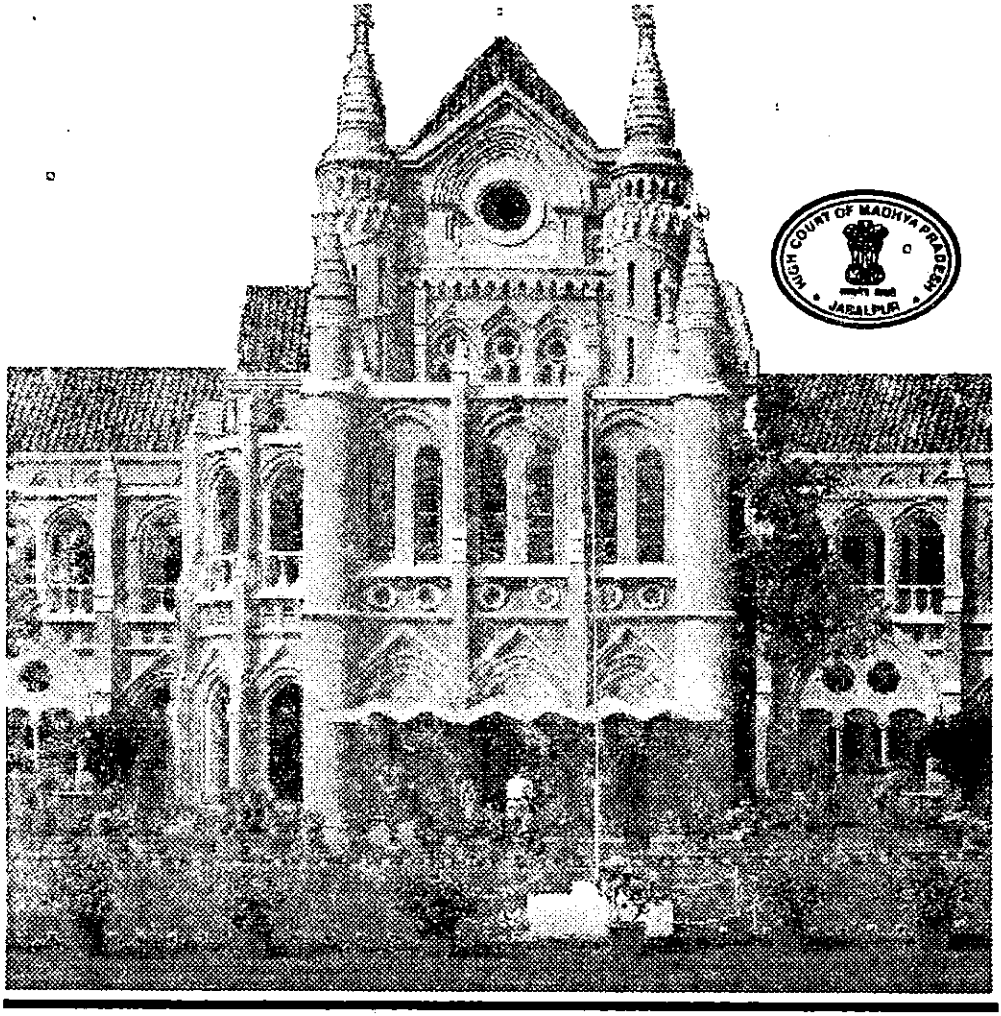
THE INDIAN LAW REPORTS
M. P. SERIES

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



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2008

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TABLE OF CASES REPORTED

(Note: An asterisk (*) denotes Note number).

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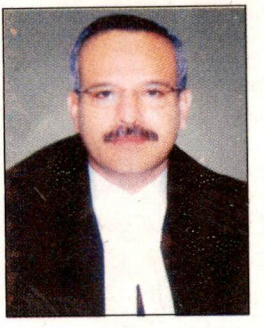
APPOINTMENTS TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri S.C. Sharma and Shri Prakash Shrivastava on their appointment as Judge of the High Court of Madhya Pradesh. Shri Sharma and Shri Shrivastava took oath of the high office on 18th January, 2008.



JUSTICE S.C. SHARMA

Born on 30th November, 1961. Passed Bachelor of Science in the year 1981 with Distinction in three subjects. Obtained Bachelor of Law in the year 1984 securing First Position and three Gold Medals for topping the Faculty, securing highest percentage of marks in three individual subjects. Also awarded National Merit Scholarship for Post Graduate studies.

Enrolled as an Advocate on 1.9.1984. Appointed as Additional Central Government Counsel by order dated 28.5.1993. Appointed as Senior Panel Counsel by Government of India on 28.6.2004. Designated as Senior Advocate by the High Court of Madhya Pradesh, in 2003. Specialized in Civil and Constitutional Law, including Service Matters.

Was Standing Counsel for High Court of Madhya Pradesh; Lokayukta Organization; Central Bureau of Investigation; M.P. Financial Corporation; Indian Oil Corporation; Rani Durgawati Vishwa Vidyalaya, Jabalpur; Khadi Gramodyog Commission; Regional Provident Fund Commissioner, M.P.; Other reputed Government/Private Undertakings. Also appointed Special Counsel for State of Madhya Pradesh for defending cases before Debts Recovery Tribunal. Also appointed as Special Counsel for M.P. State Electricity Board and Municipal Corporation, Jabalpur. Also frequently appeared for M.P. Audyogik Vikas Nigam Limited, Bhopal, beside large number of Public Sector Undertakings.

Elevated as Additional Judge of the High Court of Madhya Pradesh on 18th January, 2008.

JUSTICE PRAKASH SHRIVASTAVA

Born on 31st March 1961. Passed Bachelor of Arts from St. Aloysius College, Jabalpur. Obtained Master Degree in Economics in 1983 and Stood First Class First from Rani Durgawati Vishwa Vidyalaya, Jabalpur and Passed LL.B. in the year 1986 First Class First from Rani Durgawati Vishwa Vidyalaya, Jabalpur.

Enrolled as an Advocate in State Bar Council in February 1987 and started career as junior to Shri Y.S. Dharmadhikari, Advovate. Started practice in the Apex Court since 1994 and became Advocate on record in the Supreme Court in March 1995 and also became first standing counsel of Chhattisgarh. Expert in constitutional and civil matters.

Elevated as Additional Judge of the High Court of Madhya Pradesh on 18th January, 2008.

We wish Shri Justice S.C. Sharma and Shri Justice Prakash Shrivastava, a successful tenure on the Bench.

OVATION TO NEW JUDGES

Shri R. N. Singh, Advocate General of M. P. while felicitating the new Judges said :-

It gives me great pleasure to extend a hearty welcome to Hon'ble Justice Shri Satish Chandra Sharma and Hon'ble Shri Justice Prakash Shrivastava on their appointment as Additional Judges of this Hon'ble Court. Hon'ble Shri Justice Satish Chandra Sharma hails from family of educationist. He was born on 30th of November 1961. His father adorned the prestigious post of a Vice Chancellor and his mother a retired Principal. He was enrolled as an Advocate on 1.9.1984 in the rolls of the State Bar Council of Madhya Pradesh and was designated as Senior Advocate in the year 2003. He was a Central Government standing counsel and was also counsel for Central Bureau of Investigation. He was also standing counsel for High Court of Madhya Pradesh, MP Pollution Control Board, Provident Fund Commissioner, Lokayukta Organisation, Indian Oil Corporation, MPSEB, BSNL and various other bodies and institutions.

Hon'ble Shri Justice Prakash Shrivastava, comes from the family of renounced lawyers. His father Shri H. S. Shrivastava is a Senior Advocate designated by this Hon'ble Court and his brother and nephew are also Advocates. He was born on the 31st of March 1961 and was enrolled as an Advocate on 2.2.1987. He has practiced in the High Court of MP at Jabalpur since 1987 and has been in active and extensive practice in the Supreme Court of India. He has had a brilliant and meritorious academic record which started from Matriculation in the year 1978 where he secured a position in merit list of the State. Thereafter he has received various achievement awards from Jabalpur Rotary Club Gold Medal for scoring highest marks in M.A. (Economics) Late N.M Deshpande Memorial Gold Medal for scoring highest marks in M..A. (Economics). Late Nishkant Chouksey Memorial Gold Medal for obtaining highest marks in Statistics in M.A (Economics) and Shri O.P. Mishra Memorial Gold Medal for scoring highest marks in LL.B. While practising in this High Court he was counsel for Municipal Corporation Jabalpur and other organisations. He was the standing counsel for the State of Chhattisgarh before Hon'ble Supreme court from June 2001 to December 2004.

I feel privileged in offering this ovation to Justice Satish Chandra Sharma and Justice Prakash Shrivastava. By their sheer commitment they will prove worthy of the assignment and will be a great asset to this institution.

I, on behalf of State Govt., Law Officers and My own behalf welcome your Lordships and wish a successful tenure as Judges of this Hon'ble Court.

On behalf of Senior Advocates Council, new Judges were felicited by its President Shri P. S. Nair. He said,

On behalf of Senior Advocates Council of Madhya Pradesh and on my behalf I congratulate Hon'ble Shri Justice Satish Chandra Sharma and Hon'ble Shri Justice Prakash Shrivastava on their appointment as Judges of the High Court

of Madhya Pradesh. We extend them a hearty welcome and offer our fullest cooperation in discharge of their onerous duties.

Hon'ble Shri Justice Satish Chandra Sharma come from a renowned family with high tradition. As a Lawyer he used to be generous towards clients and accept many cases even without any remuneration. I have been appearing against him many time and found him not only cooperative but very considerative and accommodative towards all.

Your Lordship's philosophy of life is to help as many people as possible. You were generous towards people and has been lending a helping hand whenever possible. Your Lordship used io appear in a series of Public interest litigation which has social bearing itself shows his commitment towards the right course. You have established highly reputed practice and rightly deserved the status of a "Senior Advocate".

Hon'ble Shri Justice Prakash Shrivastava after starting practice and having acquired the knowledge and capacity, shifted to Supreme Court. I have occasion to appear against him in the Supreme Court where I find him fully prepared, effective in establishing his case and demolishing case of opposition. At the same time he was extremely accommodating and cooperating. His Lordship has an air of simplicity, is soft spoken, extremely cordial and humble in his approach like his father.

Preamble of the Constitution provide for social justice, economic and political, equality of status to all. Article 14 provide for equality before law and equal protection of law. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Fundamental rights and directive principles enshrined in the Constitution strengthen the above principles.

Hon'ble Judges of the High Court and Supreme Court are the only persons to ensure implementation of the provisions of the Constitution having taken the oath. Recent decisions of the Supreme Court has created a disturbing impression among the working class. In the case of 2007 (1) SCC - 408 - Indian Drugs & Pharmaceuticals Ltd. Vs. workmen - the Court has held temporary employees who include casual, daily rated, adhoc employee have no right to the post not to be continued in service nor to get absorption far less of being regularized. The onus of proof has been shifted. Provisions of 11-A of the ID Act has been diluted. Sympathy has been ruled out of consideration. Globalization has been taken as ground for interfering in service and labour matters overlooking the earlier decision.

I am sure your lordships having taken the oath of upholding the provisions of the Constitution un-influenced by any adverse sentiments or judgements will ensure the well being of the people of this country. After all Law is for the benefit of the Society and therefore, according to the need of the time, within the frame work of Constitution, re-stitching is necessary.

I, on my behalf and on behalf of members of Senior Advocates Council wish your Lordships a meaningful and satisfying tenure. May God Bless both of your Lordships.

On behalf of Central Government, Shri Dharmendra Sharma, Assistant Solicitor General of India, Welcomed the Judges. He said,

We all have gathered to welcome with open arms Hon'ble Justice Shri Satish Chandra Sharma and Hon'ble Justice Shri Prakash Shrivastava.

It is a matter of immense pleasure for us that such luminaries with impeccable legal knowledge have joined the great institution.

The presence of such personalities make us confident that we will scale higher lavels of performance and efficiency on fullfill the rightful aspiration of the common man.

The caliber and dedication of both the Hon'ble Judges is beyond and shadow of doubt. With such a Star Studded line-up of Hon'ble Judges, it gives an excellent opportunity for all of us to learn from them and emulate their professionalism.

I, sure that with the inclusion of Hon'ble Justice Shri S.C. Sharma and Hon'ble Justice Shri prakash Shrivastava, the relation between the bench and bar will strengthen further.

This great institution has made giant leaps in the disposition of Justice but we have lot of challenges to over come in the future. I would like to assure all the Hon'ble Judges that they will receive complete co-operation from our end to face any such circumstances.

On behalf of the Central Government and my collegues , I warmly welcome Hon'ble Justice Shri S.C. Sharma and Hon'ble Justice Shri Prakash Shrivastava in our midst.

I also pray to God to bestow upon them the virtues required to perform their onerous duties.

On behalf of M. P. State Bar Council, new Judges were felicitated by its President Shri Rameshwar Nikhra, Advocate. He said,

आज इस प्रदेश के न्यायमंदिर में दो ऐसे स्थापित विधि वेत्ता न्यायाधिपति के रुप में अपना पदभार ग्रहण कर रहे हैं, जिनके व्यक्तित्व की मृदुलता, विधि का ज्ञान और कठोर परिश्रम करने की क्षमता से हम सभी भलीभांति परिचित हैं।

मैं इस विशिष्ट अवसर पर सर्वप्रथम माननीय श्री जस्टिस सतीश चंद शर्मा जी का हार्दिक अभिनंदन करते हुए उन्हें अपनी शुभ कामनायें देता हूँ। श्री जस्टिस सतीश चंद शर्मा जी का जन्म 30 नवम्बर 1961 को हुआ और उन्होंने वर्ष 1984 से विधि व्यवसाय वरिष्ठ अधिवक्ता श्री विवेक तन्खा के सानिध्य में प्रारंभ किया। आपके पिता इतिहास के ख्यातिलब्ध विद्वान हैं एवं शिक्षा जगत में उनकी स्वयं की एक पृथक पहचान है। वे जबलपुर विश्वविद्यालय में वर्षों तक इतिहास विषय के विभागाध्यक्ष रहे हैं, और उन्होंने उप कुलपति के पद को भी अपनी गरिमा प्रदान की। परिवार की शैक्षिणिक परंपराओं के अनुरुप श्री जस्टिस सतीश चंद शर्मा ने विधि जगत में विधि व्यवसाय प्रारंभ करने के बाद अपने कठोर परिश्रम, लगन, और विधि के गहरे ज्ञान से न केवल व्यवसाय में अपनी एक पृथक पहचान बनाई है, वरन् अनेक उलझे एवं जटिल मुकदमों में अपने पक्षकारों की ओर से विजय श्री भी प्राप्त की। विधि व्यवसाय की इस अवधि में वे वर्ष 1993 से 2007 तक केन्द्रीय सरकार के स्टेंडिंग कौंसिल रहे और वर्ष 2004 में सीनियर एडवोकेट के विशिष्ट अलंकरण से नामांकित होने के बाद वे केन्द्रीय शासन के वरिष्ठ अधिवक्ताओं की पेनल

में शामिल हुये। विधि व्यवसाय की इस सफल यात्रा में वे सेन्ट्रल ब्यूरो आफ इन्वेस्टीगेशन, म. प्र. पर्यावरण नियंत्रण बोर्ड, माध्यम मध्य प्रदेश, प्रावीडेन्ट फंड कमिश्नर, लोकायुक्त कार्यालय, इंडियन आयल कार्पोरेशन लि., आई.बी.पी. कंपनी, एम.पी.इ.एस.बी. एवं बी.एस.एन.एल. जैसे बड़े संस्थानों में भी अधिवक्ता रहे।

श्री जस्टिस सतीश चंद शर्मा आप अद्वितीय कार्यक्षमता के धनी हैं, और वातावरण को तनावरहित बनाकर जटिलतम कानूनी प्रश्नों की सकारात्मक व्याख्या करने और समाधान के मार्ग प्रशस्त करने में भी दक्ष हैं। मुझे अपेक्षा है, कि न्यायाधिपति के रुप में आपके मार्गदर्शन में प्रदेश का न्यायजगत एवं विधिजगत तथा पक्षकारगण सभी लाभान्वित होंगे। मैं आपके सफल कार्यकाल एवं उत्तरोत्तर प्रगति की मंगल कामना करते हुये पुनः आपको शुभकामनायें देता हूँ।

माननीय श्री जस्टिस प्रकाश चंद श्रीवास्तव :-

संस्कारधानी के ख्यातिलब्ध विधि वेत्ता माननीय श्री एच. एन. श्रीवास्तव जी के प्रतिष्ठित परिवार से आप संबद्ध हैं, जिनका बहुआयामी व्यक्तित्व हम सभी के लिये प्रेरणा का स्त्रोत रहा है। आपका जन्म 31 मार्च 1961 को हुआ और वर्ष 1987 में मध्य प्रदेश राज्य अधिवक्ता परिषद द्वारा आप अधिवक्ता के रुप में नामांकित हुये, और इसके साथ ही आपने उच्चतम न्यायालय में विधि व्यवसाय प्रारंभ किया, और अपने अथक परिश्रम, विलक्षण प्रतिभा और समर्पित कार्यशैली से न केवल उच्चतम न्यायालय वरन् मध्य प्रदेश के विधि जगत में भी आपने एक विशेष स्थान बना लिया। आप अपने छात्र जीवन से ही अत्यंत कुशाग्र और अध्ययनशील रहे हैं। एम. ए. अर्थशास्त्र की परीक्षा उच्चतम अंकों से उत्तीर्ण करने पर आपको रोटरी क्लब द्वारा गोल्ड मेडिल के विशिष्ट सम्मान से अलंकृत किया गया, और साथ ही एन. एम. देश पान्डे मेमोरियल गोल्ड मेडिल, स्व. श्री निशिकांत चौकसे मेमोरियल गोल्ड मेडिल से भी आपको अलंकृत किया गया। विधि परीक्षाओं में भी उच्चतम अंकों से उपाधि प्राप्त करने पर आपको ओ. पी. मिश्रा गोल्ड मेडिल से अलंकृत किया गया। एक विधि वेत्ता के रुप में भी आपने अत्यंत समर्पित भाव से अथक परिश्रम के साथ अनेक उल्लेखनीय प्रकरणों में सफल पैरवी की, एवं अपनी गहरी सूझबूझ, अध्ययन कौशल एवं गहन कानूनी ज्ञान से विधि जगत में एक विशिष्ट पहचान बनाई। यदि यह कहा जाय कि अधिवक्ता के रुप में आपने गोल्डन परफार्मेंस दी है तो अतिश्योक्ति नहीं होगी। इस प्रदेश के न्याय मंदिर में न्यायाधिपति के रुप में पदभार ग्रहण करने के अवसर पर मैं आपका हार्दिक अभिनंदन करते हुये आपके सफल कार्यकाल एवं उत्तरोत्तर प्रगति की मंगल कामना करता हूँ।

आज जब स्थापित मूल्यों का तेजी से विघटन हो रहा है, और आस्थाओं की जड़ें कमजोर हो रही हैं, तब आम आदमी के लिये न्याय ही विश्वास की अंतिम किरण है। माननीय मुख्य न्यायाधिपति जी के मार्गदर्शन में शीघ्र, सस्ता एवं सुलभ न्याय लोगों को मिल सके इस हेतु अनेक अभिनंदनीय एवं उल्लेखनीय प्रयत्न किये जा रहे हैं। उच्च न्यायालय में इस भावना को सकारात्मक रुप देने के लिये हमारे न्यायाधिपतिगण भी उल्लेखनीय भूमिका का निर्वाह कर रहे हैं, और इस कड़ी में आज पदभार ग्रहण कर रहे न्यायाधिपति भी अपना सराहनीय योगदान देंगे इस हेतु मैं आशान्वित हूँ।

इन्हीं भावनाओं के साथ मैं पुनः आज पदभार ग्रहण कर रहे माननीय न्यायाधिपतिद्वय के लिये अपनी शुभकामनायें देता हूँ।

Reply to Ovation by Hon'ble Shri Justice Satish Chandra Sharma :–

I am extremely thankful for the kind words spoken for me.

First of all, I must express my gratitude to Almighty God for the blessings showered on me. I am grateful to My Lord Hon'ble the Chief Justice Shri A.K. Patnaik and the

members of the Collegium Hon'ble Shri Justice Deepak Verma and Hon'ble Shri Justice Dipak Mishra for considering me worth appointment to this august office. I am also grateful to Hon'ble the Chief Justice of India and members of the collegium of the Supreme Court. I am also grateful to Hon'ble Shri Justice P.P. Naolekar, Judge, Supreme Court of India, who has been very kind to me.

I am grateful to my father and my mother who taught me values of life. Without their blessings, I would not have been standing here today. I am also grateful to my elder brother who helped me a lot and to the entire family for supporting me during the struggle period. I am also grateful to my wife who always stood by my side and helped me in working hard with extreme fortitude and understanding.

I am grateful to the Hon'ble Judges of this Hon'ble Court who have always guided me from time to time. I am extremely grateful to Hon'ble Shri Justice G.P. Singh, who has blessed me personally when I went to meet him yesterday and to all Hon'ble Judges who have retired from the Hon'ble High Court for their blessings and good wishes.

I am extremely grateful to Hon'ble the Advocate General Shri R.N. Singh; Chairman, State Bar Council ofM.P.; President, Senior Advocates Council; President, M.P. High Court Bar Association; President, High Court Advocates' Bar Association for the good words expressed by them on this occasion. I am also grateful to my senior Shri V.K. Tankha, Senior Advocate under whom I worked as a Junior Lawyer. I am also grateful to Shri S.L. Saxena, Senior Advocate for his kind assistance given to me during my initial days of practice. I am thankful to all senior Advocates and all Advocates who are present and have supported me from time to time and who have always been with me in this profession.

I was student of science and was admitted to M. Tech: Course but after few months it was my father who suggested me to do Law. At that point of time, almost everybody in the family was upset. However, because of the confidence and determination of my father, I became a Law student and later on a Lawyer and now, with his kind blessings, I am joining this profession as a Judge of this Court.

I will endeavour my level best to keep the high values and traditions of the system alive and will be discharging my duties with sincerity and honesty, that too with the cooperation of Bar and I shall always overcome the difficulties and my short-comings with the help of Hon. Senior Judges of this Court and the members of the Bar.

Last but not the least, I must appreciate the assistance provided to me by my Juniors, my Office Clerks S/Shri Ramsiya and Brindawan who have worked with me for almost 25 years.

Once again I extend you good wishes and pray to Almighty to give me strength to perform the onerous duties bestowed upon me.

Thank you all once again.

Reply to Ovation by Hon'ble Shri Justice Prakash Shrivastava :–

I begin with offering my prayer to God Almighty for giving me this opportunity to serve this noble institution and perform arduous role of dispensation of justice and pray for His blessings for giving me the strength to perform the pious duty which he has bestowed on me. I am grateful to my teachers who have moulded me to face life's task courageously and laid foundation for my future career.

I had started my career as lawyer under the guidance of eminent lawyer late Shri Y.S. Dharmadhikariji. I am grateful to him for introducing me to Bar and guiding me in the profession in my formative days of career.

I take this opportunity to express my gratitude to my parents, my feelings for whom cannot be bounded in words. I am indebted to my father who is present here as Senior Advocate who guided me in every sphere of my life and inspired me to go in for career as a lawyer, in spite of the fact that all avenues were open to me since I had a good academic career. I am also indebted to my mother whose prayers to God brought me success and without whose blessings I could not have travelled so far in my journey in life. I am thankful to my other family members who always helped and encouraged me and especially my wife who has stood by me at all times.

It is said that law is the only game where if you play well you can attain heights beyond expectations. This is a critical moment in my life when I am leaving the Bar and joining the Bench to serve the cause of justice. I am being ordained to new phase of life and arduous as that.

Our High Court has a very glorious tradition. Many eminent judges like Late Justice Hidayatullah, Justice G.P. Singh, Justice J.S. Verma have adorned this court. My humble endeavour would be to maintain high and rich traditions of the court with my limited capability.

The Bar has established high traditions and practice for which it is known in the legal fraternity in the country. Members of the Bar both seniors and juniors have bestowed love, affection and cooperation to me and supported me during my practice as Advocate on record in the Supreme Court. I take this opportunity to thank them all. I hope and request for continuing similar cooperation from the Bar to enable me to perform the pious duty towards the cause of justice.

It is said that four qualities are needed in a good judge which are symptomatic of functional excellence. These can be summed up in four P's. First P is Punctuality, second is Probity i.e. uprightness integrity and honesty. Third P is Promptness and fourth and most important P is Patience, and I promise to follow them. I will be a happy and satisfied person if I am able to contribute something for this institution and society. Every bit of contribution made by me will bring joy and satisfaction and this is the object of my humbly taking up the responsibility as a High Court Judge.

May God give my strength and light my path.

I once again thank you all.

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(1)

A.K. Shrivastava, J.

ABDUL HAMEED THROUGH LRS & anr.
Vs.
SHAHJAHAN BEGUM

A. Civil Procedure Code (5 of 1908), Section 152 - Amendment of judgments, decrees or orders - A decree for specific performance of contract to execute sale deed passed in favour of plaintiffs - No decree for possession was passed in spite of specific relief claim by the plaintiffs - It is a accidental slip or omission in decree - Can be amended in exercise of power U/s 152.

B. Civil Procedure Code (5 of 1908), Section 152 - A decree for specific performance does not contain a direction for delivery of possession - Such direction can be issued even by Executing Court. 1983 JLJ 422, 2002 (1) MPLJ 475, 1997 (2) MPLJ 501 (Cases relied)

There was a suit for specific performance of contract and for delivery of possession of suit property. Trial Court passed a decree for specific performance of contract and directed defendant to execute sale deed in favour of plaintiffs. Trial Court has not given a finding that plaintiffs are not entitled for possession. However, no decree for possession was passed in spite of specific relief claimed by the plaintiffs. Application U/s 152 CPC filed that on account of accidental slip or omission in judgment and decree direction to deliver possession could not be mentioned. The application rejected by the Trial Court. Plaintiffs filed revision against the order before High Court. High Court held that it is an accidental slip or omission in the decree, can be amended in exercise of power U/s 152. Also held that while executing a decree for specific performance of contract, the Court is not concerned with the execution of the decree only, but a further step in the light of Section 55 (1)(f) of Transfer of Property Act has also to be directed and, therefore, when a decree for specific performance does not contain a direction for delivery of possession, such a direction can be issued even in execution of that decree. Revision allowed.

Adil Usmani, for the applicants

None, for the non-applicant.

C.R. 220/2005 (Jabalpur), D/- 10 December, 2007

(2)

Arun Mishra & Sanjay Yadav, JJ.

ADITYA SONI
Vs.
SANJAY GULATI & ors.

A. Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Claimant aged 4 and half years sustaining 40% permanent disability due to mal union of fracture of shaft femur and injury in the ankle also - As per II schedule - Being a non earning member notional income Rs. 15, 000/- p.a. - Annual loss of earning capacity 40% i.e.

Rs. 6000/- - Multiplier of 15 applied - Future loss of earnings capacity 6,000 x 15 = Rs. 90,000/- plus Rs. 20,000/- towards pain & suffering, medical expenditure, special diet etc. - Tribunal awarded Rs. 60,000/- - High Court enhanced the total compensation Rs. 1,10,000/- - Enhanced compensation carry interest @ 7% p.a. from the date of application till realization.

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

None, for the appellant
Ajit Agrawal, for the respondent No. 3 Insurer.

M.A. No. 3678/2005(Jabalpur), D/-10 January, 2008.

(3)

S.K. Seth, J.

BADRILAL
Vs.
SITABAI & ors.

Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(f) - *Bonafide* need of Landlord - Of his own - Whether landlord can seek eviction of tenant on the ground of Bonafide requirement of grand son - Referred to Larger Bench.

In view of the foregoing discussion, we are left with no option but to obtain an authoritative answer from a larger Bench to the following question, viz. *"Whether the decision in Nand Kishore Vs. Surjudevi 1974 MPLJ 293 is no longer good law in view of the subsequent decisions of the Supreme Court and as such, has it lost efficacy as a binding precedent?"* 1951 NLJ 250, AIR 1997 SC 628, AIR 2002 SC 2256, AIR 2003 SC 2024 (Ref.)

S.A. No. 478/2004 (Indore) D/- 3 January, 2008

(4)

Arun Mishra & S.A. Naqvi, JJ.

BATUL BEGAM & ors.
Vs.
SURESH PRASAD SAHU & ors.

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

B. Motor Vehicles Act (59 of 1988), Section 147 (as amended w.e.f. 14.11.1994)– From the amended Section risk of owner traveling in the vehicle alongwith goods is clearly covered under the policy - *Asharani's case* was based on unamended provision - Tribunal has wrongly relied upon that decision - Insurer's liability is joint and several. 2003 (2) MPWN 60 referred.

Ashok Singh, for the appellants,
Smt. Amrit Ruprah, for the respondent No. 3 Insurer.

M.A. No. 2784/2006 (Jabalpur), D/-21 February, 2008.

(5)

Arun Mishra & Sanjay Yadav, JJ.

CHAMPA PANDEY & ors.
Vs.
HARDAYAL SINGH & anr.

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

B. Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Deceased aged 32 years - His salary Rs. 3000/- per month plus daily allowance Rs. 50- Total income Rs. 4,500/- per month - 1/3rd deduction towards self expenditure - 50% deduction due to negligence of driver - Monthly loss of dependency comes to Rs. 1,500/- i.e. 18,000/- p.a.- Multiplier of 17 applied - Loss of dependency Rs. 3,06,000/- plus Rs. 40,000/- under the customary heads - Claimants are entitled for Rs.3,46,000/- .

Nagendra Singh, for the appellants,
D.N. Shukla with *Brijesh Mishra,* for the respondent No.2.

M.A. No. 1384/2005, D/- 9 January, 2008 (Jabalpur)

(6)

Arun Mishra & S.A. Naqvi, JJ.

DEVENDRA KUMAR PATLE
Vs.
MANJUSHRI PATLE

Hindu Marriage Act (25 of 1955) - Section 9 - Restitution of Conjugal Rights - Plaintiff filed suit for restitution of conjugal rights on the ground of desertion - Defendant denied the factum of marriage - Plaintiff proved by oral and documentary evidence that marriage was solemnized in accordance with customary rites and usage including Saptapadi and also proved that defendant deserted the plaintiff without any sufficient cause - Defendant did not appear for cross examination after filing his examination in chief on affidavit - Defendant's evidence cannot be read in evidence - Fails to rebut evidence of plaintiff - Suit rightly decreed - Appeal dismissed. AIR 1994 SC 135, 1991 Supp. (2) SCC 616 (Cases Rel.)

Naman Nagrath with *Aditya Sharma,* for the appellant.
None, for the respondent.

F.A. No. 548/2003 (Jabalpur), D/- 3 December, 2007.

(7)

A.K. Saxena, J

FAZILAT MOHAMMAD
Vs.
STATE OF M.P.

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

Anticipatory bail granted by High Court for 60 days with the direction that meanwhile, the applicant may move an application for regular bail before the Competent Court. Application under Section 44 (2), 70 (2) r/w Section 437 of Code moved before the Magistrate within 60 days with the allegation that police officer refuse to accept bail bond. Without perusal of case dairy Magistrate rejected the application in a causal manner, on the ground that police do not want to arrest applicant Session Court has also not entertain the application under Section 438 of Code.

When the application was filed for surrender and regular bail before the court of magistrate it was his duty to call for case dairy to see as to whether the applicant was entitled for regular bail or not and if not, then only the applicant could have been taken into custody, but the Magistrate failed to consider this aspect of the case and disposed of the bail application in a casual manner. In these circumstances, the anticipatory bail application could have been consider by the Session Court it self, but the Session Court also failed to consider the above aspects of the matter.

In the above peculiar circumstances of the matter the anticipatory bail application filed u/s 438 of code before the High Court allowed and the period of anticipatory bail extended for next 45 days.

Imtaiz Hussain, for the applicant.
Pramod Choubey, Government Advocate for the State.

M.Cr.C. No. 8104/2007 (Jabalpur), D/- 8 January, 2008.

(8)

Dipak Misra & R.S. Jha, JJ.

JAGRAM MANJHI
Vs.
STATE OF M.P. & ors.

A. Medical & Dental Post-Graduate Entrance Test, 2007 Conduct of Examination and Admission Rules, Rules 21 (4), 21 (7), Post-Graduate Regulations 2000, Regulation 10 (3) - Regulation 10 (3) prohibits migration of

transfer of P.G. students from one medical college or institution to another - State Government could not have framed a rule for mutual transfer - Petitioners application for mutual transfer from Bhopal to Gwalior rejected - Held - Regulations, 2000 would govern field. (1999) 7 SCC 120 Foll.

B. Mutual Transfer - State Government permitting mutual transfer which is impermissible in law - State is not only in contravention of Regulations of the Medical Counsel of India but a step which epitomizes unwarranted attitude giving rise to unhealthy feeling in the minds of others. (2003) 11 SCC 146 Ref.

Aditya Sanghi, for the petitioner,
Deepak Awasthy, G.A. for the respondent Nos. 1& 2,
Anoop Nair, for the respondent No. 3

W.P. No. 150/2008 (Jabalpur) D/- 9 January, 2008.

(9)

Arun Mishra & S.A. Naqvi, JJ.

KAVITA SHARMA
Vs.
ASHWNI KUMAR & ors.

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

P.C. Lodhi, for the appellant.
N.S. Ruprah with *Ajit Singh,* for the insurer.

M.A. No. 2452/2004 (Jabalpur) D/- 22 November, 2007.

(10)

Arun Mishra & S.A. Naqvi, JJ.

KAVITA & ors.
Vs.
RAJMATI & anr.

A. Motor Vehicles Act (59 of 1988), Section 166 - Liability - Mechanical Failure - Jeep turned turtle due to sudden failure of brakes - Driver of jeep died - Reasonable care taken by owner in maintaining vehicle - Accident was outcome of mechanical defect - Owner and Insurer liable to make payment of compensation. 1998 (1) MPLJ 245, 1998 (1) MPLJ 574 (foll.)

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

N.P. Dubey, for the appellants,
Manoj Mishra, for the owner,

S.K. Rao with *Ajit Agrawal,* for the insurer

M.A. No. 561/1992, D/- 6 February, 2008 (Jabalpur)

(11)

N.K. Mody, J.

MONIKA & anr.
Vs.
KAMLESH & ors.

A. Motor Vehicles Act (59 of 1988) - Section 166 - Compensation - 3 years old daughter of claimants died in accident - Tribunal awarded Rs. 1,07,000/- - Held, in view of second Schedule - Notional income, deduction 1/3rd and applying multiplier 15 - Loss of dependency 1,50,000 + 30,000 towards funeral expenses, loss of estate and love & affection HC awarded Rs. 1,80,000/-. AIR 2007 SC 1012 (Case Rel.).

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

C. Motor Vehicles Act (59 of 1988) - Section 166 - Mediclaim Policy - Amount reimbursed under the policy is not deductible from the amount of medical expenses. 2000 ACJ 701, 1983 ACJ 152, 2006 ACJ 65, 1999 ACJ 10 (Cases Rel.).

Brijesh Pandhya, for the appellant.
Sudha Shrivastava, for the respondent no. 3

M.A. No. 2084/2006 (Indore), D/- 4 December, 2007

(12)

U.C. Maheshwari, J

TIKARAM SEN
Vs.
T. SANDHYA RANI

A. Civil Procedure Code (5 of 1908), Order 9 Rule 9 r/w M.P. Motor Vehicles Rules, 1994, Rule 240 - Application for restoration of Claim Petition - Case fixed for awaiting service report of notices issued to respondents - Claim Petition could not be dismissed for want of prosecution.

B. Motor Vehicles Act, (59 of 1988), Section 166, Civil Procedure Code, 1908, Order 9 Rule 9 - Restoration of Claim Petition - Provision of Motor Vehicles Act regarding compensation has been enacted to do social justice with victim for road accident - Tribunal should adopt liberal attitude.

C. Civil Procedure Code (5 of 1908), Order 9 Rule 9 - Dismissal of Claim Petition for default of appellant's counsel - Party should not suffer due to the mistake of Counsel. AIR 1981 SC 1400 (Foll.)

Ravish Devalia, for the appellant

Anjali Banerjee, for the respondent

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

(13)

N.K. Mody, J. UNITED INDIA INSURANCE CO. LTD.
Vs.
NANDLAL & ors.

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

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

L.N. Soni with *Anand Soni,* for the applicant
Vijay Singh Chouhan, for the non-applicant nos. 1 & 2.
Sameer Verma, for the non-applicant nos. 3 to 6.

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

(14)

S.C. Vyas, J YASHWANT
Vs.
SACHIN & ors.

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

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

Jai Singh and *A.S. Rathore,* for the applicant.
V.P. Saraf for the non-applicant.
Raghuveer Singh Chouhan, Public Prosecutor for the non-applicant/State.
Rajendra Dayal, for the objectors.

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

I.L.R. [2008] M. P., 413

SUPREME COURT OF INDIA

Before Mr. Justice Altamas Kabir & Mr. Justice D.K. Jain

5 October, 2007

PRABIR BANERJEE ... Petitioner*

Vs.

UNION OF INDIA and ors ... Respondents

A. Service Law - Inter-Commissionerate Transfer - Validity - Group 'B', 'C' and 'D' employees of Central Board of Excise and Customs - Whether can be transferred from one Zone to another - Circulars dated 19-2-2004 and 9-3-2004 issued by the Deptt. of Revenue - Held - Circulars deals with inter-commissionerate transfers on compassionate ground and are not applicable in case of transfer on administrative ground from Indore to Nagpur Zone - Transfer is governed by Circulars dated 24-8-1984, 16-1-2003 and 24-8-2004 - Both Zones have common cadre as Chief Commissioner of Bhopal Zone is Cadre Controlling Authority, therefore, transfer was permissible - Appeal dismissed. (Paras 22 and 23)

B. Constitution of India - Article 136 - Writ Petition filed by appellant disposed off by High Court with liberty to file representation - Appellant already submitted his representation - Held - Appellant could not question decision of High Court once he had submitted to decision of High Court by filing a departmental representation for reconsideration of his transfer. (Para 25)

Cases Referred :

(2004) 7 SCC 405, (2004) 4 SCC 245, (2001) 8 SCC 574, (2001) 5 SCC 508 1991 Supp (2) SCC 659.

JUDGMENT

The Judgment of the Court was delivered by ALTAMAS KABIR, J.:–The petitioner in the instant special leave petition was one of two petitioners who had filed writ petition No.3622 of 2005 in the High Court of Madhya Pradesh, Indore Bench, calling in question the legal propriety of an order dated 13.9.2005 passed by the Central Administrative Tribunal, Jabalpur Bench, in O.A.No.6002/2005. The writ petitioners had approached the Tribunal for quashing of the order of transfer by which they were transferred from Indore to Nagpur. The challenge to the order of transfer was made on the ground that inter-zonal transfer was prohibited in the Department of Central Excise and Customs and hence the impugned transfer order was void and was liable to be quashed.

2. In order to appreciate the case made out by the writ petitioners before the High Court it will be necessary to set out a few facts relating to the case.

3. Appearing for the petitioner Prabir Banerjee, Mr. Mukul Rohtagi, learned Senior Advocate submitted that the petitioner had been appointed as Inspector, Central

* S.L.P (c) No. 20706/2006

Excise, in 1982. Subsequently, in 2003 he was promoted to the post of Superintendent under the Bhopal zone which comprised of the Commissionerates of Bhopal, Indore and Raipur. On 19.2.1994 the Department of Revenue in the Ministry of Finance, Government of India, issued a circular addressed to amongst others all the Chief Commissioner of Central Excise containing certain instructions regarding the discontinuance of inter-Commissionerate transfers. Since much of the submissions made in this matter revolve around the said circular, the same is reproduced hereinbelow:

"F.No. A 22015/03/2004 AD IIIA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

New Delhi, the 19th February 2004

To

All Chief Commissioner of Customs,
All Chief Commissioner of Central Excise,
All Commissioner of Customs,
All Commissioner of Central Excise,
All Directors General/ Directors
Commissioner, Central Bureau of Narcotics, Gwalior
(all by name)

Subject : Inter Commissionerate Transfers
Issuance of Instructions
regarding their discontinuance etc.

Sir/ Madam,

It would be recalled that hither to inter-Commissionerate transfer (i.e. transfer from one cadre controlling authority to another) of Group 'B', 'C' and 'D' employees were taking place on compassionate grounds. These powers had been delegated to the Head of Departments subject to the conditions laid down in F.No. A22015/34/8-0-Ad III B dated 20.5.1980. Since inter-Commissionerate transfers have caused certain administrative difficulties resulting in protracted litigation, the matter has been reviewed by the Board in detail.

Accordingly, in supersession of all the previous instructions issued on the subject in the past, it has been decided that hence forth no inter-Commissionerate transfer shall be allowed for any Group B, C and D employee. Instead, in exceptional circumstances depending upon the merits of each case where it is considered necessary to accept such requests on extreme compassionate grounds, such transfers shall be allowed on deputation basis for a period three years subject to the approval of the transfer and transferee cadre controlling authorities. Further extension of

depuration period can be made up to one year by the Commissioner and for a further period of one year by Chief Commissioners concerned on mutually agreed basis. Such transfers shall be with the specific condition that no deputation allowance shall be admissible for deputation period including extended period, if any. Where ever required, necessary amendments in recruitment rules are under approval and shall be issued subsequently.

This issues with the approval of the Board

Receipt of these instructions may please be acknowledged.

Yours faithfully,
Sd/-
(S.K. Thakur)
Under Secretary to the Govt. of India"

4. From the said circular it will be seen that the Board after reviewing the existing policy relating to inter-Commissionerate transfers took a decision whereby in supersession of all the provisions /instructions issued on the subject in the past, no inter-Commissionerate transfer would thenceforth be allowed for any Grade B, C and D employee. Even with regard to the cases where requisitions were made on extreme compassionate grounds such transfers could be allowed on deputation basis for a period of 3 years subject to the approval of the Transfer and Transferee Cadre Controlling authorities. As indicated hereinbefore the petitioner was promoted to the post of Superintendent in 2003, which is a 'B' category post.

5. The said circular was subsequently amended by another Circular issued by the Department of Revenue on 9th March, 2004 which is reproduced hereinbelow:

"F.No. A 22015/03/2004 AD IIIA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
New Delhi, the 9th March, 2004

To

All Chief Commissioner of Customs,
All Chief Commissioner of Central Excise,
All Commissioner of Customs,
All Commissioner of Central Excise,
All Directors General/ Directors
Commissioner, Central Bureau of Narcotics, Gwalior
(all by name)

Subject: Inter Commissionerate Transfers Issuance of Instructions clarification regarding.

Sir/ Madam,

I am directed to refer to this office circular of even number

dated 19.2.2004 on the subject cited above and to say that some references have been received seeking clarification regarding inter-Commissionerate transfers within the same zone. It is therefore, clarified that inter-Commissionerate transfers amongst the Commissionerates having common cadre where there is no loss of seniority involved, may be allowed to continue as hitherto.

This issues with the approval of the Board.

Yours faithfully,
Sd/-
(S.K. Thakur)
Under Secretary to the Govt. of India"

6. By virtue of said amendment it was clarified that inter-Commissionerate transfers amongst the Commissionerates having common cadre, where there was no loss of seniority, could be allowed to continue as before.

7. Pursuant to the promulgation of the aforesaid circulars an order, being Office Order No.1/2005 dated 31.3.1995 was issued by the Chief Commissioner of Customs and Central Excise, M.P. and Chhattisgarh States, whereby along with 55 other officers the petitioner was transferred from the Indore Commissionerate to the Nagpur Commissionerate. It is this order which was challenged by the petitioner and others before the Central Administrative Tribunal on the ground that although inter-Commissionerate transfers were permitted the same did not permit the authorities to also effect inter-zonal transfers which had been prohibited.

8. After considering the submissions made on behalf of the respective parties and the various circulars issued by the Central Board of Excise and Customs, and in particular the Circular/instructions dated 10th September, 1990, which provides for common cadre of Superintendents of the Bhopal and Nagpur Commissionerate under the Chief Commissioner, Bhopal, as the Cadre Controlling Authority, the Tribunal dismissed the application filed by the petitioner herein.

9. As mentioned hereinabove the said order of the Central Administrative Tribunal was impugned by the petitioner herein along with one Mahender Singh by filing Writ Petition No.3622/05 before the High Court of Madhya Pradesh, Indore Bench.

