल रैकवार वि. म.प्र. राज्य] 1370

पंचायत संविदा शाला शिक्षक (रोजगार और संविदा की शर्तें) नियम, म.प्र., 2005 - स्पष्टीकरण 5 नियम 9(बी) - विभिन्न अर्हताओं के लिये अंक - संवैधानिक वैधता

qualifications - Constitutional Validity challenged - Application for contract teacher Grade III - 20 marks to be awarded to D.Ed./B.T.C./D.S.E. incumbent but not to B.Ed. incumbent.- Held - B.Ed. incumbents may be having qualification to teach at higher level but B.Ed. is not higher qualification to teach at primary level - Rule is based on intelligible classification - Rule is intra vires of Constitution - Petition dismissed. [Manoj Kumar Pandya v. State of M.P.] ... 1383

Penal Code, (45 of 1860), Sections 100 & 304 Part II - Right of Private Defence - Appellant had inflicted a single injury by awl (Tocha) to deceased - None of accused persons were carrying any weapon - Appellant and acquitted persons were received bleeding injuries - No explanation given by prosecution - Genesis of the incident is shrouded in mystery - Trial Court found that appellant had exceeded right of private defence - Held - Appellant received injury on thoracic - Dimension and size of injury caused to appellant indicates that he did not exceed the right of private defence - Appellant acquitted - Appeal allowed. [Durga Prasad v. State of M.P.] ... 1475

Penal Code, (45 of 1860), Sections 149, 302 - Murder - Unlawful Assembly - Common Object - Accused appellants came to shop of deceased together - Most of them armed with deadly weapons - One of the accused pierced spear on left side of chest of deceased - Assaults were followed by other accused persons in same transaction - Held - Knowledge of members of unlawful assembly that death of deceased would thereby be caused can be safely attributed - Inference of knowledge and formation of unlawful assembly can be drawn from behaviour of members of assembly - Accused persons rightly convicted u/Ss 302/149 - Appeal dismissed. [Antu v. State of M.P.] ... 1483

*Penal Code (45 of 1860), Section 224, Criminal Procedure Code, 1973, Section 470(4) (b) - Computing the period of limitation, the time during which the offender has avoided arrest by absconding or concealing himself, shall be excluded - Appellant released on parole - Did not surrender after expiry of Parole - Arrested after 19 years - Period of absconding can be excluded - Charge sheet was not beyond limitation. [State of M.P. v. Shankarlal Soni] ... 52**

Penal Code (45 of 1860), Section 302 - Murder - Deceased receiving number of injuries including incised, stab and lacerated wounds - Oral dying declaration made by deceased to her daughter-in-law who reached on the spot - Fact of oral dying declaration mentioned in FIR lodged by witness - Police Statement also contains the fact of oral dying declaration - Oral dying declaration not challenged in cross examination - Reliable. [State of M.P. v. Ashok] ... 1503

Penal Code (45 of 1860), Section 302 - Oral dying declaration - In FIR it has been stated by witness that in oral dying declaration, deceased told that respondent no.1 was having a hockey stick and respondent no. 2 was having a knife - But nowhere in the entire testimony of witness anything about use of hockey stick - Respondent no. 1 is entitled for the benefit of doubt. [State of M.P. v. Ashok] ... 1503

को चुनौती — संविदा शिक्षक ग्रेड तीन के लिये आवेदन — डी.एड./बी.टी.सी./डी.एस.ई. धारक को 20 अंक दिये गये परन्तु बी.एड. धारक को कोई अंक नहीं दिये गये — अभिनिर्धारित — बी.एड. धारक की अर्हता उच्च स्तर पर शिक्षा देने के लिये है किन्तु प्राथमिक स्तर पर शिक्षा देने के लिये बी.एड. उच्च अर्हता नहीं — नियम बोधगम्य वर्गीकरण पर आधारित — नियम संवैधानिक शक्तियों के अधीन — याचिका खारिज। [मनोज कुमार पंड्या वि. म.प्र. राज्य] 1383

दण्ड संहिता, (1860 का 45), धारा 100 व 304 भाग दो — प्रायवेट प्रतिरक्षा का अधिकार — अपीलार्थी ने मृतक को टोचे से एक उपहति कारित की — कोई भी अभियुक्त अपने साथ कोई हथियार नहीं लिये था — अपीलार्थी व दोषमुक्त व्यक्तियों को रक्तंजित उपहतियों हुई — अभियोजन द्वारा कोई स्पष्टीकरण नहीं दिया — घटना की उत्पत्ति रहस्यमय व छिपायी गयी — विचारण न्यायालय ने पाया कि अपीलार्थी ने प्रायवेट प्रतिरक्षा के अधिकार का उल्लंघन किया — अभिनिर्धारित — अपीलार्थी को छाती पर उपहति आयी — उपहति का आकार व विस्तार यह दर्शाते हैं कि उसने प्रायवेट प्रतिरक्षा के अधिकार का उल्लंघन नहीं किया — अपीलार्थी दोषमुक्त — अपील मंजूर। [दुर्गा प्रसाद वि. म.प्र. राज्य] 1475

दण्ड संहिता, (1860 का 45), धारा 149, 302 — हत्या — विधि विरुद्ध जमाव — सामान्य उद्देश्य — अभियुक्तगण अपीलार्थीगण मृतक की दुकान पर साथ-साथ आये — उनमें से अधिकतर घातक हथियार लिये हुए थे — एक अभियुक्त ने मृतक की छाती के बायीं ओर भाले से वेध दिया — इसी क्रम में अन्य अभियुक्तों ने हमले किये — अभिनिर्धारित — विधि विरुद्ध जमाव के सदस्यों के ज्ञान में यह था कि इसके द्वारा मृतक की मृत्यु कारित होगी यह सुरक्षित रूप से उपांरोपण (attribute) किया जा सकता है — जमाव के सदस्यों के व्यवहार से विधि विरुद्ध जमाव की रचना और ज्ञान का अनुमान निकाला जा सकता है — अभियुक्तों को धारा 302/149 के अधीन उचित रूप से दोषसिद्ध पाया — अपील खारिज। [अंतू वि. म.प्र. राज्य] 1483

दण्ड संहिता (1860 का 45), धारा 224, दण्ड प्रक्रिया संहिता, 1973, धारा 470(4)(बी) — परिसीमा काल की संगणना करने में, वह समय अपवर्जित किया जायेगा, जिसके दौरान अपराधी फरार होकर या अपने को छिपाकर गिरफ्तारी से बचता है — अपीलार्थी को पैरोल पर छोड़ा गया — पैरोल की समाप्ति के बाद आत्मसमर्पण नहीं किया—19 वर्षों के बाद गिरफ्तारी—फरार रहने की अवधि अपवर्जित की जा सकती है—आरोप पत्र परिसीमा से परे नहीं। [म.प्र. राज्य वि. शंकरलाल सोनी] 52*

दण्ड संहिता (1860 का 45), धारा 302 — हत्या — मृतक को काफी संख्या में कटे हुये, घोपे हुये और फटे हुये घावों सहित कई उपहतियां आई — मृतक ने अपनी बहू को मौखिक मृत्युकालिक कथन दिया, जो घटना स्थल पर पहुँची थी — साक्षी द्वारा दर्ज करायी गई प्रथम सूचना रिपोर्ट में मौखिक मृत्युकालिक कथन के तथ्य का उल्लेख — पुलिस कथन में भी मौखिक मृत्युकालिक कथन के तथ्य का उल्लेख — मौखिक मृत्युकालिक कथन को प्रतिपरीक्षण में चुनौती नहीं दी गई — विश्वसनीय। [म.प्र. राज्य वि. अशोक] 1503

दण्ड संहिता (1860 का 45), धारा 302 — मौखिक मृत्युकालिक कथन — प्रथम सूचना रिपोर्ट में साक्षी ने कथन किया कि उसे मृतक ने अपने मौखिक मृत्युकालिक कथन में बताया था कि प्रत्यर्थी क्रं. 1 के पास हाकी स्टिक और प्रत्यर्थी क्रं. 2 के पास चाकू था — परन्तु साक्षी के सम्पूर्ण कथन में कहीं भी हाकी स्टिक के प्रयोग के बारे में कुछ नहीं — प्रत्यर्थी क्रं. 1 संदेह का लाभ पाने का हकदार है। [म.प्र. राज्य वि. अशोक] 1503

Penal Code (45 of 1860), Section 324, Criminal Procedure Code, 1973, Section 386 - Sentence - Applicant convicted U/s 324 - Incident took place about 14 years back - Applicant has already suffered imprisonment for 29 days - Sentence reduced to period already undergone. [Bhure Singh v. State of M.P.] ...42*

Penal Code (45 of 1860), Sections 326, 367 - Grievous Hurt - Sentence - Both hands of injured amputated by appellants no. 1 and 2 due to business rivalry - Incident took place 18 years back - However looking to the nature of incident specifically that injured will be handicapped throughout his life act of appellants deserve no sympathy - Trial Court already taken liberal view by sentencing them to 4 years imprisonment - Appeal dismissed. [Gopal v. State of M.P.] ...43*

Penal Code (45 of 1860), Sections 376 or 376/511 - Prosecutrix aged 11 years - Appellant committed sexual intercourse after throwing her on ground - In medical evidence hymen membrane was not torned but there was redness and marks of rubbing were present - Pubic hair were not found containing semen and human permatzoa whereas both were present on underwear and slides of semen of appellant - Appellant held guilty for commission of attempt to commit rape. [Babu @ Babariya v. State of M.P.] ...1495

Penal Code (45 of 1860), Section 376/511 or 354 - Prosecutrix aged 11 years was made to lie on cot by appellant after untying her Salwar - Appellant thereafter laid on her - No evidence that appellant removed his own undergarment and tried to penetrate his male organ in the vagina of prosecutrix - Medical evidence also does not show use of any kind of force on private part of prosecutrix - Appellant guilty of committing offence U/s 354. [Jeevan v. State of M.P.]...1498

Penal Code (45 of 1860), Section 500 - Defamation - Quashing of proceedings - Complaint did not contain actual words alleged to have been used by applicant - Relevant news item also not exhibited in evidence during enquiry U/s 202 - Held - Evidence was not sufficient to constitute defamation either by spoken words or intended to be read in newspaper - Complaint quashed - Petition allowed. [Rajesh Nandini Singh v. Rakesh Khare] ...49*

Prevention of Food Adulteration Act, (37 of 1954), Section 13(2), General Clauses Act, 27 - Report of Public Analyst - Service of Report - Report of Public Analyst sent to applicant by registered post - No suggestion that address described by Local Health Authority was not correct - Held - There would be presumption of service of notice sent by registered post on correct address - Merely AD was not received would not be sufficient to rebut or dislodge presumption of service. [Gulab v. State of M.P.] ...1535

Prevention of Food Adulteration Rules 1955- Rule 9B - Delay in sending Report of Public Analyst - Copy of report of Public Analyst sent to applicant after one month and seven days instead of 10 days after the institution of

दण्ड संहिता (1860 का 45), धारा 324, दण्ड प्रक्रिया संहिता, 1973, धारा 386 - दण्डादेश - आवेदक धारा 324 के अंतर्गत दोषसिद्ध - घटना करीब 14 वर्ष पूर्व घटित - आवेदक पहले ही 29 दिन का कारावास भुगत चुका है - दण्डादेश पूर्व से भुक्ती हुई सजा की अवधि तक घटाया गया। [भूरे सिंह वि. म.प्र. राज्य] 42*

दण्ड संहिता (1860 का 45), धारा 326, 367 - घोर उपहति - दण्डादेश - कारोबार प्रतिद्वंद्विता के कारण अपीलार्थी क्रमांक 1 व 2 द्वारा उपहति के दोनों हाथों का अंगच्छेदन - घटना 18 वर्ष पूर्व घटित - फिर भी घटना की विशिष्ट प्रकृति को देखते हुये कि उपहति पूरे जीवन के लिये विकलांग हो गया, अपीलार्थीगण सहानुभूति पाने के पात्र नहीं - विचारण न्यायालय ने पहले ही उदार दृष्टिकोण लेते हुये उन्हें 4 वर्ष के कारावास से दण्डित किया - अपील खारिज। [गोपाल वि. म.प्र. राज्य] 43*

दण्ड संहिता (1860 का 45), धारा 376 या 376/511 - 11 वर्षीय अभियोक्त्री - अपीलार्थी ने उसे जमीन पर पटकने के बाद मैथुन किया - चिकित्सीय साक्ष्य में योनि की झिल्ली फटी नहीं पायी किन्तु उसमें लालपन व रगड़ने के चिन्ह पाये - गुप्तांग के बाल में वीर्य और मानव शुक्राणु नहीं पाये गए जबकि ये दोनों अपीलार्थी के अधोवस्त्र और वीर्य के स्लाइड पर पाये गए - अपीलार्थी को बलात्संग का प्रयत्न करने का दोषी पाया। [बाबू उर्फ बाबरिया वि. म.प्र. राज्य] 1495

दण्ड संहिता (1860 का 45), धारा 376/511 या 354 - अपीलार्थी द्वारा 11 वर्षीय अभियोक्त्री को उसका सलवार ढीला करने के बाद पुलंग पर लिटाया - उसके बाद अपीलार्थी उसके ऊपर लेट गया - कोई साक्ष्य नहीं कि अपीलार्थी ने अपने अधोवस्त्र उतारे और अपना लिंग अभियोक्त्री के योनि में प्रवेश कराने का प्रयास किया - चिकित्सीय साक्ष्य से भी अभियोक्त्री के गुप्तांग पर किसी तरह का बल प्रयोग करना दर्शित नहीं - अपीलार्थी धारा 354 के अधीन अपराध कारित करने का दोषी। [जीवन वि. म.प्र. राज्य] 1498

दण्ड संहिता (1860 का 45), धारा 500 - मानहानि - कार्यवाहियों का अभिखण्डन - आवेदक द्वारा प्रयोग में लाये गये अभिकथित वास्तविक शब्दों का उल्लेख परिवाद में नहीं - धारा 202 की जांच के दौरान सुसंगत समाचार को भी साक्ष्य में प्रदर्श नहीं कराया - अभिनिर्धारित - बोले हुए शब्दों या आशयित समाचार पत्र को पढ़ने से मानहानि का अपराध गठित करने के लिये पर्याप्त साक्ष्य नहीं थी - परिवाद अभिखण्डित - याचिका मंजूर। [राजेश नंदिनी सिंह वि. राकेश खरे] 49*

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2), साधारण खण्ड अधिनियम 27 - लोक विश्लेषक की रिपोर्ट - रिपोर्ट की तामील - आवेदक को लोक विश्लेषक की रिपोर्ट रजिस्ट्रीकृत डाक द्वारा भेजी गयी - ऐसा सुझाव नहीं कि स्थानीय स्वास्थ्य प्राधिकारी द्वारा वर्णित पता सही नहीं था - अभिनिर्धारित - रजिस्ट्रीकृत डाक के द्वारा सही पते पर नोटिस को भेजने पर उसकी तामील की उपधारणा की जायेगी - केवल पावती का प्राप्त न होना तामील की उपधारणा का खण्डन या विस्थापन करने के लिये पर्याप्त नहीं है। [गुलाब वि. म.प्र. राज्य] 1535

खाद्य अपमिश्रण निवारण नियम, 1955 - नियम 9बी - लोक विश्लेषक की रिपोर्ट भेजने में विलम्ब - आवेदक को लोक विश्लेषक की रिपोर्ट की प्रति अभियोजन के संस्थित होने के दस दिन के बजाय एक माह व सात दिन के बाद भेजी - आवेदक ने नमूने के

prosecution - Applicant did not apply to send the other part of sample to Central Food Laboratory - Applicant cannot complain that sample had deteriorated and could not be analyzed - Revision dismissed. [Gulab v. State of M.P.] ... 1535

S.A.F. Rules, M.P. 1973 - Rule 26 - Probation - Rule 26 provides that services of probationer can be brought to an end if in opinion of appointing authority there is no likelihood of such person becoming suitable officer - No such finding in the cancellation order of appointment - Order not sustainable - Petition allowed. [Kadir Khan v. State of M.P.] ... 1375

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 7 - Mandatory - Non-compliance will not vitiate entire trial but vitiate trial relating to offences under Atrocities Act, unless and until the offence under I.P.C. has nexus with the offences under Atrocities Act-- Accused can take such objection at appellate stage also but has to satisfy Court that grave prejudice has been caused to him which has resulted in miscarriage of justice - If objection is taken at initial stage, Court can direct for reinvestigation. [Bhagwan Singh v. State of M.P.] ... 1514

Specific Relief Act, (47 of 1963), Section 16 (C) - Specific Performance of Contract - Readiness and Willingness - Plaintiff must aver in plaint and thereafter prove those averments - Readiness and willingness must be in accordance with terms of agreement - Plaintiff must prove his readiness and willingness from the institution of suit till it is culminated into decree of Court. [Bal Krishna v. Bhagwandas] ... 1340

Specific Relief Act, (47 of 1963), Section 20 - Relief for specific performance lies in the discretion of court - Court is not bound to grant such relief merely because it is lawful to do so - Discretion to grant specific performance is not exercised if the contract is not equal and fair although the contract is not void. [Bal Krishna v. Bhagwandas] ... 1340

State Road Transport Corporation Employees Deposit Fund Regulation, M.P. 1985 - Clause 10 - Interest - Retired and serving employees of the Corporation are entitled to get interest on amount deposited under the Employees Deposit Fund Scheme as prescribed in clause 10 of Regulations. [Anil Jain v. Managing Director, M.P.R.T.C.] ... 1392

State Road Transport Corporation Employees Deposit Fund Regulation, M.P. 1985 - Clause 10 - Rate of interest - The payment of interest was statutorily governed as per the regulation, and the rate of such interest has been prescribed by the government as per notifications - However the Corporation by issuing circulars can not deviate from discharge of his statutory obligation of payment of interest arbitrarily. [Anil Jain v. Managing Director, M.P.R.T.C.] ... 1392

अन्य भाग को केन्द्रीय खाद्य प्रयोगशाला में भेजने के लिए आवेदन नहीं दिया - आवेदक ऐसी शिकायत नहीं कर सकता है कि नमूना खराब हो गया था और उसका विश्लेषण नहीं हो सकता था - पुनरीक्षण खारिज। [गुलाब वि. म.प्र. राज्य], ...1535

सशस्त्र पुलिस बल, नियम म.प्र., 1973-नियम 26-परिवीक्षा - नियम 26 उपबन्धित करता है कि परिवीक्षाधीन की नौकरी समाप्त की जा सकती है यदि नियोक्ता के मत में ऐसे व्यक्ति के उपयुक्त अधिकारी बनने की कोई संभावना न हो - नियुक्ति आदेश के रद्दकरण में ऐसा कोई निष्कर्ष नहीं - आदेश अपास्त योग्य - याचिका मंजूर। [कादिर खान वि. म.प्र. राज्य] 1375

अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) नियम, 1995, नियम 7 - आज्ञापक - अपरिपालन से सम्पूर्ण विचारण दूषित नहीं होगा किन्तु अत्याचार अधिनियम से सम्बंधित अपराध का विचारण दूषित होगा, जब तक भा.द.सं. के अधीन दण्डनीय अपराध का सम्बन्ध अत्याचार अधिनियम के अधीन दण्डनीय अपराध से न हो - अभियुक्त ऐसी आपत्ति अपील के प्रक्रम पर भी ले सकता है किन्तु न्यायालय को संतुष्ट करना होगा कि उसे घोर पक्षपात कारित हुआ जिसके परिणामस्वरूप न्याय की विफलता हुई है - यदि आपत्ति प्रारम्भिक प्रक्रम पर ली जाती है तो न्यायालय पुनः अनुसंधान का निदेश दे सकता है। [भगवान सिंह वि. म.प्र. राज्य] 1514

विनिर्दिष्ट अनुतोष अधिनियम, (1963 का 47), धारा 16(सी) - संविदा का विनिर्दिष्ट पालन - तत्परता और रजामन्दी - वादी को वाद में प्रकथन करना और उसके बाद उन प्रकथनों को सिद्ध करना चाहिए - तत्परता और रजामन्दी अनुबन्ध की शर्तों के अनुरूप होना चाहिए - वादी को उसकी तत्परता और रजामन्दी वाद संस्थित करने से लेकर न्यायालय की डिक्री होने तक सिद्ध करना चाहिए। [बालकृष्ण वि. भगवानदास] 1340

विनिर्दिष्ट अनुतोष अधिनियम, (1963 का 47), धारा 20 - विनिर्दिष्ट पालन का अनुतोष न्यायालय के विवेकाधिकार के अधीन है - न्यायालय ऐसा अनुतोष दिलाने के लिये बाध्य नहीं है मात्र इसलिए कि ऐसा करना विधिसंगत है - यदि संविदा समान और उचित नहीं है तथापि शून्य भी नहीं है, तो विनिर्दिष्ट पालन का अनुतोष देने के विवेकाधिकार का प्रयोग नहीं किया जा सकता है। [बालकृष्ण वि. भगवानदास] 1340

सड़क परिवहन निगम कर्मचारी जमा निधि विनियम, म.प्र. 1985 - खण्ड 10 - ब्याज - निगम के सेवानिवृत्त कर्मचारी और सेवारत कर्मचारी, कर्मचारी जमा निधि योजना में जमा राशि पर ब्याज पाने के हकदार हैं जैसा कि विनियम खण्ड 10 में विहित है। [अनिल जैन वि. मैनेजिंग डायरेक्टर, एम.पी.आर.टी.सी.] 1392

सड़क परिवहन निगम कर्मचारी जमा निधि विनियम, म.प्र. 1985 - खण्ड 10 - ब्याज की दर - ब्याज का भुगतान विनियम के कानून से शासित होता है और ऐसे ब्याज की दर सरकार द्वारा अधिसूचनाओं में विहित की जाती है - तथापि ब्याज का भुगतान निगम की कानूनी बाध्यता है और वह परिपत्र जारी करके उसके कानूनी बाध्यता के भार से मनमाने ढंग से उन्मोचित नहीं हो सकता है। [अनिल जैन वि. मैनेजिंग डायरेक्टर, एम.पी.आर.टी.सी.] 1392

Mrs. Sushma Shrivastava, J.

BHURE SINGH & ors.

Vs.

STATE OF M.P.

A. Evidence Act (1 of 1872), Section 9 - Test Identification Parade
- No Bar that Doctor cannot conduct T.I.P. - Substantive Evidence is identification in Court - T.I.P. only provides corroboration to identification by witness in Court, if required. AIR 2003 SC 2669

क. साक्ष्य अधिनियम (1872 का 1), धारा 9 - शिनाख्त परेड - ऐसा वर्जन नहीं है कि डाक्टर शिनाख्त परेड संचालित नहीं कर सकता है - न्यायालय में पहचान सारवान साक्ष्य है - यदि अपेक्षित हो तो शिनाख्त परेड से केवल न्यायालय में साक्षी द्वारा की गई पहचान की पुष्टि होती है।

B. Penal Code (45 of 1860), Section 324, Criminal Procedure Code, 1973, Section 386 - Sentence - Applicant convicted U/s 324 - Incident took place about 14 years back - Applicant has already suffered imprisonment for 29 days - Sentence reduced to period already undergone.

ख. दण्ड संहिता (1860 का 45), धारा 324, दण्ड प्रक्रिया संहिता, 1973, धारा 386 - दण्डादेश - आवेदक धारा 324 के अंतर्गत दोषसिद्ध - घटना करीब 14 वर्ष पूर्व घटित - आवेदक पहले ही 29 दिन का कारावास भुगत चुका है - दण्डादेश पूर्व से भुक्ती हुई सजा की अवधि तक घटाया गया।

A.P. Singh, for the applicants

R.S. Shukla, Panel Lawyer, for the non-applicant/State

Cr. R. No. 709/1997 (Jabalpur), D/- 14 February, 2008.

A.P. Shrivastava, J.

GOPAL & ors.

Vs.

STATE OF M.P.

Penal Code (45 of 1860), Sections 326, 367 - Grievous Hurt - Sentence
- Both hands of injured amputated by appellants no. 1 and 2 due to business rivalry - Incident took place 18 years back - However looking to the nature of incident specifically that injured will be handicapped throughout his life act of appellants deserve no sympathy - Trial Court already taken liberal view by sentencing them to 4 years imprisonment - Appeal dismissed. 1998 CAR 305, 2006 (1) MPWN 122, 2006 (2) CAR (SC) 882, 2007(3) Crimes 95 (SC), AIR 2005 SC 44, AIR 1989 SC 236, 2004 Cr.L.R. (MP) 781, 2006(1) VB 134 (SC) (Cases ref.)

दण्ड संहिता (1860 का 45), धारा 326, 367 - घोर उपहति - दण्डादेश - कारोबार प्रतिद्वंद्विता के कारण अपीलार्थी क्रमांक 1 व 2 द्वारा उपहति के दोनों हाथों का अंगच्छेदन - घटना 18 वर्ष

पूर्व घटित - फिर भी घटना की विशिष्ट प्रकृति को देखते हुये कि उपर्युक्त पूरे जीवन के लिये विकलांग हो गया, अपीलार्थीगण सहानुभूति पाने के पात्र नहीं - विचारण न्यायालय ने पहले ही उदार दृष्टिकोण लेते हुये उन्हें 4 वर्ष के कारावास से दण्डित किया - अपील खारिज।

V.K. Saxena with Mayank Bajpai, for the appellants

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

Cr.A. No. 495/2000 (Gwalior), D/- 5 February, 2008.

(44)

Mrs. S.R. Waghmare, J

KALEBABU

Vs.

STATE OF M.P.

Arms Act (54 of 1959), Section 25(1-B)(b) - Acquisition or possession of arms of specified description in contravention of Section 4 - Knife seized from the possession of appellant not produced before Trial Court and not marked as an article - Oral evidence regarding its size and specification not sufficient - Appellant acquitted - Appeal allowed. 1998 (2) J LJ 69, AIR 1978 SC 1511, 2004 Cr.L.J. 119, AIR 2003 SC 4236 (Cases ref.)

आयुध अधिनियम (1959 का 54), धारा 25(1-बी)(बी) - धारा 4 के उल्लंघन में विनिर्दिष्ट किस्म के आयुध का अर्जन या कब्जे में रखना - अपीलार्थी के कब्जे से अभिगृहीत किया गया चाकू विचारण न्यायालय के समक्ष प्रस्तुत नहीं और उसे वस्तु के रूप में अंकित नहीं किया - उसके आकार और उसके विशिष्ट विवरण के बारे में मौखिक साक्ष्य पर्याप्त नहीं - अपीलार्थी दोषमुक्त - अपील मंजूर।

Yogesh Purohit, for the applicant.

G.S. Chouhan, G.A. for the Non-applicant/State.

Cr.R. No. 860/2003 (Indore), D/- 9 April 2008.

(45)

Arun Mishra & Sanjay Yadav, JJ

KAMLESH KAHAR

Vs.

ASHIF KHAN & ors.

A. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Claimant hired truck in connection with purchase of garlic - Accident took place while claimant was travelling in truck to fetch garlic - It cannot be said that there was violation of terms and conditions of policy - Insurance Company liable.

क. मोटरयान अधिनियम (1988 का 59), धारा 147 - बीमा कंपनी का दायित्व - दावेदार ने लहसुन खरीद कर लाने के लिए ट्रक किराये पर लिया था - जब दावेदार ट्रक पर लहसुन लाने के लिए यात्रा कर रहा था उस समय दुर्घटना घटित हुई - यह नहीं माना जा सकता है कि बीमा पॉलिसी के निबंधनों और शर्तों का उल्लंघन हुआ - बीमा कंपनी उत्तरदायी।

B. Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Permanent Disability of claimant assessed to the extent of 66% - Income taken as Rs. 3000/- p.m. - 2/3rd loss of income comes to Rs. 2000/- p.m. - Multiplier of 18 would be applicable - Compensation Rs. 12,000/- for loss of earning of four months - Rs. 4,32,000/- for loss of future income - Rs. 50000/- for pain and suffering - Rs. 11000/- for medical expenditure - Rs. 20000/- for expenditure on special diet etc. -- Compensation Rs. 3,85,758/- enhanced to Rs. 5,25,000/- - Appeal allowed.

ख. मोटरयान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - दावेदार की स्थायी निशक्तता 66 प्रतिशत निर्धारित की गयी - मासिक आय रुपये 3000/- आंकी गयी - आय की 2/3 नुकसानी रुपये 2000/- होती है - 18 का गुणक लागू होगा - प्रतिकर रुपये 12000/- 4 माह की आय की नुकसानी - रुपये 4,32,000/- भविष्य में होने वाली आय की नुकसानी - रुपये 50,000/- पीड़ा एवं दर्द के लिए - रुपये 11,000/- चिकित्सा व्यय के लिए - रुपये 20,000/- विशेष आहार इत्यादि के व्यय के लिए - प्रतिकर रुपये 3,85,758/- को बढ़ाकर रुपये 5,25,000/- किया - अपील मंजूर।

Vishal Dhagat, for the appellant

Rakesh Jain, for the respondent No.3

***M.A. No. 159/2005 (Jabalpur), D/- 12 December, 2007.**

(46)

R.C. Mishra, J.

MAHESH

Vs.

STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Section 167(2) - Compulsive release - Application for grant of bail filed after expiry of 90 days - Application not decided on the same day - Charge sheet filed on the following day - Application rejected by the Trial Court - ASJ rejected the revision - Held - Applicant's right would have been extinguished only in case if he failed to furnish bail - As no bail order was passed on the same day, therefore, applicant is entitled to be released - Application allowed. (2001) 5 SCC 453 (Ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167 (2) - बाध्यकारी जमानत - जमानत आवेदन 90 दिन की समाप्ति के बाद पेश - आवेदन पर आदेश उसी दिन नहीं दिया - आरोप पत्र अगले दिन पेश - विचारण न्यायालय द्वारा आवेदन निरस्त - अपर सेशन न्यायाधीश ने पुनरीक्षण निरस्त की - अभिनिर्धारित - आवेदक का अधिकार सिर्फ उस दशा में समाप्त हो सकता है यदि वह जमानत प्रस्तुत करने में असफल रहता है - जमानत के आवेदन पर उसी दिन कोई आदेश पारित नहीं किया, इसलिये आवेदक जमानत पर छूटने का अधिकारी है - आवेदन मंजूर।

Aditya Sharma, for the applicant.

L.D.S. Baghel, G.A. for the non-applicant/State.

***M.Cr.C. No. 6966/2007 (Jabalpur), D/- 9 January, 2008.**

(47)

K.S. Chauhan, J.

MEENA TIWARI

Vs.

SATYA PRAKASH CAPITAL
INVESTMENT LTD.

Negotiable Instruments Act (26 of 1881), Section 138, Evidence Act, 1872, Section 45 - Handwriting Expert - Applicant alleged that complainant had interpolated cheque by adding '9' in front of Rs. 6785/- - Sought permission to get cheque examined by Handwriting Expert - Held - If permission is refused it may put applicant in inconvenience and irreparable loss - Applicant permitted to examine the cheque by handwriting expert. 2007 (1) MPLJ 84 (Ref.)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138, साक्ष्य अधिनियम, 1872, धारा 45 - हस्तलेख विशेषज्ञ - आवेदक ने अभिकथन किया कि परिवादी ने चेक का क्षेपण (इन्टरपोलेटेड) रुपये 6785/- के आगे '9' जोड़कर किया - चेक का परीक्षण हस्तलेख विशेषज्ञ द्वारा कराने की अनुमति चाही - अभिनिर्धारित - यदि अनुमति अस्वीकृत की जाती है तो आवेदक को असुविधा एवं अपूरणीय हानि होगी - आवेदक को चेक का परीक्षण हस्तलेख विशेषज्ञ द्वारा कराने की अनुमति दी गई। 2007 (1) MPLJ 84 (संदर्भित)।

Narendra Jain with Jitendra Jain, for the applicant
Sharad Gupta, for the non-applicant.

*M.Cr.C. No. 4744/2007 (Jabalpur) D/- 3 Jan 2008.

(48)

U.C. Maheshwari, J

RADHIKA BAVA

Vs.

SHAILESH BAVA

Civil Procedure Code (5 of 1908), Section 24 - Transfer of Case - Husband filed suit for judicial separation at Bhopal whereas wife resides at Indore - Transfer of case from Bhopal to Indore sought on the ground that her parents on account of physical problems of old age not in a position to accompany with her for defending the case at Bhopal - She is not in a position to afford traveling and other expenses - Husband gave undertaking to pay travel and other expenses - Held - No evidence filed in support of health condition of her parents - Application dismissed with direction to husband to pay traveling and other expenses in advance to wife. (2006) 9 SCC 197, (2004) 13 SCC 363, (2004) 13 SCC 407, (2004) 13 SCC 417, (2005) 12 SCC 175 (Cases ref.)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 - मामले का अंतरण - पति ने न्यायिक पृथक्करण का मामला भोपाल में पेश किया जबकि पत्नी इंदौर में रहती थी - पत्नी ने मामले का भोपाल से इंदौर अंतरण इस आधार पर चाहा कि उसके माता-पिता वृद्धा अवस्था के कारण शारीरिक रूप से परेशान हैं, वह उनके साथ भोपाल आकर मामले की प्रतिरक्षा करने की स्थिति में नहीं है - वह यात्रा व अन्य खर्च

वहन करने की स्थिति में नहीं है - पति ने यात्रा व अन्य खर्च देने का भार अपने ऊपर लिया - अभिनिर्धारित - पत्नी ने उसके माता-पिता की शारीरिक अवस्था के समर्थन में कोई साक्ष्य पेश नहीं किया - आवेदन इस निदेश के साथ खारिज किया कि पति, पत्नी को यात्रा व अन्य खर्च की राशि अग्रिम अदा करे।

N.S. Ruprah, for the applicant

Amit Verma, for the non-applicant.

*M.C.C. No. 270/2008 (Jabalpur), D/- 22 February 2008.

(49)

R.C. Mishra, J.

RAJESH NANDINI SINGH .

Vs.

RAKESH KHARE & anr.

Penal Code (45 of 1860), Section 500 - Defamation - Quashing of proceedings - Complaint did not contain actual words alleged to have been used by applicant - Relevant news item also not exhibited in evidence during enquiry U/s 202 - Held - Evidence was not sufficient to constitute defamation either by spoken words or intended to be read in newspaper - Complaint quashed - Petition allowed. AIR 1992 SC 604 (Ref.)

दण्ड संहिता (1860 का 45), धारा 500 - मानहानि - कार्यवाहियों का अभिखण्डन - आवेदक द्वारा प्रयोग में लाये गये अभिकथित वास्तविक शब्दों का उल्लेख परिवाद में नहीं - धारा 202 की जांच के दौरान सुसंगत समाचार को भी साक्ष्य में प्रदर्श नहीं कराया - अभिनिर्धारित - बोले हुए शब्दों या आशयित समाचार पत्र को पढ़ने से मानहानि का अपराध गठित करने के लिये पर्याप्त साक्ष्य नहीं थी - परिवाद अभिखण्डित - याचिका मंजूर।

Manish Dutt, for the applicant

Mahendra Saraf, for the non-applicant No.1

S.K. Kashyap, Dy. G.A., for the non-applicant/State

*M.Cr.C. No. 8804/2005 (Jabalpur) D/- 10 March, 2008.

(50)

B.M. Gupta, J

RAMNARESH & anr.

Vs.

ARJUN & ors.

Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Withdrawal from prosecution - Cross cases pending in one Court - One party facing trial U/s 325 and another U/s 326 of I.P.C. - Withdrawal of one case cannot be said to be in public interest or in the interest of justice - Compelling one party to face trial and giving benefit to other party ought not to be allowed - Order permitting withdrawal from prosecution set aside - Petition allowed. AIR 1980 SC 1510, 2005(1) CCSC 168, 1996 SCC (Cri) 361, (1976) 4 SCC 250 (Ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 - अभियोजन का वापस लेना

— प्रतिदावों का एक न्यायालय में लंबित होना — एक पक्षकार भा.दं.सं. की धारा 325 के विचारण का और दूसरा पक्षकार भा.दं.सं. की धारा 326 के विचारण का सामना कर रहा है — एक मामले में अभियोजन को वापस लेना लोकहित या न्यायहित में नहीं कहा जा सकता है — एक पक्षकार को विचारण का सामना करने के लिए बाध्य करते हुए दूसरे पक्षकार को लाम देना मंजूर नहीं किया जाना चाहिये — अभियोजन वापस लिये जाने की अनुमति का आदेश अपास्त — याचिका मंजूर।

Two cross cases are pending in one Court. One party is facing trial U/s 326 IPC and another party is U/s 325 IPC. Filing an application for withdrawal from the prosecution U/s 321 Cr.P.C. on the basis of the direction of the Govt. to withdraw the cases of simple nature in the public interest is not proper. Considering the nature of both the cases, it has been observed that, it cannot be said to be in public interest or in the interest of justice, as required under law. It tantamount in the interest of one out of the two parties in the cases. Compelling one of the two parties to face the trial and giving benefit to the other party, while withdrawing the case pending against it, ought not to be allowed.

Y.S. Tomar, for the applicants

V.K. Saxena assisted by *Shailendra Dwivedi*, for non-applicants No. 1 to 7

M. Bhardwaj, P.P. for the non-applicant No.8

*M.Cr.C. No. 6543/07 (Gwalior), D/- 8 February 2008.

(51)

Shantanu Kemkar, J.

SANTOSH KUMAR SHARMA

Vs.

STATE OF M.P. & ors.

Mines and Minerals (Regulation and Development) Act (67 of 1957), Sections 21, 23A - Compounding of offence - Petitioner filed an application seeking compounding of offence - Application allowed and directed to deposit Rs.75,000 as compounding fee - Petitioner challenged the order on the ground that he had never made any application and the clerk of Collector had obtained his signature on blank paper - Held - Application was signed by petitioner as well as his Counsel - No explanation offered by Petitioner as to why his counsel had put his signature - Petitioner cannot be allowed to turn around and say that application was blank when he signed it - Petition dismissed.

खान और खनिज (विनियमन और विकास) अधिनियम (1957 का 67), धारा 21, 23 ए — अपराध का शमन — याची ने एक आवेदन अपराध का शमन करने के लिये प्रस्तुत किया — आवेदन मंजूर हुआ और रुपये 75,000/- शमन शुल्क जमा करने का निदेश दिया — याची ने उस आदेश को इस आधार पर चुनौती दी कि उसने कभी भी कोई आवेदन नहीं दिया और कलेक्टर के लिपिक ने उससे कोरे कागज पर हस्ताक्षर करवाये — अभिनिर्धारित — आवेदन पर याची और उसके अधिवक्ता के हस्ताक्षर थे — याची द्वारा इसका कोई स्पष्टीकरण नहीं दिया गया कि उसके अधिवक्ता ने उसके हस्ताक्षर क्यों किये — याची को अपने पक्ष से पलटने की अनुमति नहीं दी जा सकती कि आवेदन कोरा था जब उसने उस पर हस्ताक्षर किये = याचिका खारिज।

Manish Soni, for the petitioner

Deepak Awasthy, G.A. for the respondents

*W.P. No. 9976/2006 (Jabalpur), D/- 14 March 2008.

(52)

A.K. Saxena, J.

STATE OF M.P.

Vs.

SHANKERLAL SONI

A. Evidence Act (1 of 1872), Section 3 - Evidence - Examination-in-Chief of witness could not be completed as original documents were not available - Witness not produced for cross-examination - As opportunity of cross-examination not given to appellant therefore, statement of witness cannot be read over in evidence.

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्ष्य - साक्षी की मुख्य परीक्षा पूर्ण नहीं हो सकी क्योंकि मूल दस्तावेज उपलब्ध नहीं थे - साक्षी को प्रतिपरीक्षण के लिये पेश नहीं किया - चूंकि अपीलार्थी को प्रतिपरीक्षण का अवसर नहीं दिया गया, इसलिए साक्षी का कथन साक्ष्य में नहीं पढ़ा जा सकता है।

B. Penal Code (45 of 1860), Section 224, Criminal Procedure Code, 1973, Section 470(4) (b) - Computing the period of limitation, the time during which the offender has avoided arrest by absconding or concealing himself, shall be excluded - Appellant released on parole - Did not surrender after expiry of Parole - Arrested after 19 years - Period of absconding can be excluded - Charge sheet was not beyond limitation.

ख. दण्ड संहिता (1860 का 45), धारा 224, दण्ड प्रक्रिया संहिता, 1973, धारा 470(4)(बी) - परिसीमा काल की संगणना करने में, वह समय अपवर्जित किया जायेगा, जिसके दौरान अपराधी फरार होकर या अपने को छिपाकर गिरफ्तारी से बचता है - अपीलार्थी को पैरोल पर छोड़ा गया - पैरोल की समाप्ति के बाद आत्मसमर्पण नहीं किया - 19 वर्षों के बाद गिरफ्तारी - फरार रहने की अवधि अपवर्जित की जा सकती है - आरोप पत्र परिसीमा से परे नहीं।

Pankaj Dixit, Panel Lawyer for the appellant/State

Sanjay Patel, for the respondent/accused

*Cr.A. No. 797/2003 (Jabalpur), D/- 6 May 2008.

(53)

B.M. Gupta, J.

SUBHASH CHANDRA JAIN

Vs.

STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Power to proceed against other persons appearing to be guilty of offence - Public document or document of prosecution, filed along with charge sheet, can be considered at the time of taking cognizance against new person. U/s 319. JT 2005 (8) SC 458. 2000 SCC (Cri) 609. AIR 2007 SC 1899 (Ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 — अपराध के दोषी प्रतीत होने वाले अन्य व्यक्तियों के विरुद्ध कार्यवाही करने की शक्ति — धारा 319 के अधीन नये व्यक्ति के विरुद्ध संज्ञान लेते समय आरोप पत्र के साथ प्रस्तुत लोक दस्तावेज या अभियोजन के दस्तावेज पर विचार किया जा सकता है।

FIR lodged against the applicant that in the capacity of Managing Director, he committed theft of electricity detected in the premises of the company. During investigation vide letter received from Registrar of Companies, observing that he had already resigned from the post earlier to the date of incident and a new person in his place was the Managing Director of the company at the time of incident, charge-sheet filed against new Managing Director. During trial Court took cognizance against the applicant applying the provisions of Section 319 of Cr.P.C. On the ground that his name appears in the FIR and in the statements of the witnesses. In petition U/s 482 Cr.P.C., High Court observed that the letter received from Registrar of Companies being a document of the prosecution filed with the charge-sheet and also a public document can be considered in favour of and acted upon without trial. In the light of this letter, the required prospect of the case in getting his conviction cannot be accepted.

M.R. Kalla with B.K. Singh & Nandita Dubey, for the applicant
B.D. Mahore, P.P. for the non-applicant/State.

*M.Cr.C. No. 4031/05 (Gwalior), D/- 4 February, 2008.

**I.L.R. [2008] M. P., 1333
SUPREME COURT OF INDIA**

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

30 January, 2008*

JOHAR & ors.

--- Appellants

Vs.

MANGAL PRASAD & anr.

--- Respondents

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 - Appellants were tried for offence u/s. 302/34 - Convicted by Trial Court u/s. 323/34 - State did not file appeal - High Court in revision filed by complainant appreciated the evidence and remanded case back to pass judgment - Held - High Court should have kept in mind that while exercising its revisional jurisdiction, it exercises a limited power - Judgment of High Court demonstrates that in effect and substance the finding of trial court has been reversed - Trial Court would be bound by observations made in Judgment, and have no option but to convict appellants - High Court has exceeded its jurisdiction - Appeal Allowed.

(Paras 17, 20, 22)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397, 401 - अपीलार्थीगण का धारा 302/34 के अपराध के लिये विचारण किया गया - विचारण न्यायालय ने धारा 323/34 में दोषसिद्ध पाया - राज्य द्वारा अपील नहीं की गई - उच्च न्यायालय ने परिवादी द्वारा पेश पुनरीक्षण में साक्ष्य का अभिमूल्यन करते हुए मामले में निर्णय पारित करने के लिये प्रतिप्रेषण कर दिया - अभिनिर्धारित - पुनरीक्षण क्षेत्राधिकार का प्रयोग करते समय उच्च न्यायालय की ध्यान रखना चाहिए कि वह सीमित शक्तियों का प्रयोग कर रहा है - उच्च न्यायालय का निर्णय यह दर्शाता है कि विचारण न्यायालय द्वारा दिये गये निष्कर्ष को सारवान और प्रभावी रूप से उलट दिया है - निर्णय में की गई टिप्पणीयां विचारण न्यायालय पर बाध्य होंगी और उसे अपीलार्थीगण को दोषसिद्ध करने के अलावा कोई विकल्प नहीं रहेगा - उच्च न्यायालय ने अधिकारिता का प्रयोग बढ़कर किया - अपील मंजूर।

Cases referred :

(1951) 1 SCR 284, 1951 SCR 676, (1963) 3 SCR 412, (1968) 2 SCR 287, (1992) 4 SCC 305, (2004) 7 SCC 659, (2004) 7 SCC 665.

J U D G M E N T

The Judgment of the Court was delivered by S.B. SINHA, J. :-Leave granted.

2. Appellants were charged for commission of offences under Sections 148 and 302 of the Indian Penal Code and in the alternative under Section 302/149 and Section 120-B of the Indian Penal Code. They were, however, convicted for commission of an offence under Section 323 read with Section 34 of the Indian Penal Code only, recording that as accused Nos. 1 to 4 had only caused simple injuries to the deceased Umashankar, the provisions of Section 148 and 149 of the Indian Penal Code were not attracted.

3. The State did not prefer any appeal thereagainst. The complainant/respondent, however, filed a revision application before the High Court. The High Court went into the evidence adduced on behalf of the prosecution. In regard to the deposition of the official witnesses including Autopsy Surgeon it was commented :-

"10. If a public servant is corruptly (sic) makes a report in a judicial proceeding it will be offences under section 193 IPC and section 196 IPC and preparation of document with an intention to save person from punishment, it will be an offence falling under section 196 IPC. Thus, willful act of the Doctor in not referring to other injuries in the post mortem report discloses his intention to protect the respondents who are guilty of commission of murder. Witnesses were firm on the point of beating of deceased by lathi and number of injuries received by the deceased. It is held that post mortem report is incomplete report prepared by the doctor to give undue advantage to the accused. Appropriate steps for prosecution of PW9 Dr. Y.K. Malaiya be initiated for intentionally preparing false evidence."

It was opined that having regard to the nature of deposition of the Autopsy Surgeon, the trial Court committed a grave error in ignoring the other relevant materials brought on records to pronounce a judgment of acquittal in favour of the respondents (appellants herein). It was furthermore held that the doctor had willfully suppressed the head injury and was thus guilty of dereliction of duty. Re-appreciating the evidence of the prosecution witnesses, it was held :-

"It is natural that when a person is surrounded by number of accused it is difficult for eyewitness to describe the author of each and every injury. In para 16 of cross-examination, this witness has clarified that he has seen the body of injured and he found that Umashankar was having lathi injuries on his entire body and no place on his body was left where he had not received injuries by lathi.

4. On the premise that the learned trial judge has mis-appreciated the evidence, the revision application was allowed, directing :-

"22. In the result, judgment of acquittal passed by the trial court is set aside and the case is remanded to the trial court to pass the judgment on the basis of evidence on record for each offence keeping in mind evidence of eyewitnesses wherein it is stated that deceased had suffered injuries on the whole body. The fact is also referred in Dehati Naleshi and Panchnama of dead body Ex.P/3. Evidence of doctor will not prevail over the eyewitness account in this case. This is a case under section 302 IPC and the intention of all the respondents was to cause death of deceased. Trial court shall also examine and pass necessary orders against the concerned doctor for preparing document in order to give undue benefit to the accused."

5. We may, however, before embarking upon the contentions raised before us

by the learned counsel for the parties place on record that one of the accused persons, namely Roshan, had preferred an appeal before the High Court of Madhya Pradesh at Jabalpur and by a judgment and order dated 18th November, 2003, it while upholding his conviction under Section 323 read with Section 34 of the Indian Penal Code set him free on probation on his furnishing a personal bond for Rs.3,000/- (Rupees three thousand only) with one surety of the like amount. The said judgment and order has attained finality.

6.- Mr. Fakhruddin, the learned Senior counsel appearing for the appellant, submitted that the High Court committed a manifest illegality in passing the impugned judgment which is in the teeth of Sub-section (3) of Section 401 of the Code of Criminal Procedure, 1973.

7. Ms Vibhā Datta Makhija, the learned counsel appearing on behalf of the respondent-State, on the other hand, urged that it is not a case where the High Court converted a judgment of acquittal to a judgment of conviction in exercise of its revisional jurisdiction but merely remitted the matter to the trial court for consideration afresh, this Court should not interfere therewith.

8. The State did not prefer any appeal from the judgment of the learned Trial Judge. From the proceedings of the High Court, it appears that the State was not even made a party in the criminal revision application. Public Prosecutor, however, represented the State before the High Court. Nobody interestingly appeared on behalf of the complaint-revisionist.

9. Revisional jurisdiction of the High Court in terms of Section 397 read with Section 401 of the Code of Criminal Procedure is limited. The High Court did not point out any error of law on the part of the learned Trial Judge. It was not opined that any relevant evidence has been left out of its consideration by the court below or irrelevant material has been taken into consideration. The High Court entered into the merit of the matter. It commented upon the credentiality of the Autopsy Surgeon. It sought to re-appreciate the whole evidence. One possible view was sought to be substituted by another possible view.

10. Sub-section (3) of Section 401 reads as under :-

"401(3). Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction."

Technically, although Ms. Makhija may be correct that the High Court has not converted the judgment of acquittal passed by the learned Trial Court to a judgment of conviction, but for arriving at a finding as to whether the High Court has exceeded its jurisdiction or not, the approach of the High Court must be borne in mind. For the said purpose, we may notice a few precedents.

11. In *D. Stephens vs. Nosibolla* : [1951] 1 SCR 284 this Court opined :-

"10. The revisional jurisdiction conferred on the High Court under section 439 of the Code of Criminal Procedure is not to be lightly exercised when it

is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record."

12. The same principle was reiterated in *Logendra Nath Jha and others vs. Polailal Biswas* [1951 SCR 676] stating:

"—Though sub-section (1) of section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a court of appeal by section 423, sub-section (4) specifically excludes the power to "convert a finding of acquittal into one of conviction". This does not mean that in dealing with a revision petition by a private party against an order of acquittal the High Court could in the absence of any error on a point of law re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterizing the judgment of the trial court as "perverse" and "lacking in perspective", the High Court cannot reverse pure findings of fact based on the trial Courts appreciation of the evidence in the case. That is what the learned Judge in the court below has done, but could not, in our opinion, properly do on an application in revision filed by a private party against acquittal—"

13. In the instant case the High Court not only entered into the merit of the matter but also analysed the depositions of all the witnesses examined on behalf of the prosecution. It, in particular, went to the extent of criticizing the testimony of Autopsy Surgeon. It relied upon the evidence of the so called eye witnesses to hold that although appellants herein had inflicted injuries on the head of the deceased, Dr. Y.K. Malaiya, PW-9, deliberately suppressed the same. He was, for all intent and purport, found guilty of the offence under Section 193 and 196 of the Indian Penal Code. The Autopsy Surgeon was not cross-examined by the State. He was not declared hostile. The State did not even prefer any appeal against the judgment.

14. In the absence of any such injury on the vital part of the body, the learned trial Judge, upon analyzing the evidence brought on record by the prosecution, held that only four accused had committed the offence under Section 323 read with Section 34 alone. We see no reason as to how the findings of the trial judge can be said to be perverse. The learned trial judge in arriving at his conclusion noticed:-

(i) Names of some of the appellants were not stated in the first information report.

- (ii) Some of the accused persons were not present at the time of commission of offence, as their plea of alibi was acceptable.
 - (iii) The story of recovery of lathis from some of the accused is doubtful.
 - (iv) Purported recovery of lathi by the investigating officer without any disclosure statement having been made by the concerned accused, was not relevant.
 - (v) Some of the accused did not have any dispute whatsoever with the complainant side, as such they had no motive to commit the crime.
 - (vi) Only because some of the accused were present at the time of commission of the offence, having regard to the fact that the incident took place in a very small village, their presence at the time of occurrence by itself cannot lead to an inference that they participated therein, particularly when prosecution witnesses did not name them.
 - (vii) No independent witness had been examined by the prosecution despite the fact that a large number of persons witnessed the incident.
15. Upon analyzing the entire evidence on record, the learned trial judge held :-
- "58. In view of the discussion and analyses made hereinabove prosecution has proved that accused persons No. 1 to 4 i.e. Johar, Ruplal, Roshan and Santosh inflicted simple injuries to deceased Umashankar. Against accused persons offence under Section 148, 302 r/w 149 IPC have been leveled but in the incident only accused No. 1 to 4 have committed and thus participation of the number of accused is proved to be four only and under section 148 & 149 IPC the accused persons minimum remained to be five. As such against accused No.1 to 4 offence under Section 148 & 149 are not proved."
16. Evidently the High Court raised a presumption that Autopsy Surgeon deliberately did not disclose the ante mortem head injury purported to have been suffered by the deceased.
17. The approach of the High Court to the entire case cannot be appreciated. The High Court should have kept in mind that while exercising its revisional jurisdiction under Sections 397 and 401 of the Code of Criminal Procedure, it exercises a limited power. Its jurisdiction to entertain a revision application, although is not barred, but severally restricted, particularly when it arises from a judgment of acquittal.
18. Ms. Makhija is correct that sub-section (4) of Section 378 of the Code of Criminal Procedure was not available to the first informant but the same by itself would not mean that in absence of any appeal preferred by the State, the limited jurisdiction of the court should be expanded.
19. We may notice a few of the decisions of this Court which are binding on us. In *K. Chinna Swamy Reddy vs. State of Andhra Pradesh* : [1963] 3 SCR 412, this Court observed :-

"It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have though fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of s. 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised."

In *Mahendra Pratap Singh vs. Sarju Singh and Anr.* [1968] 2 SCR 287 this Court stated the law thus :-

"8. The practice on the subject has been stated by this Court on more than one occasion. In *D. Stephens v. Nosibolla* [[1951] S.C.R. 284], only two grounds were mentioned by this Court as entitling the High Court to set aside an acquittal in a revision and to order a retrial. They are that there must exist a manifest illegality in the judgment of the Court of Session ordering the acquittal or there must be a gross miscarriage of justice. In explaining these two propositions, this Court further states that the High Court is not entitled to interfere even if a wrong view of law is taken by the Court of Session or if even there is misappreciation of evidence. Again, in *Logendranath Jha and others v. Shri Polailal Biswas* [[1951] S.C.R. 676], this Court points out that the High Court is entitled in revision to set aside an acquittal if there is an error on a point of law or no appraisal of the evidence at all. This Court observes that it is not sufficient to say that the judgment under revision is "perverse" or "lacking in true correct perspective". It is pointed out further that by ordering a retrial, the dice is loaded against the accused, because however much the High Court may caution the Subordinate Court, it is always difficult to re-weigh the evidence ignoring the opinion of the High Court. Again in *K. Chinnaswamy Reddy v. State of Andhra Pradesh*, it is pointed out that an interference in revision with an order of acquittal can only take place if there is a glaring defect of procedure such as that the Court had no jurisdiction to try the case or the Court had shut out some material evidence which was admissible or attempted to take into account evidence which was not admissible or had overlooked some evidence. Although the list given by this Court is not exhaustive of all the circumstances in which the High Court may interfere with an acquittal in revision it is obvious that the defect in the judgment under revision must be analogous to those actually indicated by this Court."

In *Janata Dal vs. HS Chowdhary* : (1992) 4 SCC 305, this Court stated that the object of the revisional jurisdiction was to confer power on superior criminal courts to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment.

In *State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand* : (2004) 7 SCC 659 this Court observed :-

"21. In embarking upon the minutest re-examination of the whole evidence at the revisional stage, the learned Judge of the High Court was totally oblivious of the self-restraint that he was required to exercise in a revision under Section 397 Cr. PC. On behalf of the accused, reliance is placed on the decision of this Court to which one of us (Justice Sabharwal) is a party i.e. *Ram Briksh Singh v. Ambika Yadav*. That was the case in which the High Court interfered in revision because material evidence was overlooked by the courts below."

The judgment of *Ram Briksh* mentioned above, has since been reported as *Ram Briksh Singh vs. Ambika Yadav* : (2004) 7 SCC 665 wherein it has been observed :-

"12. For the aforesaid reasons, we are unable to accept the contention that the High Court has reappreciated the evidence. The High Court has only demonstrated as to how the material evidence has been overlooked leading to manifest illegality resulting in gross miscarriage of justice."

It was, therefore, relevant in the fact situation obtaining therein.

Yet again in *Satyajit Banerjee vs. State of W.B.* : (2005) 1 SCC 115 this Court has, while exercising its jurisdiction under Section 142 of the Constitution of India, expressed a note of caution stating :-

"22. The cases cited by the learned counsel show the settled legal position that the revisional jurisdiction, at the instance of the complainant, has to be exercised by the High Court only in very exceptional cases where the High Court finds defect of procedure or manifest error of law resulting in flagrant miscarriage of justice.

20. We may notice that prohibition contained in sub-section (3) of Section 421 refers to a finding and not the conclusion.

A bare perusal of the judgment of the High Court clearly demonstrates that in effect and substance the finding of the learned trial judge has been reversed. While hearing the matter afresh in terms of the direction of the High Court, the learned Trial Judge would be bound by the observations made therein and thus, would have no option but to convict the appellants.

21. Not only the evidence of the prosecution witnesses has been relied upon and that of the Autopsy Surgeon has been disbelieved but the Trial Judge has also been asked to initiate an appropriate proceeding against him.

22. We have, therefore, no hesitation to hold that the High Court exceeded its jurisdiction in view of the fact that the judgment of the learned Trial Judge could not be termed to be a perverse one.

23. The Trial Court might be wrong as regards analyzing the prosecution evidence but then it had not relied upon the evidence of the eye witnesses only having regard to the opinion of medical expert. The learned Trial Judge considered the plea of alibi on the part of some of the accused and accepted the same. The High Court did not bestow any consideration in this behalf. It also failed to take into consideration that even by-standers have been implicated in the matter.

24. Unfortunately, the High Court did not meet the reasonings of the learned trial judge which was its bounden duty.

25. Even the effect of the order dated 18.11.2003 passed by the High Court in the appeal preferred by Roshan was not taken into consideration.

The said order attained finality. If Roshan was guilty of commission of an offence under Section 323 of the Indian Penal Code, we fail to see any reason as to how others could be held guilty for commission of the offence under Section 302 thereof.

In any event, the judgment passed in favour of Roshan could not have been set aside indirectly which could not be done directly.

26. For the reasons abovementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed.

Appeal allowed..

I.L.R. [2008] M. P., 1340
SUPREME COURT OF INDIA

Before Mr. Justice P.P. Naolekar & Mr. Justice Lokeshwar Singh Panta

25 March, 2008*

BAL KRISHNA & anr.

--- Appellants

Vs.

BHAGWAN DAS (Dead) & ors.

--- Respondents

A. Specific Relief Act, (47 of 1963), Section 16 (C) - *Specific Performance of Contract - Readiness and Willingness - Plaintiff must aver in plaint and thereafter prove those averments - Readiness and willingness must be in accordance with terms of agreement - Plaintiff must prove his readiness and willingness from the institution of suit till it is culminated into decree of Court.*

(Para 8)

क. विनिर्दिष्ट अनुतोष अधिनियम, (1963 का 47), धारा 16(सी) — संविदा का विनिर्दिष्ट पालन — तत्परता और रजामन्दी — वादी को वाद में प्रकथन करना और उसके बाद उन प्रकथनों को सिद्ध करना चाहिए — तत्परता और रजामन्दी अनुबन्ध की शर्तों के अनुरूप होना चाहिए — वादी को उसकी तत्परता और रजामन्दी वाद संस्थित करने से लेकर न्यायालय की डिक्री होने तक सिद्ध करना चाहिए।

B. Specific Relief Act, (47 of 1963), Section 20 - *Relief for specific performance lies in the discretion of court - Court is not bound to grant such relief merely because it is lawful to do so - Discretion to grant specific performance is not exercised if the contract is not equal and fair although the contract is not void.*

(Para 8)

ख. विनिर्दिष्ट अनुतोष अधिनियम, (1963 का 47), धारा 20 - विनिर्दिष्ट पालन का अनुतोष न्यायालय के विवेकाधिकार के अधीन है - न्यायालय ऐसा अनुतोष दिलाने के लिये बाध्य नहीं है मात्र इसलिए कि ऐसा करना विधिसंगत है - यदि संविदा समान और उचित नहीं है तथापि शून्य भी नहीं है, तो विनिर्दिष्ट पालन का अनुतोष देने के विवेकाधिकार का प्रयोग नहीं किया जा सकता है।

Cases referred :

(2005) 6 SCC 243 (Rel. on), 2000 AIR SCW 2554=AIR 2000 SC 2408 (Rel. on), 1999 AIR SCW 2959=AIR 1999 SC 3029 (Rel. on).

J U D G M E N T

The Judgment of the Court. was delivered by P.P. NAOLEKAR, J. :-By this appeal, the appellants (plaintiffs in the suit) (hereinafter referred to as "the plaintiffs" for the sake of convenience) have challenged the judgment and order of the High Court dated 7.5.2002 whereby the suit filed by the plaintiffs on 10.5.1973 for specific performance of the contract to reconvey the suit property by Manaklal, the predecessor-in-interest of respondents Nos. 1 and 2 herein (original defendant No. 1 in the suit) (hereinafter referred to as ☐the defendant☐ for the sake of convenience) was dismissed by the High Court.

2. The facts necessary are that the suit property was a joint family property of the plaintiffs, namely, Bal Krishna and Ramanlal, both brothers and their late grandmother Mainabai. The parents of the plaintiffs as also their grandfather late Ramnarayan Bhutda, husband of late Mainabai had died much before the execution of the transaction in dispute. On 19.7.1952, when the plaintiffs were minors, their late grandmother Mainabai purporting to act for herself and as guardian of the plaintiffs executed a registered sale deed vide Exhibit D/1 for consideration which was stated to be Rs.25,000/- in the sale deed and delivered possession to the defendant/vendee. Mainabai died on 1.3.1964 and her legal representatives, besides the plaintiffs, were joined as proforma defendants Nos. 2 to 14. In the plaint, it was pleaded by the plaintiffs that they being in need of funds required for discharging the business debts of the joint family of the plaintiffs, their grandmother Mainabai, for herself and as their guardian entered into an agreement with the defendant, according to which a sale deed of the suit house was executed by her on behalf of herself and as guardian of the plaintiffs in favour of the defendant and the defendant was to execute an agreement of reconveyance on certain terms and conditions in favour of said Mainabai and the plaintiffs. Accordingly, Mainabai purporting to act on her own behalf and also as guardian of the plaintiffs, who were both minors at that time, executed a registered sale deed of the house on 19.7.1952 in favour of the defendant for consideration which was stated in the deed to be a sum of

Rs.25,000/- and delivered possession of the house to him except one room and one gachhi which is still in possession of the plaintiffs. Although the consideration mentioned in the sale deed was stated to be Rs.25,000/-, as a matter of fact only a sum of Rs.10,000/- was paid by the defendant as consideration which has been clearly accepted and acknowledged by the defendant in the agreement of reconveyance which he later executed in favour of Mainabai and the plaintiffs on the same day. By this agreement, the defendant agreed to reconvey the house to Mainabai and the plaintiffs after receiving from them the sum of Rs.10,000/- and interest on this amount. It was further pleaded by the plaintiffs that all essential terms of reconveyance not having been fully and properly stated in the aforesaid agreement which was executed by the defendant on 19.7.1952, certain terms and conditions were notified by a further agreement which the defendant executed in favour of the plaintiffs and their grandmother Mainabai on 21.7.1952. The terms and conditions for reconveyance as agreed and stated in this document were as follows:

- (1) The defendant No.1 will reconvey the house to Mainabai and the two plaintiffs whenever they shall call upon him to do so by a notice in writing.
- (2) For such reconveyance, Mainabai and the two plaintiffs will be liable to pay the defendant No.1 the real and original amount which the later had paid to them for the initial sale of the house, together with interest on it @ 6% per annum from the date of the original sale to the date of reconveyance.
- (3) The amount which the defendant No. 1 shall realize by way of rent of the house in question shall after deducting from it the amount spent by him on house-tax, water tax, tokhat tax, electric charges and expenditure on repairs, be either paid to him to Mainabai and the plaintiffs or credit for it shall be given to them towards the amount payable by them for the reconveyance.
- (4) No amount on account of electric charges or water charges shall be deducted by the defendant No.1 from the rent collected by him in case he was not required to pay the same and it was collected by him from the tenants.
- (5) It will be open to Mainabai and the plaintiffs to pay to the defendant No. 1 such sums as they may like from time to time towards the price of reconveyance and the same shall be accepted and accounted for by the defendant No. 1 when accounts shall be taken and interest shall be calculated by 'kat-miti'.

It was further pleaded in the plaint that towards the said agreement of reconveyance, the plaintiffs had paid to the defendant Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955 and the defendant has executed in their favour two receipts on 13.10.1953 and 1.2.1955 respectively. As per the plaint, according to the agreement

of reconveyance, the plaintiffs and defendants Nos. 2 to 14 were entitled to require the defendant (No. 1) to reconvey the suit house to them by a registered deed after receiving from them the amount of consideration payable to him as per that agreement. He had already been paid Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955. He was further entitled to receive the balance amount of Rs.5,000/- less the net rental income of the house received by him which was to be ascertained after taking an account. For determining the precise balance of the consideration payable to the defendant according to the agreement of reconveyance he was to give an account of all sums collected by him as rent of the house and also of all sums spent by him on account of taxes, repairs or any other charges and after deducting the amounts spent by him from the payable amount realized as rent, to adjust the sum towards the balance amount of Rs.5,000/- and interest which was to be paid to him. On 7.5.1973, the plaintiffs had approached the defendant personally and requested him to take the balance price of Rs.5,000/- together with interest of Rs.10,000/- by kat-miti and after adjusting towards it the net rental income realized by him to be ascertained after an account, to reconvey the house to the plaintiffs and defendants Nos. 2 to 14 by executing a registered sale deed of the house in their favour at their own cost. Then in paragraph 12 of the plaint, it was averred that 'the plaintiffs have been and are ready and willing to perform their part of the contract according to its true construction. As per the plaint, the cause of action accrued on service of notice on 9.5.1973 when the defendant failed to comply with the plaintiffs notice dated 7.5.1973. For the purposes of court fee and jurisdiction, the suit for specific performance was valued according to the consideration for the reconveyance on it by kat-miti from 19.7.1952 to the date when the defendant failed to perform the contract in spite of notice taking into account the two payments of Rs.1,000/- and Rs.4,000/- already made to the defendant. The amount of interest by kat-miti on Rs.10,000/- comes to Rs.6,930/-. Accordingly, the suit for specific performance was valued at the total amount of Rs.16,980/- for the purposes of court fee and jurisdiction. The plaintiffs, inter alia, made a prayer that 'defendant No. 1 may be directed to reconvey the suit house to the plaintiffs and defendants Nos. 2 to 14 by a registered sale deed to be executed by him in consideration of Rs.11,930/- and to deliver possession of the same to them.

3. The defendant had died even before filing of the written statement which was then filed by his legal representatives. It was denied in the written statement that the sale deed dated 19.5.1952 was for consideration of Rs.10,000/- only and not for Rs.25,000/-. Agreement of reconveyance by Manaklal either on 19.7.1952 or 21.7.1952 was denied. They also denied the terms set out in the agreement. It was submitted that the signature of Manaklal was obtained by the plaintiffs on some papers in connection with a suit filed against late Ramanandji, father of the plaintiffs and it appeared to them that false agreement and receipts had been prepared by the plaintiffs using those signed papers. The demand either oral or by

any letter by the plaintiffs from late Manaklal for execution of the sale deed was denied.

4. The trial court recorded the finding that the sale deed was for Rs.25,000/- and not Rs.10,000/-; that there was an agreement of reconveyance between the parties but for a total consideration of Rs.25,000/-; that the agreement dated 21.7.1952, not the one dated 19.7.1952, was enforceable; that the plaintiffs had paid Rs.5,000/- to late Manaklal and they had always been and were still willing to perform their part of the contract; that the suit was within limitation; and that the plaintiffs were entitled to get the deed of reconveyance executed from the legal representatives of late Manaklal on payment of balance amount of Rs.20,000/-. On these findings, the plaintiffs claim for specific performance was decreed with direction to the plaintiffs to pay or deposit the balance consideration amount of Rs.20,000/-.

5. Both parties aggrieved by the impugned judgment and decree of the trial court filed first appeals before the High Court. The grievance of the plaintiffs was that the trial court committed an error in holding that the sale deed dated 19.7.1952 was for a total sum of Rs.25,000/- and that said amount was fixed as consideration for executing the deed of reconveyance. It was asserted that the plaintiffs were liable only to pay Rs.10,000/- as consideration amount to get the deed of reconveyance from the legal representatives of late Manaklal, whereas the legal representatives of late Manaklal (deceased defendant No. 1) assailed the entire judgment and decree contending that the trial court erred in holding that execution of the two agreements Ex.P/1 and Ex. P/2 was duly proved; that the two documents were not only contradictory and inconsistent but also suspicious. The finding that a sum of Rs.5,000/- was paid to late Manaklal and plaintiffs willingness to perform their part of the contract were also challenged. It was submitted that as per the plaintiffs own showing it was clear that they were never ready or willing to pay the entire consideration for reconveyance as stipulated in the agreement Ex.P/2 and the plaintiffs readiness and willingness was only to make the payment as per the agreement Ex.P/1 dated 19.7.1952 and not agreement Ex.P/2 dated 21.7.1952.

6. Both appeals one filed by the plaintiffs and the other by legal representatives of late Manaklal were dismissed by the High Court on 10.4.1995. However, in letters patent appeals, the judgment dated 10.4.1995 was set aside and the cases were remanded back to the learned Single Judge for rehearing and deciding the matter afresh.

7. On remand, the High Court found that as per plaintiffs own showing a subsequent agreement Ex.P/2 was entered into between the parties on 21.7.1952, i.e., two days after execution of the agreement Ex.P/1 dated 19.7.1952. It was observed by the High Court that although it was the case of the plaintiffs that the subsequent agreement Ex.P/2 was executed by way of modification/clarification

of the agreement Ex.P/1, but a bare reading of the agreement Ex.P/2 would show that it was wholly an independent document making absolutely no reference of Ex.P/1. So even if the agreement Ex.P/1 was executed between the parties, the same stood substituted by a new agreement Ex.P/2 and the agreement Ex.P/1 became non-existent and neither of the parties was obliged to perform the same. The execution of the agreement Ex.P/2 was not seriously contested by the counsel for the defendants and the High Court concurred with the finding of the trial court that the factum of execution of agreement Ex.P/2 dated 21.7.1952 was duly established. The High Court further considered whether the plaintiffs were ready and willing to perform their part of the contract as per the agreement Ex.P/2 and held that clause (c) of Section 16 of the Specific Relief Act, 1963 provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. Explanation (ii) to clause (c) makes it clear that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance of the requirement of Section 16(c) is mandatory and in the absence of necessary averment in the plaint and in the absence of proof of the same that the plaintiff has always been ready and willing to perform his part of the contract, a suit cannot succeed. The High Court has held that the plaintiffs have failed to make averment and lead evidence to prove their readiness and willingness to perform their part of the contract according to its true construction, i.e., in accordance with the terms and conditions of the agreement dated 21.7.1952. The High Court has further held that although the sale deed was dated 19.7.1952 and the agreement to reconveyance was dated 21.7.1952 the only step taken by the plaintiffs was to pay back the amount of Rs.1,000/- on 13.10.1953 and amount of Rs.4,000/- on 1.2.1955 and thereafter till the service of notice dated 7.5.1973 and 10.5.1973 when the suit was filed, no steps were taken by the plaintiffs on their part to show their readiness or willingness to perform their part of the contract. Plaintiff No. 1 kept quiet almost for 18 years after attaining majority and plaintiff No. 2 for 7 years, which is indicative of callous indifference and wilful negligence on the part of the plaintiffs and, therefore, they were held not entitled for equitable relief of specific performance of the contract in their favour and consequently the decree for specific performance passed by the trial court was set aside and plaintiffs suit was dismissed. However, the legal representatives of late Manaklal (original defendant No. 1 in the suit) were directed to pay back to the plaintiffs a sum of Rs.5,000/- with interest at the rate of 6 per cent per annum. Aggrieved by this order, the plaintiffs have come up before this Court by filing a special leave petition which has been converted into the present appeal.

8. Section 16 of the Specific Relief Act, 1963 (hereinafter referred to as "the Act") corresponds with Section 24 of the old Act of 1877 which lays down that the person seeking specific performance of the contract, must file a suit wherein

he must allege and prove that he has performed, or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Explanation (ii) to clause (c) of Section 16 further makes it clear that plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance of the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiffs readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the courts discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

9. As per the pleadings, the plaintiffs allegation is that on the date of the execution of the said deed dated 19.7.1952, there was an agreement of resale entered into between the parties on 19.7.1952 itself. It is further alleged that as the terms of the agreement dated 19.7.1952 were not complete, another supplementary agreement of reconveyance was entered into and executed between the parties on 21.7.1952.

10. On 19.7.1952, an agreement is said to have been executed by Manaklal, predecessor-in-title of the defendants in favour of the plaintiffs. As per that agreement, he had purchased the suit house by a registered sale deed on the same day. Although an amount of Rs.25,000/- has been mentioned in the sale deed as sale consideration, he had not paid the said amount to the plaintiffs. He had only given Rs.10,000/- and the balance amount has been paid by the plaintiffs which has been added to the amount and the amount of Rs.25,000/- has been paid as sale consideration. When the resale of the house will be executed, the plaintiffs will be

required to pay only an amount of Rs.10,000/- along with interest and the sale deed will be executed. Execution of this document does not stand to reason as to how the amount of Rs.15,000/- has been paid by the plaintiffs to the defendant to be included along with the amount of Rs.10,000/- which has been paid by him to show the consideration of Rs.25,000/- as sale consideration. When the need of execution of the sale deed in favour of the defendant was alleged to be the plaintiffs need of money on that date, then how it is that Rs.15,000/- has been paid by the plaintiffs to the defendant whereas only Rs.10,000/- was secured by sale of the house to the defendant. If the plaintiffs were in need of money and already possessed of Rs.15,000/-, then why they will sell the house for a consideration Rs.10,000/- only. Apart from this fact, the amount of Rs.10,000/- in the document is written by hand, whereas other contents of the document are typed. The handwritten figure has not been initialled by the defendant or the plaintiffs. The sale deed executed on 19.7.1952 shows that the consideration for the sale of the house was paid : Rs.5000/- as cash and Rs.20,000/- by way of Cheque No.877383 drawn on Punjab National Bank, Siyaganj Branch. Sale deed does not show that the amount of Rs.10,000/- was paid in cash. Endorsement on the sale deed shows that this amount was paid by cash and cheque to the plaintiffs before the Registrar. These facts clearly belie the case of the plaintiffs that the sale deed was executed for only amount of Rs.10,000/- and that agreement of resale was executed by the defendant for a consideration of Rs.10,000/- only. Both the courts have for different reasons disbelieved this document. Execution of the document for resale on the date of execution of the sale deed for different consideration by the defendant than the sale consideration cannot be believed.

11. / Ex.P/2 dated 21.7.1952 is a document executed by the defendant after execution of the sale deed dated 19.7.1952 and the alleged document Ex.P/1 dated 19.7.1952. It is the plaintiffs case that as the terms of Ex.P/1 were not complete, the second document was executed on 21.7.1952. From a bare reading of the document dated 21.7.1952, it does not appear to be so. The document Ex.P/2 dated 21.7.1952 does not refer to the document dated 19.7.1952, nor is there any mention that the sale consideration was Rs.10,000/- only. This documents contends that the defendant had purchased the suit house for a consideration of Rs.25,000/- by registered sale deed; and that the house was sold by the plaintiffs as they were in need of money. It was agreed by the parties that whenever the plaintiffs would want to purchase the house, then the sale deed would be executed by the defendant in their favour on certain terms and conditions which have already been referred by us. From a bare reading of this document, it does not appear that the document was executed in pursuance of the first document. The document dated 21.7.1952 is an independent separate document wherein the defendant had agreed to reconvey the house whenever asked for by the plaintiffs.

12. It is urged by Shri S.K. Gambhir, learned senior counsel for the appellants that on the language used in clause (c) of Section 16 read with Explanation (ii), a

contract may be open to more than one construction and a plaintiff may allege the alternative construction to which the contract may be open and claim relief on that basis. The true construction of the contract would be that construction which is finally accepted by the court. The plaintiffs suit would not be dismissed merely because one of the constructions placed by the plaintiff to the contract was not accepted by the court where the alternative construction is being alleged and proved.

13. In the present case, the plaintiffs placed reliance on paragraph 12 of the plaint where it has been averred that 'the plaintiffs have been and are ready and willing to perform their part of the contract according to its true construction. This construction is, no doubt, in tune with the words used in clause (c) and its explanation (ii) of Section 16 of the Act, but when one reads this averment in the context of the other averments made in the plaint; then the averment made in paragraph 12 has a reference to the averments made in the foregoing paragraphs of the plaint.

14. In *Syed Dastagir v. T.R. Gopalakrishna Setty*, AIR 1999 SC 3029, this Court has held in para 9 as under:

"- In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of ones case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute."

In *Motilal Jain v. Ramdasi Devi (Smt.) and Others*, (2000) 6 SCC 420, this Court has held that an averment as to readiness and willingness in plaint is sufficient if the plaint, read as a whole, clearly indicates that the plaintiff was always and is still ready and willing to fulfil his part of the obligations. Such averment is not a mathematical formula capable of being expressed only in certain specific words or terms.

Further, in *Umabai and Another v. Nilkanth Dhondiba Chavan (Dead) by LRs. and Anr.*, (2005) 6 SCC 243, this Court in para 30 has said as under:

"It is well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records."

15. When the entire plaint is read, there is no reference of the agreement dated 21.7.1952 about which the plaintiffs have alleged that they are ready and willing to perform their part of the contract as per the agreement. From the entire tenor of the plaint, it is clear that the plaintiffs have pleaded for their readiness and willingness to perform their part of the contract as per the agreement dated 19.7.1952. The agreement dated 21.7.1952 has been referred to only for the purposes of accounting to be made for the payment of the consideration for resale of property and there also the plaintiffs have specifically stated that they have already paid Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955 and the defendant is entitled to receive the balance of Rs.5,000/- less the net rental income of the house received by him.

16. In the evidence also, the plaintiffs have throughout maintained that the agreement of reconveyance was for a sale consideration of Rs.10,000/- only of which Rs.5,000/- has already been paid Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955. There is no specific statement made by the plaintiffs in examination-in-chief or in cross-examination that plaintiff No.1 Bal Krishna and/or his brother plaintiff No.2 Ramanlal were/was ready or are/is ready and willing to pay the entire amount of Rs.25,000/- as consideration amount to the defendant for reconveying the suit house. It may also be pertinent to note that the finding recorded by the trial court that the sale consideration of the suit house was Rs.25,000/- was even challenged by the plaintiffs by filing an appeal before the High Court.

17. We have already recorded a finding that the document Ex.P/1 dated 19.7.1952 was not executed by the defendant in favour of the plaintiffs. The document Ex.P/2 dated 21.7.1952, which has been executed after the sale deed dated 19.7.1952, was executed by the defendant for reconveying the property in favour of the plaintiffs. That document indicates that the consideration for the reconveyance would be Rs.25,000/-. The plaintiffs case throughout in the plaint as well as in the evidence was that they were and are ready and willing to purchase the suit house for the consideration of Rs.10,000/-. In the absence of pleadings or proof by the plaintiffs as to their willingness and readiness to perform their part of the contract and get the sale deed executed in their favour on payment of Rs.25,000/-, no case is made out by the plaintiffs for specific performance of the contract of reconveyance.

18. On the above findings, we need not go into the question whether it would have been just, fair and equitable in the circumstances of the case to grant the relief of specific performance to the plaintiffs exercising discretionary power in favour of the plaintiffs.

19. For the aforesaid reasons, the appeal is dismissed. However, in the circumstances of the case, there shall be no order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 1350

WRIT APPEAL

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

4 January, 2008*

STATE OF M.P. & ors.

... Appellants

Vs.

RAMESH CHANDRA BAJPAI

... Respondent

Constitution, Article 226 - Physical Training Instructor - Equal Pay for Equal Work - Similarly situated Physical Training Instructor and Teacher have already been given UGC scale - Question of Nature of duties of Physical Training Instructor with the duties of Teacher has already become fait accompli - Single Judge allowed petition with the direction to grant pay scale of UGC Teachers - DB found no ground for interference - Appeal dismissed. (Para 6)

संविधान, अनुच्छेद 226 - व्यायाम अनुदेशक - समान कार्य के लिये समान वेतन - समरूप स्थित व्यायाम अनुदेशक व शिक्षक को विश्वविद्यालय अनुदान आयोग का वेतनमान पूर्व से दिया गया - व्यायाम अनुदेशक एवं शिक्षक के कर्तव्यों की प्रकृति का प्रश्न पूर्व निर्धारित - एकल पीठ ने याचिका विश्वविद्यालय अनुदान आयोग द्वारा शिक्षक के लिये निर्धारित वेतनमान देने के निदेश के साथ मंजूर की - खण्डपीठ ने हस्तक्षेप का कोई आधार नहीं पाया - अपील निरस्त।

Case referred :

AIR 1997 SC 3433

*A.S. Kutumbale, Addl. A.G. with Anjali Jamkhedkar, for the appellants**A.K. Sethi with S.S. Sharma, for the respondent***ORDER**

The Order of the Court was delivered by S.K. KULSHRESTHA, J. :- This appeal under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 is directed against the order dated 3.11.2004 passed by the learned Single Judge in W.P. No. 4005/2003.

2. It is not disputed that the respondent was appointed and is working as Physical Training Instructor in the Government Dhanvantari Ayurvedic College. The respondent had filed a petition for seeking parity in pay scales with the other Teachers notwithstanding that he was Physical Training Instructor in view of the decision of the Supreme Court in AIR 1997 SC 3433 *P.S. Ramamohana Rao Vs. A.P. Agricultural University and another* and the other circumstances brought on record. The learned Single Judge by his impugned order has given a direction that the respondent should also be considered for pay scales applicable in the case of UGC Teachers.

3. Learned Additional Advocate General has strenuously contended that since the service of the respondent (original petitioner) is governed and regulated by the Rules called the M.P. Public Health System of Medicine and Homeopathy) Class-

II Medical Services Recruitment Rules, 1987, on the basis of the ratio of the case in *P.S. Ramamohana Rao* (supra) he could not have claimed parity with the post of Teachers merely because his duty is to teach skills of various games as well as their rules and practices. In particular, it has been contended that in Schedule-II to the Rules, the post of Physical Training Instructor has been classified and the appointment is made directly on the posts. Learned Additional Advocate General has also referred to Schedule-III to the Rules which in Item No.8 provides that Physical Training Instructor should have Diploma in Physical Training. It has further been submitted that separate pay scales have been provided for Teachers and the Physical Training Instructors. Under these circumstances, the learned Additional Advocate General contends that since the Teachers and the Physical Training Instructors constitute different classes, it does not amount to practicing any discrimination, much less hostile, by providing separate pay scales for the post. He has further submitted that while according to UGC, a Teacher in College is required to hold higher qualifications such as Ph.D., as per the rules the Physical Training Instructor is required to have a Diploma in Physical Training, only. It is on the basis of this distinction pointed out by the learned Additional Advocate general, he prays that the order passed by the learned Single Judge be set-aside.

4. Per contra, the learned Senior Counsel for the respondent has invited attention to the return filed by the present appellant and specially to Annexure-R/1 appended thereto. By Annexure-R/1, in pursuance of the decision of this Court in LPA No.5438/2000 rendered on 1.3.2000, a large number of Physical Training Instructors have already been granted UGC Pay Scale and the State has not assailed the said order of the Division Bench of this Court and without demur, has followed the direction. Learned Senior Counsel for the respondent, therefore, contends that there is no reason to make any departure in the case of the present respondent.

5. We have heard the learned Counsel for the parties and perused the record.

6. While it is true that the rules governing and regulating the service of respondent No.1 make distinction between the Physical Training Instructor and the Teacher in relation to the status and pay scales both, one cannot be oblivious of the fact that similar persons have already been granted UGC Scale against which no steps were taken to assail the earlier order. If the argument of the learned Additional Advocate General were to be accepted, it would create an anomaly between the two posts and between the persons manning the same post. If a large number of Physical Training Instructors have already been granted the UGC Scale, we are of the view that we must not make any distinction between the case of the respondent and the cases of the other Instructors who belong to the same class. Even otherwise, the ratio of the case of the Supreme Court in *P.S. Ramamohana Rao* (supra) points out the nature of the duties of the Instructors in drawing parity with the duties of the Teachers. In view of the fact that the matter has become fait accompli insofar as the appellant State is concerned, we do not find any ground to deprive the present respondent of the benefit of the pay scale as the

same has already been extended to other similarly situate Physical Training Instructors in Ayurvedic Colleges.

7. In this view of the matter this appeal is dismissed but with no order as to costs.

8. Learned Additional Advocate General submits that since this appeal was pending, steps were not taken to comply with the direction issued by the learned Single Judge and, therefore, time may be granted for complying with the order. Prayer is allowed, the appellants are granted four months time to comply with the order.

Appeal dismissed.

I.L.R. [2008] M. P., 1352

WRIT APPEAL

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

30 January, 2008*

SECRETARY, PRIME MINISTER NATIONAL RELIEF FUND ... Appellant
Vs.

GOPAL DAS NAYAK and ors.

... Respondents

A. Constitution, Articles 226/227 - Object of Prime Minister National Relief Fund - It is working in larger interest of public and help is being provided to needy people - A discretionary fund of PM and is being managed by trust and not bureaucratic machinery - Relief Fund is not subject matter of any review by Courts - No allegation that Relief Fund is under mismanagement or is not functioning properly or the funds are not reaching the needy persons - Observations made against fund or mismanagement of fund are expunged.

(Paras 7 and 8)

क. संविधान, अनुच्छेद 226/227 - प्रधानमंत्री राष्ट्रीय राहत कोष का उद्देश्य - यह जनता के व्यापक हित में कार्य करता है एवं जरूरतमंद व्यक्ति को सहायता प्रदान की जाती है - यह प्रधानमंत्री के विवेकाधीन कोष है एवं इसका प्रबंध न्यास द्वारा किया जाता है नौकरशाही प्रबंधन द्वारा नहीं - राहत कोष न्यायालय द्वारा पुनर्विलोकन की विषयवस्तु नहीं है - ऐसा अभिकथन नहीं कि राहत कोष कुप्रबंधन के अधीन है या उचित कार्य नहीं कर रहा है या राशि जरूरतमंद व्यक्तियों को नहीं पहुंच रही है - कोष या कोष के कुप्रबंधन के विरुद्ध टीका टिप्पणी लोप की गयी।

B. Constitution, Articles 226/227 - Prime Minister National Relief Fund - Interest can be awarded in a case where some debt is payable or amount is legally payable - Interest cannot be awarded where amount is distributed from discretionary fund.

(Para 9)

ख. संविधान, अनुच्छेद 226/227 - प्रधानमंत्री राष्ट्रीय राहत कोष - ब्याज उस मामले में दिया जा सकता है जहां ऋण देय हो या राशि कानूनी तौर पर देय हो - ब्याज नहीं दिलाया जा सकता है जहां राशि विवेकाधीन कोष से वितरित की जाए।

Vinod Kumar Sharma, Assistant Solicitor General for Union of India.

Lokendra Shrivastava, for the respondent No.1.

Brijesh Sharma, G.A. for the respondents No. 1 & 2.

J U D G M E N T

The Judgment of the Court was delivered by **ABHAY GOHIL, J.** :- Prime Minister National Relief Fund (for short PMNRF) through its Secretary has filed this writ appeal under Section 2 of the Madhya Pradesh High Court (Appeal to Division Bench) Act, 2005 against the order dated 25-07-07 passed by Single Judge in Writ Petition No. 1196 of 2006, for setting aside the order of payment of interest and to expunge the observation made in para 1 of the impugned order.

2. The brief facts of the case are that respondent No.1 made request seeking financial assistance from the PMNRF for heart surgery of his daughter. Requisite documents were received in the appellant office on 08-06-2000 and on 20-06-2000, the financial assistance of Rs.20,000/- to partially defray the expenses incurred in the surgery/treatment was sanctioned and a Cheque No. 041485 dated 08-08-2000 for Rs.20,000/- was forwarded to Dean Gandhi Medical College/Hamidia Hospital, Bhopal. On 04-12-2000 appellant office received a fax message from Dean Gandhi Medical College, Bhopal that they have not received the cheque. Thereafter, another cheque dated 10-01-01 drawn on Central Bank of India, Janpath, New Delhi was forwarded to Dean Gandhi Medical College, Bhopal alongwith letter dated 10-01-01 and it appears that this letter came back to the appellant undelivered. Thereafter, respondent No.1 never contacted to appellant till 16-08-05 and ultimately filed writ petition which was registered as Writ Petition No.1196/06. After hearing learned counsel for the parties, learned Single Judge allowed the petition, made certain observations and directed that sanctioned amount be paid to the petitioner alongwith interest at normal rate as notified by the Reserve Bank of India within two months from the date of receipt of certified copy of the order. The amount has been paid but against the direction of payment of interest and observations, PMNRF has filed this writ appeal.

3. **Shri Vinod Kumar Sharma**, learned Asstt. Solicitor General for the appellant submitted that there was no mistake on part of the appellant PMNRF office, as immediately on receiving of request for financial assistance alongwith documents on 8.6.2000 the amount was sanctioned on 20-06-2000 and cheque was forwarded to the Dean, Gandhi Medical College, Bhopal and on receipt of information that they have not received the cheque, another cheque was issued and forwarded to Dean Gandhi Medical College, Bhopal along with the letter dated 10-01-01 but it was returned back undelivered, therefore, it was argued that since the appellant was not responsible for any delay either in sanctioning the amount or in releasing the amount to the respondent No.1 who was in need of money for surgery of his daughter, therefore, interest ought not to have been allowed on the aforesaid amount and the direction of payment of interest is wholly unwarranted. It was further

submitted that the observations made against aforesaid PMNRF were also uncalled for, they be expunged and if they are not expunged, they will create chaos and put the appellant in an embarrassing situation.

4. Shri Lokendra Sharma, learned counsel for respondent No.1 submitted that he was in need of money for operation of Ku. Akansha aged 12 years, who was suffering from serious heart ailment, therefore, her case was referred to Gandhi Medical College and Hamidia Hospital, Bhopal for treatment and she underwent congenital heart surgery. So far as the payment of amount is concerned, he has admitted that a sum of Rs. 20,000/- has been paid to him. His only submission was that since he was poor person and was not aware with the procedure to be followed in filing the petition in the High Court, therefore, he could not file the petition for five years.

5. Shri Brijesh Shrama, learned Government Advocate submitted that though there is no reason on record as to why the aforesaid letter dated 10-01-2001 was not delivered to the Dean while it bears the correct address of the Dean and earlier also the cheque issued was not received in the office of Dean, but that may be because of the postal problem.

6. Shri Vinod Kumar Sharma, Assistant Solicitor General and Shri Brijesh Sharma, Government Advocate both submitted that the P.M.N.R.F. has provided help to the needy persons. Fund is being managed by a trust, bureaucratic machinery is not involved in regulating the business of the trust and there is no red-tapism in the matter of implementation of their activities in sanctioning fund to the needy persons.

7. First of all, we have considered the object behind establishing the PMNRF. From the material on record, it is clear that the same has been created with a pious object to meet the natural calamities like flood, fire, earthquake and to provide help to people in distress and also to provide medical help to the needy people of this country, which is in the larger interest of the nation. PMNRF is constituted by voluntary contribution and donation of the public and no allocation has been made from the consolidated fund of India. It is strictly a discretionary fund of Prime Minister. Earlier, the Division Bench of this Court has already held that no guidelines can be laid down for granting amount from P.M.N.R.F. as the disbursement is made at the sole discretion of Prime Minister. The Bombay High Court has appreciated the establishment of PMNRF and held that it can not be a subject matter of review by the Courts as it is entirely a discretionary fund. Even no question or information on Prime Minister's National Relief Fund was admitted in both houses. In view of this fact that it is a discretionary fund and is not being audited by Comptroller and Accountant General of India, therefore, we are also of the opinion that the same is not subject matter of any review by the Courts. We have also perused the record from which it is clear that the fund is being managed by a trust and is not being managed by the bureaucratic machinery and there is

nothing on record to hold that any red-tapism is involved in the matter of implementation of the funds or the funds are not reaching the persons for whom the funds have been created or the scheme of fund is not being implemented properly.

8. In the writ petition neither any such allegations as aforesaid, were made nor any material was produced that PMNRF is under mismanagement or is not functioning properly, or there is any red-tapism or being managed by bureaucratic machinery or the funds are not reaching the needy persons. On the contrary, looking to the object and prompt action taken in sanctioning the amount thrice, it is held that the same is being managed efficiently in the larger interest of public and help is also being provided to needy persons promptly and satisfactorily, which is a matter of appreciation. Therefore, we hold that the observations made by learned Single Judge are wholly unjustified and without any foundation or material on record. It appears that the observations have not been made particularly about the PMNRF, but they are general observations about the Government Schemes. From the record it is also clear that this fund is not part of any Government scheme or business of the Government of India, and as stated supra such a fund therefore is also not subjected to audit by C.A. and Accountant General of India or judicial review. Therefore, the observations made in para 1 of the impugned order are liable to be set aside and expunged. Accordingly, they are set aside and expunged.

9. As regards the direction about payment of interest, in our considered view, in such cases of discretionary grant, interest cannot be awarded. The interest can only be awarded in case where some debt is payable or amount is legally payable to a party to fulfill legal obligations. In a case where fund is created by voluntary contribution and donation by public, which is purely a discretionary fund at the discretion of Prime Minister and the amount of help is sanctioned to the needy person, the interest cannot be claimed or awarded. More so, in this case, we have seen that there was no fault or delay on the part of the appellant-PMNRF for releasing the amount. Firstly, on receiving the documents on 8.6.2000 the amount was sanctioned on 20.6.2000 and was forwarded but unfortunately due to postal mistake it could not be received and thereafter on receiving the fax message the amount was again sanctioned and another cheque was issued on 10.01.2001 but the same again came back undelivered. Therefore, there was no delay on the part of the appellant-Office in sanctioning the amount. On the contrary no attempt was made by the respondent to make any report nor he approached and after five years he filed petition directly in the Court. Thus, under the facts and circumstances of the case, we are of the view that there was no mistake on the part of the appellant-Office in releasing the amount, thus they are not liable for payment of interest. It is submitted that the amount of Rs.20,000/-, as directed by the Court, has already been paid by the appellant to the respondent, therefore, the direction issued regarding payment of interest is also liable to be set aside. Accordingly, it is hereby set aside.

10. Consequently, this appeal is partly allowed, The impugned order dated 25.7.2007, so far as it relates to payment of interest is set aside and the observations made in para-1 of the order are also set aside and expunged with no order as to costs.

Appeal partly allowed.

I.L.R. [2008] M. P., 1356

WRIT APPEAL

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

30 January 2008*

STATE OF M.P. & ors.

... Appellants

Vs.

SHIV NARAYAN SAXENA & ors.

... Respondents

A. Municipalities Act, M.P. (37 of 1961), Sections 95, 355 - Appointment of Shiksha Karmis - Municipality is appointing authority of Shiksha Karmi - No approval of State Government required as there is no such provision - Appointments made in accordance with Rules, 1998 - Government is liable to pay salary or to reimburse the amount to Municipal Council. (Para 7)

(क) नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 95, 355 - शिक्षाकर्म की नियुक्ति - नगरपालिका शिक्षाकर्म की नियोक्ता प्राधिकारी है - राज्य शासन से अनुमोदन अपेक्षित नहीं क्योंकि ऐसा कोई उपबन्ध नहीं है - नियुक्तियां 1998 के नियमों के अनुसार की गई - सरकार वेतन देने या राशि की प्रतिपूर्ति नगरपालिका परिषद को करने के लिये दायी है।

B. Municipality Shiksha Karmi (Recruitment and Conditions of Service) Rules, M.P. 1998 - Rule 5(9)(ii) - Select List - Rule provides that select list of each category and waiting list shall be prepared which shall be valid for a period of nine months - This provision is for waiting list and not for the select list. (Para 7)

(ख) नगर पालिका शिक्षाकर्म (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1998 - नियम 5(9)(पप) - चयन सूची - नियम में उपबन्ध है कि प्रत्येक वर्ग की चयन सूची और प्रतीक्षा सूची तैयार की जायेगी जो 9 माह की अवधि के लिये वैध रहेगी - यह उपबन्ध प्रतीक्षा सूची के लिये है न कि चयन सूची के लिये।

Cases referred :

(2005) 4 SCC 154, (2005) 2 SCC 746

Brijesh Sharma, G.A. for the appellants/State

D.K. Katare, for the respondents No. 1 to 8

J.D. Suryavanshi, for the respondent No.9

J U D G M E N T

The Judgment of the Court was delivered by **ABHAY GOHIL, J.** :-State has filed this appeal under Section 2 (i) of M.P.Uchcha Nyalaya (Khand Peeth Ko Appeal) Adhiniyam, 2005 against the order dated 8.2.2007 passed by the learned Single Judge in W.P.No.4967/05 (S).

2. Brief facts of the case are that on 10.9.1988 advertisement was issued in daily news paper for appointment on the post of Shiksha Karmi Grade 1, 2 and 3 in the schools falling within the jurisdiction of Municipal Council Ganjbasoda. Selection committee was constituted and committee conducted the interview on 8th and 9th April 1999 and submitted the list for approval to the Dy. Director of Education Vidisha and Block Education Officer, Vidisha on 24.9.1999 and the list was approved by them. The list was also approved by the Municipal Council through its resolution dt. 21.10.1999 and the matter was referred to P.I.C. for approval. Because of the election of the Municipal Council and due to the enforcement of code of election conduct, the approval of PIC could not be given. After the election against the list was placed before the PIC on 16.4.2007 and it was approved. Thereafter vide letter dt.23.4.2001 appointment orders were issued by the Chief Municipal Officer, Ganjbasoda. In the appointment order, it was specifically mentioned that these appointments are subject to confirmation by the State Government. It was brought to our notice that subsequently by order dt. 2.11.2002 (Annexure P/6), the Collector referred the matter to Principal Secretary, Department of Urban Administration and Development and by letter dt. 3.9.2003 (Annexure P/7) Government examined the matter and found that under the rules approval from the Government before appointment is not necessary and it was directed that the payment of the salary to the employees be also made. Thereafter various letters were exchanged between the District Education Officer and the Chief Municipal Officer Municipal Council Ganjbasoda and the Collector regarding the payment of salary to the appointed Shiksha Karmi. Directions were given but on 6.11.2005 all the petitioners employees filed W.P.No.4967/05 (S) seeking directions to the respondent employer about the payment of salary to the petitioners.

3. Writ petition was contested and the stand of the Government was that the Government is not responsible for making the payment of salary to the respondents/ employees as their appointment is not valid. Under the prevalent rules namely M.P.Municipality Shiksha Karmi (Recruitment and Conditions of Service) Rules, 1998 (hereinafter shall be referred as Rules of 1988). As per Rule 5(9)(e)(ii), the select list of each category shall only be valid for a period of nine months. Therefore, the objection of the Government was that the appointments were made contrary to the aforesaid provisions as the period had expired and list had lapsed. It was further objected that as per resolution dated 16.4.2001 the Government never approved the list and not affirmed the appointment made by the Council.

4. After considering various rival contentions of the learned counsel for the parties, learned Single Judge was of the view that the appointments were made by the council in accordance with Rules of 1998 on the recommendations of a duly constituted committee in accordance with the aforesaid rules and any right can not be taken away by subsequent change in Rules w.e.f. 12th March 2001 under new Rules of 2000 and directed that the salary be paid and Municipal Council be reimbursed and allowed the petition with cost of Rs.10,000/-. Payable by the

respondents No.1 and 2. Against the aforesaid order and directions, the State has preferred this appeal.

5. Shri Brijesh Sharma, learned Govt. Advocate vehemently submitted that the appointments made by the respondent Council are contrary to law, they have not followed the rules. The list was lapsed after expiry of the period of nine months and the appointments were never approved by the Government, therefore the Government is not responsible for payment of salary and the order passed by the learned Single Judge is also contrary to law. Learned Single Judge has not considered the background in which the appointments were made and has overlooked this provision that unless this appointment is approved, no direction can be given to the State to make the payment of the salary and submitted that the order be set aside.

6. In reply learned counsel for the respondent supported the order and prayed for dismissal of the Writ Appeal.

7. Having heard the rival contentions of the learned counsel for the parties, we have perused the record, documents as well as finding recorded by the learned Single Judge. There is no dispute that in the year 1998, when the advertisement was issued regarding the selection and appointment of Shiksha Karimi Grade 1,2 and 3, the rules of 1998 were in force. The selection committee was constituted as per the Rules and the method of selection and recruitment as laid down was followed and thereafter the appointment were made. So far as the dispute about the validity of the select list and the waiting list for a period of 9 months as laid down in Rule 5(9)(e)(ii) of the Rules of 1998 is concerned, it is clear that the appointments could not be made because of the declaration of the election of the Municipal Council itself. There is also no dispute that these Rules of 1998 have been framed by exercising power under Section 433 read with Section 58 of the M.P. Municipal Corporation Act, 1956 and Section 355 read with Section 95 of the M.P. Municipalities Act, 1961 and as per these rules, the Municipal Council is the appointing authority of the Shiksha Karimi. There is no dispute between the parties about the constitution of the Selection Committee or the selection of the employees on the basis of their merit. State has only challenged the validity of the list on the ground of period of 9 months. Rule 5 (9)(ii) of Rules of 1998 says that select list of each category shall be prepared on the basis of the above assessment in order of merit and shall include 5 names of 20% names whichever is more in the waiting list which shall be valid for nine months. As per the language of this rule, it is clear that the period of validity of 9 months is for the waiting list and not for the select list. This rule also speak about the integrated selection list for appointment equal to the total number of vacancies. Learned Single Judge has held that the list of petitioners, which means the select list and can not be said to be the waiting list. It was also held that select list was approved by the PIC on 16.4.2001. Therefore, the learned Single Judge was of the view that the period of 9 months shall start from 16.4.2001, when the resolution shall be passed by the PIC and not from its earlier date. It was further pointed out that the delay in approval of the list by PIC was because of the election of the Council itself. Therefore, even if it is held that the provision of validity of select list

was for 9 months, which has to be reckoned from the date of 6.4.2001 when the list was approved and not prior to it, as the integrated selection list for appointment equal to the appointment number of vacancies was required to be prepared in such a manner as laid down under the rules. If the learned Single Judge has considered the aforesaid eventuality under which the list could not be approved by the PIC and the appointment orders were issued on 23.4.2001, in our considered opinion, the learned Single Judge has not committed any illegality. There is also no dispute that any appointment has been made out of the waiting list and the question of approval by Government, when the matter was referred by the Collector for approval, Government was of the view that under Rules there is no necessity to take any permission or approval from the Government and vide letter dt.3.9.2003 (Annexure P/7) Government also directed the Council to make payment of salary to the appointed Shiksha Karni. Therefore, in such circumstances after considering the provisions of the rules as well as the eventuality of election of the Council itself, if the appointments are made and approval was taken on 16.4.2001, it can not be held that the appointments were not made legally or the list had lapsed or the appointments are invalid. The only ground raised by the Government about the invalidity of the appointment was about the approval of the Government as well as the delay on account of approval of list by PIC on account of election. There is no dispute about the qualification of the candidates or that the procedure for appointment was not validly or duly followed. The learned Single Judge has also placed reliance on a decision in the case of *Secretary A.P. Public Service Commission v. B. Swapna and others* (2005) 4 SCC 154 and also in the case of *Secretary, Department of Home Secretary, A.P. And others Vs. B. Chinnam Naidu*, (2005) 2 SCC 746.

8. In fact after the selection of the candidates and till the resolution dt. 16.10.2001, Government never raised any objection regarding appointment, even when the matter was referred by the Collector to the Government for permission, the Government did not raise any objection and Government was of the view that no permission was necessary. Therefore, under these circumstances it can not be held that Government had any objection on these appointments or ever not examined the cases about their selection. It is needless to add that Writ Petition was filed by the employees for a direction to the Government for payment of their salary. Learned counsel for the respondents submitted that the respondents/employees are working from 2001 and they are rendering services in various school run by the Council, but they are not being paid regular salary and only payment was made upto July 2003 and after July 2003 no payment towards their salary have been made to them. Thus, at this stage, in such a petition the question of appointment is certainly irrelevant, because it was not the case of the Government since very beginning, on the contrary Government itself directed for payment of salary as per Annexure P/7.

9. Therefore, we are of the view that the rule does not say that the appointments should be approved by the Government and when the appointments are made as per the rules, then certainly the Government is liable to pay the salary or to reimburse the amount to the Municipal Council.

10. Thus, considering the totality of the facts and circumstances of the case, no case is made out by the Government that the Government is not liable to pay the salary to the respondents/employees. Consequently, this appeal being devoid of merit and substance is hereby dismissed. Arrears of salary be paid to the respondents positively within two months and regular salary be paid monthly. So far as the costs imposed by the learned Single Judge on the Government is concerned, under the facts and circumstances of the case we consider that the learned Single Judge has wrongly imposed the cost of Rs. 10,000/- on the Government. Order passed about the payment of costs is hereby set aside.

Appeal dismissed.

I.L.R. [2008] M. P., 1360

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice Prakash Shrivastava

4 February 2008 *

UMASHANKAR SINGH

... Appellant

Vs.

UNION OF INDIA

... Respondent

Constitution, Article 311 - Distinction - Suspension of sentence and conviction - Petitioner convicted U/s 13(1)(d) r/w 13(2) of Prevention of Corruption Act - Sentence suspended in appeal - Show Cause Notice issued as to why he should not be dispensed with service - Notice challenged on the ground that sentence is suspended - Held - There is distinction between suspension of sentence and conviction - Order suspending sentence by no stretch of imagination can be said to be an order of stay of conviction - Issuance of Show Cause Notice cannot be flawed - Appeal dismissed. (Para 12)

संविधान, अनुच्छेद 311 - अन्तर - दण्डादेश एवं दोषसिद्धि का निलंबन - याची भ्रष्टाचार निवारण अधिनियम की धारा 13 (1) (डी) सहपठित धारा 13 (2) के अधीन दोषसिद्धि - अपील में दण्डादेश का निलंबन - कारण बताओ नोटिस जारी कि क्यों न उसे नौकरी से अभिमुक्त किया जावे - नोटिस को इस आधार पर चुनौती दी कि दण्डादेश निलंबित है - अभिनिर्धारित - दण्डादेश एवं दोषसिद्धि के निलंबन में अंतर है - दण्डादेश निलंबन के आदेश को किसी भी प्रकार दोषसिद्धि को रोकने का आदेश नहीं कहा जा सकता - कारण बताओ नोटिस जारी किया जाना गलत नहीं कहा जा सकता - अपील खारिज।

Cases referred :

(2004) 4 MPHT 343, AIR 1997 SC 3531, (2003) 1 MPHT 77, (2001) 6 SCC 584, (1995) 2 SCC 513, AIR 1995 SC 1364

K.C. Ghildyal, for the appellant

Dharmendra Sharma, Assistant Solicitor General for the respondent

ORDER

The Order of the Court was delivered by
DIPAK MISRA, J.:-In invocation of the jurisdiction under Section 2(1) of the M.P.

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 the pregnability of the order dated 22.11.2007 passed by the learned single Judge in Writ Petition No.2151/2007 (S) is called in question in this writ appeal.

2. The facts which are imperative to be exposted are that the appellant-petitioner (hereinafter referred to as 'the petitioner') challenged the issuance of notice to show-cause 25/31.1.2007 invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. The show-cause notice was to the effect that why the services of the appellant should not be dispensed with inasmuch as he had been convicted under Section 13(1) (d) read with Section 13(2) of the Prevention of Corruption Act, 1988 in Special Case No.3/2005. It was brought to the notice of the learned single Judge that after being convicted on 29.9.2005 the petitioner has preferred an appeal before this Court forming the subject matter of Cr.A. No. 1895/2006 wherein this Court admitting the appeal directed suspension of sentence and granted bail to the appellant therein.

3. It was contended before the learned single Judge when the appellant had been convicted and thereafter enlarged on bail, the respondents were not justified in issuing the notice to show-cause for the purpose of termination from service. Learned single Judge placed reliance on the decision rendered in the cases of *Laxmi Narayan Hayaran Vs State of Madhya Pradesh and Another*, (2004) 4 MPHT 343, *Union of India and Others Vs. Ramesh Kumar* AIR 1997 SC 3531, *Jamna Prasad Vs. State of M.P. and Others*, (2003) 1 MPHT 77 and *K.C. Sareen Vs. C.B.I., Chandigarh*, (2001) 6 SCC 584 and expressed the opinion that the issue of show-cause notice to the appellant was within the parameters of law and did not warrant interference.

4. We have heard Mr. K.C. Ghildyal, learned counsel for the appellant and Mr. Dharmendra Sharma, learned counsel for the respondents.

5. It is submitted by Mr. Ghildyal that when the criminal appeal has been admitted pending and there has been suspension of sentence, the petitioner should not have been issued notice to show-cause for imposition of major penalty as that would frustrate the criminal appeal. It is urged by him that the appellant is entitled to continue in service till the criminal appeal is finally disposed of inasmuch as the sentence has been stayed and he has been enlarged on bail. It is urged by him that the learned single Judge has failed to appreciate the factual matrix in proper perspective and, therefore, the order passed by him is pregnable.

6. Mr. Dharmendra Sharma, learned counsel appearing for the respondents, per contra, has submitted that the order passed by the learned single Judge is absolutely defensible and flawless and there is no warrant for any interference in this appeal. It is contended by him that passing of an order keeping the sentence in abeyance in exercise of power conferred under Section 389 of the Code of Criminal Procedure would not enure to the benefit of the petitioner for the purpose of being retained in service and on that ground the notice to show cause is not to be criticised.

7. At the outset we may state that the factum of conviction, suspension of sentence and issuance of notice to show-cause are not disputed before us. What is contended by Mr. Ghildyal is that there has been stay of the operation of the sentence and grant of bail and under these circumstances the issuance of notice proposing removal of the petitioner from service is not sustainable. It is worth appreciating that there is distinction between an order of stay of conviction and an order pertaining to keeping the sentence in abeyance.

8. In *Rama Narang Vs. Ramesh Narang and Others*, (1995) 2 SCC 513 the Apex Court has observed that Section 389 (1) of the Code of Criminal Procedure empowers the Appellate court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under the said provision is the execution of the sentence or the execution of the order. The order referred to in Section 389 (1) has to have character of an order capable of execution. An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and hence, they are to be suspended to avoid execution. In such a case power under Section 389 (1) of the Code of Criminal Procedure can be invoked. When an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and the Court has jurisdiction to grant stay of order of conviction, but while granting stay of order of conviction it must examine pros and cons and it may do so imposing conditions. Similar view has been expressed in *Deputy Director of Collegiate Education (Administration), Madras v. S. Nagoor Meera*, AIR 1995 SC 1364.

9. In *Ramesh Kumar* (supra) the Apex Court while drawing distinction between the suspension of sentence and stay of conviction has expressed the view as under:

“Against a Govt. servant on the ground of misconduct which has led to his conviction on a criminal charge. The rules, however, do not provide that on suspension of execution of sentence by the Appellate Court the order of dismissal based on conviction stands obliterated and dismissed Govt. servant has to be treated under suspension till disposal of appeal by the appellate Court. The rules also do not provide the Disciplinary Authority to await disposal of the appeal by the Appellate Court filed by a Govt. servant for taking action against him on the ground of misconduct which has led to his conviction by a competent Court of law. Having regard to the provisions of the rules, the order dismissing the respondent from service on the ground of misconduct leading to his conviction by a competent Court of law has not lost its string merely because a criminal appeal was filed by the respondent against his conviction and the Appellate Court has suspended the execution of sentence and enlarged the respondent on bail. This matter may be examined from another angle. Under Section 389 of the Code of Criminal Procedure, the appellate Court has power to suspend the execution of

sentence and to release an accused on bail. When the appellate Court suspends the execution of sentence, and grants bail to an accused the effect of the order is that sentence based on conviction is for the time being postponed, or kept in abeyance during the pendency of the appeal. In other words, by suspension of execution of sentence under Section 389 Cr.P.C. an accused avoids undergoing sentence pending criminal appeal. However, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a Govt. servant on a misconduct which led to his conviction by the Court of law does not lose its efficacy merely because Appellate Court has suspended the execution of sentence. Such being the position of law, the Administrative Tribunal fell in error in holding that by suspension of execution of sentence by the appellate Court, the order of dismissal passed against the respondent was liable to be quashed and the respondent is to be treated under suspension till the disposal of Criminal Appeal by the High Court."

10. In *Jamna Prasad* (supra) it has been held as follows:-

"What emerges out of the aforesaid discussion is that, Appellate Court and Revisional Court can, in exercise of power under Sections 389(1)/482 Code of Criminal Procedure, 1973, stay the execution of sentence or order capable of execution but stay of conviction can be passed in exceptional cases after Court carefully examines the conduct of accused, facts of the case and possible ramifications or avoiding irretrievable consequences. However, in both the cases, the conviction and sentence cannot be effaced. It is the irretrievable consequence in the former case and execution of sentence in the later case which can be stayed. With regard to Government servant, competent authority can terminate the services after conviction by Criminal Court. Stay of execution of sentence will not debar it from doing so unless conviction is also stayed in exercise of power in light of principles laid down by the Apex Court in *C. C. Sarren's case* (supra). Further, on termination order having been passed, master and servant relationship terminates and filing of appeal and stay of execution of sentence do not revive it. He cannot be taken to be under suspension from the date of termination following conviction by Trial Court till the date of judgment by the Appellate Court. Therefore, he would not be entitled to claim subsistence allowance for this period."

11. In *K.C. Sareen* (supra) the Apex Court expressed the view that order of conviction under the provisions of Prevention of Corruption Act, 1988 should not be suspended though sentence of imprisonment may be suspended till disposal of the appeal.

12. We have referred to the aforesaid decisions only to highlight that there is distinction between stay of operation of conviction and suspension of sentence.

We have also referred to the decision in *K.C. Sareen* (supra) to highlight how their Lordships of the Apex Court have seriously taken note of the factum of conviction under the provisions of the Prevention of Corruption Act, 1988. In the case at hand the appellant has preferred a criminal appeal and there is an order of suspension of sentence as contemplated under Section 389 (1) of the Code of Criminal Procedure but the aforesaid order, by no stretch of imagination, can be said to an order of stay of conviction. Thus, the judgment operates otherwise barring the sentence. A show-cause notice has been issued to the appellant why a major penalty should not be imposed. He had been given time to explain his stand. The appellant is entitled under the law to file the show cause on whatever grounds possible. Issuance of show-cause; we are disposed to think, cannot be flawed, as the employer is entitled under law to issue show-cause after the appellant has been visited with the judgment of conviction specially under Section 13(1) (d) read with Section 13(2) of Prevention of Corruption Act, 1988.

14. In the result, we do not perceive any merit in this appeal and accordingly it is dismissed without any order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 1364

WRIT APPEAL

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Shantanu Kemkar

1 April, 2008*

RAM KISHORE SHUKLA

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 226 - Alternative Remedy - Order without jurisdiction - Order of removal passed by authority subordinate to appointing authority - Writ Petition dismissed by Single Judge holding that petitioner can avail the alternative remedy of appeal - Held - Order of removal was without jurisdiction - Alternative remedy of appeal is no bar for exercise of jurisdiction under Article 226 of the Constitution - Order of removal quashed - It will be open for Appointing authority to pass fresh order in accordance with law - Appeal allowed.

(Paras 5, 6 & 7).

संविधान, अनुच्छेद 226 - वैकल्पिक उपचार - अधिकारिता के बिना आदेश - नियुक्ति प्राधिकारी के अधीनस्थ प्राधिकारी द्वारा सेवा से हटाये जाने का आदेश पारित - एकल पीठ द्वारा रिट याचिका यह अभिनिर्धारित करते हुये खारिज की गई कि याची अपील का वैकल्पिक उपचार का लाभ उठा सकता है - अभिनिर्धारित - सेवा से हटाये जाने का आदेश अधिकारिता के बिना दिया गया था - अपील का वैकल्पिक उपचार है, इससे संविधान के अनुच्छेद 226 के अंतर्गत अधिकारिता के प्रयोग में वर्जन नहीं - हटाये जाने का आदेश अभिखण्डित - नियुक्ति प्राधिकारी विधि अनुसार नया आदेश पारित करने के लिये स्वतंत्र - अपील मंजूर।

Case referred :

(1988) 8 SCC 1

Dileep Pandey, for the appellant*Kumaresh Pathak*, Dy. A.G., for the respondents**J U D G M E N T**

The Judgment of the Court was delivered by A. K. PATNAIK, C.J.:—This is an appeal against the order dated 20.2.2008 passed by the learned Single Judge in WP No.2190/2008(s) filed under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal), Adhiniyam, 2005.

2. The facts briefly are that the appellant has been working as Pharmacist cum Store Keeper (Grade I) in the office of the Chief Medical & Health Centre, Rewa. For alleged irregularities in purchase of some items and equipments by the Office of the Chief Medical & Health Officer, Rewa, disciplinary proceedings were initiated against the appellant and the appellant was placed under suspension by order dated 3.1.2007 passed by the Collector, Rewa. Thereafter, an inquiry was held and a copy of the inquiry report was furnished to the appellant. The appellant furnished a representation against the inquiry report but the Chief Medical & Health Officer, Rewa, passed an order dated 13.2.2008 removing the appellant from service. Aggrieved, the appellant filed Writ Petition No.2190/2008(s) under Article 226 of the Constitution of India before this Court but by the impugned order dated 20.2.2008 the learned Single Judge disposed of the WP No.2190/2008(s) holding that the appellant has a remedy by way of an appeal to the appellate Authority against the order of removal.

3. Mr. Dileep Pandey learned counsel for the appellant submitted that in *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & others* ((1988) 8 SCC 1), the Supreme Court has held that the power to issue the prerogative writs under Article 226 is a plenary in nature and the High Court has a discretion to entertain or not to entertain a writ petition and an alternative remedy has been consistently held by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction. He submitted that in the present case, the order of removal passed by the Chief Medical and Health Officer, Rewa, is wholly without jurisdiction, inasmuch as he was not appointing authority. He referred to the provisions of Rule 2 and 5 read with Schedule I of the Madhya Pradesh Public Health and Family Welfare Department Non-Ministerial (Related to the Directorate of Health Services) Class III Service Recruitment Rules, 1989, to show that the appointing authority of the Pharmacist was the Divisional Joint Director.

4. Mr. Kumaresh Pathak learned Deputy Advocate General appearing for the respondents, very fairly conceded that the Chief Medical and Health Officer, Rewa, is not the appointing authority of the appellant.

5. Article 311 of the Constitution expressly provides that no person who is member of a civil service of a State or holds a civil post under the State shall be dismissed or removed by an authority subordinate to that by which he was appointed. Since the Chief Medical and Health Officer was subordinate to the Divisional Joint Director of Health Services, he had no jurisdiction or power to remove the appellant from service as provided under Article 311 of the Constitution.

6. It has been held by the Apex Court in *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & others* (supra) where the impugned order is without jurisdiction, alternative remedy is not bar for exercise of jurisdiction under Article 226 of the Constitution. The learned Single Judge was therefore not right in holding that the appellant can avail the alternative remedy of appeal against the order of removal.

7. In the result, we set aside the impugned order dated 20.2.2008 passed by the learned Single Judge in WP No.2190/2008(s), allow this writ appeal as well as the Writ Petition No.2190/2008(s) and quash the order of removal dated 13.2.2008. It will be open for the appointing authority or any authority above the appointing authority to pass fresh order in accordance with law.

Appeal allowed.

I.L.R. [2008] M. P., 1366

WRIT APPEAL

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Shantanu Kemkar

1 April 2008*

RESHMA PHILIP

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 226, Civil Procedure Code, 1908, Order 6 Rule 17 - Amendment of Petition - Provisions of C.P.C. do not strictly apply to proceedings under Article 226 - However, High Court while exercising its power have to keep in mind the principles incorporated in different provisions of C.P.C. (Para 5)

(क) संविधान, अनुच्छेद 226, सिविल प्रक्रिया संहिता, 1908, आदेश 6 नियम 17 - याचिका में संशोधन - सि.प्र.सं. के उपबन्ध अनुच्छेद 226 की कार्यवाही में कड़ाई से लागू नहीं होते - फिर भी उच्च न्यायालय को अपनी शक्ति का प्रयोग करते समय सि.प्र.सं. के विभिन्न उपबन्धों में समाहित सिद्धान्तों का ध्यान रखना चाहिये।

B. Constitution, Article 226 - Transfer - Petitioner challenged her transfer - Another transfer order was passed during pendency of the petition - Application for amendment of Petition dismissed as subsequent transfer order raised a fresh cause of action and writ petition dismissed as infructuous - Held - Material facts remained the same - There was only alteration of one material fact that another

*W.A. No. 319/2008 (Jabalpur)

transfer order was issued - Amendment should be allowed for the purposes of deciding real controversy, in issue between the parties - Amendment allowed and matter remitted back to Single Judge for deciding writ petition on merits. (Para 10).

(ख) संविधान, अनुच्छेद 226 - स्थानांतरण - याची ने अपने स्थानांतरण को चुनौती दी - याचिका के लंबित रहने के दौरान दूसरा स्थानांतरण आदेश पारित - याचिका में संशोधन का आवेदन खारिज क्योंकि उत्तरवर्ती स्थानांतरण के कारण नया वाद हेतुक उत्पन्न हो गया एवं रिट याचिका निष्फल होने से खारिज - अभिनिर्धारित - सारवान तथ्य यथावत रहे - केवल एक सारवान तथ्य में परिवर्तन कि दूसरा स्थानांतरण आदेश जारी किया गया - पक्षकारों के मध्य वास्तविक विवाद के विनिश्चय के प्रयोजन के लिये संशोधन मंजूर किया जाना चाहिये - संशोधन मंजूर एवं मामला एकलपीठ को रिट याचिका के गुणदोषों पर विनिश्चय के लिये वापस भेजा गया।

A.K. Pathak, for the appellant

Vivekanand Awasthy, G.A. for the respondents

J U D G M E N T

The Judgment of the Court was delivered by **A. K. PATNAIK, C.J.:-** This is an appeal filed Section 2(1) of Madhya Pradesh Uchcha Nayayalaya (Khand Nayapeeth Ko Appeal) Adhiniyam, 2005 against the order dated 18.2.2008 passed by learned single Judge in W.P. No.17635/07(S).

2. The relevant facts briefly are that the appellant was posted as Lower Division Teacher in Government Primary School, Railway Sarai, Jabalpur w.e.f. 1.8.2005. Respondent No.4 was posted as Lower Division Teacher in the aforesaid school w.e.f. 24.7.2006 and the respondent No.5 was posted in the said school as Lower Division Teacher w.e.f. 20.7.2007. By an order dated 10.7.2007 the appellant was shifted from Government Primary School, Railway Sarai to Government Primary School, Chhui Khadan. Aggrieved, the appellant filed W.P. No.17635/2007(s) contending inter alia that as per the policy of rationalisation of the Government, the surplus staff was to be shifted on the basis of last come first go. The appellant's case was that the respondent No.4 and 5 who had joined the appellant later than the appellant should have been shifted as per this policy of rationalization and appellant would not be shifted from Government Primary School, Railway Sarai to Government Primary School, Chhui Khadan. The learned Single Judge admitted the writ petition on 9.1.2008 and after taking into consideration this contention raised in the writ petition passed an interim order directing the respondents to maintain status quo which existed as on 9.1.2008. But thereafter the order of transfer of the appellant was modified by another order dated 22.12.2007 and the learned single Judge held in the impugned order dated 18.2.2008 that the order dated 22.12.2007 raised a fresh cause of action and hence the appellant may file fresh writ petition challenging the order dated 22.12.2007 and dismissed the writ petition as infructuous. Aggrieved, the appellant has filed this appeal.

3. Mr. A.K. Pathak, learned counsel for the appellant submitted that the case of the appellant all through was that she should not have been treated as surplus

employee of the institution and instead respondent Nos.4 and 5 should have been treated as surplus staff. He submitted even after the order dated 10.7.2007 was modified by the order dated 22.12.2007, this issue raised by the appellant could be decided by the Court in the writ petition W.P. No.17635/2007(s) and for this reason the appellant had filed an application for amendment in the writ petition proposing to incorporate in the writ petition the challenge to the order dated 22.12.2007 by which the order dated 10.7.2007 was modified, but the learned Single Judge instead of allowing the application for amendment has dismissed the writ petition as infructuous after holding that a fresh cause of action arose for the petitioner to file a fresh writ petition.

4. Mr. Vivekanand Awasthy, learned Government Advocate sought to sustain the order passed by the learned Single Judge saying that appellant ought to have filed a fresh writ petition challenging the order dated 22.12.2007 whereby the earlier order dated 10.7.2007 transferring the appellant from the institution was modified. Respondents No.4 and 5 have chosen not to appear before the learned Single Judge and hence we have not issued notice of the writ appeal to respondents No.4 and 5.

5. We have considered the submissions of learned counsel for the parties and we are of the considered opinion that the power vested in the High Court under Article 226 of the Constitution whether to allow or not to allow an amendment has to be judiciously exercised in accordance with the settled principles of law. Although the explanation to Section 141 of the Code of Civil Procedure, 1908 (for short 'CPC') has made it clear that the provisions of the CPC do not apply to proceedings under Article 226 of the Constitution, many of the principles incorporated in the CPC have been held to be applicable to proceedings under Article 226 of the Constitution by the Courts. Thus provisions of the CPC do not strictly apply to the proceedings under Article 226 of the Constitution, but the High Court while exercising its powers have to keep in mind the principles incorporated in different provisions of the CPC.

6. Order II Rule 1 of the CPC provides that every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Order II Rule 2 states that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Order II Rule 2 further provides that where a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any of such reliefs, but if he omits except with the leave of the Court to sue for all such reliefs he shall not afterwards sue for any relief so omitted. Order VI Rule 17 further provides that the Court may at any stage of the proceedings allow either party to alter or amend any pleadings in such manner and on such terms as may be just and all such amendments may be allowed as may be necessary for the purpose of determining the real questions in controversy between the parties. Therefore, the legislative policy is to ensure that as far as

possible all controversies between the parties in respect of the same subject matter of the dispute are decided by the Court in one and the same proceedings and the parties are not driven to multiply legal proceedings between themselves.

7. So far as the facts of the present case are concerned, the grievance of the appellant in W.P. No.17635/2007(S) was that she was working as a teacher in the Government Primary School, Railway Sarai, Jabalpur earlier than respondent Nos.4 and 5 and therefore under the policy of rationalization, instead of the appellant, respondent No.4 or respondent No.5 could be shifted to another institution. On this main ground, the appellant challenged the order dated 10.7.2007 under which she had been shifted from Government Primary School, Railway Sarai to Government Primary School, Chui Khadan. Subsequently, by the order dated 22.12.2007 the earlier order dated 10.7.2007 was modified and the appellant was posted in Primary School, Ghamapur No.5, Sankul Ghamapur instead of Government Primary School, Chui Khadan, but the grievance of the appellant that not the appellant but the respondents No.4 and 5 who were surplus employees should have been shifted from Government Primary School, Railway Sarai continued even after the order dated 22.12.2007 modifying the order dated 10.7.2007.

9. The learned Single Judge has taken the view that the order dated 22.12.2007 modifying the earlier order dated 10.7.2007 constitutes a fresh cause of action for the appellant to file a fresh writ petition. What the learned Single Judge has failed to appreciate is that cause of action for filing the writ petition constituted the whole bundle of material facts as stated in the writ petition and the material facts were that appellant was not a surplus employee of the institution but the respondent No.4 and 5 were surplus employees of the institution and instead of the appellant, respondent No.4 and 5 should have been shifted from the Government Primary School, Railway Sarai. These material facts which constitute cause of action remain the same and there was only alteration of one material fact that the appellant was posted by the order dated 27.12.2007 in Government Primary School, Ghamapur No.5, Sankul Ghamapur instead of Government Primary School, Chui Khadan. Considering the broad policy of law that parties should not be given to separate proceedings and an amendment should be allowed for the purposes of deciding the real controversy in issue between the parties, the learned Single Judge should not have held that the appellant should file a fresh writ petition challenging the order dated 27.12.2007 and instead should have allowed the application for amendment incorporating the order dated 22.12.2007.

10. We accordingly allow the appeal, set aside the order dated 18.2.2008. allow the application for amendment and remit the matter to the file of the learned Single Judge for deciding the writ petition on merits after giving due opportunities of filing replies and of hearing to the parties.

Appeal allowed.

I.L.R. [2008] M. P., 1370

WRIT APPEAL

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Shantanu Kemkar

8 April, 2008*

DEVIDAYAL RAIKWAR

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 70, 69(1), 91 - Appointment of Panchayat Karmi - Whether appealable - Panchayat Karmi is appointed U/s 70 of Adhiniyam - It does not provide that appointment shall be made by passing a resolution - Scheme provides for resolution - Resolution means formal expression of opinion or will of a body - Appointment order is issued by Sarpanch to carry out resolution of General Body - Appointment order can be challenged by filing appeal under Section 91 - Appointment of Panchayat Karmi pursuant to resolution is appealable. (Paras 9 & 10)

पंचायत राज एवम ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 70, 69(1), 91 - पंचायत कर्म की नियुक्ति - क्या अपील योग्य है - पंचायत कर्म की नियुक्ति अधिनियम की धारा 70 के अंतर्गत होती है - ऐसा कोई उपबन्ध नहीं है कि नियुक्ति के लिये प्रस्ताव पारित किया जायेगा - योजना में प्रस्ताव का उपबन्ध है - प्रस्ताव का अर्थ है निकाय की राय या इच्छा की औपचारिक अभिव्यक्ति - आम सभा के प्रस्ताव के क्रियान्वयन के लिये सरपंच द्वारा नियुक्ति आदेश जारी किया गया - नियुक्ति आदेश को धारा 91 के अंतर्गत अपील पेश कर चुनौती दी जा सकती है - प्रस्ताव के अनुसरण में की गई पंचायत कर्म की नियुक्ति अपील योग्य है।

Cases referred :

1997(2) Vidhi Bhasvar 113, 1998(2) JLJ 267, 2000 (2) MPLJ 176, 2001 (1) JLJ 229, 2008(1) MPHT 254

Sanjay Patel, for the appellant

Kumares Pathak, Dy. A.G. for the respondent Nos. 1 & 2

ORDER

The Order of the Court was delivered by **A. K. PATNAIK, C.J.**:- This is an appeal filed under Section 2 (1) of the M.P. Uchcha Nyayalaya (Khand Peeth Ko Appeal) Adhiniyam, 2005 against the order dated 14.3.2008 passed by learned single Judge in W.P.No.2766 of 2008.

2. The relevant facts briefly are that the appellant applied for appointment to the post of Panchayat Karmi in Gram Panchayat, Deri. The Gram Panchayat adopted a resolution on 17.8.2007 for appointment of respondent No.5 as Panchayat Karmi. Aggrieved, the appellant filed Writ Petition No.2766 of 2008 challenging the appointment of the respondent No.5 as Panchayat Karmi on various grounds. The learned single Judge held in the impugned order that the appellant has an efficacious and alternative remedy under Section 85 of the M.P. Panchayat Raj

Avam Gram Swaraj Adhiniyam, 1993 (for short 'the Adhiniyam') and accordingly disposed of the writ petition with liberty to the appellant to avail the remedy under Section 85 of the Adhiniyam. Aggrieved, the appellant has filed this appeal.

3. Mr. Sanjay Patel, learned counsel for the appellant submitted that Section 85 of the Adhiniyam vests power in the State Government and the Prescribed Authority to suspend an order on resolution of the Gram Panchayat and does not provide for any appeal or revision against the appointment of Panchayat Karmi by the Gram Panchayat.

4. Mr. Kumaresh Pathak, learned Deputy Advocate General for the respondents 1 and 2 submitted that under Section 91 of the Adhiniyam, an appeal and revision are provided against any order or proceeding of the Panchayat and for this reason, in the Panchayat Karmi Scheme notified by the Government of Madhya Pradesh for Panchayat and Rural Development Department on 12.9.1995, it is stated that a party aggrieved by appointment of Panchayat Karmi may obtain relief by means of an appeal or revision before the Prescribed Authority under Section 95 of the Adhiniyam.

5. Learned counsel for the parties, however, referred to conflicting decisions of this Court in *Smt. Hem Lata vs. State of M.P. and others*, 1997 (2) Vidhi Bhasvar 113, *Ram Charan Ahirwar vs. Sub-Divisional Officer, Jatara and others*, 1998 (2) J.L.J. 267, *Ram Lakhan Rawat vs. State of M.P. and others*, 2000 (2) M.P.L.J. 176 and *Hukumchand vs. Dheer Ji and others*, 2001 (1) J.L.J. 229 on the question whether an appeal or revision against resolution passed by a Gram Panchayat is available under Section 91 of the Adhiniyam read with Rules 3 and 5 of the Madhya Pradesh Panchayats (Appeal and Revision) Rules, 1995 (for short 'the Rules of 1995'). They further submitted that although an attempt was made by the Division Bench in *S.M. Sahakari Samiti, Seoni vs. Chief Executive Officer, Janapad Panchayat Seoni and another*, 2008 (1) M.P.H.T. 254 (DB) to resolve the conflicting decisions of this Court on this point, the conflict has not been resolved and the law continues to remain ambiguous whether an appeal or revision at all is available under Section 91 of the Adhiniyam read with the Rules of 1995 from a resolution passed by a Panchayat.

6. Sections 70 and 91 of the Adhiniyam, which are relevant for deciding whether appeal or revision is available against appointment of Panchayat Karmi made by the Panchayat, are quoted herein below:

"70. Other officers and servants of Panchayat -

(1) Subject to the provisions of Section 69 every panchayat may with previous approval of prescribed authority appoint such other officers and servants as it considers necessary for the efficient discharge of its duties.

(2) The qualifications, method of recruitment, salaries, leave, allowance and other conditions of service including disciplinary matters of such officer and servants shall be such as may be prescribed."

"91. Appeal and revision - An appeal or revision against the orders or proceedings of a Panchayat and other authorities under this Act shall lie to such authority and in such manner as may be prescribed."

7. Sub-section (1) of Section 70 of the Adhiniyam quoted above states that every panchayat may with the previous approval of prescribed authority appoint such other officers and servants as it considers necessary for the efficient discharge of its duties subject to the provisions of Section 69. Section 69 of the Adhiniyam provides for appointment of Secretary of a Panchayat and Chief Executive Officer of Janapad Panchayat and Zila Panchayat by the State Government or the prescribed authority. Hence, appointment of Panchayat Karmi is made under sub-section (1) of Section 70 of the Adhiniyam. Sub-section (1) of Section 70, however, does not state that such appointment has to be done by the Panchayat by a resolution.

8. It is only the Panchayat Karmi Scheme notified by the Government of Madhya Pradesh in the Panchayat and Rural Development Department on 12.9.1995 which requires a resolution to be adopted by Panchayat selecting the Panchayat Karmi and thereafter an appointment letter to be issued by the Sarpanch in favour of the selected person. English translations of Clauses 4.4 and 4.5 of the Panchayat Karmi Scheme as notified by the Government of Madhya Pradesh on 12.9.1995 are extracted herein below:

"4.4 All the applications shall be placed before the General Body of the Gram Panchayat for consideration. General Body of the Gram Panchayat after consideration on the applications shall select a candidate and place a candidate in the waiting list.

4.5 Panchayat by virtue of its resolution shall make such appointment within the specified time limit, on full time/part time or contract basis. Sarpanch shall issue appointment letter to selected person. Its copy shall be forwarded to the Chief Executive Officer, Janapad Panchayat, for record. Brief information about the 'Panchayat Karmi' shall be given therein. A register shall be maintained in the Janapad Panchayat and entries to this effect shall be made."

9. It will be clear from Clause 4.4 of the Panchayat Karmi Scheme quoted above that all applications for appointment of Panchayat Karmi will be placed before the General Body of the Gram Panchayat for consideration and the General Body of the Gram Panchayat, after consideration of the applications, shall select a candidate. It will be further clear from Clause 4.5 that after such selection is made by the Panchayat by a resolution, the Sarpanch of the Gram Panchayat shall issue an appointment letter to the selected person. In Black's Law Dictionary, First Edition, the expression 'resolution' has been described as 'a formal expression of the opinion or will of an official body or a public assembly, adopted by vote'. The resolution of the Panchayat is therefore a formal expression of opinion of the General Body of the Panchayat in favour of selection of a particular applicant as

Panchayat Karmi. The letter of appointment issued by the Sarpanch to carry out the resolution of the General Body of the Panchayat is the order of appointment of Panchayat Karmi.

10. Obviously, the provisions of an Act cannot be interpreted by reference to the provisions of a scheme made by the Government to give effect to the provisions of the Act, but has to be interpreted by reference to the provisions of the Act. As we have seen, Section 70 of the Adhiniyam does not provide for appointment of a Panchayat Karmi by a resolution of the Panchayat. Hence, an appointment order of a Panchayat Karmi issued by the Sarpanch of a Gram Panchayat can be challenged by way of appeal under Section 91 of the Adhiniyam read with the Rules of 1995. Section 91 of the Adhiniyam states that an appeal against an order of a Panchayat under the Adhiniyam shall lie to such authority and in such manner as may be prescribed. Rule 3 of the Rules of 1995 prescribes the 'appellate authority' and states that an appeal shall lie in the case of an order passed by the Gram Panchayat to the Sub-Divisional Officer. Thus, an order of appointment of a Panchayat Karmi issued by the Sarpanch pursuant to the resolution of the General Body of a Gram Panchayat is appealable before the Sub-Divisional Officer under Section 91 of the Adhiniyam read with Rule 3 (d) of the Rules of 1995.

11. From the facts of the case in *Hem Lata vs. State of M.P. and others* (supra), it is not clear whether appointment of a Panchayat Karmi by resolution passed by the Gram Panchayat was challenged before the High Court. From the facts of the case as reported, a resolution passed by the Panchayat was challenged before the High Court and a preliminary objection was raised on behalf of the respondents that the writ petitioner had alternative remedy of challenging the resolution passed by the Panchayat under Section 91 of the Adhiniyam and a learned single Judge of this Court held that Section 91 of the Adhiniyam provides that an appeal or revision shall lie against the order and the proceeding of a Panchayat and Rule 5 of the Rules of 1995 provided for revision against the proceeding of the Panchayat and therefore, revision would lie against the resolution passed by the Panchayat under Section 91 of the Adhiniyam.

12. In *Ram Charan Ahirwar vs. Sub-Divisional Officer, Jafara* (supra), the question for determination before the Court was whether the resolution of the Gram Panchayat carrying out the motion of no confidence against Sarpanch could be challenged under Section 91 of the Adhiniyam and a learned single Judge of this Court held that a motion of no confidence or a proceeding which was required to be passed by a resolution under Section 21 of the Adhiniyam could not be challenged by way of an appeal under Section 91 because the Act made a distinction between a resolution and order of a Panchayat and under Section 91, it is an order and not a resolution which can be challenged. This is not a case, therefore, where the question whether appointment of a Panchayat Karmi could be challenged by way of an appeal under Section 91 of the Adhiniyam was before the Court.

Moreover, as we have seen, Section 70 does not require that a Panchayat Karmi is to be appointed by a resolution of the Panchayat.

13. In *Ram Lakhan Rawat vs. State of M.P. and others* (supra), appointment of a Panchayat Karmi was first challenged in appeal before the Sub-Divisional Officer under Section 91 of the Adhiniyam read with Rule 3 of the Rules of 1995, but the Collector exercising the revisional powers under Section 91 of the Adhiniyam read with Rule 5 of the Rules of 1995 set aside the order passed by the Sub-Divisional Officer on the ground that an appeal was not available against the resolution of the Panchayat. The learned single Judge held that from the scheme of the Adhiniyam, it is apparent that any resolution passed by the Panchayat is neither appealable nor revisable and the resolutions of the Panchayat cannot be set aside though orders passed by the Panchayat shall be appealable under Rule 3 of the Rules of 1995 and is revisable under Rule 5 of the Rules of 1995. What the learned single Judge failed to appreciate is that under sub-section (1) of Section 70 of the Adhiniyam an appointment of a Panchayat Karmi or any officer other than those mentioned in Section 69 of the Adhiniyam or any servant of the Panchayat is not required to be made by a resolution. It is only under the Panchayat Karmi Scheme as notified by the Government on 12.9.1995 that the Panchayat in General Body has to select a candidate from amongst the candidates for appointment as Panchayat Karmi and the letter of appointment has to be made by the Sarpanch. The view taken by the learned single Judge in *Ram Lakhan Rawat vs. State of M.P.* (supra) that no appeal is available against the appointment of Panchayat Karmi, thus, in our view, is not correct in law.

14. In *Hukumchand vs. Dheer Ji and others* (supra), orders passed on election petitions under Section 122 of the Adhiniyam were challenged and a learned single Judge has taken a view that there was a clear departure in not providing any appeal or revision in so far as the cases under Section 122 are concerned. This is also not a case where the Court was called upon to decide whether an appointment of Panchayat Karmi under Section 70 of the Adhiniyam could be challenged by way of an appeal under Section 91 of the Adhiniyam.

15. In the Division Bench judgment in *S.M. Sahakari Samiti, Seoni vs. Chief Executive Officer, Janapad Panchayat, Seoni and another* (supra), the Standing Agricultural Committee of the Janapad Panchayat passed a resolution granting a contract for fisheries for three years for a reservoir situated in district Seoni in favour of the respondent in that case and the Division Bench held that since the State Government has not framed any rules by providing a forum before which the resolution could be challenged, the petitioner in that case could approach only the State Government under Section 85 of the Adhiniyam. Thus, this is also a case where the Court was not called upon to decide whether appointment of a Panchayat Karmi could be challenged by way of an appeal under Section 91 of the Adhiniyam read with Rule 3 of the Rules of 1995.

16. In the result, we hold that an appeal would lie against an order of appointment of Panchayat Karmi issued by Sarpanch of Gram Panchayat under Section 91 of the Adhiniyam read with Rule 3 of the Rules of 1995. 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 such powers will also include the power to decide whether the selection made by the Gram Panchayat by adopting a resolution was not correct either on facts or in law. The impugned order passed by the learned single Judge is modified accordingly and the appeal stands disposed of. In the facts and circumstances of the case, parties to bear their respective costs.

Appeal disposed of.

I.L.R. [2008] M. P., 1375

WRIT PETITION

Before Mr. Justice Abhay M. Naik

22 January, 2008*

KADIR KHAN

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

S.A.F. Rules, M.P. 1973 - Rule 26 - Probation - Rule 26 provides that services of probationer can be brought to an end if in opinion of appointing authority there is no likelihood of such person becoming suitable officer - No such finding in the cancellation order of appointment - Order not sustainable - Petition allowed.

(Paras 6 to 8)

सशस्त्र पुलिस बल, नियम म.प्र., 1973 - नियम 26 - परीक्षा - नियम 26 उपबन्धित करता है कि परीक्षाधीन की नौकरी समाप्त की जा सकती है यदि नियोक्ता के मत में ऐसे व्यक्ति के उपयुक्त अधिकारी बनने की कोई संभावना न हो - नियुक्ति आदेश के रद्दकरण में ऐसा कोई निष्कर्ष नहीं - आदेश अपास्त योग्य - याचिका मंजूर।

Pawan Dwivedi, for the petitioner

K.M. Mishra, P.L. for the respondents

ORDER

ABHAY M. NAIK, J. :-This petition has been preferred against the order dated 17.9.2002 marked as Annexure A/1 cancelling thereby the order of appointment dated 3.9.2002 with immediate effect.

2. Case of the petitioner is that pursuant to the advertisement issued by Madhya Pradesh, S.A.F, the petitioner applied for the post of Constable (G.D) in the Police Department S.A.F. He cleared the examination and physical test. He was selected as per the merit and was appointed on the post of constable in the pay scale of Rs.3050-75-3950-80-4590 vide order of appointment marked as Annexure

A/6. Petitioner gave his joining which was duly recorded in the Roj Namcha. Thereafter, petitioner was served with the impugned order dated 17.9.2002 whereby he was informed that his services were not required by the Government and his appointment was cancelled with immediate effect. This order has been challenged on the ground that after joining on the post of Constable after getting selected in the manner prescribed for direct recruitment, a right has accrued in favour of the petitioner which can not be snatched away in the impugned manner. Petitioner was not served with any show cause notice and no opportunity of hearing was granted before cancelling his appointment. Thus, there is flagrant violation of rules of natural justice and the impugned order contained in Annexure A/1, is unsustainable in law.

3. In the return, it has been admitted that the petitioner was selected on the post of Constable (G.D) in accordance with the prescribed procedure and as per merit. It has been averred that the entire selection list pertaining to recruitment on the post of constables made in the month of February 2002 was cancelled by the Additional Director General, S.A.F in accordance with the order issued by the office of P.H.Q.

4. Accordingly, it is stated that since the entire select list was cancelled, the appointment order issued in favour of the petitioner cannot survive. More over, petitioner having been probationer, it is stated that he can be removed in the impugned manner.

5. Shri Pawan Dwivedi and Shri K.M. Mishra, P.L made their submissions which have been considered in the light of the material available on record as well as the relevant provision of Madhya Pradesh S.A.F. Rules 1973.

6. Rule 26 provides for appointee on probation Sub Rule 3 merely states that services of the probationer during the period of probation may be brought to an end if in the opinion of appointing authority there is no likelihood of such person becoming a suitable officer in the S.A.F.

7. In view of the aforesaid, services of probationer may be definitely brought to an end provided such appointee in the opinion of the appointing authority may not become a proper and suitable officer in S.A.F. Since the reason for bringing to an end to the service of probationer is mentioned in Rule 26, the respondents are not only expected but are equally required to act within the framework of the aforesaid provision while bringing an end to the service of such probationer.

8. On perusal of Annexure A/1 it is amply clear that there is no finding that the petitioner would not become competent police officer in S.A.F. Annexure A/1 is virtually single line order based on the ground that services of the petitioner are no more required by the Government.

9. Shri Pawan Dwivedi, learned counsel for the petitioner drew attention of this Court to Annexure A which is fresh advertisement issued for recruitment on

the post of constable in the same Battalion. It clearly goes to show that services of constables in the same S.A.F Battalion are still required. Thus, reason assigned in Annexure A/1 is not sustainable at all and the impugned order having been passed without giving an opportunity of hearing to the petitioner is equally not sustainable in law.

10. At this juncture, Shri K.M. Mishra, learned Panel Lawyer contended that serious irregularities and illegalities were committed in the selection made in February 2002 therefore, the entire selection list was cancelled.

11. However, from the material available on record, no iota is found which may be said to have caused the cancellation of select list

12. Considering the same, I am of the opinion, that Annexure A/1 having been issued to the petitioner without issuing any show cause notice and without giving any opportunity of hearing is not sustainable, hence the impugned order (Annexure A/1) is hereby quashed.

13. Shri K.M. Mishra, learned P.L contended that on account of serious illegality and irregularity the list of appointment was rightly cancelled and persons selected on the basis of such process of selection shall have no right to continue.

14. This Court has to take care of the aforesaid expression. consequently, it is made clear that in case, entire selection is vitiated on account of serious irregularities and illegalities, respondents would be free to take suitable action in accordance with law. Quashment of Annexure A/1 does not mean that select list, if vitiated, shall have to revive. Respondents would obviously be within their powers to pass suitable order in accordance with law after giving proper opportunity of hearing to the petitioner.

No order as to cost.

Order accordingly.

I.L.R. [2008] M. P., 1377

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice S.C. Sharma

22 January 2008*

MUNIRAJ PATEL & ors.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 226 - Regulations of Medical Council of India, 2000, Clauses 3, 7 & Note (a) - MBBS Course - Attending classes is one thing and to become eligible in appearing in the examination is altogether different thing
- Petitioners passed 1st professional examination in supplementary examination
- Although they had attended classes with main batch but they were not allowed

to appear in second professional examination - Held - Terminology used in clause 7 'joining of main batch' cannot be given undue emphasis - Passing in 1st professional examination is compulsory before proceeding to second professional examination - Petitioners cannot be permitted to appear in examination unless they complete 18 months regular training and pass the first MBBS Course - Petition dismissed.

(Para 14)

संविधान, अनुच्छेद 226, भारतीय आयुर्विज्ञान परिषद विनियम, 2000, खण्ड 3, 7 और टीप (ए) - एमबीबीएस पाठ्यक्रम - कक्षा में हाजिर होना एक बात है और परीक्षा में बैठने के लिए पात्र होना बिल्कुल ही अलग बात है - याचियों ने प्रथम व्यावसायिक परीक्षा को पूरा परीक्षा में उत्तीर्ण किया - यद्यपि वे मुख्य बैच के साथ कक्षा में हाजिर हुए परन्तु उन्हें द्वितीय व्यावसायिक परीक्षा में बैठने की अनुमति नहीं दी गई - अभिनिर्धारित - खण्ड 7 में प्रयुक्त परिभाषा 'मुख्य बैच के साथ शामिल होना' को अनुचित बल नहीं दिया जा सकता - द्वितीय व्यावसायिक परीक्षा में प्रवेश के पूर्व प्रथम व्यावसायिक परीक्षा उत्तीर्ण करना अनिवार्य है - याचियों को परीक्षा में बैठने की अनुमति नहीं दी जा सकती है जब तक कि वे 18 महीनों का नियमित प्रशिक्षण और प्रथम एमबीबीएस कोर्स उत्तीर्ण न कर लें - याचिका खारिज।

Cases referred :

W.P. No. 15447/2006, W.P. No. 574/2002, CWP No. 17899/2004.

Aditya Sanghi, for the petitioner.