10. During the hearing of the writ petition the main submission made on behalf of the writ petitioner was that transfer from one zone to another zone was prohibited by the Department itself and the impugned transfer order being in violation of the declared policy of the Department was liable to be quashed. On the other hand, the order of the Tribunal was strongly supported by the respondents on the ground that inter-zonal transfer was permitted, inasmuch as, constitution of a zone was for the purpose of revenue and had nothing to do with transfer which is an incident of service. It was also urged on behalf of the respondents that even if the petitioners were transferred to the Nagpur zone their seniority would not be affected in any way.

11. Having regard to the submissions made the High Court observed that the

grievance of the petitioners was based on the apprehension that their seniority would be affected. However, relying on the decision of this Court in the case of *Shilpi Bose vs. State of Bihar* (AIR 1991 SC 532), the High Court ultimately came to the conclusion that transfers made in administrative exigencies or in public interest or for smooth functioning of the system did not warrant any interference under Articles 226 and 227 of the Constitution of India. Several other decisions on the same issue were also referred to and the writ petition was disposed of with leave to the petitioners to submit a representation to the competent authority within a period of four weeks from the date of the order, with a further direction that the said representation was to be disposed of within a period of four weeks from the date of receipt of the same.

12. Since the main contention of the writ petitioners was that inter-zonal transfers were not permitted by virtue of the policy of the Central Board of Excise and Customs, the High Court, instead of adverting to the said issue went into a separate issue regarding transfer in Central Government services wherein transfer is an incident of service and wrongly permitted the petitioners to file representation before the Department against the order of transfer under challenge.

13. Aggrieved by the order of the High Court one of the petitioners, namely, Prabir Banerjee, has filed this special leave petition on the same grounds as urged before the Tribunal and reiterated before the High Court.

14. Appearing in support of the special leave petition, Mr. Mukul Rohtagi, Senior Advocate, appearing with Dr. Abhishek M. Singhvi, Senior Advocate, urged that both the Tribunal as well as the High Court failed to appreciate the main plank of challenge made on behalf of the petitioners, namely, that inter-zonal transfers have been prohibited and since the Nagpur zone was a separate zone from the Bhopal zone the transfer order had been made in violation of the policy of transfer.

15. It was urged that instead of deciding the aforesaid question raised on behalf of the writ petitioners, the High Court went into a broader issue regarding transfer being an incident of service under the Central Service Rules. Mr. Rohtagi also urged that in the absence of any Rules framed by the Central Board of Excise and Customs the instructions issued by the Board from time to time would have to be applied in respect of the employees of the Department. Conceding that transfer was an incident of service in the Central services, Mr. Rohtagi urged that the said principle would not apply in this case in view of the existence of definite instructions issued by the Board in this regard.

16. It was urged that the High Court appears to have missed this aspect of the matter and had relied solely on the decision of this Court in the case of Shilpi (supra) and certain other decisions namely (i) *S.B.I. vs. Anjan* 2001 (5) SCC 508; (ii) *National Hydro Electric Power Corporation Ltd. vs. Shri Bhagwan* (2001 (8) SCC 574); (iii) *Union of India vs. Janardan Debnath* (2004 (4) SCC 245); (iv) *State of U.P. vs. Siya Ram* (2004 (7) SCC 405), in arriving at the conclusion that the writ petitioner would only be entitled to make a representation to the competent authority regarding the order of transfer.

17. Appearing for the respondents, Mr. B. Dutta, learned Additional Solicitor General, took us to the various circulars issued by the Department of Revenue in the Ministry of Finance, Government of India, which had also been referred to by Mr. Rohtagi, relating to inter-Commissionerate transfers of Grade B, C and D employees. In support of his contention that inter-zonal transfers in the Department of Customs and Central Excise were permissible, the learned Additional Solicitor General urged that services under the said Department was an all India service wherein transfer was an incident of service to which the petitioner could not legitimately object. The learned Additional Solicitor General also referred to the communication from the Central Board of Excise and Customs to the Chief Commissioner of Central Excise and the Chief Commissioner of Customs, as also Central Excise and Customs, dated 16.1.2003, whereby it was declared by the Board that all the powers being exercised by the respective Commissioners as the Cadre Controlling Authority would thenceforth be exercised by the respective Chief Commissioners. In addition to the above, the learned Additional Solicitor General referred to the directions of the Board in its communication dated 24.8.04 whereby it was indicated that pending decision on the demand for bifurcation of group 'B' and 'C' cadres relating to Nagpur and Indore Collectorates it had been decided that cadre control of the said two Collectorates would be distributed between the two Collectors of Nagpur zone and Indore zone. The Collector of Central Excise of the Nagpur zone was made the Cadre Controlling Authority of Group 'B' and 'C' employees belonging to the Ministerial cadre, whereas the Collector of Central Excise, Indore, was made the Cadre Controlling Authority in respect of Group 'B' and 'C' officers in the executive cadres. The learned Additional Solicitor General added that of the officers posts in the different Commissionerates the post of Superintendent was a Group 'B' post in the executive cadre and in respect of the two aforesaid Collectorates the Collector of Central Excise, Indore, became the Cadre Controlling Authority of such employees in the aforesaid Collectorates.

18. Referring to the counter affidavit filed on behalf of the respondents, and in particular para 3 (V), he submitted that by virtue of notification No.14/2002 Central Excise dated 8.3.2002, as amended, issued under Rule 3(2) of the Central Excise Rules, 2002, the statutory jurisdiction of the Chief Commissioner under the provisions of the Central Excise Act, 1944 and the Rules framed thereunder have been defined. He urged that the statutory jurisdiction was distinct from the jurisdiction of the Chief Commissioner as Cadre Controlling Authority which had been defined separately by way of administrative instructions. While the statutory jurisdiction of the Chief Commissioner, Bhopal under the Central Excise Act extended to the three Commissionerates of Bhopal, Indore and Raipur, the Chief Commissioner, Bhopal, was designated as the Cadre Controlling Authority for the combined cadre of Grade 'B' and 'C' of four Commissionerates, namely, Bhopal, Indore, Raipur and Nagpur. It was also submitted that since the jurisdiction of a Chief Commissioner as a Cadre Controlling Authority has not been defined or circumscribed by any notification issued under Rule 3(2), administrative instructions

issued from time to time would have to be followed in the absence of such statutory rules, as had been done in the instant case.

19. It was submitted that the High Court had not committed any error in relying on the principle that in Central Government Service transfer was an incident of service and an employee was not entitled to question the impugned order of transfer on such ground. Further, since the transfer order had been issued by the Cadre Controlling Authority, namely, the Chief Commissioner of Central Excise, Bhopal, who had been vested by the Board with authority to act as the Cadre Controlling Authority in respect of the three Commissionerates within the Bhopal zone and the Nagpur Commissionerate under the Nagpur zone, such order was made validly and could not be interfered with on the ground of lack of jurisdiction.

20. Having considered the submissions made on behalf of the respect parties we are inclined to agree with the stand taken by the respondents that while transfer is an incident of service under the Central Service Rules, the petitioner has no cause to complain in respect of the transfer order by which he was transferred from the Bhopal zone to the Nagpur zone, as the same had been passed by the Chief Commissioner of Central Excise, Bhopal zone, under powers vested in him by the Board by its Circular dated 16.1.2003.

21. Although, both the parties have relied upon the circular dated 19.2.2004 and 9.3.2004 issued by the Department of Revenue, in the Ministry of Finance, Government of India, the said two circulars have little or no relevance to the facts at issue in the instant case. The circular dated 19.2.2004 merely indicates that inter-Commissionerate transfers of Group 'B', 'C' and 'D' employees were taking place on compassionate grounds which had caused certain administrative difficulties resulting in protracted litigation which caused the Board to review the situation in detail. It is in that context that it was further indicated that in supersession of all previous instructions issued on the subject in the past from thenceforth no inter-Commissionerate transfer would be allowed for any Group 'B', 'C' and 'D' employee. Instead, in exceptional circumstances depending on merits of each case, such transfers would be allowed on deputation basis for a period of 3 years, subject to the approval of the transferring and transferee Cadre Controlling Authorities. The other circular dated 9.3.2004 merely clarified the question of inter-Commissionerate transfers within the same zone. In this context it was clarified that inter-Commissionerate transfers amongst the Commissionerates having common cadre, where there was no loss of seniority involved, such a practice would be allowed to continue.

22. In our view, neither of the two circulars have any bearing and/or relevance to the issues raised in the instant case where the central question is whether the Chief Commissioner of the Bhopal Commissionerate was competent to transfer the petitioner to a Commissionerate of a different zone, namely, Nagpur, except to the extent of indicating that inter-Commissionerate transfers between Commissionerates having a common cadre would be allowed to continue.

23. No doubt transfer is an incident of service in an All India service and under

the Central Service Rules the Controlling Authority was competent to transfer the petitioner to any place in India, where it considered expedient to do so. But apart from the above, we also have to take into consideration the decision of the Central Board of Excise and Customs in its communication dated 24.8.1984 by which pending decision on the demand for bifurcation of Group 'B' and 'D' cadres relating to Nagpur and Indore cadres the Board took a decision that cadre control of the said two Collectorates would be distributed between the two Collectors as indicated in the said communication. As mentioned hereinabove, while the Collector of Central Excise, Nagpur, was made the Cadre Controlling Authority of Group 'B' and 'D' Ministerial Cadres, the Collector of Central Excise, Indore was made the Cadre Controlling Authority of executive cadres of Group 'B' and 'D'. We are alive to the fact that the decision taken by the Board was an administrative decision, but in the absence of any direct Rule relating to transfer between two Collectorates under the Central Board of Excise and Customs, the said administrative instruction would have to be implemented insofar as inter-Collectorate transfers between the Nagpur and Indore Cadre was concerned. In fact, by subsequent circular dated 16.1.2003 the Board further declared that the Chief Commissioner of Central Excise/Customs in a Commissionerate would be the Cadre Controlling Authority up to Group 'B' level staff, and its functions would include monitoring the implementation of the Boards instructions with regard to the transfers and equitable distribution of man-power and material resources between the Commissionerates/zones.

24. The learned Additional Solicitor General had strenuously urged that by virtue of the communication dated 24.8.2004 the Collector of Central Excise, Indore, had been made the Cadre Controlling Authority of executive cadres belonging to Group 'B' and 'D' of the Nagpur and Indore Collectorates, which empowers the Chief Commissioner of the Bhopal zone to exercise control over the cadre both in respect of the three Commissionerates comprising the Bhopal zone as also the Commissionerate of Nagpur falling within the Nagpur zone. It has neither been pleaded nor has it been shown to us that the decision of the Board as contained in the said circular of 24.8.1984 has since been rescinded or altered and that the Chief Commissioner of the Bhopal zone is no longer the Cadre Controlling Authority of the Nagpur Commissionerate.

25. In the aforesaid circumstances, although the High Court has proceeded mainly on the basis that in the Central Services transfer is an incident of service and has not really dealt with the various circulars on the subject, we are not inclined to interfere with the judgment and order of the High Court disposing of the writ petition.

26. There is also another aspect of the matter, namely, that pursuant to the leave granted by the High Court to make a representation to the competent authority, the petitioner herein made a representation for reconsideration of the transfer order to the Chairman of the Central Board of Excise and Customs on 17.4.05. In other words, the petitioner had submitted to the directions given in the impugned judgment, thereby, disentitling him to question the decision rendered by the High Court.

27. For the aforesaid reasons, we dismiss the Special Leave Petition, but, in the facts of the case, without any order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 421

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat, Mr. Justice Tarun Chatterjee & Mr. Justice Lokeshwar Singh Panta

30 November, 2007

KAILASH CHANDRA ... Appellant*

Vs.

STATE OF M.P. ... Respondent

Excise Act, M.P. (2 of 1915) - Sections 46, 47 (Prior to amendment) - Confiscation - Truck driver convicted under Section 34 of Act for transporting 294 boxes of foreign liquor - Trial Court ordered for confiscation of truck of appellant after due inquiry - Order of confiscation maintained by First Appellate Court as well as High Court - Held - Burden is on owner to establish that he had no reason to believe that offence was being or likely to be committed - Appellant failed to establish his lack of knowledge - On the facts of case in lieu of confiscation, vehicle be released to appellant on payment of sum of Rs. 30,000/- as fine - Appeal allowed. (Paras 10 to 12).

J U D G M E N T

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

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Indore Bench, dismissing the revision petition filed by the appellant.

3. Background facts in a nutshell are as follows:

On 26.04.1996, in the truck bearing registration No.MOU 9470, Anokhilal Porwal the driver of the appellant was transporting 294 boxes each containing 48 quarters xxx-Rum DryGin, Beer and foreign liquor in the night at about 1.00 A.M. The truck was passing through village Naganghat Meghnagar. The Station House Officer of P.S. Kakanwana received information from the informant about passing of the truck, upon which he stopped the truck at Naganghat Barrier and seized the truck with the stock of foreign liquor. Crime No.62/96 was registered at Kakanwani P.S. under Section 34 of the M.P. Excise Act 1915 (in short 'the Act') and after due investigation, filed the charge-sheet before the learned Judicial Magistrate First Class against the driver Anokhilal Porwal. The truck was and is still owned by the appellant-Kailashchandra. The Trial Court, after completion of the trial, by judgment dated 19.03.2001 convicted the accused and sentenced him to R.I. for one year and a fine of Rs.2,000/-, in default of payment of fine, to suffer further R.I. for two months and also issued show-cause notice to the appellant for

*Cr.A. No. 1649/2007

confiscation of the truck as per provision under Section 46 of the Act 1915. The appellant submitted the reply, but the trial court was not satisfied therewith and ordered for confiscation of the truck. Against this order, the appellant Kailashchandra submitted appeal (Cri. A.No. 25/2001) whereby the lower Appellate Court remanded the case back by order dated 29.11.2001 on the ground that Supratdar was not served with the notice for confiscation of the truck personally.

The Trial Court registered Misc. Criminal Case No.34/2000 and again issued show-cause notice to the Supratdar/appellant. The appellant submitted his reply and also got himself examined as well as witness Onkar. Trial Court, again passed the order of confiscation of the truck on 07.03.2000. This order was again challenged by the appellant in Crl. A.No.24/03 by judgment dated 12.09.2003. Against this judgment/order, the appellant Kailashchandra filed Cri.Rev.No. 773/03 before the High Court and the High Court again remanded the case back to the lower Appellate Court on the ground that the lower Appellate Court had not mentioned under which provision of law (whether new or old) the appeal was filed and to decide afresh and also issued direction to the Trial Court to see whether the accused Anokhilal filed any appeal and if any filed, what was the fate of that appeal. The lower Appellate Court, in view of the aforesaid direction issued by the High Court, heard both the parties in detail and decided all the issues.

According to the Trial Court, a Criminal case was registered by the police against accused Anokhilal with regard to illegal transportation of foreign liquor in the truck on 26.04.1996. Therefore, the provision of confiscation of Section 46 of the Act, will apply and the amended provision of Section 47 and 47-A substituted by M.P. Excise Act (Act No. XXII of 2000) which came into force from 04.08.2000, will not apply and final disposal of the criminal case alongwith Section 46 of the Act read with Section 452 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') will apply. The lower Appellate Court did not accept the arguments advanced by the Public Prosecutor that the amended provision of the Act, Section 47-A and B shall apply because the judgment was passed after enforcement of the Amended Act of 2000. The Lower Appellate Court, according to the High Court, had rightly decided this issue because confiscation is a penal provision and, therefore, in a pending matter, prior to amendment, the amended provision will not apply and there is no such specific provision in the Amended Act of 2000, for application of new provision for confiscation of the conveyance and other articles, involved in the offence in a pending case.

4. Before the High Court the stand of the appellant was that he was only the owner of the truck and was not present in the truck at the time of seizure along with illicit liquor. The driver Anokhilal Porwal without his consent and permission took the truck and, therefore, the owner could not be penalized.

5. The High Court noted that the Trial Court and the First Appellate Court had considered this aspect at length and recorded concurrent findings of the fact that without knowledge of the owner of the truck, such a huge quantity of foreign liquor and that too going towards Gujarat, where liquor business is prohibited was not possible. Accordingly, the revision petition was dismissed.

6. In support of the appeal, learned counsel for the appellant submitted that the Courts below have not appreciated the factual position correctly. Alternatively it was submitted that under Section 47, as it stood before amendment, was applicable to the facts of the case and in lieu of confiscation fine can be imposed.

7. Learned counsel for the respondent, on the other hand, submitted that factual findings have been recorded to conclude that the plea taken by the owner-appellant about his lack of knowledge is clearly untenable. So far as the alternative submission is concerned, it is submitted that the provisions empower the Magistrate of two alternatives. One is to direct confiscation or in the alternative to give the owner of the thing liable to be confiscated option to pay such fine in lieu of confiscation as Magistrate thinks fit. This alternative was not suggested and also the appellant had taken the stand that the order of confiscation was improper.

8. Sections 46 and 47 (before amendment) read as follows:

> "46. Liability of certain things to confiscation:
>
> (1) Whenever an offence has been committed which is punishable under this Act, the intoxicant materials, still, utensil, implement or apparatus in respect of by means of which such offence has been committed shall be liable to confiscation.
>
> (2) Any intoxicant lawfully imported, transported, manufactured, held in possession or sold along with or in addition to any intoxicant liable to confiscation under sub-section (1), and the receptacles, packages and coverings in which any such intoxicant materials, still, utensil, implements or apparatus as aforesaid is or are found, and the other contents if any, of the receptacles or packages in which the same is or are found, and the animals, carts, vessels, rafts or other conveyance used in carrying the same, shall likewise be liable to confiscation.
>
> Provided that no animal, carts, vessels, rafts and other conveyance shall be liable to confiscation if it is proved that they are not the property of the offender and if the owner thereof establishes that he had no reason to believe that such offence was being or was likely to be committed."
>
> 47. Order of confiscation (1) Where in any case tried by him the Magistrate decides that anything is liable to confiscation under Section
>
> 46, he may either order confiscation or may give the owner of the thing liable to be confiscated, an option to pay, in lieu of confiscation, such fine as the Magistrate think fit."

9. According to the proviso to Section 46, the burden is on the owner of the property to establish that he had no reason to believe that such offence was being committed or was likely to be committed. It provides that no animals, carts, vessels, rafts and other conveyance shall be liable to confiscation, if it is proved that they

are not the property of the offender and if the owner establishes that he has no reason to believe that such offence was being or was likely to be committed. As noted above, the owner has to establish the aforesaid facts.

10. The Trial Court, first Appellate Court and the High Court have concluded that the appellant has not established his lack of knowledge.

11. Coming to the alternative submission relating to payment of fine in lieu of confiscation we find that the Magistrate had not indicated the alternative to the appellant.

12. On the facts of the case, we direct that the vehicle shall be released to the appellant on payment of a sum of Rs.30,000/- as fine. The amount is to be deposited within a period of four months from today. If the deposit is not made within the aforesaid time, this order shall not operate and appeal shall be treated to have been dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 424

SUPREME COURT OF INDIA

Before Mr. Justice C.K. Thakker & Mr. Justice D.K. Jain

25 January, 2008

SUNITA JAIN ... Appellant*

Vs.

PAWAN KUMAR JAIN & ors. ... Respondents

A. Criminal Procedure Code, 1973 (2 of 1974) - Section 362 - Power of Review by Criminal Court - Is not a inherent power - No such power has been conferred by Code - Criminal Court cannot review it's own order or judgment except to the extent of correcting any clerical or arithmetical error. (Paras 21 & 23)

B. Criminal Procedure Code, 1973 (2 of 1974) - Section 482 - The action of framing of charge upheld by HC as well as SC - Thereafter HC in exercise of inherent power u/s 482 quash criminal Proceedings - Order amounts to review its own order - Order illegal, improper, contrary to law - Set aside. (Para 26)

C. Criminal Procedure Code, 1973 (2 of 1974) - Section 482 - It is well settled that inherent power u/s 482 of Code must be exercised in rarest of rare cases- Principle for exercising power of quashing criminal Proceedings laid down in *Bhajanlal's* case. (Paras 30 & 31)

Cases Referred :

(1997) 4 S.C.C. 55, (2000) 3 SCC 693, (2003) 4 SCC 675, (1971) 3 SCC 844, (2001) 1 SCC 169, (1983) 4 SCC 7, (1960) 3 SCR 388, (1992) Supp. 1 SCC 355

J U D G M E N T

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

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*Cr.A. No. 174/2008

2. The present appeal is filed against the judgment and order dated October 30, 2003 in Miscellaneous Criminal Case No. 1442 of 1999 passed by the High Court of Judicature at Jabalpur. By the said order, the High Court allowed the application filed by the respondents-accused under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) and quashed criminal proceedings initiated by the appellant.

3. To appreciate the controversy raised in the present appeal, few relevant facts may be noted.

4. The appellant herein is the wife of Pawan Kumar Jain-respondent No.1. Respondent Nos. 2 and 3, namely, Poolchand Jain and Smt. Sarojbai Jain are parents of respondent No.1 and father-in-law and mother-in-law respectively of the appellant. It is the case of the appellant that she married to respondent No.1 on July 8, 1989. After the marriage, she remained with her husband for few days at Jabalpur and during that period, her husband and in-laws harassed her as her father had not given sufficient amount of dowry. They taunted the appellant saying that had the respondent No.1 married to any other lady, they would have received dowry amount of Rs.8-10 lakhs. On September 5, 1990, the appellant gave birth to twins. According to the appellant, the greed of the respondents for dowry was so much that in 1991, the first respondent went to the extent of getting quality of gold ornaments given by her father tested by a Goldsmith which were found to be of good quality. It is also the case of the appellant that on December 14, 1991, marriage of the appellant s younger sister was solemnized at Sagar and respondent No.1 and his father had come to attend it. At that time also, the respondents demanded car, colour TV and more gold. When the demand was not met with, the first respondent attacked the appellant and caused injury to her. In March, 1992, the 1st respondent took the appellant with him and kept her with his parents at Jabalpur. Even after giving assurance that she will not be ill-treated, she was physically and mentally tortured for dowry. The appellant informed her father that her husband and in-laws were demanding dowry from her and her husband assaulted her and her children had been taken away and they were not allowed to see the mother (appellant).

5. The appellant stated that Harish Chandra and Daya Chandra Jain, who were known to her father, learnt about the miserable condition of the appellant and both of them informed the father of the appellant in September,. 1993 about the plight of the appellant at her in-laws. One Ram Ratan Jain, who was also knowing the appellant, persuaded the respondents to behave properly but in vain.In May, 1995, again the appellant was assaulted and severely beaten. She was also compelled to sign a document purported to be a compromise deed between the appellant and the 1st respondent. The appellant lodged a complaint in Police Station Civil Lines, Raipur on May 10, 1998 which was registered as Crime No. 738 of 1998. Respondent No.1 was called at the Police Station and he executed a writing that he would not ill treat the appellant. The 1st respondent also gave assurance that he will not use any writing against the appellant said to have been signed by her.

6. In July, 1995, the 1st respondent was transferred from Raipur to Raigarh and in spite of the request by the appellant, she was not taken by her husband along with him. On March 8, 1996, the 1st respondent sent a notice through advocate to father of the appellant stating that he had filed a divorce petition. He further stated that he was ready to pay maintenance to the appellant. On 17th March, 1996, the appellant s father brought the appellant to Sagar. The appellant had to go with her father as the 1st respondent did not take her with him and had also issued notice for divorce. On March 20, 1996, the appellant lodged First Information Report (FIR) in Women Police Station which was registered as Crime No. 6 of 1996 giving details about physical and mental torture and dowry demands by respondent No.1 and his family members. According to the appellant, on July 10, 1996, non-bailable warrants were issued. In the High Court, however, the 1st respondent made a statement through his advocate that parties had decided to live together and had settled the dispute amicably. On that statement being made, bail was granted to respondent No.1 and his parents. On September 28, 1996, challan was filed against the respondents for offences punishable under Sections 498A, 506, 406 read with Section 34 of Indian Penal Code (IPC) and also under Sections 3 and 4 of Dowry Prohibition Act, 1961. On January 30, 1997, charges were framed against respondent Nos. 1 to 3 (husband, father-in-law and mother-in-law) and also against brother and sister of respondent No.1. All the accused challenged the action of framing of charge against them in the High Court by filing a Revision Petition. The High Court vide its order dated October 22, 1997, partly allowed the revision and quashed charges against brother and sister of respondent No.1. The High Court, however, held that so far as other respondents were concerned, charges could not be quashed and dismissed the petition. Being aggrieved by the said order, the respondents approached this Court by filing Special Leave Petition but even this Court dismissed the SLP on February 23, 1998. The respondents then once again filed a petition in the High Court by invoking Section 482 of the Code on February 23, 1999. The appellant filed her reply to the said petition. The High Court vide the impugned order, allowed the petition holding that there was abuse of process of law by the appellant in initiating criminal proceedings. The proceedings were, therefore, quashed. The said order is challenged in the present appeal.

7. Notice was issued by this Court on April 5, 2004. Several adjournments were taken by the parties so that the matter can amicably be settled. The matter, however, could not be settled and was ordered to be posted for final hearing.

8. We have heard learned counsel for the parties.

9. The learned counsel for the appellant submitted that grave and serious error has been committed by the High Court in quashing the proceedings. He submitted that once the proceedings had been initiated in accordance with law and the Court was satisfied that prima facie case was made out, charge was framed and the said action was upheld by the High Court as well as by this Court, it was not open to the High Court to quash the proceedings on the ground that there was abuse of process of Court. Such an order could not have been made by the High Court in the light of the order passed by this Court.

10. It was also submitted that the High Court has virtually reviewed its earlier order. There is no power of review in a Court exercising criminal jurisdiction under the Code and such order is illegal and without jurisdiction. A grievance was also made that once this Court upheld framing of charge against respondent Nos. 1 to 3, the High Court could not have held that the proceedings were initiated mala fide or there was abuse of process of Court. Such order, in the teeth of order passed by this Court, was totally illegal, unwarranted and must be set aside.

11. The learned counsel for respondent Nos. 1 to 3 supported the order of the High Court. He submitted that considering the totality of facts and circumstances, the High Court passed the impugned order which is strictly in consonance with law. It was urged that taking into account, overall conduct of the appellant and actions taken by her against the 1st respondent-husband and his family members in the light of subsequent facts which were brought to the notice of the Court, the Court was satisfied that it was in the interest of justice to quash the proceedings. Such an action cannot be said to be illegal or improper. It was also stated that two children were born in 1990 but she had never taken interest nor even seen them after 1990. Both the children are with the respondents and they are very happy. According to the respondents, there was no demand of dowry either by respondent No.1 or by his family members and a totally false and concocted complaint was filed against them and the Court was convinced that the action had been taken by the appellant to harass the respondents and the proceedings were liable to be quashed. Finally, it was submitted that this Court may not exercise equitable jurisdiction under Article 136 of the Constitution in favour of the appellant.

12. Having given anxious consideration to the rival submissions of the parties, in our view, the High Court was wrong in quashing the proceedings. From the facts noted hereinabove, it is clear that a complaint was lodged by the petitioner against respondent Nos. 1 to 3 as also against other accused for offences punishable under Sections 498A, 342 and 406, IPC and Sections 3 and 4 of Dowry Prohibition Act. The trial Court satisfied that *prima facie* case was made out and accordingly charges were framed against respondent Nos. 1 to 3 as well as against other accused. In a petition challenging that action, the High Court partly allowed the petition vide its order dated October 22, 1997 and quashed charges against brother-in-law and sister-in-law of the appellant herein but upheld the order of framing of charge against the remaining respondents i.e. respondent Nos. 1 to 3. Respondent Nos. 1 to 3 challenged the order of the High Court by approaching this Court. It was registered as Special Leave Petition (Crl.) No. 509 of 1998. On December 23, 1998, this Court dismissed the special leave petition by passing the following order:

> "We are not inclined to interfere with the order of the High Court dated 22.10.1997 framing charges against the petitioner. The SLP (Crl.) No. 509/98 is dismissed. So far as order dated 28.11.97 is concerned refusing to transfer the proceedings, issue notice. Pending proceedings before the C.J.M. Sagar, is stayed.

13. It is thus, clear that all the Courts including this Court were of the view that

there was prima facie case for framing of charge against the respondents herein. It appears that thereafter the parties tried for amicable settlement of the matter again. The Court was also informed that the parties had almost settled the matter and negotiations were going on with regard to amount to be paid to the wife. The respondent No.1-husband offered Rs.7.50 lakhs towards full and final settlement. According to the respondents, the petitioner-wife insisted for more amount. The efforts of settlement thus failed. It has also come on record that appellant-wife filed a suit against the husband for compensation of Rs.20 lakhs in the Court of First Addl. Judge, Sagar. A Revision Petition filed by respondent Nos. 1 to 3 was allowed by the High Court and it was held that Sagar Court had no territorial jurisdiction to entertain the suit. After the order passed by this Court in August, 1998, respondent Nos. 1 to 3 again moved the High Court under Section 482 of the Code for quashing of criminal proceedings. The High Court in the impugned order noted that earlier the respondents had approached the Court against framing of charge and the said action was not interfered with even by the Supreme Court. But observing that a Court of law cannot be expected to remain a silent spectator and cannot be made a tool of gratifying personal vengeance of any party , it held that the case in hand was a fit one to exercise inherent power under Section 482 and accordingly the proceedings were ordered to be quashed. The Court, for coming to the said conclusion, relied upon certain decisions of this Court.

14. In *Madhu Limaye v. State of Maharashtra,* (1977) 4 SCC 551, an interlocutory order was passed by a Court subordinate to the High Court against which Revision Petition was filed. It was contended that sub-section (2) of Section 397 barred exercise of revisional powers in relation to any interlocutory order passed in an appeal, inquiry, trial or in any other proceeding . Since the order was interlocutory in nature, revision petition was not maintainable. This Court held that even where an order cannot be challenged in revision, inherent powers under Section 482 of the Code could be exercised by the High Court in appropriate cases.

15. This Court stated :

> "On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section(2)of Section 397 also, shall be deemed to limit or affect the inherent powers of the High Court. But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is-the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the otherprinciples enunciated above, the inherent power will come into play, there being no other provision

in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly".

16. The High Court also referred to *G.V. Rao v. L.H.V. Prasad & Ors.*, (2000) 3 SCC 693 wherein this Court considered the object underlying marriage as sacred ceremony and to end the dispute amicably between the parties by pondering over differences and misunderstandings. It was observed that the parties should not litigate by instituting criminal cases which would take long time and in that process, lose their young days in chasing their cases in different Courts. The Court, therefore, observed that such matters should be settled immediately.

17. In *B.S. Joshi & Ors. v. State of Haryana & Anr.*, (2003) 4 SCC 675, proceedings for offences punishable under Sections 498A and 406, IPC were quashed. It was observed that Section 320 of the Code relating to compounding of offences would not limit the power of the High Court under Section 482 of the Code and if the High Court is satisfied that the proceedings were initiated mala fide and there is abuse of process of law, they can be quashed. Referring to earlier judgments, the Court held that there are special features in matrimonial matters and it is the duty of the Court to encourage genuine settlement of matrimonial disputes.

18. Discussing the underlying object of inserting Chapter XXA (Section 498A) in the Indian Penal Code, the Court stated:

"There is no doubt that the object of introducing Chapter XX-A containing Section 498-A in the Indian Penal Code was to prevent torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hypertechnical view would be counterproductive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of the Indian Penal Code".

19. In spite of best efforts by the learned counsel for the respondents, we are

unable to persuade ourselves to hold that after the order passed by this Court dismissing Special Leave Petition upholding framing of charge against respondent Nos. 1 to 3, the High Court could have exercised power under Section 482 of the Code quashing criminal proceedings initiated by the appellant. The High Court observed that even after dismissal of SLP by this Court, it was open for the Court to consider the prayer of the accused to quash prosecution in exercise of inherent powers because the "extraordinary jurisdiction under Section 482 of the Code may be exercised at any stage".

20. To us, the learned counsel for the appellant is right that in substance and in reality, the High Court has exercised power of review not conferred by the Code on a Criminal Court. Section 362 of the Code does not empower a Criminal Court to alter its judgment. It reads thus:

> **362. Court not to alter judgment:-** Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. (emphasis supplied)

21. The section makes it clear that a Court cannot alter or review its judgment or final order after it is signed except to correct clerical or arithmetical error. The scheme of the Code, in our judgment, is clear that as a general rule, as soon as the judgment is pronounced or order is made by a Court, it becomes functus officio (ceases to have control over the case) and has no power to review, override, alter or interfere with it.

22. No doubt, the section starts with the words "Save as otherwise provided by this Code". Thus, if the Code provides for alteration, such power can be exercised. For instance, sub-section (2) of Section 127. But in absence of express power, alteration or modification of judgment or order is not permissible.

23. It is also well settled that power of review is not an inherent power and must be conferred on a Court by a specific or express provision to that effect. [Vide *Patel Narshi Thakershi & Ors. v. Shri Pradyumansinghji Arjunsinghji,* (1971) 3 SCC 844] No power of review has been conferred by the Code on a Criminal Court and it cannot review an order passed or judgment pronounced.

24. In *Hari Singh Mann v. Harbhajan Singh Bajwa & Ors.,* (2001) 1 SCC 169, this Court held that a High Court has no jurisdiction to alter or review its own judgment or order except to the extent of correcting any clerical or arithmetical error. It deprecated the practice of filing Criminal Miscellaneous Petitions after disposal of main matters and issuance of fresh directions in such petitions.

25. The Court said;

> Section 362 of the Code mandates that no court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or an arithmetical error. The section is based on an acknowledged principle of law

> that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error.

26. In the case on hand, charges were framed against respondent Nos. 1 to 3 and the said order was affirmed by the High Court and by this Court. It is no doubt true that thereafter there was a talk of settlement between the parties which could not be materialised. It is also true that the appellant filed a suit for compensation of Rs.20 lakhs against the husband and in-laws. In our considered opinion, however, that would not confer jurisdiction on the High Court to quash criminal proceedings when the action of framing of charge against the respondents had been upheld by this Court. The order impugned in the present appeal is thus clearly illegal, improper, contrary to law and deserves to be set aside.

27. The learned counsel for the appellant contended that virtually the High Court sat over the decision of this Court and exercised appellate power by upsetting the order of the Court of framing charge against the respondents. The counsel, in this connection, referred to *Jharia s/o Mania v. State of Rajasthan & Anr.*, (1983) 4 SCC 7. In that case, the accused was convicted by a Sessions Court for an offence punishable under Section 302 read with Section 34, IPC. The order of conviction and sentence was confirmed by the High Court as well as by this Court. Thereafter, a substantive petition under Article 32 of the Constitution was instituted by the accused for issuance of a Writ of Mandamus directing the State to forbear from giving effect to the judgment of all Courts including this Court. A declaration was also sought that the conviction was illegal and his detention in jail was without the authority of law and violative of Fundamental Rights.

28. Dismissing the petition, this Court observed:

> We fail to appreciate the propriety of asking for a declaration in these proceedings under Article 32 that conviction of the petitioner by the High Court for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code is illegal, particularly when this court has declined to grant special leave under Article 136. Nor can the petitioner be heard to say that his detention in jail amounts to deprivation of the fundamental right to life and liberty without following the procedure established by law in violation of Article 21 read with Articles 14 and 19. When a special leave petition is assigned to the learned Judges sitting in a Bench, they constitute the Supreme Court and there is a finality to their judgment which cannot be upset in these proceedings under Article 32. Obviously, the Supreme Court cannot issue a writ,

direction or order to itself in respect of any judicial proceedings and the learned Judges constituting the Bench are not amenable to the writ jurisdiction of this court.

29. Even if we may not go to the extent that the High Court ventured to sit over the order passed by this Court in quashing the proceedings, in our considered opinion, on the facts and in the circumstances of the case, the High Court was not justified in invoking Section 482 of the Code and in quashing prosecution against the respondents.

30. Moreover, it is well-settled that inherent power under Section 482 of the Code must be exercised in rarest of rare cases. Before more than four decades in the leading case of *R.P. Kapur v. State of Punjab,* (1960) 3 SCR 388, this Court stated:

> It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling

under this category the allegations made against the accused person do constitute offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where th ere is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained.

(emphasis supplied)

31. Yet, in another important decision in *State of Haryana v. Bhajan Lal*, (1992) Supp 1 SCC 355, the Court referred to a number of leading decisions on the point and laid down the following principles for exercising power of quashing criminal proceedings.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the

provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

32. Speaking for the Court, Pandian, J. stated:

> "(T)he power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice".

33. We are in respectful agreement with the above observations. On the facts and in the circumstances of the case, in our judgment, the High Court was clearly in error in exercising power under Section 482 of the Code and in quashing criminal proceedings. The said order, hence, deserves to be set aside. The matter will now be decided in accordance with law by an appropriate Court.

34. Before parting with the matter, we may clarify that we have not entered into merits of the matter or allegations and counter allegations by the parties and we may not be understood to have expressed any opinion one way or the other. All observations made by us hereinabove have been made only for the limited purpose of deciding the issue before us. As and when the matter will come before the Court, it will be considered on its own merits without being inhibited or influenced by the observations made by the High Court or by us in the present order.

35. The appeal is accordingly disposed of.

Appeal accordingly disposed of.

I.L.R. [2008] M. P., 434
WRIT APPEAL

Before Mr. A.K. Patnaik Chief Justice and Mr. Justice Prakash Shrivastava

19 February, 2008

SANDEEP KUMAR RICHHARIYA --- Appellant*

Vs.

STATE OF M.P. and ors. --- Respondents

Constitution of India, Articles 14 & 16 - Equal opportunity in the matter

*W.A.No. 1880/2007 (Jabalpur)

of public employment would be grossly violated if the appellant was not considered for the selection to the post of constable.

Appellant selected for post of Constable. Select list cancelled by I.G. that some interpolations were found in some answer sheets. Order quashed by Single Bench that the result of only those candidates should have been cancelled whose answer sheets contained interpolation. Order Challenged before DB. Division Bench upheld the order of Single Bench but observed that relief granted by Single Bench should not be extended to those persons who had not come to Court. Name of appellant not included in fresh select list prepared in pursuance to the order of Court. Then, appellant filed writ petition contending that his name should have been included in the select list. Single Bench dismissed the petition relying on the decision of Apex Court in Bhoop Singh's case. Division Bench held that Fundamental Right of appellant grossly violated. It will be extremely unfair and unreasonable if appellant was not considered for selection if his answer sheet did not contain any interpolation. Respondents directed to consider the case of appellant for selection if his answer-sheet did not contain any interpolation. Appeal allowed.

Cases Referred : (Paras 7,10)

(1992) 3SCC 136, (1974) 1 SCC 317

Atul Awasthi, for the appellant.

Rahul Jain, Government Advocate for the respondents.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.**:–This is an appeal against the order dated 7.10.2007 passed by the learned Single Judge in WP No.2370/2007, filed under the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal), Adhiniyam, 2005.

2. The facts briefly are that by an advertisement published in June 2005 in the news paper "Rozgar and Nirman", applications were invited for 883 posts of Constable (General Duty) and out of 883 posts, 97 posts were to be filled in the 10th Battalion, SAF, Sagar. In response to the advertisement, the appellant applied and he went through successfully a physical test and thereafter he appeared in the written examination in July 2005 and was selected along with other candidates for interview. After the interview, the select list of 97 candidates was prepared and in the select list, the name of the appellant found place amongt the successful candidates at serial No.13 of the list pertaining to General Category. The list was sent to the respondent No.3 Inspector General of Police, Special Armed Force, Jabalpur Range, for approval but the respondent No.3 rejected the same by order dated 23.8.2005 on the ground that in the answer-sheets of some of the candidates, there was some over-writing and interpolation. The order dated 23.8.2005 passed by the Inspector General of Police was challenged before the High Court of M.P. in W.P. No.9308/2005; W.P. No.9582/2005; W.P. No.10573/2005 and W.P.No.12492/2005 by some of the successful candidates and by a common order dated 25.9.2006, the learned Single Judge allowed the writ petitions and quashed

the order dated 23.8.2005 passed by the Inspector General of Police after holding that the authorities should have only cancelled the result of those candidates whose answer-sheets contained overwriting or interpolation and should not have cancelled the result of other candidates.

3. Aggrieved, the respondents filed W.A. No.1286/2006, W.A. No.1287/2006 and W.A. No.1425/2006 against the common order dated 25.9.2006 passed by the learned Single Judge in the four writ petitions and a Division Bench of this Court while upholding the common order dated 25.9.2006 of the learned Single Judge directed that the relief granted by the learned Single Judge by a common order should be restricted to the writ petitioners and should not be extended to persons who had not come to the Court. Thereafter, a fresh select list was drawn up but the name of the appellant was not included in the select list because he had not filed writ petition at the first instance along with Writ Petitions No.9308/2005; 9582/2005; 10573/2005 and 12492/2005. The appellant then filed Writ Petition No.2370/2007(s) contending that his name should have been included in the select list prepared afresh pursuant to the order passed by the learned Single Judge in the earlier batch of writ petitions as modified by the order passed by the Division Bench in the Writ Appeals. By the impugned order dated 17.10.2007 the learned Single Judge dismissed the Writ Petition No.2370/2007(s) after holding that the Division Bench in the writ appeals has directed that the relief should be restricted only to the writ petitioners and should not be extended to those who had not approached the Court after relying on the decision of the Apex Court in the case of *Bhoop Singh Vs. Union of India and others* ({1992} 3 SCC 136).

4. Mr. Atul Awasthi, learned counsel appearing for the appellant, submitted that the appellant was not party to the Writ Appeals Nos.1286/2006, 1287/2006 and 1425/2006 in which the Division Bench passed the order dated 11.7.2007 restricting the relief granted by the learned Single Judge in earlier batch of writ petitions only to the writ petitioners and hence the common order dated 11.7.2007 of the Division Bench in the Writ Appeals Nos.1286/2006, 1287/2006 and 1425/2006 is not binding on the present appellant. He further submitted that it is well settled by the Apex Court in the case of *Ramchandra Shankar Deodhar & others Vs. The State of Maharashtra & others* ({1974} 1 SCC 317) that writ petition for enforcement of fundamental rights cannot be dismissed on the ground of delay and laches. He argued that the learned Single Judge, therefore, was not right in dismissing the writ petition of the appellant only on the ground of delay and laches when the appellant could have otherwise been selected on the basis of his merit position.

5. Mr. Rahul Jain, learned Government Advocate appearing for the respondents, on the other hand, cited the decision of the Supreme Court in the case of *Bhoop Singh Vs. Union of India & others* (supra) on which the learned Single Judge has relied on in the impugned order in which it has been held that inordinate and unexplained delay and laches is by itself a ground for refusal to grant a relief to the petitioner irrespective of the merit of this case.

6. We have perused the decision of the Apex Court in the case of *Bhoop*

Singh Vs. Union of India & others (supra) cited by Mr. Jain and we find that in the said decision the Apex Court has held that if a person entitled to a relief chooses to remain silent for long and thereby gives rise to a reasonable belief in the mind of others that he was not interested in claiming that relief, then others are justified in acting on that belief and this is more so in service matters where vacancies are required to be filled up. The Supreme Court found in the facts of that case that Bhoop Singh who had been terminated from service, challenged the order of termination after lapse of 22 years without any cogent explanation for the inordinate delay and thereafter filed a writ petition for reinstatement on the ground that others similarly dismissed had been reinstated pursuant to their earlier writ petitions filed by them. Hence by the time he approached the Court after 22 years, the vacancy of Bhoop Singh had been filled up and number of recruitments had taken place to different vacancies thereafter and by the inordinate and unexplained delay, a situation had been created, which could not be reversed by his reinstatement.

7. In the present case, on the other hand, the claim of the appellant is that he had been in fact selected in the select list of General Category candidates and had been placed at serial No.13 in the select list of the General Category candidates. Pursuant to the order passed by the Division Bench in Writ Appeals No.1286/2006, 1287/2006 and 1425/2006 on 11.7.2007, a fresh select list may have been made but the appointment orders were yet to be issued when the appellant filed the writ petition No.2370/2007. It will be extremely unfair and unreasonable if the appellant was not considered for such selection if his answer-script did not contain any interpolation or over-writing. In our considered opinion, the fundamental rights of the appellant under Articles 14 and 16 of the Constitution of India to equal opportunity in the matter of public employment would be grossly violated if the appellant was not considered for the selection to the posts of Constable.

8. As has been held by the Apex Court in the case of *Ramchandra Shankar Deodhar & others Vs. The State of Maharashtra & others* (supra) :

> "Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Article 16 is itself a fundamental right guaranteed under Article 32 and this Court which has been assigned the role of a sentinel on the qui-vive for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like."

9. Mr. Atul Awasthi, learned counsel for the appellant further submitted that the learned single Judge has further observed that the appellant has not filed a copy of the order passed in W.A. No.1286 of 2006 and has also not mentioned about the modification order passed by the Court while deciding W.A.No.1286 of 2006 and, therefore, the appellant has suppressed material facts in W.P.No.2370 of 2007. He submitted that while the Writ Petition No.2370 of 2007 was filed on 12.2.2007, the order in W.A.No.1286 of 2006 was passed on 11.7.2007, hence the question of the appellant suppressing the fact of the Division Bench having passed

the order in W.A.No.1286 of 2006 did not arise. We agree with Mr. Atul Awasthi, learned counsel for the appellant that W.P.No.2370 of 2007 having been filed prior to the order passed by the Division Bench in W.A.No.1286 of 2006, the appellant cannot be held guilty of suppression of material facts in the writ petition.

10. For the aforesaid reasons, we set aside the impugned order dated 17.10.2007 passed by the learned Single Judge and allow the writ appeal and direct the respondents to consider the case of the appellant for selection if his answer-scripts did not contain any interpolation or overwriting.

Appeal allowed.

I.L.R. [2008] M. P., 438
WRIT PETITION
Before Mr. Justice Abhay M. Naik
6 December, 2007

MOHD. AYUB KHAN ... Petitioner*
Vs.
CHAIRMAN-CUM-MANAGING DIRECTOR, M.P. POORV KSHETRA VIDYUT VITRAN CO. LTD. ... Respondent

Constitution of India - Articles 309, 311 - Higher Pay Scale - Petitioner was granted higher pay Scale in the year 2000 after completion of 9 years of service - Penalty of censure imposed in the year 2004 - Respondents directed for recovery of Rs. 97,365/- on the ground that penalty of censure was imposed for the period prior to the date when petitioner became entitled to higher pay scale - Held - No disciplinary action/enquiry was pending or contemplated on the date when higher pay scale was granted - Order of punishment was passed on 20-10-2004 - It cannot be said that petitioner was undergoing punishment on due date - No ill effect of censure as no departmental enquiry was pending or contemplated and Petitioner was not undergoing any sort of punishment - Order for recovery of surplus amount not sustainable in law - Petition allowed. (Paras 6 and 9)

Case Referred :

2007 AIR SCW 2662

Akash Choudhary, for the petitioner.
Anoop Nair, for the respondent.

ORDER

Abhay M. Naik, J. :–Petitioner was appointed in the services of respondents as Assistant Engineer on 18.2.1991 on one year's probation. After completion of probation, he was confirmed. M.P. Electricity Board vide its order dated 19.2.2000 (Annx.RJ/1) provided for higher pay scale on completion of 9/18/25 years of service. This option was available to the officer for next higher pay scale from the date following the date on which he completes 9 years of service (excluding supersession period if any) in the existing post. Petitioner completed 9 years of

*W.P. No.12228/2005 (Jabalpur)

service on 18.2.2000. Accordingly, he was granted higher pay scale with effect from 19.2.2000 vide order No.01-05/III/HPS/1146 dated 14.8.2003 (Annx.P/1). Vide impugned order Annx.P/2 dated 20.12.2004, it was directed that recovery of Rs.97,365/- be made from the petitioner on the ground that a punishment of censure was imposed on the petitioner vide order dated 20.10.2004 marked as Annx.R/2. First instalment of Rs.15,553/- was recovered from the petitioner towards the impugned partial recovery.

2. Shri Akash Choudhary, learned counsel contended that in view of Annx.RJ/1 read with Annx.RJ/2, the petitioner was rightly granted the higher pay scale and the impugned order being totally illegal and arbitrary, is not sustainable in law.

3. In the return, it has been stated that the penalty of censure was imposed for the period prior to the date when the petitioner became entitled to the higher pay scale. It is further stated that higher pay scale could have been granted to the officer who was otherwise fit for promotion on the basis of overall performance as per the criteria laid down by the Board from time to time. This apart, it was clearly mentioned in Annx.P/1 that the order of granting higher pay scale should not be forwarded to the officer concerned, if, it is found that any disciplinary action/departmental enquiry is pending/contemplated against him or he is undergoing punishment. Accordingly, it is stated that the petitioner was granted the higher pay scale in an illegal manner and the recovery of surplus amount may be made from him.

4. Heard the learned counsel in the light of pleadings contained in the writ petition, return, rejoinder and the additional return.

5. As regards the note which finds place in Annx.P/1, the same is reproduced below :-

> "It is requested that this order should not be forwarded to the officer if it is found that any disciplinary action/departmental enquiry is pending/contemplated against him or he is undergoing punishment. In such an event, the copy of the order meant for him may be returned to this office and the concerned Sr. A.O./ RAO may be informed not to give effect of this order."

6. From the record, it is an admitted position that the petitioner completed 9 years of his service as Assistant Engineer on 18.2.2000. He became entitled for higher pay scale on this date when no show cause notice was issued and no departmental enquiry was pending. On the basis of the record available before this Court, it cannot be said that any disciplinary action or departmental enquiry was contemplated on this day against the petitioner. Moreover, the Hon'ble Supreme Court of India in the case of *Coal India Ltd. & others Vs. Saroj Kumar Mishra* (2007 AIR SCW 2662), has clearly held that ordinarily departmental proceeding is said to be initiated only when a charge sheet is issued. In the case in hand, even the show cause notice Annx.R/1 was issued after about two years from the date of completion of 9 years of service by the petitioner. Thus, by no stretch of imagination, it can be said that on the due date any disciplinary action or

departmental enquiry was pending or contemplated against the petitioner. Since the order of censure was passed on 20.10.2004 vide Annx.R/2, it cannot be said that the petitioner was undergoing punishment on due date.

7. In the matter of grant of higher pay scale, relevant portion of Annx.RJ/1 dated 19.7.1990 is as follows :-

> "In supersession of the existing orders, except order 01-05/I/95 dated 26.5.1990, the Board is pleased to grant the benefit to two options for higher pay scale to the Class-I & Class-II officers on completion of 9/18/25 years of service, subject to the following conditions :-
>
> Ist Option :-
>
> (i) The officer will be eligible for exercising first option to the next higher scale from the date following the date on which he completes 9 years of service (excluding supersession period if any) in the existing post."

8. It is an admitted position that the penalty of censure was imposed on the petitioner vide order dated 20.10.2004 contained in Annx.R/2. It was more than 2 ½ years after the due date which falls on the date immediately after completion of 9 years of service by the petitioner. In the circular dated 8.12.1993, marked as Annx.RJ/2, it has been made clear by Clause-(ii) in the following manner :-

> "If on the date on which the employee is due to get higher pay scale, no departmental enquiry is pending or if the employee is not undergoing punishment, the benefit of higher pay scale should be given from the due date and any enquiry ordered or punishment awarded subsequently would not affect the issue of the order of the higher pay scale. In other words, the position as on the due date should be kept in view for the purpose of higher pay scale and not the events coming up after the due date."

9. On a conjoint reading of Annx.RJ/1 and RJ/2, it is clear that there is no ill-effect of the order of censure on Annx.P/1 because on the due date, no departmental enquiry was pending or contemplated and the petitioner was not undergoing any sort of punishment. It has been made crystal clear by Annx.RJ/2 that any enquiry ordered or punishment awarded subsequently did not affect the order of higher pay scale made in favour of the petitioner vide Annx.P/1. It has been made further clear that the provision as on the due date should be kept in view for the purpose of higher pay scale and not the event coming up after the due date. Petitioner's claim is, thus, fairly covered by Annx.RJ/1 and RJ/2.

10. Learned counsel for respondents Shri Anoopl Nair, has been unable to point out any other contrary provision which could have prevented the petitioner from claiming the benefit of Annx.RJ/1 and RJ/2.

11. This being so, it is held that the show cause notice as well as the order of censure are having no vitiating effect on Annx.P/1. Consequently, the impugned order for recovery of surplus money being contrary to Annx.RJ/1 and RJ/2 is not sustainable in law.

12. In the result, writ petition deserves to be allowed and hence allowed. Impugned order contained in Annx.P/2 is, hereby, quashed. Respondents are directed to refund the amount of recovery realised from the petitioner pursuant to the impugned order within a period of one month from the date of receipt of certified copy of this order. In case of failure to refund the money within the stipulated period, the respondents shall be liable to pay interest @ 9% per annum. Needless to say that the petitioner having been found entitled to the higher pay scale with effect from 18.2.2000 would be continued to enjoy the higher pay scale unless otherwise directed in accordance with law.

13. No order as to costs.

Petition allowed

I.L.R. [2008] M. P., 441
WRIT PETITION
Before Mr. Justice Rajendra Menon
6 December, 2007

SHYAM PARANJAPE ... Petitioner*
Vs.
STATE OF M.P. & ors. ... Respondents

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

However as pay of the petitioner was fixed incorrectly by the respondents themselves and the petitioner is not to be blamed for such incorrect pay fixation, the recovery ordered for the payment already made cannot be sustained.

Accordingly, this petition is allowed in part. Order passed by the respondents and action taken for refixation of pay of the petitioner is upheld. However, as the petitioner is not responsible for the incorrect pay fixation done earlier as no malafide or fraud or misrepresentation on the part of the petitioner is alleged or established, the respondents are restrained from recovering the amount already paid to the petitioner. (Paras 6& 7)

Case Referred :
2006 ILR 655

Rakesh Parasar, for the petitioner.
Ku. Sudha Shrivastava, Panel Lawyer for the respondents.

JUDGMENT

RAJENDRA MENON, J. :–Challenging the order Annexure A/2 whereby proposing to recover Rs. 400/- per month from the pay of the petitioner with effect from 01.01.96 and reducing his pay, petitioner has filed this petition.

2. Petitioner was employed as a Sub-Engineer in the Water Resources

*W.P. 4631/2003 (Gwalior)

Department, Division Morena since 06.11.95. For having undertaken family planning operation in view of certain circular issued by the State Government vide order dated 24th January, 1999 petitioner was granted two advance increments. However, when the revision of pay fixation took place, grievance of the petitioner is that the benefit of two advance increments is being taken away, his salary is being reduced and the advance increments given is being recovered. Accordingly, challenging the order reducing the pay and ordering recovery, petitioner has filed this petition.

3. It is the case of the petitioner that even when revision of pay scale took place, two advance increments have to be added and pay fixed which having been not done, petitioner has filed this petition claiming benefit on the basis of certain judgment rendered by a Bench of State Administrative Tribunal in O.A. No. 415/92 vide Annexure A/3.

4. The question involved in this case has already been considered by a Full Bench of this Court in the case of *State of M.P. vs. R.K. Chaturvedi and another* reported in 2006 ILR 655. The question which was referred to the Full Bench is as under:-

> "Whether in the event of promotion or payment of higher pay scale, employee is entitled for benefit of advance increments paid in previous scale of pay or cadre?"

5. The said question was answered in para 12 of the judgment by the Full Bench as under:-

> "12. In the result, our answer to the question referred to us by the Division Bench is that an employee whose pay is revised w.e.f. 1.1.1986 in accordance with sub-rule (1) of Rule 7 of the M.P. Revision of Pay Rules, 1990 automatically get the benefit of the advance increments given to him for Family Planning operations under the circular dated 29.1.1979 and once his revised scale of pay is fixed in accordance with the said provisions of sub-rule (1) of Rule 7 of the M.P. Revision of Pay Rules, 1990, he cannot claim any further benefit of advance increments in the event of his promotion or in the event of payment of higher pay scale."

6. It is, therefore, clear from the aforesaid principle laid down by Full Bench in the case of *R.K. Chaturvedi* (supra) that when pay of the petitioner is revised w.e.f. 01.01.96 in accordance with Rules 7(1) of the M.P. Revision of Pay Rules, 1990 benefit of two advance increments is automatically granted to him in the revised pay scale and petitioner cannot claim any further benefit of two advance increments. From the pay fixation done in the case of petitioner as is evident from record, it is clear that pay of the petitioner is fixed and revised in accordance with sub-rule (1) of Rules 7 of Revision of Pay Rules, 1990. That being so, petitioner cannot have any grievance and cannot claim any advance increment now. Accordingly, the claim made by the petitioner for grant of two advance increments and fixation of pay cannot be accepted. However as pay of the petitioner was fixed incorrectly by the respondents themselves and the petitioner

is not to be blamed for such incorrect pay fixation, the recovery ordered for the payment already made cannot be sustained.

7. Accordingly, this petition is allowed in part. Order passed by the respondents and action taken for refixation of pay of the petitioner is upheld. However, as the petitioner is not responsible for the incorrect pay fixation done earlier as no malafide or fraud or misrepresentation on the part of the petitioner is alleged or established, the respondents are restrained from recovering the amount already paid to the petitioner.

8. Accordingly, petition stands allowed in part and disposed of with the aforesaid without any order so as to costs.

Petition partly allowed

I.L.R. [2008] M. P., 443
WRIT PETITION
Before Mr. Justice Abhay M. Naik
6 December, 2007

SUNITA PATEL ... Petitioner*
Vs.
COLLECTOR & ors. ... Respondents

A. Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994)- Section 21(4) (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President TathaVice-President Ke Virudh Avishwas Prastav) Niyam, 1994, - Maintainability of appeal before Collector - No confidence motion against Sarpanch was declared failed - One of the Panchas filed a dispute before Collector under Section 21(4) - Collector declared the no confidence motion as has been passed - Held - Only Sarpanch or Up Sarpanch against whom no confidence motion is passed may prefer a dispute - Appeal at the instance of Panch is not maintainable.

I may further deal with the tenability of appeal before the Collector which was preferred by respondent No.3. As stated hereinabove, it would be the Sarpanch or Upsarpanch alone against whom no confidence motion is passed who may prefer a dispute before the Collector under sub-section (4) of Section 21. Thus, the appeal 13/ Appeal/A-89/06-07 at the instance of respondent No.3 was not tenable at all and the impugned order contained in Annexure/P-3 is not sustainable in law. (Para 7)

B. Panchayat (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President TathaVice-President Ke Virudh Avishwas Prastav) Niyam, 1994 Rule 5, M.P. Panchayat Nirvachan Niyam, M.P. 1995, Rule 76 - Application of Niyam, 1994 in no confidence motion - Niyam, 1994 are applicable to meeting of No Confidence motion with regard to procedure which is liable to be observed in such meetings. (Para 10)

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*W.P. No. 19078/2006 (Jabalpur)

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

From the law enunciated by the Apex court it is clear that the expression of intention must be in a manner which is provided under law. Rule 5 of Avishwas Prastav Niyam, 1994 makes it clear that a voter is required to cast his vote in favour of no confidence motion by putting the symbol (√) and against it by putting a symbol (X). In the disputed ballot paper no such mark is made by the petitioner in the horizontal columns showing his intention for or against the no confidence motion. On the back side there are no horizontal columns and the same is kept totally blank. A reverse mark of (√)does not convey any specific intention of the voter and the same cannot be treated as a expression of intention within the meaning of election laws.

Cases Referred : (Para 14 & 15)

AIR 1993 SC 367,1998 (1) MPJR 45, AIR 1990 SC 838

V.K. Shukla, for the petitioner.

Jaideep Singh, Govt. Advocate for the respondents No. 1 & 2.

A.P. Singh and *K.K. Pandey,* for the respondent No. 3.

O R D E R

ABHAY M. NAIK, J. :–This order disposes of Writ Petition No.19078/2006 and Writ Petition No.18174/2006. Reference has been taken from W.P. No.18174/2006.

2. Petitioner was elected Sarpanch of Gram Panchayat Pondi Khurd, District Katni. The said Gram Panchayat was constituted by 15 Panchas. A no confidence motion was submitted against the petitioner which came up for voting on 15.9.2006. 11 Panchas voted in favour of no confidence motion whereas 3 Panchas voted against it. One vote was declared invalid. Since, the no confidence motion was not passed by 3/4th of the Panchas present in voting, the same was rejected vide Annexure/P-1 dated 15.9.2006. An appeal was preferred against it by respondent No.3 who was merely a Panch. It has been allowed vide the impugned order Annexure/P-3 dated 24.11.2006. The learned Collector, Katni observed that the intention of the voter ought to have been ascertained and the same being ascertainable, the vote held to be invalid by the Presiding Officer could not have been rejected on technicality. The said vote was treated as valid in favour of no confidence motion and accordingly, it was held that the no confidence motion was passed by 12 votes.

3. Aforesaid order marked as Annexure/P-3 is under challenge in the writ petition on the ground that the appeal before the Collector, Katni on behalf of one of the Panchas was not maintainable. It is contended that Sub-section (4) of Section 21 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 enables merely a Sarpanch or Up-sarpanch to challenge the validity of the no confidence motion by filing a dispute before the Collector. Respondent No.3 was not Sarpanch or Up-sarpanch and had no locus standi to prefer a dispute envisaged under Sub-section (4). Accordingly, it is contended that the impugned order contained in Annexure/P-3 having been passed in an untenable appeal, is not sustainable in law.

4. Another connected writ petition bearing W.P. No.19078/2006 has been preferred by Up-sarpanch of Gram Panchayat Pondi Khurd challenging thereby Annexure/P-1 dated 15.9.2006.

5. A serious defence has been raised by Shri A.P. Singh, learned counsel that an alternative remedy of preferring a dispute before the Collector is available to the Up-sarpanch namely Smt. Sunita Patel and her petition is not maintainable. Section 21(4) is reproduced below for convenience :-

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

6. The words "as the case may be" are quite sinificant and are obviously relatable to the preceding sub-sections of Section 21. Sub-section (1) provides for passing of no confidence motion by the Gram Panchayat against the Sarpanch or Upsarpanch. Sub-section (2) provides for convening the meeting for no confidence motion. Sub-section (3) is meant for avoiding repeated no confidence motions within the stipulated period. Thereafter, sub-section (4) enables a Sarpanch or Upsarpanch who is desirous of challenging the validity of motion carried out under sub-section (1) to prefer a dispute to the Collector within the time prescribed thereunder. This being so, it is the Sarpanch or Upsarpanch alone against whom a no confidence motion is passed, is competent to prefer a dispute before the Collector. Since, no confidence motion was not passed against Smt. Sunita Patel (petitioner in W.P. No.19078/06) she was not competent to refer the dispute to the Collector, Katni. Secondly, it is only when a no confidence motion is carried out that a dispute may be referred to Collector. The words "motion carried out under sub-section (1)" occurring in sub-section (4) of Section 21 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 would mean that when a no confidence motion is successfully passed. No other meaning could be assigned to this expression because if a no confidence motion fails Sarpanch or Upsarpanch as the case may be would not be the person aggrieved at all. Considering this, no dispute against the failure of no confidence motion could have been raised by Smt. Sunita Patel under sub-section (4) and, accordingly, I hold the writ petition to be well maintainable.

7. I may further deal with the tenability of appeal before the Collector which was preferred by respondent No.3. As stated hereinabove, it would be the Sarpanch or Upsarpanch alone against whom no confidence motion is passed who may prefer a dispute before the Collector under sub-section (4) of Section 21. Thus, the appeal 13/Appeal/A-89/06-07 at the instance of respondent No.3 was not tenable at all and the impugned order contained in Annexure/P-3 is not sustainable in law. However, in view of the common controversy involved in both the writ petitions, this Court is required to decide whether the no confidence motion vide Annexure/P-1 was validly rejected. Rule 5 of M.P. Panchayat (Gram Panchayat Ke Sarpanch Tatha Up-sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President Tatha Vice-President Ke Virudh Avishwas Prastav) Niyam, 1994 (hereinafter referred to as Avishwas Prastav Niyam, 1994) makes a provision for meeting of no confidence motion which is as follows :-

> "5. Conduct of meeting- (1) The Presiding Officer shall record the attendance of the members of the Panchayat present at the meeting. (2) Omitted by Notification dated 23-12-1995. (3) The Presiding Officer shall ask any of the signatories to the notice to move the motion. (4) After the motion is moved the mover shall first speak on the motion and thereafter other members may, if they so desire, speak on the motion. (5) On the conclusion of the debate on the motion, the Presiding Officer shall call the members present in the meeting one by one and shall give them ballot paper duly signed by him to indicate its authenticity, to cast his vote for or against the motion. The member who wants to vote in favour of the motion shall affix the symbol (√) and the member who wants to vote against the motion shall affix the symbol 'X'. After the member has recorded his vote, he shall fold the ballot paper to maintain secrecy and put it in the ballot box kept on the table of the Presiding Officer. (6) After the voting is over, the Presiding Officer shall take out the ballot papers from the ballot and sort out the votes for and against the motion. If the number of votes in favour of the motion fulfills the requirement of sub-section (1) of Section 21, sub-section (1) of Section 28, or sub-section (1) of Section 35, as the case may be, the Presiding Officer shall declare that the motion of no confidence is passed."

8. Sub-rule (5) prescribes the manner in which the vote has to be cast for or against the no confidence motion. The member who wants to vote in favour of the motion shall affix the symbol (√) and the member who wants to vote against the motion is required to affix the symbol (X).

9. Shri A.P. Singh, learned counsel for the petitioner drew attention of this Court to clause (a) to (h) of Rule 76 of M.P. Panchayat Nirvachan Niyam, 1995 and contended that the ballot paper containing any kind of mark on the back side makes the voter identifiable and the vote cast by him is therefore liable to be rejected under clause (a). It has been further contended that the mark (⁄) has

been put by the voter on the back side of the ballot paper which is contrary to the manner prescribed for voting. Thus, he contended that the ballot paper has been rightly rejected by the Presiding Officer in view of clause (a) and (h).

10. Shri V.K. Shukla, learned counsel countered the submissions by contending that M.P. Panchayat Nirvachan Niyam, 1995 has no application because the same is meant for general panchayat elections. He further contended that for the purpose of no confidence motion Avishwas Prastav Niyam, 1994 has been made and would alone govern the situation. This submission is not impressive at all. Nirvachan Niyam, 1995 are quite exhaustive and they would also cover the meetings of no confidence with regard to various things for which no provision has been made in the Avishwas Prastav Niyam, 1994. Illustratively, Chapter-X of M.P. Panchayat Nirvichan Niyam, 1995 provides for counting of votes. Votes exercised in the meeting of no confidence are also liable to be counted wherefor there is no specific provision in Avishwas Prastav Niyam, 1994 and although counting is required to be made even in the meeting for no confidence. Thus, it cannot be said that M.P. Panchayat Nirvachan Niyam, 1995 will not apply to the meeting of no confidence motion with regard to the procedure which is liable to be observed in such meetings.

11. Shri Jaideep Singh, Govt. Advocate has made available the original ballot papers of the no confidence motion in a sealed envelope in the open Court. It was the hand written ballot papers. One horizontal column was made for no confidence motion whereas another for members against such motion. Front columns of the entire ballot paper were blank. On the back side there were no columns. Mark of (√) was also not put even on the back side. Mark (⁄) is found to have been put on the back side which was also counter signed by the Presiding Officer. Thus, admittedly the symbol (√) is not found to have been affixed on the front side of the ballot paper as required under sub-rule (6) of Rule 5 of Avishwas Prastav Niyam, 1994. Moreover, any such mark put on the back side of the ballot paper in contravention of sub-rule (5) would obviously disclose the identity of the voter which is not permissible under clause (a) of Rule 76 of M.P. Panchayat Nirvichan Niyam, 1995. The Apex court in the case of *Shri Satyanarain Dudhani Vs. Uday Kumar Singh and others* (AIR 1993 SC 367) has clearly observed :-

> "The secrecy of the ballot papers cannot be permitted to be tinkered lightly."

12. The Collector, Katni in the impugned order has upheld the no confidence motion on the ground that number of Panchas are illiterate and it is not expected from them that they will put the symbols at correct places. He has further observed that the intention of the voter is to be determined and the ballot paper is not liable to be rejected on technical grounds.

13. Shri V.K. Shukla, learned counsel relying upon this Court's decision in the case of *Smt. Sharda Bai Khatik Vs. State of M.P. and others* [1998 (1) MPJR 45] contended that the intention of the voter with regard to exercise of his vote in

the no confidence motion is quite ascertainable and the same could not have been legally rejected. In the case of *Sharda Bai Khatik* (supra) this Court after going through the said ballot papers observed that :-

> "By no stretch of imagination, symbol put in 3 of the aforesaid ballot papers can be said to be cross and if one looks into the symbol on the 3 ballot papers, which are the subject matter of controversy, from one angle, there is no doubt that it indicates the symbol (√). One has to bear in mind that practice of symbol is invoked, considering the over all illiteracy in the country i.e. Symbol is prescribed to convey the intention of the voter."

14. In the present case, it may be seen that the horizontal columns are made on the front side alone of the ballot papers. Its back side is completely blank. So, any mark put on the back side will not convey any intention in specific of the voter. Moreover, a symbol is put on the ballot paper in a reverse manner of (√) i.e. (∠). This being so, the decision in the case of Smt. Sharda Bai Khatik provides no assistance to the petitioner in W.P. No.19078/2006.

15. I may profitably refer to the observations of Hon'ble Supreme Court of India in the case of *Era Sezhiyan Vs. T.R. Balu and others* (AIR 1990 SC 838). I conveniently reproduce paragraph-13 :-

> "It would not be convenient to deal with the first contention of the learned counsel for the appellant. As we have already pointed out, the said rejected ballot paper was rejected on the ground that it was marked otherwise than with an article supplied for the purpose. As we have already pointed out, the figure I indicating the first preference in the said ballot paper was marked in green ink whereas in the ball-point pen kept in the voting booth with the ballot box, the ink used was blue. The returning officer took the view that the said marking of preference in green ink clearly established that it was done with a ball-point pen other than the one which was supplied for marking the preference and hence the vote was invalid. It was urged by Shri Jethmalani in this connection that although the marking of preference was done in green ink, there was no doubt that the intention of the voter concerned was to give the first preference vote to the appellant. It was submitted by him that the fundamental rule of election law is that effect should be given to the intention of the voter and this could be done only by treating the vote as valid, as the intention of the voter was quite clear. Mr. Jethmalani may be right when he contends that the intention of the voter could be clearly gathered and it was to cast the first preference vote for the appellant. However, it is not enough for the vote to be valid that it is possible to gather the intention of the voter to vote for a particular candidate as pointed out by the Constitution Bench of this Court in the leading

case of *Hari Vishnu Kamath v. Syed Ahmad Ishaque,* (1955) 1 SCR 1104 at p.1132 : (AIR 1955 SC 233 at p. 248). This Court held that (1132) (At SCR) : (At p 248 of AIR) :

> "But when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a court of law, in the same position as an intention not expressed at all."

From the law enunciated by the Apex court it is clear that the expression of intention must be in a manner which is provided under law. Rule 5 of Avishwas Prastav Niyam, 1994 makes it clear that a voter is required to cast his vote in favour of no confidence motion by putting the symbol (√) and against it by putting a symbol (X). In the disputed ballot paper no such mark is made by the petitioner in the horizontal columns showing his intention for or against the no confidence motion. On the back side there are no horizontal columns and the same is kept totally blank. A reverse mark of (√) does not convey any specific intention of the voter and the same cannot be treated as a expression of intention within the meaning of election laws.

16. Shri V.K. Shukla, learned counsel for the petitioner in W.P. No.19078/2006 feebly contended that since the subject ballot paper was also counter signed by the Presiding Officer that should be treated as valid. This preposition is highly misconceived because the signature of Presiding Officer on ballot paper merely establishes the authenticity of a ballot paper as well as the exercise of right to vote. Nothing more is conveyed by the signature of the Presiding Officer.

17. No other point is pressed.

18. In the result, I hold that the no confidence motion contained in Annexure/P-1 was not validly passed for want of requisite strength i.e. 3/4th and the order contained in Annexure/P-1 does not suffer from any kind of infirmity. Accordingly, W.P. No.18174/2006 succeeds and W.P. No.19078/2006 fails. Order contained in Annexure/P-3 is hereby quashed.

No order as to costs.

Order accordingly.

I.L.R. [2008] M. P., 449
WRIT PETITION
Before Mr. Justice Abhay Gohil & Mr. Justice A.P. Shrivastava
14 December, 2007

RAMASHANKAR BHARADWAJ ... Petitioner*
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution of India - Article 226 - Public Interest Litigation - Sarva Shiksha Abhiyan Scheme - Officers who are suppose to implement the scheme - Purchased

*W.P. No. 6052/2006 (Gwalior)

machinery worth more than Rs. 57 lacs from a company to give undue benefit to it, without calling for tenders and following due procedure - Commissioner, Gwalior Division in its report found all the officers guilty - High Court gave certain directions to State Government - Frame rules & guidelines for utilizing funds & to monitor functions of the officers appointed for implementation of the scheme and also directed for strict and serious action against the erring officers.

M.P.S. Raghuvanshi, for the petitioner,
Brijesh Sharma, G.A. for the respondent no. 1 & 2/State,
K.N. Gupta with *Anupam Shrivastava,* for the respondent no.3

JUDGMENT

The Judgment of the Court was delivered by ABHAY GOHIL, J.:–Petitioner, who is a public spirited person, social worker and a former M.L.A. from Sheopure, has filed this Probono Publico Petition stating therein that under the scheme of Sarva Shiksha Abhiyan, which was implemented in the State of Madhya Pradesh, the Collectors were appointed as District Mission Director, to provide free education to the children up to 14 years of age and for the betterment and upliftment of the education in district Sheopure, Collector Sheopure has made purchases of 61 Scot Duplicating Machines, 5 Digital Scanner-cum-Printer Digital Duplicator Machines, 5 Computer Interface, 1 Digital Scanner-cum-Printer Digital Duplicator Machine, 1 Computer Interface, 6 Colour Drums for RD machine, 6 Scot Hot and Cold Roll to Roll Laminating Machines and 6 Scot Data Bind Electrically Operate Heavy Duty Plastic Comb Document Binding machines, total costing Rs.57,47,204/-. Those machines were purchased without calling for tenders and without appointing purchase committee, without examining the rates to be quotted by different competitors and the aforesaid machines were purchased from respondent no.5-company by Collector, Sheopure and in purchasing the machines no procedure was applied or followed. The purchase orders were passed by the Collector and undue benefit has been given to the company. The useless machines were supplied, which are not in a workable condition, they are old machines and a fraud has been played with the Government funds. Therefore, the petitioner prayed that the work order be cancelled and machineries be returned back and amount be recovered or the matter be referred to CBI for enquiry and competent authority be directed to take appropriate action against the Collector, Sheopure and he should be removed from that post.

2. In reply, stand of the State was that the Collector was busy in other work, therefore, he could not properly supervise and there was a coccus of Dr.Suraj Nagar, the-then District Project Co-ordinator, Anil Singh Kushwaha, Man Singh Parmar and Dinesh Singh Jadon, they were involved in misutilisation of the public funds, they were also involved in the entire scam and approval of the Collector was obtained on the notesheet in good faith. When the matter came to his notice, he directed to initiate the legal action against the said four persons. They have been suspended and charge sheeted. The said four persons also filed petitions

challenging their suspension orders but from this reply it appears that the State has not taken any stern action against the erring persons.

3. In the aforesaid matter this Court on 15.5.2007 directed the Commissioner, Gwalior Division, Gwalior to hold an inquiry against the aforesaid officers and submit the report. In compliance of this Court's order the Commissioner has submitted its report dated 6.11.2007. According to this report, the learned Commissioner has found all the officers guilty. Since the original record was not placed before the Commissioner, therefore, pin-pointed responsibility could not be fixed, but it is mentioned that uptil now no payment of the material purchased has been made to the Company, therefore, it was found that at present the State has not suffered any loss but if the payment is made then certainly the State would suffer heavy loss.

4. After hearing and from perusal of the aforesaid report of the learned Commissioner, Gwalior Division, Gwalior, it appears that the learned Commissioner has made a detailed inquiry into the matter and has recorded its finding independently and has found Shri Mahendra Singh Bhilala, the-then Collector, Sheopure, Shri Suraj Nagar, the-then District Project Coordinator, Shri Anil Pratap Singh Kushwaha, Asstt. Project Coordinator-Finance, Shri Man Singh Parmar, Asstt.Project Coordinator-Academic and Shri Dinesh Singh Jadon, Assistant, involved in the aforesaid supplies. The report of the learned Commissioner is an eye-opener in the matter of functioning by the District Collector and other officers under Sarva Shiksha Abhiyan Scheme.

5. Therefore, in view of the aforesaid report, this petition is disposed of with the following directions:-

(i) that, a copy of the Commissioner's report be forwarded to the State Government for taking appropriate action against all the erring officers;

(ii) that, the respondents or the State Government shall not make any payment to the respondent no.5-Company. The State shall be free to return the goods/machineries or may direct the Company to recover the aforesaid amount from the aforesaid officers personally, as the State Exchequer should not be burdened for purchase of such rotten machineries;

(iii) that, the competent authority under the State Government, i.e., Principal Secretary of the concerned department will ensure timely and proper disciplinary action against the erring officers including referring the matter to the E.O.W. for inquiry and proper action against them, in accordance with law, within a period of three months;

(iv) that, it is made clear that in future no prime posting shall be given to the erring officers in the district or in any other department in which finance is involved;

(v) that, after taking appropriate action the Principal Secretary of the concerned department shall also submit the compliance report in the Court within four months;

(vi) that, it is expected that the Government will establish a machinery to supervise all these schemes and to monitor the functions of the officers appointed for implementation of the schemes and proper rules and guidelines shall also be framed so that the funds allotted under those schemes may be utilised properly, benefits are received by the beneficiaries and their mis-utilisation is prevented.

(vii) that, it is also expected that the Government will review functions of the officers under Sarva Shiksha Abhiyan Scheme and will ensure that the scheme if beneficial to the masses will continue and shall be managed in the best possible manner so that its fruit may reach to the needy persons;

While disposing off this Public Interest Litigation, we would like to place on record our deep appreciation to Dr.Komal Singh, Commissioner, Gwalior Division, Gwalior, who has conducted independent, fact finding inquiry and submitted its report well in time and assist the Court with full ability and in the best possible manner. A copy of this order be forwarded to the State Government as well as Commissioner, Gwalior Division, Gwalior for action and record.

Petition disposed of.

I.L.R. [2008] M. P., 452
WRIT PETITION
Before Mr. Justice Dipak Misra
8 January 2008

HADIYA BEGUM ---Petitioner*
Vs.
STATE OF M.P. & ors. ---Respondents

A. Forest Act, Indian (16 of 1927), Section 52 - Confiscation of Truck - Show Cause Notice to Registered Owner - Registered owner/petitioner executed power of attorney in favour of her husband - Husband present in truck when boulders were seized - He had contested the proceedings - No prejudice caused to petitioner who was adequately represented. (Para 10)

B. Forest Act, Indian (16 of 1927), Section 52 - Confiscation of Truck- Transit Pass not produced at the time of seizure - Transit Pass which was produced by petitioner in course of enquiry bore different number - No illegality committed by Departmental Authorities as well as Revisional Court by not accepting transit pass. (Para 11)

*W.P. No. 1815/2004 (Jabalpur)

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

Cases Referred : (Para 12)

AIR 1998 MP 67, 2003 Cr. LJ 2856

Mukesh Pandey and *H.S. Verma,* for the petitioner
Samdarshi Tiwari, G.A. for the respondents

ORDER

DIPAK MISRA, J. :–The petitioner is the owner of the truck bearing registration No.MPW-1875. The said truck was seized by the competent authority, the third respondent herein, on 2-10-1999 on the ground that it was involved in illegal transportation of 80 stones. A forest case No.709/18 was registered against him under sections 33, 41 and 52 of the Indian Forest Act, 1927 [for brevity 'the Act']. The prescribed authority by order dated 16-10-2001 vide Annexure-P/1 passed an order in exercise of the power conferred on him under Section 52 of the Act directing confiscation of the said truck. The petitioner, being dissatisfied with the aforesaid order of confiscation, preferred an appeal under Section 52-A of the Act before the appellate authority. It was contended before the appellate authority that the alleged stones did not belong to the Forest Department and the loading was done from the mines of one Durjan Kondar situated in the village Ranipur having a valid transit pass No.372837 which was valid up to the year 2001. That apart, it was also contended that the vehicle in question was not involved in any kind of illegal transportation and the witnesses did not support the version which did find mention in the allegation sheet.

2. The appellate authority, as set forth, without appreciating the assertions and the contentions in proper perspective affirmed the order of the revisional authority by his order dated 7-11-2003 as contained in Annexure-P/3.

3. Being grieved by the orders passed by the aforesaid authorities the petitioner preferred a revision before the learned Third Additional Sessions Judge, Chhatarpur forming the subject-matter of Criminal Revision No.312/2003. The learned Additional Sessions judge declined to interfere by the impugned order dated 4-2-2004 as per Annexure-P/5.

4. It is urged in the petition that the forums below have failed to appreciate the statement of Durjanlal from whose mines stones were transported inasmuch as the documents on record fully and completely establish the said fact. Testimony of the witnesses and the transit pass in Form No.10 issued in favour of Durjanlal clearly show the authority of the transit pass and thereby the legality of transportation. It is contended that there was nothing incriminating to show that the truck in question was involved in any illegal act causing violation to the provisions of the Act and in the absence of a case being made out entire proceedings for confiscation and the ultimate order of confiscation are unsustainable in law. In

this backdrop a prayer has been made to issue a writ of certiorari for quashment of the orders impugned and to grant compensation of Rs.1.5 lakh to the petitioner for loss of the property and Rs.5 lakh for defamation.

5. A counter affidavit has been filed by the answering respondents stating, inter alia, that the forest officers during patrolling on 2-10-1999 seized the truck as it was being plied without any authority of carrying boulders from Sarkoha beat, compartment No.P-327. The driver did not possess any valid pass. The vehicle was carrying 18 boulders. It is put forth that the seizure-memo and spot 'Panchnama' were prepared and the driver Latif Khan and Guddan Khan, the husband of the petitioner duly signed those documents. After due enquiry and being convinced that a prima facie case did exist the Authorised Officer-cum-Sub Divisional Officer (Forest) initiated the confiscation proceeding. It is asserted that the petitioner authorised her husband to participate in the confiscation proceeding and on the basis of the said authority the said Guddan Khan participated in the entire proceeding relating to confiscation. The Prescribed Authority during the enquiry found that the vehicle of the petitioner was involved in the forest offence as the seized boulders were extracted from the protected forest and was carried without authority in the truck bearing registration No. MPK 1875. At that time there was no pass for carrying such material. Reliance has been placed on the admission of the driver of Latif Khan and the husband of the petitioner that they did not possess a valid transit pass while boulders were being carried in the truck. The plea that the vehicle in question was carrying any unauthorised item without the knowledge of the owner is sans substance inasmuch as no pass was produced and the husband of the petitioner was present in the truck at the time of seizure. It is set forth that in course of enquiry a letter and pass No.372837 were produced in support of transportation but on a scrutiny of the said pass it was found that name of another driver, namely, Brijgopal was mentioned therein. Because of the same the said document was not placed reliance upon by initial authority. It is asseveratd that when at the spot documents were not produced and there was an admission that the documents were not there and during the enquiry a transit pass was produced which did not relate to the driver the initial authority and the appellate authority directed confiscation which stood affirmed by the revisional court and hence, there is no illegality or any kind of irregularity in recording such a finding. It is further put forth that when such findings do not exhibit any kind of perversity of approach there is no justification warranting interference of this Court in the writ petition.

6. I have heard Mr. Mukesh Pandey and Mr. H.S. Verma, learned counsel for the petitioner and Mr. Samdarshi Tiwari,learned Govt. Advocate for the State.

7. Questioning the correctness of the orders passed by the courts below Mr. Mukesh Pandey, learned counsel for the petitioner has raised the following submissions:

> (a) Though the petitioner is the registered owner of the vehicle no notice was issued to her as a result of which the whole proceedings relating to confiscation is vitiated.

(b) The show cause notice is absolutely vague and it is well settled in law that unless allegations are put in a unequivocal and categorical manner the proceeding loses its sanguinity.

(c) The forums below have absolutely erred by recording a finding that the seized articles are forest produce when no notification was filed with regard to area in question to show that the items are seized from the protected forest area.

(d) The forums below have committed grave illegality by not accepting the transit pass to be valid on unacceptable technical ground and, therefore, the orders are to pave the path of extinction.

(e) There was no warrant or justification to direct confiscation of the vehicle in question when the Department has not been able to prove the allegations to the hilt.

To bolster his submission he has placed reliance on the decisions rendered in *Mitthanlal Mishra vs. State Govt. of M.P. and others,* AIR 1998 MP 67 and *Chaudhary Ram vs. State of H.P. and another*, 2003 CrLJ 2856.

8. Mr. Samdarshi Tiwari, learned Govt. Advocate for the respondents/State resisting the aforesaid submissions has raised the following proponements:

(i) The petitioner's husband was in the truck when the vehicle was seized and it is the petitioner who had executed a special power of attorney in favour of her husband to carry the boulders and also to contest in the proceedings and, therefore, the ground urged that no notice was served on the petitioner is untenable. That apart, at no point of time such a contention was raised before the original authority and nothing has been brought on record that any prejudice has been caused.

(ii) As there is concurrent finding of the fact that the driver had given a statement with regard to the boulders being carried in the truck and at that juncture, he could not produce the transit pass, the order of confiscation cannot be flawed.

(iii) A notice was given to the husband of the petitioner who is the power of attorney holder as per Annexure-P/7 and hence, the law laid down in *Mitthanlal Mishra* (supra) is distinguishable.

(iv) The statement that show cause notice is not correct as the same is quite clear and also perceivable on a mere perusal.

(v) The order of confiscation is just, proper and warrantable as such forest offence cannot be lightly dealt with.

9. To appreciate the submissions raised at the Bar, I have carefully perused the orders passed by the forums below. The first aspect that is required to be dealt with is whether the petitioner being the registered owner should have been

noticed or not. In the case of *Chaudhary Ram* (supra) it was held that when there was no material evidence on record relating to or concerning the requisite knowledge of unlawful use by the owner the order of confiscation is untenable. That apart, it was also held that show cause issued to the registered owner of the vehicle before confiscation was declared bad as it was vague and ambiguous. In Mitthanlal Mishra (supra) a learned Single Judge of this Court has held as under:

> "10. The submission of the learned Government Advocate that as they did not know that the petitioner was the owner, therefore, they were not required to issue notice to the owner, cannot be accepted. It would always be the duty of the Forest Department before proceedings to confiscate the property to issue notice to all concerned. It would also be the duty of the Authority to inquire about ownership of the property so that the person having interest or interested in the property is issued a notice and is heard in accordance with the spirit of the Act.
>
> 11. Sub-section (5) of S.52 of the Act provides that no order of confiscation under sub-sec.(3) shall be made if any person referred in clause (b) of sub-sec.(4) proves to the satisfaction of Forest Officer that the property was used without his knowledge or connivance or without the knowledge or conivance of his servant or agent and that all reasonable and necessary precautions had been taken agaisnt use of objects for commission of forest offence. When the law provides that notice has to be issued, so that the person whose property is under the threat of confiscation may prove that the property was used without his knowledge or connivance, then non-issuance or notice and not-grant of an opportunity to such person would certainly vitiate the order of confiscation."

10. In the case at hand the petitioner has executed a power of attorney in favour of her husband. The husband was in the truck at the time of seizure. That apart, as is manifest, he contested in the proceedings. In view of the aforesaid, I am disposed to think that no prejudice has been caused and the petitioner has been adequately represented and defended the case.

11. The next issue that arises for consideration is whether the forums below have committed illegality by not accepting the transit pass which was produced by the husband of the petitioner in course of inquiry. The orders passed by the forums below, it is clear as day, that the same was not produced at the time of seizure. The Departmental authorities as well as the revisional authority, the learned Additional Sessions Judge, has arrived at an unequivocal conclusion that the transit pass bore different number. In view of the aforesaid obtaining factual matrix, the submission is sans substance and I unhesitatingly repel the same.