P. N. Dubey, Dy. Adv. General for the respondent No. 1

Indira Nair with Jasmeet Chana, for the respondent No. 2

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.**:-Regard being had to the similitude of the controversy involved in this batch of writ petition they were heard analogously together and disposed of by this singular order. For the sake of convenience the facts in Writ Petition No.687/2008 are exposted herein.

2. The petitioners, eight in number, are the students of second professional course prosecuting their studies in M.G.M. Medical College under Devi Ahilyabai Vishwavidyalaya, Indore. They joined the college in MBBS course in 2005 and appeared in the first professional examination in the month of August, 2006. Result of the said examination was declared on 19.9.06 in which the petitioners were declared as failed. They were directed to appear in the supplementary examination. The supplementary examination was held in February, 2007 and the results were declared on 22.3.2007 in which the petitioners qualified.

3. It is averred in the petition that the petitioners cleared the examination of MBBS first professional course on 22.3.2007 since there was supplementary examination in one paper all the students started attending classes along with the second batch. As they had attended the classes they have not lost any class nor any period of study prescribed by the Medical Council of India. It is urged that though the petitioners have completed their course and classes within the time

along with other students belonging to the main batch, yet they are being treated in the detained category and not allowed to undertake the examination of MBBS second professional course which is to be held in February, 2008. The last date of filling up the forms has been fixed on 15.1.2008. It is contended that if the petitioners are not allowed to appear in the examination scheduled to be held in February, 2008 they would unnecessarily lose one full academic session. It is contended that if the Regulations of Medical Council of India are read and appreciated in proper perspective the petitioners would be treated to have been merged in the main batch of the MBBS second professional course and hence, they are entitled to appear in the examination. It is also highlighted, that they had attended the classes immediately and they stand on different footing than those who had not passed the supplementary examination. Reliance has been placed on regulations framed by the Medical Council of India in the year 1997 which provide every student is required to undergo a period of certified study extending over 4½ academic years divided into nine semesters of six months each from the date of commencement of study for the subjects comprising the medical curriculum followed by one year compulsory internship. Special emphasis has been placed on Clause 7 of the Regulations to pyramid the stand that a candidate who passes in the supplementary examination held within six months can join the main batch and his case is distinguishable from that of failed students who have not cleared the supplementary examination. It is also highlighted that the respondents have committed illegalities in not allowing the petitioners to take up the main examination by relying on 2000 regulations which have not yet come into force. It is contended that a representation has been made to the Medical Council of India but there has been no response. It is asseverated that they have attended the classes in a regular manner and not lost any single day of study/classes. It is put forth that because of the attitude reflected by the respondents the petitioners are losing one year as they are not being treated at par with the students of main batch. In this factual backdrop prayer has been made to issue of a writ of mandamus to command the respondents to merge the petitioners with the main batch of MBBS second professional course and allow them to appear in the examination with the said batch by filling up the forms.

4. When the writ petition was listed on 18.1.2008 before this Court notices were issued and response was called for from the State Government, Medical Council of India and the concerned college and the universities. At that stage a prayer was made to grant of interim relief by permitting the petitioners to fill up the forms to appear in the examination. In view of this it was thought apposite to hear the matter finally.

5. Learned counsel for the parties fairly agreed that the university has no role in the matter and, in fact, it is the regulations framed by the Medical Council of India which requires to be interpreted. As a pure question of law emerged the learned counsel for the parties agreed to argue the matter without filing any counter affidavits.

6. We have heard Mr. Aditya Sanghi, learned counsel for the petitioners, Mrs. Indira Nair, learned senior counsel along with Ms. Jasmeet Chana for the Medical Council of India and Mr. P.N. Dubey, learned Dy. Adv. Gen. for the State.

7. The seminal question that emerges for consideration is whether the Regulations framed by the Medical Council of India permit such computation of the period. Under the heading 'Training Period and Time Distribution' the regulation prescribes that every student shall undergo a period of certified study extending over four and half academic years divided into 9 semesters i.e. six months each from the date of commencement of his study for the subjects comprising the medical curriculum to the date of completion of examination and followed by one year compulsory rotating internship. Each semester has to consist of approximately 120 teaching days. The period of four and half years is divided into three phases. Phase-I consists of two semesters, Phase-II consists of three semesters and Phase-III as the regulation prescribes the continuation of study of clinical subjects for seven semesters after passing Phase-I. The sub-regulation (3) which is relatable to Training Period and Time Distribution stipulates that the first two semesters approximately 240 teaching days shall be occupied in the Phase-I pre-clinical subjects and introduction to a broader understanding of the perspectives of medical education leading to delivery of health care. The said clause clearly stipulates that no student shall be permitted to join Phase-II para-clinical/clinical group of subjects until he has passed in all the Phase I pre-clinical subjects for which he will be permitted not more than four chances (actual examination) provided four chances are completed in three years from the date of enrollment. Clause 4 stipulates that after passing pre-clinical subjects, one and half year (three semesters) shall be devoted to para-clinical subjects. Clause 7 of the same which is relevant for the present purpose reads as under:-

"7. Supplementary examination may be conducted within 6 months so that the students who pass can join the main batch and the failed students will have to appear in the subsequent year."

8. It is worth noting here that under the said clause there is a Table which deals with Phase distribution and timing of examination. The time distribution is in three spells and each spell is of six months. A note is appended to Clause 7. The note (a) reads as under:-

"a. Passing in 1st Professional is compulsory before proceeding to Phase II training."

9. Submission of Mr. Sanghi, learned counsel for the petitioners is that if a candidate fails in the main examination and passes in the supplementary examination and joins he would be entitled to join in main branch so that the course is completed within the stipulated period of four and half years. It is the submission that for the said purpose supplementary examination is to be conducted within six months so that the students can pass and join the main branch. Learned counsel

further propounded that there is distinction between the candidates who pass the supplementary examination and those who fail in the supplementary examination, but, the College has not permitted the students to fill up the forms for the main branch.

10. Per contra, Mrs. Indira Nair, learned senior counsel for Medical Council of India and Mr. P.N. Dubey, learned Dy. Advocate General would submit that the note appended to the Rules has its own sacrosanctity. It clearly lays down that passing in the Phase-I course is compulsory before proceeding for Phase-II Training. It is urged by Mrs. Nair that one may join the main branch for the purpose of having acquisition of knowledge in the course and not to have the mid term disturbance but he cannot be treated as a candidate who has completed six months training as if he has passed the main examination. Learned senior counsel submitted that the joining of main branch cannot be made equivalent to passing of courses in question. It is not in dispute that the petitioners have passed in the supplementary examination and the results were declared on 22.3.2007. The said examination relates to first Professional Course as per the Note. The Note is categorical and unambiguous. Clauses 3, 7 and Note (a) have to be read in a purposive manner.

11. A Division Bench of this Court in *Gaurav Awasthi and others Vs. State of M.P. and others* (W.P.No. 15447/2006) was also dealing with the Regulations on Graduate Medical Examination, 1997. The Division Bench after referring to the regulations also referred to the Ordinance No.59 of Vikram University which provides that the Second Professional Examination can be taken by the students in 18 months after commencement of study of Phase-II in certain subjects. The Bench has held as under:-

"It is thus clear that on 1.11.2006 when the Second Professional Examination took place, the petitioners were not eligible to appear in the Second Professional Examination as per the regulation made by Medical Council of India and the ordinance made by the Vikram University."

12. Submission of Mr. Sanghi, learned counsel for the petitioner is that the decision is distinguishable as the University had an ordinance and in the case at hand the University has no role to play. As has been indicated earlier, we are really concerned with the regulations of the Medical Council of India. The note appended to Clause 7 clearly postulates that one can attend the Phase-II training after passing of First Professional Courses. The word 'Training' has its own significance. A learned Single Judge of this Court in the case of *Kamlesh Kumar Bhilware and another Vs. State of M.P. and others* (W.P.No.574/2002) held as under :-

"8.....Regulation 7 no where says that the moment a student clears the supplementary examination of IInd year. It is an enabling provision and that too in relation to allowing the student to attend the classes alongwith the

main batch of IInd year. Attending classes is one thing and to become eligible in appearing in the examination is altogether different thing. So long as the student does not complete 18 months in regular studies in IInd year as provided in Regulation, whether as a student coming from supplementary stream or otherwise, he has not right to appear in the examination. Indeed, there can not be a compromise on the requirement prescribed for eligibility criteria. After all, these regulations which have a statutory force and binding effect both on institution imparting education as also on students are meant for strict observance and can not be allowed to be deviated. The Courts can not interpret the statutory regulations in a way which may result in relaxation of education standard and the norms."

13. In our considered opinion, the view expressed by the learned Single Judge in *Kamlesh Kumar Bhilware* (supra) is sound and correct and we concur with the same. Similar view has been expressed by a Division Bench of High Court of Punjab and Harayana in *Amarbir Singh and others Vs. Baba Farid University and others* (C.W.P.No. 17899/2004) wherein it has been observed as under:-

"The question to be considered is whether the petitioners should complete the curriculum of 18 months of the second professional MBBS course, after having qualified the first professional examination of the MBBS course, so as to attain eligibility to appear in the second professional MBBS examination; or the curriculum of the second professional MBBS curriculum attended by the petitioners provisionally, either on account of the admission granted to them by the institutions where they were pursuing their education or by interim orders passed by this Court, prior to having qualified the first professional examination of the MBBS course, should be clubbed with the course of studies pursued by them after they qualified the first professional MBBS examination, to compute the minimum prescribed training period of 18 months so as to attain eligibility to appear in the second professional MBBS examination."

14. Thus, the terminology 'joining of main batch' cannot be given undue emphasis and if the principles of purposive construction is applied we have no hesitation in holding that the petitioners cannot be permitted to appear in the examination unless they complete 18 months regular training and pass the First MBBS course.

15. In view of aforesaid premises, the writ petitions being sans merit, stand dismissed without any order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1383

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice Prakash Shrivastava

25 January, 2008*

MANOJ KUMAR PANDYA

--- Petitioner

Vs.

STATE OF M.P. & ors.

--- Respondents

A. Constitution, Article 14 - Scope - Mere differentiation or inequality of treatment does not per se amount to discrimination - It is necessary to show that selection or differentiation is unreasonable or arbitrary and it does not rest on any rational basis. (Para 6)

क. संविधान, अनुच्छेद 14 - क्षेत्र - मात्र भेदात्मकता या व्यवहार में असमानता भेदभाव की कोटि में नहीं आता - यह दर्शाना आवश्यक है कि चयन या भेदात्मकता अनुचित या मनमाना है और उनका आधार युक्तिसंगत नहीं है।

B. Panchayat Samvida Shala Shikshak (Employment and Condition of Contract) Rules, M.P., 2005 - Explanation 5 Rule 9(b) - Marks for different qualifications - Constitutional Validity challenged - Application for contract teacher Grade III - 20 marks to be awarded to D.Ed./B.T.C./D.S.E. incumbent but not to B.Ed. incumbent - Held - B.Ed. incumbents may be having qualification to teach at higher level but B.Ed. is not higher qualification to teach at primary level - Rule is based on intelligible classification - Rule is intra vires of Constitution - Petition dismissed. (Para 10)

ख. पंचायत संविदा शाला शिक्षक (रोजगार और संविदा की शर्तों) नियम, म.प्र., 2005 - स्पष्टीकरण 5 नियम 9(बी) - विभिन्न अर्हताओं के लिये अंक - संवैधानिक वैधता को चुनौती - संविदा शिक्षक ग्रेड तीन के लिये आवेदन - डी.एड./बी.टी.सी./डी.एस.ई. धारक को 20 अंक दिये गये परन्तु बी.एड. धारक को कोई अंक नहीं दिये गये - अभिनिर्धारित - बी.एड. धारक की अर्हता उच्च स्तर पर शिक्षा देने के लिये है किन्तु प्राथमिक स्तर पर शिक्षा देने के लिये बी.एड. उच्च अर्हता नहीं - नियम बोधगम्य वर्गीकरण पर आधारित - नियम संवैधानिक शक्तियों के अधीन - याचिका खारिज।

Cases referred :

AIR 1953 SC 91, AIR 1956 SC 479, AIR 1966 SC 1980, AIR 1966 SC 1044, AIR 1972 SC 828, 2001 SCC (L&S) 1039, (1998) 6 SCC 165, (2001) 2 SCC 259, (2002) 6 SCC 562, (2003) 3 SCC 541, (2003) 3 SCC 548.

Aditya Sanghi, V.K. Shukla, Anand Dadariya, S.M. Lal, Akhilesh Choubey, Ashish Trivedi and Goutam Prasad, for the petitioner.

Samdarshi Tiwari, Govt. Advocate for the respondents/State.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J.:—In the writ petitions the constitutional validity of Explanation 5 Rule

9(b) and Rule 9(c) of M.P. Panchayat Samvida Shala Shikshak (Employment and Condition of Contract Rules), 2005 (hereinafter to be referred to as 'the rules') and corresponding pari materia Rules called M.P. Nagriya Nikay Samvida Shala Shikshak (Employment and Condition of Contract Rules), 2005 (hereinafter referred to as rules) has been assailed.

2. Facts are being referred to from W.P. No. 10200/2006. The petitioners applied for appointment as contract teacher Grade III pursuant to the advertisement published in Rojgar and Nirman dated 8.5.2006 having qualification of B.A. and B. Ed. The grievance of the petitioners is that rule 9(c) of the rules provide 20 marks to be awarded to the candidates of :

Samvida Shala Shikshak Grade I for B.Ed./B.Ed. (Special Education)

Samvida Shala Shikshak Grade II for B.Ed./B.Ed. (Special Education)/B.T.C./D.Ed./D.S.E.

Samvida Shala Shikshak Grade III for D.Ed./B.T.C./D.S.E.

20 marks of experience of educational qualification are not to be awarded to the B.Ed. incumbent, when he submits an application for contract teacher Grade III to teach at primary level. It has also been submitted that under explanation 5 to sub rule (b) of rule 9 of the aforesaid rules, the teaching experience of Class 9 to 12, 6 to 10 and 1 to 8 shall be accepted for contract teacher grade I, grade II and grade III respectively. Maximum of 15 marks shall be awarded for teaching experience in any school. For experience of one year, two years and three years, 05, 10 and 15 marks shall be awarded respectively, as provided in rule 9(b). The teachers who have teaching experience of class 9 to 12, are not entitled for award of marks of experience for class 1 to 8. It is submitted that qualification of B.Ed. is superior qualification and ought to have been accepted for grant of 20 marks. Even for contract teacher grade III, the qualification for which marks are to be awarded is D.Ed./B.T.C./D.S.E., B.Ed. has been excluded, there is no rationale behind it. It is further submitted that petitioner has experience of teaching class 9 and 10 but he has not been awarded the experience marks on the basis of class 9 and 10 for the post of contract teacher grade III, supposed to teach at primary level, thus the action is violative of Article 14 of the Constitution of India. The benefit is being given to the diploma holders, there is per-se discrimination, thus the aforesaid rules be struck down.

3. In the return filed by the respondents it is submitted that the aforesaid rules have been framed with the objective to provide efficient teachers to impart education at primary and secondary level. The provisions are neither discriminatory nor arbitrary. Considering the qualification required for a particular post and the expertise, the aforesaid qualification has been prescribed. Contract teacher grade III is recruited to impart education at primary level, considering the skill required for primary level, the aforesaid criteria has been laid down. Reliance has also been placed on the directives issued by National Council of Teacher Education as per notification (R-2) issued on 3.9.2001.

4. Learned counsel for the petitioners have submitted that the aforesaid rules are discriminatory and differentiation created has no rationale behind it. The qualification of B.Ed. is superior qualification as compared to D.Ed./B.T.C./D.S.E., thus the weightage ought to have been given at primary level also for such qualification. Similarly the experience for teaching in higher classes ought to have been considered for grant of marks of 'teaching experience' at primary level also. Consequently the explanation 5 of Sub-rule (b) of Rule 9 and rule 9(c) deserve to be quashed being ultra virus and unconstitutional as the aforesaid rules violates the mandate of Article 14.

5. Shri Samdarshi Tiwari, learned Govt. Advocate-for respondents/State of M.P. has submitted that the directives issued by National Council of Teacher Education in notification dated 3.9.2001 make it clear that for appointment of teachers for primary classes, basic teachers' training programme of 2 years' duration is required, B.Ed. is not a substitute for basic teachers' training programme. He has also relied upon D.Ed. syllabus for Madhya Pradesh and Chhattisgarh and syllabus of B.Ed. course in order to objectively satisfy this Court that the programme of D.Ed./B.T.C./D.S.E. is specially designed for taking care of students of primary level, to understand children's psychology and their development whereas in B.Ed. programme course there is no such emphasis on the child's development, emphasis is on higher skill education, thus teachers who have obtained the qualification of D.Ed./B.T.C./D.S.E. which are inter se equivalent qualification are being preferred in the matter of grant of weightage marks of the educational qualification as per explanation 5 of rule 9(b). As per rule the teaching experience of class 9 to 12 is being considered for contract teacher grade I, the teaching experience of class 6 to 10 is being considered for contract teacher grade II and the teaching experience of class 1 to 8 is being considered for contract teacher grade III respectively, as skill required for teaching the aforesaid classes is different. The marks of teaching experience are being awarded on intelligible basis. The qualification that has been prescribed has the rationale behind it of awarding marks of experience to the person who is having the qualification to teach particular class which require different skill otherwise primary teacher would also obtain the marks for experience for teaching at the higher level selection and vice versa, that would create anomalous position, thus the rules cannot be said to be arbitrary, there is object behind it and it is permissible to make classification, thus the aforesaid rules cannot be said to be *ultra-virus* or palpably arbitrary.

6. Before dilating upon the merit, we deem it appropriate to consider principle of law enunciated by the Apex Court, while dealing with the scope of equal protection under Article 14. The Apex Court in *Ameerunnissa Begum and others v. Mahboob Begum and others* - AIR 1953 SC 91 has laid down that mere differentiation or inequality of treatment does not per se amount to discrimination, and it is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the legislature has in

view in order to invalidate an enactment under Article 14. In *Bidi Supply Co. Vs. Union of India and others* - 1956 SC 479 the Apex Court has laid down in order to pass the test of permissible classification two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that differentia must have a rational relation to the object sought to be achieved by the Statute in question. In *Cochin Devaswom Board, Trichur Vs. Vamana Setti and others* - AIR 1966 SC 1980 the Apex Court emphasized that a person relying upon the plea of unlawful discrimination which infringes a guarantee of equality before the law or equal protection of the laws must set out with sufficient particulars his plea, showing that between the persons similarly circumstanced, discrimination has been made which is founded on no intelligible differentia. If the claimant for relief establishes similarity between persons who are subjected to a differential treatment, it may lie upon the State to establish that the differentiation is based on a rational object sought to be achieved by the Legislature. In *Probhudas Morarjee Rajkotia and others Vs. Union of India and others* - AIR 1966 SC 1044 the Apex Court has laid down that to make out a case of denial of the equal protection of the laws under Art. 14 of the Constitution, a plea of differential treatment is by itself not sufficient. An applicant pleading that Article 14 has been violated must make out that not only he had been treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis, and such differential treatment is unjustifiable one. In *Danthuluri Ramaraju and others Vs. The State of Andhra Pradesh and another* - AIR 1972 SC 828, the Apex Court has laid down that the rate of cess prescribed for each division has a rational nexus with the object of the Act and is based on intelligible differentia. In *Om Kumar and others Vs. Union of India* - 2001 SCC (L&S) 1039, reliance has been placed on Para 32, wherein it has been observed that so far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. In case the action is arbitrary, it can be struck down under Art. 14. In *State of M.P. and another Vs. Dharam Bair* - (1998) 6 SCC 165, the Apex Court had laid down that the experience gained by the respondent on account of his working on the post in question for over a decade cannot be equated with educational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to a higher post. If the Government, in exercise of its executive power, has created certain posts, it is for the Government to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government. The educational qualification has a direct nexus with the nature of the post. The administrative experience cannot be treated as equivalent to his knowledge in the field of teaching. In *K. Thimmappa and others Vs. Chairman, Central Board of Directors, State Bank of India and another* - (2001) 2 SCC 259, test of

permissible classification was restated by the Apex Court. In *Kailash Chand Sharma Vs. State of Rajasthan and others* - (2002) 6 SCC 562, the Apex Court has struck down the weightage on the basis of place of residence which was given to the teachers in Panchayat schools. Grant of bonus marks to the resident of district concerned and rural areas was held to be discriminatory. The reasons given by the parties to justify the said provisions, were held to be either non-existent or irrelevant and had no nexus with the object sought to be achieved viz. spread of education at primary level. It was further held that affirmative action to provide better employment opportunities to people of rural backward areas is not impermissible provided it seeks to achieve overall equality and is supported by scientific study and considerations germane to the constitutional guarantee of equality.

7. Before we dilate upon the provisions of the rules and the submission raised, we deem it appropriate to refer other decisions of Apex Court which have more or less direct bearing with the controversy involved in the instant petitions. In *P.M. Latha and another Vs. State of Kerala and others* - (2003) 3 SCC 541, the Apex Court has considered the question of B.Ed. qualification being a higher qualification than TTC, rejected the submission that B.Ed. candidates should be held to be eligible to compete for the post. The Apex Court has observed that special skill is required for the post of teaching at primary level and B.Ed. cannot be said to be equivalent to TTC, which is essential one. The Apex Court has held thus :-

10. We find absolutely no force in the argument advanced by the respondents that BEd qualification is a higher qualification than TTC and therefore, the BEd candidates should be held to be eligible to compete for the post. On behalf of the appellants, it is pointed out before us that Trained Teacher's Certificate is given to teachers specially trained to teach small children in primary classes whereas for BEd degree, the training imparted is to teach students of classes above primary. BEd degree-holders, therefore, cannot necessarily be held to be holding qualification suitable for appointment as teachers in primary schools. Whether or a particular post, the source of recruitment should be from the candidates with TTC qualification or BEd qualification, is a matter of recruitment policy. We find sufficient logic and justification in the State prescribing qualification for the post of primary teachers as only TTC and not BEd. Whether BEd qualification can also be prescribed for primary teachers is a question to be considered by the authorities concerned but we cannot consider BEd candidates, for the present vacancies advertised, as eligible.

13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law. The Division Bench forgot that in extending relief on equity to BEd candidates who were unqualified and yet allowed to compete and seek appointments contrary to the terms of the advertisement, it is not redressing the injustice.

caused to the appellants who were TTC candidates and would have secured a better position in the rank list to get appointment against the available vacancies, had BEd candidates been excluded from the selections. The impugned judgment of the Division Bench is both illegal, inequitable and patently unjust. The TTC candidates before us as appellants have been wrongly deprived of due chance of selection and appointment. The impugned judgment of the Division Bench, therefore, deserves to be set aside and of the learned Single Judge restored.

8. In *Yogesh Kumar and others Vs. Govt. of NCT, Delhi and others* - (2003) 3 SCC 548, the aforesaid decision of *P.M. Latha and another Vs. State of Kerala and others* was relied upon and in the context of appointment of Assistant Teacher, Municipal Corporation Delhi under the rules, it was held that BEd teachers were rightly excluded from the eligibility criteria. It was held that TTC cannot be said to be higher qualification but for the purpose of teaching at primary level a special skill is required, which has been obtained by the incumbents possessing the TTC certificate. The Apex Court has held thus :-

5. The Division Bench of the Delhi High Court in the impugned judgment has dealt with the above two arguments in great detail. In our considered opinion, it has rightly come to the conclusion that BEd qualification, although a well-recognised qualification in the field of teaching and education being not prescribed in the advertisement, only some of the BEd candidates who took a chance to apply for the post cannot be given entry in the field of selection. We also find that the High Court rightly came to the conclusion that teacher training imparted to teachers for BEd course equips them for teaching higher classes. A specialized training given to teachers for teaching small children at primary level cannot be compared with training given for awarding BEd degree. Merely because primary teachers can also earn promotion to the post of teachers to teach higher classes and for which BEd is the prescribed qualification, it cannot be held that BEd is a higher qualification than TTC. Looking to the different nature of TTC qualification, the High Court rightly held that it is not comparable with BEd degree qualification and the latter cannot be treated as higher qualification to the former.

9. Rule 9 of the rules is *pari materia* and identically worded for urban as well as panchayat areas, same is quoted below:-

(9) **Criterion of Selection.** - After the scrutiny of the applications received by Employing Authority, the categorywise merit list of the candidates belonging to unreserved category, Scheduled Castes, Scheduled Tribes, and Other Backward Classes shall be prepared. For preparing the merit list, a maximum of 100 marks shall be awarded as under :-

(a) A maximum of 5 marks shall be awarded to the candidate in proportion

to the marks obtained by him/her in the Samvida Shala Shikshak Eligibility Examination;

(b) A maximum of 15 marks shall be awarded for teaching experience in any school. For experience of one year, two years and three years, 05, 10 and 15 marks shall be awarded respectively.

Explanation:-(1) Teaching experience means an experience of teaching in Government Schools, Local Body (Panchayat/Urban Body) Schools, Schools receiving Grant-in-aid from Government, Education Guarantee Schools, erstwhile Non-Formal Education Centres of the Government. Teaching experience also includes experience as an honorary teacher appointed by the Government.

(2) Marks for experience shall be awarded on the basis of a certificate issued by District Education Officer/assistant Commissioner/District Organiser, Tribal Welfare in case of teacher of Government School, School receiving Grant-in-aid from Government and erstwhile Non-Formal Education Centres of Government, by District Project Coordinator in case of Education Guarantee Schools, by Chief Executive Officer of concerned Panchayat in case of Panchayat Schools, by Officer authorized by the Urban Local Body in case of Urban Local Body School and by District Education Officer/Assistant Commissioner/District Organiser, Tribal Welfare in case of honorary teachers appointed by the Government.

(3) In case of a School receiving Grant-in-aid from Government, experience certificate will be issued to those teachers only, whose salary has been paid from Grant-in-aid, only for that period for which salary was paid from the Government Grant-in-aid.

(4) A minimum experience of 8 months' duration in an academic year shall be required for being counted as an experience of one year. No marks shall be awarded for an experience of less than 8 months' duration.

(5) The Teaching experience of Classes 9 to 12, 6 to 10 and 1 to 8 shall be accepted for Samvida Shala Shikshak Grade-I, Grade-2 and Grade-3, respectively.

(c) 20 Marks shall be awarded to the candidate of each Samvida Shala Shikshak Grade-I for B.Ed./B.Ed.(Special Education), Samvida Shala Shikshak Grade-II for B.Ed./B.Ed.(Special Education)/B.T.C./D.Ed./D.S.E. and Samvida Shala Shikshak Grade-III for D.Ed./B.T.C./D.S.E.

Explanation:-(1)- In awarding marks to the candidates for holding required Degree/Diploma/Certificate with respect to the said training, the marks obtained by the candidates in the examination conducted for the said Degree/Diploma/Certificate shall not be taken into account.

(2) The candidates shall have to submit the mark sheet pertaining to the required Degree, Diploma, Certificate with the application.

(3) The B.Ed. (Special Education) or D.S.E, should be recognized by Rehabilitation Council of India, New Delhi.

(d) In case of equal marks in the categorywise merit list, preference shall be given in final selection to the candidate having obtained higher marks in the eligibility examination and even after that, if the situation of equality of marks arises then preference shall be given to the candidate who is older in age.

10. It is also necessary to consider notification (R-2) issued by National Council of Teacher Education on 3.9.2007 laying down the qualifications for primary, upper primary, secondary, senior secondary, along with it's note, same is quoted below :-

Note :

1. For appointment of teachers for primary classes, basic teachers' training programme of 2 years' duration is required, B.Ed. is not a substitute for basic teachers' training programme.

2. Some of the States are having basic teachers training course of one year duration only, while in some other State students passing secondary level examination are admitted to primary level teacher training courses. Such States may, by 2005, conduct basic teacher' training programmes of a duration of not less than two years with admission being open to Senior Secondary/Intermediate pass candidates. In the meantime candidates who have undergone basic teachers' training courses of one year duration or were admitted to such training programmes after passing secondary level examination only may be given employment in the concerned States only.

Note (1) of the aforesaid notification makes it clear that for appointment of teachers for primary classes, basic teachers' training programme of 2 years' duration is required. B.Ed. is not a substitute for basic teachers' training programme. D.Ed. syllabus contains in first paper the special emphasis on the primary level education and development of child which is its paramount consideration. Second paper is related to child's psychology which contains several subjects with respect to child's development, factor affecting their psychology, problems of behaviour and mental health of child. Other papers also emphasize education at primary level. In paper 4 also there is special emphasis on child center education, methodology, schemes, valuation, teaching material required at that level, thus the overall development of children is the paramount consideration of the course content of D.Ed., B.T.C. and D.S.E. which are equal course whereas in BEd emphasis is on higher education from class 9th to 12th. No subjects are being taught to the incumbents having BEd qualification which are having special emphasis on the education at primary level, thus rule 9(c) which excludes grant of weightage marks to the candidates having BEd qualification is in tune with the note 1 of the aforesaid notification issued by National Council of Teacher Education. We have tested it objectively also with the course contents of B.Ed. and D.Ed. and we are satisfied that special skill is possessed by D.Ed./B.T.C./D.S.E. candidates to impart

education at primary level to the children obtaining instructions at that level. Though differentiation is made under the rules in eligibility for awarding marks but that is based on intelligible classification, which is permissible within the ambit of Art. 14 of the Constitution, it has nexus with the object sought to be achieved under the provision by specially emphasizing on D.Ed./B.T.C./D.S.E. qualification for primary level and giving weightage to it, though the teachers having BEd degree are having qualification to teach higher classes but they are not having special skill to teach at primary level. 20 marks which have been reserved as per rule 9(c) have been rightly reserved for special category of candidates having special skill to impart primary education, the incumbents having BEd degree have not been totally excluded from staking their claim but they are not to be awarded marks of special educational qualification as they are not having expertise qualification to teach at primary level. Though they may be having qualification to teach at higher level but B.Ed. is not the higher qualification to teach at primary level but special skill for the purpose of teaching at primary level as held by the Apex Court in aforesaid decisions.

11. Coming to the second limb of the submission relating to the marks of experience. Explanation 5 of Rule 9(b) provides that the teaching experience of Classes 9 to 12, 6 to 10 and 1 to 8 shall be accepted for Samvida Shala Shikshak Grade-I, Grade-2 and Grade-3, respectively. A maximum of 15 marks shall be awarded for teaching experience in any school. For experience of one year, two years and three years, 05, 10 and 15 marks shall be awarded respectively. There is rationale behind the aforesaid rule also as the teachers who are supposed to teach particular class should have teaching experience of that very level/classes and consequently they are awarded the marks, otherwise the teachers who have taught only at primary level will be entitled in case provision is held to be arbitrary for having experience at the level of class 9 to 12 also and vice-versa whereas different skill is necessary for imparting the education at different level. Thus we find that intelligible classification has been made and teaching experience marks are being awarded rightly for the kind of experience which is possessed for the particular post of contract teacher grade I, II and III to teach the very class of which they are having the experience, thus it cannot be said that there is arbitrariness violating Art. 14 of the Constitution of India in the aforesaid explanation 5 to rule 9(b) of the aforesaid rules, thus the submission fails.

12. Resultantly, petitions being devoid of merit, are hereby dismissed. However, appointment made of any of the petitioners are not being disturbed. Parties to bear their own costs as incurred of these petitions.

Petition dismissed.

I.L.R. [2008] M. P., 1392

WRIT PETITION

Before Mr. Justice J.K. Maheshwari

13 February, 2008*

ANIL JAIN

... Petitioner

Vs.

MANAGING DIRECTOR, M.P.R.T.C. & anr.

... Respondents

A. State Road Transport Corporation Employees Deposit Fund Regulation, M.P. 1985 - Clause 10 - Interest - Retired and serving employees of the Corporation are entitled to get interest on amount deposited under the Employees Deposit Fund Scheme as prescribed in clause 10 of Regulations. (Paras 11 & 13)

(क) सड़क परिवहन निगम कर्मचारी जमा निधि विनियम, म.प्र. 1985 - खण्ड 10 - ब्याज - निगम के सेवानिवृत्त कर्मचारी और सेवारत कर्मचारी, कर्मचारी जमा निधि योजना में जमा राशि पर ब्याज पाने के हकदार हैं जैसा कि विनियम खण्ड 10 में विहित है।

B. State Road Transport Corporation Employees Deposit Fund Regulation, M.P. 1985 - Clause 10 - Rate of interest - 'The payment of interest was statutorily governed as per the regulation, and the rate of such interest has been prescribed by the government as per notifications' - However the Corporation by issuing circulars can not deviate from discharge of his statutory obligation of payment of interest arbitrarily. (Paras 11 & 13)

(ख) सड़क परिवहन निगम कर्मचारी जमा निधि विनियम, म.प्र. 1985 - खण्ड 10 - ब्याज की दर - ब्याज का भुगतान विनियम के कानून से शासित होता है और ऐसे ब्याज की दर सरकार द्वारा अधिसूचनाओं में विहित की जाती है - तथापि ब्याज का भुगतान निगम की कानूनी बाध्यता है और वह परिपत्र जारी करके उसके कानूनी बाध्यता के भार से मनमाने ढंग से उन्मोचित नहीं हो सकता है।

Cases referred :

W.P. No. 8209/06 (s) decided on 1-10-07, W.P.(s) No. 334/04, AIR 1965 SC 845

C.M. Nair, Anand Dubey, S. P. Vakhte, Pushpa Joshi, Rakesh Saxena, L. C. Patne, Vinod Bhavsar, Raghvendra Saxena & Arti Pal, for the petitioner

G.S. Patwardhan, K.R. Pawar & S.H. Karanjawala, for the respondent/ Corporation

Lokesh Bhatnagar, G.A. for the respondent/State

ORDER

J.K. MAHESHWARI, J. :- This order shall govern the disposal of all other similar writ petitions, the details thereof are mentioned in a separate list appended to this judgment.

2. The bunch of all these writ petitions involve two sets of cases; in one set, the employees have retired on attaining the age of superannuation or under the voluntary retirement scheme floated by the Corporation and received the amount of E.D.F, but interest on the said deposits or on dearness allowance has not been

paid. In other set, employees are working in the Corporation, claiming interest on the deposits or on the amount of dearness allowance deposited in Employees Deposit Fund Scheme.

3. In all these petitions a common question of law requires adjudication "whether employees of the Madhya Pradesh State Road Transport Corporation, either retired or in employment are entitled to get interest on the deposits or on dearness allowance deposited under the Employees Deposit Fund Scheme, and what should be the rate thereof?"

4. As the common question of law is involved in all the writ petitions, therefore, it is being decided by the common order, for the ready reference facts are being referred from W.P.No.7350/07(S) (*Anil Jain Vs. M.D.,MPRTC*). It is the case of petitioner that respondents M.P. Road Transport Corporation is duly constituted under Section 3 of the Road Transport Corporation Act, 1950, it is fully owned and controlled by the Government however falls within the definition of State as per Article 12 of the Constitution of India and amenable to writ jurisdiction of this Court. Petitioner, who is an employee of the said Corporation has filed this petition claiming interest and rate thereof on the deposits or on dearness allowance kept in a separate fund, under the scheme which is known as Employees Deposit Fund Scheme. It is not in dispute that dearness allowance, which was payable to the employees was not paid during the period 1.7.95 to 31.3.2002. The said amount ought to have been deposited by the Corporation in a fund known as Employees Deposit Fund created for the said purpose and interest thereupon is leviable. However it is prayed, on deposits under the Scheme and on dearness allowance the interest by the rate as prescribed by the State Government as per notification: on year to year basis may be directed.

5. Learned counsels appearing for petitioner submits that M.P. State Road Transport Corporation has framed a regulation in exercise of power conferred under Section 45 of the Road Transport Corporation Act, 1950, which is known as M.P. Road Transport Corporation Employees Deposit Fund Regulation, 1985. The regulation was enacted in furtherance to the Board resolution No.2560 dated 4.9.1985 and obtained approval from the Home Department, and circulated vide circular No.186 dated 17.3.1986. Under the Regulation 'fund' means the Madhya Pradesh State Road Transport Corporation employees deposit fund. As per Clause-7 of the Regulation employees deposit fund was created by making deduction from monthly emoluments of the employees covered under the Scheme. The deduction on account of arrears of dearness allowance, or additional allowance may be decided upon by negotiation with recognised representative union of the employees of the corporation. Under clause-10, Corporation is bound to pay the interest on the deposits at such rate and in accordance with such method of calculation as prescribed from year to year by the State Government in respect of general provident fund accounts. The manner of calculation of interest has further been prescribed in Sub clause (2)(3) and (4) of the said clause 10.

6. It is further contended that the rate of interest payable on deposits has been prescribed by the State Government by issuing various notifications on year to year basis. The number of notification, financial year and the rate of interest as prescribed in the notification is reproduced herein below :-

<u>S.No.</u>	<u>Date of Notification</u>	<u>Financial Year</u>	<u>Rate of interest</u>
(1)	05/06/95	1995-96	12%
(2)	19/12/96	1996-97	12%
(3)	24/07/97	1997-98	12%
(4)	30/05/98	1998-99	12%
(5)	Not known	1999-2000	12%
(6)	24/3/2000	2000-01	11%
(7)	03/05/01	2001-02	9.5%
(8)	20/05/02	2002-03	9%
(9)	06/05/03	2003-04	8%
(10)	27/08/04	2004-05	8%
(11)	20/09/05	2005-06	8%

7. Thus it is contended, the rate of interest payable on deposits has been decided by the Government in view of the provisions of Clause-10 of the Regulation, and the calculation of interest ought to be made in the manner specified in Sub Clause (2) (3) and (4) of Clause 10 of Regulation. In support of his contention reliance has also been placed on a judgment of this Court delivered in W.P. No.8209/06 (S) *Pramod Limaye & Others Vs. M.D.M.P.R.T.C. & Others* decided on 1.10.2007, whereby the direction was issued to calculate the amount of interest on dearness allowance as per the rate prescribed by the State Government by various notifications and payable to the employees within four months. It was also submitted that the Corporation had preferred the writ appeal No.637/07 before the Division Bench, which was dismissed on 7.2.2008, therefore, respondents are bound to pay interest on the deposited under employees deposit fund scheme or on dearness allowance and as per the rate prescribed, and governed by the statutory regulation.

8. Shri G.S. Patwardhan, Shri K.R. Pawar and Shri S.H. Karanjawala, counsel appearing for the respondents Corporation submits that the Managing Director of M.P.S.R.T.C. has issued various circulars dated 15.7.1996, 1.6.99 and 27.4.2000 whereby it was decided that the amount of deposits under the Scheme is liable to be refunded without interest. However, it is urged that petitioners are not entitled to get interest on the said amount or as per the rate of interest, if any, prescribed by the Government. In an alternate it is said that the question of payment of interest has been thrashed out by this Court in W.P (S). No. 334/04 in the case of *Ramchandra Yadav & Others Vs. The M.D. M.P.S.R.T.C & another* wherein it is held that regulations of the corporation having statutory force and respondents are required to pay interest on 50% deducted amount of dearness allowance. The

Court further directed for payment of interest at the rate of 8% per annum because of delay caused by the petitioner in filing of the petition. However, it is urged that in any case, if interest is payable, it may be hardly at the rate of 8% p.a. and not as per the notifications issued by the Government, however prayed for dismissal of all the petitions.

9. I have heard learned counsel appearing for the parties and perused the records. On perusal, it is not in dispute that the regulation was framed under Section 45 of the Road Transport Corporation Act, 1950. The said Regulation known as M.P. State Road Transport Corporation Employees Deposit Fund Regulation, 1985. On seeking approval, it is duly circulated. Clause(10) of the Regulation makes it mandatory upon the Corporation to pay interest on the deposit at such rate and in accordance with such method of calculation as may be prescribed from year to year to by the State Government in respect of general provident fund accounts. It is also not in dispute that for the purpose of clause-10 of the said Regulation, the Government has issued various notifications prescribing rate of interest to the different financial years as quoted above in para 6. Thus, on the amount deposited or on the dearness allowance deposited, under the scheme is payable by the Corporation alongwith interest at such rate and in accordance with such method of calculation as may be prescribed from year to year by the State Government in respect of general provident fund accounts and the manner of calculation of interest prescribed in Sub Clause (2) (3) and (4) of Clause 10 of Regulation. Thus, looking to such unambiguous legal position, the only irresistible conclusion arrived that the employees of the M.P.S.R.T.C are entitled to get interest on the deposits under Employees Deposit Fund Scheme.

10. Now the question with respect to rate of interest remains for determination. Shri Patwardhan has relied upon the circular dated 15.7.1996, 1.6.99 and 27.4.2000, by which the Corporation has taken a decision of non-payment of interest on the amount of such deposit. In an alternative by placing reliance on the judgment of *Ramchanda Yadav* (supra), it is said that the award of interest may be directed only up to 8% per annum and no more. It is further argued by Shri Patwardhan that on the principle of stare decisis judgment of *Ramchandray Yadav* (supra) must be followed in other similar cases. In support of his contention, reliance is placed on the decision of Hon'ble Supreme Court, in the case of *Sajjan Singh and Others Vs. The State of Rajasthan and others*, A.I.R. 1965 SC 845.

11. On the other hand Shri C.M. Nair counsel appearing for petitioner submits that judgment of *Ramchandra Yadav* (supra) was based on its own facts, wherein the notifications issued by the Government deciding the rate of interest on year to year basis was not brought to the notice of the Court. It is further said that since the payment of interest was statutorily governed as per the Regulation, and the rate of such interest has been prescribed by the Government as per notifications, however the Corporation by issuing circulars cannot deviate from discharge of his statutory obligation of payment of interest arbitrarily. It is further said that

once payment of interest is governed under the statute, which cannot lower down for any reason whatsoever. Counsel further submits that the judgment of *Ramchandra Yadav* (supra) has been taken into consideration by this Court in a later judgment of *Promod Limaye* (supra) and held that the amount of interest which is prescribed by the statute cannot be reduced or denied by issuing circulars. The said judgment of *Promod Limaye* (supra) has been upheld by the Division Bench vide order dated 7.2.2008 passed in Writ Appeal No.636/07. The Division Bench has held that the observations made by the learned Single Judge in the case of *Ramchandra Yadav* (Supra) does not ordain that in all cases interest shall be payable 8% notwithstanding the statutory notifications requiring the payment of interest at higher rate from time to time. Division Bench has further observed that judgment of *Ramchandra Yadav* (supra) is based on its own facts and principle of *stare decisis* does not attract. It is further held that in the case of *Promod Limaye* (supra) the notification prescribing statutory rate of interest was brought on record, therefore, the later decision, in the case of *Promod Limaye* (supra) does not violate the principle of *stare decisis*. In view of the foregoing discussion, it is apparent that judgment of *Ramchandra Yadav* (supra) was on its own facts and later judgment rendered in the case of *Promod Limaye* (supra) was based on the notifications issued by the Government prescribing the rate of interest, which statutorily regulate such rate of interest, therefore, principle of *stare decisis* is not attracted. It is to be further held that on the deposits under the employees deposit fund scheme interest is leviable as per the notifications issued by the State Government prescribing the rate thereof on year to year basis in respect to general provident fund accounts. The manner of calculation of interest has also been specified in Sub Clause (2) (3) and (4) of Clause 10 of Regulation. Accordingly, all the petitioners are held entitled to get interest on the deposits and on dearness allowance as per the rate prescribed by the Government and in the manner specified under the Regulation.

12. In some of the case petitioners have also prayed for other reliefs much less ancillary, however to claim those reliefs petitioners shall be at liberty to take recourse of law separately or afresh after submitting representation to get redress their grievance.

13. In view of the above, I allow these petitions with the following directions :-

(i) The Employees of the Corporation, who are still in employment shall be entitled to receive interest on the deposits of the Employees Deposit Fund Scheme as per the rate prescribed through notifications issued by the State Government and as per the method of calculation prescribed from year to year basis in respect of general provident fund accounts, and in the manner specified in Sub Clause (2) (3) and (4) of Clause 10 of Regulation.

(ii) In the case of those employees who have retired voluntarily under the scheme or have attained the age of superannuation from the employment

of Corporation shall also be entitled to receive interest on the deposits of Employees Deposit Fund Scheme, as per the rate prescribed through notifications issued by the State Government and as per the method of calculation prescribed from year to year basis in respect of general provident fund accounts, and in the manner specified in Sub Clause (2) (3) and (4) of Clause 10 of Regulation.

(iii) In the case of retired employees, respondent Corporation shall calculate the amount of interest as directed herein above and shall release them within the period of 4 months from the date of communication of this order and in the case of other employees it will be deposited in the fund under the Scheme. In the facts and circumstances of the case, there shall be no order as to costs.

Order accordingly.

I.L.R. [2008] M. P., 1397

WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice Shantanu Kemkar
5 March 2008*

COLORWAY PHOTO LAB

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

Finance Act (14 of 2001), Section 65(72) - Clause 2 (b) - Taxable Service
- *Service provided to customer by Photo Studio or Agency relating to Photography*
- *Photography is an inclusive definition and not restrictive - Any negative used for taking photograph would come under the inclusive definition of photography*
- *When a part of work is done by Photographer and part of work is assigned to colour laboratory would in fact be a photography studio or agency - Colour laboratories are amenable to service tax - Petition dismissed.*

(Paras 15 & 16)

वित्त अधिनियम (2001 का 14), धारा 65 (72) - खण्ड जेड (बी) - करयोग्य सेवा - ग्राहक को फोटो स्टूडियो अथवा एजेंसी द्वारा फोटोग्राफी के संबंध में सेवा प्रदाय करना - फोटोग्राफी एक समग्र परिभाषा है, प्रतिबंधक नहीं - किसी निगोटिय का प्रयोग फोटोग्राफ बनाने के लिए किया जायेगा तो वह फोटोग्राफी की परिभाषा में शामिल है - जब कार्य का कुछ भाग फोटोग्राफर द्वारा निष्पादित किया गया हो और कार्य का कुछ भाग कलर लैब को सौंपा गया हो तो वह फोटोग्राफी स्टूडियो अथवा एजेंसी है - कलर लैब सेवाकर के अध्याधीन हैं - याचिका खारिज।

Cases referred :

2005 AIR SCW 5905, 2003 (156) E.L.T. 17 (Ker.), (2000) 2 SCC 385, AIR 1977 SC 90.

Shashank Verma, for the petitioner

V. Bhide, for the respondents/State

J U D G M E N T

The Judgment of the Court was delivered by
R. S. GARG, J :- By this petition filed under Article 226 of the Constitution of India the petitioners are seeking the following reliefs:

"(a). That, this Hon'ble Court may be pleased to declare Section 67 in its present form vis-a-vis the petitioner's activity of service, *ultra-vires* the Constitution, void and inoperative.

(b). That, this Hon'ble Court may be pleased to declare circular dated 9.7.2001 as *ultra vires* the Constitution and law and further declare the same as void and inoperative.

(c) That, this Hon'ble Court may be pleased to declare by an appropriate writ that the petitioner's service activity does not attract the provision of service tax and accordingly forbear the respondents from subjecting the petitioner's activity to levy, assessment and collection of service tax.

(d) That, without prejudice to the aforesaid, this Hon'ble Court may be pleased to declare that the value of the goods (raw-materials) comprised of any service such as photography paper and chemicals etc. is not liable to be included in the value of taxable service and the same be directed to be segregated for the purpose of assessment of service tax.

(e) That, this Hon'ble Court may further be pleased to issue a writ, direction or order, restraining the respondents from recovering service tax from the petitioner calculated on the basis of gross receipts and including the components of inputs or raw-materials used by the petitioner such as photography paper, chemicals etc.

(f) That, this Hon'ble Court may be pleased to issue an appropriate writ or order or direction directing the respondents to refund service tax assessed and calculated by the respondents illegally and unauthorizedly.

(g) Any other appropriate Writ order or direction thought just and proper in the circumstances of the case may also be passed in favour of the petitioner.

(h) Cost of the petition."

2. The submission of the petition in nutshell is that provisions of Section 67 of Finance Act, 2001 be declared *ultra vires* the Constitution, void and inoperative. According to the petitioner the circular dated 9.7.2001 issued by the respondent is also *ultra vires* the Constitution as it runs contrary to the provisions of the law.

3. The short facts necessary for disposal of this writ petition are that the petitioner's firm is engaged in the activity of developing of exposed negatives, film processing, and printing of photographs. In the year 1994 service tax came to be imposed for the first time with a view to levy the service tax on recognized sectors such as Telephones, General Insurance, Stock Brokers etc. However, the Finance Act, 2001 made various amendments in the law with a view to widen the net of

the service tax by including various services in the ambit of law. Section 65(72) defines "taxable service" which included vide clause z(b) service provided to a customer by a Photo Studio or Agency relating to photography.

4. According to the petitioner the term "photography" and "photography studio or agency" have been defined in clauses 47 and 48 respectively of Section 65 of the Act and as the work done by the petitioners does not fall within the definition or mischief of "photography" and/or "photography studio or agency" they are not liable to pay the service tax. It is also submitted that the respondents by widening the definition of "photography" or "photography studio or agency" cannot be allowed to include the work of the petitioner in the mischief of the taxable clauses.

5. Respondents in their submission have come out with the case that the word "photography" is not a restrictive definition but is an inclusive definition as "photography studio or agency" would mean to include any professional photography or commercial concern engaged in the business related to photography, the work of the petitioner would certainly come under the service and the petitioner would be liable to pay service tax.

6. During the course of the arguments Shri Bhide, learned counsel for the respondents, submitted that an identical challenge was made to the provisions of the Finance Act and inclusive definition of "photography", "photography studio and/or agency" but the same had been turned down by the Apex Court in the matter of *C.K. Jidheesh Vs. Union of India and others* 2005 AIR SCW 5905, therefore, nothing survives in the petition. The respondents also placed their reliance on a Division Bench judgment of the High Court in the matter of *Kerala Colour Lab. Association Vs. Union of India* 2003 (156) E.L.T. 17 (Ker.) to contend that the colour lab would come within the mischief of the definition of "photography" and "photography studio and agency".

7. Shri Verma, learned counsel for the petitioner submitted that most of the issues proposed to be raised in the present writ petition stand concluded in view of the Judgment of the Supreme Court reported in the matter of *C.K. Jidheesh* (supra) and *Rainbow Colour Lab. and another Vs. State of M.P. and others* (2000) 2 SCC 385, but the question raised by the petitioner, that the petitioner does not come within the mischief of clause 47 and/or clause 48 of Section 65 of the Act, therefore, this Court must decide the said question.

8. Shri Verma placing reliance upon the judgment of the Supreme Court in the matter of *The South Gujarat Roofing Tiles Manufacturers Association and another Vs. The State of Gujarat and another* AIR 1977 SC 90 submitted that ordinarily the inclusive definition would not restrict its application to another article but in a given case the inclusive definition can be treated to be a closed definition. According to him the definition as given in clause 47 and 48 of Section 65 of the Act if are appreciated in their true perspective, it would clearly appear that the definitions are closed definitions.

9. On the other hand Shri Bhide, learned counsel for the respondents, submitted that in the present set of the circumstances the Court must widen the scope of the subject because the opening words say that the definition is inclusive and there are no special reasons to treat the definition as closed definitions. The scope of the subject should always be considered in its true perspective.

10. In the matter of *South Gujarat Roofing tiles Manufacturers Association and another* (supra) the question before the Supreme Court was that the Entry 22 which related to "Employment in Potteries Industry" provided an explanation that for the purposes of the said entry potteries industries includes the manufacture of the flowing articles of pottery, viz.-

- "(a). Crockery.
- (b). Sanitary appliances and fittings.
- (c). Refractories.
- (d). Jars.
- (e). Electrical accessories.
- (f). Hospital ware.
- (g). Textile accessories.
- (h). Toys.
- (i). Glazed Tiles"

In the said matter, the question before the Court was whether manufacturers of Mangalore pattern roofing tiles were covered in the definition of potteries industries especially when the definition provided for certain articles to be part of the potteries industries. Taking into consideration the nature of the work and the intention of the legislature the Supreme Court observed that the definition though was inclusive but was to be treated as closed definition because the legislature in its wisdom provided nine articles as part of the Potteries Industries.

11. In the present matter the definition of "photography" as provided in clause 47 says that "photography" includes still photography, motion picture photography, laser photography, aerial photography and fluorescent photography". This definition cannot be considered to be a closed definition because the photography avenues are much more than what are shown in clause 47. Similarly clause 48 if provides that "photography studio or agency" means any professional photographer or a commercial concern engaged in the business relating to photography" then a person who is a professional photographer or a commercial concern would always come under the mischief of "photography" and "photography studio or agency". In the matter of *C.K. Jidheesh* (supra) the Supreme Court observed that the letter/circular dated 9.7.2001 issued by the Ministry of Finance was neither arbitrary nor discriminatory nor was in violation of Article 14 and 19(1)(g) of the Constitution nor was violative of the Finance Act, 1994 as amended by the Act 14 of 2001. In

view of the said judgment one of the main challenge to the letter-cum-circular dated 9.7.2001 does not survive. The Supreme Court in the matter of *C.K. Jidheesh* (supra) found that the petitioner before the Supreme Court got separated from the Kerala Colour Labs Association's SLP on the ground that the issues were similar to those raised in an S.L.P filed by the State of Meghalaya challenging the order of the Gauhati High Court dated 5.9.2001. The Supreme Court observed that though the challenge was ostensibly to the letter issued by the Ministry of Finance but the real challenge was to the amendment in the Finance Act and, the letter dated 9.7.2001 was simply clarifying what Section 67 of the Finance Act, 1994 as amended by Act No. 2001 provided.

12. The Supreme Court further observed that the provisions of the Finance Act were challenged by the Kerala Colour Laboratories Association, the challenge was repelled by the Kerala High Court and S.L.P. against the said judgment had been dismissed by the Supreme Court. According to the Supreme Court the Kerala High Court correctly considered all aspects including the aspect of double taxation. In view of the said judgment the provisions contained in Clauses 47 and 48 of Section 65 were not *ultra vires* the Constitution.

13. In the matter of *Rainbow Colour Lab. And another Vs. State of M.P. and others* (supra) the question before the Supreme Court was that whether the work of the photographer in taking photographs, developing and printing films was in the nature of a service contract not involving in any sale of goods. The Supreme Court observed that the work was not exigible to levy of Sales Tax because the work done by the colour lab was not in the nature of a works contract.

14. In the matter of *Kerala Colour Lab. Association Vs. Union of India* (supra) the Association came to the Court with a submission that the service tax was not leviable on the colour laboratories because they were not providing any service to the consumer. The Division Bench of the Kerala High Court in paragraph '4' observed that the photo colour laboratories were to develop the negative and supply positive prints in the desired size, in the process the cost of material involved and passed on the consumer was far greater than the service involved. It was submitted before the High Court that in view of the peculiar type of service rendered by the colour laboratories where 80% of the value of property is passed to the consumer consists of costs of photographic film, value of service being negligible, it would be wholly erroneous to treat colour laboratories and photography studio as rendering "service" as understood generally. The contention was repelled by the Division Bench holding that the colour laboratories were also providing service to the consumers.

15. The colour photo laboratory in fact is an extended design of a studio. In a photography studio the photographer shoots the photos, thereafter in his dark room he develops negatives and, thereafter prints the desired size of the photographs. The work of the colour laboratory is to receive the exposed negatives/rolls, develop

the same and print the photographs of the desired size as per the orders placed by the original consumer through the photographer who had taken the photographs either in the studio or anywhere else. When the word "photography" includes still photography, motion picture photography, lazer photography, arial photography, fluorescent photography etc. then any negative used for taking photograph would come under the inclusive definition of photography. The work of the photographer is not only to shoot the person or the scene but is also to develop the negatives and bring the prints. When a part of the work is done by the photographer and part of the work is assigned to others then such person i.e colour laboratory would in fact be a "photography studio or agency".

16. In our considered opinion the colour laboratories would be a part of the "photography studio or agency" involved in providing the service to the consumer and are amenable to the service tax.

17. We are unable to hold that the respondents are unnecessarily trying to tax the petitioner.

18. For the reasons aforesaid we do not find any reason to interfere. The petition deserves to be and is accordingly dismissed. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 1402

WRIT PETITION

Before Mr. Justice Rajendra Menon

10 March 2008*

MOHAN @ MUNNA PACHARI

... Petitioner

Vs.

JAGDISH CHANDRA DUBEY

.... Respondent

Civil Procedure Code (5 of 1908), Order 9 Rule 13, Limitation Act, 1963, Section 12 Art. 123 - Application for setting aside ex-parte decree - Limitation - Application for setting aside ex-parte decree to be filed within 30 days - Provisions of Section 12 and exclusion contained therein will not apply to a proceeding under Order 9 Rule 13 C.P.C. (Para 17)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13, परिसीमा अधिनियम, 1963, धारा 12, अनुच्छेद 123 - एक पक्षीय डिक्री अपास्त करने हेतु आवेदन - परिसीमा - एक पक्षीय डिक्री अपास्त करने का आवेदन 30 दिनों के भीतर प्रस्तुत होना चाहिये - धारा 12 के उपबन्ध एवं उसमें समाहित अपवर्जन आदेश 9 नियम 13 सि.प्र.सं. के अधीन कार्यवाही पर लागू नहीं होंगे।

Cases referred :

AIR 1988 Kerala 257, AIR 1989 Allahabad 45, AIR 1968 Orissa 207, AIR 1995 Karnataka 366

Manikant Sharma, for the petitioner
D.S. Raghuvanshi, for the respondent

ORDER

RAJENDRA MENON, J. :—Challenging the concurrent orders passed by the trial court and the appellate court in rejecting the application filed by the petitioner under Order 9 Rule 13 of the Code of Civil Procedure, and refusing to set aside the ex-parte judgment and decree of eviction passed against the petitioner, this petition is filed under Article 227 of the Constitution.

2. The suit in question was filed by the respondent for eviction of the petitioner on the ground of arrears of rent and various other grounds. Issues were framed and after recording of evidence of the plaintiff when the case was fixed for evidence of the defendant i.e., the present petitioner, on 2.4.2005, the petitioner remained absent and, therefore, ex-parte proceedings were drawn and an ex-parte judgment and decree was passed on 13.5.2006. An application was filed before the trial court on 15.7.2005, challenging the ex-parte judgment and decree. The application has been rejected by the trial court and the appellate court on the ground that the application for setting aside ex-parte decree is not filed within 30 days, no reasonable cause for the delay is shown and the application is dismissed on the ground that condonation of delay is not sought for by filing appropriate application under section 5 of the Limitation Act.

3. Shri Manikant Sharma, learned counsel for the petitioner, emphasized that on 2.4.2005, when the case was fixed for evidence of the petitioner he fell suddenly sick. He was under treatment, could not appear and after the ex-parte judgment and decree was passed on 13.5.2006, petitioner approached his counsel on 17.5.2005, when he was informed about the ex-parte judgment and decree being passed, he applied for certified copy which was given to him on 21.6.2005, and he immediately filed the application under Order 9 Rule 13 CPC on 15.7.2005. It is argued by Shri Manikant Sharma that if the period incurred by the petitioner for obtaining certified copy i.e., period from 13.5.2005 to 20.5.2005 is excluded, then the application for setting aside the ex-parte judgment and decree is within time and in rejecting the application on the ground of delay and on the ground that application for condonation of delay under section 5 is not filed, the learned court has committed error.

4. Inviting my attention to Section 12 of the Limitation Act, 1963, learned counsel for the petitioner argued that the period spent for obtaining certified copy is to be excluded and, therefore, the Court has committed error in rejecting the application under Order 9 Rule 13 CPC on the ground of delay.

5. Accordingly by placing reliance on a judgment of the Kerala High Court in the case of *Unniraman Vs. Padmanabhan and Another* (AIR 1988 KERALA 257); and, the judgment of the Allahabad High Court in the case of *Rajiv Lochan Pandey Vs. Madan Gopal Sharma and Others* (AIR 1989 Allahabad 45), interference into the matter is sought for.

6. Refuting the aforesaid contention and taking me through the reasons indicated by the courts below in rejecting the application under Order 9 Rule 13 CPC, Shri Nanhoriya, learned counsel for the respondent, submitted that there is a deliberate delay on the part of the petitioner. He remained absent on various occasions and in rejecting the application under Order 9 Rule 13 CPC on the ground of delay, learned Courts have not committed any error. It is submitted by Shri Nanhoriya that in rejecting the application under Order 9 Rule 13 CPC after considering the totality of the facts and circumstances of the case, the court below have not committed any error which warrants interference in these proceedings.

7. Learned counsel for the respondent also pointed out that under Article 123 of the Limitation Act, an application for setting aside the decree passed ex-parte is to be filed within 30 days from the date of decree or 30 days from the date of knowledge, where summons or notice is not served on the applicant. It is stated that in the present case, as the notice of summons was duly served on the present petitioner, the period of 30 days has to be reckoned from the date of decree and, therefore, in rejecting the application under Order 9 Rule 13 CPC, learned court has committed no error warranting interference.

8. I have heard learned counsel for the parties and perused the record. From the records it is seen that the suit in question was filed for eviction and in the eviction proceedings petitioner has caused various delay. He was not even depositing the rent and after taking note of the totality of the circumstances it has been held by the trial court and the appellate court that while considering an application for setting aside the ex-parte judgment and decree, the totality of the circumstances have to be seen and thereafter the application decided. In this case, after considering the conduct of the petitioner in trying to deliberately delay the proceedings, application under Order 9 Rule 13 CPC is rejected not only on the ground of delay, but also after taking note of the fact that the conduct of the petitioner was only to somehow delay the proceedings. It is seen from the records that petitioner was appearing and was represented by a counsel and he was aware of the date being fixed for evidence i.e., 2.4.2005 and also for judgment i.e., 13.5.2005. It is in the backdrop of these factual aspects of the matter that the question of interference is to be considered in the present case.

9. Under Article 123 of the Limitation Act, an application to set aside the decree passed ex-parte or to rehear the appeal decreed or heard ex-parte is to be filed within 30 days and the period of 30 days is to be reckoned in cases where summons and notices is properly served on the applicant with effect from the date of decree and in all other cases with effect from the date of knowledge of the decree.

10. In the present case, it is not in dispute that the petitioner was duly served. He had filed his written statement and was appearing in the proceedings when the case was proceeded ex-parte against him on 2.4.2005, that being so, the period of

30 days is to be reckoned with reference to the date of the decree and not from the date of the knowledge. The question, therefore, now, would be as to whether the period for obtaining certified copy has to be excluded or not in such a case.

11. Section 12 of the Limitation Act contemplates for exclusion of time in legal proceedings. The period excluded therein for obtaining certified copies are contemplated under sub-section (2), (3) & (4). Sub-section (2) deals with an appeal or an application for leave to appeal or for revision or for review of a judgment. Similarly sub-section (3) also deals with a decree or order appealed from or sought to be revised or reviewed. In cases covered under sub-sections (2) & (3), the period spent for obtaining certified copy is excluded. Sub-section (4) deals with application to set aside an award.

12. Section 12 and Article 123 of the Limitation Act has been considered by the Orissa High Court in the case of *Arjuna Charan Patnaik Vs. Purnanand Patnaik and another* (AIR 1968 ORISSA 207) and in para 4 of the aforesaid judgment, it is held that the provisions of Section 12 does not cover an application for setting aside a decree passed under Order 9 Rule 13 CPC.

13. This judgment of the Orissa High Court is considered by the Karnataka High Court in the case of *Revanasiddappa Jewargi and Others Vs. Malkajappa* (AIR 1995 KARNATAKA 366), and the learned Judge after considering the provisions of sub-section (1) of Section 12 of the Limitation Act has held that sub-section (1) of Section 12 categorizes three broad heads under which all legal proceedings can be classified and has held that all miscellaneous applications would come within the purview of sub-section (1) of Section 12 and, therefore, the period spent for obtaining certified copy can be excluded and in the process has disagreed with the view taken by the Orissa High Court in the case of *Arjuna Charan Patnaik* (supra).

14- Sub-section (1) of Section 12 only contemplates that in excluding the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded. This sub-section does not deal with exclusion of the period spent for obtaining certified copy. This section may apply to an application filed under Order 9 Rule 13 CPC, but its application is limited to excluding the day on which the order is passed and does not refer to the period spent in obtaining certified copy. Requisite time spent for obtaining copies are only excluded under sub-section (2), (3) & (4). It is provided in sub-section (2) that in computing the period of limitation for filing an appeal or an application for leave to appeal or revision or review of a judgment, the date on which the judgment complained of was pronounced and the time requisite for obtaining copy shall be excluded. Similarly, sub-section (3) deals with a decree or order appealed from or sought to be revised or reviewed and sub-section (4) deals with setting aside an award.

15. The Karnataka High Court while dealing with the matter has misread sub-

section (1) of section 12 and in doing so, has not considered the fact that sub-section (1) of section 12 does not contemplate a provision for excluding days requisite spent for obtaining copy of the decree or judgment as has been specifically provided for in sub-section (2), (3) and (4). The question has been considered by the Orissa High Court with specific reference to provisions under Order 9 Rule 13 CPC and after considering the meaning of the words "date of the decree", as provided under Order 20 Rule 7 CPC, has specifically held that provisions of section 12 of the Limitation Act does not exclude the period spent for obtaining certified copy, while considering the question in a proceeding under Order 9 Rule 13 CPC.

16. I am of the considered view that law has been correctly laid down by the Orissa High Court and with due respect, I am unable to subscribe to the views expressed by the learned Judge of the Karnataka High Court in the case of *Revanasiddappa Jewargi* (supra).

17. Sub-section (1) of Section 12 only contemplates a provision for excluding a day from which such period is to be reckoned and does not deal with exclusion of the days requisite for obtaining copies of the order, decree, judgment as the case may be, that being so, in the light of the fact that the provisions of Section 12 and the exclusion contained therein will not apply to a proceeding under Order 9 Rule 13 CPC. I see no error in the order passed by the learned court below, warranting interference in these proceedings.

18. That apart, the learned court below having examined the question with regard to merit of the reasons given by the petitioner and his conduct in not participating in the proceedings with due diligence, no case is made out for interference in these proceedings under Article 227 of the Constitution.

19. Accordingly petition stands dismissed, as it is devoid of merits.

Petition dismissed.

I.L.R. [2008] M. P., 1406 /

WRIT PETITION

Before Mr. Justice S.C. Sharma

28 March, 2008*

KALYAN SINGH

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

Co-operative Societies Act, M.P., 1960 (17 of 1961), Section 64 - Dispute - Alternative Remedy - Election in respect of District Co-operative Krishi Exham Gramin Vikas Bank Shivpuri challenged on the ground that percentage of reservation of delegates is determined to the extent of 90% - Held - Reservation of membership in the election process should not exceed more than 50% - When

glaring infirmities are found in the matter of fixation of reservation over and above, the proportionate reservation, writ petition may not be dismissed on the ground of alternative remedy. (Paras 7 to 12)

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 - विवाद - वैकल्पिक उपचार - जिला सहकारी कृषि एवं ग्रामीण विकास बैंक शिवपुरी, से संबंधित चुनाव को इस आधार पर चुनौती दी कि प्रतिनिधियों के आरक्षण का प्रतिशत बढ़ाकर 90 : निर्धारित किया - अभिनिर्धारित - चुनाव प्रक्रिया में सदस्यों का आरक्षण 50 : से अधिक नहीं होना चाहिए - अनुपातिक आरक्षण तय करने के मामले में जब आरक्षण अधिक तय करने की प्रत्यक्ष त्रुटियाँ पाई जायें, तो वैकल्पिक उपचार है, इस आधार पर रिट याचिका खारिज नहीं की जा सकती है।

Cases referred :

W.P. No. 1013/1996 decided on 12-12-1996, (2001) 8 SCC 509, 2002 (2) MPLJ 542, AIR 1993 SC 477, W.A. No. 626/2007 decided on 8-10-2007

Vivek Jain, for the petitioner

Praveen Newaskar, Dy. G.A. for the respondent Nos. 1 & 2

R.D. Jain with S.N. Seth, for the intervener *Ballabh Singh Yadav*

M.P.S. Raghuvanshi and Raghavendra Dixit, for District Cooperative Krishi Evam Gramin Vikas Bank Shivpuri

ORDER

S.C. SHARMA, J.:-The petitioner before this Court has filed this present writ petition under Article 226 / 227 of the Constitution, being aggrieved by the illegal and arbitrary action of the respondents in conducting elections in respect of the District Cooperative Krishi Evam Gramin Vikas Bank Shivpuri (hereinafter referred to as the Society). The contention of the petitioner is that while conducting the elections of the Society, the percentage of reservation of delegates is determined to the extent of 90% which is more than the constitutionally permissible percentage of 50%, and therefore, the same deserves to be set aside.

2. As per averment made by the petitioner in the writ petition, there are about 8100 members of the Society and the following is the break-up of percentage of the reservation done in respect of the delegates of the Society.

SC	1900	23%
ST	2400	29%
OBC	3000	37%
GENERAL	800	10%

3. Petitioner has raised various grounds assailing the process of election and has relied upon a judgment delivered by a Division Bench of this Court in W.P. No. 1013 of 1996 (*Anand Manohar Tambe Vs. State of M.P. and others*) decided on 12th December, 1996.

4. The respondents No.1 and 2 have filed a detailed return and stand of the respondents is that once election programme has been published, this Court does

not have any jurisdiction to entertain the writ petition under Article 226 and 227 of the Constitution. It has also been averred in the return that statutory alternate remedy is available to the petitioner to raise an election dispute under section 64(2)(v) of the Madhya Pradesh Cooperative Societies Act, 1960 (hereinafter referred to as Act of 1960), and therefore, the petition deserves to be dismissed.

5. Intervention application has been filed on behalf of the District Cooperative Krishi Evam Gramin Vikas Bank Shivpuri and has also filed a reply. In the reply, it has been stated that the petition is not maintainable as there is alternate remedy available to the petitioner to file an election dispute under the Act of 1960. The intervener has also relied upon a judgment delivered by the Apex Court in the case of *Sant Sadguru Janardan Swami Dugdh Utpadak Sahkari Sanstha Vs. State of Maharashtra and others*, 2001 (8) S.C.C. 509 and a judgment of this Court in the case of *Bhopal Cooperative Whole Sales Consumer Store Vs. M.P. State Cooperative Tribunal and others*, 2002(2) M.P.L.J. 542 wherein this Court has held that once election programme has commenced, the same should be allowed to complete. The intervener has also relied on various provisions of the Act of 1960 and also bye-laws of the Society which provides for proportionate reservation in respect of the Scheduled Caste, Scheduled Tribe and Backward Classes in the same proportion in which members of each category are members of the Society.

6. Arguments were heard at length and the record has been perused.

7. In the return filed by the respondents / State, a categorical statement has been made supported by an affidavit in paragraph 5.4 of the return which reads as under:

That, the contents of para 5.4 of this petition are not admitted as mentioned. It is not true that reservation has been made only to benefit a section of the members win the election. However reservation has been made by the Joint Registrar Cooperative Societies Gwalior, not by the respondent no.3. In the year 2001 at the time of election of delegates of the bank in question proportionate reservation were made. Joint Registrar has made the reservation after following the provisions of bye law no. 24(1-b)(2) of the bye laws, rule 23(3)(I) of the rules 1962 and section 48(B)(3) of the Act 1960. However it is true that joint registrar should not have made the proportionate reservation more than 50%. On the basis of reservation made by Joint Registrar election programme (Ann.P/1) was issued by the returning officer.

8. The aforesaid statement is duly supported by an affidavit sworn by the Joint Registrar, Cooperative Societies, Gwalior and it is the specific pleading that the Joint Registrar should not have made the proportionate reservation more than 50%. It was also brought to my notice during the course of arguments that the Registrar has sought for an explanation from the Joint Registrar as to why action

should not be taken against him for committing such an irregularity of determining the percentage of reservation to the extent of 90%.

9. A Division Bench of the Court in the case of *Anand Manohar Tambe* (Supra) taking note of various judgments including the judgment of the Apex Court in the case of *Indra Sawhney Vs. Union of India* (AIR 1993 S.C. 477) has observed in paragraph 21 as under :

As a result of above discussion, we find that the provisions of Section 48(3) (a)(i) and Section 48-B(2)(a) and (b) of the Act and Rule 43 (3-A) of the Rules M.P Cooperative Societies Act, 1960 and M.P. s Co-operative Societies Rules 1962) do not lack of legislative competence nor they violate Articles 14 and /or 15 of the Constitution of India, but the interpretation put by the State in respect of making reservation beyond 50% has to be read down and the representation of Scheduled Castes, Scheduled Tribes and Other Backward Classes should be in proportion to the members of the said castes, tribes and Other backward classes which it bears to the total membership of the society and it should not exceed more than 50% reservation as laid down by their Lordships of Hon'ble Supreme Court in the case of *Indra Sawhney* (supra). The circular which has been issued by the State vide Annexure-P/4 giving clarification in clause (1) resulting into representation exceeding 50% is struck down. It is directed that a combined reading of the provisions of the Act and Rules should bear a proportion of reservation which should not exceed beyond 50%. If elections have already taken place, the same shall not be disturbed and in future, this proportion of 50% ceiling should be kept in mind while providing proportionate representation to these three categories of persons i.e. Scheduled Castes, Scheduled Tribes and Other Backward Classes. The petitions are accordingly allowed in part. In the facts and circumstances of the case, parties are left to bear their on costs.

10. The dispute in the present case relates to the percentage of reservation of delegates of the members of the Societies in question. The provisions of section 48(3) of the Act of 1960 and the provisions of 43 (3-A) of the M.P. Cooperative Societies Rules 1962 referred to in the case of *Anand Manohar Tambe* (supra) are para materia to the dispute involved in the present case. In view of the above, keeping in view the law laid down by a Division Bench of this Court in the case of *Anand Manohar Tambe* (supra) and the categorical stand taken by the State Government which is reproduced hereinabove, I am of the view that by no stretch of imagination the percentage of reservation could exceeded more than 50%. The judgments cited by the respondents on the question of maintainability of the writ petition referred to hereinabove, so also the judgment delivered by a Division Bench of the Court in the case of *Ram Pratap Singh Sikarwar Vs. State of M.P. and others*, W.A. No. 626/2007 decided on 08th October, 2007 provides that proper course is to challenge such disputes by filling election dispute. This Court would

not have entertained the present writ petition in view of the settled law that once the process of election has commenced, interference should not be made in the matter. However, keeping in view the peculiar facts and circumstances of the present case and the detailed return filed by the respondents / State supported by an affidavit of the competent authority wherein the State has admitted the mistake committed, while providing reservation beyond 50% which is impermissible under the law, this petition deserves to be entertained and the objection raised by the respondents stands rejected.

11. Keeping in view the pronouncement of the Apex Court in the case of *Indra Sawhney* (Supra) wherein it has been held that the reservation cannot exceed more than 50%, and the decision of the Division Bench of this Court in the case of *Anand Manohar Tambe* (Supra), I am of the view that the percentage of reservation which has been done in the present case beyond 50% to the extent of 90% is contrary to the provisions of the Act and the law laid down by the Apex Court and this Court.

12. The writ petition is allowed to the limited extent it provides for proportionate reservation up to 90% in respect of delegates of the Society is quashed. The respondents are directed to conduct the process of elections afresh strictly keeping in view of the provisions of the Act of 1960 as well as the bye-laws of the Society. The respondents shall also while determining the percentage of reservation of the delegates of the Society in question keep in mind the pronouncement of the Apex Court in the case of *Indra Sawhney* (Supra), and the judgment delivered by a Division Bench of the this Court in the case of *Anand Manohar Tambe* (supra).