12. The next aspect that is required to be dealt with is whether the boulders which had been seized, could be regarded as forest produce. Submission of Mr. Pandey,

learned counsel for the petitioner is that no notification has been filed that they have been removed or excavated from the protected forest. The learned Sessions Judge has accepted as a matter of fact, that no notification has been produced, but, a significant and fertile one, the controversy cannot be allowed to rest in such a narrow spectrum. The appellate authority after due scrutiny of the material brought on record has recorded a categorical finding that the vehicle carrying boulders was chased by the forest officials and eventually was caught up on the road belonging to the Public Works Department. There can be no shadow of doubt that the loading of boulders originated in the forest. When there is ample material on record that the origin of the offence was in a protected forest filing of the notification is not imperative to make it a forest offence. That apart, the origin also gets bolstered inasmuch as when the boulders were carried without requisite transit pass.

13. In view of the aforesaid premises, I do not perceive any merit in this writ petition and accordingly the same stands dismissed. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 457
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha
9 January, 2008

GANESH DUTT PANDEY ---Petitioner*
Vs.
STATE OF M.P. & ors. ---Respondents

Co-operative Societies Act, M.P. 1960 (17 of 1961), Sections 55(1), 95(3), Bank Karmachari Sewa (Niyojan, Nibandhan Tatha Unki Karya Stithi) Niyam, 1982, Rule 72(1) - Reduction in age of superannuation - Age of superannuation reduced from 60 to 58 by amendment made by Registrar in Niyam, 1982 - Constitutional validity of amendment challenged on the ground that rule has not been laid before table of Legislative Assembly as required U/s 95(3) - Held - Section 95(3) relates to rules framed by State Govt. - It has no applicability to an order by which service conditions in Co-operative Society are framed by Registrar U/s 55(1) - Petition dismissed. (Para 4)

Cases referred :

(2004) 9 SCC 755, (1985) 1 SCC 523, (1997) 10 SCC 741, (1976) 2 SCC 502, (2003) 6 SCC 545

L.K. Urmaliya, for the petitioner,

Samdarshi Tiwari, G.A. for the respondent Nos. 1 & 2,

Ku. C.V. Rao, for the respondent Nos. 3 & 4.

*W.P. No. 14502/06(s) (Jabalpur)

ORDER

The Order of the Court was delivered by **R.S. JHA, J.** :-The petitioner has field this petition challenging the constitutionality of the amendment made by the respondent No.2 vide order dated 3-6-2002 in Rule 72(1) of the Bank Karmachari Sewa (Niyojan, Nibandhan Tatha Unki Karya Stithi) Niyam 1982 whereby the age of the superannuation of the petitioner has been reduced from 60 years to 58 years. The petitioner has also sought quashing of order dated 18-7-2006 issued by respondents No. 3 and 4 by which the petitioner has been superannuated with effect from 10-10-2006 on completing the age of 58 years. The petitioner has also claimed relief of a direction to the respondents to continue him in service till the age of 60 years.

2. The petitioner has challenged the legal validity of the Rules on the ground that the Rules have been made and notified without complying with the mandatory condition prescribed under Section 95(3) of the M.P. Cooperative Societies Act, 1960 (hereinafter referred to as the 'Act') which provides that all rules made under the Act shall be laid on the table of the Legislative Assembly and as the impugned rules have not been laid before the table of the Legislative Assembly, the impugned amendment deserves to be quashed.

3. The respondents, per contra, have opposed the petition on the ground that the respondent No.2, Registrar, has been given powers under Section 55(1) of the Act to frame rules governing the terms and conditions of employment in a Society or Class of Societies and the Registrar, in exercise of this power, has amended the rules governing the services of the employees working in Cooperative Banks in the State of M.P. In the return, the respondents have also stated that the respondent No.4, Central Cooperative Bank who controls respondent No.3, sent a proposal approved by its Board of Directors, to the Registrar requesting him to amend the service rules by reducing the age of superannuation to 58 years as the financial position of the bank was not strong enough to be able to bear the financial burden resulting from the increased age of superannuation. The respondents have also filed a copy of the order passed by this Court on 26-11-2002 in Writ Petition No. 6323/2002 wherein the validity of the provisions of Section 55(1) of the Act has been upheld and a similar order issued by the Registrar reducing the age of superannuation from 60 years to 58 years has also been upheld.

4. From a perusal of Section 95 which has been heavily relied upon by the petitioner in support of his submissions, it is manifestly clear that the section enables the State Government to frame rules for the purposes of the Act with a stipulation in sub-section (3) that all rules framed by the State shall be laid on the table of the Legislative Assembly. Apparently, sub-section (3) relates to rules framed by the State Government for the purposes of the Act and has no applicability to an order by which rules regarding service conditions in a Co-operative Society are framed by the Registrar under Section 55(1) of the Act. As is evident, Section 55(1) is a separate provision giving powers to the Registrar to frame rules governing the terms and conditions of the employment in a Society. It is also manifestly clear

that Section 55 and Section 95 do not provide that the rules framed by the Registrar would also have to be laid before the table of the Legislative Assembly. In the circumstances, we are of the considered opinion that the contention of the petitioner based on Section 95(3) is misplaced and misconceived and deserves to be rejected.

5. The petitioner has challenged the reduction in the age of superannuation made by an amendment to the concerned rules vide order dated 3-6-2002 which came into effect from 1-9-2002, by filing a petition in 2006 after a long lapse of four years. As is clear from the return filed by the respondents, the said reduction in the age of superannuation has been made pursuant to a proposal and request made by the Central Cooperative Bank by forwarding a resolution passed by its Board of Directors to this effect to the Registrar on account of financial difficulty and, therefore, the impugned reduction in the age of superannuation cannot be said to be an instance of arbitrary and unreasonable exercise of powers by the Registrar as it is based on the request and proposal of the Central Cooperative Bank made on the basis of the financial inability of the bank to meet with the extra financial burden resulting from the enhanced age of superannuation.

6. Quite apart from the above a Division Bench of this Court in Writ Petition No. 6323/2002 has upheld the exercise of such statutory powers by the Registrar whereby the age of superannuation was reduced from 60 years to 58 years and has dismissed the petition filed by the petitioners therein. It is settled law that alteration in the age of retirement by the employers is a matter of executive policy and is permissible for sufficient and cogent reasons as has been held by the Supreme Court in paragraph 45 of the judgment in the case of *M.P. Vidyut Karamchari Sangh v. M.P.Electricity Board,* (2004) 9 SCC 755, relying on *K.Nagaraj v. State of A.P.,* (1985) 1 SCC 523, *Osmania University v. V.S.Muthurangam,* (1997) 10 SCC 741, *N.Lakshmana Rao v. State of Karnataka,* (1976) 2 SCC 502 and *Chandra Singh v. State of Rajasthan,* (2003) 6 SCC 545.

7. In view of the above, we do not find any merit in the petition challenging the impugned amendment in the concerned rules governing the services of Central Cooperative Bank Employees, by respondents No. 3 and 4 vide order dated 3-6-2002. Consequently, we also do not find any infirmity or illegality in the order dated 18-7-2006 superannuating the petitioner on his completing the age of 58 years. The petition being meritless is accordingly dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 460
WRIT PETITION

Before Mr. Justice S.K. Gangele

10 January, 2008

RAKESH KUMAR SHARMA --- Petitioner*

Vs.

STATE OF M.P. ---Respondent

Constitution of India - Articles 311, 14 - Natural Justice - Order passed in violation of - "Useless formality theory" - Petitioner appointed as Principal in Non-Government School although he had no requisite qualification - School taken over by State Govt. - Petitioner absorbed as Principal - Subsequently Order cancelled and was absorbed as Upper Division Teacher - No opportunity of hearing given before cancellation Order - Held - If person lacks basic qualification for the post then observance of principle of natural justice not necessary - Exception termed as "useless formality theory" - Petition dismissed. (Paras 11 to 13)

Cases Referred :

(1999) 8 SCC 378, (2005) 6 SCC 321, (2007) 1 SCC 331, 2000 (3) MPLJ 351, (2000) 7 SCC 529

M.P.S. Raghuvanshi, for the petitioner,

Smt. Ami Prabal, Dy. Advocate General, for the respondent

ORDER

S.K. GANGELE, J. :–Petitioner has filed this petition challenging the order, Annexure P-1 dated 03.06.2006. By the aforesaid order absorption of the petitioner on the post of Principal, Government Higher Secondary School (10 + 2) has been cancelled.

2. Petitioner was appointed initially as Principal, Maharshi Ram Sumeran Das Higher Secondary School, Sahasram, district Sheopur vide order dated 15.06.1990. At that time the school was a private school. Copy of the order of appointment has been filed as Annexure P-2. It is mentioned in the order of appointment that the petitioner would obtain a degree in M.A. and also degree in B. Ed. within five years. Thereafter, the petitioner obtained a degree in M.A. in the year of 1993 and degree in B. Ed. in the year of 1994.. The school was taken over by the Government on 17.09.1997. Thereafter, the petitioner was absorbed on the post of Principal vide order dated 26.12.1998. Copy of the order has been filed as Annexure P-3. Subsequently, some complaints were filed against the petitioner including before the Lokayukt complaining about the eligibility of the petitioner being absorbed as Principal. A preliminary inquiry was conducted against the petitioner and during that inquiry it was found that the petitioner was not eligible to be absorbed as Principal of Higher Secondary School (10 + 2) because he did not had the requisite qualification. Hence, vide the impugned order his absorption as Principal has been cancelled and he has been absorbed as Upper Division teacher.

*W.P. No. 3103/2006 (S) (Gwalior)

It is an admitted fact that no opportunity of hearing had been given to the petitioner before passing the impugned order, Annexure P-1.

3. Respondents in the return stated that the petitioner was initially appointed on the post of Principal of Non-Government Higher Secondary School, although he had no requisite qualifications for the post. It has further been stated that after absorption of the petitioner certain complaints had been received and after inquiry it was found that as per the circular issued by the Commissioner dated 26.06.1995 qualifications for absorption on the post of Principal, Higher secondary school (10 + 2) was Post-Graduate with atleast second division and also a degree of B. Ed. Because the petitioner passed Post-graduate degree in third division and he did not had the requisite teaching experience, hence he was not entitled for absorption. Consequently, absorption of the petitioner as Principal, Higher Secondary School (10 + 2) cancelled and he has been ordered to be absorbed as Upper Division Teacher.

4. Learned counsel for the petitioner has submitted that the petitioner had the requisite qualification for absorption as Principal and without giving any opportunity of hearing the impugned order has been passed, hence the impugned order is against the law. In support of his contentions learned counsel relied upon *Gajanan L. Pernekar v. State of Goa and another* (1999) 8 SCC 378; *Canara Bank v. V.K. Awasthy* (2005) 6 SCC 321; *Shekhar Ghosh v. Union of India and another* (2007) 1 SCC 331 and Division Bench judgment of this court in *Hari Narayan Sakya v. State of M.P. and others* 2000 (3) MPLJ 351.

5. Contrary to this, learned Deputy Advocate General has submitted that the petitioner did not had the requisite qualification for the post of Principal, Higher Secondary School (10 + 2) at the time of absorption, hence his absorption has rightly been cancelled. Apart from this, learned Deputy Advocate General has submitted that in the circumstances there was no necessity to issue show cause notice because the petitioner was lacking in primary qualifications for the post of Principal.

6. Undisputed facts of the case are that the petitioner was appointed as Principal vide order dated 15.06.1990 on the post of Principal in a school named as Maharshi Ram Sumeran Das Govt. Higher Secondary School, Sahasram, district Sheopur. At that time the school was managed by a society named as Laxminarayan Shiksha Prasar Samiti, Morena. It is mentioned in the order of appointment of the petitioner that he had to obtain a degree in M.A. and also a degree in B.Ed. within a period of five years. Thereafter, the petitioner obtained degree in M.A. in the year 1993 and degree in B.Ed. in the year 1994. The school alongwith its staff was taken over by the Government w.e.f. 17.09.1997. Thereafter, the petitioner was absorbed on the post of Principal, Govt. Higher Secondary School, (10 + 2) vide order dated 26.12.1998. The aforesaid order of absorption of the petitioner has been cancelled vide order, Annexure P-1 dated 03.06.2006 on the ground that the petitioner did not had the requisite qualification at the time of absorption on the post of Principle, Govt. Higher Secondary School (10 + 2).

7. The School Education Department issued a circular dated 26.06.1995, copy of which has been filed as Annexure R-1, with regard to absorption of staff after taking over of the institution by the Government. It is mentioned in the circular that for absorption on the post of Principal, Higher Secondary School the person concerned should possess Post Graduate degree atleast in Second Class with B.Ed. The State Government also framed Recruitment Rulels named as Madhya Pradesh Education Service (School Branch) Recruitment and Promotions Rules 1982. As per Schedule 3 of Rule 8 thereof the minimum qualification for the post of Principal, Higher Secondary School is Post Graduate decree in Science, Arts, Commerce with second division and B. Ed. and also teaching experience of five years in Higher Secondary School.

8. From the aforesaid Recruitment rule it is clear that the minimum qualification for the post of Principal, Higher Secondary School is Post Graduate with second division and B. Ed. and the same is the qualification prescribed as per the circular dated 26.06.1995 issued by the School Education Department. Admittedly, the petitioner obtained degree in M.A. with third division, hence the petitioner had no requisite qualifications for the post of Principal, Higher secondary School. As the petitioner did not had the requisite minimum qualification for the post of Principal, in my opinion, absorption of the petitioner on the post of Principal, Higher Secondary School was per se illegal.

9. In the aforesaid facts of the case the argument advanced by the learned counsel for the petitioner that the petitioner was not given any opportunity of hearing cannot be accepted.

10. It is an admitted position of law that observance of rule of natural justice has to be followed in the circumstances if the order involves civil consequences. However, the exception of the observance of rule of natural justice has been carved out by Hon'ble the supreme Court in various judgments in the facts that if a person lacks the basic qualification for the post then the observance of rule of natural justice is not necessary and the exception has been termed as 'useless formality' theory. The Hon'ble the Supreme Court in *Aligarh Muslim University and others v. Mansoor Ali Khan* (2000) 7 SCC 529 has discussed in detail the aforesaid aspect and held as under :-

> "22. In *M.C. Mehta* (1999) 6 SCC 237 it was pointed out that at one time, it was held in *ridge v. Baldwin* 1964 Ac 40 : (1963) 2 All ER 66 (HL) that breach of principles of natural justice was in itself treated as prejudice and that no other *"de facto"* prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in england but also in our country. In *S.L. Kapoor v. Jagmohan* (1980) 4 SCC 379 Chinnappa Reddy,J. followed *Ridge v. Baldwin* 1964 AC 40 : (1963) 2 All ER 66 (HL) and set aside the order of supersession of the New Delhi Metropolitan committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were

quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in *S.L. Kapoor case* (1980) 4 SCC 379 laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In *K.L. Tripathi v. State Bank of India* (1984) 1 SCC 43 : 1984 SCC (L&S) 62 Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's administrative Law (5th Edn., pp.472-75), as follows : (SCC p. 58, para 31)

"(I)t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ....There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. the requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since the, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala v. S.K. Sharma* (1996) 3 SCC 364 : 1996 SCC (L & S) 717. In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in *Rajendra Singh v. State of M.P.* (1996) 5 SCC 460.

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta (1999) 6 SCC 237 referred to above. This Court surveyed the views expressed in various judgments in england by Lord Reid,

Lord Wilberforce, Lord woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it mayu depend on the facts of a particular case.

26. It will be sufficient, for the purpose of the case of Mr. Mansoor Akli Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in *S.L. Kapoor v. Jagmohan* (1980) 4 SCC 379, namely, that on the admitted or indisputable facts, only one view is possible. In that event no prejudice can be said to have been caused to Mr. Mansoor Ali Khan though notice has not been issued."

11. The Hon'ble Supreme Court in *Canara Bank v. V.K. Awasthy* (2005) 6 SCC 321, has held that even a post decisional hearing in certain circumstances can cure the defect of not giving opportunity of pre-decisional hearing and the Hon'ble Supreme Court has held as under :-

"In some cases it has been observed that where grant of opportunity in terms of principles of natural justice do not improve the situation, "useless formality theory: can be pressed into service. However, it is not necessary to go into "useless formality theory: in detail in view of the fact that no prejudice has been shown. Unless failure of justice is occasioned or that it would not be in public interest to do so in a particular case, the Supreme court may refuse to grant relief to the employee concerned. It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing."

12. The petitioner has not filed any document controverting the fact that he has not obtained degree in M.A. in third division. Even though the counsel for petitioner has failed to produce any document before this court that the petitioner obtained M.A. degree in Second division. In such circumstances, undisputed fact is that the petitioner passed the M.A. degree in third division and consequently he was not entitled to be absorbed on the post of Principal, Higher Secondary School (10 + 2) because he did not had the requisite qualification for the post. In the aforesaid facts and circumstances of the case even if no opportunity of hearing was given to the petitioner on this ground the impugned order cannot be quashed because giving opportunity of hearing to the petitioner would mean a 'useless formality'.

13. Consequently, I do not find any merit in this petition. It is hereby dismissed. No order as to cost.

Petition dismissed.

I.L.R. [2008] M. P., 465
WRIT PETITION
Before Mr. Justice Rajendra Menon
16 January, 2008

KAMLESH BAI ... Petitioner*
Vs.
UPPER COMMISSIONER BHOPAL AND HOSANGABAD DIVISION & ors. ... Respondents

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

Cases Referred :

AIR 1993 SC 367,2004 (6) SCC 331, 2004 (6) SCC 341

Pratip Visoriya, for the petitioner.
R.D. Agrawal, Panel Lawyer for the respondent nos. 1, 10 & 11.
Deepak Shrivastava, for the respondent no. 2

O R D E R

RAJENDRA MENON, J. :–Challenging the order dated 03.04.07 Annexure P/1 passed by the Upper Commissioner, Bhopal and Hosangabad Division exercising powers of an Election Tribunal under Section 122 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as 'the Adhiniyam, 1993') and seeking quashment of the directions issued by the aforesaid order for recounting of 2173 invalid votes, petitioner has filed this petition.

2. Petitioner is an elected representatives having been elected in the election to District Panchayat, Vidisha from ward no.19. Election to the aforesaid post were held on 16.01.05 and it is stated that she was declared elected in the aforesaid election by a margin of 46 votes. Challenging the election of petitioner on various grounds, respondent no. 2 - Alpana Saxena filed a election petition under Section 122 of the Adhiniyam, 1993 and rules framed thereunder, on the basis of pleadings of the parties six issues were framed. For the purpose of deciding this petition, only issue no. 6 is relevant. Issue no. 6 pertains to the question of recounting prayed for by the respondent no. 2 in the election petition. The election petition was put to trial and has been decided by the impugned order. All the irregularities alleged by the respondent no. 2 in the election petition which were framed vide

*W.P. No.2147/2007 (Gwalior)

issues no. 1 to 5, were negated and rejected. As far as the issue no. 6 with regard to recounting of votes is concerned, learned tribunal has rejected the prayer for recounting of all the votes but had ordered recounting of votes limited to the extent of 2173 votes that were declared as invalid and has directed for recounting of these votes.

3. Shri Pratip Visoria, learned counsel representing the petitioner submitted that while directing for recounting of the invalid votes numbering 2173, learned tribunal has committed grave error in directing for recounting of votes in a very causal manner without following the principles of law applicable in this regard. Inviting my attention to the pleadings available, the grounds made by respondent no. 2 seeking recounting of the votes, reasons given by the tribunal in paras 6 and 7 directing for recounting, it was emphasised by Shri Visoria that grounds and reasons for recounting are not tenable under the law. Placing reliance on the following two judgments of the Supreme Court in the cases of *Shri Satyanarain Dudhani vs. Uday Kumar Singh and others* (AIR 1993 SC 367) and *Chandrika Prasad Yadav vs. State of Bihar and others* (2004{6} SCC 331), Shri Visoria argued that without any basis and cogent material being available for directing recounting, order passed by the tribunal for recounting of votes is unsustainable and he prays for interference into the matter.

4. Refuting the aforesaid contention and submitting that recounting order is proper, does not warrant any interference, Shri Deepak Shrivatava, learned counsel representing the respondent no. 2 prays for dismissal of this petition. Inviting my attention to the averments made by the respondent no. 2 in the election petition as contained in para 6, the application filed in the said election petitioner for recounting of votes as contained in Annexure R/2, learned counsel for the respondent no. 2 submitted that as the order is only a order of remand to the Returning Officer for recounting of the invalid votes considering the margin of votes between the elected body and the defeated candidates being only 46, no case is made out for interference in the matter exercising discretionary relief. Accordingly, he prays for dismissal of this petition.

5. I have learned counsel for the parties at length and perused the record.

6. Before adverting to consider the dispute involved in this petition, it would be appropriate to take note of the legal principles laid down by the Supreme Court in the matter of direction for recounting of votes in a election petition.

7. While considering the question of recounting of votes in a election petition filed under the Representatives of Public Act in the case of Shri Satyanarain Dudhani (supra), the Supreme Court has observed that recounting of votes cannot be permitted as a matter of course, it was held that secrecy of ballot papers cannot be permitted to be tinkered lightly. Recounting of votes it has been held by the Supreme Court has serious consequence and same can only be granted if grave illegality is pointed out. The Supreme Court has so dealt with in para 10 of the aforesaid judgment:-

"10..... A cryptic application claiming recount was made by

the petitioner - respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting. Ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered."

Again in the case of *Chandrika Prasad Yadav* (supra), the question is considered in para 20, four conditions are indicated which are required to be fulfilled before directing for recounting of votes, the conditions are:-

(i)a *prima facie* case;

(ii)pleadings of material facts stating irregularities in counting of votes;

(iii)a roving and fishing inquiry shall not be made while directing recounting of votes; and

(iv)an objection to the said effect has been taken recourse to.

Thereafter in para 21, the requirement for maintaining the secrecy of ballot papers is emphasised and the ground of narrow margin is considered and thereafter in paras 22, 23 and 24 the question is so considered:

"22. In *M. Chinnasamy v. K.C. Palanisamy* this Court upon noticing a large number of decisions held that it is obligatory on the part of the Election Tribunal to arrive at a positive finding as to how a *prima facie* case has been made out for issuing a direction for re-counting holding:(SCC p. 358, para 42):

'Apart from the clear legal position as laid down in several decision, as noticed hereinabove, there cannot be any doubt or dispute that only because a re-counting has been directed, it would not be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced

which is at variance with the pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading.'

"23. It was further held that for the said purpose the Tribunal must arrive at a finding that the errors are of such magnitude which would materially affect the result of the election. As regards stands of proof, this Court held:(SCC p. 359, para 44):

'44. The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of re-counting of votes must be of a very high standard and is required to be discharged. (see *Mahender Pratap v. Krishan Pal*).'

"24. The order of the learned Munsif did not satisfy the statutory requirements."

It is, therefore, clear from the aforesaid principles laid down by the Supreme Court that recounting of votes can be ordered only if good case on the basis of these principles are made out, aroving and fishing inquiry on the basis of vague pleading is not permissible.

8. When the reasons given by the learned election Tribunal directing recounting of votes in the present case as contained in paras 6 and 7 of the impugned order are evaluated, it is seen that learned Tribunal while deciding issue no. 6 has held that in his comments the District Returning Officer has found that valid ballot papers were rightly counted, all the ballot papers which were found in accordance with rules were counted and only invalid ballot papers have been rejected. Learned Tribunal had directed for recounting of votes only because the margin of votes by which the petitioner is declared elected is 46 and the other defeated candidates respondents no. 2,3,5,6 & 8 appeared before the Election Tribunal and have accepted that 2173 votes were rejected. It is indicated by the Tribunal that as the number of rejected ballot papers is very high, interest of justice to all concerned would be met and it would be appropriate to direct recounting of this invalid votes. This court is of the considered view that aforesaid reasons indicated by the learned Tribunal for directing recounting of votes is not permissible. The learned Tribunal has not taken note of the pleadings of the respondent no. 2 - election petitioner in the election petition Annexure R/1 only vague allegations have been made, no specific irregularity is pointed out and no reason is given as to why and for what reasons petitioner is seeking recounting. It is the considered view of this Court that in the present case, recounting have been ordered in a very casual manner, in remanding the matter to Returning Officer back for recounting the principles of law have been ignored. The grounds indicated in paras 6 and 7 of the impugned order directing for recounting are not sufficient to direct recounting in a election petition on the basis of principles laid down by the Supreme Court. In the case of

Chandrika Prasad Yadav (supra), relied upon by Shri Pratip Visoria reference is made to a earlier judgment of the Supreme Court in the case of *M. Chinnasamy v. K.C. Palanisamy and others* (2004{6} SCC 341) and after considering the principle laid down by the Supreme Court in para 42 of the said judgment it has been held that recounting could not be ordered without proper evidence and pleadings.

9. Evaluating the facts and circumstances of the present case and reasons given by the learned Tribunal for directing recounting, in the back drop of these principles, I am of the considered view that Tribunal has committed grave error in directing recounting and the same being unsustainable, has to be and is accordingly quashed. As the complete pleadings, evidence of the parties and the applications for recounting and the orders of the Returning Officer on these applications, are not available before this Court, it would not appropriate for this Court to decide the question of recounting on merit, interest of justice would be met in case matter is remanded back to the Election Tribunal and issue no. 6 is directed to be decided afresh in accordance with law.

10. Accordingly, this petition is allowed. Finding recorded and direction contained in Annexure P/1 dated 03.04.2007 so far as it relates to decision on issue no. 6 is quashed, remaining part of the order being not challenged, is hereby upheld. Matter is remanded back to the Election Tribunal with a direction to decide issue no. 6 afresh after taking note of the pleadings of the parties, evidence and documents available on record in accordance to the principles of law as indicated hereinabove.

11. Petition stands allowed and disposed of with the aforesaid without any order so as to costs.

Petition allowed.

I.L.R. [2008] M. P., 469
WRIT PETITION

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

22 January, 2008

AMAN KHANUJA ... Petitioner*

Vs.

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

A. Medical & Dental Under-Graduate Entrance Examination Rules, M.P. 2007 - Clauses 9.5, 10.1, 10.2, 10.3 - Production of original documents and retention thereof by college - Purpose is that if the original documents are returned to the student after counseling it would enable him to participate in several other counseling and block several seats in various colleges thus depriving other eligible students from seeking admission. (Para 12)

B. Medical & Dental Under-Graduate Entrance Examination Rules, M.P. 2007 - Clauses 9.5, 10.1, 10.2, 10.3 - Purpose of retaining original documents

*W.P. No. 11743/2007 (Jabalpur)

- To prevent unwarranted anarchy and chaos in the field of admission - A student who takes the risk of admission in particular college can not afford to play with it by taking recourse to production of certificate to effect that all the original documents deposited with college - When there is a rule, the same has to follow, no deviation can be allowed. (Para 12)

Case Referred :

(2005) 2 SCC 65

Aditya Sanghi, for the petitioner

Deepak Awasthy, G.A. for the respondents

ORDER

The Order of the Court was delivered by

DIPAK MISRA, J:– The petitioner appeared in Pre Medical Test (PMT 2007) and secured 185.17 marks out of 200. He appeared in All India Pre Medical Entrance Examination, 2007 and was placed at Sr. No. 674 in the All India Quota in the general category. He attended the counselling of All India PMT at New Delhi on 19.6.2007 and was allotted a seat at Udaipur in a Govt. Medical College, namely, R.N.T Medical College, Udaipur with a direction to join the College on or before 20th June, 2007 with a further stipulation to submit all the original mark-sheets and papers alongwith the fees latest by 02.7.2007. As set forth, the petitioner proceeded to Udaipur and submitted his original documents along with the mark-sheets in original in the office of the Principal, R.N.T. College. An acknowledgement was issued by the competent authority of the said Medical College to the petitioner.

2. It is averred in the petition that R.N.T. College, Udaipur took an undertaking from the petitioner in which it had been mentioned that on being re-allocated a course or college, he would immediately vacate the seat allotted to him. The petitioner was issued a certificate to the effect that all the original documents deposited with the College would be returned if he would seek admission in the M.G.M Medical College at Indore as both the Colleges are Govt. Medical Colleges. The said Certificate dated 2.7.2007 has been brought on record as Annexure-P-2. The petitioner was also issued attested copies of the original documents. It is further averred that the petitioner was called for counselling on 19.7.2007 at Bhopal for counselling of M.P. PMT General Category candidate in which he submitted copies of the documents as well as the certificate issued by R.N.T. Medical College Udaipur. All the documents were duly attested by the Notary and hence, he was found eligible for getting a seat allotted. Thereafter, on 15.7.2007, he was allotted a seat in M.G.M Medical College, Indore. The counselling committee on scrutiny of the attested copies of the documents had allotted a seat in M.G.M Medical College, Indore. He was directed to join M.G.M Medical College by 29.7.2007.He reached the College and completed all the formalities by 20th July, 2007.At that juncture, the petitioner was required to appear in the second counselling and join the college after attending the counselling at New Delhi. He attended the second counselling of All India PMT i.e. CPMT 2007 and since he was allotted a College at Pune which is a Govt. Medical College, he left the seat at Udaipur Medical

College and received the allotment letter for Pune Medical College. After leaving the seat of Udaipur Medical College on 28.7.2007, the petitioner was having the allotment of a seat in Pune Medical College with him. As 29th July, 2007 was a Sunday, he could not get the original documents submitted at Udaipur Medical College, though he was required to submit the same to M.G.M Medical College, Indore to get the seat. On 29.7.2007, he was orally informed by the College that on completion of all the formalities he will be allotted a seat on 30.7.2007.Thereafter, he was told that he would be required to get all the documents scrutinized by the Committee and if the minimum of five Committee Members approve/recommend for depositing the fee and admission, he would be granted admission in M.G.M Medical College, Indore. The petitioner appeared before the Committee alongwith the attested documents. The Committee and its members found the documents to be absolutely in order and accordingly issued a letter that he was eligible for admission in M.G.M Medical College Indore. The M.G.M Medical College informed the petitioner to immediately make a demand draft and deposit the same with them. The petitioner made a demand draft for a sum of Rs.39,850/- dated 30.7.2007 in favour of the Dean and requested him to grant him admission. But, to his utter surprise he was informed that he could not be extended the benefit of admission in MGM College Indore because he had not submitted the original documents as per rules.

3. As pleaded, the petitioner informed the Dean that all the original Documents were with Udaipur Medical College and hence, he was not in a position to deposit the original documents and he be granted admission as he had filed attested copies of the documents.

4. The petitioner was required to be present at Indore on 30.7.2007 and he had to obtain original documents from Udaipur on that date. Because of this peculiar situation, the petitioner took admission in Pune Medical College, Pune, although he had an intention to get admission in M.G.M Medical College, Indore as he is a resident of Ujjain and his first option was the seat in Government MGM Medical College, Indore. It is urged that due to high-handedness approach of the third respondent, he has been deprived of the said benefit. It is contended that both R.N.T Medical College, Udaipur and M.G.M Medical College are Government Colleges and he had obtained the certificate from the authorities of Udaipur College, and further the Scrutiny Committee had accepted the attested copies of the documents to be correct, yet the petitioner was not given admission in M.G.M Medical College, Indore and a seat was allotted to him at Indore as a result of which he was put to immense suffering and jeopardy.

5. In this obtaining factual matrix, a prayer has been made to issue a writ of mandamus commanding the respondent No.3 to allot him a seat in the M.G.M Medical College, Indore and to pass such other order/orders as may be deemed fit and proper in the facts of the case.

6. A counter affidavit has been filed by the answering respondent contending, *inter alia*. that the petitioner was given admission at Indore provisionally with the

stipulation that he must produce the original certificates on or before 29.7.2007 but he failed to appear with the original documents. A reference has been made to M.P. Medical and Dental Undergraduate Entrance Examination Rules, 2007 (for short 'Rules') which in Clause 9.5 postulates that it is mandatory for a candidate to produce his or her original testimonials before seeking admission. It is contended that the petitioner got himself admitted at Udaipur and thereafter he came to Indore but did not produce the documents in original. It is put forth that the rule does not permit any allowance in this regard and the rule has to be respected and followed ('strictly. Reliance has been placed on the decision rendered in *Mridul Dhar V/s Union of India,* (2005) 2 SCC page 65 which provides a cut of date by which the first counselling has to be completed. The last date for joining the College was till 30th July, 2007 and that having expired, the petitioner has no cliam.

7. We have heard Mr. Aditya Sanghi, learned counsel for the petitioner and Shri Deepak Awasthy, learned Govt. Advocate for the respondent.

8. At the very outset it is seemly to state that there is no dispute with regard to the facts. It is the admitted position that the petitioner had taken admission at Udaipur Medical College. While he was attending the counselling on 14.7.2007 at Bhopal for PMT general category, he was found eligible for getting a seat allotted and was, in fact, allotted a seat in M.G.M Medical College, Indore. There is no quarrel over the fact that the petitioner had not brought the original documents while seeking admission. Clause 9.5 of the 2007 Rules reads as under:-

> "9.5 The candidate or his/her authorized representative without original documents, as mentioned in proforma 01, and along with set of two attested photocopies of original documents shall not be eligible to participate in the Counselling."

9. In this context, it is profitable to refer to Clause 10.1 which deals with the role of the Admission Committee which reads as under:

> "10.1 The Admission Committee consisting of Dean/Principal, two Professors and at least two Medical Teachers belonging to reserved category shall also verify the original documents and, if found eligible, shall give admission in a course and the college allotted to the candidate."

10. On a perusal of the aforesaid two rules, it is quite vivid that the original documents are to be produced and they are to be verified. At this juncture, it is fruitful to reproduce Clauses 10.2 and 10.3 which are as under: -

> "10.2 Once admitted either through All India or State Quota, all original certificates shall be kept by the college and a certificate to that effect will be issued to the candidate by the college authorities."
>
> "10.3 Original documents shall be returned to the candidates only on completion of their Course (internship) or their RESIGNATION or leaving from the seat of the course and the college, due to any reason."

11. On a close scrutiny of the aforesaid provisions, there is no shadow of doubt that the production of the original certificates/documents and retention thereof by the college have a purpose.

12. The learned counsel for the petitioner has urged with vehemence that when the two Government colleges are involved and a certificate was issued by the first institution, no impediment should have been created by the third respondent. On a first flush, the aforesaid argument looks quite attractive but on a deeper scrutiny and keener probe, the same pales into insignificance because the rules have a purpose and the purpose is that a student cannot think of or conceive the notion that he can change an institution at the drop of a hat. If the same is permitted, not only it will cause violence to the rules, but, it will also usher in a state of unwarranted anarchy and chaos in the field of admission. The vacancies which can be filled up by others may not be available. That apart, a student, who takes the risk of admission in one particular college cannot afford to play with it by taking recourse to production of certificate. That will not be in fitness of things. It is worth noting that if the original documents are returned to a student after counselling it would enable him to participate in several other counsellings and block several seats in various colleges thus depriving other eligible students from seeking admission and it is with purpose of preventing such a situation that the rule in question has been incorporated. The sanctity of the Rule cannot be spoiled In *Mridul Dhar's case* (supra) the Apex Court, while dealing with a time schedule for completion of the admission process for First MBBS course, has expressed its anguish in following terms :-"

> 13. In various States, the first counseling and admissions in respect of State Quota seats were not over and many States had not even commenced the process even though second round of conunseling for allotment of seats from waiting list for all-India quota becoming vacnt, as a result of candidates getting admission under State quota, was to commence on 1st August, to be completed by 8th August. The effect of the aforesaid inaction and also not sending timely intimation to DGHS is to deprive those who are high up in the merit list of All-India Entrance Examination and waiting to get admission in such vacated seats which otherwise would revert back to the State quota. The result is to effectively reduce 15% all-India quota and increase State quota seats. Directions that were issued to get requisite information from various States in respect of holding of counseling, and reporting of vacant seats to DGHS for admissions for 2004-05 have been earlier noticed. As stated above, despite such directions full and complete justice could not be meted out to all meritorious students regarding college of their choice as per their position in the merit list, on account of the time-frame and its all-India consequences on admissions and the possible result of extending the admissions and resulting the schedule date contrary to the aforesaid statutory

regulations and resulting in grant of midstream admissions. To an extent possible, the seats of all-India quota would not revert to State quota. It was brought to our notice that in some cases the time schedule is deliberately not adhered to so that more number of seats may revert to State quota. If that be so, we deprecate the practice with a fond hope that such a practice would be discontinued failing which persons responsible therefore will have to face the consequences. Total impartiality is the need of the time and not the so-called loyalty to the State."

13. We have referred to the aforesaid paragraph only to highlight that there has to be some discipline in the matter of admission and the institutions cannot give vent to their own personal feelings or follow their own norms. When there is a rule, the same has to be followed. No deviation can be allowed in that regard. When deviancy occupies the centre stage, many problems do crop up and corrode the system. The same is impermissible as the law does not so countenance.

14. In view of the aforesaid analysis, we are of the considered opinion that the relief sought by the petitioner is wholly unfounded and, therefore, the writ petition being devoid of merit, stands dismissed. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 474
WRIT PETITION
Before Mr. Justice S.K. Gangele
22 January, 2008

M. P. RAJYA BEEJ EVAM FARM VIKAS NIGAM & ors. ... Petitioners*

Vs.

ASHOK KUMAR ... Respondent

A. Industrial Disputes Act (14 of 1947), Sections 2 (oo), 25-O, 25- F - 'Retrenchment' - Interpretation - Workman's application for classification under the provisions of M.P. Industrial Relations Act, pending before Labour Court, who has been in continuous service as daily wager clerk w.e.f. 6-8-1992 to 1999 - Employer terminated his services on the ground that the center was closed - Labour Court held that since the center was closed the workman will be entitled for retrenchment compensation in accordance with Section 25-FFF of Act - Held that employer has not taken permission for closure as per provisions of Section 25-O of Act and not lead cogent evidence to prove this fact - Therefore instead of retrenchment compensation High Court ordered for reinstatement of workman. (Paras 10, 11)

B. Back Wages - There is no rule of thumb that in every case where the termination of service in violation of Section 25-F of the Act, entire back wages should be awarded - A regular service of permanent character can not be compared to short

*W.P. No. 6285/2006 (s) (Gwalior)

or intermittent daily wage employment though it may be for 240 days in a calendar year - Workman engaged in 1992 on daily wage basis and his services were terminated in 1999 - Award has been passed by Labour Court in 2005 - High Court held that workman will be entitled 25% back wages from the date of termination of his services up to date of award and after date of award will be entitled full back wages.

Cases Referred: (Paras 12,13)

2006 (2) JLJ 24, 2007 AIR SCW 5260, 1957 SCR 121 = AIR 1957 SC 121, (2005) 5 SCC 591

Amit Bansal, for the petitioners,
Ashok Kumar, for the respondent

ORDER

S.K. GANGELE, J:-Because both the petitions, (Writ Petition No. 5167/2005(s) by the employee and Writ Petition No. 6285/2006 (s) by the employer) have been filed against a common award dated 08.04.2005 passed in Case No. 11/A/ID Act/Ref./2002, hence both the petition are being heard together and decided by this common order.

2. The employee, Ashok Kumar, complained to the appropriate Government that he was engaged by the Corporation at Dabra Center w.e.f. 06.08.1992 on daily wage basis to perform the work of Clerk. He was not made permanent hence he filed an application before the Labour Court under the provisions of Madhya Pradesh Industrial Relations Act for his classification. The Labour Court granted stay of status quo. In spite of that vide letter dated 31.08.1999 his services were terminated. The matter was ceased in the conciliation and after failure of conciliation proceedings it was referred to the Labour Court for adjudication.

3. Before the Labour Court the employee in his statement of claim stated that he was engaged as daily wager Clerk w.e.f. 06.08.1992. Because, thereafter he filed an application for classification before the Labour Court under the provisions of Madhya Pradesh Industrial Relations Act hence vide order dated 31.08.1999 his services were terminated. Before termination of services no inquiry was conducted neither any retrenchment compensation was given to him, hence the order of termination was void and contrary to Section 25-F of the Industrial Disputes Act.

4. The employer in its statement of claim admitted the fact that Mr. Ashok Kumar was engaged on daily wage basis, however, it has been denied by the employer that he had worked continuously. It has further been stated by the employer in para 23 of the written statement that w.e.f. April 2002 the center was closed.

5. Before the Labour Court the employee submitted his affidavit in support of his claim and stated same things. On behalf of employer affidavit of Mr. Jagdish Singh Yadav was filed. He stated that the Dabra Process Center was closed and no employee had been working there. It was further admitted in the affidavit that Mr. Ashok Kumar was working on daily wage basis. On 22.07.2004 Regional Manager of the Corporation, Mr. Jagdish Singh Yadav in his cross examination

admitted the fact that no retrenchment compensation was paid to Mr. Ashok Kumar at the time of termination of services vide order dated 31.08.1999. He further admitted that in the Corporation production of various crops and development of high quality seeds was being done and there were so many centers of the Corporation for the aforesaid purpose. The processing of seeds was also done and seeds have been sold through various centers. He further stated that hundreds of employees were working in the Corporation. Thereafter, on the basis of the above evidence on record, oral and documentary, the Labour Court has held that the services of the workman were terminated because he filed an application before the Labour Court for his classification and he had worked for more than 240 days in a calender year continuously from 06.08.1992 to 1999 as per Exs. P-1 to P-4. The Labour Court further observed that because the center was closed hence the workman will be entitled the retrenchment compensation in accordance with Section 25-FFF of the Industrial Disputes Act and passed the award accordingly.

6. The employee alongwith the petition has filed the photostat copies of attendance register and payment of wages to the employee. As per the aforesaid record it is clear that the employee has worked for 147 days in 1992, for 363 days in 1993, for 361 days in 1994, for 363 days in 1995, for 360 days in 1996, for 361 days in 1997, for 362 days in 1998 and 236 days in 1999. The employer has not controverted the aforesaid facts. The copies of the payment register have been filed after obtaining the same from the employer under the Right of Information. Hence, the aforesaid documents cannot be disputed.

7. Learned counsel for the workman has submitted that there was no valid closure of the Center and other employees were absorbed in other Centers, hence the workman is entitled reinstatement. Contrary to this, learned counsel for employer has submitted that the findings recorded by the Labour Court that employee worked for more than 240 days in a calender year are perverse and the center was closed, hence the learned Labour Court has rightly awarded compensation in favour of the employee. In support of his contention learned counsel relied upon the judgment of this Court in State of M.P. and others v. Arjunlal Rajak, 2006 (2) JLJ 24 and *District Red Cross Society v. Babita Arora and others*, 2007 AIR SCW 5260.

8. Undisputed facts of the case are that employee, Ashok Kumar was engaged on daily wage basis in the Corporation on 06.08.1992. He filed an application before the Labour Court for classification and during pendency of the application vide order dated 31.08.1999 his services were terminated. In support of his claim the employee submitted his affidavit as evidence and on behalf of the employer Regional Manager submitted his affidavit. He was also cross-examined. Along with the petition the employee also submitted details of Attendance Register and Wage Register as mentioned above in this order. As per the aforesaid registers, it is clear that the employee had worked for more than 240 days in a calender year. Because the aforesaid documents have been received by the employee from the employer under the Right to Information, hence the authenticity of the

documents cannot be disputed. Apart from this the employer has also not denied the aforesaid documents. Consequently, in my opinion, the findings of fact recorded by the Labour Court that employee worked for more than 240 days in a calender year are as per law.

9. With regard to the second contention raised by the learned counsel for the employee that the direction issued by the learned Labour Court with regard to grant of retrenchment compensation is illegal. It is clear that the employer in its statement of claim before the Labour Court stated that the center was closed in April 2001 where the workman was employed, however, during cross-examination the Regional Manager in his statement stated that he could not say that any permission from the Labour Department was obtained before closure of the Center neither any such documents have been filed in the case. Section 25-O of the Industrial Disputes Act, 1947 prescribes the procedure with regard to closure, which is as under :-

> "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 applies 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 years of continuous service or any part thereof in excess of six months."

There is amendment to this provision by State of Madhya Pradesh, however, the procedure is the same.

10. It is clear from the mandatory procedure of Section 25-O that no permission was taken by the Corporation before closure of the Center at Dabra. Apart from this, there is no clear evidence except the pleading in the written statement of the employer that the Dabra Center was closed. It was a plea of the employer that the Dabra Center was closed, hence the burden of proof was on the employer to lead cogent evidence in support of the pleading. In my opinion, the Labour Court has committed an error of law in arriving at a finding that the Dabra Center of the Corporation was closed. A Constitution Bench of Hon'ble the Supreme Court in *Hariprasad Shivshankar Shukla v. A.D. Divikar,* 1957 SCR 121 : AIR 1957

121 has held as under with regard to interpretation of the word "retrenchment" as contained in Section 2 (oo) of the ID Act :-

> "For the reasons given above, we hold, contrary to the view expressed by the Bombay High court, that retrenchment as defined in Section 2 (oo) and as used in Section 25-F has no wider meaning than the ordinary, accepted connotation of the word : it means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and bona fide closure of business as in the case of Shri Dinesh Mills Ltd. or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances like those of the Railway Company." (emphasis in original)

11. Hence, when there is no closure of the Center. Then from the facts of the case it is clear that there was a retrenchment and the employee is entitled for reinstatement because his services were terminated in violation of Section 25-F of the Industrial Disputes Act.

12. With regard to grant of back wages, it is clear that the employee was engaged in 1992 on daily wage basis. He had worked upto 1999 and during that period he filed an application before the Labour Court for his classification under the provisions of Madhya Pradesh Industrial Relations Act. During pendency of the aforesaid application the services of the employee had been terminated. Hon'ble the Supreme Court in *General Manager, Haryana Roadways v. Rudhan Singh* (2005) 5 SCC 591 has held as under with regard to grant of back wages :-

> "8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered

by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calender year."

13. Looking to the principle of law laid down by Hon'ble the Supreme Court and looking to the facts of the case that the employee was engaged in 1992 on daily wage basis and his services were terminated in 1999 and award has been passed by the Labour Court in 2005, in my opinion, the workman will be entitled 25 % (twenty five percent) back wages from the date of termination of his services upto pronouncement of the award.

14. Consequently, the petition of the management, Writ Petition No. 6285/2006(s) is hereby dismissed.

15. The petition filed by the employee, Ashok Kumar, being Writ Petition No. 5167/2005 (s) is partly allowed and award passed by the Labour Court, Annexure P-1 dated 08.04.2005 is modified to the extent that the employee will be entitled reinstatement with 25 % back wages from the date of termination of his services upto the date of pronouncement of award. After the date of pronouncement of award the employee will be entitled full back wages. No order as to costs.

Order accordingly.

I.L.R. [2008] M. P., 480
WRIT PETITION
Before Mr. Justice K.K. Lahoti
22 January, 2008

STATE OF M.P. and anr. --- Petitioners*
Vs.
DILIP KUMAR SANGNI --- Respondent

Stamp Act, Indian (2 of 1899) - Sections 2(9)(10), 3, 27, 47, Schedule 1-A (item 23) - "Conveyance" - Payment of stamp duty - Market value on the date of execution of the document was a decisive factor - Stamp duty was payable on market value of property at the time of registration of sale deed and not as per price fixed under agreement to sell or in decree of Court - Indian Stamp Act is a taxing statute and is to be construed strictly. (Para 8)

Cases Referred :

AIR 1998 AP 252, AIR 2004 M.P. 104, AIR 1997 Madras 296, AIR 2003 Raj. 117, 2007 AIR SCW 7378

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*W.P. No. 2055/2004 (Jabalpur)

P.N. Dubey, Deputy Advocate General for the petitioners.
Jitendra Tiwari, for the respondent.

ORDER

K.K. Lahoti, J. :–The State has challenged order dated 14.2.2003 (Annexure P/1) passed by the Board of Revenue, M.P. Gwalior in Revision Case No.1338/five/2000 by which the Board of Revenue set side the order passed by the Collector of Stamps, Jabalpur in Case No.196/B-105/95-96 dated 29.4.2000.

2. The facts of the case are that:-

(a) A sale-deed dated 25.3.1996 was presented to the Sub-Registrar (Registration), Jabalpur by which a piece of land admeasuring 16650 square feet alongwith a house standing on it was transferred by Narendra Agrawal in favour of Smt.Dayalaxmi Sangni for a consideration of Rs.8000/-. Aforesaid, valuation was put on the basis of judgment and decree passed by the Civil Court in Case No.19A/1993 dated 10.12.1993. The suit was decided between the parties by a compromise.

(b) The Registering Authority, Sub-Registrar, Jabalpur was not satisfied with the market value put in the sale-deed for the purpose of payment of stamp duty and sent a proposal to the Collector of Stamps on 11.4.1996, proposing value of property at Rs.8,79,000/-. The Collector of Stamps after satisfying itself with the proposal sent by the Sub-Registrar issued a show cause notice Annexure P/4 to Narendra Agrawal (vendor) and Smt.Dayalaxmi (vendee) under Section 47-A of the Indian Stamps Act, 1899 (hereinafter referred to as the 'Stamp Act').

(c) Though the notice was issued to Smt. Dayalaxmi, but her son respondent Dilip Kumar appeared before the Collector of Stamps and submitted that Smt.Dayalaxmi expired on 22.11.1999 and the respondent being her son and successor filed a reply to the show-cause notice.

(d) In the reply, respondent stated that transaction was a genuine one. His father Damodardas entered into agreement with Narendra Agrawal to purchase land Survey No.62 area 1.27 acres of village Ranipur, Tehsil and District Jabalpur for a consideration of Rs.30,000/- on 1.1.1978. The aforesaid agreement though was entered by Damodar but in the name of his wife Smt.Dayalaxmi, mother of the respondent. At the time of the agreement, Rs.500/- were paid by way of earnest money and possession of land was handed over to the father of respondent. Thereafter, father of respondent constructed his house. Narendra Agrawal had not executed the sale deed as per agreement, so father of the respondent filed a suit on 20.4.1984 against Narendra Agrawal which was registered as Civil Suit No.19-A of 1984. In the suit,

plaintiff was mother of the respondent, because agreement was in her name. The Civil Suit remained pending before 5th Civil Judge, Jabalpur between 1984 and 1993. Ultimately, on 24.11.1993, a compromise was arrived between the parties and as per compromise, mother of the respondent restricted her claim towards 16650 sq.ft. of land leaving her right towards remaining land in favour of Narendra Agrawal. It was agreed that Narendra Agrawal will execute the sale-deed of the aforesaid land for a consideration of Rs.8000/-. The price was fixed in accordance with the terms of agreement. As per compromise, the Civil Court passed a decree. Now, the sale-deed has been got executed in compliance of decree, hence provisions of Section 47-A of the Stamp Act are not applicable. The proposed value of the property by the Sub-Registrar was excessive and illegal. Reliance was placed to a judgment of Andhra Pradesh High Court in *Sub-Registrar, Kodad Town & Mandal Vs. Amaranaini China Venkat* AIR 1998 AP 252 and submitted that the aforesaid notice be dropped.

(e) The Collector of Stamps visited the spot and found that the property involved in the sale-deed is situated at Veer Sawarkar Ward, old Ranipur House No.256, Jabalpur. The property is not on main road but it is situated in 8 feet narrow lane and the level of the land was below 2 feet of the earth level. In the rainy season, the land usually submerges and the house standing on the land also submerges by 4 feet. Marks of submergence were found by the Registrar on the walls of the house. The house was also found to be an old Kachcha and in a dilapidated condition. Out of the total area, only 1445 sq.ft. area was found to be constructed. The location of the property was 5 kms away from bus-stand, 2½ kms away from Railway Station and 2 kms away from the market. The house could not be used for habitation and required reconstruction. At the time of the inspection, electricity connection was not found in the house. The Collector of Stamps considering total facts and circumstances found that the valuation proposed by the Assistant Registrar was on higher side and after reconsidering the entire facts found valuation of the property at Rs.7,83,000/- and directed the respondent to pay deficit stamp duty and registration fee on this valuation.

(f) The order of the Collector of Stamps was challenged by the respondent before the Board of Revenue under Section 56(4) of the Act. The Board of Revenue after considering the entire facts held thus:-

(i) That on 1.1.1978, an agreement was entered into between Narendra Kumar Agrawal and Smt.Dayalaxmi which was filed in original before the Board of Revenue.

(ii) That, compromise was arrived between the parties before the Civil Court and as per compromise dated 24.11.1993, the judgment & decree were passed on 10.12.1993.

(iii) That, as per compromise decree, sale-deed was to be executed by Narendra Agrawal after payment of Rs.8000/- by Smt.Dayalaxmi.

(iv) That, provisions of section 47-A are not applicable because the agreement was entered in the year 1978 and as per compromise decree, the sale-deed was executed.

(v) That the location of the house is on a narrow lane. Plot level is 2 feet below the normal earth level and in the rain, entire land is submerged and house also submerges by 4 feet.

(vi) The house was 25 year old and was in a dilapidated condition. It was not a habitable house and the location of the house was 5 kms away from bus-stand, 2½ kms away from Railway Station and 2 kms away from the market. The house was required reconstruction.

The Board of Revenue relying on judgment of Andhra Pradesh High Court in Sub-Registrar, Kodad Town & Mandal Vs. Amaranaini China Venkat AIR 1998 AP 252 found that the sale-deed was executed in compliance of the judgment and decree, the Registering Authority could not demand stamp duty on the basis of market value prevailing on the date of execution of sale-deed. That, the land was not a diverted land but was an agricultural land and unirrigated. The price paid by the vendee to the vendor was a proper consideration as per market value and on these grounds, the revision was allowed and the order passed by the Collector of Stamps dated 29.4.2000 was set aside. The Board of Revenue also held that the stamp duty and registration fee paid by Smt.Dayalaxmi was in accordance with law.

3. This order has been challenged by the petitioners on the following grounds:-

(i) That the stamp duty and registration fee were payable on the market value of property on the date of registration of the sale-deed and these have no concern with the date of agreement or consideration paid therein.

(ii) That, under Section 2(12) of the Stamp Act, date of execution is relevant for the purposes of payment of stamp duty and it has no concern with the consideration. The stamp duty is payable as per market value of the property as on the date of registration of the document. Reliance is placed by the petitioner to a Division Bench judgment of this Court in *State of M.P. Vs.Rambabu Agrawal* AIR 2004 M.P. 104 and submitted that the order passed by the Board of Revenue be set aside and that of Collector of Stamps be restored.

4. Shri Jitendra Tiwari, learned counsel for respondent vehemently opposed the contentions and submitted that the Board of Revenue has taken a correct legal view in accordance with the provisions of Stamp Act. The reasonings assigned by the Board of Revenue are in accordance with law. He placed reliance to

judgment of the Division Bench of Madras High Court in *S.P.Padmavathi Vs. State of Tamil Nadu* AIR 1997 Madras 296, judgment of Rajasthan High Court in *Shanti Lal Vs. Collector* AIR 2003 Raj. 117 and a judgment of Andhra Pradesh High Court in *Sub-Registrar, Kodad Town & Mandal Vs. Amaranaini China Venkat* AIR 1998 AP 252 and submitted that this petition may be dismissed with costs.

5. In this case factual position as stated hereinabove are not in dispute. Only the legal position in this case is to be examined that whether the stamp duty is payable in respect of the market value of the subject matter on the date of registration of the sale-deed or in case where the sale-deed is executed in compliance of the judgment and decree passed by the Court, even on compromise, the stamp duty is payable on a consideration as fixed by the Court or not ?

The relevant provisions of the Indian Stamp Act, 1899 as amended in its application to the State of Madhya Pradesh deserves to be referred.

> **Section 2(6) "Chargeable""** means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or; where several persons executed the instrument at different times, first executed;
>
> **Section 2(10) "Conveyance"** includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I or by Schedule 1-A, as the case may be;
>
> **Section 27. Facts affecting duty to be set forth in instrument .-** (1) The consideration, if any, the market value of the property and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein.
>
> (2) In the case of instrument relating to immovable property chargeable with an ad valorem duty on the market value of the property, and not on the value set-forth, the instrument shall fully and truly set-forth the annual land revenue in the case of revenue paying land, the annual rental or gross assets, if any, in the case of other immovable property, the local rates, municipal or other taxes, if any, to which such property may be subject, and any other particulars which may be prescribed by rules made under this Act.
>
> **Schedule I-A Item no.23: Conveyance;**

Description of Instrument	Proper Stamp duty
23.Conveyance, not being atransfer charged or exempted under	Seven and half percent of such market value:

No.62 irrespective of the market value of the property which is the subject matter of conveyance.	Provided that if the total amount of the duty payable is not a multiple of fifty paise, it shall be rounded off to the nearest rupee half of a rupee or over being counted as one rupee and less than half of a rupee being disregarded.
Exemption:-Assignment of Copy-right under the Copy-right Act, 1957 (No.14 of 1957), Section 18, Co-partnership deed, See Partnership (No.46).	
Explanation- For the purpose of this article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of, such agreement without executing the conveyance in respect thereof then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly : Provided that, the provisions of Section 47-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid,as they apply toa conveyance under that section: Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance, subject to a minimum of Rs.10.	

Section 47-A Instruments undervalued how to be dealt with:- (1) If the Registering Officer appointed under the Registration Act, 1908 (No. XVI of

1908), while registering any instrument finds that the market value of any property which is the subject matter of such instrument has been set forth less than the minimum value determined in accordance with any rules under this Act, he shall before registering such instrument refer the same to the Collector for the determination of the market value of such property and the proper duty payable thereon.

(1-A) Where the market value as set forth in the instrument is not less than the minimum value determined in accordance with any rules under this Act, and the Registering Officer has reason to believe that the market value has not been truly set forth in the instrument, he shall register such instrument and thereafter refer the same to the Collector for determination of market value of such property and proper duty thereon.

(2) On receipt of a reference under sub-section (1), the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an enquiry in such manner, as may be prescribed, determined the market value of the property which is the subject matter of such instrument and the duty as aforesaid. The difference, if any, in the amount of duty shall be payable by the person liable to pay the duty.

(3) The Collector may suo-motu, within five years from the date of registration of any instrument not already referred to him under sub-section (1), call for and examine the instrument for the purposes of satisfying himself as to the correctness of the market value of the property which is the subject matter of any such instrument and the duty payable thereon and if after such examination, he has reason to believe that the market value of such property has not been truly set forth in the instrument, he may determine the market value of such property and the duty as aforesaid in accordance with the procedure provided for in sub-section (2). The difference, if any, in the amount of duty, shall be payable by the person liable to pay the duty:

Provided that nothing in this sub-section shall apply to any instrument registered prior to the date of the commencement of the Indian Stamp (Madhya Pradesh Amendment) Act, 1975.

(3-A) For the purpose of enquiries under this section, the Collector shall have the power to summon and enforce the attendance of witness including the parties to the instrument, or any of them and to compel the production of documents by the same means and so far as may be in the same manner, as is provided in the case of civil court under the Code of Civil Procedure, 1908 (Cent.Act V of 1908).

(4) Any person aggrieved by an order of the Collector under sub-section (2) or sub-section (3) may, in the prescribed manner appeal

against such order to the Commissioner who may either himself decide the appeal or transfer it to the Additional Commissioner of the Division.

(5) Any person aggrieved by an order passed in appeal under sub-section (4) may in the prescribed manner appeal against such order to the Chief Controlling Revenue-authority, Madhya Pradesh.

(6) Every first and second appeal shall be filed within thirty days from the date of the communication of the order against which the appeal is filed, alongwith a certified copy of the order to which objection is made and shall be presented and verified in such manner as may be prescribed:

Provided that in computing the period aforesaid, the time requisite for obtaining a copy of the order appealed against shall be excluded.

(7) The appellate authority shall follow such procedure as may be prescribed:

Provided that no order shall be passed without affording opportunity of being heard to the appellant.

(8) The order passed in second appeal or, where no second appeal is preferred the order passed in first appeal shall be final and subject to orders passed in first or second appeal, as the case may be, the order passed by the Collector under sub-section (2) or sub-section (3) shall be final and shall not be called into question in any civil court or before any other authority whatsoever.

Explanation:- For the purpose of this Act, Market Value of any property shall be estimated to be the price which in the opinion of the Collector or the Appellate Authority, as the case may, such property would have fetched or would fetch if sold in the open market on the date of execution of the instrument.

6. From the perusal of the aforesaid provisions, it is apparent that the sale-deed is covered under the definition of conveyance and stamp duty is chargeable as applicable to such instrument. As per Item no.23 of Schedule IA, the stamp duty is chargeable on the market value of the property. The aforesaid provision specifically provides that the proper stamp duty for conveyance shall be 7½% of market value. Section 27 as substituted by M.P. Act No.8 of 1975 w.e.f. 15.5.1975 specifically provides that consideration, if any, the market value of the property and all other facts and circumstances shall be fully and truly set forth in the document for the purposes of ascertaining stamp duty. An instrument relating to sale of immovable property is chargeable with ad valorem duty on the market value of the property and not on the value set forth. The State Government has framed rules namely M.P. Prevention of Undervaluation of Instruments Rules, 1975 of which rule 3 provides that all the particulars to be set forth in the instrument

as required by sub-section (2) of Section 27 of the Act. Rule 3 of the aforesaid Rules reads thus:-

> **Rule 3: Other particulars to be set forth in the instrument as required by sub-section (2) of Section 27 of the Act:-** The following particulars shall be fully and finally set forth in the instrument relating to immovable property chargeable with ad valorem duty namely:-
>
> (i) in case of an instrument relating to agricultural land- the land revenue payable by the Bhumiswami of the adjoining agricultural land of the same class of soil, if the land which is the subject matter of instrument, is exempted from payment of land revenue or which has not been assessed to land revenue;
>
> (i-a) In case of an instrument relating to agricultural land assessed to land revenue-
>
> (a) name of the village with name of Revenue Inspector's circule, Tahsil and District wherein the land is situated; and
>
> (b) whether the land is irrigated or not; and if irrigated, whether irrigation is for one crop only or for two crops.
>
> (ii) in case of an instrument relating to transaction of any immovable property in urban or rural area except agricultural land-
>
> (a) area of the plot and the area of the constructed portion thereon; and
>
> (b) the year of construction.
>
> **3-A.** Assessment of market rent of the lease executed by or on behalf of the State Government or any undertaking of the State Government.- In case of any property which is subject matter of a lease by the State Government or any undertaking of the State Government, the market rent would be the average annual rent and the market value shall be the amount or value of such fine, or premium or advance as setforth in the instrument.
>
> **3-B** Market value of any property, which is subject matter of conveyance executed by or on behalf of the Central Government or the State Government or Semi Government Organisation or any Government Undertaking or any local body, shall be the value shown in the instrument;

7. The valuation of the property for the purpose of stamp duty is the market value at the time of its execution. The Indian Stamp Act is a taxing statute and is to be construed strictly. In the case of a decree of the Civil Court, may be on the basis of compromise, for the purpose of payment of stamp duty, provision of section 3 of the Act shall be applicable which specifically provides that the stamp duty shall be chargeable with duty of the amount indicated in the Schedule. Section 27 as amended in Madhya Pradesh specifically provides that the facts affecting the

duty to be set forth in instrument and as per Schedule I-A, on the conveyance, the stamp duty is payable on the market value. In these circumstances, there is no iota of doubt that on the sale-deed stamp duty was payable as per market value and it had no concern with the consideration shown or paid to the vendor. Section 47-A provides a procedure in respect of instrument undervalued to be dealt with. The Registering Officer while registering any instrument if has reason to believe that the market value of the property which is the subject matter of such document has not been truly set forth in the instrument, he may after registering such document refer the same to the Collector for determination of the market value of such property and proper duty payable thereon. In this case, the Sub-Registrar duly referred the matter to the Collector of Stamps for determination of the market value of such property and the Collector of Stamps after holding an enquiry determined the market value of the property which was subject matter of the sale-deed. From the perusal of the order passed by the Collector of Stamps, it is apparent that each and every aspect was seen and taken into consideration by the Collector of Stamp while determining the market value of the property.

8. In this case, there was a difference between market value and the price as agreed in the agreement or subsequently fixed in the compromise petition. The suit was decided on the basis of compromise arrived at between the parties and as per compromise decree, consideration as settled between the parties was to be paid by the vendee to the vendor. For consideration, aforesaid amount is binding between the parties but for payment of stamp duty, market value on the date of execution of the document was a decisive factor and the stamp duty was payable on the market value of the property at the time of registration of the sale deed and not as per the price fixed under agreement to sell or in the decree of the Court.

9. In the judgments relied on by the respondent, it was held that where agreement to sell was subject matter of a civil suit and a decree is passed on the basis of agreement to sell for specific performance of contract, the Registering Authority cannot demand stamp duty on the basis of market value prevailing on the date of execution of the sale deed and the consideration shown in the sale-deed as per decree of the Court is proper consideration for the purpose of stamp duty. Aforesaid judgments are based on the law applicable in the aforesaid States while Section 27 of the Stamp Act as substituted by M.P. Act no.8 of 1975 is applicable in the present case.

Recently the Apex Court has considered the law in State of *Rajasthan Vs. M/s Khandaka Jain Jewellers* 2007 AIR SCW 7378 and held thus:-

> "10. .....Therefore, in the present case when the registering authority found that valuation of the property was not correct as mentioned in the instrument, it sent the document to the Collector for ascertaining the correct market value of the property. The expression "execution" read with Section 17 leaves no manner of doubt that the current valuation is to be seen when the instrument is sought to be registered. The Stamp Act is in the nature of a taxing statute, and a taxing statute is not dependant on any

contingency. Since the word "execution" read with Section 17 clearly says that the instrument has to be seen at the time when it is sought to be registered and in that if it is found that the instrument has been undervalued then it is open for the registering authority to enquire into its correct market value. The learned single Judge as well as the Division Bench in the present case had taken into consideration that the agreement to sell was entered into but it was not executed. Therefore, the incumbent had to file a suit for seeking a decree for execution of the agreement and that took a long time. Therefore, the Courts below concluded that the valuation which was in the instrument should be taken into account. In our opinion this is not a correct approach. Even the valuation at the time of the decree is also not relevant. What is relevant in fact is the actual valuation of the property at the time of the sale. The crucial expression used in Section 17 is "at the time of execution". Therefore, the market value of the instrument has to be seen at the time of the execution of the sale deed, and not at the time when agreement to sale was entered into. An agreement to sell is not a sale. An agreement to sell becomes a sale after both the parties signed the sale-deed. A taxing statute is not contingent on the inconvenience of the parties. It is needless to emphasize that a taxing statute has to be construed strictly and considerations of hardship or equity have no role to play in its construction."

In para 14 of the judgment, the Apex Court considered the judgment of the Andhra Pradesh High Court in *Amaranaini China Venkat Rao* (supra) and found that the aforesaid judgment does not lay down the correct law and overruled it. Now in the light of the aforesaid recent pronouncement of the Apex Court, other judgments relied by the respondent are impliedly overruled by the judgment of *M/s Khandaka Jain Jewellers* (supra).

10. In view of the aforesaid discussion, the order passed by the Board of Revenue is not sustainable under the law and is hereby quashed. The order passed by the Collector of Stamps, Jabalpur dated 29.4.2000 is affirmed. Petition filed by the State is allowed with costs. Counsel's fee Rs.2000/-

Petition allowed

I.L.R. [2008] M. P., 491

WRIT PETITION

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

29 January, 2008

SHIV SINGH RAWAT ... Petitioner*

Vs.

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

A. Panchayat Raj Avam Gram Swraj Adhiniyam, M.P. 1993 (1 of 1994) - Section 36 (1) (a)(ii) - Disqualified - No person shall be eligible to be an office - bearer of Panchayat - Who sentenced to imprisonment for not less than six month unless a period of five years has elapsed since his release - Respondent no. 9 was convicted u/s 326 IPC for the period of three years on 28/9/2000 remained in custody till 2003 - There after on 26/12/2004 filed nomination papers for member of Janpad Panchyat and elected as president in January, 2005 - At the time of filing nomination paper he was not qualified to contest - Cease to continue to hold the post of president of Janpad Panchayat. (Paras 8 & 9)

B. False affidavit before HC - Respondent No. 9 filed affidavit on 23-10-07 stating that his appeal against conviction is still pending before HC - However appeal was dismissed on 24-04-02 - HC deprecate the conduct of respondent no. 9. (Para 11)

C. Criminalization of Politics - Any form is impermissible in democracy - The Citizens in democratic setup should not be compelled to suffer criminalization on the ground that they are helpless = A convict cannot be allowed to occupy an elected post where a statute clearly prohibits. (Para 11)

Case Referred :

(2004) 10 SCC 443

Shashank Shekhar, for the petitioner.

V.K. Shukla, Deputy Advocate General for the respondent nos. 1,2,3,4,7 & 8

M.L. Bhati, for the respondent no. 9.

O R D E R

The Order of the Court was delivered by **Dipak Misra, J.** :–The petitioner, a resident of village Shahpura Bhitoni, District Jabalpur, a social worker and a voter of Shahpura Panchayat as a pro bono publico has preferred this writ petition for debarring the respondent no.9, Gulab Singh Gond, from continuing on the post of President, Janpad Panchayat, Shahpura as he is not entitled to continue on the said post because he has incurred the disqualification as envisaged under section 36(1)(a)(ii) of the M.P. Panchayat Evam Gram Swaraj Adhiniyam, 1993, (for brevity 'the Act').

2. At the very outset we are obliged to state that colossal objections were raised by Mr.Bhatti, learned counsel appearing for the ninth respondent about the locus standi of the petitioner and immense emphasis was put on the language

*W.P. No. 9749/2007

employed under section 36 requiring this court to place an interpretation on the said language to highlight that the structure which is sought to be built by the petitioner relating to the disqualification of the said respondent is absolutely misconceived being shorn of any infrastructure or foundation and further the petitioner has invoked the extra-ordinary jurisdiction of this court to wreak personal vengenence in the guise of filing a public interest litigation putting forth an adroit stand that he is a public spirited person.

3. Be it noted, when the hearing commenced the learned counsel for the respondent propounded with immense astuteness that the said respondent no.9 cannot be put into the category of a disqualified person under the aforesaid provision and such a stand was taken on the base that purposive interpretation has to be given to the term 'release', used in the said provision, but, Mr.Shashank Shekhar, learned counsel appearing for the petitioner brought to our notice that the stand and the proponement canvassed on behalf of respondent no.9 have to be thrown overboard because he has not stated the real facts before this court and deliberate suppression is writ large in the asseverations made in paragraph 9 wherein it has been mentioned with imprudence that the Criminal Appeal No.2573/07 preferred by the said respondent is still pending adjudication before this court. The said affidavit has been filed on 23.10.07.

4. To appreciate the lis in question it is apposite to note certain dates. Respondent no.9 filled up nomination papers for member of Janpad Panchayat, Shahpura on 26.12.2004 and the election thereof was held in January, 2005. Thereafter, the said respondent was elected as the President of Janpad Panchayat, Shahpura in the year 2005.

5. The question that emerges for consideration is whether the said respondent is disqualified or not as per the said provision. In this context we may refer with profit to section 36(1)(a) which reads as under :

> "36(1)(a) No person shall be eligible to be an office-bearer of Panchayat who- (a) has, either before or after the commencement of this Act, been convicted :-
>
> (i) of an offence under the Protection of Civil Rights Act, 1955 or under any law in connection with the use, consumption or sale of narcotics or any law corresponding thereto in force in any part of the State, unless a period of five years or such lesser period as the State Government may allow in any particular case has elapsed since his conviction; or
>
> (ii) of any other offence and had been sentenced to imprisonment for not less than six months, unless a period of five years or such less period as the State Government may allow in any particular case has elapsed since his release.....;

6. Mr.Shashank Shekhar, learned counsel for the petitioner has invited our attention to section 36(1)(ii) to buttress the submission that a person shall not be eligible to be an office-bearer if he is convicted for any offence and has been

sentenced to imprisonment for not less than six months unless a period of five years or such less period as the State Government may allow in any particular case since his release.

7. The respondent, as is beyond dispute, was convicted under section 326 of the I.P.C. and section 25 of the Arms Act. He was sentenced to rigorous imprisonment for a period of three years and to pay a fine of Rs.500/- on the first count and rigorous imprisonment for a period of one year and fine of Rs.100/- on the second score. This court on 16.10.2000 suspended the sentence and released him on bail. On 24.4.02 this court dismissed the appeal by recording as under :

> "It is submitted on behalf of appellant Gulab @ Annilal that though bail was granted to him he did not furnish the bail and he has completed the sentence imposed upon him by the trial court. Learned counsel for the appellant does not press this appeal. It is, therefore, dismissed".

8. In view of the aforesaid the concept of 'release' that was endeavoured to be scanned by Mr.Bhatti remains in the realm of much ado about nothing as the said respondent has remained in custody for a period of three years and was not released. It is worth nothing here that the respondent no.9 was convicted by the judgment dated 28.9.2000. The same is perceptible from the judgment passed in Criminal Appeal. We would be failing in our duty if we do not state that, as it was mentioned before us that the appeal of the respondent no.9 was dismissed, we called for the record and perused the order.

9. The election was held for the post of member in the year 2004 and that of President in 2005. On a bare reading of section 36(1)(a)(ii) it is quite clear that a person will not be eligible to hold a post for a period of 5 years if he has been convicted for not less than six months. In the case at hand the respondent no.9 was convicted for a period three years. He remained in custody, as is patent, till 2003. He could not have contested till 2008. Yet, for unexplainable reasons, he was allowed to contest and also got elected. Thus indubitably he is disqualified to be in the office in question.

10. Ordinarily so holding we would have parted with the case but an eloquent and significant one, we are compelled to observe certain aspects. In a court of law a litigant is required to come with clean hands. There cannot be any denial that the duty of justice is to search for truth. Not for nothing it has been said that justice is the candle of truth and, by no stretch of imagination, the power of truth should be allowed to be corroded or marred. Its light should never be extinguished. Though the respondent no.9 very well knew that he had spent three years in custody, yet he suppressed the fact before this court that the criminal appeal preferred by him is subjudice. This is not only a blatant lie but also an unscrupulous assertion to pyramid the contention which is absolutely in the realm of impermissibility. We cannot be oblivious of the fact that the respondent no.9 has been elected as the President of Janpad Panchayat. Janpad Panchayat has its own significance in a democratic polity. A person who has been elected to the said post has made an effort to succeed by taking recourse to such a stand.

11. It is condign to state here that the politics neither at the grass root level nor at any level can be allowed to have any nexus with criminalization. Criminalization requires to be ostracized from the periphery of body polity. The citizens in democratic set up should not be compelled to suffer criminalization on the ground that they are helpless. A convict cannot be allowed to occupy an elected post where a statute clearly prohibits. In this context, we may refer with profit to the decision rendered in *Ram Udgar Singh Vs. State of Bihar,* (2004) 10 SCC 443 wherein their Lordships have stated thus :

> Politics, which was once considered the choice of noble and decent persons is increasingly becoming a haven for law breakers. The 'Nelsons' eye' turned by those wielding power to criminalisation of politics by their solemn and determined patronage and blessings by vying with each other has been encouraging and facilitating rapid spread and growth with rich rewards and dividends to criminals. The alarming rate of social respectability such elite gangsterism gaining day by day in the midst of people who chose and had given unto themselves the right to elect their rulers, mostly guided by misdirected allegiance to party politics and self oriented profit making endeavours seem to provide the required nectar for its manifold and myriad ways of ventilation with impugnity. Though it is an irony, yet accepted truth is that the 'Home rule' we could achieve by 'non-violence' has become the root cause for generating 'homicidal' culture of political governance effectively shielded by unprincipled mass sympathies and highly profit-oriented selfish designs of unscrupulous 'people' who have many faceted images to present themselves at times to the extent of their deification. For some it brings seal for respectability and for some others, it is intended to be used as a shield for protection against law enforcing agencies and that is how reports of various Commissions and Committees have become sheer cry in wilderness.

We have referred to the aforesaid passage to highlight that the criminalization of politics by any form is impermissible in democracy which is the basic feature of our Constitution. We would have thought of directing prosecution against him for filing a false affidavit before this court but we restrain ourselves from doing so. We only deprecate the conduct of the respondent no.9.

12. In view of our aforesaid analysis, the respondent no.9 ceases to continue to hold the post of President of Janpad Panchayt, Shahpura and direct the Commissioner, Jabalpur and the Collector, Jabalpur to see that he does not hold the said post even for a single day. The competent authority shall take prompt steps to fill up the vacancy as per law.

13. Resultantly, the writ petition is allowed. There shall be not order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 495
WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice S.C. Sharma

31 January, 2008

APL INTERNATIONAL LIMITED ---Petitioner*

Vs.

STATE OF M. P. & 3 ors. ---Respondents

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994) - Section 75 (First Proviso) - Duty of Bank towards account holder - On the instructions of Registrar of Stamps, Bank had debited in petitioner's account 1% additional duty i.e. Rs. 6,97,000/- - In view of the amendment in Section 75 of Act additional duty shall not exceed the amount of stamp duty payable thereupon - Bank has no authority either under Contractual Law or under Bank Laws to deduct any amount without giving prior information to account holder (petitioner) - Any adjustment without prior information to account holder (petitioner) in fact some times may amount to misappropriation and breach of trust - High Court directed the Bank to repay amount which was in excess of liability with interest to petitioner. (Paras 9 & 10)

Case referred :

2003(1) MPJR SN 62

Kishore Shrivastava with *Ankur Shrivastava,* for the petitioner,
Samdarshi Tiwari, G.A. for the respondent Nos. 1 to 3,
Wajid Hyder, for the respondent No.4.

ORDER

The Order of the Court was delivered by

R. S. GARG, J :-The petitioner being aggrieved by the circular letter dated 31.5.1995 (Annexure P/1) addressed by the respondent no.2 to all the District Registrars, Collector of Stamps and Sub Registrars in the State of Madhya Pradesh and also being aggrieved by the letter dated 24.3.2000 addressed by respondent no.4 State Bank of Indore to the petitioner (Annexure P/2) is before this Court with a submission that provisions contained in Section 75 of Madhya Pradesh Panchayat Raj Awam Gram Swaraj Adhiniyam, 1993 (Panchayat Raj Act for short) are *ultra vires* the Constitution, the respondent no.2 i.e. Inspector General of Registration and Superintendent of Stamp had no authority to issue the circular letter no.1964 dated 31.5.1995 (Annexure P/1) to other authorities to recover 1% duty in addition to stamp duty nor the respondent/Bank had any authority under the law to deduct a sum of Rs.6,97,000/- from petitioners C.D. account towards cost of Panchayat duty on mortgage created in favour of the bank without issuing any notice to the petitioner or without affording any opportunity of hearing and without looking into the notification of the State Government issued on 29.12.1990 which was fixing a cap of Rs.50,000/-.

*W.P. No. 3855/2000 (Jabalpur)

2. It is conceded before us that challenge to the vires of Section 75 amended so also un-amended of the Panchayat Raj Adhiniyam has been rejected by this Court in the matter of *M/s. Vikas Concrete Industries Vs. State of M.P.* 2003(1) MPJR SN 62 (W.P. No.4854 of 1999 (Jabalpur) decided on 7.2.2003). In view of the said judgment Shri Shrivastava, learned Senior Counsel fairly concedes that question of the vires does not survive for consideration as the matter is no more res integra. Submission of Shri Shrivasvata however is that once the State Government exercising its powers under Section 9(1)(a) of the Indian Stamp Act, 1899, reduced, remitted or compounded the stamp duty then such duty as reduced by the State Government shall only be levied. According to him the notification dated 29.12.1990 clearly provides that equitable mortgage by surrender of title deeds if is beyond the value of Rs.50,00,000/- then the maximum stamp duty payable would be Rs.50,000/-. He also submits that Section 75 though at one side provides that the duty imposed under the Indian Stamp Act shall stand increased by 1% on the value of such property or in the case of mortgage on the amount secured by the instrument but the first proviso clearly provides that such extra stamp duty levied in respect of mortgage shall not exceed the amount of stamp duty thereupon. According to him if the stamp duty cap is fixed at Rs.50,000/- then the extra stamp duty to be recovered under Section 75 of Panchayat Raj Act could not be more than Rs.50,000/-.

3. Shri Samdarshi Tiwari, learned counsel for the State conceded to the legal position and submitted that if the stamp duty stands reduced to Rs.50,000/- then the additional stamp duty to be levied would not exceed the amount of the stamp duty which in this case would be Rs.50,000/- only.

4. Shri Wajid Hyder, learned counsel for the respondent no.4 State Bank of Indore however submitted that the Registrar of Stamp had informed them to recover the additional duty at 1% and as the additional charge was created in the property somewhere in the year 1994 when the cap under Section 75 of the Panchayat Act had not come in force they were obliged and duty bound to deduct the amount. On being asked that what were the instructions and what document had been filed to support this tall claim learned counsel for the Bank submitted that the respondent no.4 Bank has not filed any reply, return or counter affidavit.

5. Shri Wajid Hyder, learned counsel however also submitted that as the additional charge was for an amount of Rs.6,97,00,000/- (Rupees six crores ninety seven lacs only) was created in 1994 and as the maximum cap came in force under Act No.2 of 1997 w.e.f. 7.1.1997 Bank was absolutely justified in deducting the amount.

6. In the matter of *M/s. Vikas Concrete Industries* (supra) a Division Bench of this Court had clearly observed that the proviso to Section 75 only adds a further maximum cap to 1% which is an additional duty in the realm of rate. The Division Bench also observed that the notification issued under Section 9 was a beneficial legislation putting a cap on the limit of payment of the stamp duty. The Division Bench also held that where the maximum leviable stamp duty was Rs.50,000/- then the duty leviable under Section 75 would not exceed Rs.50,000/-.

They also observed that amendment to Section 75 of Panchayat Raj Adhiniyam would have retrospective effect.

7. In view of the said Division Bench judgment it is clear that the maximum cap on recovery of the stamp duty is Rs.50,000/- and recovery of the additional duty under Section 75 of the Panchayat Act would also be limited Rs.50,000/-.

8. In absence of any document asking the respondent no.4 to deduct the amount of 1% we are unable to accept the contention made by Mr. Wajid Hyder.

9. The submission that the loan was taken in the year 1994 or the limit was extended in the year 1994, therefore, the duty leviable in the year 1994 was chargeable. Unfortunately the argument raised by Mr. Wajid Hyder loses sight of the fact that the deduction was not made in the year 1994 or before 7.1.1997 before the first proviso was introduced to Section 75 of the Panchayat Act. If such was the case then the Bank had a reasonable reason and sufficient cause to say that they did not commit a lapse either in their work or in their service because prior to 7.1.1997 the Bank was obliged to recover 1% additional duty on the valuation of the property or on the amount secured by the mortgage. The Bank in fact had debited the said amount of Rs.6,97,000/- somewhere in the year 2000 and immediately informed the petitioner vide their letter dated 24.3.2000 (Annexure P/2) that they had debited the C.D. Account by an amount of Rs.6,97,000/-.

10. In the year 2000 the first proviso to Section 75 was in operation. If the Bank wanted to recover 1% additional stamp duty even after amendment of Section 75 of the Panchayat's Act then they were obliged and duty bound to issue a notice to the petitioner that why such amount be not debited. In any case the action taken by the Bank was to lead to civil consequences and the petitioner's account was to be debited by a sum of Rs.6,97,000/-. A Bank cannot act like a ordinary creditor. It cannot act like Merchant of Venice. When people bank upon a Bank, then the Bank must show that it is worth banking. Simply because money of some people or some account holder is lying with the Bank, the Bank has no authority either under the contractual law or under the Bank laws to deduct any amount without giving prior information to the account holder and a notice to show cause. Such adjustments without prior information to the account holder in fact and sometimes may amount to misappropriation and breach of trust. In a given case when a customer/account holder issues instruction to the Bank to do a particular act then the Bank is obliged to act in accordance with such instructions and if the Bank does not wish to observe such instructions then the Bank is obliged to inform the customer that for one reason or the other or because of the legal embargo the Bank would not observe the instructions. A customer may issue some standing instruction to the Bank to do some acts, such as collecting bills, making payment of the bills, deducting the amount for services provided by them etc. In case the instructions are issued to the Bank to deduct any amount as the Bank wants then such instructions would bind the customer otherwise ordinarily the Bank relations would bind the Bank and the customer. If the customer does not give any authority to the Bank to deduct a particular amount and pay to a third party then the Bank is not entitled nor authorized to deduct the amount and make

the payment to the third party. It would altogether be a different thing that if under some Act or law an authority can direct the Bank to freeze the account or make payment to such authority then the Bank would be obliged to honour and observe the directions issued by such authority. In the present case unfortunately and for the reasons best known to the Bank they have not filed any document or instruction/letter to prove that the Registrar, or the Inspector General of Registration and Superintendent of Stamp ever asked the Bank to recover a sum of Rs.6,97,000/- and make payment from the account of the Bank and pay the same to the State exchequer.

11. In the present matter the Bank also cannot take shelter under their ignorance that they did not know about amendment in Section 75 of the Panchayat Act. If the law says that everybody knows law then a Bank which is governed by different laws and has the assistance of battery of lawyers cannot be allowed to say that the law was not in their notice or was not brought to their notice or there was no law. If first proviso to Section 75 provided that extra stamp duty levied in respect of mortgage shall not exceed the amount of stamp duty on the document, then the Bank was not obliged even to honour the instructions issued to them by the Registrar. The money lying in deposit with the Bank did not belong to the Bank, it was money of the customer. The Bank was a trustee and caretaker of the same.

12. In view of the judgment in the matter of *M/s. Vikas Concrete Industries* supra we must hold that the maximum stamp duty leviable could not exceed Rs.50,000/- and accordingly the extra stamp duty leviable under Section 75 of Panchayat's Act could not exceed the amount of Rs.50,000/-.

13. We must hold that the Bank acted in an highhanded manner and, without taking the customer in confidence debited the account by sum of Rs.6,97,000/- and paid the said amount to the State exchequer.

14. Shri Wajid Hyder, learned counsel for the respondent Bank submitted that the Bank would refund the amount to the petitioner only after the money is paid back to the Bank by the State Government. According to him the Bank acted bonafidely and, therefore, the Bank be not asked to refund the money.

15. Shri Shrivastava, learned counsel for the petitioner however submitted that the petitioner be not asked to recover the money from the State Government and if the illegal deduction was made by the Bank then the Bank must take steps to correct the wrong. According to him if the Bank had deducted the amount without any authority of law then the Bank must refund the amount along with interest over it with the rate on which the Bank recovers the money from the bebtors.

16. After hearing learned counsel for the parties we must accept the submissions made by Shri Shrivastava, learned Senior counsel for the petitioner. If the Bank had deducted the amount of Rs.6,47,000/- in excess of the liability of the petitioner that too without any authority of law then Bank has to repay the money with interest at the rate of 9% with quarterly interest in favour of the petitioner either by refunding the amount in cash or by making a credit entry in the accounts of the

petitioner if the petitioner still holds an account with the Bank. It is expected of the Bank that within a period of two months from today the Bank would take necessary steps. In case the Bank does not take appropriate action as directed aforesaid then the Bank shall be liable to pay 15% compound interest from the date of this order till the amount is paid or entry is made.

17. In view of the judgment in the matter of *M/s. Vikas Concrete Industries* supra as the State is not entitled to recover anything beyond Rs.50,000/- under Section 75 of the Panchayat's Act the Bank would be entitled to make an application to the concerned competent officer of the State Government for refund of the money. If such an application is filed by the Bank then the State Government and its officers without showing any undue lethargy shall dispose of the said application within a period of three months from the date of submission of the application along with a copy of this order.

18. The petitioner shall also be entitled to its costs quantified at Rs.5,000/-.

Order accordingly.