13. The writ petition is allowed and disposed of to the extent indicated hereinabove. No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 1410

WRIT PETITION

Before Mr. Justice Viney Mittal

31 March, 2008*

HIND SYNTEX LTD.

--- Petitioner

Vs.

DEWAS MAZDOOR SANGH & Ors.

--- Respondents

Industrial Disputes Act, (14 of 1947), Section 25-O - Procedure for closing down an undertaking - Petitioner applied to State seeking permission to close down industrial undertaking - Intended date for closure given was 15.03.2004 which was beyond 90 days - State Govt. did not consider application - Matter referred by State Govt. to Industrial Tribunal - Tribunal held that closure is justified

- However directed for payment of full wages to workmen till date of order i.e. 06.07.2005 - Held - Section 25-O is a complete Code - Wherever decision is taken by State Govt. or Tribunal, intended date of closure specified by employer cannot be changed - Fixing of date of closure upto date of order by Tribunal is beyond its jurisdiction - Petition allowed. (Para 22)

औद्योगिक विवाद अधिनियम, (1947 का 14), धारा 25-ओ - उपक्रम को बंद करने के लिये प्रक्रिया - याचि ने औद्योगिक उपक्रम बंद करने की अनुमति के लिये राज्य को आवेदन किया - समापन की आशयित-तिथि 15.03.2004 दी गई जो 90 दिनों से परे थी - राज्य शासन ने आवेदन पर विचार नहीं किया - मामला राज्य शासन द्वारा औद्योगिक अधिकरण को निर्दिष्ट - अधिकरण ने यह अभिनिर्धारित किया कि समापन न्यायसंगत है - यद्यपि कामगार को आदेश की तिथि अर्थात् 06.07.2005 तक का पूरा बकाया वेतन देने का निदेश दिया - अभिनिर्धारित - धारा 25-ओ पूर्ण संहिता है - जहाँ राज्य शासन या अधिकरण के द्वारा निर्णय लिया जाना हो, तो नियोक्ता द्वारा समापन की आशयित विनिर्दिष्ट तिथि नहीं बदली जा सकती है - समापन की तिथि को अधिकरण द्वारा आदेश की तिथि तक नियत करना उसके क्षेत्राधिकार से परे है - याचिका मंजूर।

Cases referred :

(2004) 8 SCC 90, AIR 1966 SC 1657, (1999) 4 SCC 697, W.P. 9533/06(S) decided on 16.01.2007

Brian D' Silva with Vijay Assudani, for the petitioner.

S.H. Moyal, for the respondent No.1.

ORDER

VINEY MITTAL, J.:- This order shall dispose of two writ petitions being WP No. 1892/2005(s) and WP No. 2612/2005(s). As a matter of fact, both these writ petitions are cross petitions challenging the award dated June 20, 2005 passed by the Madhya Pradesh Industrial Tribunal, Indore (Hereinafter referred to as the Tribunal). Whereas WP No. 1892/05(s) has been filed by the company Hind Syntex Limited, other writ petition WP No. 2612/05(s) has been filed by the workers-union-Dewas Mazdoor Sangh. For the sake of convenience, henceforth the management company Hind Syntex Ltd. would be referred as petitioner-company, whereas Dewas Mazdoor Sangh would be referred as workers-union.

Facts.

2. The petitioner-company is a company incorporated under the Companies Act and is having an industrial undertaking at village Birgod, Tehsil Tonkkhurd, District Dewas. The said industrial unit was engaged in manufacture of synthetic blended yarn. According to the petitioner-company, it had commenced the industrial operations in the said undertaking in the year 1983 and had made substantial profits up to the year 1997. However, thereafter there was a drop in the demand of its product. It has also been claimed that the government policies also became adverse and there was a shortage of electricity. Non-cooperation of the workmen of the industrial undertaking has also been alleged. On account of the aforesaid reasons, it is claimed by the petitioner-company, that it started running in losses and for the period 1998 till 2003, the accumulated losses amounted to Rs. 17.56 crores.

3. In these circumstances, it is claimed by the petitioner-company, that left with no other alternative, it applied to the State Government through an application dated December 11, 2003, filed under Section 25-O of the Industrial Disputes Act, 1947 (hereinafter referred to as Act), seeking a permission to close down the industrial undertaking run by petitioner-company. As required under sub-section (1) of Section 25-O of the Act, the intended date of closure was given as March 15, 2004 in the said application i.e. beyond a period of 90 days, from the date of filing the application. It appears that the aforesaid application was taken into consideration by the State Government. The pleas of the petitioner-company, as well as of the workers-union, were considered. An order dated February 7, 2004 was passed, whereby the State Government opined that the matter be resolved through negotiations and discussions between the petitioner-company and workers-union, through the intervention of the Labour Commissioner. Vide the said order dated February 7, 2004, the State Government ordered that "keeping in view the aforesaid option, the application filed by the applicant seeking permission for closure is not being considered". A copy of the order dated February 7, 2004 passed by the State Government has been appended as Annexure P-1 with the present petition.

4. The petitioner-company maintains, that although under Section 25-O of the Act, on filing of the application seeking permission to close the industrial undertaking, the State Government had only a power, either to grant the aforesaid permission or refuse the same, and in absence of passing the said order, after expiry of 60 days of filing the application, such a permission to close the undertaking shall be deemed to have been granted, still with a view to seek a clarification, in order to avoid any further complications, the petitioner-company filed an application for review of the order dated February 7, 2004. In the said review application filed by the petitioner-company, the State Government referred the matter to the Industrial Tribunal for adjudication, vide a reference order dated June 15, 2004.

5. In the reference proceedings before the Tribunal, a claim petition was filed on behalf of the petitioner-company, which was contested by the workers-union, by filing a reply thereto. The parties also led their evidence and placed the requisite material on record in support of their respective pleas. Ultimately, an order dated June 20, 2005 was passed by the Tribunal, which was pronounced on July 6, 2005, whereby the Tribunal held that the request made by the petitioner-company, seeking a permission to close the undertaking, was absolutely justified. Consequently, it held it to be a fit case for granting permission for closure. As a consequence thereof, 823 workmen of the industrial undertaking were found entitled to compensation, for loss of employment, according to law. In addition, the Tribunal also ordered that the aforesaid workmen "will be given full wages up to 6-7-2005 and retrenchment compensation as per Section 25-O(8) of the Act by the employer Hind Syntex Limited". A copy of the award dated June 20, 2005 (pronounced on July 6, 2005) by the Tribunal, has been appended as Annexure P-5 with the petition.

6. Whereas the petitioner-company has challenged the directions issued by the Tribunal to the effect that 823 regular workmen of the industrial undertaking would be entitled to full back wages upto July 6, 2005, and as such has approached this Court through WP No. 1892/05(s), the workers-union has approached this Court challenging the permission for closure granted in favour of the petitioner-company, and has approached this Court through WP No. 2618/05(s).

7. I have heard Shri Brian D' Silva, learned senior counsel for the petitioner-company, and Shri S.H. Moyal, learned counsel for the workers-union, at some length and with their assistance, have also gone through the record of the case.

8. Shri Brian D' Silva learned senior counsel for the petitioner-company, at the outset, has stated that the petitioner-company is not raising any contest against the grant of retrenchment compensation to 823 regular workmen of the industrial undertaking as per the requirement of Section 25-O of the Act, nor is raising any challenge to the entitlement of the aforesaid workmen to get full wages upto the date of closure i.e. March 15, 2004, which had been indicated by the petitioner-company in its application filed under Section 25-O of the Act, but is merely aggrieved against the additional directions issued by the Tribunal, whereby the aforesaid workmen of the industrial undertaking of the petitioner-company have been held entitled to full wages upto July 6, 2005. The learned senior counsel has argued that under the provisions of Section 25-O of the Act, an intended date of closure was required to be indicated by an employer, who sought a permission to close down the undertaking of an industrial establishment. The said date had to be beyond a minimum period of 90 days from the date of filing of the application and the State Government was obliged in law to pass appropriate orders thereupon and communicate to the applicant-management, within a period of 60 days from the date of filing of the said application, either granting the said permission or refusing the said permission, failing which, after expiry of 60 days, the aforesaid permission shall be deemed to have been granted. The learned senior counsel maintains that in the present case the application in question was filed by the petitioner-company on December 11, 2003, in which the intended date of closure was indicated as March 15, 2004. Although an order on the said application was passed on February 7, 2004 (Annexure P-1), but the said order was neither an order refusing to grant permission nor permission had been granted. According to Shri D' Silva, the legal consequence of the aforesaid action of the State Government was that the permission to close the industrial undertaking would be deemed to have been granted to the petitioner-company, after expiry of 60 days from the filing of the said application and the closure would become effective from March 15, 2004 (the date as notified by the petitioner-company). It has further been contended by the learned senior counsel that an application for review was filed by the petitioner-company. only by way of abundant caution, and when the State Government had thought it appropriate to refer the controversy to the Tribunal, the Tribunal was also bound in law to answer the said reference within a period of

30 days and from the receipt thereof and a decision was required to be taken before the intended date of closure, and intimated to the management. In any case, even if the Tribunal chose to take a decision after expiry of 30 days, the permission granted by the Tribunal would become effective from the date of closure, as originally notified by the management in the application under Section 25-O of the Act. Shri D' Silva elaborates that the aforesaid date of closure, as intended by the management, could neither have been altered by the State Government nor by the Tribunal, and therefore, while pronouncing its award on July 6, 2005, the Tribunal could not have directed the management (petitioner-company), to pay full wages to the workmen of the industrial undertaking up to the date of pronouncement of the award. According to the learned senior counsel, the aforesaid directions issued by the Tribunal are not only erroneous and contrary to law, but in fact beyond the jurisdiction of the Tribunal, and therefore, are not sustainable.

9. The aforesaid contentions raised on behalf of the petitioner-company have been refuted by Shri S.H. Moyal, learned counsel appearing for the workers-union. Additionally, the learned counsel for the workers-union has also challenged the permission for closure of the undertaking, granted by the Tribunal to the petitioner-company. Shri Moyal has argued that there was absolutely no justification for the Tribunal to have granted the permission to close the undertaking, in as much as, the petitioner-company had failed to bring its case within the parameters, as required under the provisions of Section 25-O of the Act. According to the learned counsel, the losses suffered by the petitioner-company were, in fact, on account of its own mis-management and therefore, the petitioner-company could not be permitted to take advantage of its own defaults/mis-management, so as to render a large number of its workmen as unemployed. Learned counsel for the workers-union has also justified the directions issued by the Tribunal by claiming that unless and until a permission was legally granted to the management to close an industrial undertaking, the closure thereof by the management itself was illegal, and therefore, since the permission had been granted to the petitioner-company by the Tribunal on July 6, 2005, therefore, the Tribunal had rightly directed the payment of the full wages to the regular 823 workmen of the undertaking upto that date. Shri Moyal has in fact maintained that since the very permission granted by the Tribunal for closure of the undertaking of the petitioner-company is not sustainable, therefore, the workmen of the industrial undertaking of the petitioner-company are not only entitled to full wages upto July 6, 2005, but for the entire period thereafter also. The learned counsel has also argued that very application filed by the petitioner-company, seeking permission to close the undertaking, was not in accordance with law and therefore, no permission to close the undertaking could be granted on such a defective application.

10. I have duly considered the rival contentions raised by the learned counsel for the parties. I have also perused the various findings recorded by the Tribunal in its award Annexure P-5.

11. At this stage, before proceedings any further, it would be appropriate to notice that the relevant findings recorded by the Tribunal in its impugned award as follows:

"16. Now the matter has been referred to this Tribunal for "adjudication". The Tribunal has also to keep in view the guidelines given by the Parliament in Section 25-O of the Act. The Tribunal has to test the "genuineness and adequacy of the reasons stated by the employer and keep in view the interest of the general public and all other relevant factors". Both sides were directed by the Tribunal to submit the statement of claims, produce the relevant documents and file affidavits. Opportunity has also been given to both the parties to cross-examine the deponents.

17. The information furnished in the application and the documents annexed to the application under Section 25-O(1) of the Act have been considered by this Tribunal. The balance-sheets, profit and loss accounts and audit reports for the last three years have been examined. The figures of losses from the years 1998-99 to 2003-04, as given above, have been taken into account. There was total accumulated loss of Rs. 17.56 crores when the application was submitted and it became Rs. 19.70 crores when the application for review was made. The reasons for the closure have been supported by affidavit of the Executive Director of the company who has been cross-examined at length. There is no denial that the company has been suffering losses continuously for the last six years. It is found that the productivity of the machines is low inspite of the installation of some new machines at a cost of Rs. 6.19 crores and the captive power plant at a cost of Rs. 7 crores. The cess or duty imposed on captive power plant is very huge and it has cast heavy financial burden on the company. No dividend has been paid to the share-holders for the last five years. The workmen are not prepared for reduction in wages or for increase in the workload. There are no funds to buy raw material and the sale of the yarn is poor due to reduced demand. The production has come to stand-still from 10.10.2003.

18. There are 823 regular workmen who are going to be adversely affected by the proposed closure. The interest of the workmen looms large heavily while considering the application for closure or retrenchment. They would be thrown out of employment. They would get retrenchment compensation according to law to tide over the financial difficulty for sometime. That would not last long. The possibility of getting alternative employment is not very bright. The workmen have highlighted these aspects in their replies and affidavits. Their plea is that they are not responsible for the losses which the company is suffering. They say that there is mismanagement. But no specific details have been given to show what kind of mismanagement has been there.

19. Shri S.K. Mishra, Executive Director of the company has been cross-examined at length. He has stated in cross-examination that there were losses when new plant and machinery and captive power plant were installed and all this was done in the hope that the conditions would improve and the unit would start giving profits. According to him, the Banks stopped giving credit or advances for buying raw material in the year 2003 and, therefore, the production has stopped. He has stated in cross-examination that the company has another unit in Pilu Khedi which has been established in the year 1994 for spinning work. He was asked that the company has purchased the shares of two other companies as mentioned in the balance sheet. He could not deny it. On reference to the balance sheets, it is found that an amount of Rs. 2,40,55,000/- has been invested in the shares of the Dewas Soya Limited and Hind Filters Limited and in the mutual fund of Morgan Stanley Mutual Fund in the year ending 31.3.2001. It is mentioned in the balance-sheet that the "shares have been pledged against inter corporate deposit". It is contended on behalf of the workmen that the investments in the shares and mutual funds of other companies should not have been made and this money could be utilized for running the undertaking. The argument on behalf of the workmen on this score is plausible to some extent. It has been submitted by the counsel for the company during the course of arguments that some money was invested in the shares of other companies as Hind Syntex Limited was incurring heavy losses. On over all consideration of all the material it cannot be said that these investments were made with any mala fide intention. The company was still having accumulated loss of about Rs. 15 crores (17.56-2.50). The other factors discussed above are definite indicators that there is no chance of revival and turning the undertaking of the company at Dewas into a viable unit. It is difficult to run it into profits and pay the regular wages of the employees. There is no working capital and the Banks are not giving credit as the undertaking is bleeding and suffering continuous losses. The demand in the market for synthetic yarn has declined. The reasons given by the employer for the closure are genuine and adequate. On balancing the interest of both the sides, this Tribunal is of the opinion that the permission for closure should be granted so that out of the assets which are available, retrenchment compensation may be paid to the workmen. If the permission for closure is refused or delayed the assets or the company may further depreciate and deplete and it may be that there may be difficulty in the payment of compensation according to law which is going to be a huge amount. In that situation, the workmen would not get that succour which can be provided to them at the moment".
12. It has further been held by the Tribunal as follows:

"The continuous losses has crippling effect on the undertaking. The situation is unfortunate. Even if the workmen are not directly to be blamed for such

a state of affair how long a loss making undertaking can be directed to run its business in the interest of the labour. After careful consideration of all the aspects in favour of the management and also in favour of the workmen this Tribunal is of the opinion that this is a fit case for granting permission for closure and 823 regular workmen would be entitled to compensation for loss of employment, according to law. They will be given full wages upto 6.7.2005 and retrenchment compensation as per Section 25-O(8) of the Act by the employer Hind Syntax Limited”.

13. Since both the learned counsel for the parties have repeatedly referred to the provisions of Section 25-O of the Act, during the course of their arguments, it would also be advantageous to extract the aforesaid provisions for ready reference. It may be pertinent to point out that through Act No. 32 of 1983, the State of Madhya Pradesh had substituted the aforesaid provisions of the Central Act. In the State amendment, a new subsection (2) was inserted, whereas subsections (2) to (8) of the Central enactment were renumbered as subsections (3) to (9). Except for the aforesaid insertion of subsection (2), there is no difference in the language of Section 25-O of the Central enactment and as substituted by the state amendment. However, it is very fairly conceded by the learned counsel for the parties that the provisions of subsection (2) of the State amended provisions are not at all relevant for the controversy in question. In these circumstances, in order to avoid any unnecessary confusion, the provisions of Section 25-O of the Central Act are being reproduced.

“25-O. Procedure for closing down an undertaking.-(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applied shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner:

Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for permission has been made under sub-section(1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting, or refusing to grant permission shall, subject to the provisions of sub-section (5), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months."

14. The first question which needs to be determined by this Court is as to whether there was any justification for the petitioner-company to have applied for permission to close its industrial undertaking and as to whether the Tribunal was justified in accepting the said request?

15. The detailed findings of fact recorded by the Tribunal have already been reproduced above. The Tribunal has examined the entire controversy between the parties, rightly, by attempting to find out as to whether the application filed by the employer, seeking the permission was based upon "genuineness and adequacy of the reasons" and also by keeping in view the interest of the general public and other relevant factors. In the aforesaid back drop, the Tribunal has examined that the figures of losses from the year 1998-99 to 2003-04 had accumulated to Rs. 17.56 crores, when the application was filed by the petitioner-company before the State Government and, in fact, had further risen to Rs. 19.70 crores, when the application for review was made. The factum of the petitioner-company suffering the aforesaid huge losses has not even been denied by the workers-union. The Tribunal has also noticed that the productivity of the machines of the undertaking is low, inspite of the installation of some new machines at a cost of Rs. 6.19 crores, and the setting up of the captive power plant at the cost of Rs. 7 crores. The Tribunal has also found that no dividend had been paid to the share holders and even the workmen were not prepared for reduction in wages or for increase in the work load. It has also been found by the Tribunal that an amount of Rs. 2,40,55,000/- had been invested by the petitioner-company in shares of Dewas Soya Ltd. and Hind Filters Ltd. and in some mutual funds in the year ending March 31, 2001. After deducting an amount of Rs. 2.50 crores, the accumulated loss of the petitioner-company, on the date of application, has been determined as Rs. 15 crores and in these circumstances, the Tribunal has opined that there was neither any working capital nor any credits available from the banks and therefore, there was no chance of revival and turning the undertaking into a viable unit.

16. In my considered view, the aforesaid facts determined by the Tribunal wholly justify the request made by the petitioner-company for closure of its undertaking, more-so, when the Tribunal itself has found that there was no chance of revival and making the undertaking viable.

17. It is well settled by now that under the provisions of Article 19(1)(g) of the Constitution of India, when there is a fundamental right to carry on business, the said right inherently contains a right to close down the business also, subject to reasonable controls. The provisions of Section 25-O of the Act, provide reasonable restrictions against the uncalled for and unreasonable closure of an undertaking by the employer. The detailed procedure is laid therein. The State Government is required to consider the application filed by the employer, within the parameters provided under the said provision. The aforesaid parameters are also to be required to be kept in view when the matter is being adjudicated by the Tribunal, or even by this Court, while exercising the powers under Article 226 of the Constitution of India. However, when the findings of fact recorded by the Tribunal are not shown to be erroneous or contrary to the record or even wanting in parameters, as required under Section 25-O of the Act, then, this Court, while exercising the powers of judicial review, cannot act as a Court of appeal and the findings of fact cannot be reopened, unless and until it is shown that the aforesaid findings are perverse or based upon no evidence.

18. In the present case, nothing has been pointed out by the learned counsel for the workers-union that any of the aforesaid grounds exist, on account of which the order of the Tribunal, Annexure P-5, suffers from some infirmity, necessitating an interference from this Court. Consequently, it has to be held that the order Annexure P-5, whereby the permission to close the industrial undertaking has been granted to the petitioner-company, is wholly justified and the grievance made by the workers-union, while filing WP No. 2612/05(s), is wholly without any basis.

19. This brings me to the challenge made by the petitioner-company with regard to the directions to it to pay full wages of the regular 823 workmen of the industrial undertaking up to July 6, 2005.

20. It is not in dispute that an application under sub-section (1) of Section 25-O of the Act was filed by the petitioner-company on December 11, 2003. As required in law, the intended date of closure had been indicated as March 15, 2004. The said date was clearly beyond a period of 90 days from the date of filing of the application. Although an order dated February 7, 2004 (Annexure P-1) was passed by the State Government, but it is clear from the perusal thereof that the State Government had merely opined that the matter be resolved between the management and the workmen by negotiations and talks, through the intervention of the Labour Commissioner, and on that basis, it was ordered that the application filed by the petitioner-company seeking permission to close the undertaking "is not being considered". A bare reading of Section 25-O of the Act leaves no manner of doubt that such a course was not even open to the State Government. It could have either granted the permission, sought by the petitioner-company, or refuse the same. While passing the order, Annexure P-1, the State Government did not choose to do either. Consequently, the petitioner-company has claimed that a permission would be deemed to have been granted to it, in terms of sub-section (3) of Section 25-O of the Act. Still an application was filed by it for review, under the provisions of sub-section (5), with a view to avoid any difficulty. On the aforesaid application, the matter was referred by the State Government to the Tribunal for adjudication.

21. Under sub-section (5), the Tribunal is also required to pass an award within a period of 30 days from the date of such reference. The intention of the Legislature to settle the entire controversy within a total period of 90 days of filing of the application is apparent. The Government is required to take a decision within a period of 60 days. A further period of 30 days has been provided to the Tribunal, in case, a reference is made. The time limits provided in sub-section (3) and sub-section (5) clearly reflect that the State Government, as well as the Tribunal, are required to meet the deadline of intended date of closure, which had been indicated by the employer, while filing the application under sub-section (1). In these circumstances it has to be inferred that whenever a decision is taken by the State Government or by the Tribunal, in case of a reference, the intended date of closure, specified by the employer in the application filed under sub-section (1), cannot be

changed. Whereas, after expiry of 60 days, in case of default by the Government, the permission shall be deemed to have been granted and the intended date would remain unchanged, by necessary inference, it has to be taken, that in case, the Tribunal also fails to finalize its adjudication within a period of 30 days, then any permission granted by the Tribunal thereafter shall also operate from the intended date of closure, specified by the employer, and the Tribunal would have no jurisdiction to fix any other future date. If it were to be presumed that the Tribunal could fix any other date for closure of the undertaking, then it would not only be against the spirit of Section 25-O of the Act, but would also lead to an anomalous situation, in as much as, the employer, who had already suffered huge losses and had applied for permission to close on account of the aforesaid fact, would be made further liable to carry the extra burden for no fault of his.

22. The aforesaid inference is also justified if provisions of sub-section(6) are taken into consideration. Sub-section (6) provides for a situation where no application for permission under sub-section (1) is filed within the period specified therein or where the permission for closure is refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down. Thus, the aforesaid provision postulates a situation where an undertaking is closed by an employer, pending an application seeking permission to close, and provides that when the permission for closure has been refused, the said closure of the undertaking shall be deemed to be illegal and in such a situation, the workmen shall be entitled to all benefits, as if the undertaking had not been closed down. Therefore, it must necessarily follow that in a reverse situation, when the permission sought under sub-section (1) is granted, the closure of the undertaking by the employer shall be deemed to be legal, from the date of closure. In my considered view, the very language employed by sub-section (6) is a complete answer to the objection raised by the learned counsel for the workers-union and therefore, it has to be held that the Tribunal, while directing the payment of full wages upto July 6, 2005, or in other words by fixing the date of closure up to the date of pronouncement of the award, has clearly acted beyond its jurisdiction. As a matter of fact, while issuing the aforesaid directions, the learned Tribunal has ordered the awarding of certain amounts, to which the workmen are not entitled in law, thus granting them the benefits beyond the provisions of sub-section (8).

23. At this stage, certain observations made by the Apex Court in the case of *Gordon Woodroffe Agencies (P) Ltd. Vs. Presiding Officer, Principal Labour Court and others* (2004) 8 SCC 90 may be extracted below:

“12. Having heard the learned counsel for the parties and perused the records, we are satisfied that so far as the legality and genuineness of the closure is concerned, the Labour Court after considering the evidence brought on record has given a conclusive finding in favour of the appellant

which finding has been confirmed by the learned Single Judge as well as the Division Bench of the High Court and the same has become final. Therefore, we will have to consider whether consequent to such finding of the Labour Court, it can direct payment of further compensation over and above what is contemplated under the Act. The answer to this question is found in the two judgments relied on by learned counsel for the appellant before us. In the case of *Om Oil and Oil Seeds Exchange Ltd.* AIR 1966 SC 1657 this Court held:

"If the management was entitled to retrench 30 workmen and did so after paying wages for the period of notice and retrenchment compensation, we fail to appreciate the grounds on which an order for payment of 50 per cent of the wages in addition to retrenchment compensation may be made. Retrenchment compensation is paid as solatium for termination of service resulting in unemployment, and if that compensation be paid there can be no ground for awarding compensation in addition to statutory retrenchment compensation. If the Industrial Tribunal comes to the conclusion that an order of retrenchment was not properly made, and the Tribunal directs reinstatement an order for payment of remuneration for the period during which the employee remained unemployed, or a part thereof may appropriately be made. That is because the employee who had been retrenched for no fault of his had been improperly kept out of employment, and was prevented from earning his wages. But where retrenchment has been properly made and that order has not been set aside, we are not aware of any principle which may justify an order directing payment of compensation to employees property retrenched in addition to the retrenchment compensation statutorily payable."

13. In our opinion, the ratio laid down in the above case clearly applies to the facts of this case. In the instant case also, the Labour Court came to the conclusion that the closure of the establishment was legally justifiable and the management had, as required under the law, offered apart from the compensation payable for the closure, all other statutory dues which some of the employees collected without demur and in the case of the respondent workmen, even though the same were offered on time, they did not accept it, therefore, the question of paying any additional ex-gratia compensation which is not contemplated under the statute, does not arise. This Court in the case of *N.S. Giri* (1999) 4 SCC 697 held:

"[A]n award under the Industrial Disputes Act cannot be inconsistent with the law laid down by the legislature or by the Supreme Court and if it does so, it is illegal and cannot be enforced."

Thus, it is clear from the pronouncements of this Court that the Labour Court or for that matter the High Court had no authority in law to direct payment of any additional sum by way of ex gratia payment otherwise than

what is provided under the statute when the act of the management in closing down the establishment is found to be valid and all legally payable amounts have been paid or offered in time. In such a situation, contrary to the statute, the principle of social justice cannot be invoked since the legislature would have already taken note of the same while fixing the compensation payable."

24. Since I have already held that the date of closure of the undertaking, as specified by the petitioner-company being March 15, 2004, could not have been altered or modified, either by the State Government or by the Tribunal, therefore, it must necessary follow that the workmen of the industrial undertaking were not entitled to any wages w.e.f. the aforesaid date and in case of permission to closure having been granted, the said permission would relate back to the date notified by the management. In such a situation, the workmen were only entitled to receive compensation as per the provisions of sub-section (8) and no further amount. Granting of any further amount being not permissible under the provisions of Section 25-O of the Act, the same could not have been awarded. An identical view has been taken by this court in the case of *General Manager Stresscrete Pvt. Ltd. Vs. State of M.P. and another* WP No. 9533/2006(s) decided on January 16, 2007 (Principal Bench).

25. Needless to say that Section 25-O of the Act is a complete code in itself and provides for a detailed procedure for dealing with the application filed by the management seeking permission to close the undertaking. The rights and duties of the management and its workmen flow from the said provisions. Neither any rights could be denied to either of them nor anything extra could be made available. In my considered view, the directions issued by the Tribunal, while passing the order Annexure P-5, for payment of full wages up to July 6, 2005, cannot be legally sustained and as such are hereby quashed.

26. Before parting with this order, it may be relevant to notice certain developments, which had taken place during the course of hearing in the present petitions. When the arguments in these writ petitions were heard in part on September-24, 2007, an effort was made to resolve the controversy between the parties, by way of an amicable settlement. The following order was passed:-

"Shri Brian D' Silva, Senior Advocate with Shri Vijay Assudani, and Shri Sajid Akhtar, Advocates for the petitioner alongwith Shri S.L. Mundra, Executive Director of the petitioner-company in person.

Shri S.H. Moyal, Advocate for respondent No. 1 union with Shri Ravindra Singh Thakur, Secretary, and Shri Rajendra Yadav, Treasurer for Dewas Mazdoor Sangh-respondent No. 1.

Arguments heard in part.

Shri S.L. Mundra, Executive Director of the petitioner-company, who is present in Court has undertaken that the entire wages upto December 31, 2003 of the workmen, who were employed with the petitioner-company

shall be paid on November 6, 2007, provided that the aforesaid workmen make themselves available in the factory office of the petitioner-company on the aforesaid date at 11 A.M.

Shri Mundra further states that the petitioner-company shall also take up the matter with the competent authorities and the Monitoring cell to find a way to amicably settle the matter. Shri Mundra also states that the remaining wages upto March 15, 2004, which are not in dispute in any manner, shall be paid to the workmen thereafter, as per directions which may be issued by this Court.

Shri S.H. Moyal, learned counsel for respondent No. 1 accepts the offer made on behalf of the petitioner-company and Shri Ravindra Singh Thakur, Secretary of respondent No. 1-Dewas Mazdoor Sangh, who is present in Court undertakes to inform the concerned workmen with regard to the present order.

To come up for remaining arguments on November 20, 2007.

The matter be treated as part heard."

27. On the adjourned date when the matter was taken up further hearing on November 20, 2007, the following order was passed:-

"Shri Brian D' Silva, Senior Advocate with Shri Vijay Assudani, Advocate, for the petitioner.

Shri S.H. Moyal, Advocate, for respondent No. 1.

Shri Brian D' Silva, learned Senior counsel for the petitioner informs the Court that an amount of Rs. 51,99,570/- has been disbursed by the petitioner-company to the 630 workmen who had come present on November 6, 2007 to receive the payment. Learned Senior counsel further states that the aforesaid amount had been paid keeping in view the directions issued by this Court on September 24, 2007 and the petitioner-company is further ready to comply with any further directions which this Court may issue with regard to the payment to the workmen.

However, Shri S.H. Moyal, learned counsel for respondent No. 1-union states that the workmen have not been paid their due wages up to December 31, 2003. Shri Moyal also states that the respondent-union would like to argue the matter on merits of the controversy and it may not be possible to settle the dispute amicably.

List on January 29, 2008.

The matter be not treated as part heard."

28. It is in the light of the aforesaid developments that the arguments have been heard by the Court on merits of the controversy.

29. As a result of the aforesaid discussion, writ petition No. 1892/2005(s) filed by the petitioner-company is allowed to the extent that the directions issued by the Tribunal, to pay the full wages to the workmen of the industrial undertaking up to July 6, 2005, shall stand quashed. However, the petitioner-company would be required to pay the aforesaid workmen, compensation in terms of Section 25-O(8) of the Act, while deducting the payments already made to the workmen in terms of the orders dated September 24, 2007 passed by this Court. As a necessary corollary, writ petition No. 2612/2005(s) filed by the workers-union is dismissed.

30. There shall be no order as to costs.

C.c. as per rules.

Petition allowed.

I.L.R. [2008] M. P., 1425

WRIT PETITION

Before Mr. Justice S.K. Seth

15 April, 2008*

MADANLAL

Vs.

SUB DIVISIONAL OFFICER (REVENUE) & ors.

... Petitioner

... Respondents

Panchayats (Election Petitions, Corruption Practices and Disqualification for Membership) Rules, M.P. 1995 - Rule 21(d)(iii) - Grounds for declaring election to be void - Amendment of Election Petition - Election Petitioner has to plead all material facts which have affected result of election - Election petitioner cannot be permitted to introduce new facts by way of amendment after limitation - Order allowing application for amendment quashed - Petition allowed.

(Para 7)

पंचायत (निर्वाचन याचिका, भ्रष्ट आचरण एवं सदस्यता के लिये अपात्रता) नियम, म.प्र. 1995 - नियम 21 (डी)(पपप) - निर्वाचन को शून्य घोषित करने के आधार - निर्वाचन याचिका में संशोधन - निर्वाचन याचिका को, सभी सारवान तथ्य जिन्होंने निर्वाचन के परिणाम को प्रभावित किया, का अभिवचन करना था - निर्वाचन याचिका को परिसीमा के बाद संशोधन द्वारा नये तथ्यों को जोड़ने की अनुमति नहीं दी जा सकती - संशोधन का आवेदन स्वीकार करने का आदेश अभिखण्डित - याचिका मंजूर।

Cases referred :

AIR 2000 SC 256, AIR 2007 SC 581

C.L. Yadav with A.K. Pandya, for the petitioner

Amit Agrawal, for the respondent No.2

ORDER

S.K. SETH, J.:—This petition under Article 227 of the Constitution of India is directed against the order dated 21.01.2008 (Annexure P/1) passed by the prescribed authority in the election petition filed by the respondent No.2. The said

order was passed allowing an application under Order 6 Rule 17 preferred by the respondent No.2 to introduce the amendment in the election petition.

2. Facts in brief are as under. Petitioner and respondent No.2 along with other candidates contested the election of Sarpanch, Gram Panchayat, Dhardi, district Neemuch. The result of the election was declared on 27.01.2005 and the petitioner was declared elected to the office of Sarpanch. The election of the petitioner was challenged by respondent No.2 alone basically on the ground that there was illegal rejection of valid votes or acceptance of invalid votes. After recording evidence, the Specified Officer passed an order for recounting of votes on 9.8.2005. After recounting, without setting aside the election of the petitioner, the specified officer declared respondent No.2 as the returned candidate to the office of Sarpanch. The said order was challenged by the petitioner before this Court in W.P.No.2282/05, which was allowed on 1.5.2007, and the order passed by the Specified Officer was set aside and the case was remanded for a fresh decision in accordance with law. Being aggrieved by the order passed by this Court, respondent No.2 preferred an appeal, which was registered as W.A.No.353/07. The said writ appeal was dismissed on 29.8.2007 in view of the fact that matter has already been remanded, therefore, respondent No.2 who was the appellant would be free to raise all legal pleas before the Specified Officer and further with a direction that the authority will not be influenced by the order passed by this Court. Taking a cue from the order passed by this Court, respondent No.2 (election petitioner) moved an application for amendment in the pleadings. The application was opposed by the petitioner herein and after hearing rival submissions, the application was allowed by the order impugned, hence this petition.

3. I have heard Shri C.L. Yadav, learned senior counsel and Shri Amit Agrawal, learned counsel for the respondent No.2 at length. Perused the material available on the record. Shri C.L. Yadav, learned senior counsel submitted that an election petition can be submitted under the M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995. He invited attention to Rule 5, which provides that an election petition shall contain concise statement of material facts with sufficient particulars, the grounds on which election is called in question. He also invited attention to Rule 21 (d) (iii) of the said rules, which reads as under:-

21. Grounds for declaring election to be void.-(1) Subject to the provisions of sub-rule (2) if the specified officer is of opinion-

(a)

(b)

(c)

(d) that the result of the election in so far as it concerns returned candidate has been materially affected -

(i)

(ii)

(iii) by the improper acceptance, refusal or rejection of any vote or the reception of any vote which is void; or

(iv)

the specified officer shall declare the election of the returned candidate to be void.

(2)

4. Rule 23 contemplates making of an order at the conclusion of the enquiry by the Specified Officer, which includes a declaration that the election petitioner is duly elected on the ground that the election petitioner has received a majority of valid votes.

5. Shri Yadav, learned senior counsel has placed reliance on the decision of the Supreme Court reported in AIR 2000 SC 256 in the case of *Jeet Mohinder Singh Vs. Harmander Singh Jassi*. A reading of the said decision of the Supreme Court reveals that the election of Harmander Singh Jassi to the Legislative Assembly was challenged on various grounds in an election petition. The said petition was dismissed by the Designated Election Judge and against that order matter went to the Supreme Court in an appeal under Section 116A of the Representation of People Act, 1951. One of the grounds taken in the election petition was with regard to the corrupt practices. During the course of the trial of the election petition, the election petitioner filed a replication to the written statement wherein he came out with the averment that some of the voters to the said election were threatened by Sangram Singh, SHO, Jagseer Singh, Dharminder Singh, Jaswant Singh, Jagraj Singh and Mander Singh. Except Dharminder Singh who was examined as PW/13, all of the persons were not examined and in this context it was held by their Lordships of the Supreme Court speaking through R.C.Lahoti, J (as His Lordship then was) as under:-

"Here itself, we may observe that material facts and particulars as to commission of corrupt practice are required to be given in the election petition and not in the replication filed much after the expiry of period of limitation for filing election petition. The material facts and particulars alleged for the first time in the replication and not forming part of averments made in the election petition cannot be tried and cannot be made subject matter of issues framed by the Court."

6. Per contra, Shri Agrawal, learned counsel appearing for the respondent No.2 submitted that what is to be pleaded has been prescribed in Rule 5 and Rule 21 talks about the opinion of the Specified Officer, therefore, the pleading whether the receipt or rejection of invalid votes has materially affected the election is not required to be pleaded. He also placed reliance on a decision of the Supreme

Court reported in AIR 2007 SC 581 in the matter of *Virender Nath Gautam Vs. Satpal Singh & ors.* and submitted that an application for amendment can always be made to explain material facts already pleaded in the election petition and as such the Specified Officer committed no illegality in allowing the application for amendment.

7. After having heard learned counsel for the parties and going through the material as well as the decisions cited at the bar, I am of the opinion that the Specified Officer have acted in exercise of its jurisdiction illegally or at any rate with material irregularity in allowing the application for amendment contrary to the law as declared by the Supreme Court in *Jeet Mohinder Singh (supra)*. In order to succeed in an election petition, the election petitioner is required to plead all material facts, which have affected material the result of the election. In absence of such pleadings in the original election petition, the election petitioner cannot be permitted to introduce said facts by way of amendment after the period of limitation.

8. In view of the foregoing discussion, the order impugned is unsustainable in law and accordingly is hereby set aside. Now the Specified Officer shall proceed to decide the election petition in accordance with law.

Order accordingly.

I.L.R. [2008] M. P., 1428

WRIT PETITION

Before Mr. Justice S.C. Sharma

16 April 2008*

RAM KHILADI GURJAR

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

National Security Act (65 of 1980), Section 3 - Detention - Public Order
- 20 cases registered against petitioner out of them one is registered U/ss 336 & 347 of IPC for indiscriminate firing in public - Even if it is taken as a single act would enough to hold that public order was affected - A single act can be considered for detaining a person - Advisory Board on due consideration upheld the detention - No interference can be made in writ petition on the basis of material on record.
 (Paras 8, 10)

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 — निरोध — लोक व्यवस्था — याची के विरुद्ध 20 मामले पंजीबद्ध उनमें से एक मामला लोक स्थान पर अंधाधुंध गोली चलाने के लिए भा.द.सं. की धारा 336 व 347 के अन्तर्गत पंजीबद्ध — यदि इस एकमात्र तथ्य को ही लिया जावे तो यह भी लोक व्यवस्था प्रभावित करने के लिए पर्याप्त पाया जायेगा — एक तथ्य भी व्यक्ति को निरोधित करने के लिए विचार में लाया जा सकता है — सलाहकार बोर्ड ने भलीभाँति विचार करने के बाद निरोध.आदेश की पुष्टि की — अभिलेख पर उपलब्ध तथ्यों के आधार पर रिट याचिका में कोई हस्तक्षेप नहीं किया जा सकता है।

Cases referred :

(2004) 8 SCC 591, (2004) 7 SCC 467.

Y.K. Pathak with Prashant Sharma, for the petitioner

Praveen Newaskar, Dy. G.A. for the respondents No.1 & 2.

ORDER

S.C. SHARMA, J.:—The present petition has been filed under Article 226 of the Constitution by the petitioner challenging an order dated 7th September, 2007 passed by the respondent no. 1, State of Madhya Pradesh so also order passed by the District Magistrate, Gwalior in case No. NSA/13/07 dated 19th July, 2007 under the provisions of the National Security Act 1980 (hereinafter referred to as the Act of 1980) detaining the petitioner for a period of one year.

2. The contention of the petitioner is that he was detained on 21st July, 2007 (Annexure-P/3). As per the detention order dated 21st July, 2007, twenty one cases have been detailed in the order. The petitioner in this petition has stated that in most of the cases which has been listed in the detention order, he has been acquitted and after the year 2003 only three cases have registered against him. In the year 2003 a case was registered on 14.10.2003 at crime no. 336/03 under sections 302, 341, 120-B of IPC. After the year 2003 it was only 18th May, 2007 a case has been shown in the list to have been registered against the petitioner and the contention of the petitioner is that this case does not relate to the petitioner but is related to one Ram Khiladi S/o Shri Kartar Singh, resident of Morena. It is further contended by the petitioner that thereafter a case has been shown to have been registered on 1st July 2007 at crime No. 158/07 under Sections 294 and 507 of IPC, and another case has been registered against him on 3rd July, 2007 at crime No. 647/07 for offences under sections 336 and 347 of IPC. The grievance of the petitioner is that the case which has been registered on 3rd July, 2007 has been registered on account of political influence exercised by one Mr. Rakesh Shukla an Ex-M.L.A., belonging to the ruling party. The petitioner has assailed the order passed by the competent authority under the Act of 1980, on various grounds. The contention of the petitioner is that on account of political pressure, the order of detention has been passed against the petitioner under the Act of 1980. It has been further contended that political pressure has been exerted by Mr. Rakesh Shukla, a member of the ruling party who was instrumental in getting the impugned order passed against the petitioner.

3. It is the contention of the petitioner that he belongs to Backward Class community involved in various social work activities and in order to tarnish the reputation of the petitioner, the impugned action has been taken against him infringing the fundamental rights guaranteed under Article 21 of Constitution, therefore, the action of the respondents deserves to be set aside.

4. The petitioner has further stated in the writ petition that out of 21 cases which have been listed against the petitioner, he has been acquitted in 13 cases

and he was falsely implicated in two cases and some of the cases which are pending against him are triable by the Magistrate First Class. It is the contention of the petitioner that once he has been acquitted in most of the criminal cases, there is total arbitrariness and non-application of mind on the part of the District Magistrate, Gwalior in passing the order of detention which has been affirmed by the State Government.

5. The learned Govt. Advocate produced the record on the basis of which detention order has been passed. The detention order has been passed under the Act of 1980 and the petitioner has submitted an appeal before the State Government and after carefully considering the entire material available on record, the State Government has affirmed the detention order.

6. The matter relating to detention of the petitioner was also presented before the Advisory Board. The Advisory Board has also confirmed the detention of the petitioner and vide order dated 13th August, 2007 the Advisory Board has reported that there is sufficient cause for the detention of the petitioner under the provisions of the Act of 1980. The counsel for the State has strenuously argued on behalf the State Government that no ground is made out for interference with the order passed by the District Magistrate and the subsequent order passed by the State Government, as the petitioner has bad antecedents and is a history sheeter.

7. Section 3 of the Act of 1980 reads as under:

“3. Power to make orders detaining certain persons.- (1) The Central Government or the State Government may,-

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

It is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation,- For the purposes of this sub-section, acting in any manner prejudicial to the maintenance of supplies and services essential to the community” does not include “acting in any manner prejudicial to the

maintenance of supplies of commodities essential to the community” as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(4) When any order is made under this section by any officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detentions, this sub-section shall apply subject to the modification, that, for the words “twelve days”, the words “fifteen days” shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.”

8. In the present case, it is evident from the detention order passed under the Act of 1980 that as many as 21 cases were registered against the petitioner from 1995 onward though in respect of one case the contention of the petitioner is that it does not relate to him which was registered on 18th May 2007 in crime no. 265/07 for offence under sections 392 of IPC and 11/13 of the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981. The petitioner has

stated that in most of the cases he has been acquitted but the fact is that there are 20 cases which were registered against the petitioner and in some of them trial has been taken place, though petitioner has been acquitted in 13 such cases, but by no stretch of imagination, it cannot be presumed that the petitioner enjoys a good reputation in the society. The petitioner, thus have a record of criminal antecedents. The contention of the petitioner that after the year 2003, only three cases have been registered and the one registered on 18th May 2007 does not relate to him, does not wipe out the antecedents of the petitioner. A case was registered against the petitioner on 03rd July, 2007 at crime No.647/2007 which relates to a case in which the petitioner started indiscriminate firing and offence under sections 336 and 347 IPC., has been registered against him. Indiscriminate firing, even if it taken as a single act is good enough to hold that public order was affected. The Apex Court in the case of *State of U.P. vs. Sanjai Pratap Gupta alias Pappu and others*, (2004) 8591 observed in paragraphs 10 and 14 as under:

“10. 'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State. (See *Kishori Mohan Bera v. The State of West Bengal* (1972 (3) SCC 845); *Pushkar Mukherjee v. State of West Bengal* (1969 (2) SCR 635); *Arun Ghosh v. State of West Bengal* (1970 (3) SCR 288); *Nagendra Nath Mondal v. State of West Bengal* (1972 (1) SCC 498).”

“14. The stand that a single act cannot be considered sufficient for holding that public order was affected is clearly without substance. It is not the number of acts that matters. What has to be seen is the effect of the act on even tempo of life, the extent of its reach upon society and its impact.”

9. In the aforesaid case the Supreme Court has held that the stand that a single act cannot be considered sufficient for holding the public order was affected is without substance. It was observed by their Lordship that it is not the number of acts that matters but what has to be seen is the effect of the act on the even tempo of life, the extent of its reach upon society and its impact.

10. The argument of the learned counsel for the petitioner that the question of firing is the only incident which has taken place after 2003 and the same could not have been made the basis for passing the order under the Act of 1980, as a sword of domicile. Indiscriminate firing in public is certainly an act which has got far reaching consequence upon the society. The neighbours and the people of the locality must have been terrorized by the anti-social activity of the petitioner because of indiscriminate firing, therefore, the District Magistrate, Gwalior has rightly considered the offence which took place after the year 2003 and passed the order of detention with a view to prevent him from acting in a manner prejudicial to the maintenance of public order. More over, it is not a case that the petitioner is enjoying a clean record prior to the year 2003 as the total number of cases registered against the petitioner were twenty one in number. A person with 21 criminal cases can in no way say before this Court that he is having a clean record and he has been detained under the Act of 1980 only because of firing incident that took place, on 03rd July, 2007. I do not find any reason to interfere with the order of the detention impugned in this petition.

11. The Apex Court in the case of *Commissioner of Police and others vs. C.Anita (Smt.)*, (2004) SCC 467 has held in para 5 as under:

"5. Before dealing with rival submissions, it would be appropriate to deal with the purpose and intent of preventive detention. Preventive detention is an anticipatory measure and does not relate to an offence, while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the concerned law. The action of Executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner, the failure to conform to which should lead to detention. The satisfaction of the Detaining Authority, therefore, is considered to be of primary importance, with great latitude in the exercise of its discretion. The Detaining Authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to take action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens would lose all their meanings provide the justification for the laws of preventive detention. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or

corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender. This jurisdiction has at times been even called a jurisdiction of suspicion. The compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment for individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs". This, no doubt, is the theoretical jurisdictional justification for the law enabling preventive detention. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by striking the right balance between individual liberty on the one hand and the needs of an orderly society on the other. These aspects were highlighted in *Union of India v. Amrit Lal Manchanda and another*, (2004 (3) SCC 75)."

12. In the present case there was enough material on record based on which the District Magistrate has passed the order of detention under the Act of 1980. The activities of the detenu were prejudicial to the public order and the public order as the French call "order publique" is something more than ordinary maintenance of law and order, as observed by the Apex Court in paragraphs 8, 9, 11, 12, 13, in the case of *Sanjai Pratap Gupta* (Supra).

"8. "Public Order" is what the French call 'ordre publique' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? (See *Kanu Biswas v. State of West Bengal* (AIR 1972 SC 1656).

9. "Public order" is synonymous with public safety and tranquility: 'It is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State'. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (See *Dr. Ram Manohar Lohia v. State of Bihar and others* (1966 (1) SCR 709)).

11. The distinction between 'law and order' and 'public order' has been

pointed out succinctly in *Arun Ghosh's case* (supra). According to that decision the true distinction between the areas of 'law and order' and 'public order' is 'one of degree and extent of the reach of the act in question upon society'. The Court pointed out that 'the act by itself is not determinant of its own gravity. In its quality it may not differ but in its potentiality it may be very different'. (See *Babul Mitra alias Anil Mitra v. State of West Bengal, and others* (1973 (1) SCC 393, *Milan Banik v. State of West Bengal* (1974 (4) SCC 504).

12. The true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

13. The two concepts have well defined contours, it being well established that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life. Infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder. Law and order represents the largest scale within which is the next circle representing public order and the smallest circle represents the security of State. "Law and order" comprehends disorders of less gravity than those affecting 'public order' just as 'public order' comprehends disorders of less gravity than those affecting 'security of State'. (See *Kuso Sah v. The State of Bihar and others* (1974 (1) SCC 185), *Harpreet Kaur v. State of Maharashtra* (1992 (2) SCC 177), *T. K. Gopal v. State of Karnataka* (2000 (6) SCC 168), *State of Maharashtra v. Mohd. Yakub* (1980) (2) SCR 1158)."

13. In the present case it is evident from the detention order that the detenu was a history sheeter and against him 21 cases have been instituted and as rightly held by the Apex Court, this Court cannot substitute its own findings over the finding of the detaining authority as the District Magistrate has precisely enumerated the grounds in the detention order, therefore, this Court do not find it to be a fit case for interference.

14. The learned counsel for the petitioner during the course of argument has cited large number of cases relating to public order and public peace resulting in detaining a person under the Act of 1980. All those judgments have been discussed and the considered by the Apex Court in the judgment which have been dealt with in this order, and therefore, they are not being dealt separately.

15. This Court is of the opinion that the District Magistrate, Gwalior has taken into consideration the entire material placed before him and has rightly passed the order of detention on his satisfaction as per the provisions of section 3 of the Act of 1980. The State Government is also justified in approving the order passed by the District Magistrate, Gwalior. The Advisory Board has also considered the material placed before it and has rightly held that there is sufficient cause for the detention of the petitioner.

16. Keeping in view the fact that large number of cases have been registered against the petitioner and especially the reasons indicated in the order passed by the District Magistrate, the same has to be up held by dismissing the petition.

17. In view of the above, petition stands dismissed. No order as to cost.

Petition dismissed.

I.L.R. [2008] M. P., 1436

WRIT PETITION

Before Mr. Justice R.K. Gupta

16 April 2008*

VINOD KUMAR KHARE

... Petitioner.

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 309, M.P. Land Revenue Code, 1959, Section 104(2)
 - **Disciplinary Authority - Petitioner working as Patwari - He was removed from service by Sub Divisional Magistrate after holding departmental enquiry - Held - Collector is the appointing authority and removal of Petitioner by Sub Divisional Magistrate not proper - Notification to that effect issued by State Govt. will not have the effect of damaging substantive Section 104(2) - Petitioner directed to be reinstated with 50% back wages - Competent Authority is free to pass appropriate order in accordance with law - Petition allowed.** (Para 11)

संविधान, अनुच्छेद 309, म.प्र. भू राजस्व संहिता, 1959, धारा 104(2) – अनुशासनात्मक प्राधिकारी – याची पटवारी के रूप में कार्यरत – उसे अनुविभागीय मजिस्ट्रेट ने विभागीय जांच करने के बाद सेवा से हटा दिया – अभिनिर्धारित – कलेक्टर नियुक्ति प्राधिकारी है और याची को अनुविभागीय मजिस्ट्रेट द्वारा सेवा से हटाया जाना उचित नहीं – राज्य सरकार द्वारा इस संबंध में जारी की गई अधिसूचना का प्रभाव सारथान धारा 104 (2) को क्षति नहीं पहुंचायेगा – याची को 50 प्रतिशत पिछले वेतन के साथ सेवा में बहाल किये जाने का निदेश दिया – सक्षम प्राधिकारी विधि के अनुसार यथोचित आदेश पारित करने के लिये स्वतंत्र है – याचिका मंजूर।

Case referred :

W.P. No. 7785/03 (O.A. No.3466/1992)

Praveen Verma, for the petitioner

Vinod Mehta, G.A. for the respondents

ORDER

R.K. GUPTA, J.:-The present petition is filed by the petitioner challenging the order dated 29/30.12.1991 (Annexure A-17). By this order a penalty of removal from services has been imposed on the petitioner. This order has been passed by the Sub Divisional Officer after holding a departmental enquiry against the petitioner. Petitioner was employed on the post of Patwari and a charge-sheet was issued to the petitioner, which is Annexure A-1 wherein the following charges were framed against the petitioner :-

आरोप क्र. -1-

आप लगातार रूप से अपने मुख्यालय से अनुपस्थित हैं। ज्ञापन प्रतिलिपि दिनांक 20.2.89, 2.2.89, 9.2.89, 22.2.89, 3.3.89 इसके अतिरिक्त अन्य पत्रों से भी स्पष्ट है कि आपको शासकीय कार्य पूर्ति हेतु लगातार रूप से राजस्व निरीक्षक नायब-तहसीलदार द्वारा तहसीलदार द्वारा कार्यालय से पत्र व्यवहार किया गया तथा स्पष्ट प्रमाण उपलब्ध है कि आप अपने निश्चित मुख्यालय तथा निवास से अनुपस्थित रहे।

आरोप क्र. -2-

जिलाध्यक्ष महोदय के निर्देशानुसार जबलपुर शहर में अवैध कालोनाईजर्स की जानकारी स्थल निरीक्षण के उपरांत आपको तैयार कर प्रकरण बनाने पूर्ण करना थी। जो आपने नहीं किया।

आरोप क्र.3 -

मतदाता सूची पूनरीक्षण 1989 में आपको सत्यापन संबंधी कार्य समय सीमा 29.2.89 तक पूर्ण करना था जो नहीं किया तथा जानबूझ कर आपने चुनाव कार्य जो कि एक राष्ट्रीय कार्य है की स्पष्ट अवहेलना करके अनुशासनहीनता का परिचय दिया।

आरोप क्र.4-

बरगी सर्किल का लघु सिंचाई गोशवारा डायरी आदि अभिलेख आपने पूर्ण नहीं किया। जो एक अवैधानिक कार्य है। ग्राम बेतला कोटवारी जमीन संबंध में ग्रामवासियों के आवेदन पत्र के निराकरण के संबंध में आपने जानकारी नहीं भेजी।

आरोप क्र. -5

निलंबन किए जाने के उपरांत आपको कार्यप्रभार राजस्व निरीक्षक द्वारा निर्देशित पटवारी को तत्काल सौंपकर पालन प्रतिवेदन प्रेषित करना था जो आपने लगातार स्मरण पत्र तथा निर्देशों के बाद भी आज तक नहीं भेजा।

आरोप क्रमांक -6

कार्यालयीन निर्देशों की आपने स्पष्ट अवहेलना की तथा निलंबित अवधि में आप शासकीय अभिलेख अपने पास रोक के रखते हैं। जिससे शासकीय कार्य में अवरोध उत्पन्न हो गया है जिसमें आप व्यक्तिगत रूप से उत्तरदायी हैं। क्योंकि आपके विरुद्ध क्रिमिनल प्रोसीडिंग नियमानुसार पृथक से चालू की जाय।

आरोप क्र. -7

आपको रांडी अग्निकांड की जांच तथा प्रतिवेदन बाबत श्री चंद्रमोहन दास पूर्व मंत्री के पत्र पर निर्देशित किया गया था इनके अलावा और भी कार्य पूर्ण करने थे जो आपके द्वारा आज तक नहीं किए गए। यह कार्य आपकी उदासीनता का परिचायक है।

आरोप क्र. -8-

आपके विरुद्ध कुछ दिन पूर्व से एक शिकायत अनुविभागीय अधिकारी न्यायालय में लंबित है जिसमें आपको कारण बताओ नोटिस जारी किया गया है।

2. A departmental enquiry was conducted against the petitioner and in the said enquiry the petitioner was found guilty of the charges. Petitioner was also placed under suspension by an order dated 9.3.1989 (Annexure A-5) and the said order of suspension was ultimately rejected by order dated 12.2.1990 (Annexure A-6). Petitioner was again placed under suspension by order dated 25.6.1991 (Annexure A-7) and another charge-sheet was issued to the petitioner on 22.8.1991 (Annexure A-8). The charge-sheet Annexure A-8 contains the following charges against the petitioner:

“आरोप क्र. -1-

आपके कार्यलय में ग्राम मानेगांव की शासकीय भूमि के खसरा 36/1, 52, 54/1, 76, 76/2 एवं 81/2 की हेरा फेरी की गई है एवं गंभीर अनियमिततायें कर अनेकों व्यक्तियों के नाम शासकीय अभिलेखों में बगैर किसी उच्चाधिकारी के आदेश के बी - 1 वर्ष 88-89 एवं खसरा पांचशाला वर्ष 89-90 में दुरुस्ती की है। खसरा पांच शाला 89-90 में जिसवार खरीफ रब्बो का पृष्ठवार योग नहीं किया गया और फर्जी जिसवार तैयार कर प्रस्तुत की है। इसी तरह बी -1 में भी जमाबंदी गोदवारा नहीं लगाया और न हो अभिलेख तैयार करने के हस्ताक्षर किये हैं।

आरोप क्रमांक -2

ग्राम मानेगांव की नामान्तरण पंजी में आपके द्वारा फर्जी नामान्तरण दर्ज किए गए हैं भूतपूर्व पटवारी श्री लल्लूराम तिवारी के तथा तत्कालीन नायब तहसीलदार के हस्ताक्षर बनाकर रिकार्ड में हेराफेरी की गई है जो नामान्तरण क्रमांक 16/2, 21, 22 में दर्ज किए गए हैं उनमें भी गंभीर अनियमिततायें हैं।

आरोप क्रमांक -3

आपका मुख्यालय ग्राम मंगेली है परन्तु आप जबसे इस हल्के में कार्यरत हैं, तभी से आपके मुख्यालय में नहीं रहते, जिससे शासकीय कार्य में बाधा उत्पन्न होती है तथा काश्तकारों को अनावश्यक भटकना पड़ता है।

आरोप क्रमांक -4

आपके द्वारा ग्राम मानेगांव के ख.नं. 73/8 एवं 73/11 की संबंधित व्यक्ति श्री मनोज कुमार को बगैर आदेश के नकलें प्रदान के जिसमें आपने रा.नि. के फर्जी हस्ताक्षर बनाये। मूल अभिलेख नक्शा एवं खसरा पांचशाला से भिन्न नकलें प्रदाय की जिससे संबंधित व्यक्ति को अवैधानिक ढंग से आपके द्वारा व्यक्तिगत रूप से उत्तरदायी है एवं दंड के भागी है। आपके द्वारा किया यह कृत्य अनुशासनहीनता का द्योतक है, एवं यह कृत्य शासकीय संपत्ति को क्षति पहुंचाने की नियत से किया गया।

अतः उपरोक्त बिन्दुओं के आधार पर श्री विनोद कुमार खरे प.ह.नं.55 (नि.) ने म.प्र. सिविल सेवा आचरण नियम 1976 के नियम तीन (एक)(दो) एवं (तीन) का स्पष्ट रूप से उल्लंघन किया है।”

3. In pursuance of charge-sheet dated 22.8.1991 (Annexure A-8) a departmental enquiry was conducted by Shri M.K. Tiwari, who was appointed as the inquiry officer. Petitioner was issued a show cause notice on 11.12.1991 (Annexure A-12). In the said show cause notice a penalty of removal from services was imposed upon the petitioner as the charges were found proved against the petitioner.

4. With reference to another charge petitioner was issued a show cause notice dated 22.8.1991 (Annexure A-14). By order dated 29/30.12.1991 (Annexure A-17) a penalty of removal from services was imposed upon the petitioner. Petitioner submitted an appeal to the Collector, which is Annexure A-18 to the petition. The said appeal has also been dismissed by the appellate authority by passing an order dated 20.10.1992 (Annexure A-19).

5. On the basis of the aforesaid factual backdrop of the case, learned counsel for the petitioner raised a solitary ground that according to the judgment passed by this Court in W.P.No. 7785/2003 (O.A. No. 3466/1992 (*Ashok Kumar Khare Vs. State of M.P. & others*) the Sub-Divisional Officer is not the competent authority to dismiss the petitioner and the competent authority is the Collector. Since in the present case the order imposing the penalty of removal from services has been passed by the Sub-Divisional Officer, therefore, in view of the ratio of the judgment passed by this Court in the case of *Ashok Kumar Khare* (supra) the order of dismissal impugned in the petition is bad in law.

6. Learned counsel for the respondents submitted that the Sub-Divisional Officer is the competent authority to dismiss the petitioner and there is no illegality in the order. In this reference the judgment passed by this Court in the case of *Ashok Kumar Khare* (supra) is to be considered wherein the ratio has been laid down as under:-

“Section 104(2) clearly envisages that the Collector is the appointing authority. It cannot be construed that Section 24 of the Code has delegated the power on the S.D.O. for initiating departmental proceedings for removing a Patwari. What has been stated in the Section 24 is that State may confer on any Assistant Collector or on any Revenue Officer certain powers. Needless to emphasise, that is for the purpose of the said but there is no such conferral of power on the S.D.O. to proceed against the Patwari.

In view of the aforesaid facts and circumstances as well as the provisions which are enshrined in the Code, I am of the considered opinion that the order of the disciplinary proceeding passed vide Annexure A-19 which has been affirmed by the order of the appellate authority have to pave the path of destruction and accordingly they are lanced. At this juncture I have been apprised that no action has been taken against the petitioner so far, by the Collector. When the whole proceeding is vitiated from the stage of inception itself because of the lack of jurisdiction, petitioner is bound to be reinstated. He was removed in the year 1991. He has yet not attained

the age of superannuation. The consequential benefits are bound to follow. However, at this juncture it is submitted that grant of full salary to the petitioner would be difficult as the State is going through extreme financial difficulty. Keeping the aforesaid facet in consideration it is directed that the petitioner be reinstated in the post of Patwari within a period of three months from the date of order passed today and be paid the arrears of salary which is fixed at 50%. Needless to emphasise, the competent authority is at liberty to proceed against the petitioner as per law."

7. The view taken in the case of *Ashok Kumar Khare* (supra) has also been followed by this Court in W.P. No. 8478/2003 (O.A. No. 3079/ 1993) decided on 20. 11.2007.

8. Shri Vinod Mehta, learned Govt. Advocate appearing for the respondent-State submitted that in view of the Notification dated 1st October, 1959 published in the Gazette of M.P. on 9th October, 1959, the Sub-Divisional Officer is the competent authority to dismiss the Patwari. The Notification No. is 11429 C.R. 635-सात-ना dated 9th October, 1959 and on this basis it is submitted by him that the competent authority to dismiss the Patwari is not the Collector. In the earlier judgment, this Court has not taken into account the aforesaid Notification.

9. Submission of Shri Mehta is considered. In this reference, it is to be seen that Section 258 of the M.P. Land Revenue Code, 1959 provides the general rule making powers of the State Government and by virtue of Section 258 Sub-section (2) Sub-clause (xix) subject is provided for making the rule which relates to prescription of other duties of Patwari under sub-section (2) of Section 104, which has been substituted by amending of Section 19(1) of the First Amendment Act (24 of 1961) and prior to the substitution of the aforesaid provision the subject in Section 258(2) Sub-Clause (xix) was appearing as "Regulation of appointment of Patwari and prescription of their additional duties under Sub-section (4). But, after Amending Act (24 of 1961) this has been omitted and new sub-clause 19 has been added which only provides prescription of duties of Patwari under sub-section (2) of Section 104. On the basis of the same, there has been an amendment for the rule making power of the State Government under Sub-clause 19 of Section (2) of Section 258 of the M.P. Land Revenue Code, 1959. Under sub-section (2) of Section 104 it is provided that the Collector shall appoint one or more Patwaris for each Patwari Circle for the maintenance and correction of land records and for such other duties as the State Government may prescribe. It is also to be seen that this sub-section (2) has also been amended by the Amendment Act No. 24 of 1961 by Section 5 of the M.P. Act No. 24 of 1961 (Amendment Act) and before the amendment in the Sub-section (2) it was mentioned that "Subject to the rules made under Section 258" and these words have been omitted by Section 5 of the M.P. Act No. 24 of 1961. The amended provision reads as under:-

"(2) The Collector shall appoint one or more patwaris to each patwari circle

for the maintenance and correction of land records and for such other duties as the State Government may prescribe.”

10. On the basis of the aforesaid position of law under the M.P. Land Revenue Code, 1959 and by virtue of sub-section (2) of Section 104 the substantive power is vested with the Collector. Under the un-amended provision the power to appoint was subject to rule made under Section 258. These words have been omitted and there had also been corresponding amendment in Sub-clause (xix) of Sub-section (2) of Section 258. After the amendment, the State Government has power to assign such other duties as may be prescribed. The duties of Patwaris are to be prescribed by the State Government in exercise of powers with reference to the prescription of the duties to Patwaris in terms to the existing entries which state that prescription of other duties of Patwari under Sub-section (2) of Section 104. The first part of Section 104(2) is not disturbed which relates to the power of the Collector to appoint Patwaris.

11. Learned counsel for the respondents placed reliance on the Notification dated 9th October, 1959. After the amendment in Sub-section (2) of Section 104 and also in Sub-clause (xix) of Sub-section (2) of Section 258 the Notification dated 9th October, 1959 shall have no application in the present case. No other notification has been shown to this Court on behalf of the respondents by which the Sub-Divisional Officer has been empowered by the State Government to appoint a Patwari and rightly so because the substantive Section of the M.P. Land Revenue Code, 1959 i.e. Section 104(2) itself empowers the Collector to appoint Patwari. Thus, even though the notification is issued by the State Government but that will not have the effect of damaging the substantive Section 104(2) which may run contrary to the Notification.

12. On the basis of the aforesaid reasoning, I am inclined to hold that in the present case since the order imposing penalty passed by the Sub-Divisional Officer is without any jurisdiction, therefore, the order dated 29/30.12.1991 (Annexure A-17) is set aside and accordingly I direct for the reinstatement of the petitioner with 50% of back wages. However, this order shall not restrict the right of the competent authority to pass an appropriate order in accordance with law.

Accordingly, the present petition stands partly allowed.

Petition partly allowed.

I.L.R. [2008] M. P., 1442

WRIT PETITION

Before Mr. Justice S.K. Gangele

22 April, 2008*

M.P. HOUSING BOARD

... Petitioner

Vs.

SMT. JYOTI CHITNIS and ors.

... Respondents

Industrial Disputes Act, (14 of 1947), Sections 25-K, 25-L, 25-N, Factory Act, 1948, Section 2(M) - Industrial Establishment - Services of respondent No. 1 terminated without the permission from the Government - Held - Construction of houses by the petitioner for the purpose of selling comes within definition of manufacturing process - As per Provision of Chapter V(B) of Act, 1947 no permission sought from Government before termination of services - Order of Tribunals directing re-instatement proper - However, respondent No.1 entitled for 25% back wages instead of 50% as directed by Tribunals.

(Paras 8, 11, 12, 13)

औद्योगिक विवाद अधिनियम, (1947 का 14), धारा 25-के, 25-एल, 25-एन, कारखाना अधिनियम, 1948, धारा 2(एम) - औद्योगिक स्थापना - प्रत्यर्थी क्र. 1 की सेवाएँ शासन की अनुमति के बिना समाप्त कर दी - अभिनिर्धारित - याची द्वारा मकानों का निर्माण विक्रय करने के प्रयोजन से किया यह विनिर्माण प्रक्रिया की परिभाषा में आता है - 1947 के अधिनियम के अध्याय पाँच(बी) के उपबंध अनुसार सेवाएँ समाप्त करने से पूर्व शासन से कोई अनुमति नहीं ली गई - अधिकरण का बहाल करने के निदेश का आदेश उचित - यद्यपि अधिकरण द्वारा निदेशित 50: पिछले वेतन के स्थान पर प्रत्यर्थी क्र. 1, 25: पिछला वेतन पाने का हकदार।

Cases referred :

AIR 1999 SC 355, AIR 1962 SC 29.

Rajendra Sagoria, for the petitioner.

Prashant Sharma, Caveator.

Sudha Shrivastava, P.L. for the respondents No.2 and 3/State.

ORDER

S.K. GANGELE, J.:-The petitioner has filed this petition challenging the orders of Industrial Court dated 10.11.2005 annexure P/5 and labour Court dated 13.10.2004 Annexure P/7. The respondent No.1 was engaged on daily wage basis on 23.01.1992. She had been performing the work of typist. As per respondent her services were terminated w.e.f 28.02.2000 without giving any opportunity of hearing and without any departmental enquiry. The respondent filed an application before the Labour Court under the provisions of M.P.I.R. Act 1960. She pleaded that she had been engaged as daily wagger typist on 23.01.1992 and disengaged w.e.f 28.02.2000 without any notice. The provisions of section 25-N of the Industrial Disputes Act 1947 were not complied with. The petitioner had been performing manufacturing work and it engaged more than 100 employees. It was specifically stated in the application that the petitioner had

been in construction business and it had been constructing houses laying down sewer pipelines and constructing roads and thereafter selling the houses to the consumers. The petitioner in its reply admitted the fact that the respondent was engaged on daily wage basis and her services were terminated w.e.f 28.02.2000. It has further been stated that she had been paid retrenchment compensation of Rs.18,309/- equal to 15 days wages of a year and also salary for the period of one month. It was further stated that the Government issued a direction to terminate services of daily wage employees who were engaged after 31.12.1988. Consequently, the services of the respondent were terminated.

2. Before the Labour Court the respondent tendered her evidence and stated that she was engaged on daily wage basis on 23.01.1992 as typist and disengaged w.e.f 28.02.2000. She further stated that more than 100 employees had been working in the department and it was engaged in development of land, construction of houses, laying down of pipelines and construction of roads. It had been selling the aforesaid houses to the consumers. On behalf of the petitioner one Mr. D.K. Sawie, who was working as Assistant Engineer at the relevant time was examined. He in his cross-examination admitted the fact that no permission was obtained from the appropriate Government before termination of services of the respondent. He further admitted that more than 100 employees had been working in the Office and the Board was engaged in developing of land and construction of roads and houses, which were sold to the consumers. The photocopies of the attendance registers of the respondent were also produced by the Board before the Labour Court from January 1992 upto February 2000. It is clear from the attendance registers that the respondent had been continuously working as daily wage typist. She was also paid the salary to this effect.

3. On the basis of the above evidence, the Labour Court has held that the termination of services of the respondent was in violation of the provisions of Industrial Disputes Act, 1947. No proper permission from the appropriate Government was taken by the Board before terminating the services. The Labour Court ordered reinstatement with 50% backwages. The aforesaid findings have been affirmed by the Industrial Court in appeal.

4. Learned counsel for the petitioner has submitted that both the Courts have committed an error of law in allowing the application of the Respondent. The Board paid retrenchment compensation as per law. Because it wanted to reduce the strength of its staff who were surplus. Contrary to this, learned counsel for the respondent No.1 has submitted that the provisions of chapter-V (B) of Industrial Disputes Act, 1947 are applicable in the present case because the petitioner was engaged in manufacturing process and that provisions have not been complied with before terminating services of the respondent. It has further been stated that the provisions are penal in nature, hence both the Courts have rightly ordered reinstatement with 50% backwages.

5. From the evidence of the petitioner witness Assistant Engineer and documentary evidence produced by the Board and statement of the respondent No.1 it is clear that the respondent was engaged as daily wager typist on 23.01.1992 and dis-engaged on 28.02.2000. As per the petitioner, it complied the provisions of section 25(F) of the Industrial Disputes Act and paid retrenchment compensation of Rs.18,308/- to the respondent. Witness of the petitioner admitted the fact that more than 100 employees had been working in the respondent Board and the work of the petitioner was of development of land construction of houses, roads, lying pipelines and other construction. It has been selling the houses to the consumers.

6. Chapter V (B) of Industrial Disputes Act, 1947 prescribes special provisions relating to retrenchment and closure in certain establishments. Section 25(K) of the Industrial Disputes Act prescribes conditions for application of Chapter-V (B) which is as under:-

25-K Application of Chapter V-B- (1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than (one) hundred workmen were employed on an average per working day for the preceding twelve months.

Industrial establishment has been defined in section 25(L) which is as under:-

25-L Definitions-For the purpose of this Chapter,-

(a) 'industrial establishment' means-

(i) a factory as defined in clause (m) of Section 2 of the Factories Act, 1948 (63 of 1948);

(ii) a mine as defined in clause (j) of sub section (1) of Section 2 of the Mines Act, 1952 (33 of 1952); or

(iii) a plantation as defined in clause (f) of Section 2 of the Plantation Labour Act, 1951 (69 of 1951)

7. Section 2 (M) of the Factory Act 1948 defines factory as under-

(m) "factory" means any premises including the precinct thereof-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

and section 2(K) of Factory Act, 1948 defines manufacturing process, which is as under-

(k) "manufacturing process" means any process for-

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to use, sale, transport, delivery or disposal, of

(ii) pumping oil, water, sewage or any other substance; or

(iii) generating, transforming or transmitting power, or

(iv) composing types for printing by letter-press, lithography, photo-gravure of other similar process or book binding (or)

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels, (or)

(vi) preserving or storing any article in cold storage:

8. It is clear from the aforesaid definitions that manufacturing process means making, altering, repairing and adopting any article and substance with a view to use, sale, transport deliver or disposal. In the present case the petitioner was constructing houses. It had been using raw material for the purpose of construction of houses and also developing the land and constructing roads. Thereafter the petitioner has been selling the newly constructed houses to the consumers.

9. Hon'ble Supreme Court in *Lat Mohammad and Others Vs. Indian Railway Construction Co. Ltd and Others* AIR 1999 SCC 355 has held as under with regard to manufacturing process:-

"While railway lines are being constructed on a given site no article or substance is being made or repaired, maintained, finished etc. Raw materials like railway sleepers, bolts and loose railway rails when bought by the construction company from open market and brought on site are articles visible to eyes and are movable articles. These articles are adapted for their use. Their use is for ultimately laying down a railway line. In that process sleepers, bolts and rails would get used up. If that happens, the definition of 'manufacturing process' dealing with adaptations of these articles for use would squarely get attracted. It is true that the ultimate product of this exercise or process is the bringing into existence a railway track which is embedded in the earth which cannot be sold, transported, delivered or disposed of like a movable property. However, as the definition is worded, it cannot be said of necessity that any end product which results after adapting any raw-material, article or substance "with a view to its use" must necessarily result into a movable final product or a commodity. It has to be kept in view that the definition of 'manufacturing process' in S. 2(k) of the Factories Act has nothing to do with manufacturing of goods which

may attract excise duty under the Central Excises and Salt Act, 1944. For the definition of "manufacturing process" under S. 2(k) end product may be goods or otherwise. It is not necessary that the end product must be marketable. Even accepting that the final product namely, construction of railway line embedded in earth is not the subject-matter of sale, transfer, delivery or disposal, still the raw-materials which are adapted for their use with a view to constructing railway line which is the final product could be said to have fallen within the sweep of the definition of the term 'manufacturing process' as found in S. 2(k) of the Factories Act.