I.L.R. [2008] M. P., 499
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha
5 February, 2008

SUMAN ---Petitioner*
Vs.
STATE OF M.P. & anr. ---Respondents

A. Constitution of India, Article 226, Ordinance of Dr. Harisingh Gour Vishwavidyalaya, Ordinance 5.22(2) - Academic Issue - Petitioner applied for revaluation of subject - On revaluation two different examiners given different marks i.e. 58 and 45 - As per provision of Ordinance No. 5.22(2) Petitioner was given 45 marks in revaluation - Petitioner challenged this by way of Writ Petition, Writ Appeal and SLP but could not get any success - In present petition constitutional validity of Ordinance 5.22(2) challenged - Held - Challenge to constitutional validity of Ordinance cannot confer any benefit to Petitioner as the controversy of revaluation as far as Petitioner is concerned has been put to rest - Issue has become totally academic, therefore does not deserve advertence - Petition dismissed. (Paras 12 & 15)

B. Imposing costs. - Personal anxiety should not be permitted to create a concavity in the justice dispensing system, for such litigants irrefragably waste the time of Court and also pave the path of abuse of the process of law - Compelled to impose costs of Rs 5000/-. (Para 16)

Cases Referred :

(1997) 8 SCC 31, 1960 SC 378

M.L. Sharma, for the petitioner

*W.P. No. 12093/2007 (Jabalpur)

Deepak Awasthy, G.A. for the respondent No.1,
Harvinder Singh, for the respondent No.2

ORDER

The Order of the Court was delivered by DIPAK MISRA, J.:– The present writ petition preferred under Article 226 of the Constitution of India frescoes a flummoxed picture and exposits a scenario which can be stated without fear of any contradiction that there is an adroit endeavour on the foundation of self-convinced remonstrance by the petitioner to accomplish not only a misconceived but also, in a way, implausible result. The pleadings, as we perceive, are nebulous and mercurial from which it is extremely difficult to discern and 'come right on the marrow of the case'. It has the effect potentiality to create a maze. It is, we are disposed to think, due to preconceived and predetermined propensity and ingenuity of the petitioner which reflects her incurable ambition based on fallacious conception of justice as if justice is sans law. True it is, justice is not divorced from mercy but mercy cannot be the sole and lone governing factor. As it appears the petitioner has persuaded herself by exclusive aspiration and interest and not by reason in the remotest sense.

2. We have commenced with the aforesaid prefatory note inasmuch as in a confused state of pleadings one thing alone is clear that the petitioner, a student of LL.B.-II has prayed for various reliefs which are not only manifold or multi-fold but have their own bizzare characteristics. She has prayed for declaring the Ordinance No.5.22 (2) of the Dr. Harisingh Gour Vishwavidyalaya as unconstitutional, to quash the revaluation result in LL.B.-II examination of March-April, 2006 due to fraud played by the respondent University, for issue of direction registering a criminal case against the accused persons and to award maximum marks to the petitioner in the subject in question.

3. It is apposite to mention here that the petitioner had appeared in LL.B.-II examination conducted by the respondent University and her result was declared in June, 2006. Being dissatisfied with the marks in the subject of Jurisprudence and Interpretation of Statutes she applied for revaluation. The revaluation was done and result thereof was declared and eventually in the subject of Interpretation of Statute she was given 45 marks as against 44 marks allotted to her in the main examination.

4. The petitioner was grieved by the award of the marks on revaluation which impelled her to invoke the inherent jurisdiction of this Court in Writ Petition No.14649/2006. The matter was heard by a learned single Judge of this Court and he observed that the first examiner of the revaluation allotted 58 marks and the second examiner of revaluation allotted 45 marks to the petitioner and hence, she was allotted 45 marks as per the Ordinance No.5.22 (2). Being of this view the learned single Judge did not find any fault in the revaluation and dismissed the writ petition.

5. The petitioner preferred writ appeal No. 509/2007 which faced dismissal. As averred in the petition, a Special Leave Petition was filed but the same was also dismissed.

6. After taking such recourse the present petition has been filed seeking reliefs as mentioned hereinabove.

7. We have heard Mr. M.L. Sharma, learned counsel for the petitioner and Mr. Deepak Awasthy, learned Government Advocate for the State and Mr. Harvinder Singh, learned counsel for the respondent No.2.

8. To appreciate the controversy it is seemly to reproduce Ordinance 5.22 (2) which reads as under:

> "If the marks awarded in the paper by any of the two examiners varies from the marks given by the original examiner by more than 10% of the maximum marks in the paper, the average of the marks awrded by two of the examiners, the original examiner and the two revaluer and nearest to each other will be then to represent at the "correct valuation". This average of marks will be awarded to candidate for the revision of his result.
>
> Provided that subject to conditions that at least one of the variation from the original marks is more than 10% of the maximum mark in the paper, if two differences in marks allotted by the three examiners are equal, the two marks to the advantages of the candidate shall be taken into account for arriving at the correct valuation. If the average marks are more than 20% of the maximum marks, answer book will be sent to the third examiner with original obtained marks along with marks given by the first and second examiner of revaluation and marks given third examiner will be awarded."

9. We would like to mention that the question that falls for consideration is whether this Court should address itself to the constitutional validity of the Ordinance. Submission of the learned counsel for the petitioner is that relying on the said ordinance the writ petition, the writ appeal and the SLP were dismissed though the said ordinance is totally invalid and unconstitutional. Learned counsel would submit that the ordinance itself is contradictory and further the marks have been fabricated and forged.

10. Learned counsel for the respondent, per contra, submitted that the petitioner could have challenged the constitutional validity of the ordinance on earlier occasion but she had chosen not to do so. It is proponed by them that no relief can be granted to the petitioner as the controversy has already been put to rest in the earlier writ petition and, therefore, the issue has become academic.

11. To appreciate the submissions raised at the Bar we have carefully persued the order passed in Writ Petition No.14649/2006 as the said file was called for by us. We have also bestowed our anxious consideration and perused the pleadings. On a scrutiny of the pleadings we notice that a number of allegations have been made with regard to forgery committed by the respondent No.2. We fail to fathom how the said allegations would aid and assist the petitioner to assail the constitutional

validity of the Ordinance. The said aspect possibly could have been highlighted in the first writ petition. But, that was not done.

12. Quite apart from the above, the matter had travelled to the Apex Court and the petitioner was not granted any relief and revaluation conducted by the University was found to be correct. The challenge to the constitutional validity of the Ordinance, at present, cannot confer any benefit to the petitioner inasmuch as the controversy of revaluation as far as the petitioner is concerned has been put to rest. Thus, the issue has become totally academic.

13. In this context we may refer with profit to the decision rendered in *Central Areca Nut & Cocoa Marketting & Processing Cooperative Ltd. Vs. State of Karnataka and Others,* (1997) 8 SCC 31 wherein it has been held as under:

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

Thereafter their Lordships proceeded to state as follows:-

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

Again their Lordships in paragraph 8 held as under:-

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

14. In *State of Bihar Vs. Rai Bahadur Hurdut Roy Moti Lall Jute Mills,* AIR 1960 SC 378 the Apex Court has observed that the courts are and should be reluctant to dwell upon the constitutional validity of the matters of merely academic importance.

15. As no relief can be granted to the petitioner from any score, we are indubitable, that the issue is absolutely academic and does not deserve advertence by us.

16. Consequently, the petition, being devoid of merit, stands dismissed. Ordinarily we would have restrained ourselves from imposing costs keeping in view the anxiety of the petitioner, but, an eloquent one, a litigant can afford to be anxious to

a permissible extent. Anxiety has its own limits. Personal anxiety should not be permitted to create a concavity in the justice dispensation system, for such litigations irrefragably waste the time of court and also pave the path of abuse of the process of law. Thus, ostracizing and abdicating our restraint we are compelled to impose costs of Rs.5,000/-(Rupees Five Thousand).

Petition dismissed.

I.L.R. [2008] M. P., 503
WRIT PETITION

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

MOHD. RIYAZ & anr. ---Petitioners*
Vs.
STATE BAR COUNCIL & ors. ---Respondents

A. Advocates Act (25 of 1961), Rules of 1963 and Service Rules of 1975 - Prior general law stands repealed by a subsequent particular law - Rules of 1963 are general rules - Whereas Service Rules of 1975 are particular rules regarding service conditions of staff of Bar Council - These particular rules having been made later than the general rules of 1963 - Will have the effect of repealing Chapter II of the rules 1963, which earlier provided for conditions of service of staff of Bar Council. (Paras 5 to 8)

B. Advocates Act (25 of 1961), Service Rules of 1975 - Rule 5 - Age of retirement of Secretary of Bar Council - Rule 5 provided age of retirement 58 years for "staff" - Staff not defined in rules - Have the same meaning as it has in Section 11 of Act i.e. staff include Secretary of Bar Council - Therefore his age of retirement is 58 years. (Para 9)

C. Advocates Act (25 of 1961), Service Rules of 1975 - Rule 31 - Wherever rules are silent on any matter, rules in that regard applicable to the "employees" of High Court in the same "cadre" shall be applicable.

(i) Expression "Employee" - Has not been defined in rules - Secretary has been equated with the other employees of Bar Council by Section 15 (2)(k) of Act - Secretary draws his salary from Bar Council and is under the control of Bar Council - Therefore Secretary is employee of Bar Council.

(ii) Expression "cadre" - Bar Council as the employer to decide what would be the equivalent cadre for Secretary - As per the resolution of Bar Council, Secretary has been treated at par with an Additional District Judge (equivalent to Additional Registrar of High Court). (Paras 10 & 11)

K.K. Trivedi, for the petitioner No.1,

*W.P. No. 12019/2006 (Jabalpur)

Rajendra Tiwari with *Nikhil Tiwari,* for the respondent Nos. 1 & 2,
Ajay Pratap Singh, for the respondent No.3,
R.L. Gupta, for the respondent No.4,
K.S. Wadhwa, Imtiaz Husain & Sameer Seth for the respondent No.7

JUDGMENT

The Judgment of the Court was delivered by **A.K. PATNAIK, C. J.** :–The petitioner No.1 is a practicing lawyer and is registered as an Advocate in the rolls of the State Bar Council of Madhya Pradesh (for short 'the State Bar Council'). He has filed this writ petition as a Public Interest Litigation contending *inter alia* that the respondent No.7, who is working as Secretary of the State Bar Council has already attained the age of superannuation but is still being continued by the State Bar Council and that he is being paid salary much in excess of what is permitted under the rules. The petitioner has therefore prayed that this Court should issue a writ/direction to the State Bar Council to remove the respondent No.7 from the post of Secretary of the State Bar Council forthwith and for a further writ/direction to the State Bar Council and its Chairman to recover all payments towards salary made to the respondent No.7 in excess of what is permitted under the rules and all payments of salary made to respondent No.7 after the age of his superannuation.

2. Mr. K.K. Trivedi, learned counsel for the petitioner submitted that the State Bar Council in exercise of its powers under Section 15 and other relevant provisions of the Advocate Act, 1961 (for short 'the Act') has made rules with the approval of the Bar Council of India in the year 1963 (hereinafter called 'the Rules of 1963'). He submitted that Chapter II of the Rules of 1963 provides for appointment of a Secretary, Accountant, Clerks and Peons by the State Bar Council as well as the qualifications and conditions of service of the stipendiary Secretary and other members of the staff. He submitted that in Rule 2 of Chapter II of the Rules of 1963 it is provided that the Secretary shall be a full time employee of the Bar Council and shall draw salary in the scale of Rs.300-25-800/- and benefits of provident fund and leave salary at such rates as are admissible under the rules. He submitted that the Rule 2 of the 1963 Rules further provides that the Secretary shall retire on attaining the age of 55 years provided the Bar Council may in case of the Secretary otherwise physically fit extend his tenure for a period of three years. He submitted that sub-section (3) of Section 15 of the Act provides that the no rules made under Section 15 of the State Bar Council shall have effect unless they have been approved by the Bar Council of India. He submitted that the Rules of 1963 have been approved by the Bar Council of India, and cannot be altered without the approval of the Bar Council. He vehemently submitted that notwithstanding the aforesaid provisions in the Rules of 1963 that the Secretary of the Bar Council will draw salary in the scale of Rs.300-25-800 and that he will retire at the age of 55 years, the State Bar Council has fixed the basic pay of the respondent No.7 at Rs.34,750/- and reduced the same to Rs.27,400/- subsequently and has continued the service of the respondent No.7 beyond 57 years. The respondent No.4 adopted the aforesaid submissions made by Mr. Trivedi.

3. Mr. Rajendra Tiwari, learned Senior Counsel, appearing for the respondents No.1 and 2, on the other hand, submitted relying on the return filed by respondents No.1 and 2 that the State Bar Council has made Service Rules in the year 1975 (hereinafter called 'the Service Rules of 1975') which were approved by the Bar Council of India in its Resolution No.86/1975 dated 31.5.1975 and Rule 5 of the Service Rules of 1975 provides that the age of retirement of the members of the staff shall be 58 years. He submitted that the Service Rules of 1975 do not make any provision regarding pay-scales of the members of the staff but Rule 31 of the Service Rules of 1975 provides that wherever Service Rules of 1975 are silent in any matter, the rules in that regard applicable to the employees of the High Court Madhya Pradesh in the same cadre shall be applicable to the employees of the State Bar Council. He submitted that in accordance with Rule 31 of the Service Rules of 1975, the staff of all the grades of State Bar Council are being paid the salary as applicable to the staff of the High Court of Madhya Pradesh. He further submitted that by resolution dated 13.11.1978 the State Bar Council has resolved that the pay-scale of the Secretary will be at par with the Additional District Judge and the pay-scales of the remaining employees of the Bar Council shall be equivalent to the pay-scales of the corresponding grade of the employees of the High Court. He further submitted that this resolution has come into force from 1.1.1979 and in accordance with the resolution, the respondent No.7 is being paid the pay-scale of an Additional District Judge as recommended by the Shetty Commission. Mr. Tiwari argued that the Service Rules of 1975 will prevail over Chapter II of the Rules of 1963 containing the conditions of service of the Secretary of the Bar Council and other members of the staff of the Bar Council.

4. Mr. K.K. Trivedi, learned counsel for the petitioner and the respondent No.4 in their rejoinder contended that the Rules of 1963 are still in force and are applicable. Mr. Trivedi in particular submitted that Service Rules of 1975 are applicable to the staff of the State Bar Council but do not apply to the Secretary of the State Bar Council. He submitted that assuming that some provisions of the Service Rules of 1975 are applicable to the Secretary of the State Bar Council, Rule 5 which provides that the age of retirement of the members of the staff shall be 58 years is applicable to only the staff and not to the Secretary of the State Bar Council. Mr. Trivedi further submitted that Rule 31 of the Service Rules of 1975 is not applicable to the Secretary of the Bar Council inasmuch as Rule 2 of the Rules of 1963 specifically provides for salary of the Secretary and it stipulates that the Secretary shall draw salary in the scale of Rs.300-25-800 and therefore Rule 31 of the Service Rules of 1975 has no application.

5. We are unable to accept the aforesaid submissions of Mr. Trivedi and the respondent No.4. A settled principle of interpretation of statute is that a prior general law stands repealed by a subsequent particular law. In 'Principles of Statutory Interpretation 11th Edition 2008 by Justice G.P. Singh, this principle of statutory interpretation has been explained at page 648 thus :

> "A prior general Act may be affected by a subsequent particular or special Act, if the subject-matter of the particular Act prior to

its enforcement was being governed by the general provisions of the earlier Act. In such a case the operation of the particular Act may have the effect of partially repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases."

6. The Rules of 1963 have been made under Sections 15(1) & (2) and 28(1) & (2) read with Sections 9, 10, 11,12,17,21, 25 and 26 of the Advocates Act, 1961. Chapter I of 1963 Rules provides for different Committees namely the Executive Committee, the Enrolment Committee, the Disciplinary Committees, the Finance Committee, the Examination Committee, the Rules Committee, the Legislation or Reforms Committee and the Privileges Committee and is relatable to Section 9 of the Act. Chapter II of the Rules of 1963 provides for staff of the Bar Council and the qualifications and conditions of service of the Secretary, Accountant and other members of the staff of the State Bar Council and is relatable to Section 11 of the Act. Chapter III is titled Accounts & Audits and is relatable to Section 12 of the Act. Chapter V is titled Rules for meetings of the Bar Council, Chapter VI is titled Rules common to all committees, Chapter VII is titled the Executive Committee, Chapter VIII is titled the Enrolment Committee, Chapter IX is titled the Disciplinary Committee, Chapter XII is titled Rules Committee, Chapter XIII is titled Legislation & Law Reforms Committee, Chapter XIV is titled the Privileges Committee, Chapter XV is titled Miscellaneous, Chapter XVII provides for powers and duties of the Chairman and Vice Chairman of the State Bar Council, Chapter XVIII provides for election of Chairman and Vice-Chairman, Chapter XIX is titled Management & Investment of the Funds of the Council, Chapter XX relates to enrolments of the advocates, Chapter XXI is titled conditions of enrolment, Chapter XXII deals with rights and authorities of the members of the Bar Council. The Rules of 1963 are therefore general rules made by the State Bar Council under sub-section (2) of Section 15 of the Act which confers powers on the State Bar Council to make rules on various matters enumerated therein.

7. A reading of the Service Rules of 1975 would show that the Service Rules of 1975 provide for different service conditions of the staff of the Bar Council of India. It provides for the duties hours, the age of retirement, the powers of the Chairman in disciplinary matters, the administrative control of the Secretary over the members of the staff, the administrative control over the Secretary of the Executive President and the acts and omissions on the part of the employees which would amount to misconduct, the punishment for minor and major misconduct, the manner in which proceedings for misconduct will be initiated and concluded, different types of leave available to the Secretary and staff of the Bar Council, the traveling allowance and daily allowance to be paid on tour to the different members of the staff, festival advances to be paid to the permanent employees of the Bar Council, advance for purchase for bicycle to the members of the staff, advance to be paid against provident fund, house rent allowance, medical allowance etc. Rule 31 of the Service Rules of 1975 provides that where Service Rules of 1975 are silent in any manner, the rules applicable to the employees of High Court

of Madhya Pradesh in the same cadre shall be applicable to the employees of the State Bar Council.

8. It is thus clear that the Service rules of 1975 are particular rules made under clause R of sub-section 2 of Section 15 of the Act prescribing the service conditions of the employees of the State Bar Council. These particular rules having been made later than the general rules of 1963 will have the effect of repealing Chapter II of the Rules of 1963 which earlier provided for conditions of service of the staff of the State Bar Council. Therefore, we do not accept the submission of Mr. Trivedi and the respondent No.4 that the provisions of the 1963 Rules do not stand repealed by the Service Rules of 1975. In our considered opinion, the provisions of Chapter II of the Rules of 1963 stand repealed in so far they are inconsistent with the provisions of the Service Rules of 1975.

9. We now come to the submission of Mr. Trivedi that Rule 5 relating to age of retirement and Rule 31 relating to matters in which the Service Rules of 1975 are silent are not applicable to the Secretary of the Bar Council. Rules 5 of the Service Rules of 1975 is quoted herein below:

> "5. The age of retirement of the members of the staff shall be 58 years, provided that the Council may extend the age of retirement, if it thinks fit, for a total period of two years in the particular case.

It is clear from Rule 5 of the Service Rules of 1975 quoted above that it provides that "the age of retirement of the members of the staff shall be 58 years". The Service Rules of 1975 do not define the expression "Staff". In absence of any such express definition of "Staff" in Service Rules of 1975, the word "Staff" will have the same meaning as it has in the Act. Section 11 of the Act which is titled "Staff of the Bar Council" reads thus:

> "11. Staff of Bar Council.
>
> (1) Every Bar Council shall appoint a secretary and may appoint an accountant and such number of other persons on its staff as it may deem necessary.
>
> (2) The secretary and the accountant, if any, shall possess such qualifications as may be prescribed."

Since Section 11 of the Act makes it clear that the staff of Bar Council will include the Secretary of the State Bar Council, the word "Staff" in Rule 5 will include the Secretary of the Bar Council and therefore Rule 5 of the Service Rules of 1975 will be equally applicable to the Secretary of the State Bar Council and as provided in Rule 5 of the Service Rules of 1975, the retirement age of Secretary of the Bar Council is also 58 years. Respondent No.7 is yet to be 58 years and accordingly no direction or writ can be issued to respondent No.1 and 2 to remove the respondent No.7.

10. Rule 31 of the Service Rules of 1975 is quoted herein below:

> "Wherever these Service Rules are silent in any matter, the rules in that regard applicable to the employees of the High Court of

> Madhya Pradesh in the same cadre shall be applicable to the employees of the Bar Council of Madhya Pradesh."

Rule 31 of the Service Rules of 1975 thus states that wherever the Service Rules of 1975 are silent on any matter, Rules in that regard applicable to the employees of the High Court of Madhya Pradesh in the same cadre shall be applicable to the employees of the State Bar Council. The question is whether the Secretary of the Bar Council is an employee of the State Bar Council. The expression "employee" has not been defined in the Service Rules of 1975. It has also not been defined in Section 2 of the Act. Sub-section 2(k) of Section 15 of the Act however states that a Bar Council may without prejudice to the generality of its powers under sub-section (1) in particular make rules providing for the qualifications and conditions of service of a Secretary, Accountant and other employees of the Bar Council. Hence the Secretary of the Bar Council has been equated with the other employees of the Bar Council by Section 15(2)(k) of the Act. That apart, from the provisions of Section 11 of the Act as well as the Service Rules of 1975 it is very clear that the Secretary of the Bar Council draws his salary from the State Bar Council and is under the control of the State Bar Council as if he was an employee of the Bar Council of Madhya Pradesh. The Secretary of the Bar Council of Madhya Pradesh is thus an employee of the Bar Council to whom the provisions of Rule 31 of the Service Rules of 1975 are applicable.

11. It is for the State Bar Council of Madhya Pradesh as the employer to decide what would be the equivalent cadre for the Secretary of the Bar Council. A resolution has been adopted by the State Bar Council on 31.11.1978 as under:

> "Resolution no.253/78/EC dt. 13/11/78 dt. 13/11/78.
>
> It was resolved that pay scale of the Secretary will be at par with the Additional District Judge and the pay scales of the remaining employees of the Bar Council shall be equivalent to the pay scales of the corresponding grade of employees of the High Court. The Resolution shall come into force from 1.1.1979."

Thus as per the resolution of the State Bar Council, the Secretary has been treated at par with an Additional District Judge (equivalent to Additional Registrar of the High Court) and has been paid pay-scales accordingly. It is not the case of the petitioner No.1 that the respondent No.7 is drawing any pay higher than the pay-scale of the Additional District Judge. Hence, no writ or direction can be issued to the respondents No.1 and 2 to recover any amount paid to the respondent No.7.

12. In the result, we do not find any merit in this writ petition and we accordingly dismiss the same. No costs.

Petition dismissed.

I.L.R. [2008] M. P., 509

WRIT PETITION

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

21 February, 2008

NARMADA BACHAO ANDOLAN ---Petitioner*

Vs.

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

A. Constitution of India - Article 21 - Protection of Life and Personal Liberty - Construction of Omkareshwar Dam - Rehabilitation - Rehabilitation and resettlement of displaced persons being part of fundamental right of displaced persons guaranteed under Article 21 of Constitution - They are to be rehabilitated and resettled in such manner that they are better off than what they were before their displacement - Rehabilitation and resettlement is constitutional obligation of State. (Para 31)

B. Constitution of India - Article 21, Rehabilitation and Resettlement Plan, Paragraph 3,5 - Allotment of agricultural land - When agency undertaking construction of Dam assures in its R & R policy that it will offer agricultural land to displaced persons and later does not offer such agricultural land - Right under Article 21 of Constitution is violated - It is duty of Court to enforce R & R Policy and ensure allotment of agricultural land to displaced persons. (Para 32)

C. Constitution of India - Article 21 - Allotment of agricultural land to landless persons - State Government had decided to give grant of Rs. 49,300 to landless person instead of allotting land to them - Fundamental right under Article 21 not violated - Landless persons not entitled for allotment of agricultural land. (Paras 51, 64(ii))

D. Constitution of India - Article 21 - Allotment of agricultural land - Displaced families and encroachers entitled to allotment of agricultural land - State to make all possible efforts to locate Government or Private Land and allot such land to displaced families and encroachers if they opt for the same and refund 50% of the compensation received by them and if they also agree to other terms stipulated in R & R Policy. (Paras 52, 64(i))

E. Constitution of India - Article 21 - Major Son - Son who has become major on or before the date of notification under Section 4 of Land Acquisition Act will be treated as separate displaced family and would be entitled to allotment of agricultural land as far as possible in accordance with R & R Policy. (Para 64(iii))

Cases Referred :

(2000) 10 SCC 664, (2004) 9 SCC 362, (2005) 4 SCC 32, (1979) 2 SCC 409, AIR 1978 SC 597, (1996) 1 SCC 731, (1996) 2 SCC 549, 2006 (3) MPJR 218, (1998) 4 SCC 117, (2002) 2 SCC 333, 1973 SC 1461, (2002) 9 SCC 232,

*W.P. No. 4457/2007 (PIL) (Jabalpur)

(1994) 3 SCC 1, (1995) 2 SCC 577, (2002) 10 SCC 606, 1986 (Supp) SCC 578, (1977) 3 SCC 592, AIR 1974 SC 1682, AIR 1986 SC 180, AIR 1959 SC 149, (1974) 1 SCC 317, AIR 2006 SC 1489.

Chittroopa Palit & Alok Agrawal, for the petitioner,
R.N. Singh, Advocate General and *Arpan Pawar,* for the respondent No.1,
Ravi Shankar Prasad with *Suparna Shrivastava,* for the respondent No.2.

ORDER

The Order of the Court was delivered by **A. K. PATNAIK, C.J.**:–The petitioner, an organization working for the legal rights of oustee families affected by the large dams in the Narmada Valley, has filed this Public Interest Litigation for appropriate directions for the rehabilitation and resettlement of the oustee families of the Omkareshwar Project in the State of Madhya Pradesh.

Facts of the case

2. The background facts in short are that on 6th July, 1968, the State of Gujarat made a complaint to the Government of India under Section 3 of the Inter-State Water Disputes Act, 1956 stating that a water dispute has arisen between the States of Gujarat, Madhya Pradesh and Maharashtra over the use, distribution and control of water of Narmada, an inter-State river. The Central Government constituted the 'Narmada Water Disputes Tribunal' (for short 'the NWDT') for adjudication of the water dispute, by notification dated 6th October, 1969 and made a reference of the water dispute to the NWDT. The NWDT made an award, called, the 'Narmada Water Disputes Tribunal Award' (for short 'the NWDT award'). The NWDT award inter alia apportioned the utilisable quantum of Narmada water between the States of Madhya Pradesh, Gujarat, Rajasthan and Maharashtra and also provided inter alia for regulatory releases to be made by the State of Madhya Pradesh for requirement of the Sardar Sarovar Project in Gujarat.

3. In November 1993, a detailed project report of the Omkareshwar Dam was prepared by the Government of Madhya Pradesh, Narmada Valley Development Department. In this Project report, Omkareshwar Dam is described as one of the series of major dams to be constructed across the Narmada River for generation of power and for irrigation from the regulatory releases of upstream reservoir which was to ensure supplementary releases to Gujarat to enable use of its share of water as per the directions in the NWDT award and the dam was to be constructed near Mandhata island in the Omkareshwar town in Khandwa district of Madhya Pradesh and was to submerge thirty villages in the area affecting thousands of families.

4. For rehabilitation and resettlement (R&R) of these project affected families, the Narmada Valley Development Department, Government of M.P. submitted in August, 1993 the R&R Plan to different agencies of the Government of India. By letter dated 8th October, 1993, the Government of India, Ministry of Welfare approved the R&R Plan of the Omkareshwar Dam submitted by the Government

of M.P. By letter dated 13th October, 1993, the Ministry of Environment and Forests accorded environmental clearance and by letter dated 22nd October, 1993, the Ministry of Environment and Forests also accorded forest clearance to the Omkareshwar Dam.

5. On 16th May, 2000, a Memorandum of Understanding (for short 'MOU') was drawn up between National Hydro-Electric Development Corporation (a Government of India Undertaking) and the Government of M. P. agreeing to set up a joint venture Company under the Companies Act, 1956 to complete and manage the dam and the power houses of the Indira Sagar and Omkareshwar Multi-purpose Projects, and it was stipulated in the MOU that the joint venture Company would comply with the provisions of the NWDT award and the work of R&R of the oustees of the two projects would be the joint responsibility of the joint venture Company and the State of Madhya Pradesh. Pursuant to the MOU, the respondent No.2 was incorporated as the joint venture Company and registered under the Companies Act, 1956 on 11th August, 2000 for managing the dams and power houses of the two projects. Clause 63 of the Articles of Association of the respondent No.2 Company stipulates that the respondent No.2 Company would comply with the provisions of the NWDT award and Clause 64 of the Articles of Association of the respondent No.2 Company stipulates that the work of R&R of the oustees of the two projects would be the joint responsibility of the respondent Nos.1 and 2.

6. By letter dated 15th May, 2001, the Planning Commission conveyed its acceptance for investment in the Omkareshwar Multi-purpose Project in the State Plan with an estimated cost of Rs.1784.29 crores subject to the conditions enumerated in the Government of India's letter dated 13th October, 1993 according environmental clearance letter dated 22nd October, 1993 according forest clearance and letter dated 8th October 1993 according approval to the R&R action plan. By Office Memorandum dated 24th July, 2001, the Central Regulatory Authority of the Government of India also accorded approval to the revised estimated cost of the Omkareshwar Multi-purpose Project subject to fulfillment of inter alia the conditions that the respondent No.2 shall get transferred the environment and forest clearances in their favour and also shall comply with the requirements stipulated by the Ministry of Environment and Forest in their clearances.

7. The construction of the Omkareshwar Dam was over in October 2006 and by letter dated 28th March, 2007, the Narmada Valley Development Authority permitted the respondents to close the radial and sluice gates of the dam so as to achieve a water level of 189 meters at the dam site. The petitioner then filed the present writ petition contending that in judgments delivered in connection with Sardar Sarovar and Tehri Projects, the Supreme Court has held that there can be no submergence of villages without rehabilitation of the people living in such villages, and that all entitlements as per the R&R Policy must be given before one year and rehabilitation must be completed in all respects six months before submergence. The petitioner also stated in the writ petition that though acquisition of properties and R&R measures were initiated by the respondents in the villages which were

to be submerged, these are yet to be completed. The petitioner prayed for appropriate writs and directions to the respondents for providing the various R&R entitlements to the project affected families. The petitioner also prayed that eviction of all project affected families and severing of drinking water and electricity supplies be stopped and the respondents be restrained from taking any coercive measure and from closing the gates of the Omkareshwar Dam Project until all the project affected families are rehabilitated as per the R&R Policy of the Government, R&R plans, NWDT award and orders/judgments of the Supreme Court, conditions stipulated by the Ministry of Environment and Forest, Government of India clearances, MOU and as per their fundamental and constitutional rights guaranteed under Arts. 14, 21 and 300-A of the Constitution of India.

8. On 30th March, 2007, the Court after hearing learned counsel for the parties issued notice of the writ petition to the respondents and fixed the matter to 9th April, 2007 for consideration of the interim prayer and in the meanwhile, directed the Grievance Redressal Authority (for short 'GRA') for the Omkareshwar Project to submit a report of rehabilitation work already done and the rehabilitation works still to be done and to indicate in the report the consequences of closure of the gates of Omkareshwar Dam on the people residing in the area which is to be submerged. By the order passed on 30th March, 2007, the Court also directed that till the matter was taken up on 9th April, 2007, status quo would be maintained by the respondents with regard to closure of the gates of the Omkareshwar Dam and the supply of drinking water and electricity to the people of the area will not be severed. Thereafter, the interim matter was heard from time to time and on 18th May, 2007, the Court directed that the interim order passed on 30th March, 2007 shall continue till further orders. The respondents challenged the order dated 18th May 2007 of this Court before the Supreme Court in SLP (Civil) No.10368 of 2007 and on 11th June, 2007, the Supreme court stayed the interim order passed by this Court but did not express any opinion on the merits of the case and disposed of the SLP.

9. Thereafter, the petitioner filed an interim application (I.A.No.4594 of 2007) stating that as a consequence of closure of the gates of the Omkareshwar Dam and filling up the water up to 189 meters at the dam site, only five villages, namely Gunjari, Paladi, Sailani, Bakhatpur and Rampura were to be submerged and the consistent case of the respondents was that only in these five villages, acquisition and rehabilitation measures were complete. The petitioner also stated in the interim application that in the remaining 25 villages, acquisition and rehabilitation measures were yet to be completed and yet the respondents were taking all kinds of coercive measures including severing of water and electricity supplies and were demolishing houses and public buildings, such as schools etc. On 22nd June, 2007, the Court, after hearing learned counsel for the parties passed orders restraining the respondents from severing electricity and water supplies and demolishing public buildings such as schools etc. in the other 25 villages and from taking any coercive steps which would force the oustees to leave these village during the pendency of the petition or until further orders were passed by the Court.

10. Again, the petitioner filed I.A.No.6779 of 2007 complaining that although by order dated 22nd June, 2007, the Court had restrained the respondents from severing electricity and water supplies and demolition of houses and public buildings such as schools etc. in the remaining 25 villages and had also restrained the authorities from taking coercive measures in the 25 villages which would force the villagers to leave the villages, the respondents had decided to raise the water level at the dam above 189 meters. A reply was filed on behalf of the respondents to the I.A. stating that by order dated 22nd June, 2007, the Court did not prohibit raising of water level above 189 meters but only directed that there will be no severing of electricity and supply of water and demolition of houses and public buildings etc. during the pendency of the petition or until further orders were passed by the Court and that no coercive measures will be taken so as to force the oustees to leave the villages. After hearing the learned counsel for the parties, the Court passed orders on 17th August, 2007 directing the respondents to maintain the water level at 189 meters in the Omkareshwar Reservoir. The respondents challenged the order dated 17th August, 2007of this court before the Supreme Court in SLP (Civil) No.14919 of 2007 and the Supreme Court disposed of the SLP by its order dated 5.9.2007 observing that if the water level goes above 189 meters, it may cause severe problems to the residents of 25 villages who are yet to receive rehabilitation measures and hence the respondents shall maintain the water level at 189 meters till the final order was passed by the High Court. The Supreme Court also expressed the view that the High Court should finally dispose of the matter at the earliest and in the meantime, the respondents would take steps to make all efforts to rehabilitate the affected oustees.

WHETHER DISPLACED FAMILIES FROM WHOM AGRICULTURAL LAND IS ACQUIRED AND LANDLESS AGRICULTURAL LABOURERS ARE ENTITLED TO ALLOTMENT OF AGRICULTURAL LAND ?

Contention of the petitioner

11. Ms. Chittroopa Palit, appearing for the petitioner submitted that in *Narmada Bachao Andolan vs. Union of India and others* (2000 [10] SCC 664), (hereinafter referred to as 'the first Narmada Bachao Andolan case') one of the issues before the Supreme Court was whether displacement of tribals as a result of construction of Sardar Sarovar Dam violates the rights under Article 21 of the Constitution of India and Kripal, J. delivering the majority judgment held in para 62 at page 702 of the judgment as reported in SCC that displacement of tribals and other persons would not per se result in the violation of their fundamental or other rights and what has to be seen is whether such tribals who are displaced and are rehabilitated at new locations are better off than what they were and enjoy more and better amenities than those they enjoyed in their tribal hamlets. She submitted that in *N.D. Jayal and another vs. Union of India and others* (2004 [9] S.C.C. 362) in which Rajendra Babu, J. reiterated in paragraph 60 at page 394 of the S.C.C. that rehabilitation of oustees of a dam is a logical corollary of Art. 21 of the Constitution and the oustees should be in the better position to lead a decent life and earn livelihood in the rehabilitated locations.

She submitted that again in *Narmada Bachao Andolan vs. Union of India and others* (2005 [4] S.C.C. 32) (hereinafter referred to as 'the second Narmada. Bachao Andolan case'), S.B. Sinha, J. noted the opinion of the three Judge Bench Judgment of first *Narbada Bachao Andolan vs. Union of India and others* (supra) that displacement of tribals would not per se result in the violation of their fundamental or other rights if on their rehabilitation at new locations they are better off than what they were and enjoy more and better amenities than those they enjoyed in their tribal hamlets.

12. Ms. Palit submitted that for the tribals and others, who were to be displaced by construction of the Omkareshwar Multi-purpose Project, the State Government formulated a R&R Policy and also prepared a R&R Plan in the year 1993. She submitted that paragraph 3 of the R&R Policy provided for allotment of agricultural land and reads as follows:

"3.0 ALLOTMENT OF AGRICULTURAL LAND:

3.1 Displaced families would be rehabilitated in accordance with their preferences on land at the new sites, taking as far as possible, the social groups as a unit.

3.2 (a) Every displaced family from whom more than 25 percent of its land holding is acquired in revenue villages or forest villages shall be entitled to and be allotted land to the extent of land acquired from it, subject to provision in 3.2 (b) below.

(b) A minimum area of 2 ha. of land would be allotted to all the families whose lands would be acquired irrespective of whether Government land is offered or private land is purchased for allotment.

Where more than 2 Ha. of land is acquired from a family, it will be allotted equal land, subject to a ceiling of 8 Ha.

(c) The Government will assist displaced families in providing irrigation by well/tubewell or any other method on the land already irrigated. In case the allotted land cannot be irrigated (which fact would be certified by the Agriculture Department), the displaced family would be allotted a minimum of 4 Ha. of land instead of 2 Ha. provided at 3.2 (b) above. In other cases, where irrigation is not possible, the development of dry land would be subsidised by the State Government to the extent of 75% of the cost involved, unless higher subsidies are provided to farmers in any other scheme of the Government.

3.3 Entitlement of Encroachers for allotment of land:

Encroachers, whether on revenue land or forest land will also be entitled for allotment of land, where the area of the land acquired from an encroacher is upto 1 Ha. he will be entitled to 1 Ha. area of land. In those cases where acquisition of land from an

encroacher is more than 1 Ha., he will be entitled to 2 Ha. of land irrespective of the fact that the land acquisition from such an encroacher may even be greater than 2 Ha."

13. Ms. Palit submitted that paragraph 5 of the R&R Policy of the State of M.P. formulated in the year 1993 was titled 'Recovery of cost of allotted land' and provided as follows:

5.0 RECOVERY OF COST OF ALLOTTED LAND:

5.1 At least fifty percent amount of compensation for the acquired land shall be retained as initial instalment towards the payment of the cost of land to be allotted to the oustee family. However, if an oustee family does not wish to obtain land in lieu of the submerged land and wishes full payment of the amount of compensation it can do so by submitting an application to this effect in writing to the concerned Land Acquisition Officer. In such cases oustee families will have no entitlement over allotment of land and shall be paid full amount of compensation in one instalment. As option once exercised under this provision shall be final, no claim for allotment of land in lieu of the acquired land can be made afterwards. If any oustee family belonging to the Scheduled Tribes, submits such an application, it will be essential to obtain orders of the Collector who will, after necessary enquiry certify that this will not adversely affect the interests of the oustee family. Such application of the Scheduled Tribes oustee families will be accepted only after the above said certification by the Collector.

5.2 The balance cost of the allotted land will be treated as an interest-free loan and the proportionate area of the land will be mortgaged with the Government for that amount.

5.3 There will be no recovery of this loan for the first 2 years. Thereafter, the loan would be recovered in 20 equal yearly instalments.

5.4 Grant-in-aid would be paid to cover the gap between the amount of compensation and the cost of allotted land in those cases where the cost of allotted land is more than the amount of compensation. This grant would be payable to all displaced land owning Scheduled Castes and Scheduled Tribe families and other families losing up to 2 Ha. of land. For other families from whom more than 2 Ha. up to 8 Ha. of land of land is acquired, grant-in-aid an addition to amount of compensation will be given by the Narmada Valley Development Authority on the following rates:

(a) Rs.2000/- per Ha.

or

(b) 50 percent of the difference of the price of the allotted land and the amount of compensation, whichever is less.

Taking into consideration the appreciation in the cost of land with the lapse of time period, the amount of compensation will be revised by the Authority. For the families from whom more than 8 Ha. of land is acquired, the amount of grant-in-aid under 5.4 (b) above shall be calculated on the basis of the amount of compensation for 8 Ha. of land and the cost of the allotted land.

5.5(a) Notwithstanding the provisions in clause 5.1 (a), a displaced person may deposit more than 50% of the compensation amount payable towards cost of land at the new site if he so desires.

(b) In those cases, where the option of interest-free loan is not availed of and the family pays full cost of land, such family would be assisted by a further grant-in-aid or Rs.1,000/- per Ha. per year for 2 years."

14. Ms. Palit submitted that for complying with the provisions of paragraphs 3 and 5 of the R&R Policy, the Government of M.P. also prepared a R&R Plan and in this R&R Plan, the State Government clearly stated that a total of 2,688.45 Ha. of land would be required for resettlement of the famlies out of which 180.31 Ha. would be required for relocation of house sites and 2,508.14 Ha. would be required for allotment of agricultural land and also indicated how such required land was to be made available for allotment amongst the oustee families. Paragraph 2 of the R&R Plan of the Government of M.P. is extracted herein below:

"2.0 Resettlement:

The total command areas of the dam comprises of 617 villages covering service area of 1.468 Lakh Ha. in Barwaha, Maheshwar, Kasrawad, Dharampuri, Manawar and Kukshi tehsils of Khargone and Dhar districts. Efforts will be made to resettle the oustees in the nearest tehsils, i.e., Khandwa, Barwaha, Maheshwar and Bagli, so that the oustee families are not put to any undue hardship and inconvenience.

2.1 In brief, the requirement of land for the rehabilitation of the oustees is as follows:

i. For abadi purposes 180.31 Ha.

ii. For agriculture (compen- 2,508.14 Ha.
satory agricultural lands)

2.2 As regards the availability of lands for abadi, there are several villages in the affected/benefitted zones, wherein nistar lands far in excess of the minimum, prescribed under the existing policy of the State Government is available. A portion of such lands is proposed to be diverted for abadi purposes to rehabilitate the oustees. As shown in Annexure-4, it is proposed to utilise 180.31 Ha. (which is all that is required), out of 636.96 Ha. of

excess nistar land in 10 villages of Khandwa, Bagli and Barwaha tehsils for this purpose.

2.3 As regards the lands to be allotted for agricultural purposes, Annexure-5 gives the village-wise details of the area proposed to be acquired under the M.P. Pariyojana Ke Karan Visthapit Vyakti (Punahsthapan) Act, 1985) (in short, Rehabilitation of PAP Act). It may be mentioned that the above Act provides for acquisition of land from bigger cultivators owning more than 4 Ha. of land in the command area in varying degrees depending upon the size of their holdings. A list of such big cultivators holding more than 4 Ha. of agricultural lands within the command area of the project has been prepared and the exact area which can lawfully be acquired out of these holdings under the provisions of Section 11 (4) of the said Act has also been calculated. To ensure a better integration of the oustee families with the host population, land acquisition through consent awards will also be encouraged and purchase committee will be constituted to give a better deal to all concerned.

2.4 The total population of live-stock in the affected tehsils is 12,799 (Annexure-7), it is presumed that only such oustee families whose house-sites are affected due to the construction of the dam will carry their live-stock to the relocation sites. The population of live-stock in such host villages here the relocation of house-sites for these outstee families have been proposed is 4,271. The total grazing land available in these villages is 371.966 Ha. Besides, 4,604.997 Ha. of other Government land is also available, which can be used for nistar and other common purposes. The village-wise list of such lands has been appended at Annexure-8.

It is, thus, clear from the above figures that enough land for grazing and other nistar purposes will be available in the host villages and there will be no serious adverse affect on the carrying capacity of these villages.

2.5 From what has been discussed above, it is evident that the problem of displacement of people in this project is very small and easily manageable. Only 1,653 families are to be assisted in relocating their houses. The number of families to be provided with compensatory agricultural lands along with house-sites, is also quite small, i.e. 752 only. The requirements of abadi land (180.31 Ha.) and of the agricultural lands (2.508.14 Ha.) for the oustee families is indeed so modest that it should pose no problem to make arrangements for these in the neighbouring villages/ command areas of the project. With a power generation potential of 520 MW, which will be an excellent peaking back-up to the hydel power deficient supply system of Madhya Pradesh, and an

irrigation potential of 1.47 Lakh Ha., Omkareshwar Project is, by far, the most attractive projects in the Narmada Valley in terms of benefits."

15. Ms. Palit vehemently submitted that the State Government has not complied with the provisions of paragraphs 3 and 5 of the R&R Policy inasmuch as it has not offered agricultural land to any of the displaced families of the Omkareshwar Multi-purpose Project. She argued that the members of the displaced families who were carrying on agricultural operations in their respective lands acquired for the Omkareshwar Multi-purpose Project were dependent upon agriculture for their livelihood and knew the skills of an agriculturist and therefore, have to be provided with agricultural land to enable them to earn their livelihood after their displacement on account of the Omkareshwar Multi-purpose Project but since the respondents have not provided such agricultural land in terms of paragraphs 3 and 5 of the R&R Policy, the displaced families have been reduced to paupers without any means of livelihood and their fundamental right under Art. 21 of the Constitution have been affected. In this context, she pointed out that a survey of land purchased by cultivators who were entitled to allotment of agricultural land but were denied agricultural land in 12 villages affected by the Omkareshwar Dam shows that only 11 percent of the displaced families were able to purchase agricultural land and the rest of the farmers have been pauperized. The details of this survey have been given in paragraph 65 of the rejoinder filed on behalf of the petitioner.

16. Ms. Palit next submitted that the R&R Policy and Plan of 1993 of the Omkareshwar Multi-purpose Project of the Government of Madhya Pradesh had been approved by different departments and agencies of the Government of India and were binding on the respondents. She submitted that the Ministry of Environment and Forest, Govt. of India accorded environmental clearance to the Omkareshwar Multi-purpose Project in its Office Memorandum dated 13th October, 1993 and expressly stipulated in the environmental clearance that the Rehabilitation Programme should be extended to landless labourers by identifying and allocating suitable land as permissible. She submitted that in the said Office Memorandum dated 13th October, 1993, it was clarified that all the measures will be implemented under the provisions of Environment Protection Act, 1986 and the Ministry reserved the right to take action including revoking the clearance under the provisions of the Environment Protection Act, 1986 to ensure effective implementation of the suggested safeguards in a time bound and effective manner. She submitted that the Government of India, Ministry of Environment and Forests also permitted diversion of 5829.85 Ha. of Omkareshwar Project in Khandwa, Khargone and Dewas districts of Madhya Pradesh by letter dated 31st August, 2004 under Section 2 of the Forest Conservation Act, 1980 subject to the conditions stipulated therein and condition No.5 stipulated that displaced shall be resettled on non-forest lands as per the Resettlement and Rehabilitation Plan. She submitted that the Planning Commission in its letter dated 15th May, 2001 conveyed its acceptance to the Omkareshwar Multi-purpose Project for investment with the estimated cost of

Rs.1784.29 crores and clearly stated in the said letter dated 15th May, 2001 that the Scheme may be executed subject to the conditions stipulated in the Government of India OM dated 13th October, 1993 according environmental clearance, Government of India OM dated 22nd October, 1993 according forest clearance and the Government of India OM dated 8th October, 1993 according approval to the R&R Action Plan. She further submitted that by OM dated 24th July, 2001, the Central Electricity Authority of the Government of India also accorded approval to the estimated cost of the Omkareshwar Multi-purpose Project and stipulated that the according of clearance would be subject to fulfillment of inter-alia the conditions that the respondent No.2 shall get transferred the environment and forest clearances and also shall comply with the requirements stipulated by the Ministry of Environment & Forest in its clearances.

17. She submitted that in the MOU between the National Hydro-electric Development Corporation, which is a Government of India Undertaking, and the Government of Madhya Pradesh under which a joint venture company was set up for completing and managing the dams and power-houses of Indira Sagar and Omkareshwar Multi-purpose Projects, it was clearly stipulated that the work of R&R of the oustees of the two Projects would be the joint responsibility of the joint venture company and the State of Madhya Pradesh and pursuant to the said MOU, the respondent No.2 Company was incorporated and registered as a joint venture Company and clause 64 of the Articles of Association of the respondent No.2 Company stipulates that the work of R&R of oustees of the two Projects would be the joint responsibility of the respondents 1 and 2. She argued that the respondents were bound by the terms of the MOU and the Articles of Association to comply with the R&R Policy of 1993.

18. Ms. Palit submitted that the respondents were also bound under Section 5 of the Environment Protection Act, 1986 to comply with the environment clearance and were bound under Section 2 of the Forest Conservation Act, 1980 to comply with the forest clearance and were also bound under Section 29 of the Electricity Supply Act, 1948 to comply with the clearances of the Central Electricity Authority. She submitted that under Article 65 of the Articles of Association of the respondent No.2 Company, the directives issued by the President of India from time to time were also binding on the respondent No.2 and, therefore, the respondent No.2 Company has to follow the conditions stipulated in the different directions of the Government of India in the Ministry of Forest and Environment, Planning Commission and the Central Electricity Authority. The Supreme Court in the first *Narmada Bachao Andolan case* (supra) held that compliance of the conditions under which the statutory approval was given including completion of relief and rehabilitation works and taking of all compensatory measures for environmental protection in compliance of the Scheme framed by the Government will have to be ensured by the Court while giving directions for protecting the rights under Article 21 of the Constitution. She vehemently submitted that since land for land acquired was stipulated in paragraphs 3 and 5 of the R&R Policy of the Government of M.P. formulated in 1993, which received the clearances of the

Government of India, Ministry of Welfare, Ministry of Environment and Forests, Planning Commission and the Central Electricity Authority and land for landless agricultural labourers was a condition stipulated in the environment and forest clearances of the Government of India, Ministry of Environment and Forests, this Court should issue directions to the respondents to comply with the said conditions and provide land for land acquired in accordance with paragraphs 3 and 5 of the R&R Policy of the Government of M.P. framed in the year 1993 and the land for landless agricultural labourers in accordance with the clearances of the Ministry of Forest and Environment, Government of India so as to ensure protection of the rights under Art. 21 of the Constitution.

19. Ms. Palit next submitted that land for land acquired was also one of the terms and conditions of the NWDT award. She submitted that although initially the dispute relating to the Narmada waters arose out of the Sardar Sarovar Project located in Gujarat, after the award was made by the NWDT, an agreement was reached between different States so as to cover all the Projects planned in the Narmada Basin and as a consequence the Omkareshwar Multi-purpose Project planned in the Narmada Basin, which was formed to release water as contemplated by the NWDT award for the Sardar Sarovar Project from the upstream river, also came within the purview of the NWDT award and this would be clear by the notification dated 3rd June, 1997 under Section 6-A of the Inter-State Water Disputes Act, 1956 issued by the Ministry of Water Resources. She submitted that it will be clear from the notification dated 3rd June, 1997 that protection of environment and preparation of scheme for the welfare of oustees and other affected persons were to be part of the responsibility of the authority and the authority was to ensure the faithful compliance of the terms and conditions of the NWDT award at the time of clearance of the projects. She argued that by virtue of these developments, the respondents were bound to provide land for land acquired in terms of the NWDT award to the oustees and other project affected persons.

20. Ms. Palit submitted that the stand taken by the respondents in their replies that due to non-availability of fertile agricultural lands, the Government of M.P. changed its policy and as per the revised policy, land was to be given for land acquired only if it was possible to give such land should not be accepted by the Court because the change of policy was by the Government of M.P. without any approval of the Government of India, Ministry of Welfare and Ministry of Environment and Forests. She submitted that in any case, the respondents had indicated in their R&R Plan how and from where the land will be obtained for purposes of offering the same to the displaced families but nothing has been indicated in the replies filed on behalf of the respondents that it was not possible to offer such agricultural land to the displaced families and the landless agricultural labourers. She referred to the documents annexed to the rejoinder of the petitioner Annexure.RJ/17 and Anneure.RJ/18 to show that the State Government, on the other hand, had undertaken to make available huge areas of land required for the Special Economic Zone by acquiring private land under the Land Acquisition Act.

She submitted that if big areas of land could be acquired by the State Government for setting up of Special Economic Zones for industries in the State of M.P., refusal to offer agricultural lands to displaced families and landless agricultural labourers for the reason that it was not possible to give such land was patently discriminatory. She placed reliance on the observations of the Supreme Court in *Motilal Padampal Sugar Mills Vs. State of U.P.* ({1979} 2 SCC 409) that if the Government wants to resist its liability based on promissory estoppel, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government.

Contention of Respondent No.2 :

21. In reply, Mr. Ravi Shankar Prasad, learned Senior Counsel appearing for the respondent No.2 submitted that Art. 21 of the Constitution only guarantees that life and personal liberty of a person cannot be taken away except by a procedure established by law and in *Maneka Gandhi vs. Union of India and others* (AIR 1978 S.C. 597), the Supreme Court has held that such procedure established by law contemplated in Art. 21 of the Constitution must satisfy the test of Art. 14 of the Constitution and, therefore, must be reasonable. He argued that the right under Article 21 of the Constitution cannot therefore be expanded by Courts to include the right to be given land for land acquired. He submitted that the right to land for land in fact has a flavour of right to property but the right to property is subject to the power of eminent domain of the State and if land is taken for a public purpose by following a reasonable procedure as provided in the Land Acquisition Act, it will not be violative of Art. 21 of the Constitution. In support of this submission, he cited *New Reviera Cooperative Housing Society vs. Special Land Acquisition Officer* (1996 [1] S.C.C. 731) in which the Supreme Court has held that if the contention that acquisition of land by the State for public purpose violates Art. 21 of the Constitution is given credence, then no land can be acquired under the Land Acquisition Act, 1894 for any public purpose since in all such cases, owners and all other persons would be deprived of their property. He also relied on the decision in *Chameli Singh vs. State of U.P. and others* (1996 [2] S.C.C. 549) in which the Supreme Court has similarly held that in every acquisition of land which is compulsory in nature, the owner may be deprived of land, the means of his livelihood, but the State exercises its power of eminent domain for public purpose and so long as the exercise of the power is for the public purpose, the individual's rights as the owner of the land must yield place to a larger public purpose and a plea of deprivation of right to livelihood under Art. 21 of the Constitution in such cases is unsustainable.

22. Mr. Prasad next submitted that the right guaranteed under Art. 21 of the Constitution has to be balanced by the resources available with the State. He submitted relying on the averments in paragraphs 36 to 41 of the reply filed on behalf of the respondent No.2 that because of scarcity of fertile land in the State, the Government of M.P. had to amend its R&R policy from time to time. In this

context, he submitted that in and around the Narmada Basin area, 10% of the Government land called 'Charnoi' had been kept reserved for cattle grazing in every village but by order dated 4th March, 1998 of the Government of M.P., the Charnoi land in each village was reduced to 5% of the total land in the village and this percentage was reduced to 2% by order dated 19th September, 2000. He submitted that Charnoi land thus available was further reduced for providing land to S.C. and S.T. in the form of pattas and this resulted in non-availability of fertile land in the State. He further submitted that initially the State Government considered setting up of 'land banks' for generating availability of fertile land but since most of the land was either unfertile or encroached/encumbered, the State Government had no option but to revise its R&R Policy and provide therein that lands will be made available lands for the displaced persons on 'as far as possible' basis. He submitted that in the revised R&R Policy, it was stipulated that land was to be given to the Project oustees only if it was possible to allot land, otherwise not. He further submitted that under the revised R&R policy, Special Rehabilitation Grant (for short 'SRG') was allowed to oustees whose lands were acquired and as a consequence, the oustees whose lands were acquired were provided with large amount of cash compensation as SRG. He argued that the various packages under the revised R&R policy of the State Government given to the oustees had made them better off and the contention of the petitioner that the oustees have been reduced to paupers and the rights of the oustees under Art. 21 of the Constitution have been violated is not correct.

23. Mr. Prasad cited the Division Bench judgment of this Court in *Narmada Bachao Andolan vs. Narmada Hydro-Electric Development Corporation and others*, 2006 (3) M.P.J.R. 218 delivered in the case of Indira Sagar Project in which it has been held in paragraph 79 that the R&R policy of the State Government was rational and reasonable and has been made keeping in view the interest of the weak and marginal sections of the oustees and did not offend or play foul with Arts. 14 and 21 of the Constitution of India. He also relied on the decision in *State of Punjab and others vs. Ram Lubhaya Bagga and others* (1998 [4] S.C.C. 117) in which the new policy of the State of Punjab relating to reimbursement of medical expenses of its employees was challenged as being violative of Art. 21 of the Constitution, but the Supreme Court held that the right of the State to change its policy from time to time in changing circumstances cannot be challenged. He submitted that in *Balco Employees' Union (Regd) vs. Union of India and others* (2002 [2] S.C.C. 333), the Supreme Court has further held that it is neither within the domain of the Courts nor within the scope of judicial review to embark upon an enquiry whether a particular public policy is wise, or whether a better public policy can be evolved and the Courts would not be inclined to strike down a policy at the behest of the petitioner merely because it has been urged that another policy would have been fairer or wiser or more scientific or more logical.

24. Mr. Prasad next submitted that under Art. 162 of the Constitution, the executive powers of the State extends to the matters with respect to which the Legislature of the State has power to make law and the State Legislature has

power to make law in respect of irrigation and water power projects and rights in and over land under Entries 17 and 18 of List-II of Seventh Schedule to the Constitution read with Art. 246 of the Constitution and therefore R&R for families displaced on account of an intra-state irrigation and water power project including offer of land for land acquired are within the exclusive powers of the State Government and the State Government need not consult the Union Government if it wants to lay down a R&R policy or make changes in such R&R policy. He submitted that in *Kesawanand Bharati and others vs. State of Kerala,* AIR 1973 S.C. 1461, C.J., S.M. Sikri has taken a view that federal character of the Constitution is one of the basic features of the Constitution which cannot be destroyed by a constitutional amendment. He submitted that this being the position of law, the Government of India, Ministry of Environment and Forests, while granting environmental and forest clearances, cannot encroach upon the executive powers of the State to formulate its own policy of R&R or change its policy of R&R. He also relied on the observations of Sabharwal, J, as he then was, in *ITC Limited vs. Agricultural Produce Market Committee and others,* 2002 (9) S.C.C. 232 that while maintaining Parliamentary supremacy, one cannot give a go-bye to the federalism which has been held to be a basic feature of the Constitution in *S.R. Bommai vs. Union of India,* 1994 (3) S.C.C. 1.

25. Mr. Prasad next submitted that from the Statement of Objects and Reasons as well as the provisions of the Environment Protection Act 1986, in particular Sections 7 to 13 of the said Act, it will be clear that the Act intends to ensure that environment is free from pollution. In support of this contention, he cited the decisions of the Supreme *Court in Virender Gaur and others vs. State of Haryana and others,* 1995 (2) S.C.C. 577 and in *T. N. Godavarman Thirumalpad vs. Union of India and others,* 2002 (10) S.C.C. 606. He argued that any direction issued by the Central Government in exercise of its powers under Section 5 of the Environment Protection Act, 1986 thus will have to be confined to only such directions as will ensure that the environment is free from pollution and such directions cannot include a stipulation that land should be offered to displaced families from whom land has been acquired or that land should be offered to landless agricultural labourers. He submitted that in any case, environmental clearances of the Omkareshwar Dam Project which were granted were not under any statutory rule and were administrative in nature. He cited the observations of Kripal, J. in the first *Narmada Bachao Andolan case* (supra) that environmental clearances granted in 1993 were administrative in nature. He argued that the Court therefore cannot issue a mandamus to enforce a purely administrative decision of the Government of India, Ministry of Environment and Forests for providing land to displaced families whose land has been acquired and to landless agricultural labourers.

26. Mr. Prasad finally submitted that in *N.D. Jayal vs. Union of India (Tehri Dam case)* (supra), the Supreme Court has held that it is for the Government to decide how to do its job of execution of a project and when it has put a system in place for execution of a project and such a system cannot be said to be arbitrary,

then the only role which the Court has to play is to ensure that the system works in the manner it was envisaged. He submitted that in the aforesaid case the Supreme Court also observed that Courts are not well equipped to adjudicate on a policy decision and that the duty of the Courts is only to see that while taking a decision, no law is violated and people's fundamental rights as guaranteed under the Constitution are not transgressed upon except to the extent permissible under the Constitution. He also referred to the observations of the Supreme Court in this case that if the Government authorities after due consideration of all view points and full application of mind take a decision, then it is not appropriate for the Court to sit in judgment and interfere in such matters, which should be left to the matured wisdom of the Government or its executive. He submitted that in this decision, the Supreme Court also observed that the adherence to sustainable development principle is a sine qua non for maintenance of symbiotic balance with the right to environment and development and to ensure such development is one of the goals of the Environment Projection Act, 1986 and this is quite necessary to guarantee right to life under Art. 21 of the Constitution . He submitted that in the aforesaid case, the Supreme Court also considered the contention that all major sons should be given 2 Ha. of land as minimum, but the contention was not accepted by the Supreme Court because it was thought that on account of scarcity of land it may not be feasible to provide land to every family. He submitted that the contention of the petitioner therefore that land should be offered to displaced families from whom land has been acquired and to landless agricultural labourers even when there is scarcity of land in the State of M.P. should be rejected outright by the Court.

Contention of Respondent No.1

27. Mr. R.N. Singh, learned Advocate General, appearing for respondent No.1, adopted the arguments of Mr. Prasad and further submitted that as per the plan, the Omkareshwar Dam is to generate 520 MW of Power and a balance has to be struck between the power requirements of the State and the interests of the outstees. He submitted that it will be clear from clauses (ix), (x) and (xi) of the NWDT award that the directions therein with regard to rehabilitation do not apply to the displaced families of the Omkareshwar Multipurpose Project but only apply to the displaced families of Sardar Sarovar Project and therefore the provisions made in sub-clause iv(7) of Clause XI for allotment of the agricultural land do not apply to the displaced families of the Omkareshwar Dam Project. He submitted that nonetheless the policy of the State of Madhya Pradesh is to properly rehabilitate and resettle the displaced families of the Narmada River Project located in the State of Madhya Pradesh. Relying on the averments in the reply filed on behalf of the State of Madhya Pradesh, he submitted that the Government of Madhya Pradesh has amended the R&R Policy of Omkareshwar as originally framed in the year 1993 to offer better, liberal and more suitable R&R packages to the displaced families which has resulted in improving their quality of life. He submitted that the Government of Madhya Pradesh had to amend the R&R Policy on the basis of experience at the ground level and the intention of the Government was

to make the R&R Policy more friendly for the displaced families so that they can start their life afresh. He submitted that the Narmada Valley Development Authority, Government of Madhya Pradesh, in its meeting held on 27.4.2002 took the decision to allot land "as far as possible" to the oustees and accordingly introduced the changes in clauses 3.2(a), (b) and (c) of the R&R Policy of the Government of Madhya Pradesh of the Narmada Valley Project as it would be clear from a copy of the minutes of the meeting annexed to the reply of the respondents to the additional rejoinder as Annexure AR-22. He submitted that it will be clear from the minutes of the aforesaid meeting of the Narmada Valley Development Authority that this change of policy has been made for allotting land as far as possible because there were no cultivating lands available in the villages and it was not possible for the Government to arrange sufficient agriculture land for allotment to the displaced families.

28. Relying on the reply of the respondents to the additional rejoinder, Mr. Singh further submitted that only 14 outstees opted for land before receiving compensation but by the time their applications for land reached the concerned Land Acquisition Officer/Rehabilitation Officer, the 14 oustees had accepted cash compensation and this shows the unwillingness of the oustees for opting land for land. He submitted that the 14 oustees have perhaps accepted the cash compensation because they realised the hardship of repaying a long term loan under paragraph 5 of the Rehabilitation Policy. He further submitted that besides these 14 outstees, 551 oustees applied for land after receiving compensation. He referred to copies of some of the applications filed by such outstees annexed to the reply of the respondents to the additional rejoinder as Annexure AR/25 to show that these applications were filed in June-July, 2007 much after the applicants received their compensation for land.

29. Regarding landless agricultural labourers, Mr. Singh submitted that they have been paid Rs.18,700/- as rehabilitation grant, Rs.49,300/- for creating employment and assets, Rs.20,000/- for purchasing of plot, Rs.5,000/- for transportation of belongings. He submitted that landless agricultural labourers thus were placed better off than they were before their displacement and were happy in their new place of settlement. He further submitted that since the displaced persons are still purchasing land, at this juncture, it would be early to say that the majority of them were unable to purchase land. Referring to the statements annexed to the reply of the respondents to the additional rejoinder as Annexure AR/24, he submitted that till date 376 oustees have purchased land worth Rs.9.39 crores after availing exemption from stamp duty and therefore the contention of the petitioner that the oustees are not able to purchase land out of the amounts granted to them is not correct.

30. Mr. Singh further submitted that a notification was issued under Section 10 of the Madhya Pradesh Pariyojana Ke Karan Visthapit Vyakti (Punahsthapan) Adhiniyam, 1985 (for short 'Adhiniyam, 1985') for Indira Sagar Project for the purpose of acquiring agricultural land for resettlement of displaced families of the Indira Sagar Project, but the Government faced a lot of difficulties in enforcing

the provisions of the Adhiniyam, 1985 and considering these practical difficulties, the notification issued for the Indira Sagar Project was revoked and no notification was issued under Section 10 of the Adhiniyam, 1985 for the Omkareshwar Multipurpose Project. He submitted that Section 17 of the Adhiniyam provides for acquisition of land by the State Government for the purpose of resettlement of the displaced families, but acquisition of land thereunder would have resulted in causing lot of hardship to the persons whose land is acquired. He cited the observations of the Supreme Court in *Gramin Sewa Sanstha Vs. State of M.P. And others,* 1986 (Supp) SCC 578 that if in order to resettle one set of displaced persons, the State Government would have to displace another set of persons, the remedy might be worse than the disease. He also relied on the decision of the Supreme Court in the first *Narmada Bachao Andolan's case* (supra) for the proposition that the only role which the court has to play is to ensure that the system devised by the Government works in a manner as envisaged and that the Court in exercise of its power will not go beyond its jurisdiction into the field of policy decision. He submitted that this is therefore not a fit case in which the court should entertain the contention of the petitioner at this belated stage that the displaced families and the landless agriculturists have not been offered land as per the original R&R Policy of the Government of Madhya Pradesh and as per the conditions stipulated in the different clearances of the Government of India and its agencies.

Findings & Conclusions :

31. In the first Narmada Bachao Andolan case, N.D. Jayal vs. Union of India and the second Narmada Bachao Andolan case (supra), the Supreme Court has held that so long as the displaced persons are rehabilitated and resettled in such a manner that they are in a better position to lead a decent life and earn their livelihood in the rehabilitated location, their fundamental right guaranteed under Article 21 of the Constitution would not be violated by construction of a dam. Rehabilitation and resettlement of the displaced persons being part of the fundamental right of the displaced persons guaranteed under Article 21 of the Constitution are thus constitutional obligations of the State. Rehabilitation and resettlement of displaced persons are not powers of the State Government under Article 162 of the Constitution read with entries 17 & 18 of List II in the Seventh Schedule of the Constitution read with Article 246 of the Constitution as contended by Mr. Prasad. Accordingly, if construction of dam is undertaken by the State Government exclusively as an Intra-State river project within its powers under Article 162 of the Constitution read with entries 17 of List II in the Seventh Schedule of the Constitution, the State Government has to rehabilitate and resettle the persons displaced on account of the construction of a dam in such a manner as to place them in a better position to lead a decent life as part of its constitutional duty under Article 21 of the Constitution. But if a construction of a dam is to be undertaken jointly by the State Government and Central Government or through their agencies, then the State Government, the Central Government or such agencies of the Central Government and the State Government will have to

discharge the constitutional obligation under Article 21 and ensure rehabilitation and resettlement of the persons displaced on account of the construction of dam so that they lead a better life in the rehabilitated locations.

32. The requirement of Article 21 of the Constitution, as has been held by the Supreme Court in the first *Narmada Bachao Andolan case, N.D. Jayal vs. Union of India* and the second *Narmada Bachao Andolan case* (supra) is that the displaced persons must be rehabilitated and resettled in such a manner that they are better off than what they were before their displacement and they enjoy more and better amenities than those they enjoyed before their displacement and it is for the Government or the agency constructing a dam to consider all relevant aspects including its resources and decide how exactly the displaced persons will be rehabilitated and resettled so as to lead a decent and better life at the new locations. As has been held by the Supreme Court in *N.D. Jayal vs. Union of India* (supra), if there is scarcity of agricultural land, the Government may not offer land to the displaced families and the landless agricultural labourers in its R&R Policy. For example, the Government or the agency may provide employment to a displaced person or it may provide sufficient capital for self-employment of the displaced person and may not offer allotment of agricultural land to the displaced persons for their rehabilitation. But if the Government or the agency undertaking the construction of a dam after considering all relevant aspects assures in its R&R policy that it will offer agricultural land to displaced persons with a view to ensure that they continue to earn their livelihood from agriculture, but later on does not offer such agricultural land as promised in the R&R Policy to the displaced persons and as a consequence their right under Article 21 of the Constitution is violated, it will be the duty of the Court to enforce the R&R Policy and ensure allotment of such agricultural land to the displaced persons because the Government or the agency had itself decided to fulfill its constitutional obligation under Article 21 of the Constitution by offering agricultural land to the displaced persons to enable them to continue their occupation of agriculture as a means of their livelihood.

33. In *Maneka Gandhi vs. Union of India and others* (supra) cited by Mr. Prasad, the question whether construction of a dam without rehabilitation and resettlement of persons displaced on account of the construction of the dam would violate Article 21 of the Constitution was not an issue and the Supreme Court was only called upon to decide whether the procedure for impounding a passport of a person was reasonable and satisfied the tests of Article 14 and 21 of the Constitution. This decision therefore has no application to the facts of the present case.

34. In *New Reviera Cooperative Housing Society vs. Special Land Acquisition Officer* (supra) on which Mr. Prasad placed reliance, several flats of the New Reviera Cooperative Housing Society, Bombay were notified for acquisition for public purpose. A contention was raised that the acquisition was violative of Article 21 of the Constitution inasmuch as it deprived the owner of the flat the right to shelter, but the Supreme Court held that if this contention is accepted then no land can be acquired under the Land Acquisition Act, 1894 for any public

purpose. In this case again, the Supreme Court was not deciding the effects of displacement of a large number of tribals and other persons on account of construction of dam on their right to livelihood under Article 21 of the Constitution. In this case, moreover there was no policy of the Government for allotment of agricultural land to displaced persons from whom land was acquired for the purpose of the dam.

35. Similarly, in *Chameli Singh and others vs. State of U.P. and another* (supra), land to the extent of 5 bighas, 6 biswas and 14 biswas in Village Bairam Nagar, Pargana Nahtaur, Tahsil Dhampur, District Bijnore were notified for acquisition for providing houses to Scheduled Castes and the acquisition was challenged on *inter alia* the ground that it is violative of the right to livelihood under Article 21 of the Constitution of the owner of the land, but the Supreme Court repelled the challenge holding that the State exercises its power of eminent domain for public purpose and acquires the land and so long as the exercise of power is for public purpose, the individual's right as an owner must yield place to the larger public purpose. In this case again, the Supreme Court was not confronted with a case where a big population including tribals and Scheduled Castes dependent on agriculture were being displaced on account of construction of a dam nor was there any R&R Policy of the Government assuring that agricultural land will be allotted to them to mitigate the hardships of displacement.

36. In *Gramin Sewa Sanstha vs. State of M.P. and others* (supra) cited by Mr. R.N. Singh, the Supreme Court did observe that if to resettle one set of displaced persons the State Government would be displacing another set of persons, the remedy would be worse than the disease, but the Supreme Court also directed the State Government to consider whether the cultivable land at any other place or places are available for the tribals who are displaced on account of the Hasdeo Bango Dam Project. The Supreme Court observed :

> " The State Government will also bear in mind the problem of rehabilitation and resettlement of tribals' communities settled in the land which is sought to be acquired for the project and it is therefore necessary that the provision for re-settlement which is made for them must be a provision which does not affect their homogeneity or communal life. There are guidelines for re-settlement and rehabilitation of tribals which have been laid down in various reports and particularly in the report of the World Bank in regard to the dams which are being constructed in Gujarat and those guidelines may serve as useful indicators for the purpose of considering what provisions can be made for re-settlement and rehabilitation of the tribals who would be displaced on account of the present project."

37. The Division Bench Judgement of this Court in *Narmada Bachao Andolan Vs. Narmado Hydro-Electric Development Corporation and others* (supra) cited by Mr. Prasad, has dealt with different issues relating to rehabilitation of the displaced persons of the Indira Sagar Dam, but in this case we are concerned

with rehabilitation of the persons displaced by the construction of the Omkareshwar Dam. Moreover, the contentions and issues raised in this writ petition are substantially different from those raised in the aforesaid case relating to the Indira Sagar Dam.

38. Coming now to the facts of the present case, the Omkareshwar Multipurpose Project was to be constructed out of the resources of the State Government as well as the resources of the Central Government and the Narmada Hydro-Electric Development Corporation which is an agency of the Central Government and the State Government. Hence, both the State Government and the Central Government were under a constitutional obligation under Article 21 of the Constitution to workout a R&R Policy for rehabilitation and resettlement of the displaced persons of the Omkareshwar Multipurpose Project which would ensure that the persons displaced by the Project were better off after their displacement and were not deprived of their very livelihood by the project. As has been observed by Beg, C.J. in *State of Rajasthan and others Vs. Union of India and others* ({1977} 3 SCC 592) :

> "In our country national planning involves disbursements of vast amounts of money collected as taxes from citizens residing in all the States and placed at the disposal of the Central Government for the benefits of the States without even the "conditional grants" mentioned above. Hence, the manner in which State Governments function and deal with sums placed at their disposal by the Union Government or how they carry on the general administration may also be matters of considerable concern to the Union Government."

Thus, the contention of Mr. Prasad that R&R Policy was within the exclusive domain of the State Government of Madhya Pradesh is misconceived.

39. The R&R Policy and R&R plan were accordingly prepared in the year 1993 by the State Government of Madhya Pradesh and approved by the Government of India, Ministry of Welfare by letter dated 8th October, 1993. Paragraph 3 of the R&R Policy provided for allotment of agricultural land. Sub-para 3.2(a) stipulated that every displaced family from whom more than 25 percent of land holding is acquired in revenue villages or forest villages shall be entitled to and be allotted land to the extent of land acquired from them. Sub-para 3.2(b) further stipulated that a minimum area of 2 ha. of land would be allotted to all the families whose lands would be acquired irrespective of whether Government land is offered or private land is purchased for allotment, but where more than 2 ha. of land is acquired from a family, it will be allotted equal land subject to a ceiling of 8 ha. Sub-para 3.2(c) further provided that the Government will assist displaced families in providing irrigation by well/tubewell or any other method on the land already irrigated and in case the allotted land cannot be irrigated, the displaced family would be allotted a minimum of 4 ha. of land instead of 2 ha. provided in sub-para 3.2(b). Sub-para 3.3 further provided that encroachers whether on revenue land or forest land will also be entitled for agricultural land and where the area of land acquired from an encroacher was upto 1 ha. he will be entitled to 1

ha. area of land and where acquisition of land from an encroacher is more than 1 ha., he will be entitled to 2 ha. of land.

40. Some changes to paragraph 3 of the R&R Policy of 1993 were made in the year 2002. On 27.4.2002, the Narmada Valley Development Authority, Government of Madhya Pradesh took a decision to make the provisions of the Policy more realistic and provided in sub-paragraphs 3.2(a), 3.2(b) and 3.2(c) that the land would be allotted "as far as possible". This change introduced in 2002 did not require a fresh approval from the Government of India and its agencies because under law the respondents were not liable to perform an impossibility even without this change of *Policy. In re. Presidential Election,* 1974 (AIR 1974 SC 1682), Ray, C.J. has discussed this maxim of law thus :

> " The maxim of law impotentia execusat legem is intimately connected with another maxim of law lex non cogit adimpossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability of perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him".

41. This change introduced in the R&R Policy of 1993 on 27.4.2002 by the Narmada Valley Development Authority of Government of Madhya Pradesh in any case did not absolve the respondents from allotting agricultural land to the displaced families and the encroachers as stipulated in sub-paragraphs 3.2(a), 3.2(b), 3.2(c) and 3.3. All that the change meant was that so far as it was possible, the respondent would allot agricultural land in terms of sub-paragraphs 3.2(a), 3.2(b) and 3.2(c) of the Policy, but if it was not possible for the State Government to allot agricultural land to the displaced families it need not allot such agricultural land. As a matter of fact, in para 4 of the minutes of the meeting of the Narmada Valley Development Authority held on 27.4.2002, it is stated that where Government lands are available, they will certainly be allotted to the outstees, but where such lands are not available, there the oustees should be encouraged to purchase agricultural lands in the villages of their choice on their own and in this they will be appropriately assisted.

42. The real question to be decided is whether it was not possible for the State Government to allot agricultural land to the displaced families in accordance with Paragraph 3 of the R&R Policy of 1993 as amended on 27.4.2002. In the para 2 of the R&R Plan of the Government of Madhya Pradesh extracted above prepared in the year 1993, it has been assessed that a total of 2,508.14 ha. of agricultural land would be required for allotment to the displaced families as per the R&R Policy of 1993 and such land was proposed to be acquired from big cultivators holding 4 ha. of land in the command area of the project under Section 11(4) of the M.P. Pariyojana Ke Karan Visthapit Vyakti (Punahsthapan) Act, 1985 and it was also proposed that to ensure a better integration of the oustees with the local

population, land acquisition through consent awards will also be encouraged and purchase committee will be constituted to give a better deal to all concerned. It was further stated in para 2 of the R&R Plan of the Government of M.P. that agricultural land measuring 2,508.14 ha. for the oustee families was indeed so modest that it should pose no problem to make arrangements for these in the neighbouring villages/command areas of the project. But these proposals in para 2 of the R&R Plan prepared in the year 1993 have not been executed by the Government of M.P. and the plea taken by the respondents in their replies filed in this case is that notification issued under Section 10 of the M.P. Pariyojana Ke Karan Visthapit Vyakti (Punahsthapan) Act, 1985 in respect of the Indira Sagar Dam had to be revoked after difficulties were faced on the ground level to enforce the provisions of the 1985 Act. No material has been placed by the respondents to show that efforts were made to locate any other Government land for allotment to the displaced families and the encroachers as promised in paragraph 3 of the R&R Policy of 1993 as amended in 2002. All that is stated in the replies of the respondents is that after the Government passed the order dated 4th March, 1998, the Charnoi land which had been kept reserved for cattle grazing was reduced from 10% to 5% in every village and again after Government passed the order dated 19th September, 2000 Charnoi land was further reduced to 2%. The reduction of Charnoi land from 10% to 2% by Government orders dated 4th March, 1998 and 19th September, 2000 is Government's own doing and cannot be accepted by a Court as an impossibility on the part of the Government to make available agricultural land for allotment to the displaced families and the encroachers in accordance with the R&R Policy of 1993 as amended in 2002. As has been noted by Ray, C.J., In re. Presidential Election, 1974, the party pleading impossibility must be disabled from performing a legal duty without any fault in him and has no remedy over it. The respondents have not placed any material to show that any effort was at all made to locate private land which could be purchased for allotment to the displaced families and the encroachers in accordance with the para 3.2(b) of the R&R Policy of 1993 as amended in 2002. On the other hand, it appears from the documents annexed along with the rejoinder of the petitioner as Annexures RJ/17 and RJ/18 that the State Government has made available huge areas of land required for the Special Economic Zone by acquiring private land under the Land Acquisition Act, 1894 for setting up industries in the State of Madhya Pradesh. As a matter of fact, as per the survey conducted by the petitioner, 11% of the displaced families were able to purchase private agricultural land. This goes to show that if not Government land, private land was available for sale to the displaced families and the encroachers and yet the respondents have not made any efforts to even assist displaced families and the encroachers to purchase private agricultural land in terms of para 3 of the R&R Policy of 1993 as amended in the year 2002. On the pleadings and materials filed before us therefore we are unable to accept the stand of the respondents that on account of scarcity of cultivable land in the State it was impossible on the part of the State Government to comply with paragraph 3 of the R&R Policy of 1993 as amended in the year 2002.

43. We cannot also accept the stand of the respondents that the oustees have all accepted the full compensation for acquisition of land which would go to show that they were not really interested for allotment of agricultural land in their favour and that if they were really keen for allotment of agricultural land they would have accepted only 50% of the amount of compensation for the acquired land and submitted an application to obtain land in lieu of the acquired land and allowed 50% of the amount to be retained as initial instalment towards the payment of the cost of the land to be allotted to them in accordance with sub-para 5.1 of the R&R Policy of the State of Madhya Pradesh as formulated in the year 1993. It appears from the return filed by the respondents that admittedly 14 outstees opted for land before receiving compensation and yet they were paid the cash compensation for the acquired land later on. This only establishes that cash compensation for the acquired land was paid to the oustees by depositing the same in their accounts irrespective of whether they wanted land in lieu of the land acquired. Before crediting the accounts of the oustees with the full compensation for the land acquired from them, the authorities ought to have inquired from the oustees who were rural agriculturists whether they would opt for allotment of agricultural land in lieu of land acquired from them and if the oustees opted for allotment of land only 50% of the compensation for the land ought to have been credited in the accounts of the oustees and the balance retained towards the cost of the land. It is also difficult to believe that the oustees perhaps accepted the cash compensation and did not opt for allotment of agricultural land in lieu of the land acquired from them because of the stipulation in sub-para 5.2 of the R&R Policy of 1993 that the balance cost of the allotted land was to be treated as interest-free loan and the proportionate area of land was to be mortgaged to the Government for the amount of the loan. It was for the oustees to exercise the option for allotment of agricultural land in lieu of a land acquired from them after considering all the terms and conditions of allotment as stipulated in para 5 of the R&R Policy of 1993 and it is not for the respondents to make their own guesses that the oustees were perhaps not interested in allotment of land in lieu of the land acquired from them. Moreover, we find from sub-para 5.1 of the R&R Policy of 1993 that if any oustee family belongs to Scheduled Tribes submitted an application that he would have no claim for allotment of land in lieu of the acquired land, it was essential to obtain the orders of the Collector who after necessary enquiry was to certify that this will not adversely affect the interests of the oustee family and such an application of the Scheduled Tribes oustee family was to be accepted only after such a certification by the Collector. Sub-para 5.4 of the R&R Policy of 1993 further provides that grant-in-aid would be paid to cover the gap between the amount of compensation and the cost of allotment of land in those cases where the cost of allotted land is more than the amount of compensation and such a grant was payable to all displaced land owning Scheduled Castes and Scheduled Tribes families and other families losing up to 2 ha. of land. We find that in a hot-haste to somehow complete the rehabilitation process and start the power project of the Omkareshwar Dam, these provisions for grants to SC/ST families and other families have been withheld contrary to assurances in the R&R Policy of

1993 on the plea that none of the oustee families were interested in allotment of agricultural land and were more keen on the taking the full compensation for the agricultural land.

44. In any case, the plea taken by the respondents that by accepting the full compensation for acquisition of land, the oustees cannot thereafter ask for allotment of agricultural land in lieu of land acquired from them in accordance with the R&R Policy of 1993 as amended in 2002 is a plea based on estoppel or waiver. As we have held, once the Government of Madhya Pradesh framed the R&R Policy with the approval of the Ministry of Social Welfare and Justice to offer agricultural land to displaced families with a view to ensure that they continue to earn their livelihood from agriculture, it was the constitutional obligation of the Government to offer agricultural land to the displaced persons in accordance with the policy and correspondingly the oustees had a fundamental right to claim allotment of agricultural land in lieu of the land acquired from them in accordance with such R&R Policy of the Government and such a claim based on fundamental right cannot be defeated by plea of estoppel or waiver taken by the respondents. In *Olga Tellis and others vs. Bombay Municipal Corporation and others,* AIR 1986 SC 180, a preliminary objection was raised on behalf of the Bombay Municipal Corporation that the pavement dwellers had conceded before the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and had given an undertaking to the High Court that they will not obstruct the demolition of the huts after 15th October, 1985, and therefore they were estopped from contending before the Supreme Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood guaranteed under Article 21 of the Constitution but the Supreme Court relying on its earlier decision *Basheshwar Nath vs. Commissioner of Income-tax, Delhi,* AIR 1959 S.C. 149 rejected the preliminary objection and held that there can be no estoppel against the Constitution and that the principle of estoppel can have no application to representations made regarding assertion or enforcement of fundamental rights.

45. We cannot also accept the contention of Mr. R.N. Singh, learned Advocate General that we should not entertain the contention of the petitioner at this belated stage that the displaced families have not been offered land as per the original R&R Policy of the Government of Madhya Pradesh. Although the R&R Policy was framed as far back in the year 1993, it was to be implemented atleast six months before completion of the dam. The construction of Omkareshwar Dam was over in October 2006 and it was only in March, 2007 that the Narmada Valley Development Authority permitted the respondents to close the gates of the dam and cause submergence of the land of the project affected families and the petitioner filed the writ petition promptly on 30.3.2007 making a grievance inter alia that the agricultural land has not been allotted to the project affected families in accordance with para 3 of the R&R Policy of 1993 but yet the gates of the dam were going to be closed so as to cause submergence of the existing agricultural land of the project affected families as a consequence of which they would not be

able to cultivate their existing land and earn their livelihood. The Supreme Court has held in *Ramchandra Shankar Deodhar and others vs. State of Maharashtra and others*, (1974) 1 SCC 317, that the Court which has been assigned the role of a sentinel on the qui vive for protection of fundamental rights cannot easily allow itself to be pursuaded to refuse relief solely on the jejune ground of laches, delay or the like. Moreover, this is not a case where on account of the delay, if any, in filing the writ petition third party rights have been created or parties have altered their position. All that has happened is that Government has paid full amount of compensation instead of paying 50% of the compensation to the project affected families in their efforts to expeditiously complete the rehabilitation process and start the power project. Such excess compensation can be refunded or adjusted by appropriate directions of the Court and the reliefs claimed in the petition can be moulded accordingly. In a recent decision of the Supreme Court in *Bombay Dyeing & Manufacturing Company Ltd. vs. Bombay Environmental Action Group and others*, AIR 2006 SC 1489, the Supreme Court has held that delay although may be the sole ground for dismissing the public interest litigation in some cases, each case must be considered having regard to its facts and circumstances and keeping in view the magnitude of the public interest, the Court may consider the desirability of relaxing the rigours of the accepted norms. In the present case, since the fundamental right of the oustees under Article 21 of the Constitution are at stake, we do not think that we should dismiss this writ petition espousing the claim of the displaced families for allotment of agricultural land as per the R&R Policy of the Government on the ground of delay and laches.

46. Mr. Prasad and Mr. Singh, learned counsel for the respondents, however, are right in their submission that the rehabilitation measures including allotment for agricultural land to the displaced persons of the Omkareshwar Dam Project were not part of the NWDT award. In Clause XI of the final orders of the NWDT, directions were given by the NWDT regarding submergence, land acquisition and rehabilitation of displaced persons. Sub-clause II of Clause XI deals with lands which were to be compulsorily acquired and provides for land to be acquired by Madhya Pradesh and Maharashtra for the Sardar Sarovar Project. Sub-clause IV of Clause XI deals with provisions for rehabilitation and it provides for rehabilitation of 6147 oustee families spread over 158 villages in Madhya Pradesh as a consequence of the Sardar Sarovar Project. Sub-clause IV(7) of Clause XI which provides for allotment of agricultural land to displaced families is quoted herein under :

> "IV(7) Allotment of Agricultural Lands: Every displaced family from whom more than 25% of its land holding is acquired shall be entitled to and be allotted irrigable land to the extent of land acquired from it subject to the prescribed ceiling in the State concerned and a minimum of 2 hectares (5 acres) per family, the irrigation facilities being provided by the State in whose territory the allotted land is situated. This land shall be transferred to the

> oustee family if it agrees to take it. The price charged for it would be as mutually agreed between Gujarat and the concerned State. Of the price to be paid for the land a sum equal to 50% of the compensation payable to the oustee family for the land acquired from it will be set off as an initial instalment of payment. The balance cost of the allotted land shall be recovered from the allottee in 20 yearly instalments free of interest. Where land is allotted in Madhya Pradesh or Maharasthra, Gujarat having paid for it vide Clause IV(6)(i) supra, all recoveries for the allotted land shall be credited to Gujarat."

Thus, the price charged for the land was to be mutually agreed between Gujarat and the concerned States (Madhya Pradesh or Maharashtra) and where the land was allotted in Madhya Pradesh or Maharashtra and Gujarat has paid for it, all recoveries for the allotted land was to be credited to Gujarat. This is because the submergence of the land and acquisition of the land were for the Sardar Sarovar Project in which Gujarat was interested. Thus all the aforesaid directions in the NWDT Award were in relation to the Sardar Sarovar Project and were not applicable to displaced families affected by the acquisition of land for the Omkareshwar Project.