All the workers employed by the construction company would squarely attract the definition of the term 'workmen' as found in S. 2(1) of the Factories Act as they are working for remuneration in a manufacturing process carried out by the project. Thus all the requirements of the term 'factory' as defined by S. 2(m) of the Factories Act are satisfied on the facts of the present case."

10. Constitution Bench of Hon'ble Supreme Court reported in *Ardeshir H. Bhiwandiwalla Vs. State of Bombay* AIR 1962 SCC 29 has held as under with regard to manufacturing of salt from sea water that whether it is manufacturing process or not :-

"The sea water in the sea never becomes salt merely on account of the play of sun's rays on it. Labourers are employed for (i) admitting sea water to the reservoirs by working sluice gates, sometimes at night also, or the pump; (ii) filling crystallizing beds; (iii) watching the density of brine in the crystallizing beds; (iv) seeing that the density does not exceed certain limits and that salts other than sodium chloride (common salt) are not formed; (v) scraping and collecting salt crystals; (vi) grading the salt crystals by 'sieving' and (vii) putting salt into gunny bags. It follows that it is due to human agency, aided by natural forces, that salt is extracted from sea water. The processes carried out in the Salt Works and described above, come within the definition of 'manufacturing process' in S. 2 (k) inasmuch as salt can be said to have been manufactured from sea water by the process of treatment and adaptation of sea water into salt. The sea water, a non-commercial article, has been adapted to salt, a commercial article. Case law discussed.

11. From the above principle of law laid down by Hon'ble Supreme Court it is clear that construction of houses by the petitioner for the purpose of selling comes within the definition of manufacturing process. The respondent was working with the petitioner at the relevant time. Hence, she was a worker. The witnesses of the petitioner himself admitted that more than 100 employees were working in the Office. Hence provisions of Chapter-V (B) of the Industrial Disputes Act, 1947 had to be followed before retrenching and terminating the services of the respondent

No. 1. The provision of section 25 (N) of the Industrial Disputes Act prescribes conditions precedent for retrenchment of worker which are as under:-

"25. N. Conditions precedent to retrenchment of workman.-(1)

No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application also be served simultaneously on the workman concerned in the prescribed manner.'

12. It is clear from the aforesaid legal provisions that the petitioner has not followed the mandatory provisions of section 25(N) of I.D Act, 1947 before terminating and retrenching the service of the respondent, hence findings recorded by both the Courts are as per law.

13. With regard to payment of wages, it is clear that the respondent was engaged on daily wages in the year 1992 and she was disengaged in the year 2000. She had worked for more than eight years continuously. The petitioner did not obtain any permission from the appropriate Government before terminating services of the respondent as required under section 25(N) of the Industrial Disputes Act, 1947. Looking to the above facts, in my opinion respondent will be entitled 25% backwages from the date of termination of services upto the date of passing of the order by the Labour Court and thereafter full backwages. Consequently, petition of the petitioner is disposed of with the following direction:-

(i) The orders of the Labour Court Annexure P/7 and Industrial Court Annexure P/5 are upheld upto the extent of awarding reinstatement to the respondent to the extent that the respondents shall be entitled 25% backwages from the date of termination of services upto the date of passing of the order of the Labour Court and thereafter full wages as applicable.

No order as to cost.

Petition disposed of.

I.L.R. [2008] M. P., 1448

WRIT PETITION

Before Mr. Justice R.K. Gupta

29 April 2008*

DOMUDAS DHAKATE

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Articles 341, 342 - Cancellation of Caste Certificate - High Power Committee cancelled caste certificate as petitioner does not belong to Halba/Halbi but Kosti community which is a backward Class - Petitioner claimed protection under Milind's Case - Held - Apex Court had extended benefit only to the Doctors who had already carried out their studies and had also obtained degree - Petitioner cannot be given protection by directing employer for not taking any action against petitioner as employment was obtained by submitting a false certificate - Petition dismissed. (Para 9)

संविधान, अनुच्छेद 341, 342 — जाति प्रमाण पत्र का रद्दकरण — याची का जाति प्रमाण पत्र उच्चाधिकार समिति ने रद्द किया चूंकि वह हल्बा/हल्बी जाति का नहीं था बल्कि कोष्टी समुदाय जो एक पिछड़ा वर्ग है, का है — याची ने मिलिंद के मामले के अंतर्गत संरक्षण का दावा किया — अभिनिर्धारित — उच्चतम न्यायालय ने उन्हीं डॉक्टरों को यह लाभ विस्तारित किया था जिन्होंने अपना अध्ययन पूर्ण कर लिया था और डिग्री प्राप्त कर ली थी — याची ने मिथ्या प्रमाण पत्र प्रस्तुत कर नौकरी प्राप्त की थी अतएव याची को ऐसा संरक्षण नहीं दिया जा सकता है कि उसके नियोक्ता को निदेश दिया जाये कि उसके विरुद्ध कोई कार्यवाही न करे — याचिका खारिज।

Cases-referred :

AIR 2001 SC 393, (2006) 2 SCC 471, 2008 AIR SCW 1939.

S.Paul, for the petitioner

Shailesh Mishra, for the respondents No. 1 to 4;

Ajay Ojha, for the respondent No.5,

S.K. Shrivastava, for intervener

O R D E R

R.K. GUPTA, J.:—In all the aforesaid 4 petitions the common question of law and facts are involved, therefore, all these petitions with the consent of the parties are heard jointly and are decided.

2. The petitioner filed this petition before this Court challenging the order Annexure A-5 in all the petitions, whereby the high power committee has cancelled the status certificate of the petitioner. According to the petitioner he does not belong to the Halba / Halbi (S.T.) community and in fact he is a member of (Kosti) community and thus, he belongs to the backward class. The petitioners are claiming the relief that benefit of the *Milind/s Case* (AIR 2001 SC 393) be extended to them.

3. The petitioner initially was appointed as a Manager with the respondent in the Directorate of Rural Industries (Handloom). The petitioner was also declared as permanent on the post on which he was appointed. According to the petitioner, he was appointed on the basis of status certificate, which was surrendered by the petitioner and the petitioner claimed that he belongs to the Halba (S.T.) community and the said certificate was issued by Tehsildar Sousar, District Chhindwara in the year 1983, copy of the same is filed as Annexure P-4. The employment was secured by the petitioner on the basis of false status certificate that he is S.T.. The respondents on the basis of judgment which is reported in AIR 2001 SC 393, in the matter of *State of Maharashtra Vs. Milind*, wherein the Hon'ble Apex Court held that (Kosti's) have no identity as S.T., therefore, they cannot claim that they belong to S.T. Community. The Apex Court in the said judgment further held that the cases of status certificate of Halba (S.T.) shall not be reopened and shall remain unaffected.

4. Para 37 is reproduced as under :

"Respondent No. 1 joined the medical course for the year 1985-86. Almost 15 years have passed by now. We are told he has already completed the course and may be he is practising as doctor. In this view and at this length of time it is for nobody's benefit to annul his Admission. Huge amount is spent on each candidate for completion of medical course. No doubt, one Scheduled Tribe candidate was deprived of joining medical course by the admission given to respondent No. 1. If any action is taken against respondent No. 1, it may lead depriving the service of a doctor to the society on whom public money has already been spent. In these circumstances, this judgment shall not affect the degree obtained by him and his practising as a doctor. But we make it clear that he cannot claim to belong to the Scheduled Tribe covered by the Scheduled Tribes Order. In other words, he cannot take advantage of the Scheduled Tribes Order any further or for any other constitutional purpose. Having regard to the passage of time, in the given circumstances, including interim orders passed by this Court in SLP (C) No. 16372/85 and other related affairs, we make it clear that the admissions and appointments that have become final, shall remain unaffected by this judgment."

5. The proceedings against the petitioner were initiated for the cancellation of the status certificate granted to the petitioner and ultimately it is found that the status certificate, which was granted to the petitioner is liable to be cancelled because the Kosti's is S.T. and accordingly the respondents passed an order Annexure A-5 by which the status certificate is cancelled and accordingly it was also directed to take an action against the petitioner.

6. Learned counsel appearing on behalf of the petitioner has not made any submission with regard to the cancellation of the status certificate by the High

power committee, but during the course of the arguments learned counsel for the petitioner submitted that since the Apex Court in *Milind's Case* has held that the benefit, which was conferred to the community on the basis of status certificate issued then the benefit shall not be taken away. The submission made as aforesaid by the learned counsel for the petitioner is considered. It is seen in the present case the Apex Court in 2006 (2) SCC 471, in the matter of *LIC of India Vs. Sushil* has considered the *Milind's Case* and ultimately the Apex Court in para 6 held as under :

The protection under *Milind Case* cannot be extended to respondent employee as the protection was given under the peculiar factual background of that case. The employee concerned was a doctor and had rendered long years of service. This Court noted that on a doctor public money has been spent and, therefore, it will not be desirable to deprive the society of a doctor's service. Respondent 1 employee in the present case is an LIC employee and the factor which weighed with this Court cannot be applied to him.

7. The Apex Court withdraw the impact of the *Milind's case* and ultimately Apex Court held that the benefit of the *Milind's Case*, wherein the Apex Court directed that no action shall be taken further against such incumbents after the judgment in *Milind's Case*, against those who have already taken the benefit of the status certificate, but the Apex Court held that the said benefit was not extendable to the employees concerned but the benefit as such is to be given only to the Doctors, who have already carried out their studied and have also obtained the Degree.

8. The Apex Court further in *Union of India Vs. Dattatray Namdeo Mendhekar & ors.*, 2008 AIR SCW 1939 and in para 5 has again considered the same. The para 5 of the judgment is reproduced which reads as under :

"*Milind* (Supra) related to a Medical College admission. The question that arose for consideration in that case was whether it was open to the State Government or Courts or other authorities to modify, amend or alter the list of Scheduled Tribes and in particular whether the "Halba-Koshti" was a sub-division of 'Halba' Tribe. This Court held that it was not permissible to amend or alter the list of Scheduled Tribes by including any sub-divisions or otherwise. On facts, this Court found that the respondent therein had been admitted in medical course in ST category, more than 15 years back; that though his admission deprived a scheduled tribe student of a medical seat, the benefit of that seat could not be offered to scheduled tribe student of a medical seat, the benefit of that seat could not be offered to scheduled tribe student at that distance of time even if respondent's admission was to be annulled; and that if his admission was annulled, it will lead to depriving the services of a doctor to the society on whom the public

money had already been spent. In these peculiar circumstances, this Court held that the decision will not affect the degree secured by respondent or his practice as a doctor but made it clear that he could not claim to belong to a Scheduled Tribe. But the said decision has no applicable to a case which does not relate to an admission to an educational institution, but relates to securing employment by wrongly claiming the benefit of reservation meant for Scheduled Tribes. When a person secures employment by making a false claim regarding caste/tribe, he deprives a legitimate candidate belonging to scheduled caste/tribe, of employment. In such a situation, the proper course is to cancel the employment obtained on the basis of the false certificate so that the post may be filled up by a candidate who is entitled to the benefit of reservation.

In this context, we may also refer to the decisions in *Bank of India Vs. Avinash D. Mandivikar* (2005) 7 SCC 690 and *Additional General Manager, Human Resources, Bharat Heavy Electricals Ltd. V. Suresh Ramkrishna Burde*, 2007 (5) SCC 336, wherein this Court held that when a person secures appointment on the basis of a false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated. In the latter case, this Court explained *Milind* thus:

"The High Court has granted relief to the respondent and has directed his reinstatement only on the basis of the Constitution Bench decision of this Court in *State of Maharashtra Vs. Milind*. In our opinion the said judgment does not lay down any such principle of law that where a person secures an appointment by producing a false caste certificate, his services can be protected and an order of reinstatement can be passed if he given an undertaking that in future he and his family members shall not take any advantage of being member of a caste which is in reserved category"

This Court further held that even in cases of admission to educational institutions, the protection extended by *Milind* (Supra) will be applicable only where the candidate had successfully completed the course and secured the degree, and not to cases where the falsehood of the caste certificate is detected within a short period from the date of admission.

(emphasis applied)

9. On the basis of law laid down by the Apex Court, the Apex Court held that once benefit of the status has been taken prior to the judgment passed by Apex court in *Milind's Case* then other benefits were not be made available to the employees, it was only available to the doctor or to the such students those who have carried out their studies on the basis of the law laid down by the Apex Court in *Milind's Case*. The present case relates to the employment and not to the admission in the higher or technical education.

10. The Apex Court has also explained the scope of the *Milind's Case* for not taking an action against the person those to have taken the advantage of the wrong status certificate and the said case subsequently since had already explained in Apex Court in two of the aforesaid cases, therefore, the petitioner cannot be given benefit of the *Milind's Case* by directing the respondents for not taking any action against the petitioner as employment is obtained by submitting a false certificate, which ultimately has also been cancelled by the high power committee. It is also not the case of the petitioner that petitioner belongs to the ST community and is Halba.

11. In view of the aforesaid law laid down by the Apex court I do not find any case for interference and the petition stand dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 1452

WRIT PETITION

Before Mr. Justice J.K. Maheshwari

2 May, 2008*

SUNIL THAKUR

... Petitioner

Vs.

HINDUSTAN PETROLEUM CORPORATION & anr.

.... Respondents

A. Constitution, Article 16 - Resignation - *Petitioner submitted resignation making a request for its acceptance prior to expiry of period of notice - Acceptance of resignation before expiry of period of notice not arbitrary.* (Para 23)

(क) संविधान, अनुच्छेद 16 — त्यागपत्र — याची ने त्यागपत्र इस निवेदन के साथ प्रस्तुत किया कि इसे सूचना अवधि की समाप्ति के पूर्व स्वीकार किया जाये — सूचना अवधि समाप्ति से पूर्व त्यागपत्र स्वीकार किया जाना मनमाना नहीं।

B. Constitution, Article 16 - Resignation - *Withdrawal of - Resignation once accepted cannot be permitted to be withdrawn as the relations of employer and employee ceases with effect from the date of its acceptance.* (Para 24)

(ख) संविधान, अनुच्छेद 16 — त्यागपत्र — वापस लेना — एक बार स्वीकार किये गये त्यागपत्र को वापस लेने की अनुमति नहीं दी जा सकती क्योंकि त्यागपत्र स्वीकार करने की तारीख से नियोजक एवं कर्मचारी के संबंध समाप्त हो जाते हैं।

Cases referred :

(2005) 8 SCC 314, (1978) 2 SCC 301, (2003) 1 SCC 701, 1989 Suppl. (2) SCC 175, (2007) 4 SCC 492, (1977) 3 SCC 321, (2007) 8 SCC 212, (1996) 3 SCC 364, (1988) 4 SCC 364, (1984) 2 SCC 141, (1978) 2 SLR 425 (Del).

Petitioner in person

Bharat Chitile, for the respondents

O R D E R

J.K. MAHESHWARI, J.:—This petition is filed invoking jurisdiction under Article 226 of the Constitution of India assailing the acceptance of the resignation dated 03/10/05 Annexure-P/1 and the rejection of the request for withdrawal of the resignation vide letter dated 13/10/05 (Annexure-P/2).

2. It is the case of petitioner that he had joined the respondent Corporation as Officer trainee on 09/01/89 and confirmed with effect from 09/01/90, he was promoted up to the Officer Grade-C. As per order dated 09/09/04 and posted as Executive Operation Officer LPG Bottling Plant at Indore. Petitioner has submitted his resignation on 23/09/05 addressed to General Manager LPG as per Annexure-P/4, due to insufferable humiliation and harassment at the hands of the respondents. It is further stated that the Corporation has framed their Service Rules, having application to all the officers including petitioner and published in the Personal Manual of the Corporation, the rule 11.1 (iii) deals resignation. The petitioner has received the information through the Executive Director LPG by a registered letter accepting of his resignation Annexure-P/1 dated 03/10/05. He has objected vide Annexure-P/6 dated 06/10/06 and said acceptance of the resignation was unlawful, invalid and against the Rules of the Corporation. It is contended that he has withdrawn his resignation, prior to expiry of notice period of one month; however, rejection thereof by the Corporation as per letter dated 13/10/05 Annexure-P/2 conveying to receive your that the cheques towards SBFS from the Plant Manager, LPG Plant Manual.

3. On 15/10/05 petitioner was intimated telegraphically by the Plant Manager LPG Bottling Plant Indore to collect his dues from the Office; however, by another letter dated 25/10/05 he had again asked to receive their dues, which was not responded by petitioner, therefore, a letter dated 09/11/05, along with three cheques were sent to him settling the terminal dues which were not encashed and an intimation has been given in this respect vide Annexure-P/7 and P/10. Petitioner has contended that as per the rules of Corporation, if any departmental enquiry was pending against the employee his resignation could not have been accepted if tendered without sanction by the authority competent to dismiss him. It is said, an enquiry was pending against him; however, without prior sanction acceptance of his resignation was not valid; thus, acceptance of his resignation is contrary to the rules. It is further contended that an employee of the Corporation may resign either by giving one month notice or by depositing one month salary. In the present case he has not deposited one month's salary; however, acceptance of his resignation prior to one month on 03/10/05 and communicated by the order impugned dated 30/09/05 is arbitrary and with utmost haste with the bias intention, therefore also, the acceptance of his resignation is arbitrary. It is also said, he has applied for withdrawal of resignation on 06/10/05, within one month, therefore, rejection thereof is illegal.

4. It is said that because the petitioner has raised various issues of corruption, against the higher officers; however, the respondent Corporation had decided to quit him, and in activation to their motive the resignation of petitioner was accepted within one week, without expiry of notice period of one month, which was not permissible; however, the acceptance of his resignation vide letter dated 03/10/05 Annexure-P/1 is illegal. It is also stated that a regular employee of the Corporation having legal right to withdraw his resignation prior to expiry of notice period i.e., one month; however, the letter of resignation dated 23/09/05 ought to have treated as notice and must be accepted after one month, the acceptance of the resignation within 7 days is arbitrary. In support of his contention reliance has been placed on a judgment of the apex Court in the case of *Shrikant S.M. v/s Bharat Earth Movers Limited* (2005) 8 SCC 314 and urged if an employee resigns without specifying the date of its acceptance, such resignation must be accepted only after one month. Reliance has also been placed on a judgment of the apex Court in the case of *Union of India & Ors v/s Gopal Chandra Mishra & Ors* reported in (1978) 2 SCC 301. It is further argued by him, that he has not received terminal benefits till withdrawal of the resignation i.e., 06/10/05; however, the master and servant relationship had continued up to 06/10/05 i.e., date of withdrawal of the resignation, therefore, withdrawal is illegal. Reliance has also been placed on a judgment of *Dr. Prabha Atri v/s State of UP and others* (2003) 1 SCC 701 wherein the Court has observed that the letter of resignation to relinquish the job or office once for all may be treated as notice of resignation. While interpreting the word 'with immediate effect' as mentioned in the letter of resignation the apex Court has observed that such letter and wording thereof could not be given undue importance de hors the context tenure of language used and the purport as well as the remaining portion of the letter indicating the circumstances in which it was written. However, it is urged that the letter of resignation Annexure-P/4 may be treated as notice of resignation and it may be accepted only after expiry of one month in terms of the Rules.

5. It is also stated that the respondent Corporation has offered the salary of 22 days in lieu of the notice period after its acceptance; however, the letter of resignation which may be made effective as per the Company's Rules with effect from completion of one month. It is also argued that petitioner was not intimated by the competent authority, under his signatures regarding acceptance of the resignation which, is the Director Marketing and the Director Human Resources, therefore, communication made by the Executive Director LPG dated 03/10/05 for acceptance of the resignation cannot be treated valid. It is said that petitioner has never sought release from the service of the Corporation with immediate effect as mentioned in the communication of the acceptance of resignation and for this reason he has not deposited one month salary, therefore, the acceptance of the resignation is improper. In the said submissions it is requested that the communication of acceptance of the resignation Annexure-P/1 and of rejection

of the letter of withdrawal of resignation Annexure-P/2 may be ordered to be quashed and petitioner may be reinstated with all consequential benefits.

6. Respondents by filing their reply has not disputed the status of Corporation and admitted it falls within the meaning of the 'State' for the purpose of Article 12 of the Constitution. The appointment of the petitioner and his promotion has also not been disputed. It is said that on promotion petitioner was transferred to Shahdol in Jabalpur LPG Regional Office and vide letter dated 15/06/04 directed to handover the charge to new incumbent at Indore and to report duty on or before 26/04/04 at the transferred place, but he has not complied those instructions and remained unauthorized absent for about two months. He had resumed his duties on 29/09/04 only when his place of posting was changed at Indore as Executive Operation Officer Indore LPG Plant. It is further contended that while remaining at Indore on his new assignment he was continued to remain unauthorized absent up to a long period, chart showing his absence is filed as Annexure-R/2. It is said that various letters were given to him to remain present, but he absented himself willfully from the duty, on 13/06/05 he had submitted his first resignation, which was withdrawn prior to its acceptance. He has again submitted his resignation on 23/09/05, but after its acceptance an unsuccessful attempt of withdrawal of the said resignation was made vide letter dated 06/10/05. In the return the Service Rules, as referred, having application admittedly and by producing the file notes it is stated that on receiving the letter of resignation dated 23/09/05 the respondents took up various steps in accepting the resignation by following the rules.

7. On 26/09/05 the Senior Human Resources Officer West Zone has obtained Vigilance and other clearance, thereafter, on 30/09/05 Director Marketing gave its sanction accepting his resignation with immediate effect as desired by him for taking another employment. It is stated that due to his willful continuous absence, non-grant of notice period is of little consequence, particularly when he himself requested for acceptance of resignation with immediate effect, therefore, Corporation has not insisted him for one month's notice. It is also said that petitioner is a Salary Grade-'C' Officer and the competent authority was Functional Director (Director Marketing) with Director P & A (Director Human Resources) on obtaining clearance from the Functional General Manager LPG and General Manager Human Resources Development, according to rule 11.1(iii) (b) the competent authority has concurred with the proposal of acceptance of resignation. In view of the said submissions it is urged that the resignation of the petitioner has rightly been accepted on 30/09/05 and communicated vide letter dated 03/10/05, therefore, acceptance of the resignation of the petitioner and its communication is in accordance with the Service Rules. The respondents in their reply has not disputed the letters of petitioner dated 03/10/05 Annexure-P/5, and 06/10/05 Annexure-P/6 which was rejected on 13/10/05 vide Annexure-P/2 by the authority competent. In view of the said facts, it is urged that the acceptance of such resignation cannot be termed as arbitrary or contrary to the Rules, bias or illegal.

8. Shri Bharat Chitle counsel appearing for the petitioner has taken through me the language of the letter Annexure-P/5 dated 03/10/05 and tried to justify the action of the Corporation and contended that the language of such letter indicates that petitioner was not willing to withdraw his resignation submitted voluntarily. It is further said that the language of the letter Annexure-P/4 indicate that petitioner wants to quit from the employment immediately; thus, looking to the prayer as made by him the resignation was immediately accepted; however, deviation, if any, from the Rules in accepting the resignation prior to one month is not fatal and the employer is having right to accept the resignation once the employee relinquishes his employment voluntarily. In view of the said submission it is urged that acceptance of the resignation prior to one month notice cannot be termed as arbitrary. In support of the said contention reliance has been placed on a judgment of the apex Court in the case of *Punjab National Bank v/s P.K. Mittal* 1989 Suppl. (2) SCC 175. Reliance has further been placed on the judgment of the apex Court in the case of *Secretary Technical Education, U.P. v/s Lalit Mohan Upadhyay*, reported in (2007) 4 SCC 492 and submitted that withdrawal of the resignation must be prior to its acceptance and the letter Annexure-P/6 submitted by the petitioner after its acceptance having no consequence. In support of such contention reliance has further been placed on a judgment of the Supreme Court in the case of *State of Haryana v/s Ramkumar Mann*, (1977) 3 SCC 321.

9. Shri Chitle has further relied upon the judgment of the apex Court in the case of *Chief Commercial Manager South Central Railway, Secunderabad & others v/s G. Ratnam & others*, (2007) 8 SCC 212; *State Bank of Patiala & others v/s S.K. Sharma*, (1996) 3 SCC 364 and the case of *J.R. Raghupathy & others v/s State of A.P. & others*, (1988) 4 SCC 364. The said judgments were relied to support his contention that the Rules of the Corporation are having no statutory force, therefore, it cannot be enforced through Court by issuing writ in the nature of mandamus, and deviation, if any, from the Rules may not result the action of the respondents as arbitrary or illegal.

10. After having heard the petitioner in person and Shri Bharat Chitle, counsel appearing for the respondent/Corporation the judgments relied upon by the parties are required to be taken note of. The petitioner has relied upon the judgment of *Shrikant S.M.* (supra), wherein the facts were: the appellant was the officer of M/s Bharat Heavy Earth Movers Limited, who was not assigned any work; however he got upset and tendered a letter of resignation on January, 1993 that he was thankful to the Chief Managing Director for giving him opportunity to serve the esteemed organization but want to leave the Company. He, therefore, requested to treat his resignation and relieve him from the duties as per Company rules. The said letter was proceeded with and accepted treating it resignation by the Deputy General Manager (Personnel) on the said day and the appellant was informed accordingly. It was also intimated that the appellant would be entitled to receive pay towards notice period as per Company rules. By another letter of

even date he was intimated that his casual leave has been sanctioned and directed to pay balance amount. But prior to its acceptance appellant had submitted 2nd letter indicating the future date of acceptance of resignation i.e., 15th January'93 and prior to the said date he has withdrawn such resignation on 8th January'93. However, it was argued by a subsequent letter, future date to relinquish the job was given by appellant prior to which date it was withdrawn, therefore, acceptance of the resignation was held improper. In view of these facts the apex Court in reference to the Company rules has observed as under:-

"11. Plain reading of the above rule makes it clear that a permanent employee may resign from service by giving one month's notice in writing or by paying one month's basic pay in lieu of notice to the company. Admittedly, the appellant had not paid one month's basic pay in lieu of notice to the company. It is, therefore, clear that since the letter of resignation was as per company rules, it was to become effective after one month. The learned single Judge was also of the same opinion. He observed in the order that the company rules required an employee to resign by giving one month's notice in writing, or if he wanted to be relieved immediately, by paying one month's pay in lieu of notice period. Since the appellant had not paid one month's pay in lieu of notice along with his letter of resignation, it could safely be presumed that he had tendered his resignation letter by giving a notice of one month in writing to the employer. The learned single Judge then observed that the 'intention' of the appellant to resign from service was accepted by the employer on the same day, i.e., January 04, 1993 and he was informed that he would be relieved from service at once. According to the learned single Judge, though by another letter of the same date, the appellant was informed that he had been granted casual leave from January 05, 1993 to January 13, 1993 and January 14, 1993 being holiday, he would be relieved from January 15, 1993, it was within the powers of the company under the rules and would not change the legal position that once the resignation was accepted, it was effective. Hence, it was not open to the appellant to withdraw the resignation on January 08, 1993. Referring to several judgments, the learned single Judge held that since the resignation was accepted, the company was fully justified in ignoring and not accepting the request of the appellant made in his letter dated January 08, 1993. In the opinion of the learned single Judge, the act of relieving the appellant was a subsequent act, which had nothing to do with the act of accepting the resignation and the appellant was not entitled to any benefit."

The apex Court has further considered the meaning of term resignation, which means spontaneous relinquishment of one's own right; however, in the given facts the action of respondents to accept resignation was held arbitrary.

11. The other judgment of *Gopal Chandra Misra* (supra) was a known case

of resignation of a Judge of the High Court, wherein a Judge of the Allahabad High Court had submitted his resignation stating that because he will remain on leave till 31st July '77; however, resignation may be made effective from 1st August, 1977. The said letter of resignation was withdrawn on 15th July 1977 prior to the future date of acceptance. In that context the apex Court has observed that the intention to give up or relinquish the office is the concomitant act of relinquishment and necessary to constitute a complete and operative resignation; the complete and effective act of resignation from an office must have a link with resigner to terminate its tenure, because the resignation which was submitted by a Judge have taken place on a date different from a date chosen by the Judge, it subverts his exclusive constitutional right to resign his office with effect from a date of his choosing. However, the apex Court has further observed that in absence of a legal control or constitutional bar, a 'prospective' resignation can be withdrawn at any time before it becomes effective when it operates to terminate employment or the office tenure of the resignor.

12. In the case of *Dr. Prabha Atri* (supra) the appellant who was working as Anesthetist in Kamla Nehru Memorial Hospital, Allahabad, was served with a memo for certain lapses. Thereupon she left the hospital without intimation and even on request to give anesthesia to one of the patient admitted in emergency she had not cared. In reply to said memo it is stated by her that the appellant has verbally clarified her position; however, prayed for withdrawal of the said memo. In later part of reply it was also mentioned that if her explanation is not acceptable to the Management then treat it my resignation' and accept it with immediate effect. In the said facts the apex Court in reference to a judgment of *P.K. Ramchandra Iyer v/s Union of India* (1984) 2 SCC 141 has observed, thus.--

"8. In *P.K. Ramchandra Iyer v. Union of India* this Court had an occasion to consider the nature and character of a letter written by one of the petitioners in that case who after stating in the letter that he has been all along patiently waiting for the redressal of his grievance, yet justice has not been done to him and

"as such, after showing so much patience in the matter, I am sorry to decide that I should resign from the membership of the Faculty in protest against such a treatment and against the discrimination and victimization shown to me by the Head of the Division in the allotment of students of 1968 and 1969 batches and departmental candidates". (SCC p.172, para 34)

In that context, this Court observed that the callous and heartless attitude of the Academic Council in seizing an opportunity to get rid of him by treating the said letter to be a letter of resignation when really he was all along making representations seeking justice to him and

out of exasperation of the said person wrote the letter stating that he only honourable course left open to him was to resign rather than suffer (SCC p.173, para 34).

In *Moti Ram v. Param Dev* this Court observed as hereunder: (SCC pp.735-36, para 16)

"16. As pointed out by this Court, 'resignation' means the spontaneous relinquishment of one's own right and in relation to an office, it connotes the act of giving up or relinquishing the office. It has been held that in the general juristic sense, in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and the concomitant act of its relinquishment. It has also been observed that the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. (See: *Union of India v. Gopal Chandra Mishra*.) If the act of relinquishment is of unilateral character, it comes into effect when such act indicating the intention to relinquish the office is communicated to the competent authority. The authority to whom the act of relinquishment is communicated is not required to take any action and the relinquishment takes effect from the date of such communication where the resignation is intended to operate in praesenti. A resignation may also be prospective to be operative from a future date and in that event it would take effect from the date indicated therein and not from the date of communication. In cases where the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself, would not be sufficient to result in relinquishment of the office and some action is required to be taken on such communication of the intention to relinquish, e.g., acceptance of the said request to relinquish the office, and in such a case the relinquishment does not become effective or operative till such action is taken. As to whether the act of relinquishment of an office is unilateral or bilateral in character would depend upon the nature of the office and the conditions governing it."

10. We have carefully considered the submissions of the learned counsel appearing on either side, in the light of the materials and principles, noticed supra. This is not a case where it is required to consider as to whether the relinquishment envisaged under the rules and conditions of service is unilateral or bilateral in character but whether the letter dated 9-1-1999 could be treated or held to be a letter of resignation or relinquishment of the office, so as to sever her services once and for all. The letter cannot be construed, in our view, to convey any spontaneous intention to give up or relinquish her office accompanied by any act of relinquishment. To constitute a "resignation", it must be unconstitutional and with an intention to operate as such. At best, as observed by this Court in the decision in *P.K. Ramchandra Iyer* it may amount to a threatened offer more on account of exasperation, to resign on account of a feeling of frustration born out of an idea that she was being harassed unnecessarily but not, at any rate, amounting to a

resignation, actual and simple. The appellant had put in about two decades of service in the hospital, that she was placed under suspension and exposed to disciplinary proceedings and proposed domestic enquiry and she had certain benefits flowing to her benefit, if she resigns but yet the letter dated 9-1-1999 does not seek for any of those things to be settled or the disciplinary proceedings being scrapped as a sequel to her so-called resignation. The words "with immediate effect" in the said letter could not be given undue importance dehors the context, tenor of language used and the purport as well as the remaining portion of the letter indicating the circumstances in which it was written. That the management of the hospital took up such action forthwith, as a result of acceptance of the resignation is not of much significance in ascertaining the true or real intention of the letter written by the appellant on 9-1-1999. Consequently, it appears to be reasonable to view that as in the case reported in P.K. Ramchandra Iyer the respondents have seized an opportunity to get rid of the appellant the moment they got the letter dated 9-1-1999, without due or proper consideration of the matter in a right perspective or understanding of the contents thereof. The High Court also seems to have completely lost sight of these vital aspects in rejecting the writ petition."

13. In view of the foregoing judgments it is apparent that if a resignation has been tendered by an employee it may be given effect with effect from the date which he has chosen and the acceptance prior to the said date is improper and the prospective resignation may be withdrawn prior to the said date. It is further held that merely writing word 'accept resignation with immediate effect' should not be given undue importance dehors the context to the letter written by an employee under the circumstances. It is further held that the requirement of the rule must be observed, otherwise it may be presumed that tendering his resignation may amount to a notice to the employer and it should be accepted under the rules after expiry of the period of notice, and it may be withdrawn prior to the said date of notice.

14. On the other hand, as per judgment relied upon by the respondents in the case of *Punjab National Bank* (supra) the apex Court had an occasion to deal with the issue of resignation of permanent Bank Officer, who had tendered his resignation on 21st January'86 giving future date of 30th June'86. The said resignation was accepted with immediate effect waiving the condition of notice under sub-clause (2) of Clause 20 of the Bank Regulation. The apex Court had held that the resignation could take effect either on the date chosen by the employee in the notice i.e., 30th June'86 or on expiry of three months period. But the Bank can not accept it on any earlier date. The apex Court had further held that the notice period may be reduced by the Bank on the request of the employee but not otherwise and the resignation may be withdrawn before the date on which it has become effective.

15. In the case of *Delhi Electric Supply Undertaking v/s Tara Chand* (1978) 2 SLR 425 (Del) the apex Court has held as under.--

"The regulation permitted the termination of the services of a servant of the undertaking "on notice of three months from either side without any cause to be assigned in case of permanent servants." The employee in that case sent a letter to the employer stating that 'he was compelled to resign for various reasons' and this resignation was accepted by the undertaking. The Delhi High Court in its judgment (to which one of us was a party) observed that notice under the regulation was intended for the benefit of the employer which could, if it considered necessary or proper, waive the period of notice and accept the resignation with immediate effect. But that was a case where the employee, though bound to give three months' notice, expressed his desire to resign with immediate effect and it was also accepted by the employer. It was not the case that he had given notice indicating a desire to be relieved at a future date. The analogy of that case would have applied to the present case as well if the respondent here had expressed his desire to be relieved immediately even before the expiry of the three months' notice period and the bank had accepted it. The employer would then certainly have been entitled to accept the resignation, as requested by the employee, waiving the notice period. The distinction between that case and the present one is that, here, the employee has chosen a future date on which resignation would be effective but he is being forced to "resign" before such date."

In view of the foregoing it is apparent that if an employee has made a request to accept his resignation with immediate effect such prayer may be accepted by the employer waiving the condition of notice period because such acceptance by employer is on the request of the employee concerned:

16. In the case of *Secretary Technical Education U.P.* (supra) the apex Court has taken in to consideration the right of withdrawal of resignation prior to its acceptance and in paras 17 and 18 it has observed that normally the resignation becomes effective and his service/office tenure gets terminated when it is accepted by the competent authority. An employee is entitled to withdraw his resignation before its acceptance by the competent authority.

17. In the judgment *Ramkumar Mann* (supra) the apex Court has held that once the resignation was submitted voluntarily which was accepted by the Government; however, on and from that date the relationship of employer and employee between the respondent and State ceases and, thereafter, he had no right whatsoever either to claim the post or a right to withdraw his resignation which has already become effective.

18. The other set of judgments relied upon i.e., the in *Chief Commercial Manager, South Central Railway, Secunderabad & others* (supra) and *J.R.*

Raghupathy and others (supra) were relied in the context that the administrative rules, regulations and instructions which have no statutory force do not give rise of any legal right in favour of the aggrieved party and cannot be enforced in a Court of Law, but in both these cases the sub-delegated legislation i.e., executive instructions were relied upon and which were not issued under the statute, therefore, the Court has taken the view the administrative rules, regulations and instructions cannot get enforced through Court. There cannot be any doubt to accept such legal proposition, but in the present case the Company has framed its own rules after agreement with the union members which are sacrosanct to the employer and employee both and binding in between as per agreements. Therefore, the respondents cannot derive the benefit of those judgments. The another judgment relied upon by the respondents in the case of *State Bank of Patiala & Ors.* (supra) it was held that the substantive and procedural compliance which may be mandatory can be waived in favour of them to whom it was made. The said analogy cannot also be disputed by this Court, but in the facts and circumstances emerging in the present case it cannot be said that the rules which are relied upon by one party and accepted by other implementation thereto is also admitted in reply, therefore, in the said context the acceptance of the said analogy may be relevant for the purpose of this case.

19. In the present case it is not in dispute that on account of unauthorized absent a departmental enquiry was pending against the petitioner. Bare reading of the letter Annexure-P/4 indicates that it is not a simple letter of resignation, but written making various allegations in five pages and in the last petitioner has mentioned to resign from the post which was accepted on 30/09/05 and communicated on 03/10/05 vide Annexure-P/1. The file notes accepting resignation have been produced for perusal of the Court whereby the HR Department West Zone dated 27/09/05 the factum of pendency of the domestic enquiry was mentioned, but because the resignation was submitted by the petitioner. However, it was proposed to drop the inquiry, the said file note was concurred by the Director, Marketing and HR on 30/09/05. It is further seen from the record that the acceptance of resignation during pendency of the departmental enquiry was sanctioned on 30/09/05 by the authority who is competent to dismiss him and a parallel file note was placed by the HR Department West Zone, wherein the order to accept resignation was simultaneously passed on the same date i.e., 30/09/05 and communicated vide letter dated 03/10/05. The Rules relevant which are applicable on both the parties are reproduced below:-

“11.1(iii) Resignation

- a) Under no circumstances will the resignation of an officer whose conduct is under investigation be accepted, if tendered without the sanction of the authority competent to dismiss him.
- b) In all cases, a regular officer resigning from the services of the

Corporation is required to give 30 days notice or pay 30 days salary in lieu of notice period under the present terms of appointment or as specified.

c) Resignations are accepted by the Competent authorities as indicated below:

Grades	Authority
A	Functional GM with GM-HRD
B,C,D	Functional Director with Director P&A
E,F,G	Recommended by Functional Director with Director P&A, accepted by C&MD.
H and above	Board of Directors.

Before processing the resignation of an officer, it must be ensured that all outstandings to his account are cleared. It is also necessary to ensure that he vacates Corporation Accommodation, if any, and hands over possession of Corporation property to his immediate Supervisor/Competent Authority on acceptance of his resignation."

20. In the context of the said Rules, the request made in letter of resignation by petitioner in Annexure-P/4 is reproduced as under:-

"I do not want to quit the services of the Corporation but in view of the reasons and circumstances mentioned above and to enable me take up another employment to ensure survival of my family I am forced to quit from the services of the Corporation and I hereby submit my resignation from the services of the Corporation. Please note that since it is question of survival of my family, I may be required to take up any employment immediately while still on the payroll of the Corporation during the period form the resignation because this situation has come because my 100% salary is being deducted and that too even before the inquiry is over."

21. By the file note it is apparent that the authority competent to dismiss the petitioner has granted sanction on 30/09/05 to accept his resignation on the same date resignation was accepted, because the petitioner has requested for its acceptance prior to expiry of period of notice due to survival of his family. The said acceptance was acknowledged by him without any objection vide letter Annexure-P/5 on 03/10/05, the relevant thereof is reproduced herein below:-

"1. ... I do not intend to take back the resignation but I can also not accept a situation where Corporation keeps my money with it for I do not how much time because I have experienced that earlier also the Corporation has kept my money illegally."

"3. the circumstances mentioned in my resignation letter described the condition in which I was forced to resign and since management has accepted the resignation it is of little consequence to me what action is

taken on the matter and acceptance of resignation without clearing my dues further proves that management wants to harass me.”

22. After two days he had again written a letter of conditional withdrawal of the resignation Annexure-P/6 dated 06/10/05, which was rejected on 13/10/05. Thus, the acceptance of resignation Annexure-P/1 and the rejection thereof cannot be said to be arbitrary. In view of the discussions made herein above, it is to be further held that acceptance made by the respondent Corporation cannot be held in violation of the procedure as prescribed in Rule 11 (i) (iii) (a)(b)(c).

23. In the facts of the present case, it is the petitioner who himself has submitted the resignation making a request for its acceptance prior to expiry of the period of notice due to survival of his family as apparent from the language quoted herein above. However, if the Corporation has accepted the prayer made by the petitioner prior to the period of notice, it cannot be said to be arbitrary, in view of the judgment of the Apex Court as referred herein above in the case of *Delhi Electricity Supply Undertaking* (supra). The argument as advanced by the petitioner relying on the judgment of *Dr. Prabha Atre* (supra), *Shrikant S.M.* (supra) and *Gopal Chandra Mishra* (supra) having no application to the facts of the present case, because in case of *Dr. Prabha Atre* she has submitted reply to the show cause notice and in the last it was observed that if the reply is not found satisfactory it may be treated as resignation which may be accepted with immediate effect. In the case of *Shrikant S.M.* (supra) it was mentioned that the resignation may be accepted as per the Company Rules but by subsequent letter the date of acceptance was given to accept it from prospective date, prior to which it was withdrawing and in the case of *Gopal Chandra Mishra* (supra) the date of resignation was of future date prior to which it was withdrawn. Therefore, the directions as issued by the apex Court in the aforesaid three cases having no application to the facts of the present case.

24. In view of the foregoing discussions, it is apparent that it is the petitioner who himself has tendered his resignation, making request of waving the period of notice because he was required to take employment somewhere else for survival to him and his family, however, on acceptance of such resignation, vide letter Annexure-P/5 dated 03/10/05, he has prayed for settlement of dues mentioning that he does not intend to take back the resignation. Later on, on 06/10/05, he has submitted letter of withdrawal of resignation; such action of petitioner is based on after thought. The arguments regarding arbitrary exercise of the power of acceptance of resignation prior to completion of one month notice period cannot be accepted because it is a case in which the petitioner himself has made a request for acceptance of his resignation with immediate effect and if such request is accepted by the Corporation, it cannot be said to be arbitrary or in violation of rules particularly in view of the acknowledgment of such acceptance vide letter Annexure-P/5. Therefore, irresistible conclusion which may be arrived at in this

case is that the acceptance of resignation on 30/09/95 by the Corporation vide Annexure-P/1 and rejection of the withdrawal letter of resignation vide Annexure-P/2 dated 13/10/05 has rightly been ordered.

25. Accordingly, I find no merit in this petition and it is hereby dismissed. However, it is observed that if the Corporation has not settled and paid all the dues of petitioner, the same may be finalized and released within the period of two weeks. In the facts and circumstances of the case, parties are directed to bear their own costs.

Petition dismissed.

I.L.R. [2008] M. P., 1465

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

7 May 2008*

MANOHAR SWEETS

... Petitioner

Vs.

COMMISSIONER OF INCOME TAX

... Respondent

Income Tax Act (43 of 1961), Section 127 (2) - Power to transfer cases -
Petitioner's cases transferred from Indore to Bhopal circle of Income Tax Department without giving opportunity of hearing and assigning any reason -
Held - *Concerned authority has not complied the provisions of Section 127(2) -*
Order transferring cases quashed - However, concerned authority may take necessary steps as per provision of Section 127(2). (Paras 9, 11 & 15)

आयकर अधिनियम (1961 का 43), धारा 127 (2) - मामलों के अंतरण का अधिकार - याची के मामले सुनवाई का अवसर दिये बिना और कोई कारण बताये बिना आयकर विभाग के इंदौर वृत्त से भोपाल वृत्त में अंतरित कर दिये - अभिनिर्धारित - संबंधित प्राधिकारी ने धारा 127 (2) के उपबन्धों का पालन नहीं किया - मामलों के अंतरण का आदेश अभिखण्डित - तथापि संबंधित प्राधिकारी धारा 127 (2) के उपबन्ध अनुसार आवश्यक कदम उठा सकते हैं।

Cases referred :

(1976) 102 ITR 281 = AIR 1976 SC 437, (2006) 283 ITR 532 (All), 2008 AIR SCW 373

G.M. Chaphekar with B.M. Masani, for the petitioner

R.L. Jain with Veena Mandlik, for the respondent

ORDER

SHANTANU KEMKAR, J.:- This order shall also govern disposal of Writ Petition No.3252 of 06, as common question of law and facts is involved in both the aforesaid petitions.

2. For convenience, the facts of Writ petition No.3241 of 06 are being taken.
3. The petitioner claims to be a registered partnership firm having its principal

place of business and office at Jawahar Marg, Indore and was being assessed for the purposes of Income Tax at Indore. A notice dated 1.11.1993 (Annexure P-1) was issued to the petitioner by the Commissioner, Income Tax, Bhopal invoking the powers conferred under the provisions of S. 127 (1) of the Income Tax Act, 1961 (for short the 'Act') for transfer of petitioner's cases from Indore to Bhopal circle of the Income Tax Department. Petitioner objected to the aforesaid notice (Annexure P-1) by its letter dated 19.11.1993 (Annexure P-A-1) and dated 13.12.1993 (Annexure P-1-C). After receipt of petitioner's letters objecting the proposed transfer of cases, no action was taken by the Revenue and the proceedings were dropped; and the petitioner was continued to be assessed by the Income Tax Officer, Indore under the jurisdiction of Commissioner, Income Tax, Indore.

4. When the matter stood thus, in the year 2005, the petitioner learnt that once again the Commissioner, Income Tax, Bhopal has initiated the proceedings for transfer of petitioner's cases from Indore to Bhopal. The Petitioner, therefore, submitted a letter by way of an objection on 21.11.05 (Annexure P-6), objecting transfer of its file from Indore to Bhopal.

5. In reply to the petitioner's aforesaid objection, the Commissioner, Income Tax, Indore informed to the petitioner vide letter dated 25.11.05 (Annexure P.7) that the department has already decided to transfer the petitioner's cases from Indore to Bhopal and in the circumstances, petitioner would be at liberty to question the jurisdiction of the Assessing Officer, Bhopal. Feeling aggrieved by this communication, petitioners have filed these petitions.

6. Mr. G. M. Chaphekar, learned Sr. Counsel has argued that powers to transfer the cases are conferred upon the authorities under S. 127 of the Act. However, the impugned decision with regard to transfer of petitioner's cases has been taken contrary to the provisions contained in S. 127 of the Act. according to him the transfer of cases is from the jurisdiction of one Commissioner of the Income Tax Department to the another Commissioner of the Income Tax Department, Section 127 (2) of the Act would be attracted. He submitted that the petitioner has not been given any opportunity of hearing before taking the decision, moreover neither the decision has been communicated nor there are any reasons in the decision for the transfer of cases. Thus, according to him the decision of transfer of cases is liable to be quashed.

7. Mr. R. L. Jain, learned Sr. counsel appearing for Revenue, has submitted that the impugned decision taken by the Revenue with regard to transfer of petitioner's cases from Indore to Bhopal was justified, as the petitioner is carrying on its business at Bhopal and not at Indore. In the circumstances, according to him, no case for interference is made out.

8. Admittedly, petitioner's Income Tax Returns were being subjected to assessment by Income Tax Officer, Indore since last 30 years after the year 1993 on petitioners objecting to the proposed transfer of cases, no action was taken. Thereafter in the year 2005, vide communication dated 25.11.2005 (Annexure P-7), the petitioner was

informed by the Commissioner Income Tax, Indore that the decision has already been taken for transferring its cases from Indore to the Assessing Officer, Bhopal under the Commissioner Income Tax Bhopal.

9. A bare perusal of the impugned communication dated 25.11.05 (Annexure P-7) it is clear that the commissioner, Income Tax, Indore from whose jurisdiction the cases were to be transferred, had not given any opportunity of being heard to the petitioner, nor reasons have been recorded in this regard. It is also revealed from the order sheets dated 18.7.2007 and 18.9.2007 recorded by this court that the Revenue had failed to file an affidavit stating therein that before ordering the transfer of the cases an opportunity of hearing was afforded to the petitioner and reasons were recorded for transfer the cases. On the other hand, the documents produced by the Revenue at the time of hearing, shows that pursuant to the request of transfer of cases made by the Commissioner, Income Tax, Bhopal vide letter dated 28.10.2005, the Commissioner, Income Tax-II, Indore took following decision on 8.11.2005:-

“I agree with the contention of the C.I.T, Bhopal that the assessee's concerned are assessable at Bhopal and not at Indore. This being so, there is no need to pass any order u/s 127 (2) of the I.T. Act. The relevant case records may be sent to the CIT, Bhopal immediately for necessary action at his end regarding the jurisdiction of his AOs over the relevant cases”.

Thereafter, in compliance of the decision dated 8.11.2005, the petitioner's files were transferred from Indore to Bhopal alongwith letter dated 15.12.2005.

10. Since the cases are being ordered to be transferred from the jurisdiction of Commissioner, Indore to the jurisdiction of Commissioner, Bhopal, section 127(2) of the Act providing power to transfer the cases in such situation would have application. Section 127 reads thus :-

Power to transfer cases:

“S.127. (1) The Director General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.

(2) Where the Assessing Officer or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to whom the case is to be transferred are not subordinate to the same Director General or Chief Commissioner or Commissioner :-

(a) where the Directors General or Chief Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Director General or Chief Commissioner or

Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;

(b) where the Directors General or Chief Commissioners or Commissioners aforesaid are not in agreement, the order transferring the case may, similarly, be passed by the Board or any such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, authorise in this behalf.

3. Nothing in sub-section (1) or sub-section (2) shall be deemed to require any such opportunity to be given where the transfer is from any Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction and the offices of all such officers are situated in the same city, locality or place.

4. The transfer of a case under sub-section (1) or sub-section (2) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Assessing Officer or Assessing Officers from whom the case is transferred.

11. Sec. 127 (2) of the Act provides that where the Assessing Officer from whom the case is to be transferred and the Assessing Officer to whom the case is to be transferred are not subordinate to the same Commissioner, then, if, both Commissioners are in agreement, then Commissioner from whose jurisdiction the case is to be transferred may after giving reasonable opportunity to the Assessee of being heard in the matter whenever it is so possible and after recording reasons for doing so, pass the order. The entire action on the part of the Revenue lacks compliance of the requirement of Section 127 (2) of the Act.

12. In the matter of *Ajantha Industries and ors. V. Central Board of Direct Taxes and ors.* [1976] 102 ITR 281], the Supreme Court while considering the scope of S. 127 (1) of the Act has held that, "the requirement of recording reasons under S. 127 (1) of the Income Tax Act, 1961, for the transfer of a case from one Income Tax Officer to another, is a mandatory direction under the law and non communication thereof to the assessee is not saved by showing that the reasons exists in the file although not communicated to the assessee. Recording of reasons and disclosure thereof are not a mere idle formality. When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the vice of violation of the principles of natural justice on account of omission to communicate the reasons is not expiated".

13. In the matter of *R. K. Agarwal and ors V. Commissioner of Income Tax and ors.* [2006] 283 ITR 532 (All) a Division Bench of Allahabad High Court has followed the views expressed in the matter of *Ajantha Industries* (supra).

14. In the matter of *State of Himachal Pradesh V. Paras Ram & Ors.* (2008 AIR SCW 373) it has been observed by the Supreme Court that reasons are live links between the mind of decision taker to the controversy in question and the decision or conclusion arrived at. Failure to give reasons amounts to denial of justice. Reasons substitute subjectivity by objectivity. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before the court. The affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made.

15. Having regard to the law laid down by the Supreme Court, the clear provisions of S. 127 (2) of the Act and the documents produced before the court, I am of the view that the impugned decision/action taken by the respondent Revenue in transferring of petitioner's cases to Bhopal, is contrary to the requirement of S. 127 (2) of the Act and against the settled legal position and as such cannot be sustained.

16. Consequently, both the petitions are allowed. The impugned communication (Annexure P.7) is hereby quashed. However, Respondent Revenue is at liberty to take necessary steps, if so advised, for transfer of cases by adhering to the provisions of S. 127 (2) of the Act.

No orders as to costs. A copy of the order be retained in the connected writ petition.

Petition allowed.

I.L.R. [2008] M. P., 1469

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

14 May, 2008*

ANIL

... Petitioner

Vs.

STATE OF M. P. & ors.

... Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Sections 11, 40, 41(1)(B), M.P. Krishi Upaj Mandi (Mandi Samiti Ka Nirvachan) Rules 1997, Rules 14(b), 80, 82 - Representatives of traders holding licence - Nomination of 4th respondent as member to Board under category of representatives of traders holding licence - 4th respondent is trader but not elected as representative of traders holding licence - Held - Post of representatives of traders holding licence can only be held on being elected as provided under rules - Nomination of 4th respondent quashed - Petition allowed. (Paras 9 & 10)

कृषि उपज मंडी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 11, 40, 41(बी), म. प्र. कृषि उपज मंडी (मंडी समिति का निर्वाचन) नियम 1997, नियम 14(बी), 80, 82 - अनुज्ञप्तिधारी व्यापारियों (लाइसेंसी) के प्रतिनिधि अनुज्ञप्तिधारी व्यापारियों के प्रतिनिधियों के संवर्ग में चौथे

प्रत्यर्थी को बोर्ड में सदस्य के रूप में नामांकन – चौथा प्रत्यर्थी एक व्यापारी है परन्तु अनुज्ञप्तिधारी व्यापारियों का निर्वाचित प्रतिनिधि नहीं – अभिनि धारित – अनुज्ञप्तिधारी व्यापारियों के प्रतिनिधि का पद केवल निर्वाचित होने पर ही धारित किया जा सकता है, जैसा की नियमों में उपबन्ध है – चौथे प्रत्यर्थी का नामांकन अभिखण्डित – याचिका मंजूर।

Sunil Jain, for the petitioner.

Anand Pathak, Dy. G.A. for the respondent No.1.

G.K. Mandhanya, for the respondents No. 2 &3.

Vinay Zelawat, for the respondent No.4.

ORDER

SHANTANU KEMKAR, J.:—This is a petition in the nature of quo warranto filed under Art.226 of the Constitution of India seeking quashment of the order dated 30.12.2005 (Annexure P/2) issued by the State Government nominating the 4th respondent as “Member” of the Madhya Pradesh State Agricultural Marketing Board (for short, “the Board”).

2. The petitioner claims to be a licenced trader of Mandi Committee Badnawar. He has filed a certificate (Annexure P/1) of his election as “representatives of traders” issued under rule 80 Madhya Pradesh Krishi Upaj Mandi (Mandi Samiti Ka Nirvachan) Rules 1997 (for short “the Rules”).

3. The State Government exercising its powers conferred by Section 41(1)(B) of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (for short, “the Adhiniyam”) nominated various members to the Board in addition to the ex-officio members. The 4th respondent has also been nominated as member to the Board under category of “representatives of traders holding licence” in any market committee within the State as provided under Section 41(B)(h) of the Adhiniyam vide impugned order dated 30.12.2005 notified in Madhya Pradesh Rajpatra dated 13.1.2006.

4. The case of the petitioner is that the State Government could not have nominated the 4th respondent as Member of the Board as he was not qualified under Section 41 (B) (h) of the Adhiniyam to be so nominated. According to the petitioner the 4th respondent being not a representative of the traders of the Market Committee his nomination as Member of the Board deserves to be quashed.

5. The stand of the respondents in their return is that the 4th respondent though is not an elected representative of the licenced traders but he being licenced trader in Mandi Committee Badnawar, the State Government has rightly nominated him by invoking powers under clause (h) of Section 41(1)(B) of the Adhiniyam. The respondents further stated that in absence of word “elected” in sub-clause (h) of Section 41(1)(B) of the Adhiniyam, contention of the petitioner that the 4th respondent could not have been nominated, is misconceived.

6. Heard learned counsel for the parties and perused the annexures filed along with the petition and return.

7. Section 11 of the Adhiniyam deals with the constitution of Market Committee.

Sub clause (c) of Section 11 provides that in the Market Committee there shall be one representative of traders. For the election of traders representatives the mode of preparation of voters list is prescribed under rule 14 (b) of the Rules. Rule 82 of the Rules provides for election of traders representatives. After election the certificate to that effect has to be issued to the elected representatives of traders under rule 80 of the Rules. It is, thus, clear that in the Market Committee the representatives of traders are being elected and the petitioner is one such elected representatives of traders. It is also clear from Section 31 and 32 of the Adhiniyam that a trader has to obtain licence from the Market Committee to operate in the Market area.

8. Section 40 of the Adhiniyam provides for establishment of the Board. Section 41(1)(B) describes as to who can be nominated by the State Government as "member" of the Board. Section 41-(1)(B)(h) under which the 4th respondent has been nominated as Member reads as under:

"S.41 Constitution of Board-(1) The State Government shall constitute the Board which shall consist of the President and the following members, namely:-

B-Members nominated by the State Government

(f) xxx xxx xxx

(g) xxx xxx xxx

(h) Two representatives of traders holding licence in any Market Committee within the State.

(i)

(j)"

9. On bare reading of clause (h) extracted above it is clear that the State Government can nominate two Members of the Board from amongst the representatives of traders holding licence in any Market Committee within the State. Admittedly, the 4th respondent is a trader holding licence in Market Committee, Badnawar, but he is not a representative of traders holding licence. As already noticed the rules provide for the post of representatives of traders by election. Since the post of the "representatives of traders" can only be held on being elected as provided under rules, the contention of the respondent that in the absence of the word "elected" in clause (h) it is not necessary that the nomination could be only from the representatives of traders is wholly misconceived. In view of the clear provision that the nomination is to be made of two representatives of the traders, there remain no room to say that the requirement for being nominated as Member of the Board is only of holding of licence by a trader. Such interpretation would run contrary to clause (h) of Section 41(1)(B) of the Adhiniyam which clearly provides that the State Government shall nominate two representatives of traders holding licence in any Market Committee within the State.

10. In view of the aforesaid, when it is not in dispute that 4th respondent is not

representative of traders I have no hesitation to hold that the nomination of the 4th respondent by the State Government in exercise of powers conferred on it under Section 41(1)(b)(h) of the Adhiniyam is illegal and without any authority of law. The 4th respondent being not a representative of traders was and is ineligible under clause (h) of Section 41 (1)(B) of the Adhiniyam for being nominated as Member of the Board by the State Government.

11. Accordingly, the petition is allowed, the impugned order dated 30.12.2005 (Annexure P/2) issued by the State Government so far as it relates to nomination of the 4th respondent in the Board deserves to be and is hereby quashed. However, no orders as to costs.

Petition allowed.

I.L.R. [2008] M. P., 1472
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
11 March 2008*

SHYAMLAL

...Appellant

Vs.

DURGABAI

... Respondent

Hindu Marriage Act (25 of 1955), Section 25 - Permanent Alimony - 'At the time of passing of any decree' - Suit for grant of divorce dismissed by Trial Court - Permanent alimony to wife U/s 25 cannot be granted - Though her claim to maintenance stands preserved U/s 18(1) of the Hindu Adoptions and Maintenance Act and Section 125 Cr.P.C. (Paras 5 & 9)

हिन्दू विवाह अधिनियम (1955 का 25), धारा 25 — स्थायी निर्वाह व्यय — 'कोई डिक्री पारित होने के समय' — विवाह बिच्छेद का वाद विचारण न्यायालय द्वारा खारिज — धारा 25 के अन्तर्गत पत्नी को स्थायी निर्वाह व्यय नहीं दिलाया जा सकता — यद्यपि उसका भरण पोषण का दावा हिन्दू दत्तक एवं भरण पोषण अधिनियम की धारा 18 (1) एवं धारा 125 दण्ड प्रक्रिया संहिता के अन्तर्गत सुरक्षित।

Cases referred :

AIR 1989 A.P. 08, (1993) 3 SCC 406, AIR 2001 MP 106, AIR 2005 SC 422

Y.S. Rathore, for the appellant

Ramlal Patidar, for the respondent

J U D G M E N T

N.K. MODY, J.:—Being aggrieved by judgment and decree dated 26/07/07 passed by Additional District Judge, Jaora, District Ratlam in Civil Suit No. 60-A/05, whereby the application filed by the appellant for divorce was dismissed by the learned Trial Court and it was directed that the appellant shall pay a sum of Rs.3,000/- per month as permanent alimony, the present appeal has been filed.

2 Learned counsel for appellant submits that grievance of the appellant is

that no direction can be issued by the learned Court below regarding payment of permanent alimony where the suit for divorce has been dismissed. Learned counsel further submits that since in the present case the petition for divorce was dismissed, therefore, learned Court below committed jurisdictional error in holding the appellant liable for payment of permanent alimony @ Rs.3,000/- per month. Learned counsel further submits that as per proceedings initiated by the respondent for maintenance under Section 125 Cr.P.C. registered as M.Cr.C.No.142/05 was dismissed by judicial Magistrate First Class Mandsaur vide order dated 24/08/06 against which Criminal Revision was filed by the respondent which was registered as Criminal Revision No. 197/06 and the same was dismissed on 13/07/07 on the ground that respondent is not residing with the appellant without any sufficient cause. It is submitted that in the facts and circumstances of the case, learned Court below committed error in holding the appellant liable for payment of permanent alimony.

3. Learned counsel for respondent submits that there is no bar for issuance of direction of permanent alimony, when the suit for divorce is dismissed. Learned counsel submits that the direction issued, was passed on the application filed by the respondent. It is also submitted that after holding inquiry regarding financial status of the appellant learned court below has issued the impugned direction which requires no interference. Hence the appeal deserves to be dismissed.

4. Learned counsel for respondent placed reliance on a decision in the matter of *Silla Jagannadha Prasad v/s Smt.Silla Lalitha Kumari* reported in AIR 1989 A.P. 08 wherein Division Bench of Andhra Pradesh High Court has held that Section 25 of the Hindu Marriage Act empowers every Court deciding a matrimonial matter to give the relief of maintenance to either party irrespective of the fact whether the petition for any of the reliefs mentioned in Ss.9 to 13 of that Act is dismissed or allowed, whether the reliefs are granted or declined.

5. In response to it learned counsel for appellant placed reliance on a decision of Hon'ble Apex Court in the matter of *Chand Dhawan (Smt) v/s Jawaharlal Dhawan* reported in (1993) 3 SCC 406 wherein Hon'ble Apex Court has held that "the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the Court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. When by Court intervention under the Hindu Marriage Act, affectation of disruption to the marital status has come by, at that junction, while passing the decree, it has the power to grant permanent alimony or maintenance, if that power is invoked at that time. It also retains the power subsequently to be invoked on application by a party entitled to relief. And such order, in all events remains within the jurisdiction of that Court, to be altered or modified as future situations may warrant. Without the marital status being affected or disrupted by the matrimonial court, under the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The matrimonial court, a court of special jurisdiction, is not meant to pronounce upon a claim of maintenance

without having to go into the exercise of passing a decree, which implies that unless it goes onwards, moves or leads through, to affect or disrupt the marital status between the parties. By rejecting a claim, the matrimonial court does make an appealable decree in terms of Section 28, but that neither affects nor disrupts the marriage. It certainly does not pass a decree in terms of Section 25 for its decision has not moved or done anything towards, or led through, to disturb the marriage, or to confer or take away any legal character or status. It was further observed by the Hon'ble Apex Court that without affectation or disruption of the marital status, a Hindu wife sustaining that status can live in separation from her husband and whether she is living in that state or not, her claim to maintenance stands preserved in codification under Section 18(1) of the Hindu Adoptions and Maintenance Act; Relief to the wife may also be due under Section 125 of the Code of Criminal Procedure. But this is a measure in the alternative to provide for destitute wives.

6. However, the Court is not at liberty to grant relief of maintenance simpliciter obtainable under one Act (Hindu Adoptions and Maintenance Act) in proceedings under the other (Hindu Marriage Act). Both the statutes viz. The Hindu Marriage Act and the Hindu Adoptions and Maintenance Act codified as such are clear on their subjects and by liberality of interpretation inter-changeability cannot be permitted so as to destroy the distinction on the subject of maintenance. These two enactments keeping apart, the remaining two, i.e. Hindu Succession Act, 1956 and Hindu Minority and Guardianship Act, 1956 are a package of enactments, being part of one socio-legal scheme applicable to Hindus. When distinctive claims are covered distinctly under two different statutes and agitable in the courts conceived of thereunder, the plea that when a claim is otherwise valid, choosing of one forum or the other should be of no consequence, cannot be sustained. These are not mere procedural technicalities or irregularities, but are matters which go to the root of the jurisdiction."

7. By this judgment Hon'ble Apex Court over-ruled the decision given by Andhra Pradesh High Court. In another decision of this Court in the matter of *Badriprasad v/s Smt. Urmila Mahobiya* reported in 2001 MP 106 it was held that permanent alimony to wife cannot be granted if a petition for divorce between the parties is dismissed.

8. In the matter of *Ramesh Chandra Rampratapji Daga Vs. Rameshwari Ramesh Chandra Daga*, Reported in AIR 2005 SC 422, the Hon'ble Apex Court has observed that section 25 of the Hindu Marriage Act is an enabling provision. It empowers the court in a matrimonial case to consider facts and circumstances of the spouse applying and decide whether or not to grant permanent alimony or maintenance. It was also observed that when the legislature has used such wide expression as 'at the time of passing of any decree,' it encompasses within the expression all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring marriage as null and void under

Section 11, annulment of marriage as voidable under Section 12 and divorce under Section 13. It was also observed by the Hon'ble Apex Court that it is with the purpose of not rendering a financially dependant spouse destitute that Section 25 enables the Court to award maintenance at the time of passing any type of decree resulting in breach in marriage relationship.

9. In the present case from perusal of the record it is evident that vide order dated 13/07/06 interim maintenance was awarded @ Rs.500/- per month from the date of the order and Rs.1,000/- as litigation expenses. No issue was framed regarding entitlement of the respondent for permanent alimony. Apart from this the petition filed by the appellant for divorce was dismissed. In the circumstances the direction of the learned court below for payment of permanent alimony was beyond jurisdiction of the court and learned court below committed error in awarding permanent alimony @ Rs.3,000/- per month. In view of this appeal stands allowed. Part of the judgment and decree whereby permanent alimony has been awarded @ 3,000/- per month is set aside. However, it is made clear that respondent is at liberty to take appropriate steps for grant of maintenance and if any proceedings are initiated by the respondent then the competent authority shall proceed with the same at the earliest in accordance with law. No order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 1475
APPELLATE CRIMINAL
Before Mr. Justice S.K. Kulshrestha
29 January, 2008*

DURGA PRASAD
Vs.
STATE OF M.P.

--- Appellant

--- Respondent

Penal Code, (45 of 1860), Sections 100 & 304 Part II - Right of Private Defence - Appellant had inflicted a single injury by awl (Tocha) to deceased - None of accused persons were carrying any weapon - Appellant and acquitted persons were received bleeding injuries - No explanation given by prosecution - Genesis of the incident is shrouded in mystery - Trial Court found that appellant had exceeded right of private defence - Held - Appellant received injury on thoracic - Dimension and size of injury caused to appellant indicates that he did not exceed the right of private defence - Appellant acquitted - Appeal allowed.

(Para 16)

दण्ड संहिता, (1860 का 45), धारा 100 व 304 भाग दो - प्रायवेट प्रतिरक्षा का अधिकार - अपीलार्थी ने मृतक को टोचे से एक उपहति कारित की - कोई भी अभियुक्त अपने साथ कोई हथियार नहीं लिये था - अपीलार्थी व दोषमुक्त व्यक्तियों को रक्तरंजित उपहतियाँ हुई - अभियोजन द्वारा

कोई स्पष्टीकरण नहीं दिया - घटना की उत्पत्ति रहस्यमय व छिपायी गयी - विचारण न्यायालय ने पाया कि अपीलार्थी ने प्रायवेट प्रतिरक्षा के अधिकार का उल्लंघन किया - अभिनिर्धारित - अपीलार्थी को छासी पर उपहति आयी - उपहति का आकार व विस्तार यह दर्शाते हैं कि उसने प्रायवेट प्रतिरक्षा के अधिकार का उल्लंघन नहीं किया - अपीलार्थी दोषमुक्त - अपील मंजूर।

Case referred :

AIR 1976 SC 2263

P.K. Saxena with Sunil Verma, for the appellant.

Girish Desai Dy. A.G., for the respondent.

J U D G M E N T

S.K. KULSHRESTHA, J. :- The appellant has filed this appeal against the judgment dated 11th March, 1995, passed by the learned 1st A.S.J., Shajapur in S.T. No.62/1993, whereby, while acquitting co-accused Mahesh Kumar and Ramchandra, the appellant has been convicted for an offence under Section 304, Part-II of the I.P.C. and sentenced to R.I. for three years and fine of Rs.5,000/-. In case of default in payment of fine, the judgment directs him to suffer additional R.I. for one year.

2. The accused was tried alongwith two acquitted co-accused for offence punishable under Section 302 read with Section 34 of the I.P.C. The prosecution had alleged that on 19/11/1992, the appellant and two accused persons, in furtherance of their common intention, assaulted Kailash and caused his death. The report(Ex-P/12) of the incident was lodged by Manoharlal(P.W.7). It was stated by Manoharlal(P.W.7) that there was a crowd gathered in front of the house of Chogmal and when he went to see as to what was happening, Mahesh picked up a "Tocha"(awl) and accused Durgaprasad assaulted the deceased with the said instrument. Kailash also assaulted appellant Durgaprasad and caused injuries, and on intervention, the witnesses Manoharlal(P.W.7) and his brother Bhojraj(P.W.8) also sustained injuries. Kailash was given milk to drink, but by that time he became cold and died.

3. The matter was investigated and after collecting the evidence and recording the statement of witnesses under Section 161, the charge-sheet was filed.

4. The accused abjured their guilt and stated that they were innocent. The learned A.S.J., however, on trial, while acquitting co-accused Mahesh and Ramchandra, both sons of the appellant, convicted the appellant Durgaprasad for an offence punishable under Part-II of Section 304 of the I.P.C. It is this conviction of the appellant that this appeal has been filed assailing its legality and propriety.

5. Learned Senior counsel has invited attention to the testimony of Manoharlal(P.W.7) and Bhojraj(P.W.8) in order to emphasize that although these witnesses have sustained severe injuries and their presence at the time of the incident cannot, therefore, be doubted, the injuries received by Durgaprasad on the thoracic as deposed to by Dr. Ms. Sudha Rajawat(P.W.1) and the injuries received by Mahesh and Ramchandra both sons of the accused, having not been explained, the single injury caused by the appellant not by any conventional weapon

but by a 'tocha'(pointed instrument for making hole in the paper) cannot be said to have been in excess of the right of private defence available to the appellant on account of the injury inflicted to the appellant and his two sons.

6. The learned Dy. A.G. has, however, controverted the statement of the learned counsel and stated that the injuries found on the person of the accused and the two acquitted accused were not of any serious nature requiring the prosecution to explain the said injuries, with the result, the accused cannot claim benefit on the ground that their injuries have not been explained.

7. I have heard learned counsel for the parties and perused the record. In-so-far as the injuries caused to deceased is concerned, Dr. Dubey(P.W.9) has stated that it was a triangular injury having depth of three inches. The postmortem report(Ex-P/17) shows that the deceased had a small penetrating wound on his back $\frac{3}{4}$ " away towards left at the level of thoracic 3rd and 4th vertebra triangular in shape and measuring $\frac{1}{4}$ ". In his opinion, the medical expert has stated that the deceased died on account of shock and haemorrhage as a result of injury to vital organs and excessive bleeding.

8. Dr. Ms. Sudha Rajawat(P.W.1) examined the injuries of Manoharlal(P.W.7), who had abrasions on head, hands and forearm and also examined Bhojraj(P.W.8) who had an incised wound measuring $1" \times \frac{1}{4}" \times \frac{1}{4}"$ in the left arm.

9. Before advertng to the injuries of the witnesses and the deceased, it would be advantageous to refer to the injuries received by the appellant and his two sons acquitted Mahesh and Ramchandra. The certificate issued by the Doctor(Ex-D/2) indicates that appellant Durgaprasad had sustained an incised penetrating wound over back of chest 2" below the inferior angle of left scapula measuring $\frac{1}{4}" \times \frac{1}{4}"$ x upto thoracic cavity. There was fresh oozing of blood with slight swelling around the wound. In addition, there was an abrasion on the dorsal aspect of right index finger base measuring $\frac{1}{4}" \times \frac{1}{4}"$, tenderness over middle part of left leg and tenderness over lateral aspect of left arm.

10. The injuries received by acquitted accused Mahesh vide Ex-D/3 indicates that there was a lacerated wound over scapula with fresh clotted blood. The wound was at 2 O' clock position measuring $2" \times \frac{1}{2}" \times \frac{1}{4}"$, at 5 O' clock position measuring $1" \times \frac{1}{4}" \times \frac{1}{4}"$, at 8 O' clock position measuring $2" \times \frac{1}{2}" \times \frac{1}{4}"$ as also at 11 O' clock position measuring $2\frac{1}{2}" \times \frac{1}{2}" \times \frac{1}{4}"$. In addition, he had sustained injuries which had caused tenderness with slight swelling over the left arm, tenderness over left lateral side of chest with contusion $3" \times 1\frac{1}{2}"$ and tenderness on the right side of front of chest $1\frac{1}{2}"$ below the right nipple.

11. I may also at this stage, refer to Exhibit-D/4 in which the injuries of Ramchandra have been recorded by the doctor. Ramchandra had sustained abrasion over left elbow $1 \text{ cm} \times \frac{1}{2} \text{ cm}$, abrasion over left scapula region posteriorly $1 \text{ cm} \times \frac{1}{2} \text{ cm}$ with clotted blood, abrasion over right scapular region posteriorly over back $1\frac{1}{2} \text{ cm} \times \frac{1}{2} \text{ cm}$ with clotted blood present and contusion over left leg just 2" below the knee joint.

12. Since the learned A.S.J., has considered it a case of individual liability without arriving to any conclusion of free fight between two fractions, it is necessary to examine the testimony of P.W.7 Manoharlal and P.W.8. Bhojraj.

13. Manoharlal(P.W.7) in his deposition has stated that he was in his house when he heard the shouts outside. When he rushed towards the shop of Mahesh, he met his brother Bhojraj and then both of them proceeded towards the shop and saw that Mahesh, Durgaprasad and Ramchandra were assaulting Kailash. Durgaprasad had a tocha, Mahesh was armed with a screw driver and Ramchandra wielded lathi. Durgaprasad stabbed Kailash with the tocha and when this witness tried to intervene, Mahesh assaulted him resulting in injury on his left arm. He also stated that one lathi blow was struck by Ramchandra over his head. He has confirmed having lodged F.I.R.(Ex-P/12) and having been sent to the hospital for examination of his injuries. This witness has denied the suggestion that injuries were caused by the accused persons after they had assaulted the accused and his sons. P.W.8 Bhojraj is also an injured witness. He has stated that when he rushed to the shop of Durgaprasad where the incident was taking place, he saw that Kailash was being assaulted by the appellant and two co-accused, who were slapping him. Thereafter, they brought a farsi(axe) and Mahesh assaulted him with a screw driver and Kailash was assaulted by Durgaprasad with a tocha, which caused injury on the back of the deceased. It is significant that no attempt has been made by the prosecution to explain the injuries of the accused persons.

14. While it cannot be disputed that prosecution is not obliged to explain the injuries of the accused unless the injuries are of serious nature, in the present case, the injuries found on Durgaprasad was of the size $\frac{1}{4}$ " x $\frac{1}{4}$ " and on thoracic cavity. The evidence also shows that the accused persons had sustained bleeding injury with the result, their injuries could not have gone unnoticed by the prosecution witnesses. The eye witnesses have, therefore, not unfolded the correct genesis of the incident and have ascribed that in the quarrel the injuries were inflicted.

15. The learned A.S.J., in paragraph 39 of its judgment has stated that there was a quarrel and, therefore, these persons were liable for their overt acts. I may record, unless it was a case of free fight, the right of private defence could not have been denied to the accused persons if it was available to them on the basis of the material on record.

16. The learned A.S.J., has also observed that even assuming that right of private defence accrued in favour of Durgaprasad, he had clearly exceeded the same and, therefore, he was guilty under Section 304, part-II. From the evidence on record, I am unable to subscribe to the view expressed by the learned A.S.J. The injuries of Durgaprasad(Ex-D/2), co-accused Mahesh and Ramchandra have already been referred to above and assuming that the injuries of Ramchandra even not measured, there cannot be any doubt that injuries of Durgaprasad measuring $\frac{1}{4}$ " x $\frac{1}{4}$ " on thoracic and accused Mahesh, who had two bleeding

lacerated wounds could have gone unnoticed by the prosecution witnesses. The right of private defence accrued in favour of the appellant having been conceded by the learned A.S.J., then the nature of the injuries caused to Durgaprasad as per its dimension and sizes clearly indicates that Durgaprasad did not exceed the right. It cannot be denied that Durgaprasad assaulted the deceased once as against injuries received by him on thoracic and his sons Mahesh and Ramchandra. Under these circumstances, the learned A.S.J., erred in holding that Durgaprasad exceeded right of private defence. Infact in the facts and circumstances of the case, Durgaprasad had inflicted a single injury and none of the accused persons were carrying any conventional weapon, Durgaprasad clearly acted in the right of private defence and did not exceed the said right.

17. The Supreme Court in *Laxmisingh Vs. State of Bihar* 1976 S.C. 2263 has observed that on failure of the prosecution to explain the injuries of the accused, the consequences that ensue that prosecution has suppressed the genesis of the case and if the accused takes the plea of having acted in his defence, the said plea is rendered probable. In the present case, genesis of the incident is shrouded in mystery and even otherwise the facts clearly gives an indication that accused Durgaprasad had acted in right of private defence. It is trite that in exercise of right of private defence, a person exercising the right cannot take advantage of the situation and cause more harm than is necessary but at the same time, one cannot be oblivious of the fact that same cannot be weighed in golden scale. The person exercising the right has to make sure that the danger and the apprehension has abated. A single injury in the facts and circumstances of the case, therefore, could not lead to any assumption that right was exceeded.

18. In the result, this appeal succeeds and is allowed. The conviction of the appellant Durgaprasad and the sentence awarded to him, are set aside and he is acquitted of the charge against him. The appellant Durgaprasad is on bail. His bail bond shall stand discharged.

Appeal allowed.

I.L.R. [2008] M. P., 1479
APPELLATE CRIMINAL
Before Mr. Justice S.C. Sinho
6 February, 2008*

ARVIND KUMAR

Vs.

STATE OF M.P.

... Appellant

... Respondent

Essential Commodities Act (10 of 1955), Sections 3,7, M.P. (Khadya Padarth) Sarvajanic Nagrik Purti Vitran Scheme, 1991, Clause 6(5), 12 - Violation of Scheme - Appellant convicted for violating provisions of Scheme -

Held - Scheme was not made in exercise of any power conferred by order U/s 3 of Act - Scheme is made in exercise of Executive Power of State - Appellant cannot be convicted for violating provisions of Scheme - Appellant acquitted - Appeal allowed. (Para 6)

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3, 7, म.प्र. (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति वितरण योजना, 1991, खण्ड 6(5), 12 - योजना का उल्लंघन - अपीलार्थी को योजना के उपबन्धों के उल्लंघन के लिये दोषसिद्ध किया गया - अभिनिर्धारित - योजना अधिनियम की धारा 3 के अंतर्गत आदेश में प्रदत्त किसी भी शक्ति के प्रयोग में नहीं बनाई गई थी - योजना राज्य की कार्यपालिक शक्तियों के प्रयोग में बनाई गई - अपीलार्थी को योजना के उपबन्धों के उल्लंघन के लिये दोषसिद्ध नहीं किया जा सकता - अपीलार्थी दोषमुक्त - अपील मंजूर।

Cases referred :

AIR 1981 SC 2001, 2005 (II) MPWN 86, Cr.A. No. 179/92, 1990 ILJ 348, 1993 (1) MPWN 120.

L.N. Saklle, for the appellant.

Vikram Singh, Panel Lawyer for the respondent.

J U D G M E N T

S.C. SINHO, J.:-Special Sessions Judge, Sagar in Special Case No.3/92 recording conviction of appellant u/s 3/7 of the Essential Commodities Act, 1955 for violating the provision of Section 6 (5) and (12) of the Madhya Pradesh (Khadya Padarth) Sarvajanik Nagrik Purti Vitran Scheme, 1991 (hereinafter referred to as "Scheme" only) and sentenced to imprisonment for a period of 3 months and to pay fine of Rs.2,000/- and in default of fine to suffer R.I. for a period of 3 months. Being aggrieved appellant has preferred this appeal u/s 374 (2) of Cr.P.C.

2. It is undisputed that appellant was working as assistant manager/Sales man in Seva Sahakari Sanstha Naryawali (Sagar). On 2.5.1992 an inspection was made by Shri Dharam Das(P.W.1) Dy. Registrar Co-Operatives alongwith Food Officer Shri Mishra and Food Inspector Rajendra Kumar Shrivastava (PW 2) and others. Appellant was working there as assistant manager-cum-Salesman. On Inspection they found that the stock of 1 Quintal of Sugar and 31 Kg of Kerosene oil was not distributed to the customers and it was found missing in the shop. Therefore appellant violated the clause 6(5) and (12) of the "Scheme". Appellant was prosecuted for violating the provisions of the "Scheme" and they found that appellant has distributed the said 1 Quintal of Sugar and 31 Kg of Kerosene oil not to real customers because on register the Ration Cards numbers or signatures of customers were missing.

3. Appellant was prosecuted for the violation of the provisions of the "Scheme". During trial Dharmdas (PW 1) Dy. Director Co-operatives, Rajendra Kumar Shrivastava (PW 2) Food Inspector, (PW 7) Vimal Kumar Jain, Bhagwandas Pandey (PW 8) and R.C. Patele (PW 9) Co-Operative Officials were examined and they have found that the accused appellant has sold 1 Quintal of Sugar and

31 Litres of Kerosene oil to such persons whose cards numbers were not mentioned in the distribution register nor the signatures of the customers were obtained in the register. Rajendra Kumar Shrivastava (PW 2) has prepared Ex. P/1 Panchanama and further seized Art. A register of sale of kerosene oil, Art. B register for Sale of other commodities and Art. C stock register for kerosene oil and all other items. As seizure memo Ex.P/2 these registers were seized from R.K.Shrivastava by Nanehelal Aharwar (PW 6) Sub Inspector Naryawali in presence of Suryabhan Tiwari (PW 5) Head Constable. These facts are further certified by Vimal Kumar Jain (PW 7), Bhagwandas Pandey(PW 8) and R. C. Patle (PW 9). After considering the evidence Special Court found that the appellant was guilty for violating the provisions of the aforesaid "scheme" and convicted and sentenced him as aforesaid.

4. The only contention of Shri Sakalle learned counsel for the appellant was that this "Scheme" is not covered u/s 3/7 of E.C.Act therefore appellant can not be convicted for breach of clauses 6 (5) and Clause (12) of the "Scheme". There can not be any prosecution of appellant because this "Scheme" is not formulated u/s 3 of the E.C. Act and not a part of MP (Foodstuff Distribution Control) Orders 1960, there can not be any punishment u/s 7 of the E.C.Act 1955 hence the whole trial was illegal and without jurisdiction therefore appellant can not be convicted.

5. I have heard both the counsel at length.

6. The validity of the "Scheme" was considered in A.I.R. 1981 SC 2001 *Madhya Pradesh Ration Vikreta Sangh and others v. State of MP* and it was held that the "Scheme" was not made in exercise of any power conferred by the order u/s 3 of E.C. Act Clause 2(d) of the order only defines the expression of "Government Scheme" and it does not confirm any power to make scheme. The definition itself postulates that the "scheme" is one which is made in exercise of its Executive Power. The executive power of the State is provided in Art. 162 of the Constitution extends to the matter with respect of which the legislature of the State has power to make laws. It was the duty and burden of the prosecution to prove the nature of "scheme", and whether the "scheme" for violation of which appellant has been convicted is framed under the provisions of Section 3/5 of the E.C.Act.

7. It will be fruitful to reproduce *Shiv Kumar v. State of MP* 2005 (II) MP Weekly Note No.86 where it is held:

"Section 3 of the Essential Commodities Act confers power on the Central Government as well as on the State Government to provide for regulations for prohibition, production, supply and distribution of essential commodities and section 7 of the Act provides penalties for contravention of any order made under section 3. First condition for prosecuting a person under section 7 is that there should be a contravention of the control order issued by the State Government under section 3 of the Essential Commodities Act. Any Scheme framed under the executive powers by the State Government may

not come within the purview of the control order and for that it would not be necessary that it should satisfy the provisions laid down under section 3 of the Act. Therefore, in order to prosecute a person for violation of the terms and conditions of the scheme it is necessary for the prosecution to prove that the scheme is in the nature of control order and further to prove that the same has been issued under section 3 of the Essential Commodities Act and in the absence of such an evidence, any scheme framed under executive power cannot fall within the purview of the control order and the person can not be prosecuted and held guilty."

In the case of *M.P. Ration Vikreta Sangh Jabalpur and others v. State of M.P. And another* [1981 J.L.J. 564] it has been held that the scheme was not made in exercise of any powers conferred by the Act. Division Bench held that the scheme was not made in exercise of powers conferred under section 3 read with section 5 of the Essential Commodities Act and was made only in exercise of executive powers of State. It was also pointed out that the aforesaid decision was affirmed by the apex court in appeal in the case of *M.P. Ration Vikreta Sangh Society v. State of M.P.* [AIR 1981 SC 2001]. Similar view has been taken by this Court in the cases cited above. Therefore, when any scheme framed is covered under section 3/5 of the Essential Commodities Act the case can be taken for its violation but if the scheme is not framed under the authority of the Act and it is only framed under the executive powers of the State Government, accused cannot be prosecuted for the violation of executive orders of the State Government."

8. This view is further fortified in *Gyarsi v. State of MP Criminal Appeal No. 179/92* reported in 2006 M.P.H.T. Page --- and *Mohan v. State of MP* 1990, J.L.J. 348 and *Maniram v. State of MP* 1993 -Vol. 1 Short note 120.

9. For the reasons above this appeal is allowed the conviction of the appellant u/s 3/7 of the Act for breach of Section 6 (5) and 12 of the Madhya Pradesh (Khadya Padarth) Sarvajanic Nagrik Purti Vitran Scheme, 1991 so also the sentences passed thereunder are hereby set aside. Fine if paid be refunded to appellant.

Appeal allowed.

**I.L.R. [2008] M. P., 1483
APPELLATE CRIMINAL**

*Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saxena
26 February, 2008**

ANTU & ors.

--- Appellants

Vs.

STATE OF M.P.

--- Respondent

Penal Code, (45 of 1860), Sections 149, 302 - Murder - Unlawful Assembly - Common Object - Accused appellants came to shop of deceased together - Most of them armed with deadly weapons - One of the accused pierced spear on left side of chest of deceased - Assaults were followed by other accused persons in same transaction - Held - Knowledge of members of unlawful assembly that death of deceased would thereby be caused can be safely attributed - Inference of knowledge and formation of unlawful assembly can be drawn from behaviour of members of assembly - Accused persons rightly convicted u/Ss 302/149 - Appeal dismissed. (Paras 15 and 23)

दण्ड संहिता, (1860 का 45), धारा 149, 302 - हत्या - विधि विरुद्ध जमाव - सामान्य उद्देश्य - अभियुक्तगण अपीलार्थीगण मृतक की दुकान पर साथ-साथ आये - उनमें से अधिकतर घातक हथियार लिये हुए थे - एक अभियुक्त ने मृतक की छाती के बायी ओर भाले से वेध दिया - इसी क्रम में अन्य अभियुक्तों ने हमले किये - अभिनिर्धारित - विधि विरुद्ध जमाव के सदस्यों के ज्ञान में यह था कि इसके द्वारा मृतक की मृत्यु कारित होगी यह सुरक्षित रूप से उपारोपण (attribute) किया जा सकता है - जमाव के सदस्यों के व्यवहार से विधि विरुद्ध जमाव की रचना और ज्ञान का अनुमान निकाला जा सकता है - अभियुक्तों को धारा 302/149 के अधीन उचित रूप से दोषसिद्ध पाया - अपील खारिज।

Cases referred :

(2003) 2 SCC 257, (2003) 5 SCC 537, (2004) 13 SCC 189, AIR 1978 SC 1647, AIR 2006 SC 1639, AIR 2006 SC 951, (2004) 10 SCC 443, AIR 2004 SC 2477, (2002) 3 SCC 327.

*Surendra Singh with R.K. Chaturvedi and S.K.P. Verma, for the appellants.
S.K. Rai, Govt. Advocate for the respondent.*

J U D G M E N T

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :-All the above 05 appeals arise out of the common judgment, hence they are being disposed of by this common judgment.

2. Appellants have filed these appeals against the judgment dated 05.02.1999 passed by the First Additional Sessions Judge, Jabalpur, in Sessions Trial No.306/1996, convicting them under Sections 302, 302/149 and 148 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs.2000/- and rigorous imprisonment for 04 years with fine of Rs.1000/-, on each count

respectively. Appellant Soyab Khan alias Babloo, has further been convicted under Section 324 of the Indian Penal Code and sentenced to rigorous imprisonment for one year with fine of Rs.200/-.

3. 18 persons were tried for the offences under Sections 147, 148, 302, 302/149, 307 and 307/149 of the Indian Penal Code. Except the appellants, the Trial Court acquitted 11 accused persons.

4. The facts, as alleged by the prosecution are that all the accused persons were annoyed with Chhannu alias Umesh Sethi (deceased) and Mustaq Khan (complainant) for not getting prominence in the orchestra of Ganesh Ustav Samiti, Gokulpur. Because of that, on 08.03.1996 at about 8:30 pm, when Mustaq Khan was sitting in his Egg Shop situated at Gokulpur main road and was talking to Umesh Sethi and Takali, who were sitting in front of the shop, suddenly all the accused persons variously armed with deadly weapons reached there. Appellant Gudda alias Kali dealt a blow of "Ballam" (spear) on the left side of the chest of Umesh Sethi and when Mustaq Khan (PW-1) tried to save him, appellant Soyab Khan dealt a blow of "Gupti" on his left arm. When Takali (PW-4) in order to save himself tried to run away, some of the accused persons chased him. However, he was saved by neighbours Jagdish Yadav (PW-2) and Yashpal (PW-3). Antu, Babloo alias Sustti, Mannu, Ashok, Shanker, Munna, Vijay alias Mithun and Vijay Balmik continued to surround Mustaq Khan and Umesh Sethi. Gudda alias Kali and Babloo alias Sustti caused several injuries to Umesh Sethi. After assaulting Mustaq Khan and Umesh Sethi, all the accused persons ran away from the spot. Bobby alias Rakesh Sethi (PW-5), brother of Umesh Sethi, also reached there. Then Mustaq Khan and Umesh Sethi in an auto went to the Police Station Ranjhi and lodged the report (Exhibit P/1), from where they were sent to Victoria Hospital, Jabalpur for treatment and medico-legal examination. By the time Umesh Sethi reached the hospital, he expired. His dead body was then sent to the Medical College & Hospital, Jabalpur for post mortem examination.

5. Dr. Anoop Jain (PW-10) carried out the post mortem examination and found the following injuries on the body of deceased :-

(1) Penetrating wound on the left side of the chest wall, 3 inches lateral to left nipple in 4th intercostal space, oval in shape. One inch diameter, sharp edges, direction is backward medially upto the depth of 6 inches.

(2) Incised wound on anterior surface of left upper arm, upper 1/3rd 2 x 1 inches through and through to lateral surface, exit wound is 1 x 1 inch cutting the muscles and subcutaneous tissues. Direction is lateral and backward, 2 inches length.

(3) Incised wound on lateral surface of left upper arm, upper 1/3rd, 1 x 1/2 inch skin-deep, below injury No.2.

(4) Incised wound on left forearm, upper 1/3rd anterior surface, oval in

shape, $1\frac{1}{2} \times 1 \times 1\frac{1}{2}$ inch.

(5) Incised wound on top of left shoulder, $1 \times \frac{1}{2}$ inch skin deep.

(6) Incised wound on lateral surface of left knee joint, $1 \times \frac{1}{2}$ inch skin deep.

(7) Contusion present over the left thigh, lateral surface 2×1 inches transversely.

(8) Contusion present over the left leg, lateral surface 2×2 inches.

(9) Abrasion and contusion present on right upper arm, lateral surface $1 \times \frac{1}{2}$ inch, transversely present.

On internal examination, he found penetrating wound on the left 4th intercostal space passing through the left pleura, left anterior part of lung through and through making route of $1 \times \frac{1}{2}$ inch upto the left pericardial border and making route in to pericardium and left ventricle lateral wall upto the cavity of ventricle $\frac{1}{2} \times \frac{1}{2}$ inch, whole of left pleural cavity as well as pericardial cavity is full of blood.

In the opinion of the doctor, the injuries were antemortem in nature and could be caused by the sharp penetrating object and sharp-hard object. The cause of death could be injury to heart, leading to haemorrhage and death. Mode of death was homicidal. The post mortem examination report is Exhibit P/5.

6. Dr. J.N.Sen (PW-6) examined the injuries of Mustaq Khan (PW-1) and found one incised wound of $1 \times \frac{1}{2}$ inch on left upper arm on anterior medial side and another incised wound $1\frac{1}{2} \times \frac{1}{2}$ inch on the left upper arm, medial side near axilla. Both injuries were bleeding and were caused by hard and sharp object. Injury report is Exhibit P/4.

7. After requisite investigation, charge sheet was filed against 18 accused persons and the case was committed for trial. On charges being framed, accused persons abjured their guilt and pleaded false implication. Appellants Ajay @ Babloo and Gudda @ Kali, pleaded alibi and also examined Pooranlal (DW-2) and Ramlal (DW-3) as defence witnesses.

8. Learned Trial Judge relying upon the evidence of eyewitnesses Mustaq Khan (PW-1), Jagdish Yadav (PW-2), Yashpal (PW-3), Takali alias Umesh Kumar (PW-4) and Rakesh Kumar Sethi (PW-5), convicted the appellants as aforesaid and, however, not finding the prosecution evidence sufficient against other 11 accused persons, acquitted them of all the charges.

9. Shri Surendra Singh, learned senior counsel, appearing for appellants Antu and Ajay alias Babloo alias Sustu, submitted that they have been falsely implicated and their participation in the incident has not been established beyond doubt. Alleged eyewitnesses have improved upon their earlier versions in naming appellant Antu before the Trial Court. They have exaggerated in attributing a knife in his hand.

He submitted that in the circumstances of the case, it has not been established that the common object of the unlawful assembly was to cause death of Umesh Sethi. At the most, the aforesaid appellants could be held liable under Section 326/149 of the Indian Penal Code.

10. Shri S.K.P. Verma, learned counsel for appellant Gudda alias Kali alias Laxmi, submitted that the Trial Court committed error in convicting the appellant Gudda with the aid of Section 149 of the Indian Penal Code, as the allegation of the common object of the assembly to commit murder of the deceased was not established. He also submitted that the evidence of eyewitnesses was discrepant and contradictory and was not worthy of reliance.

11. Shri Yogesh Dhande, learned counsel for the appellant Soyab Khan, submitted that since appellant Soyab Khan is said to have caused only one simple injury with "Gupti" to Mustaq, he cannot be held liable under Section 302/149 of the Indian Penal Code.

12. Shri Ghanshyam Pandey, learned counsel for appellants Shanker alias Jhabra, Vijay and Nandi alias Mannad Singh, submitted that appellant Shanker and Vijay were not named in the First Information Report as well as in the statements of witnesses recorded under Section 161 of the Code of Criminal Procedure. According to him, it were Shankar Barau and Shanker Ben who were named in the First Information Report. It was not established that appellant Shankar alias Jhabra had participated in the incident. He submitted that the aforesaid appellants had no grudge against the deceased and infact the cause of incident was a quarrel between Khushwant Singh (a relative of Ajay alias Babloo alias Sust) and Rakesh Sethi (PW-5). There was no reason or motive for the aforesaid appellants to murder Umesh Sethi.

13. Shri S.K.Rai, Government Advocate for the State, on the other hand, has submitted that the evidence of eyewitnesses is reliable and trustworthy. Presence of Mustaq Khan (PW-1) is established by the fact that he suffered injuries in the incident. Jagdish Yadav (PW-2), Yashpal (PW-3) and Takali (PW-4) are independent witnesses. Evidence of eyewitnesses has been corroborated by the medical evidence of Dr.J.N.Sen (PW-6) and Dr.Anoop Jain (PW-10) who examined the injuries on the body of victims. He has submitted that there is enough evidence on record to show that the appellants had gone together at the shop of Mustaq Khan where the deceased was present and after assaulting him, ran away from the spot together. As such, it has been clearly established that the appellants had formed an unlawful assembly which had the common object of causing the death of Umesh Sethi.

14. We have heard the counsel of both the sides at length and perused the evidence and material on record.

15. The prosecution case rests on the testimony of five witnesses viz. Mustaq

Khan (PW-1), Jagdish Yadav (PW-2), Yashpal (PW-3), Takali alias Umesh Kumar (PW-4) and Rakesh Kumar Sethi (PW-5). We will analyze the testimony of these witnesses so as to find out the nature of offence committed and involvement of the appellants. Whether all the appellants, as alleged, were involved in the incident and if so, to what extent? First and foremost question involved in this case is, whether all the appellants had formed an unlawful assembly with a common object of committing the murder of Umesh Sethi. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing the offence is a member of the same assembly is guilty of that offence. The first clause contemplates the commission of an offence by any member of an unlawful assembly, which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act, which may not necessarily be the common object of the assembly; nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of an unlawful assembly. In the case of *Rajendra Shantaram Todankar Vs. State of Maharashtra and others*, (2003) 2 SCC 257, the Apex Court held that a mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149, either clause, is apparently attracted and the Court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 of the Indian Penal Code, merely because a criminal act was committed by a member of the assembly, every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act.

16. For examining the motive for committing the offence, we refer to the First Information Report (Exhibit P/1) lodged by Mustaq Khan (PW-1), wherein, it has been mentioned that all the accused persons belonged to Ganesh Utsav Samiti, Gokulpur, who did not get importance in the orchestra. Having felt slighted and

insulted, they grew a revengeful attitude and for that reason, they wanted to kill him and Umesh Sethi. Mustaq Khan (PW-1) testified that 3-4 days before the occurrence there had occurred a quarrel between the accused persons and Bobby alias Rakesh Sethi (brother of deceased). In cross-examination, Mustaq Khan deposed that he did not know as to who were the members of Ganesh Utsav Samiti and who was its president. Accused persons were said to be the members of the aforesaid Samiti because they used to collect the donations for the said Samiti. From the evidence of this witness, it is not revealed as to how and why the accused persons entertained a grudge against him. It has not been said that the deceased and his brother had any rivalry with them or they in any manner caused any obstruction in their activities. Rakesh Sethi (PW-5) in paragraph No.39 of his evidence deposed that he was neither a member of Ganesh Utsav Samiti nor did he run any orchestra. According to him, about two days before the occurrence, Khushwant (relative of appellant Babloo alias Susthi) had an altercation with an elderly man, when he intervened, Khushwant slapped him. In turn, he also slapped Khushwant, whereupon, Khushwant went away saying that he would bring the people of Ganesh Utsav Samiti. 15-20 minutes thereafter, Babloo alias Susthi, Vijay and Gudda alias Kali came with Khushwant to beat him, but he escaped. From the above circumstances, it appears that the dispute which is said to be motive of commission of the present offence had occurred between Rakesh Sethi (PW-5), the brother of Umesh Sethi, and Khushwant who happened to be a relative of Babloo alias Susthi.

17. Mustaq Khan (PW-1), Jagdish Yadav (PW-2), Yashpal (PW-3), Takali alias Umesh Kumar (PW-4) and Rakesh Kumar Sethi (PW-5), have testified that the appellants along with other accused persons had come to the shop of Mustaq Khan (PW-1), in front of which Umesh Sethi and Takali were sitting on a bench. They were armed with deadly weapons like sword, spear, knife, gupti and iron rod. Seeing them, Umesh Sethi entered the shop, but appellant Gudda alias Kali dealt a blow of his spear on his chest. When Mustaq Khan (PW-1) tried to save him, appellant Soyab Khan dealt a blow of Gupti on his left arm. Appellants Babloo alias Susthi, Antu and Nandi also assaulted the deceased with their respective weapons. Babloo alias Susthi, had a sword, Antu had a knife and Nandi had a sword. These persons also assaulted Takali (PW-4), but he ran away shouting. Four-five accused persons ran after him, but Jagdish and Lalu saved him. Rakesh Sethi (PW-5) had also come at the spot and had raised hue and cry, then all the assailants ran away.

18. Jagdish Yadav (PW-2), has testified that his cycle shop is situated near the shop of Mustaq Khan (PW-1). At about 8:30 pm, when he was in his shop and Yashpal (PW-3) was standing outside, he saw 15-20 persons armed with knife and sword passing by his shop. Out of them, he knew appellants Gudda alias Kali, Babloo alias Susthi, Shanker alias Jhabra, Bhaloo Khan and Antu. They went to the shop of Mustaq Khan. On being told by Yashpal that a quarrel had taken

place, he came out of his shop and saw Gudda alias Kali inflicting a blow with spear on the chest of Umesh Sethi and Soyab Khan inflicting a blow by 'gupti' on the left hand of Mustaq Khan. Umesh Sethi fell down and other accused persons also assaulted Umesh Sethi. The evidence of Mustaq (PW-1) and Jagdish (PW-2) finds corroboration from the evidence of Yashpal (PW-3), Takali (PW-4) and Rakesh Sethi (PW-5) who too have testified similarly. From the above evidence, it is clearly established that the appellants had come together openly armed with deadly weapons at the shop of Mustaq Khan (PW-1), where Umesh Sethi was sitting and the appellant Gudda alias Kali had pierced a spear on the left side of the chest of Umesh Sethi and when Mustaq (PW-1) tried to save Umesh, he was also assaulted by the appellant Soyab Khan. It has also been established that some of other appellants had also assaulted Umesh by their respective weapons, even after he had received a spear blow on the chest at the hands of appellant Gudda alias Kali.

19. Dr. Anoop Jain (PW-10), on post mortem examination of the body of Umesh Sethi, found as many as 9 injuries, out of which one was a penetrating wound on the left side of the chest which had injured his left lung and heart. Besides that, 5 incised wounds and 3 contusions and abrasions were also found on other parts of his body. Dr. J.N. Sen (PW-6) had also found two incised wounds on the left arm of Mustaq Khan (PW-1).

20. In *State of Rajasthan Vs. Nathu and others*, (2003) 5 SCC 537, the Apex Court has held that if death is caused in prosecution of the common object of an unlawful assembly, it is not necessary to record a definite and specific finding as to which particular accused out of the members of the unlawful assembly caused the fatal injury. Once an unlawful assembly has come into existence, each member of the assembly also becomes vicariously liable for the criminal act of any other member of the assembly committed in prosecution of the common object of the assembly. In the case of *Rajendra Shantaram Todankar* (supra) and in *Parsuram Pandey & others Vs. State of Bihar*, (2004) 13 SCC 189, it has been held that to attract Section 149 of the Indian Penal Code the prosecution must prove that the commission of an offence was by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of the assembly or must be such that the members of the assembly knew that it was likely to be committed.

21. The ratio of the case of *Muthu Naicker and others Vs. State of Tamil Nadu*, AIR 1978 SC 1647, cited by Shri Surendra Singh, Senior Counsel, in our opinion, is not attracted in the fact situation of the present case. In that case, the Apex Court has observed that whenever in uneventful rural society something unusual occurs, more so where the local community is faction-ridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event

mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly. In the case in hand, the accused/appellants had gone in a market of Gokalpur (Jabalpur), at the shop of Mustaq Khan (PW-1) together and had caused injuries to Umesh Sethi (deceased) and also assaulted Mustaq Khan (PW-1) who tried to save him and after the occurrence, all of them ran away from the spot together. In the case of *Mohinder Singh & others Vs. State of Punjab*, AIR 2006 SC 1639, it is held that if the prosecution established that all the appellants came to the spot of incident together and they were carrying deadly weapons, two of them carrying 12 bore guns and immediately on reaching the spot, one of the accused opened the fire followed by firing by another accused in the same transaction, the common object of the assembly is clearly established. The knowledge of the assembly that grievous hurt or death would be caused can be safely attributed to the members of the unlawful assembly because two members of the assembly carried licenced guns.

22. We are not in agreement with Shri Yogesh Dhande, learned counsel for appellant Soyab Khan that there was no motive which could have impelled the accused persons to commit the murder of Umesh Sethi, merely because the past quarrel had taken place between Rakesh Sethi (PW-5) and Khushwant (relative of appellant Babloo alias Sustti). The facts of the case of *Radha Mohan Singh alias Lal Saheb & others Vs. State of U.P.*, AIR 2006 SC 951, on which he placed reliance, are not applicable to the facts of the present case. In case of *Radha Mohan Singh* (supra), the accused persons armed with Lathi, Farsa and knife, had suddenly appeared on the pathway of the village and one of the accused had assaulted the deceased with spear and other accused had assaulted with Farsa. When witness Ganesh Singh tried to save him, some of the accused persons assaulted him with Lathis. The injury caused by Farsa to the deceased was of very small dimension. In the above fact-situation, in view of the superficial injury caused by Farsa, the Apex Court held that the accused who caused the injury with Farsa did not wield the Farsa with an intention or object to cause any injury to the deceased and it could not be held that the common object of the unlawful assembly was to commit murder of the deceased. In the present case, it has clearly been established that the accused/appellants armed with deadly weapons had come at the shop of Mustaq Khan (PW-1), where the deceased was sitting and appellant Gudda alias Kali had dealt a spear blow on the chest of the deceased which was followed by assaults by other accused persons. It is also significant to note that in this pre-concerted attack when Mustaq Khan (PW-1) tried to save the deceased, appellant Soyab Khan dealt a blow with Gupti on his hand. In this view of the matter, it is not possible to hold that appellant Soyab Khan did not share the common object of the unlawful assembly of committing murder of the deceased.

23. Taking into consideration all the above factual and legal aspects, we are of the opinion that the prosecution has clearly established that the accused/appellants came to the shop of Mustaq Khan (PW-1) together, where the deceased was sitting. Most of them were carrying deadly weapons like spear, sword, knife and gupti etc.. Immediately on reaching the spot, appellant Gudda alias Kali pierced the spear on the left side of the chest of Umesh Sethi. When Mustaq Khan (PW-1) attempted to save him, appellant Soyab Khan dealt a blow by Gupti to him. Assaults on the deceased were followed by the other accused/appellants in the same transaction. The aforesaid facts clearly established the common object of the unlawful assembly. The knowledge of the members of the assembly that the death of Umesh Sethi would thereby be caused, can be safely attributed to the members of the unlawful assembly. An inference is to be drawn of the knowledge of the common object and formation of an unlawful assembly, from the behaviour of the members of the assembly of the accused persons who came together with deadly weapons and immediately launched the attack on the deceased. Injury found on the chest of the deceased was sufficient to cause his death. Injury found on the body of Mustaq Khan (PW-1), who tried to intervene further reinforces the inference of existence of the common object of an unlawful assembly to kill Umesh Sethi and to cause injuries to any other person who tried to intervene.

24. Learned counsel for the appellants argued that as many as 18 accused had been put on trial, but the witnesses adopted the method of pick and choose, resulting in acquittal of 11 accused persons, therefore, he submitted that their evidence should not be relied upon for the present appellants. In our opinion, this argument is not acceptable because the principle of "falsus in uno falsus in omnibus" is not applicable in India. It is merely a rule of caution and not mandatory rule of evidence. The Apex Court in case of *Ram Udarsingh Vs. State of Bihar*, (2004) (X) SCC 443 and in case of *Gubbala Venugopala Swamy and others Vs. State of Andhra Pradesh*, AIR 2004 SC 2477, held - "That even if a major portion of evidence of a witness is found to be deficient, in case the residual is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, conviction can be maintained. The duty of the Court is to separate the grain from the chaff and appreciate in each case, as to what extent the evidence is worthy of acceptance."

25. Now the crucial question before us is to determine whether all the appellants were the members of the unlawful assembly and had the common object to commit murder of Umesh Sethi. In this connection it is necessary to advert to the evidence of Mustaq Khan (PW-1) and the First Information Report (Exhibit P/1) lodged by him. In the First Information Report, Mustaq (PW-1), along with other accused persons named accused Vijay Mithun, Vijay Balmik and Shanker Ben. The charge sheet was filed against the accused Vijay Kumar Raikwar, Vijay Balmik and Vijay son of Maiku Singh. Learned Trial Court finding the evidence insufficient against the accused Vijay Kumar Raikwar and Vijay Balmik, acquitted them, however, finding the presence of Vijay son of Maiku Singh established in the unlawful assembly, convicted him. It is somewhat strange that the accused Vijay Mithun and Vijay Balmik

who were named in the First Information Report were acquitted and appellant Vijay son of Maiku Singh who was not named in the FIR has been convicted. Similar is the situation with the appellant Shanker alias Jhabra whose name too is not found mentioned in the First Information Report. The person named in the First Information Report is Shanker Ben of Gokulpur. Uttam Singh Sikarwar (PW-9), Investigating Officer, in paragraph No.72 of his deposition categorically stated that in the First Information Report, Shanker Ben was named, but since no evidence was found against him, he was not made accused. It is thus apparent that appellant Shanker alias Jhabra is a different person than Shanker Ben who was named in the First Information Report. Mustaq Khan (PW-1) did not depose before the Court about the presence of appellant Shanker alias Jhabra amongst the accused persons. In paragraph No.49 of his testimony, he even stated that he did not know Shanker Ben whom he had named in the FIR (Exhibit P/1). Jagdish Yadav (PW-2) who, in his chief examination, stated about the presence of appellant Shanker alias Jhabra, when confronted with his police statement (Exhibit D/1), could not explain as to how the name of appellant Shanker alias Jhabra was missing therein. Yashpal (PW-3) when confronted with his police statement, in paragraph No.45 of his deposition, could not explain as to why the fact that appellant Shanker alias Jhabra accompanied other accused persons, was not mentioned therein. He was also confronted with the police statement on the point that Shanker alias Jhabra had surrounded the deceased. Similar is the situation with the evidence of Takali (PW-4) who was confronted with his police statement, where he did not disclose that Shanker along with other persons assaulted and chased him. So far as Rakesh Sethi (PW-5) is concerned, he did not say that appellant Shanker alias Jhabra in any manner participated in the assault on the deceased. He merely said that Shanker assaulted Takali (PW-4). However, this fact does not find support from the evidence of Takali (PW-4) himself. In this view of the matter, we are of the opinion that the prosecution has not established the presence and participation of appellant Shanker alias Jhabra in the unlawful assembly beyond reasonable doubt. His conviction, therefore, deserves to be set aside.

26. As regards to the presence of appellant Vijay son of Maiku Singh is concerned, his name does not find place in the First Information Report. Mustaq Khan (PW-1), in paragraph No.35 of his evidence, testified that he had named Vijay in the First Information Report whose shop is situated near Bappa Sweets. However, such description does not find place in the First Information Report. On the contrary, Vijay Mithun Raikwar and Vijay Balmik were named in the First Information Report, who were acquitted by the Trial Court. Jagdish Yadav (PW-2) also did not mention the presence of appellant Vijay S/o Maiku in the occurrence. Yashpal (PW-3) testified that he knew only accused/appellants Gudda, Soyab, Babloo alias Susthi, Nandi, Antu and Shanker alias Jhabra and he did not know others. Takali (PW-4), though in chief examination deposed that appellant Vijay who runs a betel shop was present with the assailants, however, in paragraph No.40, in cross-examination, he was confronted with his police statement (Exhibit D/3), wherein the presence of "Vijay Panwala" was not mentioned. Though

Rakesh Sethi (PW-5) testified about the presence of Vijay Panwala (appellant), yet in view of the fact that the evidence of other eyewitnesses with respect to his presence appeared doubtful and that his name was not mentioned in the First Information Report, his solitary testimony does not inspire confidence. Thus, we do not find it established beyond doubt that appellant Vijay S/o Maiku had participated in the unlawful assembly. As such, his conviction deserves to be set aside.

27. So far as appellant Antu is concerned, he has been named in the First Information Report. Mustaq Khan (PW-1) testified that appellant Antu dealt a knife blow to the deceased. However, the fact that he was armed with a knife and had dealt its blow to the deceased is missing in the First Information Report (Exhibit P/1) and in his police statement. Jagdish Yadav (PW-2) testified that appellant Antu was present with other accused persons, but he did not say that he was armed with any weapon. Similarly, Yashpal (PW-3) testified that appellant Antu had come and surrounded the deceased along with other accused persons and he was armed with a knife. Though this witness was confronted with the police statement on the plea that it was not mentioned therein that appellant Antu along with other accused persons had surrounded the deceased, yet, infact, this fact is found mentioned in the aforesaid statement. It is to be noted that though the police statement of Yashpal (PW-3) was not marked as exhibit by the Trial Court, may be inadvertently, still the Investigating Officer Uttam Singh Sikarwar (PW-9), categorically testified and proved that he had recorded the statement of this witness during the investigation as he had stated. Rakesh Sethi (PW-5) also testified about the presence of appellant Antu, though he was contradicted by the police statement (Exhibit D/2) about the fact whether, he was armed with "Lathi" or "knife". Since Takali (PW-4) did not mention about the presence of appellant Antu, learned counsel argued that even if one prosecution witness who has been relied by the Court did not name him, the appellant Antu deserves to be given benefit of reasonable doubt. We are unable to agree with the learned counsel that the ratio of *Shanta Vs. State of Haryana*, AIR 1981 SC 650, can be applied to the case of appellant Antu. In the case of *Shanta* (supra), there had been a fight between two factions in the village. One witness had stated that the appellant had entered into the arena only after the deceased was fatally assaulted by some other accused. In such circumstances, the Apex Court observed that when one of the important prosecution witness who had been relied on by both the Courts below, clearly exonerates the appellant of the charge under Section 302/149 of the Indian Penal Code, then that circumstance was sufficient to give benefit of reasonable doubt to the appellant. In the above circumstances, though it is not proved that appellant Antu was armed with a knife, none the less, in our opinion it has been amply established that he was the member of the unlawful assembly and had shared its common object.

28. So far as other appellants namely Ajay alias Babloo alias Susthi, Nandi alias Mannad Singh and Soyab Khan alias Babloo, are concerned, excepting a few

minor differences in matters of details, the evidence of the eyewitnesses is substantially consistent that they formed an unlawful assembly with appellant Gudda alias Kali and other accused persons, the object of which was to cause death of Umesh Sethi.

29. In case of *Sukhbir Singh Vs. State of Haryana*, (2002) 3 SCC 327, it has been held by the Apex Court that an accused is vicariously guilty of the offence committed by other accused persons only if he is proved to be a member of an unlawful assembly sharing its common object. Once the existence of common object of unlawful assembly is proved, each member of such an assembly shall be liable for the main offence, irrespective of his actual participation in the commission of the offence. It is not necessary that each of the accused, forming the unlawful assembly, must have committed the offence with his own hands.

30. So far as the evidence of Nar Bahadur (DW-1) is concerned, he has said that at the time of occurrence he had seen appellant Nandi at his betel shop which is situated in the same locality. Police personnel were asking him to close his shop and, that before him Vijay and Nandi had closed their shops and had gone to their houses with him. In view of the overwhelming and reliable evidence of eyewitnesses, casual evidence of this witness does not appear reliable. The evidence of Puranlal (DW-2) and Ramlal (DW-3) that appellant Gudda alias Kali had taken the son of Puranlal to the Victoria Hospital at about 11:00 pm on 8th March 1996, does not appear trustworthy as the incident had occurred at about 8:30 pm in the town of Jabalpur. It is quite possible for appellant Gudda alias Kali to have participated in the occurrence which had taken place long before 11:00 pm. In this view of the matter, the evidence of the defence witnesses, does not appear reliable.

31. Taking into consideration the facts and circumstances as discussed above, we are satisfied that appellants Antu, Ajay alias Babloo alias Sustu and Gudda alias Kali alias Laxmi Narayan of Criminal Appeal No.458/1999; appellant Nandi alias Mannad Singh of Criminal Appeal No.954/1999 and appellant Soyab Khan alias Babloo of Criminal Appeal No.955/1999, formed an unlawful assembly knowing beforehand that the murder of Umesh Sethi was likely to be committed in prosecution of their common object. Therefore, the aforesaid appellants were rightly convicted under Section 302 of the Indian Penal Code with the aid of Section 149 of the Indian Penal Code. Their conviction and sentences are affirmed. Conviction and sentence of appellant Soyab Khan under Section 324 of the Indian Penal Code for causing injury to Mustaq Khan (PW-1), is also affirmed.

32. For the reasons mentioned above, Criminal Appeal No.929/1999 of appellant Shanker alias Jhabra and Criminal Appeal No.942/1999 of appellant Vijay son of Maiku Singh, are allowed. Their conviction and sentences are set aside. They are acquitted. Appellants Shanker alias Jhabra and Vijay son of Maiku Singh are on bail, their bail bonds and surety bonds are discharged.

33. Criminal Appeal No.458/1999 of appellants Antu, Ajay alias Babloo alias Sustu and Gudda alias Kali alias Laxmi Narayan, Criminal Appeal No.954/1999 of appellant Nandi alias Mannad Singh and Criminal Appeal No.955/1999 of Soyab Khan alias Babloo, are dismissed. Appellants Antu, Ajay alias Babloo alias Sustu, Nandi alias Mannad Singh and Soyab Khan, who are on bail, shall surrender immediately for serving out the remaining part of their sentences.

A copy of this judgment be kept in Criminal Appeal Nos.929/1999, 942/1999, 954/1999 and 955/1999.

Appeal dismissed.

I.L.R. [2008] M. P., 1495
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
10 March 2008*

BABU @ BABARIYA

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Sections 376 or 376/511 - Prosecutrix aged 11 years - Appellant committed sexual intercourse after throwing her on ground - In medical evidence hymen membrane was not torned but there was redness and marks of rubbing were present - Pubic hair were not found containing semen and human permatzoa whereas both were present on underwear and slides of semen of appellant - Appellant held guilty for commission of attempt to commit rape.
(Paras 8, 9 & 10)

दण्ड संहिता (1860 का 45), धारा 376 या 376/511 - 11 वर्षीय अभियोक्त्री - अपीलार्थी ने उसे जमीन पर पटकने के बाद मैथुन किया - चिकित्सीय साक्ष्य में योनि की झिल्ली फटी नहीं पायी किन्तु उसमें लालपन व रगड़ने के चिह्न पाये - गुप्तांग के बाल में वीर्य और मानव शुक्राणु नहीं पाये गए जबकि ये दोनों अपीलार्थी के अघोवस्त्र और वीर्य के स्लाइड पर पाये गए - अपीलार्थी को बलात्संग का प्रयत्न करने का दोषी पाया।

Jaisingh with Ravi Varma, for the appellant

Manish Joshi, PL for the respondent

J U D G M E N T (ORAL)

S.L. KOCHAR, J.:—The appellant has filed this appeal, challenging his conviction U/Ss.376, 506-B of the IPC and sentence to undergo RI for 10 years with fine of Rs.3000/-; in default of payment of fine six months additional SI and one year RI with fine of Rs.500/-, in default of payment of fine one month S.I, passed by learned Addl. Sessions Judge, Sardarpur in ST No.40/2006, judgment dated 28/9/2006. However, the substantive sentences have been directed to run concurrently.

2. Briefly stated the prosecution case as unfolded before the trial Court is that on 12/10/2005 in the evening prosecutrix aged 11 years was returning back with her she-goats towards her house along with Radha (PW.2). When they reached near a culvert, the appellant reached there and driven her goats because of which prosecutrix also rushed behind her she-goats. The friend of prosecutrix Radhabai (PW.2) also followed her. Appellant with bad intention caught the hand of the prosecutrix and thrown her on the ground. He kissed her cheek and also pressed her breast, thereafter committed sexual intercourse twice in some interval. The prosecutrix raised cry upon which appellant threatened her to break out her teeth and also shown knife and threatened to kill her because of which she kept mum. The appellant, after committing bad act, fled away. Radhabai (PW.2) was also threatened by the appellant because of which she was standing at some distance. After the incident, both went to the house and prosecutrix disclosed about the incident to her mother and after arrival of her father also reported the matter to him. Because of night hours and non availability of transportation facility matter was reported on the next day i.e. 13/10/2005 at 10.05 a.m. The distance of the police station was five kilo meter. The police had registered the Crime No.136/2005 U/S. 376 read with 506-II of the IPC. Prosecutrix was medically examined by Dr.Anita Dahana (PW.7) who issued her MLC (Medical Legal Certificate) (Ex.P.7). Dr.Nitin Joshi (PW.12) medically examined the appellant and found him fit for commission for sexual intercourse. His medical report is Ex.P.12. Doctor also prepared slides of the semen vide Ex.P.15. The seized articles were sent for chemical examination and report of the chemical examiner is Ex.P.16. On completion of investigation, appellant was charge sheeted for the above mentioned offences.

3. The appellant refuted the charges, therefore, put to trial. The learned trial Court, after examining the prosecution witnesses, recording of accused statement and hearing both the parties, convicted the appellant as indicated herein above.

4. The learned counsel for appellant has submitted only argument that even if the complete prosecution case is accepted, offence at the most would fall U/S.354 of the IPC, assault or criminal force to woman with intend to outrage her modesty.

5. On the other hand, the learned counsel for State has supported the impugned judgment and finding arrived at by the trial Court.

6. Having heard the learned counsel for parties and after perusing the entire record of the trial Court, this Court is of the opinion that offence against the appellant would be made out U/S.376 read with 511 of the IPC, attempt to commit rape.

7. There is no dispute that prosecutrix was a minor girl aged about 11 years. According to the statement of the prosecutrix, she was caught, thereafter thrown on the ground by the appellant and appellant committed sexual intercourse twice with her. The incident was witnessed by eye witness Radhabai (PW.2), a minor

girl aged nine years. She partially supported the prosecution case. According to this witness, appellant caught the prosecutrix and took her. She was threatened by the appellant for causing injury by knife, therefore, she did not follow him. After some time prosecutrix returned back. She was in deadly condition and also weeping. They went along with their goats and she-goats slowly towards their house.

8. - The version of the prosecutrix is also corroborated by her father Kanji (PW.3) who was disclosed about the incident and name of the appellant by the prosecutrix.

9. Not only this, the version of the prosecutrix is also corroborated by Dr.Smt. Anita Dahana who medically examined her on 13/10/2005. According to medical report, her age was between 10-11 years. There was no development of breast, axillary hairs were not present. Pubic hair were present slightly. She did not find any external injury on her person. On examination of private part, hymen membrane was not torned but there was redness and mark of rubbing were present below the hymen membrane as well as presence of pressure injury. In the opinion of this Doctor, the act of attempt to commit rape was committed with the prosecutrix and there was no full penetration. She proved her medical report (Ex.P.7). In cross examination, nothing substantial has come to discard the testimony of Dr.Anita.

10. In the FSL report, Article-A petticoat and Article-C pubic hair, were not containing semen and human spermatozoa. Both were present on underwear and slides of the semen of the appellant. It has come in the statement of the prosecutrix that at the time of commission of rape with her, her petticoat was kept beside the place of incident. Dr.Nitin Joshi (PW.12) proved the medical report (Ex.P.12) of the appellant and also stated in Court that appellant was capable of performing sexual intercourse. He has also prepared slides of his semen.

11. In view of the statement of prosecutrix (PW.1), eye witness Radhabai (PW.2), statement of father Kanji (PW.3), medical evidence as mentioned herein above, this Court is of the view that appellant is liable for conviction for commission of attempt to commit rape with the prosecutrix punishable U/S.376 (f) read with 511 of the IPC, since the prosecutrix was under 12 years of age at the time of incident. Offence U/S.376(f) of the IPC shall be punished with minimum 10 years jail sentence but same may extend for life and fine is also prescribed and according to proviso, Court may for adequate and special reasons, may impose less than 10 year jail sentence. In the instant case, there are no special reasons. Appellant was 30 years of age at the time of incident and must be a married person. Sentence for attempt to commit rape is prescribed U/S.511 of the IPC in Chapter XXIII of the IPC i.e. the offence is punishable with life imprisonment or imprisonment not exceeding half of the longest term provided for the offence or fine or both. For the offence attempt to commit rape (376 (f)) punishment extend

for longest term of life imprisonment and half of this would be 10 years as per provision U/S.57 of the IPC regarding fractions of terms of punishment which says that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years.

12. In the result, appellant is acquitted from the charge of commission of rape with the prosecutrix, instead thereof he is convicted U/S.376(f) read with 511 of the IPC sentenced to RI for 10 years and fine of Rs.3,000/-, in default of payment of fine he shall suffer additional RI for one year. His conviction and sentence U/S.506-II of the IPC are hereby affirmed. Both the sentences shall run concurrently. Out of realisation of fine amount, Rs.3,000/- be paid as compensation to the prosecutrix, the daughter of Kanji (PW.3) as per provision U/S.357, sub-section (1) of the Cr.P.C. Office is directed to send copy of this judgment along with the record to the trial Court.

13. The appeal fails and is accordingly dismissed on the terms indicated herein above.

Appeal dismissed.

I.L.R. [2008] M. P., 1498
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
 12 March 2008*.

JEEVAN

Vs.

STATE OF M.P.

... Appellant

... Respondent

Penal Code (45 of 1860), Sections 376/511 or 354 - Prosecutrix aged 11 years was made to lie on cot by appellant after untying her Salwar - Appellant thereafter laid on her - No evidence that appellant removed his own undergarment and tried to penetrate his male organ in the vagina of prosecutrix - Medical evidence also does not show use of any kind of force on private part of prosecutrix - Appellant guilty of committing offence U/s 354. (Paras 8, 10)

दण्ड संहिता (1860 का 45), धारा 376/511 या 354 - अपीलार्थी द्वारा 11 वर्षीय अभियोक्त्री को उसका सलवार ढीला करने के बाद पलंग पर लिटाया - उसके बाद अपीलार्थी उसके ऊपर लेट गया - कोई साक्ष्य नहीं कि अपीलार्थी ने अपने अघोवस्त्र उतारे और अपना लिंग अभियोक्त्री के योनि में प्रवेश कराने का प्रयास किया - चिकित्सीय साक्ष्य से भी अभियोक्त्री के गुप्तांग पर किसी तरह का बल प्रयोग करना दर्शित नहीं - अपीलार्थी धारा 354 के अधीन अपराध कारित करने का दोषी।

Cases referred :

AIR 2004 SC 1497, AIR 2004 SC 1874

Nirmala Kulhar, for the appellants

Manish Joshi, Panel lawyer for the State/respondent

J U D G M E N T (O R A L)

S.L. KOCHAR, J.:-The appellant has preferred this appeal against his conviction under section 376 read with section 511 of the Indian Penal Code and sentence of rigorous imprisonment for four years and fine of Rs. 5,000/-, in default of payment of fine to suffer additional R.I for three months passed by the learned Ist Addl. Sessions Judge, Sonkatch District Dewas vide judgment dated 27.11.2007 in S.T.No. 10/2007.

2. According to the prosecution case on 06.09.06 between 7.00 and 8.00 PM, the appellant took the prosecutrix (PW-12), aged 11 years in his house for cooking food, because his wife had gone to her father's house. When prosecutrix did not return back, her father the complainant Manoharlal (PW-6) reached at the house of the appellant and had suspicion, because the light of the house of the appellant was off. He entered inside the house and switched on to the light and saw that his daughter, the prosecutrix was sitting on the cot (PALANG) and appellant was also sitting by her side. Manoharlal asked the prosecutrix to go to the house and when she got up from the cot, her salwar fell downwards. Manoharlal asked his daughter as to what happened and why the Salwar got untied, the prosecutrix while weeping disclosed that the appellant had untied her salwar and she tried to run away, but the appellant caught hold of her hands, gagged her mouth and also threatened. Thereafter, he lied on her and committed bad act (rape) with her. The complainant caught the appellant and brought out side the house and thereafter, called his nephew Prakash and with his help, tied the appellant by a rope. Villagers, Omprakash Sharma, Sarpanch Mukesh Malviya and watchman Poonamchand were informed about the incident and report Ex.P/5 was lodged by him at the Police Station on 06.09.06 at 9.45 PM. Prosecutrix was sent for medical examination and the same was done by Dr PW-2 Pushpa Pavaiya who gave her report Ex.P/2. PW-1 Dr Atul Paonikar examined the appellant and gave report Ex.P/1. The garments of the prosecutrix and appellant were sent for examination to the Forensic Science Laboratory, but its report had not received till pronouncement of the judgment. After completion of investigation, the appellant was charge-sheeted for commission of the offence as already noted herein-above.

3. The appellant refuted the charges and his defence was that Manoharlal, father of the prosecutrix used to purchase grocery on credit from his shop and lodged a false report to save himself from payment of money to the appellant. The appellant examined DW-1 Lakhn Lal. Learned trial Court, on conclusion of trial, finding the appellant guilty, convicted and sentenced him as indicated herein above. Hence, this appeal.

4. Learned counsel for the appellant does not wish to press this appeal on merit. Even otherwise also there is overwhelming evidence available on record. Learned counsel has advanced the only argument that the offence at the most

under section 354 of the Indian Penal Code would be made out against the appellant looking to the statement of the prosecutrix and the medical evidence. Learned counsel has also prayed for awarding the sentence to the appellant for this offence to the period already undergone by him with fine.

5. On the other hand, learned counsel for the State has supported the impugned judgment and finding.

6. Having heard learned counsel for the parties and after perusing the entire record, this Court finds substance in the arguments of the learned counsel for the appellant. PW-1 Dr Atul Paonikar, on examination of the appellant, found him capable of performing sexual intercourse. He did not find any external injury on his person or penis. PW-2 Dr Pushpa Pavaiya medically examined the prosecutrix and proved her medical report Ex.P/2. This witness also did not find any external or internal injury on the person of the prosecutrix. The prosecutrix was between 11 and 12 years of age, menses had not started, she was lean and thin, breasts were not developed and only buds were present. On internal examination, she found libia, majora and minora healthy and without any injury. There was no swelling, hymen was intact and there was no bleeding. Semen was also not present. Her vagina was admitting the top of little finger with difficulty and pubic hair were not present. She prepared two slides of vaginal swab and also sealed her salwar. Dr Pavaiya did not give any opinion about commission of rape and referred her for ossification test. She also gave Salwar and slide of vaginal swab of the prosecutrix for being sent to the Chemical Examiner to the concerned constable. She also stated that opinion could not have been given unless the report was received from the Chemical Examiner. Till final judgment, the prosecution has not filed the FSL report before the trial Court which is clear from para 20 of the impugned judgment.

7. PW-6 Manoharlal has supported the prosecution case and proved the First Information Report Ex.P/5. In cross-examination, he admitted about purchase of grocery goods from the shop of the appellant and account diary Ex.D/4, but denied the defence suggestion in regard to false implication of the appellant on account of balance amount. PW-7 Prakash Sharma also supported the prosecution case and the statement of Manoharlal regarding commission of bad act with the prosecutrix by the appellant and tying of the appellant by the rope. PW-9 Pushpabai, mother of the prosecutrix has deposed that on the date of incident, the appellant took the prosecutrix to his house for cooking food since his wife had gone to her parents' house. Thereafter, the prosecutrix was brought to the house of her father Manoharlal and prosecutrix disclosed about the commission of bad act after untying her Salwar by the appellant. PW-12, the prosecutrix has deposed that on the date of incident at 8.00 PM, she went to the house of the appellant for cooking food, because his wife had gone to her parents' house and inside the house appellant committed bad act after putting off her Salwar. Appellant

had delivered threats and also gagged her mouth.. She also disclosed about the incident to her father. The further say of this witness was that she was made to lie on the cot by the appellant and after untying her Salwar, he also laid on her. She has no-where stated about removing of the clothes of the appellant and thereafter lying on her. She has also not stated that the appellant tried to penetrate his male organ into her vagina.

8. In view of these facts and circumstances of the case, it cannot be said that the appellant attempted to commit rape on the prosecutrix. There is no evidence available on record that the appellant removed her garments, his own under garment, exposed his male organ and thereafter, tried to penetrate the same in the vagina of the prosecutrix. Medical evidence is also not suggesting use of any kind of force on the private part of the prosecutrix. Therefore, in the considered opinion of this Court, offence under section 376 read with section 511 of the Indian Penal Code, attempt to commit rape would not be made out against the appellant.

9. The Supreme Court in the case of *Aman Kumar and another V/s State of Haryana* (AIR 2004 SC 1497) observed in paras 10 and 11 as under:-

“An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime,, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly shows the legislative intention to make a difference between the case4s of a mere preparation and an attempt.

In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.”

(Also see: *Koppula Venkat Rao V/s. State of Andhra Pradesh* (AIR 2004 SC 1874).

10. The appellant, at the most would be liable for commission of offence punishable under section 354 of the Indian Penal Code, Assault or criminal force

with intent to outrage the modesty of woman. The aforesaid discussion of the evidence is clearly establishing the ingredients of this section.

11. It would be apposite to consider and mention here that whether the learned Trial Court has rightly awarded the sentence under section 376/511 of the Indian Penal Code, in accordance with the provision of section 511 of the Indian Penal Code if offence of attempt to commit rape is proved. Section 511 of the Indian Penal Code reads as under :-

“511: Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempts does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.”

12. In the Penal Code, there is no express provision available for punishment for attempt to commit rape. Therefore, awarding of punishment would be governed by Section 511 of the Indian Penal Code and according to this section attempt of rape is punishable with half of the longest term of imprisonment. Section 376 of the Indian Penal Code in clause (1) as well as in clause (2), the longest sentence of life imprisonment is prescribed except the rape with own wife who is under 12 years of age. Section 57 of the Indian Penal Code is prescribing fractions of terms of punishment. For convenience, Section 57 is reproduced below :-

“Section 57: In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.”

13. In view of section 376 read with section 57 of the Indian Penal Code, the offender must be punished for attempt to commit rape under section 376/511 of the Indian Penal Code for imprisonment of ten years.

14. Ex-consequenti, this appeal is allowed in part. Conviction and sentence of the appellant as awarded by the trial Court are hereby set aside. Instead, he is convicted under section 354 of the Indian Penal Code. The appellant is a first offender and a married person having responsibility to maintain his family consisting of wife, two minor sons and old parents. Learned counsel has also submitted that after this incident, the appellant has closed down his small grocery shop and at present is earning his livelihood by working as a labourer. The offence is not mandatorily punishable with jail sentence. Therefore, this Court is of the view that ends of justice would be served to sentence the appellant to the period already under gone (seven months and twelve days and fine of Rs. 5,000/-, which according to the learned counsel, has already been deposited by the appellant in the trial Court. If this is so, the learned trial Court is directed to release the

appellant forthwith if not required in any other criminal case. Office is directed to transmit the record of the trial Court along with a copy of this judgment, to that Court, for immediate compliance.

Appeal allowed in part.

**I.L.R. [2008] M. P., 1503
APPELLATE CRIMINAL**

Before Mr. Justice S. Samvatsar & Mr. Justice A.K. Shrivastava

26 March, 2008*

STATE OF M.P.

Vs.

ASHOK & anr.

... Appellant

... Respondents

A. Evidence Act (1 of 1872), Section 32 - Dying Declaration - Conviction can be based upon oral dying declaration if same is found to be trustworthy and reliable.

(Para 16)

(क) साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - मौखिक मृत्युकालिक कथन पर दोषसिद्धि आधारित की जा सकती है, यदि वह विश्वसनीय और भरोसेमंद हो।

B. Penal Code (45 of 1860), Section 302 - Murder - Deceased receiving number of injuries including incised, stab and lacerated wounds - Oral dying declaration made by deceased to her daughter-in-law who reached on the spot - Fact of oral dying declaration mentioned in FIR lodged by witness - Police Statement also contains the fact of oral dying declaration - Oral dying declaration not challenged in cross examination - Reliable.

(Para 16)

(ख) दण्ड संहिता (1860 का 45), धारा 302 - हत्या - मृतक को काफी संख्या में कटे हुये, घोपे हुये और फटे हुये घावों सहित कई उपहतियां आई - मृतक ने अपनी बहू को मौखिक मृत्युकालिक कथन दिया, जो घटना स्थल पर पहुँची थी - साक्षी द्वारा दर्ज करायी गई प्रथम सूचना रिपोर्ट में मौखिक मृत्युकालिक कथन के तथ्य का उल्लेख - पुलिस कथन में भी मौखिक मृत्युकालिक कथन के तथ्य का उल्लेख - मौखिक मृत्युकालिक कथन को प्रतिपरीक्षण में चुनौती नहीं दी गई - विश्वसनीय।

C. Penal Code (45 of 1860), Section 302 - Oral dying declaration - In FIR it has been stated by witness that in oral dying declaration, deceased told that respondent no.1 was having a hockey stick and respondent no. 2 was having a knife - But no where in the entire testimony of witness anything about use of hockey stick - Respondent no. 1 is entitled for the benefit of doubt. (Para 19)

(ग) दण्ड संहिता (1860 का 45), धारा 302 - मौखिक मृत्युकालिक कथन - प्रथम सूचना रिपोर्ट में साक्षी ने कथन किया कि उसे मृतक ने अपने मौखिक मृत्युकालिक कथन में बताया था कि प्रत्यर्थी क्रं. 1 के पास हाकी स्टिक और प्रत्यर्थी क्रं. 2 के पास चाकू था - परन्तु साक्षी के सम्पूर्ण कथन में कहीं भी हाकी स्टिक के प्रयोग के बारे में कुछ नहीं - प्रत्यर्थी क्रं. 1 संदेह का लाभ पाने का हकदार है।

D. Criminal trial - Duty of prosecution - Oral dying declaration was not challenged in cross-examination of a witness - Therefore it is not necessary for

prosecution to ask to autopsy surgeon that despite deceased having injuries whether he was able to give dying declaration. (Para 17)

(घ) दाण्डिक विचारण — अभियोजन का कर्तव्य — मौखिक मृत्युकालिक कथन को साक्षी के प्रतिपरीक्षण में घुनौती नहीं दी गई — इसलिये अभियोजन के लिये शव परीक्षण करने वाले सर्जन से यह पूछना आवश्यक नहीं था कि मृतक को उपहतियां होने के बावजूद क्या वह मौखिक मृत्युकालिक कथन देने की स्थिति में था।

Cases referred :

AIR 2001 SC 2503, AIR 2003 SC 507, AIR 2003 SC 854, AIR 1957 SC 614, 1996 JIJ 52, AIR 1993 SC 65, AIR 2000 SC 2059.

M.P.S. Bhadoriya, P.P. for the appellant

R.K. Sharma, for the respondent

J U D G M E N T

The Judgment of the Court was delivered by A.K. SHRIVASTAVA, J. :- Feeling aggrieved by the judgment of absolvitur passed by learned 4th Additional Sessions Judge, Gwalior in Sessions Trial No. 228/1992 dated 26/11/1993 acquitting the respondents for the offence punishable under Section 302/34, IPC, the State of Madhya Pradesh has preferred this appeal under Section 378(3) of the Code of Criminal Procedure, 1973.

2. In brief the case of prosecution is that on 22/6/1992 at 8:30 in the morning Jagdish who is a labour went to his work place. After departure of jagdish his father Chunnilal (hereinafter referred to as 'the deceased') also proceeded to his work place. After some time, one girl of the locality came and informed Laxmi Bai at her home that some persons were assaulting the deceased by knives, as a result of which said Laxmi Bai rushed towards the place of occurrence which is situated near by a Jain Temple at Gandewali Sadak. The deceased who was the father-in-law of Laxmi Bai was lying near the door of temple and he gave oral dying declaration to Laxmi Bai that respondents had assaulted him. It is the further case of prosecution that respondent No-2-Dewanand was having a knife and respondent No.1-Ashok was having a hockey stick. Respondent No-2-Dewanand has dealt the blows of knife to the deceased. The blood was oozing from the abdominal region of the deceased and it is said that on account of some dispute of partition, the incident had taken place. It is the further case of prosecution that by making the point of partition, earlier also respondent No.2- Dewanand assaulted Jagdish by knife and on account of enmity, they have caused injuries by knife and hockey stick resulting into the death of deceased at the spot.

3. Laxmi Bai lodged first information report in Police Station, Janakganj. On lodging of the first information report, criminal was triggered off and set in motion. After registering the case, the investigating agency sent the deceased to the hospital; arrived at the spot and prepared the spot map; recorded the statement of the witnesses; arrested the accused persons and after completion of the investigation, submitted a

charge sheet in the competent Court which, on its turn, committed the case to the Court of Session and from where it was received by the trial Court for its trial.

4. Both the respondents were charged under Section 302, IPC and in the alternative they were charged under Section 302/34, IPC. Needless to emphasis, both the accused persons abjured their guilt and pleaded complete innocence.

5. In order to prove the charges, prosecution examined as many as 11 witnesses and placed Exs.P/I to P/II, the documents on record. The defence of the respondents is of false implication and the same defence they set forth in their statement recorded under Section 313, Cr.P.C., however, they did not choose to examine any witness in their defence.

6. Learned trial judge, on the basis of the evidence placed on record, came to hold that since Laxmi Bai was cited as an eye witness and from her testimony, it is not proved that she has seen the incident, therefore, learned trial Court had acquitted the respondents from the charges by the impugned judgment.

7. In this manner, present appeal has been filed by the State of Madhya Pradesh.

8. The contention of Shri Bhadoriya, learned Public Prosecutor, is that learned trial Court erred in law in holding that Laxmi Bai (P.W.I) has not seen the incident and since she is an eye witness and on the basis of her unimpeachable evidence the offence committed by the respondents has been duly proved, hence learned trial Court erred in law in acquitting the respondents. Further it has been contended by learned Public Prosecutor that even if it is held that P.W.I-Laxmi Bai has not seen the incident, but it is borne out from her testimony as well as from the FIR that deceased gave oral dying declaration to her, therefore, it would be sufficient evidence against the respondents holding them to be guilty for the charges levelled against them. On these premised submissions, it has been argued by learned Public Prosecutor that by allowing this appeal, the judgment of absolvitur be set aside and the respondents be convicted for the charges levelled against them.

9. On the other hand, Shri R.K. Sharma, learned counsel for the respondents, argued in support of the impugned judgment and has submitted that cogent reasons have been assigned by learned trial Court holding P.W.I-Laxmi Bai not to be an eye witness. Further it has been contended by learned counsel that on the basis of the solitary evidence of P.W.I-Laxmi Bai without any corroboration, the conviction cannot be accorded. In support of his contention, learned counsel has placed reliance on *Mahabir Singh V. State of Haryana*, AIR 2001 SC 2503, *Joseph V. State of Kerala*, AIR 2003 SC 507 and *Lallu Manjhi and another V. State of Jharkhand*, AIR 2003 SC 854. Learned counsel has also placed reliance on the decision of the Supreme Court *Vadivelu Thevar V. The State of Madras*, AIR 1957 SC 614.

10. By placing reliance on the Division Bench decision of this Court *Amar Singh V. State of M.P.*, 1996 J.L.J. 52, it has been argued by learned counsel for the respondents that looking to the injuries sustained by the deceased, it was not possible for him to

speak and, therefore, question of giving oral dying declaration by the deceased to P.W.I-Laxmi Bai, does not arise. Lastly, it has been argued by learned counsel that if two views are possible on the basis of the evidence placed on record, the view which has been taken by the learned trial Court acquitting the respondents should be given credence and weightage and the judgment of absolutor should not be converted into the judgment of conviction merely on the basis that another view is also possible. On these premised submissions, it has been argued by learned counsel for the respondents that this appeal sans substance and the same be dismissed.

11. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be allowed in part.

12. In the present case, sole eye witness which has been examined by the prosecution is P.W.I-Laxmi Bai. No doubt, it is true, that this witness is the daughter-in-law of the deceased as she is the wife of Jagdish who is the son of the deceased. However, merely because P.W.I-Laxmi Bai happened to be the close relative of the deceased would, in itself, is no ground to discard his testimony if the same is found to be otherwise reliable. It is well settled in law that the evidence of the close relatives and friends of the deceased is to be scrutinized with great care and caution. By keeping this well settled principle of law, we shall now examine the testimony of sole eye witness P.W.I-Laxmi Bai.

13. According to eye witness Laxmi Bai, on the fateful day one girl of her locality came to her home when she was cooking the food and informed that two persons are assaulting by knives to the grand-father of Neetu (it would be relevant to mention here that Neetu is the daughter of this witness and hence the deceased was her grand-father). Immediately this witness rushed to the place of occurrence and found that both the respondents were causing injuries by knives to her father-in-law. Thereafter she went to call her Jaith (husband's elder brother) Ghanshyam who happened to reside near by her house. She has further stated that when she arrived at the spot, at that time both the accused persons were giving blows of knives to the deceased. Firmly this witness has stated that the deceased told her that respondents had caused injuries to him. According to this witness, the respondents were armed with knives and both of them were giving blows of knives on the chest region of the deceased. On being asked to this witness, she explained that on account of property dispute there is enmity. The name of the brother of deceased is Dharm Singh and respondents are the sons of Dharm Singh.

14. This witness Laxmi Bai is also the author of FIR Ex.P/1 and she has proved her FIR Ex.P/1. On going through the cross-examination of this witness, it is gathered that this witness is an illiterate lady because she has stated in para-5 of her cross-examination that she does not know the measurement of the distance as she is not acquainted with Furlong, Mile etc. However, she has stated that within ten minutes she reached at the place of occurrence from her house. In para-6 and 8 of her cross-examination, though she has stated that when she arrived at the spot, at that juncture,

respondents were causing injuries by knives to the deceased, but, she has put her ignorance that why this fact has not been mentioned in FIR Ex.P/I and her case diary statement Ex.D/I. The factum of causing injuries by knives by both the accused persons is neither in the FIR Ex.P/I nor in her case diary statement Ex.D/I. Later on, she has stated that when she arrived at the spot, at that time she saw accused persons were running away from the place of occurrence and ultimately she has stated that when she arrived at the spot, by that time, respondents had already fled from the place of occurrence. Thus, according to us, learned trial Court did not commit any error in holding that this witness is not an eye witness. We have also minutely scrutinized the evidence of this witness particularly para-8 of her cross-examination and we find that this witness has not seen the incident because she is not firm on the point of causing injuries by the respondents by knives in her presence.

15. However, on deeper scrutiny of the testimony of this witness and by keeping her evidence in juxtaposition to the FIR Ex.P/I lodged by her and by reading them conjointly, we find that the deceased gave oral dying declaration to her that respondents have caused injuries to him. In the FIR it has been specifically mentioned by this witness that respondent No.2-Dewanand was having knife and respondent No.1-Ashok was having hockey stick. The blood was oozing from the abdominal region of the deceased. In her testimony, she has also stated and this fact also finds place in the FIR Ex.P/I lodged by this witness that there is enmity between the accused persons and the complainant party in respect of the immovable property.

16. On close scrutiny of the evidence of this witness, we find that her testimony is in two parts. In the first part, she has demonstrated herself to be an eye witness which has not been found to be proved and in the other part she has stated that there is an oral dying declaration of the deceased. In para-2 of her testimony, she has specifically stated that deceased gave oral dying declaration to her about causing of injuries by the respondents and this fact also finds place in her prompt FIR Ex.P/I. On going through FIR, we find that the incident took place at 8.30 in the morning and within half an hour at 9.00 A.M. on 22/6/1992 FIR was lodged and, therefore, it cannot be said or inferred that the oral dying declaration is a concoction. Apart from this, there is no cross-examination on this vital and turning point of the case. In the cross-examination not even a single question was put by the respondents in regard to giving oral dying declaration by the deceased to P.W.I-Laxmi Bai. Thus, giving of oral dying declaration by the deceased to this witness, as stated by her in para-2 of her testimony, is unchallenged. The Supreme Court in the case of *Prakash and another V. State of Madhya Pradesh*, AIR 1993 SC 65, in para-11 has held that if the oral dying declaration is reliable, the conviction could be accorded on its basis.

17. We are not at all impressed by the submission of learned counsel for the respondents that it was the duty of the prosecution to ask the Autopsy Surgeon that despite deceased having received injuries, whether he was able to give oral dying declaration. Since, no cross-examination was put by respondents in respect to the oral dying declaration given by the deceased to P.W.I-Laxmi Bai, according to us, it

was not necessary for the prosecution to put this question to the Autopsy Surgeon because the oral dying declaration was not challenged in the cross-examination of P.W.I-Laxmi Bai who was examined earlier to the doctor. Apart from this, the Supreme Court in the case of *Prakash and another* (supra) in para-11 has held as under :

"11. It is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration."

The Supreme Court also held in the same para-11 that in ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. The Supreme Court further held that there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. The Supreme Court hence held that it is quite likely that on being asked, the deceased would name the assailants. The Supreme Court did not interfere in the Finding of the High Court accepting the oral dying declaration. In the present case also the respondents are well known to the deceased and, therefore, on being asked by P.W.I-Laxmi Bai who is the daughter-in-law of the deceased, the deceased had told the names of the respondents.

18. The decision of Division Bench of this Court in the case of *Amar Singh* (supra) is quite distinguishable on the facts and circumstances, because, on going through para-4 of the said judgment, we find that after a considerable long period of the incident, the oral dying declaration was given by the deceased to the witnesses and in that situation, it was held by the Division Bench of this Court that looking to the serious injuries sustained by the deceased it was not possible for him to give oral dying declaration after a considerable long period. However, in the present case within a span of few minutes only, P.W.I-Laxmi Bai arrived at the spot and at that time the deceased was in a position to give oral dying declaration which he gave to P.W.I-Laxmi Bai, therefore, the decision of *Amar Singh* (supra) is not applicable in the present factual scenario.

19. However, in the FIR Ex.P/1, it has been stated by P.W.I-Laxmi Bai that by giving oral dying declaration to her, deceased told that respondent No.1-Ashok was having a hockey stick while respondent No.2-Dewanand was having a knife. But, no where in her entire testimony she has stated anything about the hockey stick. Since as per prosecution's own case respondent No.1-Ashok has been assigned by a hockey stick in the FIR, but, Laxmi Bai (P.W.I) has not at all stated about using of hockey stick by respondent No.1-Ashok, we are of the view that respondent No.1-Ashok is entitled for the benefit of doubt. Respondent No.2-Dewanand has been assigned by knife and it has also been stated by the deceased by giving oral dying declaration to P.W.I-Laxmi Bai and since there are umpteen injuries of knife, we are of the view that respondent No.2-Dewanand is responsible for causing death to the deceased.

20. On going through the testimony of Autopsy Surgeon Dr. J.N. Soni (P.W.6), we find that deceased sustained following injuries :

- "(i) Lacerated wound 7 cm above the nasion and tem. left to mid line, 3 cm x 0.5 cm x 0.3 cm margin abraded for 0.5 cm both side sagittally placed.
- (ii) Rail pattern contusion right shoulder 6 cm x 3 cm, superior aspect anterior posteriorly.
- (iii) Contusion 6 cm above the right wrist posteriorly 5 x 1.5 cm vertical.
- (iv) Incised wound right index finger distal phalanx, 1.5 cm x 0.5 cm x 0.5 cm flapping effect, distally.
- (v) Incised wound 5 cm above right subcostal margin, 1 cm x 0.5 cm x 0.5 cm, anteriorly, transverse.
- (vi) Stab wound 1.5 cm above the right iliac crest 2 cm x 0.5 cm flapping upwards it was 5 cm deep in the muscles.
- (vii) Stab wound 12 cm below the iliac crest, lateral aspect of right thigh 3.5 cm x 1.5 cm x 5 cm deep, vertically placed.
- (viii) Stab wound two cm below the injury No.7, two posterior one, 1.5 cm x 0.5 cm and posterior one 3 cm x 1.0 cm, they are communicated subcutaneously 5 cm apart.
- (ix) Stab wound 2 cm anterior to injury No.8. 1.5 cm x 0.5 cm x 1.5 cm.
- (x) Stab wound 2 cm above and 1 cm above the posterior injury of No. 8, 1.5 cm x 0.5 cm x 1 cm deep.
- (xi) Abrasion right leg mid 4 x 1 cm anteriorly.
- (xii) Stab wound 17 cm below the supra sternal notch and 5 cm left to mid line over chest 2.5 cm x 0.5 cm. It passes between 5th and 6th ribs inside the thorax, after cutting the lung through and through to pericardium, pericardial cavity full of blood and had given the rick on lateral border of the left vertical wall cut and cavity opened 6 cm deep.
- (xiii) Stab wound 6 cm below the injury No. 12 and 1.5 cm left to mid line 2 cm x 0.5 cm x 5 cm deep. It has cut the lower portion of lung. (5 cm deep)"

According to the doctor, death was due to shock and haemorrhage as a result of thoracic injury caused by sharp penetrating object. On going through injury No.xii and other injuries, we find that on thoracic region there were injuries of sharp and penetrating object like knife. The deceased sustained as many as eight injuries of knife and, therefore, looking to the nature of injuries, we are of the view that respondent No.2-Dewanand has committed the offence under Section 302, IPC.

21. In the case of *Jagdish and another V. State of M.P.*, AIR 2000 SC 2059, three persons were prosecuted and the trial Court found that two persons namely

Vidyaram and Jagdish are entitled for acquittal because the prosecution has failed to prove its case against them, but convicted Uttam causing fatal injuries on the vital parts by Farsa which were found to be established and, eventually, convicted him for the offence punishable under Section 302, IPC. In appeal by the State, High Court also convicted the acquitted accused persons and affirmed the conviction of accused Uttam also. The Supreme Court while affirming the conviction of Uttam in para-13 has held as under :

"13. The trial Court came to the conclusion that P.W.I-Saligram's statement to the extent of "Farsa" being used which was attributed to accused Uttam causing fatal injuries on the vital parts had been established fully and the trial Court came to the conclusion that these injuries had been inflicted only with the intention of causing the murder of the deceased Bachchoo Lal. The deep enmity existing between the families was sufficient for Vidyaram to have a motive to murder the deceased Bachchoo Lal. On that basis the trial Court came to the conclusion that Uttam was guilty of murder. This view is affirmed by the High Court and we find no reason to disagree with the same."

In the present case also there is deep enmity existing between both the families and, hence, there is sufficient motive to kill the deceased.

22. The decision of *Joseph* (supra), *Lallu Manjhi* (supra), *Mahabir Singh* (supra) and *Vadivelu Thevar* (supra) placed reliance by learned counsel for the respondents, relates to sole testimony of the eye witnesses'. We have already held herein above that P.W.I-Laxmi Bai is not an eye witness but we are placing reliance on her testimony that deceased gave oral dying declaration to her which has not been challenged in the cross-examination. According to us, learned trial Court erred in law in holding that because P.W.I-Laxmi Bai is not an eye witness, therefore, oral dying declaration given to her by the deceased should also be disbelieved. There is no law as such. If a witness, though not an eye witness, has reached soon after the incident and the deceased has given oral dying declaration to him which is wholly reliable, the conviction could be accorded solely on the basis of oral dying declaration.

23. Resultantly, this appeal succeeds in part. The judgment of acquittal passed by learned trial Court acquitting respondent No. 1-Ashok is hereby affirmed. However, the judgment of acquittal of respondent No-2-Dewanand is hereby set aside and it is hereby held that respondent No-2-Dewanand has committed the offence of culpable homicide amounting to murder and the charge under Section 302, IPC framed against him, is proved. Hence, he is convicted under Section 302, IPC and is hereby sentenced to suffer life imprisonment. Respondent No-2-Dewanand is on bail, his bail bonds are cancelled. He is hereby directed to surrender immediately before the trial Court to serve out the sentence.

Appeal succeeds in part.

I.L.R. [2008] M. P., 1511
APPELLATE CRIMINAL
Before Mr. Justice A.K. Shrivastava
 31 March 2008*

V.K. BRAHAMANKAR
 Vs.

....Appellant

SPECIAL POLICE ESTABLISHMENT

...Respondent

Criminal Law Amendment Ordinance, 1944 - Sections 3, 4 - Attachment of Property - District Judge - Special Judge has passed ad-interim order U/s 4 of Ordinance for attaching the property - No charge sheet was filed before Special Judge - Held - Special Judge is empowered with the powers of District Judge under the Ordinance of 1944 only when the said Court is trying the offence punishable under Prevention of Corruption Act - No charge sheet was filed when impugned order of attachment was passed - Order passed by Special Judge without jurisdiction - Appeal allowed.
 (Para 14)

दण्ड विधि संशोधन अध्यादेश, 1944—धारा 3, 4—संपत्ति की कुर्की — जिला न्यायाधीश — विशेष न्यायाधीश ने अध्यादेश की धारा 4 के अधीन सम्पत्ति को कुर्क करने का अंतरिम आदेश पारित किया — विशेष न्यायाधीश के समक्ष आरोप पत्र पेश नहीं था — अभिनिर्धारित — विशेष न्यायाधीश को 1944 के अध्यादेश के अधीन जिला न्यायाधीश के अधिकार सिर्फ तब प्राप्त होते हैं जब वह न्यायालय भ्रष्टाचार निवारण अधिनियम के अधीन दण्डनीय अपराध का विचारण कर रहा हो — कोई आरोप पत्र पेश नहीं था जब कुर्की का आक्षेपित आदेश पारित किया था — विशेष न्यायाधीश द्वारा बिना अधिकारिता के आदेश पारित — अपील मंजूर।

Namrata Kesharwani, for the appellant.

Aseem Dixit, Govt. Adv. for the respondent.

J U D G M E N T

A.K. SHRIVASTAVA, J.:—The order passed in this appeal shall also govern the disposal criminal appeal No.2110/1997 (*Smt. Vandana Brahamankar Vs. Special Police Establishment*) and criminal appeal 2183/1997 (*Shivkumar Gupta and another Vs. the State of M.P. and another*) as they have also arisen from the same impugned order dated 2.9.1997 which is impugned in this appeal.

2. Feeling aggrieved by the order dated 2.9.1997 passed by First Addl. Special Judge (Lokayukta) in Criminal Miscellaneous Case No.5/1997, this appeal has been filed under Section 11 of Criminal Law Amendment Ordinance, 1944 (in short the Ordinance).

3. The facts leading to this appeal lie in narrow compass. Suffice it to state that during the pendency of the investigation of a case against the present appellant under Section 13(1)(e) read with section 13(2) of Prevention of Corruption Act, 1988 (in short the Act), an application under Section 3 of the Ordinance was submitted by Dy. Superintendent of Police, Special Police Establishment, Lokayukta, Jabalpur before the Special Judge who has passed the impugned order praying therein that the immovable property of appellant V.K. Brahamankar be attached under the

interim arrangement. On the submission of the said application dated 5.4.1997, an order under Section 4 of the Ordinance attaching the property under interim arrangement was passed by the Special Judge, Jabalpur. Thereafter, a notice was issued to the appellant to show cause under Section 4 of the Ordinance.

4. In pursuance to the notice issued to him under Section 4 of the said Ordinance, appellant submitted reply on 22.4.1997 as this finds place in the order sheet dated 22.4.1997 of the Special Court. Thereafter, on 17.7.1997 the Principal Secretary, Department of Energy authorized Superintendent of Police Lokayukta authorizing him to file application for attachment of the immovable property of appellant though it was already filed earlier to this date as the same was filed on 5.4.1997 by Dy. Superintendent of Police, Lokayukta.

5. On going through the order sheet of the Special Court, this Court finds that against the show cause present appellant V.K. Brahamankar as well as his wife Smt. Vandana Brahamankar who is appellant in criminal appeal no.21/10/1997, filed reply.

6. On 29.4.1997 Shiv Kumar Gupta and Smt Shakuntala Gupta who are the appellants of criminal appeal No.2183/1997 filed objections under Section 4(4) of the said Ordinance that they bought the property mentioned in their objection from V.K. Brahamankar on 8.1.1996.

7. The learned Special Judge by the impugned order rejected the objections I.A. No.6 of Shiv Kumar Gupta and Smt Shakuntala Gupta of criminal appeal No.2183/1997 and kept the objections of V.K. Brahamankar and Smt. Vandana Brahamankar pending holding that they will be decided after recording the evidence. Hence this appeal has been filed.

8. The contention of Ku. Namrata Kesharwani, learned counsel for the appellant is that in order to attach the property under the said Ordinance prerequisite conditions embodied in Section 3 of the Ordinance should have been complied with and if any of the condition has not been fulfilled, the application is premature and is not maintainable. Further it has been submitted by her that on receiving an application under Section 3 of the Ordinance to attach the immovable property by interim measure a complete procedure has been given under Section 3 and 4 of the said Ordinance and if that would be the position since the said procedure has not been followed, the order impugned is palpably without jurisdiction. In her usual vehemence, she has also submitted that since on the date of the filing of the application for attachment there was no authorization, therefore the application was not maintainable. Apart from this it has been submitted by her that during the pendency of the proceedings, the order of authorization was passed on 17.7.1997 by Principal Secretary, Department of Energy and Superintendent of Police (Lokayukta), Special Establishment was authorized to file an application but the application was filed by Dy. Superintendent of Police, Special Police Establishment. The contention of learned counsel is that there is no sub-delegation

power under the Ordinance and therefore, for this additional reason also the application is not maintainable.

9. By pressing the appeal 2110/1997 filed on behalf of Smt. Vandana Brahamankar, it is been argued by learned counsel that in the application for attachment of the property of Smt. Vandana Brahamankar has been mentioned and a prayer has been made that the said property be attached but Smt. Vandana Brahamankar has not been made party to the proceedings, therefore, without impleading her as party and making a specific prayer no order can be passed. On these premised submission it has been argued by learned counsel that these two appeal be allowed by setting aside the impugned order.

10. By inviting my attention to the provisions of Section 3,4 and 5 of the said Ordinance, it has been argued by learned counsel for the appellant that the District Judge is the only authority before whom such an application would lie and upon which he can pass the order and the Special Judge constituted under the Act has no jurisdiction to decide such application. By inviting my attention to Section 5(6) of the Act it has been argued that the powers exercisable by the District Judge under the Ordinance can be exercised by the Special Judge under the Act only while trying the offence punishable under the Act and not otherwise and if that is the position the entire exercise which has been done by the Special Judge is futile exercise.

11. Shri. R.K. Verma, learned counsel by pressing criminal appeal No.2183/1997 has submitted that appellants Shivkumar Gupta and Smt. Shakuntala Gupta bought the property under the attachment from V.K. Brahamankar and therefore, these two appellants filed objections under Section 4 of the said Ordinance. The contention of Shri Verma is that if such objections are filed under Section 4 of the said Ordinance the procedure contemplated under Section 5 ought to have been complied with and since this has not been done the impugned order cannot be allowed to remain stand.

12. On the other hand Shri Aseem Dixit, learned Public Prosecutor argued in support of the impugned judgment and has submitted that the immovable property under the attachment should remain intact and the same may not be alienated in order to create interest of third party, therefore, the application was rightly submitted by the prosecution and the same has been rightly decided by the impugned order.

13. Having heard learned counsel for the parties, I am of the view that these three appeals deserve to be allowed.

14. The moot question is whether the Special Judge constituted under the Act was having any power to pass any order under the Ordinance. On going through Sections 3,4 and 5 of the Ordinance of 1944 everywhere this Court finds that in all these three Sections the term "District Judge" has been used and nowhere the 'Special Judge' constituted under the Act of 1988 has been empowered to entertain the application to pass interim or final attachment order under Section 4 and 5 of the Ordinance. Thus, according to me, the applications filed by respondent I.A.

No.3 and 4 before the Special Judge constituted under the Act of 1988 were not maintainable and the impugned order which has been passed on the applications which in itself were not maintainable is coram non judice. To me, the Special Judge constituted under the Act of 1988 is empowered with the powers of District Judge under the Ordinance of 1944 only when the said Court is trying the offence punishable under the Act. Admittedly, when the impugned order was passed, no charge sheet was filed and the case was not being tried by the Special Judge under the Act. Hence, the impugned order is without jurisdiction.

15. Since the impugned order is without jurisdiction and the same is being set aside on that ground alone, the other objections raised by the learned counsel for the appellants are not being dealt with.

16. Resultantly, the above said three appeals are hereby allowed. The impugned order passed by learned Special Judge, being without jurisdiction, is hereby set aside and the proceeding before the Special Judge in respect to the interim and final attachment of the immovable property, is hereby dropped and the property is released from the attachment.

Appeal allowed.

I.L.R. [2008] M. P., 1514

APPELLATE CRIMINAL

Before Mr. Justice A.P. Shrivastava

16 April, 2008*.

BHAGWAN SINGH & ors.

...Appellants

Vs.

STATE OF M. P.

...Respondent

A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 7 - Mandatory - Non-compliance will not vitiate entire trial but vitiate trial relating to offences under Atrocities Act, unless and until the offence under I.P.C. has nexus with the offences under Atrocities Act - Accused can take such objection at appellate stage also but has to satisfy Court that grave prejudice has been caused to him which has resulted in miscarriage of justice - If objection is taken at initial stage, Court can direct for reinvestigation.

क. अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) नियम, 1995, नियम 7 - आज्ञापक - अपरिपालन से सम्पूर्ण विचारण दूषित नहीं होगा किन्तु अत्याचार अधिनियम से सम्बंधित अपराध का विचारण दूषित होगा, जब तक भा.द.सं. के अधीन दण्डनीय अपराध का सम्बंध अत्याचार अधिनियम के अधीन दण्डनीय अपराध से न हो - अभियुक्त ऐसी आपत्ति अपील के प्रक्रम पर भी ले संकता है किन्तु न्यायालय को संतुष्ट करना होगा कि उसे घोर पक्षपात कारित हुआ जिसके परिणामस्वरूप न्याय की विफलता हुई है - यदि आपत्ति प्रारम्भिक प्रक्रम पर ली जाती है तो न्यायालय पुनः अनुसंधान का निदेश दे सकता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 193 - Cognizance

of Offences by Sessions Court - Committal proceedings before Special Court are mandatory - Proceedings cannot be quashed in those cases where charge sheet was filed directly before Special Court in view of judgment passed in Anand Swaroop Tiwari unless occasioned failure of justice. (Para 27)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 193 - अपराधों का सेशन न्यायालय द्वारा संज्ञान - विशेष न्यायालय के समक्ष मामला सुपुर्दगी की कार्यवाही आज्ञापक है - आनन्द स्वरूप तिवारी वाले मामले में पारित निर्णय को ध्यान में रखकर उन मामलों में कार्यवाही अभिखण्डित नहीं की जा सकती है जहाँ आरोप पत्र सीधे विशेष न्यायालय में पेश किया गया हो जब तक कि न्याय की निष्फलता न हुई हो।

Cases referred :

2006 (1) MPJR 70, 2006 Cr.L.J. 4429, Cr. No. 29/2000 delivered on 21-09-2006, (2000) 2 SCC 504, (2004) 1 SCC 215, (2004) 4 SCC 584, (2001) 7 SCC 679, 1995 Cr.L.J. 2376, 1996 MPLJ 141, AIR 1980 SC 1707, AIR 1981 SC 765, AIR 1987 SC 1073.

V.K. Saxena with Aditya Ghuraiya, for the appellants

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

J U D G M E N T

A. P. SHRIVASTAVA, J.:—This appeal is directed by the appellants against the judgment of conviction and sentence dated 21.1.2000 passed by the Special Judge (Scheduled Castes and Scheduled Tribes), Guna (M.P.) in Special Case No.42/96, by which the appellants have been convicted and sentenced as under:-

(I) Appellants have been convicted under Section 3 (1)(xv) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for six months each with a fine of Rs. 100/- each. They have further been convicted under Section 426 of I PC and sentenced to undergo rigorous imprisonment for one month each.

(II) Appellant Bhagwan Singh has been convicted under Sections 323 and 451 of IPC and sentenced to undergo rigorous imprisonment for three months (on both counts) with a fine of Rs. 100/-.

(III) Appellant Kishore Singh and Indrapal Singh have been convicted under Section 323 read with Section 34 of I PC and sentenced to undergo rigorous imprisonment for three months each.

(IV). In default of payment of fine, they have also been directed to undergo imprisonment.

(V) All the sentences are to be run concurrently.

2. In brief, the case of the prosecution is that report was lodged by the complainant Jujla (P.W.I) on 23.4.96 at about 10:15 at police station Chanderi that a day before occurrence, appellant Bhagwan Singh had come and told the complainant to work

at his thresher. Complainant had refused to work at thresher. Thereafter on the date of incident, i.e. on 22.4.96 at village Bhatija appellants came to his house and abused him and also threatened to kill him in case he did not work at thresher and caused damage to the bricks of the roof of the house of the complainant. Appellant Bhagwan Singh has also beaten him causing injury to his hand. The complainant was sent to the hospital for medical examination. After completion of the investigation, charge-sheet was filed before the Special Court and the trial Court convicted and sentenced the appellants accordingly as stated above.

3. On 30.1.2007 arguments heard finally and on 17.1.2007, a reference was made by this Court and the matter was referred to the larger Bench to clarify the following points:-

(I) Whether the compliance of Rule 7 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 is mandatory;

(II) Whether due to non-compliance of the said rule the whole trial would vitiate or only those offences relating to the Scheduled Tribes (Prevention of Atrocities) Act, 1989;

(III) Whether this objection regarding non-compliance of the Rule 7 can be taken for the First time before the Appellate Court; and

(iv) If it is found that Rule 7 is mandatory whether the Court can direct for reinvestigation in terms of Rule 7 and direct to File fresh charge-sheet before the Court.

4. During the course of final submissions, counsel for the appellants raised the following points that in this case, there is non-compliance of Rule 7 of SC & ST (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as "the Rules") by the investigating agency. Further, the offences under Atrocities Act and Indian Penal Code are interlinked to each other. Therefore, the conviction of the appellants cannot be sustained and particularly, the charge-sheet was filed against the appellants directly before the Special Court. There is no committal proceeding. Therefore, the judgment of trial Court is erroneous and illegal. Hence, the finding of sentence is not maintainable.

5. Regarding the non-compliance of Rule 7, what would be the consequence for that is considered in the case of *Dhanraj Singh Vs. State of M.P.* reported in 2006(1) M.P.J.R. 70, in which it was held that the entire investigation is vitiated and the conviction cannot be maintained. Accused were acquitted in both the offences under Section 3(1)(10) of the Act and under Section 323 of IPC. Similar view has been expressed in the case of *Bharat Singh Vs. State of M.P.* reported in 2006 Cr. L.J. 4429.

6. But, this Court has taken contradictory view in the case of *Keshav Singh Vs. State of M.P.* in Criminal Appeal No. 29 of 2000, judgment dated 21.09.2006.

7. The Division Bench of this Court in Criminal Appeal No. 110 of 2000

answered the reference on 24th August, 2007 and the answer recorded by Division Bench is as under:-

- (I) That, the provisions of Rule 7 of the Rules are mandatory in nature;
- (II) That, non-compliance of Rule 7 of the Rules will not vitiate the entire trial but vitiate the trial relating to the offences under the Atrocities Act, unless and until the offences under the Indian Penal Code has nexus with the offences under the Atrocities Act;
- (III) That, objection regarding non-compliance of the provision of Rule 7 of the Rules can be taken for the first time before the Appellate Court, but while doing so, the accused will have to satisfy the Appellate Court that due to non-compliance of the said provision, grave prejudice is caused to him which has resulted into miscarriage of justice and unless the accused satisfies the appellate Court that there was miscarriage of justice, he will not get any benefit of the said provision; and
- (IV) If objection is raised at the earliest opportunity, the Court if satisfied, can direct for re-investigation and to file charge-sheet, but not at a belated stage of the proceedings.

8. Now, with the answer of the reference given by Division Bench of this High Court, the matter has been finally settled and it was held by Division Bench of this Court that Rule 7 of the Rules is mandatory in nature. But non-compliance of Rule 7 of the Rules will not vitiate the entire trial but vitiate the trial relating to the offences under the Atrocities Act, unless and until the offence under the Indian Penal Code has nexus with the offences under the Atrocities Act. Whether in this case, the offences of atrocities are interlinked with the offences of Indian Penal Code, will be discussed later on.

9. Learned counsel for the appellants raised new objection that in this case, due to non-committal proceedings, the trial would be vitiated. He submits that being a legal objection this can be raised at the appellate stage also.

10. This is a crucial point whether due to non-committal proceeding, the trial would be vitiated.

11. Counsel for the appellants mainly relied on *Gangula Ashok & another Vs. State of A.P.* (2000) 2 SCC 504; *Vidyadharan Vs. State of Kerala* (2004) 1 SCC 215, and *Moly & another Vs. State of Kerala* (2004) 4 SCC 584.

12. Case of *State of M.P. Vs. Bhooraji and Others*, 2001(7) SCC 679 also discussed. It is submitted by the counsel for the appellants that in view of the citations submitted by him, the principles of *Bhooraji and others* (supra) case will not be applicable.

13. I would like to discuss the relevant decisions on this point pronounced by this High Court as well as the Hon'ble Apex Court. Since, the Act came into force in the State of Madhya Pradesh, this point was considered in the case of

Meerabai Vs. Bhujbal Singh reported in 1995 Cr. L. J. 2376 in which the Division Bench of this High Court held that the Special Court has no jurisdiction to try the offences unless the case is committed to it in view of Section 193 of Cr. P.C. But, subsequently, in the case of *Anand Swaroop Tiwari Vs. Ram Ratan Jatav and others* reported in 1996 MPLJ 141, the Full Bench of this High Court held that a Special Court under Prevention of Atrocities Act is not to function as a Sessions Court but as a Court of original jurisdiction. It can take cognizance of any offence without committal order by the Magistrate.

14. Thereafter, in the case of *Gangula Ashok and another* (supra), the Apex Court held that under the Prevention of Atrocities Act, Special Court is a Court of Session. It is specified for trial of offences as distinguished from "inquiry" as defined in Section 2(g) of Cr.P.C. Therefore, it cannot take cognizance directly as a Court of original jurisdiction without the case being committed to it by a Magistrate in view of Section 193 of Cr. P.C. Sections 4 and 5 of Cr. P.C. do not indicate any departure from this position.

15. In the case of *Vidyadharan* (supra), the Apex Court considered the aspect whether Special Court under the Act is a Court of Session; whether "Special Court" under the Act being a Court of Session, excepted from interdict of Section 193 of Cr. P.C., 1973; whether there was any express provision in the Act or in Cr.P.C. excepting the Special Court and further whether a combined reading of Sections 4(2) and 5 of Cr. P.C. excepted the Special Court.

"The Apex Court has discussed this point. The relevant para 18 of its judgment contains that:-

"Section 193 of the Code has to be understood in the aforesaid backdrop. The Section imposes an interdict on all Courts of Session against taking cognizance of any offence as Court of original jurisdiction. It can take cognizance only if "the case has been committed to it by a Magistrate." as provided in the Code. Two segments have been indicated in Section 193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently in express language regarding taking of cognizance, and the second is when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word "expressly" which is employed in Section 193 denoting those exceptions is indicative of the legislative mandate that a Court of Session can depart from the interdict contained in the Section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently, no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate."

16. In the case of *Moly and another* (supra), it is held by the Apex Court that under the Prevention of atrocities Act, under Sections 14 & 2(l)(d). Special Court

is a Court of Session. It is specified for trial of offences as distinguished from 'inquiry'. Cognizance can be taken by said Court directly as a result of Court of original jurisdiction without the case being committed to it by a Magistrate. It is not permissible in view of Section 193 of Cr. P.C. In the absence of any contrary provision in the 1989 Act or in Cr. P.C. in that regard. Section 5 of Cr. P.C. cannot be brought in aid for supporting the contrary view. The word "except as otherwise expressly provided" used in Cr.P.C. that means except positively provided differently in clear and unambiguous language.

17. The Apex Court in the case of *Bhooraji and Others* (supra) dealt with the matter elaborately and also distinguished the case which was decided by the Apex Court in the case of *Gangula Ashok and another* (supra). The factual position in the case of *Bhooraji and others* (supra) is that police, after investigation, filed charge-sheet against eleven accused in respect of various offences including Section 302 read with Section 149 of IPC and Section 3(2) of the Act. The case started in January 1992 before the Court of Additional Sessions Judge, Dhar (M.P.) which was the specified Court as per Section 14 of the said Act. The charges were framed and the case was decided on 23.8.1995 by convicting all the eleven accused under Sections 148, 323, 302 read with Section 149 of IPC and sentenced them to various punishments including imprisonment for life. All the eleven accused persons filed appeal before the High Court of Madhya Pradesh. It was during the pendency of the said appeal that the Hon'ble Supreme Court decided the case in *Gangula Ashok and another* (supra) in which it was held that committal proceedings are necessary for a specified Court under the SC & ST Act to take cognizance of the offences to be tried. But the legal position which held by the field in the State of Madhya Pradesh till then was the same on account of a judgment pronounced by a Division Bench of the High Court of Madhya Pradesh in *Meerabai* (supra) case. But the said legal position was changed in the State when a Full Bench of the High Court of Madhya Pradesh overruled the aforesaid dictum by a judgment pronounced in *Anand Swaroop Tiwari* (supra). The Full Bench in para 20 of its judgment held that:-

"Section 193 of the Code of Criminal Procedure does not apply to proceedings under the SC & ST Act and committal orders are not required".

The Full Bench, in order to prevent repetition of trials already held or started, took the precautionary measure of directing that;

"where cognizance has already been taken on the basis of committal orders in police challan cases, it is not necessary for the Courts to retrace their steps or to take cognizance afresh".

18. The Apex Court also observed that when this Court pronounced the judgment in *Gangula Ashok and another* (supra) case, the legal position as was adopted by the Division Bench of the M.P. High Court in *Meerabai* (supra) case, got

revived and the Full Bench decision got eclipsed. Taking advantage of this Court, all the convicted persons filed I.A. No.288 of 2000 before the High Court seeking quashment of the trial proceedings on the ground that:-

"The trial was without jurisdiction inasmuch as the specified Court of Session did not acquire jurisdiction to take cognizance of and try the case, in the absence of it being committed by a Magistrate."

"The entire trial held by the Court below shall stand quashed and the trial Court was directed to return the charge-sheet and the connected papers to the prosecution for resubmission to the Magistrate for further proceedings in accordance with law."

Against this order, the State of MP filed an appeal before the Apex Court. It is observed by the Apex Court that in the present case, where the accused did not raise any question when they were heard at the time of framing of the charge, that the Court cannot proceed without committal made by a Magistrate. Nor did they raise such a plea at any stage either before or after the evidence was recorded by the trial Court. The convicted persons thought of raising such a contention only when they found the decision of this Court in *Gangula Ashok and another* (supra) as useful to them.

19. Now, I will quote some important and relevant paras of the judgment in *Bhooraji and Others* (supra) case which are as follow :-

8. "The real question is whether the High Court necessarily should have quashed the trial proceedings to be repeated again only on account of the declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC & ST Act. *A de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering *a de novo* trial. This is because the appellate Court has plenary powers for re-valuating and reappraising the evidence and even to take additional evidence by the appellate Court itself or to direct such additional evidence to be collected by the trial Court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the Court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice."

13. It is useful to refer to Section 462 of the Code which says that even proceedings conducted in a wrong sessions division are not liable to be set at naught merely on that ground. However, an exception is provided in that section that if the Court is satisfied that proceedings conducted erroneously

in a wrong sessions decision "has in fact occasioned a failure of justice", it is open to the Higher Court to interfere. While it is provided that all the instances enumerated in Section 461 would render the proceedings void, no other proceedings would get vitiated *ipso facto* merely on the ground that the proceedings were erroneous. The Court of appeal or revision has to examine specifically whether such erroneous steps had in fact occasioned a failure of justice. Then alone the proceedings can be set aside. Thus the entire purport of the provisions subsumed in Chapter XXXV is to save the proceedings linked with such erroneous steps, unless the error is of such a nature that it had occasioned a failure of justice.

14. We have to examine Section 465(1) of the Code in the above context, it is extracted below:-

"465.(1) "Subject to the provisions here-in-before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby."

15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the Legislature as possible occurrences in criminal courts. Yet the Legislature dis-favoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the Legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity."

16. What is meant by "a failure of justice" occasioned on account of such error, omission or irregularity? This Court has observed in *Sham N. Saheb M. Multani v. State of Karnataka* [(2001)2 SCC 577] thus:

"We often hear about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of the Environment* [1977(1) All ER 813]) The criminal Court, particularly the Superior Court, should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."

17. It is an uphill task for the accused in this case to show that failure of justice had in fact occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. The normal and correct procedure, of course, is that the case should have been committed to the Special Court because that court being essentially a Court of Session can take cognizance of any offence only then. But if a specified Sessions Court, on the basis of the legal position then felt to be correct on account of a decision adopted by the High Court, had chosen to take cognizance without a committal order, what is the disadvantage of the accused in following the said course?

23. We conclude that the trial held by the Sessions Court reaching the judgment impugned before the High Court in appeal was conducted by a court of competent jurisdiction and the same cannot be erased merely on account of a procedural lapse, particularly when the same happened at a time when the law which held the field in the State of Madhya Pradesh was governed by the decision of the Full Bench of the Madhya Pradesh High Court (supra). The High Court should have dealt with the appeal on merits and on the basis of the evidence already on record. To facilitate the said course, we set aside the judgment of the High Court impugned in this appeal. We remit the case back to the High Court for disposal of the appeal afresh on merits in accordance with law and subject to the observations made above.

20. The case of *Meerahai* (supra) was decided by the Division Bench of this High Court on 24.1.1994. The Full Bench of this High Court gave its decision in *Anund Swaroop Tiwari* (supra) case on 23.8.1995. The case of *Gangula Ashok and another* (supra) was pronounced by the Apex Court on 28.01.2000; the case of *Bhooraji and Others* (supra) was pronounced on 24.08.2001 while the cases of *Vidyadharan* (supra) & *Moly and another* (supra) decided by the Apex Court on 14.11.2003 & on 23.3.2004.

21. It is submitted by learned counsel for the appellants that four judgments on this point i.e. *Gangula Ashok and another* (supra), *Vidyadharan* (supra), *Moly and another* (supra) and *Bhooraji and Others* (supra) were decided by the Apex Court and submitted that if two decisions on the same point are given by Superior Court, the latter view could be prevailed. In this regard, he relied on *Rajpur Ruda Meha and others Vs. State of Gujarat* reported in AIR 1980 Supreme Court 1707, in which it is held that about the precedent when certain question is neither raised nor argued a discussion by court after 'pondering over the issue in depth' would not be a binding precedent.

22. The basis of judgment on this point of *Gangula Ashok and another* (supra) has been discussed by the Apex Court in subsequent decisions specially in the case of *Bhooraji and Others* (supra), the Apex Court also distinguished the

applicability of *Gangula Ashok and another* (supra) case in its judgment and the reasons have been given elaborately by the Apex Court.

23. About the precedent, in the case of *Shankarlal Gyarasilal Dixit Vs State of Maharashtra* reported in AIR 1981 SC 765, the Apex Court observed that legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. Further, in the case *Ambalal Manibhai Patel and others Vs. State of Gujarat and others* reported in AIR 1987 SC 1073 it is observed that the ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what is actually decided, and not what logically follows from it.

24. From the perusal of record, it is found that the present case has been filed before the Special Court on 28.5.96 against the appellants by police station Chanderi under Sections 451, 323, 426 of IPC and under Section 3(l)(xy) of the Act and during the relevant time, the law pronounced by the Full Bench of this High Court in the case of *Anand Swaroop Tiwari* (supra) was prevailing and it was decided on 23.8.1995. The judgment of this case was delivered on 21.1.2000 and after passing the judgment and when the appeal was pending, the decision in *Gangula Ashok and another* (supra) case was pronounced by the Apex Court on 28.1.2000.

25. Therefore, looking to the factual aspect of the case and ratio decided by the Apex Court in *Bhooraji and Others* (supra) case, the trial would not vitiate on the ground that committal proceeding has not been followed by the Court. From the record of the lower Court and the impugned judgment, it appears that no such objection has been taken by the appellants at the time of trial regarding the non-compliance of procedural lapse.

26. Therefore, regarding the committal proceedings before the Special Court in view of *Gangula Ashok and another* (supra) case and subsequent law on this point, it is clear that Special Courts under Section 14 of the Atrocities Act are Courts of Session and committal proceedings are necessary under Section 193 of Cr. P.C. But in the present case, the principle of *Gangula Ashok and another* (supra) case is not applicable as already-discussed in detail earlier. Therefore, due to non-committal proceedings, the impugned judgment cannot be erased merely on the ground of procedural lapse in view of observations made in *Bhooraji and Others* (supra) case.

27. In view of legal objection raised by learned counsel for the appellants and the discussions made in the aforesaid paras and the proposition of law laid down by the Division Bench of this Court as well as by the Apex Court, the position is now clear and settled:-

- (I) That, the provisions of Rule 7 of the Rules are mandatory in nature;
- (II) That, non-compliance of Rule 7 of the Rules will not vitiate the entire

trial but vitiate the trial relating to the offences under the Atrocities Act, unless and until the offence under the Indian Penal Code has nexus with the offences under the Atrocities Act;

(III) That, the objection regarding non-compliance of the provision of Rule 7 of the Rules can be taken for the first time before the appellate Court, but while doing so, the accused will have to satisfy the appellate Court that due to non-compliance of the said provision, grave prejudice is caused to him which has resulted into miscarriage of justice and unless the accused satisfies the appellate Court that there was miscarriage of justice, he will not get any benefit of the said provision;

(IV) If the objection is raised at the earliest opportunity, the Court if satisfied, can direct for reinvestigation and to file charge-sheet, but not at a belated stage of the proceedings.

(V) In view of the decision in the case of *Gangula Ashok and another* (supra), the committal proceedings before the Special Court are mandatory in view of Section 193 of Cr.P.C. But, those cases which were filed directly before the Special Court without committal proceedings in view of the decision of the Full Bench of this Court in *Anand Swaroop Thvari* (supra) case prevailing at that time, the proceedings cannot be quashed due to procedural lapse as mentioned unless occasioned failure of justice as lays down by the Apex Court in *Bhooraji and Others* (supra) case.

28. Now, i will consider the factual aspect of the case.

29. All the appellants were convicted by the trial Court under Section 3(1)(xv) of the Act and under Section 426 of IPC. Appellant Bhagwan Singh in addition to above conviction, convicted under Sections 451 and 323 of IPC while the remaining appellants in addition to above conviction convicted under Section 323 of IPC with the aid of Section 34 of IPC. The allegation against the appellants is that they tried to dispossess the complainant Jujla (P.W.1) knowing that he is the member of Scheduled Caste. All the appellants entered into the house of the complainant. Appellant Bhagwan Singh entered into the house of the complainant by damaging his *Khapra* and thereby committed the act of 'mischief. Regarding the dispossession, in examination-in-chief, the complainant deposed that the quarrel took place due to refusal of work as a labourer without charges. The appellants came to the house of the complainant with the appellant Bhagwan Singh; and they all entered into the house of the complainant and brought the complainant outside of the house. In this regard, the complainant Jujla (P.W.1) stated that appellant Bhagwan Singh told him to work in his house. When he refused, then filthy language was used by the appellant Bhagwan Singh. It is further alleged that appellant Bhagwan Singh was taken the complainant outside of the house and threatened him that he would dispelled him from the village. Thereafter, appellant Bhagwan Singh inflicted '*farsa*' blow on his right hand, appellant Indrapal Singh gave a '*lathi*' blow on his right hand

and appellant Kishore Singh gave blow by shoe on his face. The wife of the complainant Smt. Kunwar Bai (P.W.2), Brijbhan (P.W.5) were present on the spot at the time of incident. In para 7 of his cross-examination, the witness admits that two bigha of land has been forcibly taken by the appellant Bhagwan Singh. Appellants are brothers and they were cultivating his land for the last 7-8 years. When the complainant asked them to return his land, they refused to do so. *Patta* was prepared in his name. Regarding the infliction of injuries, minor contradictions and omissions came out in the cross-examination. In the cross-examination, the witness turned his version about infliction of injuries by '*farsa*'.

30. Smt. Kunwar Bai (P.W.2), who is wife of the complainant, deposed that all the appellants entered into the house of the complainant by damaging '*khapra*' and they took the complainant outside the house and beat her husband.

31. Brijbhan (P.W.5), who is an eye-witness of the incident, has not supported the prosecution case. According to the witness, in his presence, no incident has taken place. He was declared hostile by the prosecution.

32. Similarly, Sukhar (P.W.6) has turned hostile and he has also not supported the prosecution case.

33. Dr.R.P.Sharma (P.W.3) examined the complainant Jujla (P.W.1) on 23.04.96 and found simple injuries which were caused by hard and blunt object. The report is Ex.P.2. L.C. Shriwas (P.W.4) proved the First Information Report which is Ex.P. 1. A.S.I. Chandan Singh Parihar (P.W.7) conducted the investigation of the case and also prepared the sop map.

34. All the independent witnesses have not corroborated the version of the complainant Jujla (P.W.1). According to the complainant, appellant Bhagwan Singh entered into his house. As per Smt. Kunwar Bai (P.W.2), who is wife of the complainant, stated that all the appellants entered the house of the complainant and they broken his '*Khapra*'. The prosecution has proved Ex.P.4 which is *Nuksani Panchanama* but the witness Sukhar (P.W.6) supported the *Nuksani Panchanama* Ex.P.4. However, it was not proved by the complainant himself. The testimony of Investigating Officer Chandan Singh Parihar (P.W.7) shows that he prepared *Nuksani Panchanama* Ex.P.4. According to this *Panchanama*, the loss is worth Rs. 500/-. The testimony of Investigating Officer in this regard remained unchallenged although it is not corroborated by independent witnesses. Looking to the testimony of the complainant and the Investigating Officer, it is not proved that the loss of '*Khapra*' caused to the complainant is worth Rs. 500/-.

35. Regarding the offence under Section 3(l)(xv) of the Act, the essential ingredient of the Section is that-

"Whoever not being a member of Scheduled Caste or Scheduled Tribe; forces or causes a member of Scheduled Caste or Scheduled Tribe to leave his house, village or other place of residence, shall be punishable under this Section."

36. Regarding the objection of non-compliance of Rule 7 as decided by the Division Bench of this Court although the Rule 7 of the Rules will not vitiate the entire trial but vitiate the trial relating to the offences under the Atrocities Act, unless and until the offence under the Indian Penal Code has nexus with the offences under the Atrocities Act. This objection has been raised by the appellants for the first time during the appellate stage but while doing so, the accused will have to satisfy the appellate Court that due to non-compliance of the said provision, grave prejudice is caused to him which has resulted into miscarriage of justice and unless the accused satisfies the appellate Court that there was miscarriage of justice, he will not get any benefit of the said provision. In this case also the counsel for the appellants has not satisfied the Court that why this objection was not raised before the trial Court and what prejudice or miscarriage of justice is caused to him due to non-compliance. Therefore, the objection is not sustainable.

37. In this case, the cause of dispute arose due to refusal of the complainant to work as a labourer without charges in the house of the appellant Bhagwan Singh or at his threshers. On this dispute, the appellant Bhagwan Singh entered into the house of the complainant; and caused damage his Khapra; and brought him outside the house and inflicted injuries to him which are simple in nature.

38. From the evidence on record, it does not appear that there was any intention of the appellants to dispossess the complainant from his house, being a member of Scheduled Caste or Scheduled Tribe. The backdrop of the case clearly shows that the incident took place due to refusal of the complainant to work. To take revenge, the appellant Bhagwan Singh went to the house of the complainant, brought him outside the house and inflicted simple injuries to him. Therefore, the essential ingredients of Section 3(1)(xv) are not proved by the prosecution against the appellants beyond reasonable doubt.

39. In view of the above discussion, it is found that the offence under Section 3(1)(xv) of the Act is not proved against all the appellants. Further, it has also come in the evidence that only the appellant Bhagwan Singh entered into the house of the complainant although version of the wife of the complainant is inconsistent on this point. According to the complainant, only appellant Bhagwan Singh entered into the house of the complainant but his wife stated that all the appellants entered into the house of the complainant which is not proved as per the prosecution story. Therefore, offence under Section 426 of IPC is only made out against the appellant Bhagwan Singh and it is not established against rest of the appellants. But from the evidence, it is clear that the appellants caused injuries to the complainant and all the injuries are found to be simple in nature. The conviction of all the appellants under Section 3(1)(xv) of the Act and except Bhagwan Singh, conviction against the remaining appellants under Section 426 of IPC are hereby set aside, if the amount of fine is realized, it be returned to them. Appellant Bhagwan Singh is convicted under Sections 451, 323 & 426 of IPC while the remaining appellants are convicted under Section 323 read with Section 34 of IPC.

40. Regarding the sentence, it is submitted by the counsel for the appellants that the incident took place on 22.4.96, since then nearly 12 years have elapsed and the charges which were proved by the prosecution are minor in nature, therefore, looking to the long-pendency of the case, the Court should take lenient view in awarding the sentence.

41. Looking to the above facts and circumstances of the case, the sentence of the appellant Bhagwan Singh under Sections 451, 323 & 426 of IPC is reduced to the period already undergone but the amount of fine to the tune of Rs. 1,000/- is imposed under Section 323 of IPC and amount of fine to the tune of Rs. 500/- is imposed under Section 426 of IPC while the amount of fine as awarded by learned trial Court under Section 451 of IPC is enhanced from Rs. 100/- to Rs. 500/-. The sentence of the rest of the appellants under section 323 read with Section 34 of IPC is also reduced to the period already undergone but the amount of fine is imposed to the tune of Rs.1,000/- on each. In default of payment of fine, the appellants have to undergo simple imprisonment for one month on each count. On realization of the fine amount, Rs.1,000/- (Rupees one thousand only) be given to the complainant as compensation under Section 357 of Cr.P.C. Bail bonds of the appellants shall stand discharged. They are directed to deposit the amount of fine before the trial Court within a period of 15 days from the receipt of this judgment.

42. Copy of this judgment be sent to the concerning Court for necessary compliance.

43. With the above modification, the appeal stands disposed of.

Appeal disposed of.

I.L.R. [2008] M. P., 1527

CRIMINAL REVISION

Before Mr. Justice A.P. Shrivastava

1 February, 2008*

SOVARAN SINGH & ors.

... Applicants

Vs.

STATE OF M.P.

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 216, 397 - Interlocutory Order - Alteration of Charge - Prosecution filed application under Section 216 of Code for framing additional charges - Trial Court fixed the case for evidence without deciding application - Revisional Court directed Trial Court to decide the application - Held - Orders which are matters of moment and some affect or adjudicate rights of accused or a particular aspect of trial cannot be said to be interlocutory order - Revision maintainable. (Para 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216, 397 - अन्तर्वर्ती आदेश - आरोप में परिवर्तन - अभियोजन ने अतिरिक्त आरोप विरचित करने के लिए संहिता की धारा 216 के अंतर्गत आवेदन

प्रस्तुत किया - विचारण न्यायालय ने आवेदन को विनिश्चय किये बिना मामला साक्ष्य के लिये नियत किया - पुनरीक्षण न्यायालय ने विचारण न्यायालय को आवेदन का विनिश्चय करने का निदेश दिया - अभिनिर्धारित - आदेश जो महत्वपूर्ण विषयों पर है और अभियुक्त के अधिकार का न्याय-निर्णय करते हैं या उनको किसी तरह प्रभावित करते हैं या विचारण के किसी विशिष्ट पहलू पर है तो ऐसे आदेशों को अन्तर्वर्ती आदेश नहीं कहा जा सकता है - पुनरीक्षण पोषणीय।

Cases referred :

AIR 1978 SC 47, AIR 1980 SC 962, 2000 (3) MPHT 464, 1997 (2) MPLJ 690, 1995 MPLJ 669, AIR 1977 SC 2185.

Jitendra Sharma, for the applicants.

B.B. Sharma, Panel Lawyer for the non-applicant.

O. R. D. E. R.

A.P. SHRIVASTAVA, J.:- This revision is filed by the applicants under Sections 397 read with Section 401 of Code of Criminal Procedure, 1973, arising out of the order dated 17.11.2006, passed by the Court of Sessions Judge, Morena (M.P.) in Criminal Revision No. 40 of 2006, by which the Revisional Court directed the learned trial Court to decide the application of the prosecution under Section 216 of Cr.P.C., dated 22.8.05.

2. The main grievances of the applicants are that the impugned order passed by Court below is illegal and not sustainable in law because the same was filed against an interlocutory order. Therefore, the Court below was not having jurisdiction to interfere with the order passed by learned trial Court in exercising its revisional jurisdiction.

3. Fact of the case, in brief, is that on the basis of the report lodged by the applicant No.2 at the police station Jaura bearing Crime No. 355/97, under Sections 302, 147, 148, 149 of IPC was registered. Subsequently, the matter was investigated by the CID. On the basis of CID report, the offence under Sections 304-A, 201, 177, 182, 211 of IPC was registered against the applicants. The trial Court framed the charges under Section 304-A, 201, 211 of IPC and fixed the case for prosecution evidence. The prosecution filed an application under Section 216 of Code of Criminal Procedure and averred that, the police has filed the challan under Sections 304-A, 201, 177, 182, 211 of IPC against the accused persons and charges under Sections 304-A, 201, 211 have been framed. It was further alleged that, the accused persons have lodged a false report in the police station on 15.10.97 and have gave false information to a public servant thereby earlier a false case was registered against the accused persons and on the basis of the CID investigation, they have been found innocent whereas as a matter of fact, it was prayed that charges under Sections 194, 120(B), 177 and 182 of IPC be further framed against the accused persons.

4. The learned trial Court has not decided the application and fixed the case for evidence. It is pertinent to note that against the order dated 12.12.05, a revision petition was filed before the Sessions Judge, Morena bearing Criminal Revision No. 40 of 2006 and on 24.3.2006, the Court directed the trial Court to consider

the application filed by prosecution under Section 216 of Cr.P.C. Against the above impugned order, a Criminal Revision No. 404 of 2006 was filed before this Court. The Hon'ble High Court set aside the order on 18.5.2006 and directed the Sessions Judge to pass an order in accordance with law after giving opportunity of hearing to both the parties. After hearing both the parties, the impugned order was passed on 17th November, 2006.

5. Arguments heard at length. Written arguments have also been filed by the applicants. The gist of arguments is that the order of the Magistrate was interlocutory in nature and, therefore, it could not be challenged before the Sessions Court and the Sessions Judge has passed an erroneous order which is liable to be set aside. In support of the above contentions, learned counsel for the applicants relied on various citations which are as follows:-

(I) In the case of *Madhu Limaye V. State of Maharashtra* reported in AIR 1978 Supreme Court 47 in which it is held that the High Court can exercise its inherent power to quash an interlocutory order.

(II) In the case of *V. C. Shukla V. State through C.B.I.* reported in AIR 1980 Supreme Court 962 in which Hon'ble Delhi High Court held that order framing of charge is interlocutory. Appeal against same is incompetent.

(III) In the case of *Habib V. State of M.P. and others* reported in 2000(3) M.P.H.T. 464 in which it is laid down that Magistrate is empowered under Section 216 of Cr. P.C. to alter or add any charge at any time before the judgment is pronounced. It does not amount reviewing of earlier order.

(IV) In the case of *Khagesh Kumar Goel V. State of M.P. and others* reported in 1997(V-2) M.P.L.J. Page 690 it is held that the order passed at the time of framing charge negating plea of accused that no charge is made out and he is entitled to be discharged not an interlocutory order. Jurisdiction to entertain revision in such matter not barred under Section 397(2) of Cr. P.C. Where however, the plea of the accused is that a minor charge is made out instead of the charge as framed such an order is an interlocutory order and no revision application challenging such order tenable.

(v) Lastly, in the case of *Ramchandra S/o. Shrilal and others V. State of Madhya Pradesh*, reported in 1995(V-40) M.P.L.J. Page 669 it is held that regarding framing of charge, factors to be taken into consideration.

6. Counsel for the respondent-State submits that the learned trial Court has not assigned any reason for postponing the application of the prosecution for framing the additional charge against the accused persons. He is unable to accept the contentions of learned counsel for the applicants that the impugned order comes within the ambit of an interlocutory order. He also submits that as the petition is kept pending by trial Court, the order passed by learned Sessions Judge suffers no irregularity because the Sessions Judge simply directed the trial Court to decide the application.

7. Regarding the interlocutory matter, the Apex Court in the case of *Amar Nath and others V. State of Haryana and others*, AIR 1977 Supreme Court 2185 discussed and also observed the scope of Section 397(2) of Cr. P.C. It is laid down that:-

“The term “interlocutory order” in Section 397(2) has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section.397. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2). But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court. Case law referred to.”

8. It is no doubt that against the framing of charge revision is maintainable and in this case also the prosecution has filed an application to amend the charge against the accused. The learned trial Court without deciding the application postponed the consideration of the application but no reasoned order was passed by the trial Court and it was passed in cryptic way. The Sessions Judge only directed the trial court to decide the application. But orders which are matters of moment and some affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the trial Court. Further, by directing to dispose of the application will not prejudice the rights of the accused because at the time of disposal of application, the trial Court hears both the sides and then passes the order. Therefore, the objection raised by the applicants cannot be sustainable. Hence, the order passed by the Sessions Judge is affirmed with a direction that the learned trial Court after giving opportunity of hearing to both sides shall pass reasoned order in accordance with law. The revision is disposed off accordingly.

Revision is disposed of.

I.L.R. [2008] M. P., 1531

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

22 April, 2008*

AKBAR and another
Vs.

--- Applicants

STATE OF M.P.

--- Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 464 - Effect of omission to frame, or absence of, or error in, charge - Appellants charged for offence u/s 407 I.P.C. - Convicted u/ss. 379 & 381 I.P.C. - Held - Charge contained particulars of offences and accused persons were aware of basic ingredients of offence for which they were being tried - Conviction u/ss. 379 & 381 I.P.C. is saved by provision of Section 464 as it has not resulted in failure of justice.

(Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 464 - आरोप विरचित न करने या उसके अभाव या उसमें गलती का प्रभाव - अपीलार्थीओं के विरुद्ध भा.द.सं. की धारा 407 के अधीन दण्डनीय अपराध के लिए आरोप विरचित - भा.द.सं. की धारा 379 व 381 के अधीन दोषसिद्ध पाया - अभिनिर्धारित - आरोप में अपराधों की विशिष्टियाँ दी गई थीं और अनियुक्तगण अपराध के मूल तत्वों से अवगत थे जिनके लिये उनका विचारण किया जा रहा था - भा.द.सं. की धारा 379 व 381 के अधीन की गई दोषसिद्धि धारा 464 के उपबंधों द्वारा सुरक्षित क्योंकि ऐसा नहीं हुआ कि इसके परिणामस्वरूप वस्तुतः कोई न्याय नहीं हो पाया हो।

Case referred :

(2006) 2 SCC 450

None, for the applicants.

Anjali Jamkhedker, P.L. for the non-applicant.

O R D E R

S.R.WAGHMARE, J.:—This revision has been filed under Section 397 read with Section 401 of the Cr.P.C. Being aggrieved by order and sentence dated 16-04-2004 passed by the 7th Additional Sessions Judge (Fast Track) Ujjain, in criminal appeal No.14/2004 convicting and sentencing the accused Akbar under Section 381 of the I.P.C and accused Faiz Mohammad under section 381 of the I.P.C and sentencing both the accused to one year of rigorous imprisonment each with fine of Rs.200/- each and in case of default of payment of the fine to undergo an additional sentence of two months rigorous imprisonment each.

2. Brief facts of the prosecution story are that on the date of incident i.e. On 23-4-1994, 125 quintals of wheat valued at Rs.51,250/- was loaded on truck bearing registration No.MBE-1785 by complainant Dilip Kumar (P.W-2) of Suraj Trading Company, Ghoda Nikas, Bhopal, as Muneem of the said firm. The truck driven by Akbar son of Babukhan and clearner Razak Ali was to proceed to Pithampur,

at Dist. Dhar. On 24-4-1994 the truck reached Dewas, the accused Akbar stated that he wanted to visit his brother-in-law Faiz Mohammad, who was residing at village Nogawa Ujjain, and, therefore, they stopped the truck at 9.00 p.m. in the said village and they decided to stay over night in the said village. The complainant Muneem Dilip Kumar (P.W-2) thereupon said that he would join them at Dewas on the next day. The truck did not arrive from Nogawa, so the complainant Dilip Kumar (P.W-2) visited the same and found the truck stationed at well of Faiz Mohammad and truck was empty and did not contain the wheat which had been loaded on it.

3. On being questioned Faiz Mohammad, stated that some thief has stolen the wheat in the night and thereupon along with the brother-in-law accused Akbar and cleaner Razak went in search of wheat, thereupon the complainant Dilip Kumar (P.W-2) tried to get a trace in the market of Dewas, Indore and Ujjain and on not getting any information about the same he had a doubt that the driver Akbar, Razak and Faiz Mohammad had in collusion stored or stolen the wheat. He lodged the report at Police Thana, Nogawa, vide Ex. P/2 on 24-4-1994 at 8.30 a.m. stating that the wheat has been stored in gunny bags carrying a red cross mark and crime was registered at No.53/94 for offence under Section 379 in the alternative under Section 407 of the I.P.C. The investigation officer B.R. Dwivedi (P.W-5) prepared spot map Ex.P/11 and received the bill for the wheat Ex.P/5, the Mandi form Ex. P/6, biltee of the truck Ex.P/7, the rent note of the truck Ex.P/4 in evidence. The statement of the accused were recorded vide Ex.P/13 and Ex.P/14 and 55 quintals of wheat was seized vide Ex.P/7 from accused Akbar from a room at the back of his house and vide EX.P/15 70 quintals of wheat was recovered from the room where animals are tied at the back of the house of accused Faiz Mohammad. The truck was seized vide Ex.P/16 and Ex.P/17.

4. On completion of the investigation the accused were charged for offence under Section 407 of the I.P.C. before the Chief Judicial Magistrate, who in turn committed them to committal Court for their trial. The accused abjured their guilt and stated that they were falsely implicated in the matter. They however, did not examine any witness in their defence. The trial Court on consideration of the facts and circumstances of the case came to a conclusion that the accused were guilty. Akbar was guilty for offence under Section 381 whereas accused Faiz Mohammad was convicted for offence under Section 379 as herein above stated whereas, the cleaner Razzak was acquitted from the offence under Section 407 of the I.P.C.

5. Being aggrieved the accused filed appeal before the 7th Additional Sessions Judge, (Fast Track) Ujjain, who upheld the conviction and sentence and hence the present revision. The revision has been filed mainly on the ground that there has been no ocular testimony. The conviction is based mainly on the evidence of the investigation officer B.R. Dwivedi (P.W-5) and his testimony has not been corroborated any of the independent witnesses; out of six prosecution witnesses five witnesses have been declared hostile according to the petitioner. It is also been objected the F.I.R. was delayed by five days and was not reliable peace of

evidence. More importantly the testimony of the prosecution witness Dilip Kumar (P.W-2) when the complainant himself has been declared hostile was not trust worthy. He had disposed the bags of wheat which were given to him on suprudginama and was unable to produce them in Court and hence his testimony ought not been relied and both the Courts committed grave error in relying on his testimony. More importantly, the ownership of the wheat was not established in the first place another important objection raised by the petitioner was that the accused were charged under Section 407 but convicted and sentenced under Section 379 and 381 of the I.P.C which was contrary to the provisions of Criminal Procedure Code and no charge was levied under the said sections, therefore, the conviction was vitiated and ought to be set aside.

6. Counsel for the respondent/State, however, on the other hand has fully supported the judgment of the trial Court as well as appellate Court stating that the appellate Court has properly marshalled the evidence available on record and there was no reasons to doubt the testimony of Inspector D.R. Dwivedi (P.W-5), who was also investigating officer. There are no allegations of malafide or any previous enmity with the accused to disbelieve this witness, he has remained steadfast on his cross-examination. Moreover, he was also witness of recovery of the wheat from the house of accused Akbar and Faiz Mohammad and the investigation as well as the seizure are all in accordance with law. Moreover, Counsel has stated that there was no need to doubt the testimony of complainant (P.W-2) Dilip Kumar, merely because he had been declared hostile, since it was perfectly natural that he had been unable to bring sacks of wheat. The Public Prosecutor was bound to doubt his veracity, however, on cross-examination it is found that he had properly identified the bags when Mr. Sharma of the Gram Panchayat brought the empty wheat bags to Court which have been marked as Ex.P/5 stated that those wheat bags were same bags which were recovered from the accused since they contained identification of the mark of red cross on them. Stating further that the delay in the F.I.R. had occurred because of the search of the wheat bags and the driver and cleaner; the present accused had vanished before they could be properly traced and the delay has been properly explained and there is no need to doubt content of F.I.R. Counsel stated that both the Court below had passed the order after giving cogent and valid reasons for the same and the same seizure as well as investigation proceedings have been in accordance with law. The offence under Section 379 as well as 381 of the I.P.C has been clearly made out and there was no infirmity in the order passed, prayed for dismissal of the revision.

7. On consideration the above submissions and evidence on record, I find that the testimony of P.W-2 Dilip Kumar is credible because although the complainant has been declared hostile only on the ground of his failure to bring empty sacks in Court which has been rectified during the cross-examination and since *Falsus in uno, falsus in omnibus* is a principle not available in criminal jurisprudence in India and appellate Court has rightly dealt with evidence of this witness and stated

that merely because he had been declared hostile at one stage, it was not necessary to discard his entire testimony. If the testimony is considered in totality in para 6 of his cross-examination the witness has justified that the empty sacks which were then full were recovered from the house of accused Faiz Mohammad, it was found in the room where the cattle were tied. This evidence is corroborated by testimony of the investigating officer Inspector (Dwivedi P.W-5), who has been steadfast in his testimony has already noted above. The independent witnesses of seizure may not have supported the prosecution story as they were declared hostile, but this is common occurrence since such witnesses retract their statement in Court being in fear of their life. The testimony of the investigation officer being reliable and his being a public officer there is no need to doubt veracity of his statement.

8. The only other objection that needs to be considered is whether the imposition of section 379 and 381 of the I.P.C. when the accused were originally charged under Section 407 of the I.P.C. is legal and the trial Court could have without imposing the above charges convicted the accused under Section 379 and 381 of the I.P.C., instead for offence under Section 407 of the I.P.C. The answer to the said objection is available under Section 464 of the Cr.P.C., whereby it is stated that no sentence or order by Court of competent jurisdiction shall be deemed to be invalid merely on the ground that no charge is framed under Section 464 of the Cr.P.C. the Section reads thus:-

“Effect of omission to frame, or absence of, or error in, charge-(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may,-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charges.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction”.

9. Failure to frame a charge under Sections 379 and 381 of the I.P.C. in the present case could not be said to be irregularity since it is curable irregularity under Section 464 of the Cr.P.C. The trial Court having found that the wheat was not recovered from the truck seized; offence under Section 407 was not made out, however, when the charge contains the particulars of the offence and the accused is aware of basic

ingredients of the offence for which he was being convicted is the principle that is required to be satisfied. (*Radha Mohan Singh Vs. State of U.P.* (2006) 2 SCC page 450 relied on) then the conviction of the accused for offence under Sections 379 and 381 of the I.P.C. by the trial Court as well as appellate Court is saved by the provision of Section 464 since the conviction has not resulted in a failure of justice; the accused were faced with the theft of the wheat and the ingredients of the charges under Section 379 and 381 of the I.P.C. were available to the accused and hence the objection of the petitioner in the revision petition is of no consequence and is discarded as such.

10. The objection that the officer of seizure is also the investigating officer is also without substance as the investigation has been carried out by the investigating office under the due process of law. The inspector Dwivedi (P.W-5) being found to be quite reliable and the wheat having been found from the house of both the accused then there is no getting away from the fact that the accused were guilty for the offence under Section 379 and 381 of the I.P.C as held by both the Courts below.

11. In view of the above, the petition is without merit and is dismissed as such, the petitioner shall surrender to his bail bonds to undergo the remaining part of the sentence on or before the 05-05-2008 before the trial Court.

Petition dismissed.

I.L.R. [2008] M. P., 1535

CRIMINAL REVISION

Before Mrs. Justice Sushma Shrivastava

28 April, 2008*

GULAB

Vs.

STATE OF M.P.

--- Applicant

--- Non-applicant

A. Prevention of Food Adulteration Act, (37 of 1954), Section 13(2), General Clauses Act, 27 - Report of Public Analyst - Service of Report - Report of Public Analyst sent to applicant by registered post - No suggestion that address described by Local Health Authority was not correct - Held - There would be presumption of service of notice sent by registered post on correct address - Merely AD was not received would not be sufficient to rebut or dislodge presumption of service.
(Paras 11 and 12)

क. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2), साधारण खण्ड अधिनियम 27 - लोक विश्लेषक की रिपोर्ट - रिपोर्ट की तामील - आवेदक को लोक विश्लेषक की रिपोर्ट रजिस्ट्रीकृत डाक द्वारा भेजी गयी - ऐसा सुझाव नहीं कि स्थानीय स्वास्थ्य प्राधिकारी द्वारा वर्णित पता सही नहीं था - अभिनिर्धारित - रजिस्ट्रीकृत डाक के द्वारा सही पते पर नोटिस को भेजने पर उसकी तामील की उपधारणा की जायेगी - केवल पावती का प्राप्त न होना तामील की उपधारणा का खण्डन या विस्थापन करने के लिये पर्याप्त नहीं है।

B. Prevention of Food Adulteration, Rules 1955- Rule 9B.- Delay in sending Report of Public Analyst - Copy of report of Public Analyst sent to applicant after one month and seven days instead of 10 days after the institution of prosecution - Applicant did not apply to send the other part of sample to Central Food Laboratory - Applicant cannot complain that sample had deteriorated and could not be analyzed - Revision dismissed. (Para 20)

ख. खाद्य अपमिश्रण निवारण नियम, 1955 - नियम 9बी - लोक विश्लेषक की रिपोर्ट भेजने में विलम्ब - आवेदक को लोक विश्लेषक की रिपोर्ट की प्रति अभियोजन के संस्थित होने के दस दिन के बजाय एक माह व सात दिन के बाद भेजी - आवेदक ने नमूने के अन्य भाग को केन्द्रीय खाद्य प्रयोगशाला में भेजने के लिए आवेदन नहीं दिया - आवेदक ऐसी शिकायत नहीं कर सकता है कि नमूना खराब हो गया था और उसका विश्लेषण नहीं हो सकता था - पुनरीक्षण खारिज।

Cases referred :

AIR 2004 SC 1233, 2000 Cr.L.J. 1429, 1998 Cr.L.J. 4354, 2003 Cr.L.J. 2797, AIR 1967 SC 970, 2005(3) MPLJ 458, AIR 1971 SC 1277, AIR 1972 SC 1631, 1996 Cr.L.J. 1238, 1994 Supp (2) SCC 177, AIR 1991 SC 1757, (2004) 13 SCC 78.

Namrata Kesharwani, for the applicant.

R.N. Yadav, Panel Lawyer for the non-applicant/State.

ORDER

SUSHMA SHRIVASTAVA, J.:-Applicant has preferred this revision against the appellate judgment dated 26.2.98 passed by IIInd Additional Sessions Judge, Teekamgarh in Criminal Appeal No. 28/95; whereby the conviction of the applicant under section 7(i)/16(1)(a)(i) of Prevention of Food Adulteration Act, 1954 (hereinafter to be referred as 'Act') recorded by Chief Judicial Magistrate, Teekamgarh and sentence passed on him are upheld.

2. Applicant was tried for the offence under section 7(i)/16(1)(a)(i) of the Act before Chief Judicial Magistrate, Teekamgarh on the basis of complaint instituted by Food Inspector Nazar Mohd. It is alleged that on 25.5.89 at about 11 'O'clock in the morning at Motor-stand Teekamgarh, during checking by Food Inspector Nazar Mohd, applicant was found carrying 12 litres of cow-milk in two cans for sale, which appeared to be adulterated. Food Inspector Nazar Mohd. then purchased a sample of 750 ml of cow-milk from the applicant for analysis in presence of panch witnesses and gave him a notice in writing in Form No. VI to have it analyzed. The Food Inspector then divided the sample of cow-milk collected from the applicant into three equal parts and filled each part in three clean and dried bottles, added prescribed quantity of Formalin in each bottle and duly packed and sealed them, sent one of its parts to the Public Analyst for analysis and the remaining two parts to the Local Health Authority. Upon analysis, the sample of milk taken from the applicant was found to be adulterated. After obtaining necessary sanction, applicant was prosecuted under section 7(i)/16(1)(a)(i) of the Act. After institution of the prosecution, notice under section 13(2) of the Act alongwith the report of the Public Analyst was sent to the applicant by registered post.

3. After trial Chief Judicial Magistrate, Teekamgarh found the applicant guilty for selling adulterated cow-milk and convicted him under section 7(i)/16(1)(a)(i) of the Act and sentenced him to six months' rigorous imprisonment and fine of Rs. 1,000/- by judgment dated 8.8.95 passed in Criminal Case No. 907/89.
4. In criminal appeal preferred by the applicant against the aforesaid order of his conviction and sentence, the appellate Court, after considering the evidence on record and other legal aspects of the case, affirmed the conviction and sentence passed on the applicant under section 7(i)/16(1)(a)(i) of the Act by the impugned judgment which has been assailed in this revision.
5. Learned counsel for the applicant submitted that the two courts below gravely erred in law and facts in convicting and sentencing the applicant and failed to consider that the notice under section 13(2) of the Act was not served on the applicant and there was inordinate delay in launching the prosecution and the applicant was thus deprived of the right under section 13(2) of the Act.
6. Learned counsel for the State, on the other hand, justified and supported the impugned judgment.
7. Impugned judgment and records of the lower courts perused.
8. There is a concurrent finding of the fact of two courts below that the applicant was carrying cow-milk for sale and Food Inspector Nazar Mohd. had duly purchased a sample of 750 ml of cow-milk from the applicant for analysis, which was found to be adulterated after analysis. The aforesaid finding of fact does not suffer from any infirmity in view of the evidence of Food Inspector Nazar Mohd. (P.W-1), corroborative evidence of S.C. Upadhyaya (P.W-3) and the documents (Ex.P-4 to Ex.P-10) placed on record.
9. The evidence of Food Inspector Nazar Mohd. (P.W-1) and documents prepared by him on the spot clearly indicate that the Food Inspector had purchased the sample of cow-milk from the applicant in prescribed quantity in presence of panch witnesses and gave him a notice in writing to have it analyzed and divided the sample then-and-there into three equal parts; added necessary Formalin into each part, duly sealed them and sent one of its parts to the Public Analyst for analysis and the remaining two parts to Local Health Authority and had followed the procedure prescribed under the Act for taking sample of article of food. As per report of Public Analyst (Ex.P-10), the sample of cow-milk taken from the applicant was found to be adulterated, as it did not conform to the standard prescribed for cow-milk under the Act. No infirmity in the procedure in collecting the sample of milk from the applicant was urged or pointed out.
10. Learned counsel for the applicant, however, submitted that as per dictum laid down by the Apex Court in the case of *State of Orissa Vs. Gauranga Sahu* reported in AIR 2004 Supreme Court page 1233, forwarding of the copy of the report of the Public Analyst under the Act is not only a ritual, but a statutory

requirement to be mandatorily observed in all cases and the despatch of such report is intended to inform the accused of his valuable right to get the sample analyzed from the Central Food Laboratory, but the service of notice under Section 13(2) of the Act alongwith report of Public Analyst on the applicant was not established in the instant case by placing on record any A/D receipt or certificate from the Post Office.

11. Again, there is a concurrent finding of fact of the two courts below that the notice under section 13(2) of the Act (Ex.P-14) alongwith the report of the Public analyst was sent to the applicant by registered post and service of notice sent by registered post, which did not return back, could be legally presumed. Evidence of Smt. Prabha Verma (P.W-4) employed in the Office of Local Health Authority, Teekamgarh also indicated that the notice under section 13(2) of the Act alongwith the report of Public Analyst (Ex.P-10) was sent to the applicant by registered post vide postal receipt (Ex.P-15) on the address mentioned in her evidence. There was no suggestion in her cross-examination that the address described by her in the evidence on which the notice (Ex.P-14) alongwith the copy of report of Public Analyst was sent to the applicant was not his correct address. Rather the same address was also mentioned by the applicant in his examination under section 313 of Cr.P.C.

12. Thus, there would be a presumption of service of notice sent by registered post on the correct address of the applicant in view of provisions of Section 27 of General Clauses Act as well as Section 114 (illustration e & f) of the Indian Evidence Act. The mere fact that AD receipt was not received back was not sufficient to rebut or dislodge the presumption of service of notice sent by registered post in absence of any evidence to the contrary. It is a known fact that AD receipt is sent back by ordinary post and could also be misplaced. Therefore, it could not be held that notice under section 13(2) of the Act alongwith the report of the Public Analyst was not served on the applicant.

13. The citations referred to by learned counsel for the applicant reported in Cr.L.J. 2000 page 1249 (*Himachal Pradesh H.C.*) *State of H.P. Vs. Prem Singh*, 1998 Cr.L.J. 4354 (*Pimpri Chinchwad Nagarpalika Vs. Giriraj Chiranjilal Sharma and Another*) and 2003 Cr.L.J. 2797 (*Andhra Pradesh H.C.*) (*Devarkonda Ramesh Vs. The State of A.P.*) turned on different set of facts and are of no avail to the applicant in the instant case.

14. Learned counsel for the applicant also submitted that the sample of milk was taken from the applicant on 25.5.89 and complaint against him under section 7(i)/16(1)(a)(i) of the Act was filed before the Court on 18.12.89 with inordinate delay. According to learned counsel for the applicant, as per statement of Smt. Prabha Verma (P.W-4), the copy of the report of Public Analyst alongwith the notice under section 13(2) of the Act was sent to the applicant on 25.1.90, i.e. after a period of nearly one month and seven days, whereas Rule 9B of Prevention

of Food Adulteration Rules, 1955 requires that the copy of the report of the Public Analyst should be sent within a period of ten days after the institution of the prosecution. Thus, there has been non-compliance of Rule 9B of P.F.A. Rules, 1955 on the one hand and inordinate delay of seven months in launching the prosecution on the other, which deprived the applicant of his valuable right under Section 13(2) of the Act to have the other part of the sample analyzed by the Central Food Laboratory because the milk does not remain fit for analysis after six months. Reliance was placed in this behalf on the decision of the Apex Court rendered in the case of *Municipal Corporation of Delhi Vs. Ghisa Ram* AIR 1967 Supreme Court page 970 and Single Bench decision of this Court reported in 2005(3) M.P.L.J. page 458 (*Ram Singh Vs. State of M.P.*).

15. As stated earlier, there is a clear finding of fact recorded by two courts below that the notice under section 13(2) of the Act was sent to the applicant alongwith report of Public Analyst by registered post and was served on him. It is manifest from the record that the applicant did not apply to the court under section 13(2) of the Act to send the other part of the sample to the Director Central Food Laboratory for analysis; nor did he summon the Public Analyst in evidence to establish that the sample of milk had deteriorated by that time and become unfit for analysis. The Apex Court in its three Judges Bench decision rendered in the case of *Babulal Hargovinddas Vs. State of Gujarat* AIR 1971 SC page 1277, distinguishing facts of the case of *Municipal Corporation of Delhi Vs. Ghisa Ram* (supra), observed that unless an application to send the sample to the Director Central Food Laboratory is made under section 13(2) of the Act by the accused, he cannot complain that the sample had deteriorated and could not be analyzed.

16. It was again reiterated by the Apex Court in a later decision rendered by three Judges' Bench in the case *Ajitprasad Ramkishan Singh Vs. The State of Maharashtra* reported in AIR 1972 SC page 1631 that without making an application under section 13(2) of the Act, the vendor cannot complain that he has been deprived of any such right.

17. A Division Bench of this Court in the case of *Govind Prasad Vs. State of M.P. and another* reported in 1996 Cr.L.J. page 1238 (M.P.) after going through the various decisions of Apex Court including the case of *Municipal Corporation of Delhi Vs. Ghisa Ram* (supra) cited by learned counsel for the applicant observed as under:-

"The principle of law declared in *Ghisaram's case* in AIR 1967 SC 970 (supra) has been explained by Larger Benches of the Supreme Court in latter cases and we are bound to follow the law declared in the latter cases. Since the revision petitioner did not invoke his right U/S. 13(2) of the Act and did not examine the Public Analyst to show that part of the sample of milk in the case would necessarily have become unfit for analysis by the

time summons was served on him and did not adduce other evidence to that effect, it cannot be said that the part of a sample would have become decomposed and that it was futile for him to invoke his right U/S 13(2) or that it could be presumed or assumed under these circumstances that he has been prejudiced in his defence."

18. In the aforesaid case of *Govind Prasad Vs. State of M.P. and another* (supra) the Division Bench also considered the various other single Bench decisions of this Court and came to hold that particular sample will necessarily decompose within a particular period cannot be a matter of assumption and presumption. In absence of application under section 13(2) of the Act and the evidence to the contrary, it cannot be said that on account of delay in launching the prosecution the sample must have decomposed and become unfit for analysis.

19. In another case of *Prabhu Vs. State of Rajasthan* 1994 Supp (2) Supreme Court Cases 177, where the applicant after the service of notice under section 13(2) of the Act did not make an application under Section 13(2) for sending the sample to the Director Central Food Laboratory, their lordships held as under:-

".....Following the consistent law laid by this Court we are of the considered view that since admittedly the applicant had not availed of the remedy under section 13(2) to send the sample of article of food for analysis by the Central Food Laboratory, it cannot be held that the applicant suffered prejudice on account of delay in launching the prosecution."

20. In the instant case also the applicant made no application under section 13(2) of the Act to send the other part of sample to the Director Central Food Laboratory for analysis and there was no evidence on record to hold that the other part of sample of milk had decomposed or deteriorated and become incapable for analysis. Thus, in view of the legal position discussed above, it cannot be said that the applicant was deprived of the right under section 13(2) of the Act or he was prejudiced in his defence due to delay in launching the prosecution or delay in despatch of notice under section 13(2) of the Act.

21. The Apex Court in the case of *Rajendra Vs. State of M.P.* reported in AIR 1991 S.C. page 1757 has reiterated that non-compliance with Rule 9-A (which has been substituted by amended Rule 9B) is not fatal and it is a question of prejudice.

22. In view of the foregoing discussion, the conviction the applicant under section 16(1)(a)(i) of the Act does not suffer from any legal or factual infirmity so as to call for any interference in revision.

23. As regards the sentence, applicant has been awarded the minimum prescribed sentence of six months imprisonment with fine of Rs. 1,000/-. As held by the Apex Court in the case of *Mahendrakumar G. Patel & another Vs. State of Gujarat & another* reported in 2004 SCC (13) page 78 in view of mandatory

provisions of section 16(1) of the Act, no sentence lesser than the minimum prescribed by the statute could be awarded for the offence under section 16(1)(a)(i) of the Act. The minimum sentence imposed on the applicant, therefore, requires no further reduction in the facts and circumstances of the case.

24. Revision fails and is dismissed. Applicant is on bail. He shall surrender to his bail bonds to serve out remaining part of his sentence.

Revision dismissed.

I.L.R. [2008] M. P., 1541
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice U.C. Maheshwari
5 February, 2008*

ARJUN SAHU

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 437(6) - 'Unless for reasons to be recorded in writing' - Magistrate has a right to refuse bail even after expiry of 60 days from the date of framing of charges after recording reasons in writing. (Para 16)

(क) दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437 (6) - 'जब तक ऐसे कारणों से जो लेखबद्ध किये जायेंगे' - 'मजिस्ट्रेट को आरोप-विरचना की तिथि से 60 दिन समाप्त होने के बाद भी कारण लेख बद्ध करके जमानत से इंकार करने का अधिकार है।

B. Criminal Procedure Code, 1973 (2 of 1974) - Section 437(6) - Applicant practicing as an Advocate - Applicant advised the poor illiterate persons suffering from Gangrene or like disease to prepare their false claim cases in order to earn easy money - Poor persons admitted in hospital and their limbs were amputated and false vehicular accident cases were registered in connivance of Doctor and police personals - Applicant does not deserve for bail. (Para 16)

(ख) दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437 (6) - आवेदक अधिवक्ता के रूप में विधि व्यवसायी - आवेदक ने गरीब, अशिक्षित व्यक्तियों जो गैंगरीन या उसी तरह की बीमारी से पीड़ित थे, को सरलता से धन अर्जित करने के लिये उनके मिथ्या दावे तैयार करवाने की सलाह दी - गरीब व्यक्तियों को अस्पताल में भर्ती कराया गया और उनके अंगों का अंगविच्छेदन किया गया और डॉक्टर व पुलिस कर्मचारियों की दुरभिसंधि से मोटर यान दुर्घटना के मिथ्या दावे दर्ज कराये गये - आवेदक जमानत पाने का पात्र नहीं।

Cases referred :

2000 (2) MPLJ 42 = 2000 (3) Crimes 388, 2002 (5) MPLJ 302, 1987 Cr.L.J. 55, 2006 Cr.L.J. 1594, 1996 (3) SCC 422, 2000 (9) SCC 533, (2002) 10 SCC 677.

Anil Khare and Som Mishra, for the applicant.

T.S. Ruprah, Additional Advocate General assisted by J.K. Jain, Government Advocate for the non-applicant.

ORDER

U. C. MAHESHWARI J.:—The petition of the applicant filed under Section 439 of Cr.P.C. is being decided by this order.

2. The applicant has been arrested on 30.3.2007 in connection of Crime No.783/06 registered at Police Station Garha for the offence under Section 420, 467, 468, 471 and 120-B r/w 34 of IPC.

3. As per case of the prosecution the applicant being an advocate of Jabalpur practicing mainly in Motor Accident Claim cases with intention to have earn easy money advised the poor illiterate persons suffering from Gangrene or like other disease for preparation of their false claim cases under the Motor Vehicle Act while those persons were not the sufferers of vehicular accident. They have not only been advised by him but he also managed all affairs in this regard. In such connection, under conspiracy with the Doctor such poor persons were admitted in the Suvidha Hospital, Jabalpur where by carrying out surgery their concerning limbs were amputated and their medico legal reports stating that they sustained the injuries in vehicular accidents were prepared and by managing police officials of the P. S. Garha, Jabalpur the offences of vehicular accidents got registered at such police station. The number of alleged insured vehicle were also arranged and provided to the concerned complainant and also to police. He being planer of aforesaid scheme managed all the affairs through his junior advocates, police officials and doctors along with others. In implementation of such plan various forged medical reports and papers were prepared with intention to file the false claims under the Motor Vehicle Act and in this manner various claims on behalf of the concerned victims whose limbs were amputated, were filed by the applicant before the different Tribunals. On receiving the information regarding such offence in writing from unknown source the same was inquired by the police and later it being a cognizable offence the crime was registered. During investigation on collecting the evidence prima-facie alleged offence is revealed against the applicant and other persons through whom he implemented his aforesaid scheme. Initially charge sheet was submitted for some other accused but after arrest of the applicant by holding some supplementary investigation the charge sheet is also filed against the applicant. Now he is facing such trial.

4. On behalf of the applicant his counsel Shri Anil Khare firstly by referring the provision of Section 437 (6) of Cr. P. C. said that according to it's mandate after framing the charge against him on 26.7.2007 within two months from such date the trial has not been concluded. Hence, in view of the mandatory provision of the aforesaid section the applicant deserves to be released on bail. Secondly he prayed for bail on the ground of parity saying that some of the accused, against whom the same allegations are made as alleged against the applicant, have been released on bail and there is no distinguishable case against him, specially he said that Shishir Kewat, Advocate against whom same allegations are made has also

been released on bail. Thirdly, he prayed for bail saying that aforesaid all sections of IPC for which the applicant is facing the prosecution are tri-able by the Judicial Magistrate and in last eight months only one prosecution witness has been examined. It shows the trial may not be concluded in near future. Therefore the applicant should not be kept in jail by way of punishment unless the offence is proved against him. Lastly on merits, he said that the evidence collected by the investigating agency is not sufficient to draw the inference at this stage that he has committed the alleged offence. He also referred various interrogatory statements recorded by the police either at the stage of enquiry or after registration of the offence or subsequent to it recorded in the supplementary investigation under Section 173 (8) of Cr. P. C. and prayed to enlarge him on bail till disposal of the trial. In support of his contention he also placed his reliance on some reported cases.

5. On the other hand responding the aforesaid argument, learned Additional Advocate General said that the provision of Section 437 (6) of Cr. P. C. is not mandatory according to its language, after recording the reasons in writing the Magistrate has authority to refuse the bail even if the trial is not concluded within sixty days from the date of framing the charges. He further stated that all the citations on which the applicant's counsel has placed his reliance in this regard, such question is left open, as such later part of such sub-section cannot be said to be mandatory for granting the bail. So far parity is concerned he said that in comparison of other accused of the case looking to the nature of the evidence collected by the prosecution agency, the applicant being planner of the scheme is the man accused of the case and in this way he is more responsible for the alleged offence. In support of this contention he referred the interrogatory statement of Smt. Sharda Barman, the wife of one of the victim whose limb was amputated, recorded in enquiry and interrogatory statements of Ku. Varsha Tiwari and Rahul Shrivastava Advocates, which were recorded during supplementary investigation under Section 173 (8) of Cr. P. C. in the month of January 2008. He also said that statement of Varsha Tiwari was also recorded earlier as the same is available in the case diary. In this background he said that all other accused, the junior advocates, doctor, concerned police officials the alleged accused of the case were working under the command and advise of the applicant. It was also said that interrogatory statement of Varsha Tiwari and Rahul Shrivastava are giving sufficient circumstance to draw the inference that the applicant is only person in whose guidance the Insurance Company has been defrauded through false claims cases of sufferers of Gangrene and like other disease who were not the victims of the vehicular accidents. On his advice the limbs of aforesaid poor persons have been amputated, by admitting them in private hospital under conspiracy with the doctor to have earn the easy money. In such manner the applicant has given the wrong message to the society against ethics of his profession and also the system. A person who is in a position to manage various things to satisfy his temptation of money, if he is released on bail it will give the wrong message to the society at

large and may prejudice the prosecution case by winning over the material witnesses of the case. In this background firstly he said that in such circumstance the applicant should not be released on bail. In any case he should not be released on bail till recording the evidence of aforesaid material witnesses of the prosecution. So far delay in concluding the trial is concerned, he said that the delay cannot be a ground for allowing the bail petition when the prima-facie evidence is available on the record against the applicant regarding such serious offence and prayed for dismissal of this petition

6. Having heard before considering the merits of this petition, I would like to reproduce sub-section (6) of Section 437 of Cr. P. C. for ready reference, which reads as under:

"(6). If in any case triable by Magistrate the trial of the person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate unless for reasons to be recorded in writing, the Magistrate otherwise directs."

7. Considering the aforesaid provision on earlier occasion in the matter of *Ram Kumar @ Raj Kumar Rathore Vs. State of M. P.* reported in 2000 (2) MPLJ 42 = 2000 (3) Crime 388, this court has laid down as under:

"5. Looking to the provision referred to above it is but clear that it is mandatory in nature, and the mandate is that if the Magistrate is trying a case in which the accused has been charged for a non-bailable offence and the trial has not concluded within a period of sixty days from the first date of recording the evidence in the case and that the accused had remained in custody during the whole of such period of sixty days, then he becomes entitled to be released on bail, provided of course, the Magistrate does not reject the same recording in writing his reason, therefore, circumscribing the undisputed factual circumstances in the ambit of provisions of Section 437(6) of the Code of Criminal Procedure it is apparent that they hold the field and apply here from all four corners. In rejecting the bail application of the petitioner the learned trial Magistrate and the learned Fourth Additional Sessions Judge, Gwalior, have no doubt given their reasonings as required under the above provisions of the Code of Criminal Procedure but they are simply to the effect that if the petitioner were to be released then it is doubtful that he would be attending the Court on each and every date fixed by the Magistrate. The reasonings indicating the apprehension of the learned Court below, by no stretch of imagination, could be termed as judicious, and therefore, they are not of such a nature as to thwart and wash off the mandatory character of the provisions of Section 437 (6) of the code of Criminal Procedure."

8. It appears from the aforesaid case that later part of the aforesaid sub section the proviso has not been interpreted in the aforesaid case. In fact it was held that the given case was not covered by the proviso.

9. In another occasion in the matter of *Rajendra S/o Rajarama Pal Vs. State of M.P.* reported in 2002(5) MPLJ302, this court has held as under:

"9. This Provision is showing that if the trial is not completed within a period of 60 days from the date fixed for recording evidence then the accused, who is in custody, is entitled to be released on bail. If the Court is of the opinion that the accused is not entitled for bail then it is obligatory on the part of the Court to assign reason for refusing the bail. In view of mandatory Provision of Section 437 sub section (6) Criminal Procedure Code, the applicant is entitled to be released on bail. There is no special reason on the basis of which his prayer may be refused. Similar view has been taken in the case of *Saritadevi Vs. State of Himachal Pradesh*, 2000 (2) Crimes 543 and in the case of *Mohd Abdul Vs. State of West Bengal* 1991 Crimes (II) 741."

10. In the aforesaid decision it is held that if the court is of the opinion that the accused is not entitled for bail, it is obligatory on its part to assign the reasons for refusing the bail. In such situation on availability of sufficient reason for dismissing the application then as per said proviso after recording the reasons in writing the bail application may be dismissed.

11. Subsequent to the aforesaid decision again this provision was considered in the matter of *Damodar Singh Chauhan Vs. State of M.P.*, reported in MPWN 138, in which it was held as under:

"It is clear that the above provision is mandatory in nature and according to this provision if the Magistrate is trying a case in which the accused is charged for a non-bailable offence and the trial of the case is not concluded within a period of 60 days from the first date fixed for taking evidence in the case and if the accused is in custody during the whole of the said period then he becomes entitled to be released on bail, provided the Magistrate rejects the bail application after recording in writing the reasons therefore."

12. It is apparent that in the aforesaid cases the earlier part of the aforesaid section is held to be mandatory but proviso has not been interpreted.

13. In all the aforesaid cases, considering the reasons assigned by the Magistrate were not found sufficient to reject the bail and in such premises the bail was granted but it was not said in any of the aforesaid case that if the case is covered by aforesaid proviso even then the applicant is entitled for bail in the light of earlier part of this sub-section. Therefore, this court has to examine the case whether the case at hand is covered by the proviso of aforesaid sub-section or not.

14. In the matter of *Robert Lendi Vs. The Collector of Customs and another*

reported in 1987 Cri.L.J.55, the Division Bench of Delhi High Court answered this question, in the following words:

"21. The next question that arises for consideration is whether while refusing bail under sub-sec. (6) of S.437 of the Code the Magistrate can only refuse bail on the limited reasoning germane to the cause of delay and whether the bail can be refused on the general grounds recognized as good for refusal to grant bail. Undoubtedly, the object of sub sec(6) of S.437 of the Code is to eradicate delay in trial. To us, it appears that it is equally important that the ends of justice do not suffer. The procedural laws are essentially meant to safeguard the interest of justice. The twin objections namely to eradicate the delay in trial and to achieve the ends of justice are necessarily to be harmonized. It is in that context one has to find out whether the discretion exercised by the Magistrate in withholding bail after sixty days, has been properly and judicially exercise. We find nothing in the provision to support the assertion of Mr. Mehta that the reasons for declining the bail under this provision should be only those, which are germane to the cause of delay. There is no reason to give such a restricted meaning to the provision. The expression used in the provision is "unless for reasons to be recorded in writing, the Magistrate otherwise directs". A plain reading of the expression shows that the Legislature has put no fetters on the powers of the Magistrate that under this provision bail can only be refused for reasons germane to the cause of delay. If that were so, the Legislature would have certainly made it clear. To us it appears that the consideration for refusing bail under this provision can be the reasons, which are generally invoked and understood in law as the grounds for refusing bail. All that is required of the Magistrate is that should he decide to decline to grant bail, he must record his reasons in writing. There are no fetters placed on the exercise of this discretion.

15. By following the aforesaid decision of the Division Bench of Delhi High Court the Jharkhand High Court is also answered this question in the matter of *Didar Singh Vs. State Jharkhand* reported in 2006 Cri.L.J.1594, in which it was held as under:

"11. The contention advanced on behalf of the petitioner that if the trial court is not concluded within a period of sixty days from fixed date for evidence then accused who is in custody has to be released on bail cannot be accepted as from the plain reading of the aforesaid provision, it is clear that the said provision under Section 437(6) is not mandatory in nature as Section 167(2) of the Cr. P. C. which provides that if the investigation is not completed within a period of ninety days or sixty days as the case may be then the accused is entitled to be released on bail mandatorily irrespective of the merit of the case. Under Section 167(2) Cr. P. C. the right to be released on bail is absolute under the provision of Section 437(6) of the Cr.

P. C. which is not mandatory in nature, the entitlement of the accused to be released on bail is dependent upon the reasons to be recorded in writing by the Magistrate for refusal to release him on bail. The reasons may be several, therefore, it is the discretion of the trial court either to release or not to release an accused under the aforesaid provision for the reasons to be recorded in writing. There is no doubt that discretion of the trial Court has to be exercised judicially and not arbitrarily. It is found that the trial court has exercised its discretion either refusing or granting bail in exercise of power under Section 437 (6) of the Cr. P. C. is justifiable in the facts and circumstances of a particular case then such exercise of discretion is not liable to be interfered with unless it is found that discretion so exercised by the trial court is wholly improper, unjustified and arbitrary. The Division Bench of Delhi High Court in the case of *Robert Lendy* (1987 Cri. L.J.55) (Supre) has held that the procedural law is essentially meant to safeguard the interest of justice. The twin objects, namely, to reject the delay in trial and to achieve the ends of justice are necessarily, to be harmonized. It is in that context, one has to find out whether the discretion exercised by the Magistrate in withholding bail after sixty days, has been properly and judicially exercised."

16. In view of the aforesaid legal position it is manifestly clear that under the proviso after recording the reasons in writing the Magistrate has a right to refuse the bail even after sixty days from the date of framing the charge even if the entire evidence is not recorded. In the case at hand there are sufficient prima-facie circumstance showing that the applicant being planer of the aforesaid scheme by taking advantage of the position of poor illiterate persons, who were the sufferer of Gangrene or like other disease, in order to have earn the easy money advised them to prepare their false claim cases of vehicular accident and in pursuance of that by admitting those poor persons in hospital their limbs were amputated and on such report the criminal offence regarding vehicular accident were got registered with the connivance of some police officials the number of vehicle were also given by this applicant. In such situation the case of the applicant is squarely covered by the proviso of Section 437 (6) and in such premises he does not deserve for bail in the earlier mandatory part of Section 437 of Cr.P.C.

17. Coming to the question of parity, it appears from the record that other accused of the case namely Vinay Sahu, Dharmendra Kirar, Rajendra Kapoor, Banti Choudhary, Premchand @ Guddu Sahu, Brijbhushan Singh, Ramnaresh Mishra, Govind Prasad Tiwari along with Doctor Dang and junior advocate Shri Shishir Kewat have been directed to be released on bail on earlier occasion but on considering the available evidence on record the case of the applicant is apparently distinguishable from the aforesaid other accused doctors, police officials and junior advocates. As per interrogatory statements of Smt. Sharda Barman the wife of one of the victim whose limb was amputated, Ku. Varsha Tiwari and Rahul

Shrivastava, Advocates the applicant being planer has implemented such scheme by taking the advantage of poor persons on account of their disease of Gangrene or like others with connivance and conspiracy of aforesaid accused. Under the aforesaid premises the applicant appears to be a main accused of the case. Besides this looking to the manner of investigation in which the same was carried out, it appears that applicant being influencing person may prejudice the prosecution case, if he is released on bail at this stage. I deem fit to mention here that aforesaid Ku. Varsha Tiwari and Rahul Shrivastava were the junior advocates in the office of the applicant for some time when the aforesaid scheme was implemented by the applicant for some of the cases. Therefore, looking to the position and on consideration of over all circumstances of the case it may be inferred that on releasing the applicant on bail before recording the evidence of aforesaid material witnesses he may prejudice the prosecution case and that may give the wrong message to the society at large. I would like to mention here that while deciding the bail petition the court has to keep the interest of the society also at large.

18. Although the applicant counsel cited the case 1996 (3) SCC 422 (*R. D. Upadhyay Vs. State of A. P. and others*) but the same is not helping to the applicant at this stage because in such case the direction was given only for the offences under Customs Act, Arms act or under Section 326, 324 and 354 of IPC and such persons have also been directed to be released on bail if they have completed one year in jail. It is undisputed fact on record that such duration has not been completed in the case at hand.

19. Other cited case reported in 2000 (9) SCC 533 (*Ashok Dhingra Vs. N.C.T. of Delhi*) is also not beneficial for the applicant. In such case the applicant was already on temporary bail and that order was continued and such case was not the case of amputation of limbs of the poor persons like case at hand. Hence, the same is distinguishable on the facts.

20. Another case cited by the applicant counsel in the matter of *Mehmood Mohammed Sayeed Vs. State of Maharashtra* reported in (2002) 10 SCC 677, such case is decided keeping in view the condition of the court of Maharashtra and also after completion of more than one year custody of the accused, which is not the situation here. Therefore, at this stage aforesaid all the cited cases on behalf of the applicant are not helping him, although this court has no dispute regarding the principle laid down by the Apex Court in such cases.

21. In view of the aforesaid discussion, it is held that the order passed by the trial court on 10.9.2007 rejecting the bail application of the applicant and thereafter the orders passed by the Sessions Court are based on sufficient reasons in writing for rejection of the bail.

22. Under the aforesaid premises, at this stage applicant does not deserve to be released on bail, hence, this petition is hereby dismissed. However, applicant shall be at liberty to revive his prayer for bail after recording the statement of

aforesaid prosecution witnesses namely Ku. Varsha Tiwari, Rahul Shrivastava and Smt. Sharda Barman.

23. Accordingly bail petition is dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 1549
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice B.M. Gupta

19 February, 2008*

MANGILAL and another

--- Applicants

Vs.

STATE OF M. P.

--- Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 - Revision - Interlocutory order - Charge Sheet filed u/Ss. 304 & 201 I.P.C. - Magistrate took cognizance u/Ss. 302, 201 I.P.C. - Order is interlocutory in nature - Not revisable. (Para 3)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397, 401 - पुनरीक्षण - अन्तर्वर्ती आदेश - आरोप-पत्र भा.द.सं. की धारा 304 और 201 के अन्तर्गत पेश - मजिस्ट्रेट ने भा.द.सं. की धारा 302, 201 के अन्तर्गत संज्ञान लिया - आदेश अन्तर्वर्ती प्रति का है - पुनरीक्षण योग्य नहीं।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 190, 319 - Charge-sheet has been filed before Magistrate for the offences exclusively triable by Court of Sessions - Application u/Ss. 190, 319(2) Cr.P.C. filed before Magistrate for proceeding against applicants - On the basis of enquiry Magistrate took cognizance against applicants - Held - Case instituted on police report which is exclusively triable by Court of Sessions, Magistrate has no option but to commit the case for trial or to order for further investigation - Holding of any enquiry by Magistrate not provided - Order taking cognizance set aside - Petition allowed. (Para 9)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 190, 319 - मजिस्ट्रेट के समक्ष अनन्यतः सेशन न्यायालय के विचारण योग्य अपराधों के लिए आरोप-पत्र पेश - मजिस्ट्रेट के समक्ष आवेदकों के विरुद्ध कार्यवाही करने के लिए द.प्र.सं. की धारा 190, 319(2) के अन्तर्गत आवेदन पेश - जांच के आधार पर मजिस्ट्रेट ने आवेदकों के विरुद्ध संज्ञान लिया - अभिनिर्धारित - पुलिस रिपोर्ट पर संस्थित मामला जो अनन्यतः सेशन न्यायालय द्वारा विचारण योग्य है, में मजिस्ट्रेट, मामला विचारण हेतु सुपुर्द करे या पुनः अनुसंधान का आदेश देवे, अन्य विकल्प नहीं - मजिस्ट्रेट द्वारा जांच करने का कोई उपबंध नहीं - संज्ञान लेने का आदेश अपास्त - याचिका मंजूर।

N.P. Dwivedi and S.K. Tiwari, for the applicants.

B.D. Mahore, P.P. for the non-applicant/State.

Jyoti Tikhe, for the Complainant.

ORDER

B.M. GUPTA, J.:—Although both the petitions have been filed by different petitioners impugning the different orders, yet both are arising out of one case, hence, have been heard together and are being disposed of by this common order.

2. Vide M.Cr.C.No.4256/05 order dated 13th July, 2004 and vide M.Cr.C.No.4400/05 order dated 30th August, 2005 passed by the JMFC, Mungawali in criminal case No.111/04 have been impugned, by which cognizance under Sections 302 and 201 of IPC/ 302/34, 201/34 and 120-B of IPC has been taken against the petitioners while applying the provisions of Section 190 of Cr.P.C.

3A. The factual matrix in brief, being necessary to be known, is that with regard to the death of Kallu @ Balkishan S/o Babulal Jatav merg No.1/03 was registered at police Station, Bahadurpur, Distt. Guna. After conducting enquiry and coming to the conclusion that the mode of death is homicidal, FIR crime No.1/03 was registered against unknown persons under Section 302/201 of IPC at the same police Station. After conducting investigation, charge-sheet was filed on 15th June, 2004 for the offence punishable under Section 304/201 of IPC against only two petitioners viz Mangilal @ Manga and Tulsiram. On 13th July, 2004 the learned Magistrate vide first impugned order, while observing that the offence punishable under Sections 302, 201 of IPC appears to be made out on the basis of the charge-sheet papers, passed the impugned order against the aforementioned two petitioners. This order has been impugned firstly on the ground that upto that time, there was no document available on the record in support of this order. Countering the contention, Shri Mahore, the learned Deputy Govt. Advocate, has submitted that on the basis of the statement of Harnam Singh recorded under Section 164 of Cr.P.C., offence of murder has been made out. But, on perusal of the statement of Harnam Singh recorded under Section 164 of Cr.P.C. on 10th April, 2003, it does not appear that he is stating anything with regard to the offence of murder committed by these two petitioners. His statement is also based on the information given by these two petitioners. The relevant part of his statement goes as under:-

“..... उन लोगो ने यह भी बताया था कि कल्लू ट्रैक्टर से गिर गया है और मर गया है। इसलिए कल्लू को अथाई खेडा के पास पुलिया के पास रख आये है।”

Thus, he only states that as per the information given by the petitioners, the deceased fell down from a tractor and died and they kept his dead-body near the culvert of Athaikheda. The other statements recorded during investigation of Tulsiram, Manga, both the petitioners, Sangram Singh, Pappu, Bhagwandas, Nimma Khan, Narayan and Harnam are also to the same effect. These witnesses have also not stated anything with regard to committing murder by these two petitioners. Even on behalf of the State, except the aforementioned statement of Harnam, nothing has been mentioned in support of this impugned order. Although as per the post-mortem report dated 3rd January, 2003, the cause of death has been mentioned as homicidal in nature but on this ground alone, it cannot be said that there is evidence

against the petitioners that they have committed the murder. In view of this, the observation of the learned Magistrate that on the basis of the documents on record, the offence of murder appears against the petitioners, cannot be sustained as the same appears erroneous.

3B. With regard to the same impugned order dated 13.7.04 related to M.Cr.C.No.4256/05, a preliminary objection has also been raised on behalf of the State, that the impugned order dated 13th July, 2004 was revisable, but instead of filing the revision, petition has been filed, hence, it is not maintainable. As mentioned hereinabove, the charge-sheet was filed against the petitioners under Sections 304 and 201 of IPC. Instead of taking cognizance under the same offences, if the cognizance has been taken by the learned Magistrate under Sections 302 and 201 of IPC, the order being interlocutory, does not appear to be revisable.

4. With regard to another petition M.Cr.C.No.4400/05 in which order dated 30th August, 2005 has been impugned, on perusal of the copy of the order-sheet dated 27th December, 2004, it appears that one application under Sections 319(2) and 190 of Cr.P.C. was filed for taking cognizance against other two petitioners of this petition i.e. Sangram Singh and Narayan. The case was fixed for reply of the application on various dates. Vide order dated 28th March, 2005, it appears that the learned Magistrate directed the applicant/complainant Bhagwan Das, the brother of the deceased, that if in support of the application some evidence is available with him, that can be produced. On 18th May, 2005 the statements of applicant Bhagwan Das and his brother Narayan were recorded under Section 164 of Cr.P.C. Thereafter the case was fixed for consideration of the application on 21st June, 2005. On 21st June, 2005 one application was moved on behalf of Bhagwan Das that he wants to produce one more witness Bablu, and for whom he sought time. The same was given. His statement was recorded on 3rd August, 2005 under Section 164 of Cr.P.C. Thereafter, on the basis of this new evidence, on 30th August, 2005, the second impugned order has been passed taking cognizance against these two petitioners for the offence punishable under Sections 302/34, 201/34 and 120-B of IPC.

5. The second order has been impugned on behalf of the petitioners on the ground that the learned Magistrate was not empowered to conduct enquiry and to record statements of aforementioned three witnesses under Section 164 of Cr.P.C. and thus the statements cannot be used against the petitioners as the base of the impugned order.

6. Admittedly, the charge-sheet was filed for the offence punishable under Section 304/201 of IPC and it is also not disputed that the offence punishable under Section 304 of IPC is exclusively triable by the Court of session. In such cases, the provisions of Section 209 and 207 of Cr.P.C. are applicable. Section 209 of Cr.P.C. provides commitment of the case to the Court of session when the offence is triable exclusively by it. When in a case instituted on a police report or

otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of session, he shall commit, after complying with the provisions of Section 207 or Section 208 of Cr.P.C., as the case may be etc. etc. What is relevant for the present case is, that in such cases, the Magistrate is obliged to comply the provisions of Section 207 or 208 and to commit the case to the court of session. The provisions of Section 208 of Cr.P.C. being related to the case instituted otherwise than police report i.e. on a private complaint, hence, not relevant for the present dispute and not required to be considered herein this order. Section 207 of Cr.P.C. provides that in any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

- (i) the police report;
- (ii) the first information report recorded under Section 154;
- (iii) the statements recorded under sub-section 3 of Section 161 of all persons;
- (iv) the confessions and statements, if any, recorded under Section 164;
- (v) any other document etc.

7. On perusal of both the provisions of Section 209 and 207 of Cr.P.C., it appears that upon filing of a charge-sheet by the police for such an offence which is exclusively triable by the Court of session, as in the present case, the learned Magistrate was obliged to comply the provisions of Section 207 of Cr.P.C. without any delay and to commit the case to the Court of session. Holding an enquiry upon such application under Section 319(2) and 190 of Cr.P.C., as it has been filed in this case and presently impugned before this Court, is nowhere provided. The learned Magistrate was either to take cognizance under Section 190(b) of Cr.P.C., which provides taking cognizance on a police report or to direct the police for further investigation. If the charge-sheet was filed under aforementioned offences punishable under Section 304/201 of IPC and the accused were appearing before the learned Magistrate, considering the fact that the offence for which the charge-sheet has been filed is exclusively triable by the Court of session, the learned Magistrate was to commit the case for trial to the court of session, as provided by Section 209 of Cr.P.C. As provided in Section 207 (iv) of Cr.P.C. the confessions and the statements recorded under Section 164 of Cr.P.C. of which the copies were required to be given to the accused persons, are related to the statements recorded during investigation because the words used in Section 207 of Cr.P.C. that the learned Magistrate shall furnish to the accused such copies without delay indicate that if alongwith the charge-sheet such statements under Section 164 of Cr.P.C. are included recorded during investigation, the copies of those documents were required to be supplied to the accused persons. In view of these provisions, the contention on behalf of the petitioners appears correct and appears to be sustained that the learned Magistrate was not empowered to hold an enquiry upon

receiving this application and to record the statements of the witnesses under Section 164 of Cr.P.C.

8. There is no dispute between the parties and as it appears from the impugned order, the cognizance against these petitioners i.e. Sangram Singh and Narayan has been taken on the basis of these statements under Section 164 of Cr.P.C., which appears erroneous and also an abuse of the process of the Court.

9. As mentioned hereinabove, the impugned application has been filed under two provisions of Cr.P.C.; first under Section 319(2) and second under Section 190. On perusal of Section 319 (1) of Cr.P.C., it appears that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed an offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed and sub-section (2) of Section 319 of Cr.P.C. provides that where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid. It is well settled now, that the word evidence as used in this provision is the evidence based on the statements recorded by the Court and it does not include the evidence collected by the police during investigation. The word enquiry which has been used in this provision is not related to a case instituted on a police report, because as per the provisions related to the committal of the case provided by Code of Criminal Procedure, 1973, the requirement of conducting an enquiry has been omitted, as the same was provided by the old Code of Criminal Procedure, 1898. This word enquiry may have a relation to the case instituted otherwise than a police report, i.e. a private complaint for which an enquiry has been provided under Section 202 of Cr.P.C. As the present case is not based on a case instituted otherwise than a police report, hence, being irrelevant, giving any observation by this Court at this stage is not required about the word enquiry as to whether that relates to those cases instituted on a private complaint or not. But I am of the considered opinion that in a case instituted in police report, if it appears to the Magistrate that the offence is exclusively triable by the court of session, he has no option but to commit the case for trial to the court of session or to order for further investigation without accepting the charge-sheet. For the sake of repetition, after filing of the charge-sheet, holding any sort of enquiry by the learned Magistrate is not provided.

10. Despite repeated asking, nothing that sort of provision could have been mentioned or shown even on behalf of the State. It is simply submitted that on the basis of these statements recorded under Section 164 of Cr.P.C. by the learned Magistrate, after filing of the charge-sheet, the offence of murder appears to have been committed by these two petitioners and in that way, order is justified. Without observing anything with regard to the merits of these three witnesses, it is suffice to observe that if at all the complainant is not satisfied with the charge-sheet filed by the police in the case, he is free to file a private complaint under the provisions prescribed in chapter XV of Cr.P.C. (Section 200 to 203 of Cr.P.C.)

11. As discussed hereinabove, on the documents filed alongwith the charge-sheet, there appears no evidence of murder against any of the four petitioners, hence, both the orders related to both the petitions being erroneous and an abuse of the process of the Court, deserve to be set aside.

12. Consequently, both the petitions are allowed and both the impugned orders are set aside.

Petition allowed.

I.L.R. [2008] M. P., 1554
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Vyas
 24 March, 2008*

CHANDANMAL

....Applicant

Vs.

SURYAKANT

....Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code, 1860, Section 406 - *Quashing of complaint - Non-applicant filed complaint on the allegation that he had entrusted jewelry worth Rs. 125 crores to applicant - Applicant did not return jewelry inspite of repeated requests - Applicant alleged that property was handed over to him by way of security of loan - Held - It is not in dispute that property belonging to non-applicant is in possession of applicant - It is not a case in which allegations do not disclose commission of any offence or allegations are absurd and inherently improper or there is an express legal bar to the institution - No case made out for quashing of complaint - Application dismissed.* (Paras 14 & 15)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता, 1860, धारा 406
 - परिवाद का अभिखण्डन - अनावेदक ने परिवाद यह अभिकथन करते हुए पेश किया कि उसने 125 करोड़ रुपये मूल्य के गहने आवेदक को न्यस्त किये थे - आवेदक ने बार-बार अनुरोध के बावजूद गहने वापस नहीं किये - आवेदक ने अभिकथन किया कि सम्पत्ति उसे ऋण की प्रतिभूति के रूप में सौंपी गई थी - अभिनिर्धारित - इसमें विवाद नहीं है कि अनावेदक की सम्पत्ति आवेदक के कब्जे में है - यह मामला नहीं है कि अभिकथन से किसी अपराध का कारित होना प्रगत न होता हो या अभिकथन अर्थहीन व निहायत अनुचित हों या संस्थापन करने में कोई विधिक बाधा हो - परिवाद को अभिखण्डित करने का मामला नहीं बनता है - आवेदन खारिज।

Cases referred :

1990 Cr.L.J. 1046, AIR 2005 SC 9, AIR 2000 SC 297, AIR 1999 SC 2071, AIR 1995 SC 231, AIR 1981 SC 1054, (2003) 11 ILD 427 (SC), AIR 1986 SC 2045, AIR 1960 SC 866, 1992 SCC (Cri) 426.

S.K. Vyas assisted by L.S. Chandiramani, for the applicant

S.M. Dagaonkar, for the non-applicant

ORDER

S.C. VYAS, J.:—This is a petition filed under Section 482 of Cr.P.C., challenging the order passed by XV Additional Sessions Judge, Indore in Criminal Revision No. 700/2005 dated 3.6.2006, whereby he confirmed the order passed by Judicial Magistrate, First Class, Indore in Criminal Revision No. 1340/03 dated 2.9.2005. Learned Magistrate in the aforesaid criminal case framed charge under Section 406 of IPC against the present petitioner which has been confirmed by the Sessions Court.

2. Brief facts of the case are that a private complaint was preferred by complainant/Suryakant Johri against present petitioner, thereby alleging that on 18.7.1993 he handed over his ancestral jewellery to the present petitioner for safe custody and thereby entrusted that property with the present petitioner. Complainant said that the property was valuing Rs. 125 crores. The house of the complainant was under repairing on the relevant time and present petitioner asked him to give that property to him for safe custody with the promise to return the same as and when demanded. Thereafter when the jewelery was demanded by the complainant/respondent, then present petitioner assured him that the property has been kept in safe custody and avoided its return. Many times demand was made by the complainant and ultimately when present petitioner denied return of those articles, then he lodged FIR against present petitioner and offence was registered by the police under Section 406 of the IPC as Crime No. 115/1998. It is alleged that the crime was not properly investigated by the police and in the meantime petitioner moved an application for grant of bail under Section 438 of Cr.P.C., which was allowed by the High Court on the condition that he will fully co-operate with the police in seizure of the disputed jewelery, thereafter on the request of respondent some jeweleries were seized by the police, but out of that jewelery one item Alexendride could not be seized, because the same was sold by the present petitioner to some foreigner for \$ 3 Crore (Three Crore Dollars). It is also alleged that at the place of that precious stone some other stone was seized by the police and in this way present petitioner committed criminal breach of trust, punishable under Section 406 of IPC. Ultimately, police prepared Khatma report on 25.4.2000, then a private complaint was filed by the respondent, on the basis of which criminal case under Section 406 of IPC was registered against present petitioner and he was summoned. Thereafter, evidence before charge was taken and on the basis of that evidence order for framing charge under Section 406 of IPC was passed, which was challenged by the present petitioner before learned Session Court, unsuccessfully and thereafter, present petition has been filed.

3. The petitioner has come with a specific case. As per the defense of petitioner, the alleged property was handed over to him by the complainant/respondent, but the same was given by way of security of the amount of loan of Rs. 30 lacs. The amount was taken by the respondent in many installments from the petitioner and

the jewelery was also pledged one by one with the petitioner as security of loan. It has also been specifically taken as defense that no big precious stone valuing crores of rupees was ever handed over by the present respondent to the petitioner and in fact an artificial stone was given which has already been recovered. This defense has also been specifically taken that complaint is hopelessly barred by time because as per the case of prosecution itself, the property was handed over to the petitioner on 18.7.1993 and on 5.1.1998 finally petitioner refused to return that property to the respondent and then he lodged report with the police station Tukoganj. Thereafter, present complaint was filed on 18.8.2001, which is about 7 ½ months late than the prescribed period of limitation as per provisions of Section 468 of Cr.P.C., therefore, the complaint is required to be dismissed on this ground.

4. - Learned counsel for the petitioner Sr. Advocate, Shri S.K. Vyas has very vehemently argued that the complaint was barred by limitation, because as per the case of prosecution itself he went to the accused/petitioner many times for making demand for return of the jewelery, but he denied and ultimately on 4.1.1998 he totally refused to return the property to the complainant and said that no property belonging to the complainant/respondent is with him and the complainant is free to take any action which he choses. Thereafter, FIR was lodged on 5.1.1998. He further submitted that as per the provisions of Section 468 of Cr.P.C., the prescribed limitation for filing a complaint of the offence punishable under Section 406 of IPC is only three years, because the offence is punishable with imprisonment for three years or fine or both. He submitted that Section 468 of Cr.P.C. specifically provides that period of limitation for taking cognizance shall be three years for the offence punishable with imprisonment for a term exceeding one year but not exceeding three years. He further placed reliance on the provisions of Section 469 of Cr.P.C. and submitted that the period of limitation starts from the date when the offence was committed, but in the present case, as per the story of prosecution, complaint was not lodged within prescribed period of limitation after refusal of the present petitioner from returning the entrusted property.

5. Whereas, learned counsel for the respondent Shri S. M. Dagaonkar submitted that after refusal of present petitioner for returning the property, immediately FIR was lodged by the complainant/respondent with the police station Tukoganj and he was waiting for the outcome of the investigation. When finally police failed to file charge sheet against the petitioner and preferred to file Khatma report, then he was having no other choice, but to file private complaint and in these circumstances complaint was filed. He submitted that the private complaint is very well within the limitation from the date of filing of Khatma report by the concerning police. He submitted that the date on which the FIR was lodged and the period during which the investigation was going on is required to be excluded from the period of prescribed limitation.

6. This question was also raised before learned Judicial Magistrate as well as before learned Sessions Judge. Both of them have not agreed with the present

petitioner on the question that the complaint is barred by limitation. Learned Magistrate in his order has held that the period during which the investigation was going on is required to be excluded from the period of limitation, because that period has passed during investigation and complainant was bona fide waiting during that period. It has also been held that apart from offence punishable under Section 406 of IPC, complaint was also filed for the offence punishable under Section 468 and 506 sub Clause 2 of IPC and, therefore, in the facts of the present case provisions of Section 468 (3) will be application and not that of Section 468 (2) (c) of Cr.P.C. Learned Sessions Judge was also of the view that the delay has properly been explained by the complainant and under the provisions of Section 473 of Cr.P.C., trial Court was having discretion to take cognizance of the offence, even after the period of limitation, if it is satisfied that the delay has properly been explained and it is necessary to do so, in the interest of justice.

7. Provisions of Section 473 of Cr.P.C. Reads as under :-

“Section 473 – Notwithstanding anything contained in the foregoing provisions of this chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice.”

8. This provision of Section 473, Cr.P.C. empowers any Court which takes cognizance of an offence to take such cognizance even after expiry of the period of limitation, if it is satisfied that in the facts and the circumstances of the case that the delay has been properly explained or that it is necessary to take cognizance even after expiry of period of limitation, then the period of limitation will be extended by that Court. In the case of *Madan Mohan Sharma Vs. State of M.P.*, (1990 Cri LJ 1046), it has been held that power of condonation of delay can be exercised even suo moto.

9. In the case of *Zandu Pharmaceuticals Works Ltd. and others Vs. Mohd. Saharagfull Haq and others*, which has been referred by learned Sessions Judge in his order, the delay in filing the complaint was not explained by the prosecution and the Magistrate had not even referred Sections 468 and 473 of the Cr.P.C. In his order. The delay was not found fully explained and, therefore, that complaint was found barred by limitation. Whereas in the facts of the present case not only the delay in filing of complaint has fully been explained, but learned Magistrate also in his speaking order found that delay has been explained properly and chooses to condone it. The reasons which have been given by learned Magistrate appears appropriate in the facts of the present case and not only this, but the defence would have further opportunity to raise the same question at the time of final arguments. When full facts will be cleared, then both parties will be in better position to address on this question. So far as present stage is concerned, I find that FIR of the offence was lodged by the complaint at the police station and then

the matter was under investigation. So naturally he was required to wait for the outcome of the investigation and then only he could file a private complaint. In these circumstances, the period which has passed in investigation of the matter has been excluded from the period of limitation and thereby if the period of limitation has been extended by learned Magistrate, then there appears no illegality in it and learned Magistrate was having full discretion to do the same. There is nothing to show that the discretion which was available with the Magistrate has been exercised by him improperly. In this regard judgment of Hon'ble Supreme Court in the case of *State of Himachal Pradesh Vs. Tara Dutt and another* - (AIR 2000 SC 297) can be fruitfully referred, wherein, in Paragraph No. 7 it has been held as under :-

“Para 7 – Section 473 confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences for which a period of limitation has been provided in S. 468 the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for : superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence. But the provisions are of no application to the case in hand since for the offences charged, no period of limitation has been provided in view of the imposable punishment thereunder. In this view of the matter we have no hesitation to come to the conclusion that the High Court committed serious error in holding that the conviction of the two respondents under Section 417 would be barred as on the date of taking cognizance the Court could not have taken cognizance for the said offence. Needless to mention, it is well settled by a catena of decisions of this Court that if an accused is charged of a major offence but is not found guilty thereunder, he can be convicted of a minor offence if the facts established indicate that such minor offence has been committed.”

10. Learned counsel for the petitioner has drawn attention of this Court towards reported judgment of the Hon'ble Supreme Court. He referred the case of *Arun Vyas Vs. Anita Vyas* (AIR 1999 SC 2071), *State of Maharashtra Vs.*

Sharadchandra Vinayak Dongre and others. (AIR 1995 SC 231), *State of Punjab Vs. Sarwan Singh* (AIR 1981 SC 1054) and *Ramesh Chanra Sinha Vs. State of Bihar* [(2003) 11 ILD 427 (SC)], but these cases are distinguishable from the facts of present case. In the case of *Arun Vyas* (supra) charge under Section 498-A of IPC was levelled and it was found as continuing offence, though in that case complaint was also filed for the offence punishable under Section 406 of IPC regarding which it was held that complaint was barred by limitation in respect of that offence. But as there is charge of Section 498-A of IPC also, therefore, the whole complaint was not barred by limitation. Therefore, the facts are distinguishable. In the case of *Sharadchandra Vinayak Dongare* (supra) cognizance was taken after period of limitation even without notice to the accused and, therefore, it was ordered that notices be issued to the accused. In the case of *Sarwan Singh* (supra), as a matter of principle it was held that offence punishable under Section 406 of IPC is not a continuing offence and on this question there cannot be any quarrel. But in the facts of the present case the delay has been properly explained and has been properly condoned. In the case of *Ramesh Chanra Sinha* (supra) the only ground for condonation of delay was given by the Magistrate that the proceedings were stayed, whereas as a question of fact it was found that the stay order was earlier vacated. Therefore, all these cases are distinguishable on facts and are not of any help to the petitioner.

11. The next contention raised by learned counsel for the petitioner is that on facts also there is no ground to presume that the petitioner has committed offence punishable under Section 406 of IPC. He submitted that petitioner is a creditor and has a right to continue his possession on the pledged property till his dues are clear. He submitted that the basic ingredients of dishonesty is not available in the facts of the present case, because the property was pledged with the petitioner and the complainant was required to clear his dues. In this regard learned counsel for the petitioner has taken this Court through the entire statement of the complainant as well as his witnesses and submitted that, looking to the major contradictions which have come in their statements and the documents which have been filed by the petitioner during the course of trial, including the written document containing signatures of the respondent/complainant and the declaration made by the present petitioner to Income Tax Department, it is clear that it is a case of pledging of property and not a case of entrustment and misappropriation.

12. I have carefully gone through the statements of the prosecution witnesses and the documents which have been filed by the present petitioner during trial. The complainant/respondent has denied his signatures on the documents which have been referred by the petitioner. It is also clear that initially no case of pledging of any property was made by the petitioner before Income Tax Officer. Later on, a declaration was made under voluntarily discloser scheme and some amount of tax was paid. It is also averred by the petitioner/accused that some mediators were appointed to settle the dispute between the parties and in their presence

documents were signed by the respondent/complainant, but the complainant in his examination before charge has denied these facts. At this stage, the evidence is incomplete and complete evidence is yet to be recorded.

13. It is now well settled that what ever the allegations made in the complaint should be taken into consideration without any critical examination of the same by this Court while considering the petition filed under Section 482 Cr.P.C. and if the offence is *ex facie* appears on the basis complaint and the statement of the witnesses then the truth of falsity of the allegations would not be gone into by the Court, at this earlier stage. Whether the allegations made in the complaint are true or not is to be decided on the basis of the evidence led at the later stage. At this stage the Court is required to see whether it can be said that allegations in the complaint do not make out any case against accused or do they disclose all the ingredients of any offence alleged against accused, or the allegations are patently absurd or inherently improbable so that no prudent person could have reached to just a conclusion that there is sufficient ground for proceeding against accused. When the facts are incomplete and hazy and there are allegations and counter allegations of both the parties, then it is not desirable for this Court at this stage to go for minute documentation of the evidence available on record to give any finding on the question of fact which is yet to be finally determined by the trial Court. Whether it be a case of private complaint or of a police report, but at the stage of framing of charge trial Court is only required to apply the test of prima facie case and to come to the conclusion, as to whether in his opinion there are grounds for presuming that the accused has committed an offence triable under Chapter XIX of the Cr.P.C., which the Magistrate is competent to try and which in his opinion could be adequately punishable by him, then he shall frame charge in writing against the accused. This question was considered by the Supreme Court in the case of *R. S. Nayak Vs. A. R. Antulay* (AIR 1986 SC Page 2045) and in para 44 it is observed that :-

"Para 44 - The Code contemplates discharge of the accused by the Court of Session under S. 227 in case triable by it; cases instituted upon a police report are covered by S. 239 and cases instituted otherwise than on police report are dealt with in S. 245. The three sections contain somewhat different provisions in regard to discharge of the accused. Under S. 227, the trial Judge is required to discharge the accused if he 'considers that there is not sufficient ground for proceeding against the accused'. Obligation to discharge the accused under S. 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under S. 245 (1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction....." It is a fact that Ss. 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be

made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under S. 245, on the other hand, is reached only after the evidence referred to in S. 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under S. 245 (1) is a preliminary one and the test of "*prima facie*" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a *prima facie* case is made out, charge has to be framed."

14. In police report case because the material is available in the form of police report which contains FIR, other documents and statements of the witnesses recorded under Section 161 of Cr.P.C. and on the other hand in a private complaint case the material is available in the form of statements recorded before framing of charge and defense can have the opportunity of cross examination also. Entire examination is required to be considered by the trial Court. In the facts of the present case also complainants as well as his witnesses have been examined before charge and there is no dispute that immovable properties belonging to the complainant were in possession of present petitioner. As per the case of prosecution that property was entrusted, whereas as per the case of defense it was pledged against some amount which was advanced. Which of the story is true is to be seen by the trial Court keeping in mind the general principles of criminal trial that prosecution is required to prove its case beyond all reasonable doubts, without depending on any weakness of the defense case. At this stage it is not necessary for this Court to express any opinion on the quality of the evidence or on the credibility of the prosecution witnesses. If defense likes, then witnesses can be produced by it also to prove the material which has been placed during cross examination of the complainant and which has been denied.

15. Considering the matter from all angles and keeping in mind the limited scope of of interference available under Section 482 of Cr.P.C. to this Court, I do not find it a fit case for quashing the prosecution. It is always to be remembered that inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations made in the complaint or the first information report, even if taken at their face value and accepted in their entirety, do not *prima facie* disclose the commission of an offence or where the uncontroverted allegations made in the FIR or complaint and the evidence relied in support of the same do not disclose the commission of any offence against the accused, or the allegations are so absurd and inherently improper that on the basis of which no prudent person could have reached a just conclusion that there were sufficient grounds in proceeding against the accused or where there is an express legal bar engrafted

in any provisions of the Code or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly actuated with mala fide and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge and on similar grounds only as held by Supreme Court in the case of *R. P. Kapur Vs. State of Punjab* (AIR 1960 SC 866) and in the case of *State of Haryana Vs. Bhajan Lal* (1992 SCC (Cri.) 426) and later on in many other cases.

16. Applying these principles in the facts of the present case, I do not find any ground for quashing the complaint. Therefore, this petition has no merits and is dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 1562

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.K. Saxena

17 April, 2008*

IN REFERENCE

--- Applicant

Vs.

RADHAKRISHNA & Ors.

--- Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 395 - Reference to High Court - Whether Special Court constituted under M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 is empowered to try the offence punishable under Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Police filed one charge sheet for the trial of offences under the Adhiniyam 1981 and the Act 1989 - Held - Special Court constituted under one Act cannot try the cases of other Acts for which other Special Court has been constituted - Reference answered accordingly. (Para 20)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 395 — उच्च न्यायालय को निर्देश — म.प्र. डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, 1981 के अधीन गठित विशेष न्यायालय क्या अनुसूचित जाति/अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 के अधीन दण्डनीय अपराध का विचारण करने के लिये सशक्त है — पुलिस ने अधिनियम 1981 और अधिनियम 1989 के अधीन अपराधों के विचारण के लिए एक आरोप पत्र पेश किया—अभिनिर्धारित—एक अधिनियम के अधीन गठित विशेष न्यायालय ऐसे मामलों का विचारण नहीं कर सकता है जो किसी अन्य अधिनियम के अधीन गठित विशेष न्यायालय द्वारा विचारणीय हैं — तदनुसार निर्देश उत्तरित।

Cases referred :

(1990) 2 SCC 288, 1993 (1) Crimes 1001, (2003) 4 SCC 139.

T.S. Ruprah, Additional Advocate General for the applicant/State.

ORDER

A.K. SAXENA, J.:— A reference has been made by the Special Judge of Special Court, Bhind constituted under the M.P. Dakaiti Aur Vyapharan Prabhavit

Kshetra Adhiniyam, 1981 (for short 'the Adhiniyam'), under sub-section (2) of Section 395 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') on the question that where a Special Court has been constituted under the Adhiniyam and another Special Court has been constituted under the Scheduled Castes/ Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act') and only one charge-sheet is filed for the trial of the offences under the Adhiniyam and the Act, then which Court has jurisdiction to try the case ?.

2. According to reference, the Crime No.312/02 has been registered by Police Station City Kotwali, Bhind against three accused under Sections 364-A, 302, 120-B of I.P.C., 3(2)(v) of the Act and 11/13 of the Adhiniyam. The charge-sheet has already been filed in the Special Court, who is authorised to try the offences punishable under the Adhiniyam. At the time of filing of the charge-sheet, the Special Court was vacant but the case No.100/04 was registered in that Special Court in absence of the Presiding Judge of the Court. It has been submitted in the reference that two separate Special Courts have been constituted separately to try the offences under the Act and the offences punishable under the Adhiniyam arise out of the area of Bhind District whereas one charge-sheet has been filed to try the offences which are triable by two different Special Courts.

3. The notices were sent to all the three accused of the case, but they did not prefer to come before this Court and instead, they requested that their case may be transferred to any of the Courts.

4. The learned Additional Advocate General Shri T.S. Ruprah argued the matter at length. Shri S.C. Datt, Senior Counsel also extended his valuable assistance at the request of the Court and they are of the view that a Special Court cannot take the cognizance of the offences which are triable by another Special Court. They also referred various provisions of the Code as well as the provisions of the Adhiniyam and the Act.

5. Before considering the point under reference, it would be profitable to refer different provisions of the Code as well as the Adhiniyam and the Act because the charge-sheet has been filed in the Court of Special Judge, Bhind to try the offences punishable under the Adhiniyam and the Act also. Section 4 of the Code deals with the matter of investigation, inquiry and trial of the offences under the Indian Penal Code and any other law and those provisions are as follows:

"S.4. (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

6. The proviso of Section 11 of the Code provides that-

"Provided that the State Government may, after consultation with the High Court, establish, for any local area, one or more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other Court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established."

7. The powers of the Court have been provided under Section 26 of the Code, which are as follows:

" S. 26. Subject to the other provisions of this Code-

(a) any offence under the Indian Penal Code (45 of 1860) may be tried by-

(i) the High Court, or

(ii) the Court of Session, or

(iii) any other Court by which such offence is shown in the First Schedule to be triable;

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by-

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable."

8. A combined reading of all these provisions indicates that the offences under the Indian Penal Code may be tried by the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable or when any Court is mentioned in this behalf in such other law, then the offence shall be triable by such Court. It means where any other law provides that the offence under that law shall be triable by a Special Court, then such offence cannot be tried by any other Court.

9. Section 6 of the Adhiniyam stipulates that the State Government may in consultation with the High Court, constitute as many Special Courts as may be necessary in or in relation to such dacoity and kidnapping affected area or areas as may be specified in the notification. Section 7 of the Adhiniyam provides that notwithstanding anything contained in the Code, or any other law for the time being in force, a specified offence shall be triable only by a Special Court and in trying any specified offence, a Special Court may also try any offence other than the specified offence with which the dacoit may, under the Code, be charged at the same trial, if the offence is connected with the specified offence.

10 Section 14 of the Act also provides the powers of State Government to

constitute Special Courts with the concurrence of the Chief Justice of the High Court. But the Adhiniyam and the Act both, do not empower the Special Courts to try the offences of other Acts for which the Special Courts under other Acts have been constituted by the State Government with the consultation of the High Court or the Chief Justice of the High Court. There is no provision in the Code which provides that the offences under different Acts triable by different Special Courts, can be tried by any of the Special Courts. The above mentioned provisions of the Code, the Adhiniyam and the Act indicate that the Special Court constituted under the Adhiniyam, cannot try the offences punishable under the Act and the Special Court constituted under the Act, cannot try the offences punishable under the Adhiniyam, as both the aforesaid Special Courts have been constituted under two different laws and only for the purposes of trial of offences under respective laws.

11. Now, at this stage, the nature of the notifications, issued by the State Government, may be considered. The State Government, in consultation with the High Court of Madhya Pradesh, constituted the Special Courts in relation to dacoity affected areas and following notification was published on 19th May, 1981 in M.P. Rajpatra (Asadharan) at page 1000.

"F.No.1-7-81-B-XXI, dated the 19th May, 1981.- In exercise of the powers conferred by sub-Section (1) of Section 6 of the Madhya Pradesh Dakaiti Prabhavit Kshtra Adhyadesh, 1981 (No.5 of 1981), the State Government, in consultation with the High Court of Madhya Pradesh hereby constitutes the Special Courts specified in column (2) of the Schedule below in relation to this dacoity affected areas as specified in the corresponding entries in column (3) of the said Schedule.

SCHEDULE

S.No. (1)	Special Courts (2)	Areas (3)
1.	Special Court, Morena	Revenue District, Morena.
2.	Special Court, Bhind	Revenue District, Bhind.
3.	Special Court, Gwalior	Revenue District, Bhind. Gwalior and Datia.
4.	Special Court, Datia	Revenue District, Datia.
5.	Special Court, Shivpuri	Revenue District, Shivpuri.
6.	Special Court, Guna	Revenue District, Guna.
7.	Special Court, Sagar	Revenue District, Sagar.
8.	Special Court, Damoh	Revenue District, Damoh.
9.	Special Court, Tikamgarh	Revenue District, Tikamgarh.
10.	Special Court, Chhatarpur	Revenue District, Chhatarpur.
11.	Special Court, Panna	Revenue District, Panna."

12. The other notification for the constitution of Special Courts to try the cases under the Act, was also published by the State Government with the concurrence of the Chief Justice of High Court of Madhya Pradesh which runs as follows:

"F.No.1/2/90/XXI-B(1),--In exercise of the powers conferred by section 14 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (No.33 of 1989) the State Government with the concurrence of the Honourable Chief Justice of the High Court of Madhya Pradesh, hereby specifies for each of the districts mentioned in column (1) of the table below, a Court of Sessions specified in the corresponding entry in column (2) of the said table to be a Special Court to try the offences under the said Act.

TABLE

Name of the District (1)	Name of the Special Court of Session (2)
Balaghat	Sessions Court, Balaghat
Bastar at Jagdalpur	Sessions Court, Bastar
Betul	Sessions Court, Betul
Bhind	Sessions Court, Bhind
Bhopal	Sessions Court, Bhopal
Bilaspur	Sessions Court, Bilaspur
Chhindwara	Sessions Court, Chhindwara
Chhatarpur	Sessions Court, Chhatarpur
Damoh	Sessions Court, Damoh
Datia	Sessions Court, Datia
Dewas	Sessions Court, Dewas
Dhar	Sessions Court, Dhar
Durg	Sessions Court, Durg
East Nimar Khandwa	Sessions Court, East Nimar (Khandwa)
Guna	Sessions Court, Guna
Gwalior	Sessions Court, Gwalior
Hoshangabad	Sessions Court, Hoshangabad"

13. These notifications clearly indicate that the Special Courts constituted by the State Government under these notifications, were not empowered to try the cases of other Special Courts constituted under other Acts or in other words, these two Special Courts have no power to take cognizance of the cases of each other. The forum of the trial of the offences under a particular Act is regulated by that Act, if provided. According to the notifications issued by the State

Government, since Special Courts have been established and the provisions of the forum of the trial have been made, certainly the trial cannot go in accordance with the general provisions of the Code.

14. The *maxim generalia specialibus non derogant* has been considered in the case of *Sanwarmal Kejriwal vs Vishwa Cooperative Housing Society Ltd. and others*, 1990(2) SCC 288 in respect of jurisdiction of the Courts. Though, this maxim was considered in a civil matter, but it will also be applicable in the matter of jurisdiction of the Courts who are dealing with the criminal cases. The Apex Court put the question in this case as to what happens when competing provisions vesting jurisdiction under different laws open with non-obstante clause and invest jurisdiction in different Courts? Thereafter answered the question that a general provision would have to give way to the special provision on the *maxim generalia specialibus non derogant*. No doubt, the provisions in respect of the trial under the Code would not apply where a Special Court under any other law has been established but what about jurisdiction, where two Special Courts have been constituted under two different Acts and a charge-sheet involving various offences under those Acts has been filed in one Special Court, is a matter of consideration.

15. While dealing with the matter of creation of Special Court of a Judicial Magistrate and pending cases in another Court, the Allahabad High Court laid down the following principle in the case of *Raghunath Rai vs State of U.P. & Ors.*, 1993 (1) Crimes 1001 as follows:

"Thus as soon as the Special Court of Judicial Magistrate of the First Class was created to try the offences punishable under the Act, the jurisdiction of all other Magistrates to try the offences under the Act ceased. It cannot, in the circumstances, be said that the Magistrate before whom the matter was pending before the establishment of the Special Court of Judicial Magistrate First Class continued to have jurisdiction to try the case. In view of the above fact, this Court was right in directing that all the cases pending before other Magistrates should be transferred to the court of special Court of Judicial Magistrate of the First Class, Lucknow for trial".

16. In the case of *Dy. Chief Controller of Imports & Exports vs Roshanlal Agarwal and others*, (2003) 4 SCC 139, the Apex Court found that the Judicial Magistrate, First Class, who by virtue of the notification became a Special Court, was not divested of the jurisdiction which he otherwise possessed under Section 26 of the Code.----- The language of the notification also does not show that powers or jurisdiction of a Judicial Magistrate, who is to perform the functions of a Special Court to try the offences under the Acts are being affected or curtailed in any manner.

17. Though, the above case is not directly connected with the point involved in this case, but it is very much clear from the principles laid down in the above case

that, if there is no curtailment of jurisdiction to try the offences under a particular Act, certainly the Court is empowered to try the cases of other Acts. It means, if there is curtailment of powers or jurisdiction after issuance of notifications, certainly the charge-sheet can only be filed in accordance with the notifications issued by the Government. In other words, if the Special Court is constituted to try an offence of a particular Act and another Special Court is constituted to try an offence of other Act, certainly both the Courts cannot exceed their jurisdiction to try the cases of each other.

18. Section 7 of the Adhiniyam provides the jurisdiction of Special Court and according to it, only the Special Court can try the specified offences but the Special Court may also try any offence other than the specified offence with which the dacoity may, under the Code, be charged at the same trial, if the offence is connected with the specified offence. Since the Special Courts have been constituted by the State Government to try the offences punishable under the Act, therefore, the provisions of Section 7 of the Adhiniyam become redundant for the purposes of the trial of offences punishable under the Act. The Adhiniyam and the Act do not provide that the trial of the offences punishable under the other Acts, under which the Special Courts have been constituted to regulate the trial, may be tried by the Special Court constituted under the Adhiniyam or the Act. It means the Special Courts, constituted under the Adhiniyam or the Act, have no jurisdiction to try the offences of other Acts for which the Special Courts have been constituted. In other words, in absence of any provision or notification, the Special Court constituted under one Act, cannot try the offences triable by the Special Court constituted under another Act even if only one charge-sheet is filed in a Special Court for the trial of different offences punishable under different Acts under which different Special Courts have been constituted.

19. The main purpose of the constitution of Special Courts is to provide speedy trial, but it appears that the State Government did not consider this aspect as to when a person commits different offences punishable under different Acts and for the trial of those offences, two or more Special Courts have been constituted, then which of the Courts will try the case where only one charge-sheet is filed for the trial of the offences. In view of the provisions of sub-section 2 of Section 4 of the Code, all the offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offence. The provisions of Section 11 of the Code are also relevant though, these provisions relate to jurisdiction of Special Court of Judicial Magistrate. A combined reading of above provisions of the Code, various provisions of the Adhiniyam and the Act and also the notifications issued under the Adhiniyam and the Act, this Court is of the considered opinion that where one charge-sheet is filed for the trial of offences punishable under different Acts in a Special Court and the State Government

notified different Special Courts under the different Acts to try the cases independently, certainly in absence any of law or notification, one Special Court will not be empowered to try the offences of other Acts for which different Special Courts have been constituted for want of jurisdiction. At the most, if a charge-sheet is filed in which the offences triable by two Special Courts are involved, the Special Court in which the charge-sheet is filed, is empowered to take cognizance of those offences only for which that Special Court is constituted and that Special Court cannot take the cognizance of the offences which are triable by another Special Court. In such type of situation, it is duty of the prosecution to take appropriate steps so that the disposal of the case may not be delayed. At the same time, it is duty of the State Government to consider desirability to amend the law or to constitute Special Courts so that one Special Court may be able to try different offences of different Acts triable by different Special Courts so that the goal of speedy trial may be achieved.

20. In view of the above discussion, the conclusion of this Court on the matter is that where two Special Courts have been constituted by the Government for the trial of offences punishable under different Acts and these Special Courts have no power to try the offences of other Act in view of the provisions of those Acts or the notifications issued, the Special Court constituted under one Act for the purposes of trial of offences of that Act, cannot try the cases of other Acts for which, other Special Court has been constituted. At the most, the Special Court where the charge-sheet is filed, can try the offences punishable under the Adhiniyam for which the Special Court is constituted vide notification issued by the State Government but the same Special Court cannot try the cases punishable under the Act. With this conclusion, the reference is answered accordingly. This Court is thankful to Shri S.C. Datt, learned Senior Counsel for his valuable assistance rendered to the Court in this case.

Order accordingly.

I.L.R. [2008] M. P., 1569

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

21 April, 2008*

H.S.S. RAGHUVANSHI

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Prevention of Corruption Act, 1988, Section 13(1)(d) - *Quashing of Proceedings on the ground of delay in lodging F.I.R. - F.I.R. lodged in the year 2006 i.e., after 6 years of incident - Applicant found guilty in departmental enquiry which had culminated in the year 2004 - Held - No general or wide proposition of law can be formulated*

that whenever there is inordinate delay on the part of investigating agency in completing investigation such delay would provide ground for quashing F.I.R. - Considering nature of allegations and defence in enquiry it cannot be said that delay in lodging F.I.R. would cause any prejudice to Applicant in his defence or occasion failure of justice - Petition dismissed. (Paras 10,12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, भ्रष्टाचार निवारण अधिनियम, 1988, धारा 13(1)(जी) - प्रथम सूचना रिपोर्ट विलंब से दर्ज कराने के आधार पर कार्यवाही का अभिखण्डन - प्रथम सूचना रिपोर्ट वर्ष 2006 में अर्थात् घटना के 6 वर्ष के बाद दर्ज कराई - आवेदक को विभागीय जांच में, जो सन् 2004 में समाप्त हुई, दोषी पाया गया - अभिनिर्धारित - विधि की कोई सामान्य या व्यापक प्रतिपादना सुनिश्चित नहीं की जा सकती है कि जब भी अनुसंधान एजेंसी द्वारा अनुसंधान को पूरा करने में अत्यधिक विलंब हुआ हो तो ऐसे विलंब के आधार पर प्रथम सूचना रिपोर्ट अभिखण्डित की जाये - जांच में अभिकथन की प्रकृति और प्रतिरक्षा पर विचार करने पर यह नहीं कहा जा सकता है कि विलंब से प्रथम सूचना रिपोर्ट दर्ज कराई इससे आवेदक को उसके प्रतिरक्षा में पूर्वाग्रह होगा या न्याय की निष्फलता का कारण बनेगा - याचिका खारिज।

Cases referred :

1989 (1) Crimes 126, AIR 1990 SC 1266, 1991 CrLJ 118, 1991 Cr.L.J. 1756, AIR 1992 SC 604.

Abhijeet Awasthy, for the applicant.

G.S. Ahluwalia, Standing Counsel for the SPE Lokayukt.

ORDER

R.C. MISHRA, J.:-This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), for having the FIR and consequent investigation quashed. The corresponding case has been registered as Crime No.33/06 at Special Police Establishment Lokayukt, Bhopal in respect of the offences punishable under Section 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988.

2. The background facts may be summarized as under:-

"A departmental enquiry was initiated against the petitioner upon the charge that on 02.06.2000, while working as Assistant Estate Manager of M.P. Housing Board as against total requirement of Rs.2489/- as registration charges, he had taken an amount of Rs.6000/- from K.P.Tiwari for getting sale deeds executed in favour of her daughters Manju Sharma and Anju Thapak and failed to refund the excess amount. Ultimately, he was found guilty and was punished with penalty of stoppage of two increments with cumulative effect. His appeal, under Section 16(2)(a) of M.P. Grih Nirman Mandal Adhiniyam, 1972, was dismissed by the Board. Although, he challenged legality of the appellate order of the Board, by preferring an appeal, under Section 16(2)(b) of the Adhiniyam, before the State Government yet, without waiting for its decision, he invoked writ jurisdiction of this Court. His writ petition is pending as W.P. No.556/07.

3. The petitioner has challenged the initiation of criminal proceedings in view of the following facts :

(i) There is an inordinate delay in lodging the FIR.

(ii) The adverse finding in the departmental enquiry, forming basis of the prosecution, is still under judicial review.

(iii) The first informant is a total stranger to the transaction.

4. In response, learned Standing Counsel for SPE Lokayukt has submitted that none of the grounds raised necessitates any interference with a legitimate prosecution of the petitioner.

5. It is a well settled that any one can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary (*A. R. Antulay v. Ramdas Nayak and another* AIR 1984 SC 718 referred to). Further, the Board, as the employer, has a discretion, in every case, whether or not to initiate criminal prosecution in addition to departmental proceedings for a particular misconduct attributable to its employee.

6. Thus, the only question that is required to be addressed is as to whether, in the facts and circumstances of the case, the FIR deserves to be quashed on the ground of delay in lodging the same ?

7. Admittedly, the FIR pertaining to the offence, allegedly committed on 2/6/2000, was lodged on 9/11/2006 i.e. after a considerable period of more than six years.

8. Learned counsel for the petitioner, while placing primal reliance upon a decision of the Supreme Court in *The State of Punjab Vs. Kailash Nath* (1989 (1) Crimes 126), has contended that an unexplained and unconscionable delay in initiating investigation is sufficient to quash the FIR. In that case, legality of the High Court's order quashing the FIR as against the respondent Kailash Nath on the ground that same having been lodged six years after the event of alleged misconduct and three years after his retirement was in the teeth of Rule 2.2 of the Punjab Civil Service Rules was called in question. The relevant portion of sub-rule (b) of the Rule, as extracted in the judgment, reads : -

"(b) The Government further reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Govt. if, in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement.

Provided that :

(1) and (2)

(3) No such judicial proceedings, if not instituted while the officer was in

service, whether before his retirement or during his re-employment shall be instituted in respect of a cause of action which arose or an event which took place more than four years before such institutions :

Explanation : For the purpose of this rule.

(a)

(b) a judicial proceeding shall be deemed to be instituted.

(i) in the case of a criminal proceedings on the date on which the complaint or report of the police officer on which the Magistrate takes cognizance is made....."

9. Although, the Apex Court reversed the view taken by the High Court that the 3rd proviso (supra) placed absolute or general embargo on prosecution of Government servants yet, maintained its order quashing the FIR on the ground of inordinate delay. In this view of the matter, all that *Kailash Nath's case* (above) lays down is that it is open to quash a prosecution on the ground of unexplained unconscionable delay in making the FIR and it is, thus, no authority for the proposition that a mere delay in lodging the FIR would, by itself, serve as a sufficient ground for quashing the proceedings in pursuance of the registration of the case notwithstanding whatever may be the reasons for the delay. This view is fortified by a subsequent pronouncement of the Supreme Court in *State of Andhra Pradesh vs. P.V.Pavithran* AIR 1990 SC 1266. The illuminating observations clinching the point under consideration are reproduced below:

"There is no denying the fact that a lethargic and lackadaisical manner of investigation over a prolonged period makes an accused in a criminal proceedings to live every moment under extreme emotional and mental stress and strain and to remain always under a fear psychosis. Therefore, it is imperative that if investigation of a criminal proceeding staggers on with tardy pace due to the indolence or inefficiency of the investigating agency causing unreasonable and substantial delay resulting in grave prejudice or disadvantage to the accused, the Court as the protector of the right and personal liberty of the citizen will step in and resort to the drastic remedy of quashing further proceedings in such investigation .

.....

The determination of the question whether the accused has been deprived of a fair trial on account of delayed or protracted investigation would also, therefore, depend on various factors including whether such delay was unreasonably long or caused deliberately or intentionally to hamper the defence of the accused or whether such delay was inevitable in the nature of things or whether it was due to the dilatory tactics adopted by the accused. The Court, in addition, has to consider whether such delay on the part of the investigating agency has caused grave prejudice or disadvantage to the

accused. The assessment of the above factors necessarily vary from case to case.

10. Adverting to facts of the case on hand, it may be observed that the departmental enquiry initiated against the petitioner could be concluded on 7/2/2004 only. The adverse findings recorded by the Enquiry Officer and the consequent penalty are subject matter of challenge in W.P. No.566/07. Considering the very nature of offence and the plea of defence in the Enquiry, it is not possible to conclude that the delay in lodging the FIR would cause any prejudice to the petitioner in his defence or occasion a failure of justice.

11. In *Adarsh Kumar Batra vs. State of Punjab* 1991 CRI.L.J. 118, the FIR was not quashed on the ground of inordinate delay of 8 years alone but also for the reasons that it did not contain any specific allegation that building was constructed by accused over plot purchased by his wife or that he spent huge amount on construction of house and that income of wife was not taken into consideration while holding that he made or spent more money during the check period over these items in excess of known sources of his income or that of his wife. Further, in *Kulbir Singh vs. State of Punjab* 1991 CRI.L.J. 1756, the FIR lodged after lapse of 9 years and all proceedings resulting therefrom against accused were quashed on the ground that the accused would be prejudiced in defending himself effectively in view of the fact that actual measurement of subject matter of offence of embezzlement viz. stone metal was not possible as it was in scattered position. It is relevant to note that in *Kulbir Singh's case* (supra), only one of the facets of the delay in lodging the FIR was highlighted by quoting the following observations made by the Supreme Court in *P.V. Pavithran's case* (above):-

"There is no denying the fact that a lethargic and lackadaisical manner of investigation over a prolonged period makes an accused in a criminal proceedings to live every moment under extreme emotional and mental stress and strain and to remain always under a fear psychosis. Therefore, it is imperative that if investigation of a criminal proceeding staggers on with tardy pace due to the indolence or inefficiency of the investigating agency causing unreasonable and substantial Delay resulting in grave prejudice or disadvantage to the accused the Court as the protector of the right and personal liberty of the citizen will step in and resort to the drastic remedy of quashing further proceedings in such investigation."

12. However, these observations can not be read in isolation as, after considering the other material aspects of the matter, it was categorically laid down in *P.V. Pavithran's case* only that no general and wide proposition of law can be formulated that whenever there is inordinate delay on the part of the investigating agency in completing the investigation, such delay, ipso facto, would provide ground for quashing the First Information Report or the proceedings arising therefrom.

(emphasis supplied)

13. In *State of Haryana vs. Bhajan Lal* AIR 1992 SC 604 the Supreme Court, after illustrating category of cases attracting interference under S. 482. Of the Code, also sounded a note of caution to the effect that the power of quashing the criminal proceedings should be exercised very sparingly with circumspection and that too in the rarest of rare cases. Accordingly, the FIR disclosing commission of an offence punishable under Section 13(1)(d) read with 13(2) of the Prevention of Corruption Act 1988, does not deserve to be quashed on the ground of delay.

14. For these reasons, the question formulated above is answered in the negative.

15. In the result, petition stands dismissed.

Petition dismissed.