47. We shall now deal with the contention of Mr. Prasad and Mr. Singh, learned counsel for the respondents that sufficient cash compensation has been paid to the oustees in addition to the other amenities provided to them for residence, transportation etc. which have put them in a position in which they are better off than what they were prior to their displacement. In paragraph 42 of the reply filed by the respondent No.2, it is stated that initially compensation paid to the displaced families under the Land Acquisition Act were determined on the basis of "lagan" for land acquisition but thereafter the administration came up with the Special Rehabilitation Grant (for short 'the SRG') to ensure that the land holders of very poor quality of land got enough compensation to buy equal amount of land of "average quality" and such SRG amounting to Rs.1,561.41 lacs has been disbursed to the Omkareshwar oustees and the whole objective of SRG was to ensure that the displaced persons of the Omkareshwar Dam Project are in a position to buy land of the same or better quality regardless of the quality of their land acquired. We are of the considered opinion that SRG disbursed to the oustees cannot absolve the respondents from allotting agricultural land to the displaced families under paragraph 3 of the R&R Policy of 1993 as amended in 2002. SRG paid to the displaced families appears to have been only a measure adopted by the administration to ensure that every displaced family got adequate monetary compensation for the land acquired from it and to enable it to pay for the costs of the land, Government or private, allotted to it for carrying on agricultural operations. As has been very fairly admitted by Mr. Prasad and Mr. Singh, learned counsel for the respondents, SRG was not a substitute for para 3 of the R&R Policy of 1993 as amended in the year 2002 for allotment of agricultural land to the displaced persons. Para 3 of the R&R Policy of 1993 as amended in 2002 provided for

allotment of agricultural land to the displaced persons as far as possible and this part of the policy was not replaced by SRG by any amendment of the R&R Policy.

48. We now come to the question whether landless agricultural labourers are also entitled to allotment of agricultural land. Admittedly, the R&R Policy as amended of the Government of Madhya Pradesh and as approved by the Ministry of Welfare for Omkareshwar Multipurpose Project of the Government of Madhya Pradesh, does not provide for allotment of agricultural land to landless agricultural labourers. Instead, it provides for a grant of Rs.49,300/- for purchase of productive employment creating assets for the purposes of livelihood after displacement and further provides that special efforts will be made for effective rehabilitation of the families of the landless agricultural labourers and adequate arrangements will be made by the Narmada Valley Development Authority for the upgradation of existing skills or imparting of new skills so as to promote full occupational rehabilitation and also provides that suitable provisions will be incorporated in the tender documents of the Local Competitive Bidding (LCB) and other forms to ensure the employment of displaced persons in the project works. The contention of petitioner is that although the R&R Policy for Omkareshwar Multipurpose Project does not contain a provision for allotment of agricultural land to the agricultural landless labourers, Clause 7 of the Office Memorandum dated 13th October, 1993 of the Ministry of Environment and Forest, Government of India stipulates that the rehabilitation programme should be extended to landless labourers by identifying and allocating suitable land and similarly condition No.5 of the letter dated 31st August, 2004 of the Government of India, Ministry of Environment and Forest granting forest clearance under Section 2 of the Forest Conservation Act, 1980 provides that the project affected persons should be rehabilitated by allotment of non-forest land.

49 Condition No.5 in the letter dated 31st August, 2005 of the Government of India, Ministry of Environment and Forest permitting diversion of 5,829.85 ha. of forest land for the Omkareshwar Multipurpose Project is quoted herein below:

> "5. No forest land shall be utilised for rehabilitation of project affected persons. Displaced people shall be resettled by the State Government immediately on non-forest lands as per the Resettlement and Rehabilitation Plan to avoid any kind of encroachments on forest lands."

It will be clear from the condition No.5 of the letter dated 31st August, 2004 that it only says that no forest land should be utilised for rehabilitation of project affected persons and that the displaced people should be resettled by the State immediately on non-forest land as per the Resettlement and Rehabilitation Plan to avoid any kind of encroachments on forest land. This condition meant that rehabilitation and resettlement of the displaced people should be in accordance with the R&R Policy and Plan of the Government and the State Government should ensure that no forest land is utilised for rehabilitation and resettlement of displaced persons as per the R&R Policy of the Government. We cannot therefore hold that the condition No.5 of the letter dated 31.8.2004 of the Ministry of

Environment and Forests granting forest-clearance for diversion of forest land for the Omkareshwar Project stipulates that land will also be allotted to the landless agricultural labourers even though the R&R Policy did not provide for such allotment of agricultural land to the landless agricultural labourers.

50. Clause (vii) of the Office Memorandum dated 13th October, 1993 of the Ministry of Environment and Forest, Government of India which accorded environmental clearance to the Omkareshwar Multipurpose Project is quoted herein below:

> "(vii) The Rehabilitation Programme should be extended to landless labourers and the people affected due to canal by identifying and allocating suitable land as permissible. A time bound programme should be submitted by December, 1993."

The aforesaid clause stipulates that rehabilitation programme should be extended to landless labourers and people affected due to canal by identifying and allocating suitable land as permissible. The words "as permissible" clearly indicates that if allotment of suitable land to landless labourers was permissible under the law, the rules or the policy of the Government, such land should be allotted to the landless labourers and people affected due to the canal, otherwise not. Thus, the consideration and entitlement to allotment of land to landless labourers would be as per the law, the rules or the policy of the Government and not by virtue of the stipulation in condition No.5 in the Office Memorandum dated 13th October, 1993. Except referring to the definitions of 'landless person' and 'uneconomic holding' in the M.P. Land Revenue Code, 1959, the petitioner has not been able to show any provision of law or rule or policy of the Government under which agricultural landless labourers are entitled to allotment of land. Hence, we cannot hold while deciding this writ petition that agricultural landless labourers would be entitled to allotment of agricultural land.

51. We have already held that it is for the Government to lay down a policy of R&R to ensure that the oustees or project affected families are placed in a better position than what they were and that their fundamental right to livelihood is not violated. The State Government after considering all relevant facts including the resources of the State has decided that instead of allotting land to landless agricultural labourers it will give a grant of Rs.49,300/- to purchase productive employment creating assets besides providing other amenities and it will also upgrade their existing skills and impart new skill in them so as to promote full occupational rehabilitation and it will also make suitable provisions in the tender documents of Local Competitive Bidding in other forms to ensure the employment of the displaced persons in the project works. Agricultural landless labourers, it is true, were also dependent on agriculture for their livelihood, but on the submergence and acquisition of agricultural land on which they were working, they may or may not get employment in the agricultural land and hence the State Government appears to have adopted a policy of R&R under which they are paid Rs.49,300/- to buy some productive employment creating asset and of teaching them new skills to ensure their occupational rehabilitation so as to ensure that their fundamental

right under Article 21 is not violated and it is not for the Court to interfere with such a policy decision of the State Government and to direct the respondent No.1 to allot agricultural land to landless agricultural labourers.

52. Our conclusion therefore is that displaced families and encroachers are entitled to allotment of agricultural land in terms of para 3 of the R&R Policy of 1993 as amended in the year 2002 and are thus entitled to a writ/direction to the respondent No.1 to make all possible efforts to locate Government land or the private land and allot such Government land or private land to the displaced families and encroachers if they opt for the same and refund 50% of the compensation amount received by them to be retained towards the instalment of price of the land and if they also agree to the other terms stipulated in para 5 of the R&R Policy of 1993. Our further conclusion is that agricultural landless labourers are not entitled to allotment of agricultural land by virtue of the forest and environmental clearances given by the Ministry of Environment and Forests and hence no writ/ direction can be issued to the respondents in this writ petition for such allotment of agricultural land. It will however be open for such landless agricultural labourers to apply for such allotment of agricultural land under any law, rule or policy of the Government other than the R&R Policy of 1993 as amended in the year 2002.

ALLOTMENT OF AGRICULTURAL LAND FOR ADULT SON AS A SEPARATE FAMILY.

Contention of the petitioner :

53. Ms. Palit, appearing for the petitioner, submitted that in sub-paragraph 1.1(b) of R&R Policy of 1993, the definition of 'displaced family' is as follows:

> "1.1(b) Displaced Family:
>
> (i) A family composed of displaced persons as defined above shall mean and include husband, wife and minor children and other persons dependent on the head of the family ...
>
> (ii) Every son who has become major on or before the date of notification under Section 4 of the Land Acquisition Act, will be treated as a separate family."

She submitted that it is very clear from the definition of 'displaced family' that a son who has become a major on or before the date of notification under Section 4 of the Land Acquisition Act has to be treated as a separate family and accordingly the family of every major son will be treated as displaced family and would be entitled to the benefits of the R&R Policy including allotment of agricultural land. She submitted that in the second *Narmada Bachao Andolan case* (supra), the Supreme Court interpreting similar provisions in the NWDT award held that once a major son comes within the purview of the expansive definition of family, it would be idle to contend that the scheme of giving "land for land" would be applicable to only those major sons who were landholders in their own rights. She submitted that a major son of a landholder who did not possess land separately would therefore be entitled to grant of separate land in accordance with para 3 of the R&R Policy of 1993.

Contention of the respondent No.1

54. The contention of the respondent No.1 in its reply is that the provision in the R&R Policy is that agricultural land would be allotted to those displaced families from whom more than 25% land would be acquired and thus when no land is acquired from major sons they are not entitled to allotment of agricultural land and they are to be treated as landless families and are entitled to benefits that are being given to landless families.

Findings and conclusion :

55. It is clear from the definition of displaced family given in sub-para 1.1(b) of the R&R Policy of 1993 that it will compose of and includes husband, wife and minor children and other persons dependent on the head of the family and it will not include a son who has become major on or before the date of notification under Section 4 of the Land Acquisition Act. Para 3.2 of the R&R Policy of 1993 states that every displaced family from whom more than 25% of its land is acquired in revenue villages or forest villages shall be entitled to the extent of land acquired from it subject to the provisions of para 3.2 and shall be allotted such land as far as possible. There is no separate definition of displaced family given in para 3 of the R&R Policy of 1993. Hence, the same definition as has been given in sub para 1.1(b) of the R&R Policy of 1993 would be applicable to para 3 of the R&R Policy and the 'displaced family' in para 3.2 will include husband, wife, minor children and other persons dependent on the head of the family and every son who has become a major on or before the date of notification under Section 4 of the Land Acquisition Act but who was part of the larger land owning family from whom land was acquired will have to be treated as separate displaced family from whom land is acquired under the Land Acquisition Act. While calculating however the extent of landholding of a displaced family for the purposes of determining the area of land to be allotted to the displaced family, the share of the displaced family without the major son may only be taken. Similarly, while calculating the extent of land to be allotted to the separated family of such major son, the share of the major son in the land may be taken into consideration.

56. In the second Narmada Bachao Andolan case (supra), one of the points for consideration was whether adult sons were entitled to 2 ha. of land as per the NWDT award and the Supreme Court held as under:

> "The definition of family indisputably includes major sons. A plain reading of the said definition clearly shows that even where a major son of the landholder did not possess land separately, he would be entitled to grant of a separate holding."
>
> "Once major son comes within the purview of the expansive definition of family, it would be idle to contend that the scheme of giving "land for land" would be applicable to only those major sons who were landholders in their own rights. If a person was a landholder, he is his own right would be entitled to the benefit of rehabilitation scheme and, thus, for the said purpose, an expansive

> definition of "family" would to an extent become obscure. As a major son constitutes "separate family" within the interpretation clause of "family", no meaning thereto can be given."

It will be clear that the Supreme Court found in the aforesaid case that the definition of "family" clearly shows that even where a major did not possess separate land he would be entitled to grant a separate holding. In the NWDT award, 'family' was defined to include husband, wife and minor children and other persons dependent on the head of the family and every major son was to be treated as a separate family. Similar definition of 'displaced family' has been adopted in para 1.1(b) of the R&R Policy of 1993 for the Omkareshwar Multipurpose Project and hence we hold that every adult son and his family who was part of the bigger family from whom land was acquired would be entitled to allotment of agricultural land in accordance with para 3 and 5 of the R&R Policy of 1993 for the Omkareshwar Dam Project.

DENIAL OF OTHER ENTITLEMENTS AS PER THE R&R POLICY OF 1993 TO THE OUSTEES

Contention of the petitioner

57. Ms. Palit appearing for the petitioner submitted that sub-para 1.1 (a) of the R&R Policy of 1993 states that any person who is ordinarily residing or carrying on any trade or vocation for his livelihood for atleast one year before the date of publication of notification under Section 4 of the Land Acquisition Act or has been cultivating the land atleast three years before such notification is issued in an area which is likely to come under submergence, whether temporary or permanent, or is otherwise required for the Project, is a project affected family and under sub-paragraphs 6.1, 6.3, 7.1 and 7.2, these project affected families are entitled to rehabilitation grant, transportation assistance, house plots, house construction assistance or grant in aid, but the respondents have arbitrarily left out all those who are going to lose their land and their adult sons and daughters from the family list and they have been denied their R&R entitlements. She further submitted that similarly there are many families who have been denied their grant-in-aid under sub-paragraph 7.2 of the R&R Policy. She submitted that the respondents have also left out persons who possess BPL status before the displacement from the list of beneficiaries. She submitted that although the R&R policy of 1993 provides for an appeal against the decision of the Rehabilitation Officer to the Collector and also Grievance Redressal Authority (for short 'the GRA'), the Appellate Authority and the GRA are not at all effective and have not been ensuring that the oustees get their entitlements as per the R&R Policy of 1993.

Contention of the respondents

58. Mr. R.N. Singh, learned Advocate General for the State of M.P., on the other hand, submitted that it is not correct that the various entitlements under the R&R Policy have not been given to the oustees as contended by the petitioner. He submitted that in any case these grievances can be brought before the Appellate Authority or the GRA.

Conclusion :

59. Whether the oustees have been given their entitlements as per the R&R Policy of 1993 as amended from time to time, involve determination of disputed questions of fact. That apart, grievances of individual oustees have to be considered separately on the peculiar facts as applicable to the oustees. It is only after the GRA takes a decision in this regard that the oustees or the petitioner on their behalf may approach this Court for appropriate direction under Art. 226 of the Constitution if the oustee still feels aggrieved. In paragraph 67 of the decision in the second *Narbada Bachao Andolan case* (supra), the Supreme Court has held :

> "67. Several contentions involving factual dispute had, we may notice, not been raised before GRA, GRA had been constituted with a purpose, namely, that the matters relating to rehabilitation scheme must be addressed by it at the first instance. This Court cannot entertain applications raising grievances involving factual issues raised by the parties. GRA being headed by a former Chief Justice of the High Court would indisputably be entitled to adjudicate upon such disputes. It is also expected that the parties should ordinarily abide by such decision. This Court may entertain an application only when extraordinary situation emerges."

UNTIL THE REHABILITATION IS COMPLETE, SUBMERGENCE CANNOT BE ALLOWED BY THE COURT

Contention of the petitioner

60. Ms. Palit appearing for the petitioner further submitted that the Environment Management Plan of 1993 for the Omkareshwar Dam Project envisaged that R&R would be completed one year before submergence. She further submitted that the Apex Court has also held in *B.D. Sharma vs. Union of India and others* (supra) that rehabilitation should be complete atleast six months before the area is likely to be submerged. She submitted that similarly in *N.D. Jayal vs. Union of India* (supra), the Supreme Court has held that rehabilitation should take place six months before submergence. She submitted that since the entitlements of the oustees under the R&R Policy of 1993 including allotment of agricultural land have not been given, the Court should not allow any submergence at all until the rehabilitation measures are complete and a notification in that regard is issued by the authorities after being satisfied that the rehabilitation measures are complete.

61. Mr. Prasad and Mr. Singh, appearing for the respondents, on the other hand, submitted that the Supreme Court has in the first *Narmada Bachao Andolan case* (supra) observed that while issuing directions and disposing of the case the Court will have to keep in mind the completion of the Project at the earliest.

CONCLUSIONS

62. We find that in the *B.D. Sharma vs. Union of India and others* (supra), the Supreme Court observed in paragraph 7 of the order as reported in the S.C.C. that rehabilitation should be so done that atleast six months before the area is allowed to be submerged the rehabilitation is complete. Thereafter, in the first

Narmada Bachao Andolan case (supra), Kripal, J., as his Lordship then was, observed in paragraph 254 as reported in the S.C.C.:

> "254. While issuing directions and disposing of this case, two conditions have to be kept in mind, (i) the completion of the project at the earliest, and (ii) ensuring compliance with the conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under Article 21 of the Constitution. ...."

Again in *N.D. Jayal vs. Union of India* (supra), Rajendra Babu, J, as his Lordship then was, observed :

> "60. .....The overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of oustees. They should be rehabilitated as soon as they are uprooted. And none of them should be allowed to wait for rehabilitation. Rehabilitation should take place before six months of submergence. Such a time-limit was fixed by this Court in B.D. Sharma vs. Union of India and this was reiterated in Narmada. This prior rehabilitation will create a sense of confidence among the oustees and they will be in a better position to start their life by acclimatizing themselves with the new environment."

63. The law is thus settled that submergence cannot take place until rehabilitation of the oustees is complete as otherwise their fundamental right under Article 21 of the Constitution would be affected and their trust and confidence on the authorities will be shaken but at the same time the Court must ensure early completion of project. We have taken a view that the displaced families and encroachers are entitled to allotment of agricultural land as per para 3 of the R&R Policy of 1993 as amended in 2002 and the State Government has not placed materials before the Court to show that it was not possible for the State Government to offer Government or private land to such displaced families and encroachers. The petitioner has also contended before us that other entitlements as per R&R Policy of 1993 have not been given to the oustees as yet. Following the law laid down by the Supreme Court, we hold that till rehabilitation is complete, no further submergence can be allowed of the remaining 25 villages. Regarding the five villages already submerged, the submergence took place after the orders were passed by the Apex Court on 11th June, 2007 in SLP (Civil) No.10368 of 2007 and we do not think it will be proper for us to direct the respondents to restore status-quo ante for the five villages.

Reliefs :

64. In the result, we dispose of this writ petition with the following declarations and directions:

(i) The displaced families and encroachers are entitled to

allotment of agricultural land as far as possible in terms of paragraphs 3 and 5 of the R&R Policy of 1993 as amended in 2002, and we accordingly direct the respondent No.1 to locate Government land or private land and allot such land as far as possible, to the displaced families and encroachers, if they opt for such land and refund 50% of the compensation amount received by them to be retained towards the instalments of price of land and if they also agree to other terms stipulated in paragraph 5 of the R&R Policy of 1993.

(ii) Landless labourers are not entitled to allotment of agricultural land under the R&R Policy of 1993 and the conditions of the forest and environment clearances given by the Ministry of Environment and Forests and hence, no writ/direction is issued to the respondents to allot such agricultural land in their favour but it will be open for them to apply under any law, rule or policy of the Government for allotment of land as landless persons.

(iii) A son who has become major on or before the date of notification under Section 4 of the Land Acquisition Act will be treated as a separate displaced family, if he was part of a bigger family from whom land was acquired and would be entitled to allotment of agricultural land as far as possible in accordance with paragraphs 3 and 5 of the R&R Policy of 1993, as amended in 2002 and we accordingly direct the respondent No.1 to locate Government land or private land and allot such land as far as possible to such major sons if they opt for such land and also agree to the terms stipulated in paragraph 5 of the R&R Policy of 1993 but the extent of land to be allotted to them will be determined on the basis of their share in the land before acquisition as observed in this judgment.

(iv) Any oustee who has a grievance that he has not been given his entitlement as per the R&R Policy of 1993, as amended from time to time and as per the observations in this judgment, may lodge a grievance directly with the GRA by 31st March, 2008 and the GRA will look into all pending grievances and such new grievances which may be filed by 31st March 2008 and will ensure that all grievances are redressed by 14th June, 2008 and will submit a report in this Court by 14th June, 2008 and the matter will be listed before the Court on 17th June, 2008.

(v) On such a report being filed by the GRA and on the Court being satisfied that rehabilitation is complete, appropriate directions will be given for allowing submergence of the remaining 25 villages.

The writ petition is allowed with cost of Rs.10,000/- to be paid by the respondents to the petitioner within a month from today.

Petition allowed

I.L.R. [2008] M. P., 544
WRIT PETITION

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

UTV SOFTWARE COMMUNICATION ...Petitioner*
Vs.
STATE OF M.P. ...Respondent

A. Constitution of India, Articles 19(1)(a) and 19(2), Cinematograph Act (37 of 1952), Sections 5(a) & 13 - A movie enjoys the guarantee under Article 19(1)(a) of Constitution - Article 19(2) of Constitution enables the State to make law imposing reasonable restrictions on the exercise of rights guaranteed under Article 19(1)(a) of Constitution - A film shall not be certified for public exhibition if in the opinion of the authority competent to grant certificate, the film or any part of it is against the interest of inter alia public order. (Paras 8 & 9)

B. Cinemas (Regulation) Act, M.P. (17 of 1952), Section 6(1) - State Government has issued order of suspending exhibition of film Jodha-Akbar U/s 6(1) of Act in the whole State after considering the report of Additional Commissioner (Excise) and Report of I.G. Police - High Court found that reports which were placed before the Government show that in some places there has been some agitation and opposition to exhibition of the film but the agitation and opposition are not of such a serious nature as to form an opinion that exhibition of the film likely to cause breach of peace in the entire State - Order of State Government quashed - However, on the basis of fresh material and after keeping in mind the observations made in the judgment - Government may pass fresh order. (Para 10)

Case Referred :

(1989) 2 SCC 574

Kishore Shrivastava with *Akshay Dharmadhikari* & *Shreyas Dharmadhikari*, for the petitioners

R.N. Singh, Adv. General and *Vijay Shukla*, Dy. Adv. General for the State,

Mrigendra Singh and *K.D. Singh*, for the interveners.

JUDGMENT

The Judgment of the Court was delivered by A.K. PATNAIK, C. J.:– The petitioner carries on inter alia the business of distribution of feature films and claims to be the sole distributor of the Hindi feature film "Jodha Akbar". The case of the petitioner in the writ petition is that the film "Jodha Akbar" was cleared by the Central Board of Film Certification (for short 'the Board') and a Class U/A Certification was issued by the Board on 6.2.2008. Thereafter, the film "Jodha Akbar" was put up for public screening in the theatres throughout the State of Madhya Pradesh and was being screened in about 30 theatres in the cities and towns of Madhya Pradesh when the Government of

*W.P. No. 2461/2008 (Jabalpur)

Madhya Pradesh issued an order dated 22.2.2008 suspending the screening of the film throughout the State of Madhya Pradesh with immediate effect. Aggrieved, the petitioner has filed this writ petition under Article 226 of the Constitution with a prayer to quash the impugned order dated 22.2.2008. The petitioner has also prayed for an interim order for staying the effect and operation of the impugned order dated 22.2.2008.

2. Mr. Kishore Shrivastava, learned senior counsel for the petitioner submitted that under Entry 60 of List I of the Seventh Schedule read with read with Article 246 of the Constitution Parliament has power to make law on the subject "sanctioning of cinematograph films for exhibition" and in exercise of this power, Parliament has made the Cinematograph Act, 1952 (for short 'the Central Act of 1952') and Section 5A of the Central Act of 1952 provides for certification of films by the Board of Film Censors. He submitted that sub-section (3) of Section 5A provides that a certificate granted by the Board under this section shall be valid throughout India for a period of ten years subject to the other provisions of the Act. He argued that since the film "Jodha Akbar" has been certified by the Board under Section 5A of the Central Act of 1952, the petitioner had right to have the film exhibited in the throughout country including the State of Madhya Pradesh. He submitted that the only provision of the Central Act of 1952 under which the exhibition of the film once certified under Section 5A of the Act can be suspended is Section 13 of the Central Act of 1952 under which power has been vested in the authorities mentioned therein to suspend the exhibition of the film in a State, part or district, as the case may be. He submitted that Section 13 of the Central Act of 1952 however has no applicable to States but to Union territories as would be clear from sub-section (1) of Section 13 of the Central Act of 1952.

3. Mr. Shrivastava next submitted that the State Legislature has also the power under Entry 33 of List II of Seventh Schedule read with Article 246 of the Constitution to make laws on cinemas subject to provisions of entry 60 of List I and in exercise of such power the State Legislature of Madhya Pradesh has made the Madhya Pradesh Cinemas (Regulation) Act, 1952 (for short 'the State Act of 1952'). He submitted that Section 6(1) of the State Act of 1952 which empowers the State Government and the District Magistrate to suspend exhibition of a film in any place in the area specified in an order which has been certified under Section 5A of the Central Act of 1952 is inconsistent with the provisions of Central Act of 1952 and is therefore void.

4. Mr. Shrivastava finally submitted that Article 19(1)(a) of the Constitution guarantees to every citizen the right to freedom of speech and expression and Article 19(2) of the Constitution provides that nothing in Article 19(1)(a) of the Constitution will prevent the State from making any law imposing reasonable restrictions on the exercise of this right in the interests of inter alia public order. He submitted that in S. Rangarajan vs. P. Jagjivan Ram and others, (1989) 2 SCC 574 the Supreme Court has held that the commitment of freedom of expression demands that it cannot be suppressed unless the community interest is really endangered and that the anticipated danger should not be remote, conjectural or

far-fetched and it should have proximate and direct nexus of thoughts repressed in a movie and the expression of thought should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg". He submitted that Section 5B of the Central Act of 1952 enumerates the principles for guidance in certifying films and one of the principles enumerated therein is that a film shall not be certified for public exhibition if, in the opinion of the competent authority to grant certificate, the film or any part of it is against the interests of public order. He submitted that once the film Jodha Akbar has been confined under Section 5A of the Central Act of 1952 after the authority had formed the opinion that the film will not effect public order, unless the situation is so grave and intrinsically dangerous to public order, the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution should not be affected by any order preventing the exhibition of a film. He submitted that the Court should strike down the impugned order dated 22.2.2008 as public order in the State of Madhya Pradesh was not really endangered by the exhibition of film "Jodha Akbar" and the State Government appears to have passed the impugned order dated 22.2.2008 on the pressure of Kshatriya Committee.

5. Mr. R.N. Singh, learned Advocate General, on the other hand, submitted that entry 33 of List II of Seventh Schedule read with Article 246 of the Constitution is clear that the State Legislature has power to make laws on cinema subject to provisions of entry 60 of List I. He further submitted that entry 60 of List I of the Seventh Schedule covers only law made by Parliament on "sanctioning of cinematograph films for exhibition". He submitted that in exercise of such power under List I entry 60 read with Article 246 of the Constitution, Parliament has made Central Act of 1952 which leads to certification of films and cinematograph of films for public exhibition, but the State Legislature has also made the State Act of 1952 on cinemas in exercise of its powers under entry 33 of List II of Seventh Schedule read with Article 246 of the Constitution. He submitted that on a reading of the preamble of the Act and its different provisions, it is clear that the Act provides for not only regulation for cinema through licensing but also empowers the State Government and the District Magistrate to suspend the exhibition of any film in any place and any area if it or he is of the opinion that any film which is being publicly exhibited is likely to cause a breach of peace.

6. Mr. R.N. Singh submitted that it will be clear from sub-Section (1) of Section 6 of the State Act of 1952 that the State Government is empowered thereunder to issue an order in respect of whole State or any its part. He further submitted that two reports, one dated 17.2.2008 by the Additional Commissioner(Excise) and another dated 21.2.2008 by the Inspector General of Police(Law & Order) were submitted to the State Government and on the basis of the two reports, the State Government was formed an objective opinion that the exhibition of the film "Jodha Akbar" if continued would cause breach of peace and accordingly the State Government passed the order under sub-section (1) of Section 6 of the State Act of 1952 suspending the exhibition of the film "Jodha Akbar" in the entire State of Madhya Pradesh. He submitted that the language of sub-section (1) of Section 6

of the State Act of 1952 is clear that the order passed under sub-section (1) of Section 6 of the Act by the State Government and the District Magistrate shall remain in force for only two months unless the State Government is of the opinion that such order should continue and further directs for extension of period of suspension. He submitted that this is therefore temporary measure adopted by the State Government or the District Magistrate to prevent breach of peace and as such the fundamental right guaranteed under Article 19(1)(a) of the Constitution is not affected for a long period.

7. Mr. Mrigendra Singh, learned counsel, appearing for the intervenor submitted that sentiments of the Kshatriya Committee has been very badly affected by the distortion of history shown in the film "Jodha Akbar" and if the film is exhibited and the feelings of the Kshatriya Committee are hurt, there may be a serious law and order situation in the State of Madhya Pradesh.

8. We have considered the submissions of learned counsel for the parties. Article 19(1)(a) of the Constitution guarantees right to freedom of speech and expression to every citizen. In S. Rangarajan vs. P. Jagjivan Ram and others (supra), the Supreme Court has further held that a movie enjoys the guarantee under Article 19(1)(a) of the Constitution. Paragraph 10 of the judgment of the Supreme Court as reported in SCC is quoted herein below:

> "Movie doubtless enjoys the guarantee under Article 19(1)(a) but there is one significant difference between the movie and other modes of communication. The movie cannot function in a free marketplace like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The focussing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact 'in the minds of spectators'. In some cases, it will have a complete and immediate influence on, and appeal for everyone who sees it. In view of the scientific improvements in photography and production the present movie is a powerful means of communication. It is said: "as an instrument of education it has unusual power to impart information, to influence specific attitudes towards objects of social value, to affect emotions either in gross or in microscopic proportions, to affect health in a minor degree through sleep disturbance, and to affect profoundly the patterns of conduct of children." (See Reader in Public Opinion and Communication, Second Edition by Bernard Berelson and Morris Janowitz, p. 390.) The authors of this book have demonstrated (at pp. 391 to 401 by scientific tests the potential of the motion pictures information of opinion by spectators and also on their attitudes. These tests have also shown that the effect of motion pictures is

> cumulative. It is proved that even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change. It can, therefore, be said that the movie has unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instil or cultivate violent or good behaviour. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the' movie cannot be equated with other modes of communication. It cannot be allowed to function in a free marketplace just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary.

9. It will be clear from the observations quoted above that the Supreme Court has also held that a movie also has a unique capacity to disturb and arouse feelings and for this reason censorship by prior restraint is not only desirable but also necessary. The Central Act of 1952 provides for such prior censorship of films. Section 5A of the Central Act of 1952 states that if after examination of film or having it examined in the prescribed manner, the Board considers that the film is suitable for screening of public, a certificate may be given which is called "U/A" Certificate. Section 5B of the Central Act of 1952 enumerates the principles for guidance while writing films and it has been held by the Supreme Court in S. Rangarajan vs. P. Jagjivan Ram and others (supra) that Article 19(2) of the Constitution has been practically read into Section 5B(1) of the Central Act of 1952. Article 19(2) of the Constitution, as we have seen, enables the State to make law imposing reasonable restrictions on the exercise of rights guaranteed under Article 19(1)(a) of the Constitution in the interests of inter alia public order and Section 5B of the Central Act of 1952 provides that a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of inter alia public order.

10. We may now examine the provisions of sub-section (1) of Section 6 of the State Act of 1952 which is quoted herein below:

> 6. Power of State government or local authority to suspend exhibition of films.(1) The State Government in respect of the whole State or any part thereof, and the District Magistrate in respect of the district or town within his jurisdiction, may, if it or he is of opinion that any film which is being publicly exhibited, is likely to cause a breach of the peace, by order suspend the exhibition of any film and during such suspension no person shall exhibit such film in any place in the area specified in the order.

The language of sub-section (1) of Section 6 of the State Act is clear that the State Government can pass an order under sub-section (1) of Section 6 suspending the exhibition of any film if it is likely to cause breach of peace either in respect of the whole State or any part thereof. The last limb of sub-section (1) of Section 6

makes it clear that once such an order is passed no person shall exhibit the film in respect of which the order has been passed in any place "in the area specified in the order". Thus, the competent authority of the State Government has to apply his mind before issuing an order under sub-section (1) of Section 6 whether the order of suspending the exhibition of a particular film is to be passed for the whole of the State or in any part thereto. If the materials before the State Government are such as to indicate that breach of peace in entire State was likely to be caused on account of public exhibition of a film, the competent authority of the State Government may pass an order under sub-section (1) of Section 6 in the whole State. But if the materials before the state are such as to indicate that the breach of peace in only particular areas of the State was likely to be caused by the exhibition of the film, the State Government will confine its order under sub-section (1) of Section 6 to that specific area.

11. In the instant case, we find that the impugned order dated 22.2.2008 state that the exhibition of the film Jodha Akbar has invited opposition and agitation in some in some places on account of which the State Government is of the opinion that breach of peace is likely to be caused in the State of Madhya Pradesh and for this reason the State Government has issued the order suspending the exhibition of the film Jodha Akbar under Section 6(1) of the State Act of 1952 in the whole of the State.

12. Mere opposition or agitation in some places in the State of Madhya Pradesh to the exhibition of the film Jodha Akbar cannot be a ground for arriving at an opinion that there would be breach of peace in the State of Madhya Pradesh or at the places concerned. As has been held by the Supreme Court in S. Rangarajan vs. P. Jagjivan Ram and others (supra), the anticipated danger from the expression of the thought or opinion should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg". Paragraph 45 of the judgment of the Supreme Court is quoted herein below:

> "The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg".

13. We have also perused the two reports which were placed before the State Government before it passed the order dated 22.2.2008. On a perusal of the

report dated 17.2.2008 of the Additional Commissioner(Excise), we find that he has reported that in many places of the State where the film was exhibited there have been no problems whatsoever. In the report of the Inspector General of Police(Law & Order) dated 21.2.2008, we find that in some places there has been some agitation and opposition to the exhibition of the film Jodha Akbar, but the agitation and opposition are not of such a serious nature as to form an opinion that the exhibition of the film of Jodha Akbar was likely to cause breach of peace in the entire State of Madhya Pradesh. In this case, it is quiet possible that sentiments and feelings of the Kshatriya Committee in the State may have been affected as has been submitted by Mr. Mrigendra Singh, learned counsel for the intervenor, but under Article 19(1)(c) of the Constitution and in a democracy, the commitment to freedom of expression has to be kept alive and freedom of expression cannot be gagged by a simple agitation or opposition by one section of the society. It is only when there is immediate danger to public order so as to spark a breach of peace that the State Government or the District Magistrate should exercise the powers under Section 6(1) of the State Act of 1952 and not otherwise. As observed by the Supreme Court, paragraph 51 of the judgment in as reported in *S. Rangarajan vs. P. Jagjivan Ram and others* (supra) as reported in SCC :

> "We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it ? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression."

13. In the result, we quash the order dated 22.2.2008 of the State Government issued under Section 6(1) of the State Act of 1952 but we make it clear that it will be open for the State Government or the District Magistrate to pass orders under Section 6(1) of the State Act of 1952 if it/he is of the opinion that the exhibition of the film is likely to cause breach of peace on the basis of fresh materials that may be available after keeping in mind the observations made in this judgment. In view of our aforesaid conclusion, it is not necessary for us to examine the question whether the State Act of 1952 is ultra vires the powers of State Legislature under Article 246 of the Constitution.

14. The writ petition is allowed. No order as to cost.

Petition allowed.

I.L.R. [2008] M. P., 551

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

4 December, 2007

MUKESH KUMAR GARG ... Appellant*

Vs.

RAMCHANDRA MOTWANI ... Respondent

A. Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(b) - Sub-Letting - Defendant taking accommodation for carrying business in the name and style 'Mukesh Kumar Rakesh Kumar Garg' - Later on firm was registered but defendant was not a partner in said firm - No pleading by defendant that he is having legal possession or having control over suit premises - Merely because partners are father and uncle of defendant not a ground to hold that suit premises has not been sub-let - Plaintiff entitled for decree u/s 12(1)(b).

So far as the contention of learned senior counsel that defendant/tenant is still having legal possession on the suit premises is concerned, suffice it to state that though the pleading of plaintiff in para 4-A of the plaint has been denied by defendant by way of amendment in his written statement by adding para 4-A, but nowhere it has been specifically pleaded by him that still in the suit premises he is having legal possession or having control on the suit premises. In the evidence also the defendant Mukesh Kumar Garg (DW-1) has not so stated that still he is possessing the suit premises and he is having control over it (Paras 9 & 10)

B. Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(b) - Sub-Letting - Waiver - Long possession of registered partnership firm - It was not in the knowledge of plaintiff that actually who is carrying on business - Plaintiff has specifically pleaded that a week earlier it has come to his knowledge that defendant has inducted a sub-tenant - It cannot be said that plaintiff was having knowledge about possession of partnership firm for a considerable long period. (Para 12)

Cases Referred :

AIR 1988 SC 1362, AIR 1990 SC 1208, AIR 2001 SC 1273.

Cases distinguished :

AIR 1987 SC 2055, AIR 1974 SC 280, 2004 (II) MPWN 154.

V.S. Shroti, with *Ashish Shroti,* for the appellant,

ORDER

A.K. Shrivastava, J:- Learned senior counsel is heard on the question of admission.

2. This second appeal has been filed at the instance of tenant/defendant who has lost from both the Courts below in the suit filed by the landlord/plaintiff for eviction on the grounds envisaged under section 12 (1) (b) and (f) of M.P. Accommodation Control Act, 1961 (in short **'the Act'**).

*S.A. No. 1768/2007 (Jabalpur)

3. Learned trial Court decreed the suit on the ground of sub-tenancy i.e. under section 12 (1) (b) of the Act. However, the ground of bona fide requirement for the purpose of business has not been found to be proved and the suit of plaintiff on that ground has been dismissed. The cross-objection filed by plaintiff before the learned first appellate Court assailing the judgment of the trial Court not decreeing the suit on that ground has also been dismissed.

4. Necessary facts for the purpose of disposal of this appeal lie in a narrow compass. Suffice it to state that appellant is a tenant in the suit premises of plaintiff. A rent note Ex.P-1 dated 5/2/1985 was executed between the parties. In the rent note specifically it has been mentioned that for carrying out the business of cloth in the name and style of "Mukesh Kumar Rakesh Kumar Garg" the suit accommodation has been taken on tenancy basis by the appellant. This fact is admitted to the parties. Apart from this, this fact is also not in dispute that later on firm "Mukesh Kumar Rakesh Kumar Garg" has been registered as a registered partnership firm having partners Prakash Chandra Garg and Ashok Kumar Garg and defendant/tenant Mukesh Kumar Garg is totally a stranger to the said partnership firm as he is not a partner in the said firm.

4. Pleading of plaintiff in the plaint so far as it relates to sub-letting of suit premises is concerned, it has been embodied by the plaintiff by way of amendment that after filing of the suit he came to know that the suit premises has been sub-let by the tenant/defendant. In that regard plaint part 4-A may be seen in which there is specific pleading of the plaintiff that a week earlier i.e. 14-15/10/1991 he (plaintiff) came to know that defendant has parted with possession to the partners of the firm and has inducted a sub-tenant. The plaintiff has also pleaded that what is the secret contract between the defendant and those persons to whom he has parted with the possession of the suit accommodation is not known to him and it is in the knowledge of the defendant.

5. Though the averment made in para 4-A of the plaint in regard to sub-letting has been emphatically denied by the defendant by amendment and adding para 4-A in the written statement, but nowhere in reply to the said averment it has been so pleaded by the defendant that he is having legal possession in the suit premises and is carrying on the business of firm "Mukesh Kumar Rakesh Kumar Garg" or is having any control on the suit premises.

6. An issue in regard to sub-tenancy has been framed by the trial Court and parties led their evidence. The trial Court found the ground of sub-tenancy to be proved and eventually decreed the suit of plaintiff under section 12 (1) (b) of the Act. The appeal which was filed by the defendant before learned first appellate Court has been dismissed by the impugned judgment. Hence this second appeal has been filed by the tenant/defendant.

7. It has been contended by Shri V.S.Shroti, learned senior counsel for the appellant that tenant/appellant Mukesh Kumar Garg is still having legal possession in the suit premises though firm "Mukesh Kumar Rakesh Kumar Garg" has been later on registered under the Partnership Act in which tenant/defendant Mukesh

Kumar Garg is not a partner and since it is borne out from the evidence of Mukesh Kumar Garg (DW-1) that at the time of taking suit premises on tenancy basis it was pacified to the plaintiff that the family members of the defendant shall carry on the business of firm "Mukesh Kumar Rakesh Kumar Garg", therefore, it can be said that he (defendant) is having legal possession on the suit premises though business is being carried out by the registered partnership firm "Mukesh Kumar Rakesh Kumar Garg" whose partners are Prakash Chandra Garg, the father of the defendant and Ashok Kumar Garg, who is brother of his father Prakash Chandra Garg and, therefore, learned Courts below erred in substantial error of law in decreeing the suit of plaintiff under section 12 (1) (b) of the Act. In support of his contention, learned senior counsel has placed reliance on certain decisions of the Supreme Court; they are Dipak Banerjee v. Smt. Lilabati Chakraborty (AIR 1987 SC 2055), Jagan Nath (Deceased) through LRs., v. Chander Bhan and others (AIR 1988 SC 1362) and Smt. Krishnawati v. Shri Hans Raj (AIR 1974 SC 280). By placing reliance on the decision of the Supreme Court M/s. Delhi Stationers and Printers v. Rajendra Kumar (AIR 1990 SC 1208), it has been argued by learned senior counsel that registered partnership firm was created in the year 1985 and for a considerable long period the plaintiff did not object in respect to carry on the business by registered partnership firm "Mukesh Kumar Rakesh Kumar Garg" and, therefore, impliedly the landlord has waived this ground and has accepted firm "Mukesh Kumar Rakesh Kumar Garg" to be the tenant. By placing reliance on another decision of Supreme Court *Kulwant Kaur* v. *Gurdial Singh Manna* (dead) by L.Rs. and others (AIR 2001 SC 1273), it has been argued that the finding of two Courts below are perverse and therefore this appeal be admitted for final hearing.

8. Having heard learned senior counsel for the appellant, I am of the view that this appeal deserves to be dismissed.

9. So far as the contention of learned senior counsel that defendant/tenant is still having legal possession on the suit premises is concerned, suffice it to state that though the pleading of plaintiff in para 4-A of the plaint has been denied by defendant by way of amendment in his written statement by adding para 4-A, but nowhere it has been specifically pleaded by him that still in the suit premises he is having legal possession or having control on the suit premises. In the evidence also the defendant Mukesh Kumar Garg (DW-1) has not so stated that still he is possessing the suit premises and he is having control over it and, therefore, the decisions of Dipak Banerjee, Jagan Nath and *Smt. Krishnawati* (supra) are not applicable in the present factual scenario. A Single Bench decision of this Court *Rajendra Pal Singh* v. *Bala Sahib Matkar* 2004 (II) MPWN 154 has also been placed reliance by learned senior counsel, but the same is also distinguishable on the above-said ground. The position would have been different if there would have been the evidence of the tenant that he is still having control over the suit premises and is possessing the same. But, in the instant case neither there is any such pleading of the defendant nor there is any evidence of his to that effect.

10. The plaintiff in his testimony has specifically stated that defendant has parted

the possession of the suit premises and registered partnership firm "Mukesh Kumar Rakesh Kumar Garg" is carrying on the business in the suit premises. To me, merely because the partners of the said registered partnership firm are the father and uncle, respectively of the defendant/tenant, itself is no ground to hold that the suit premises has not been sub-let and the possession of the suit premises has not been parted to the said partnership firm because there is no pleading of the defendant nor there is his evidence in that regard. I have already held here-in-above that there is no iota of evidence of defendant and he had not pleaded that despite registered partnership firm is running the business in the suit premises, he is still having possession and control over the suit premises. Initially the burden of proof of sub-letting was on the plaintiff which he has discharged by his evidence. However, in rebuttal defendant has not specifically pleaded and stated in his testimony that he is having possession or control over the suit premises and, therefore, parting with possession of suit premises and sub-letting can be inferred.

11. I do not find any substance in the second contention of learned senior counsel that at the time of taking suit premises on rent it was pacified to the plaintiff that the business of firm "Mukesh Kumar Rakesh Kumar Garg" shall be carried out by the family members of the defendant and thereafter only the rent note was executed. Shri Shroti, learned senior counsel has also invited my attention to para 4 of the statement of defendant recorded under Order XVIII Rule 4 CPC in that regard. Admittedly in the rent note Ex.P-1 no such term of agreement has been embodied. The execution of rent note is admitted to the parties in which Mukesh Kumar Garg has been shown as tenant and in Clause 5 a condition has been stipulated that the purpose of tenancy is non-residential and for carrying out the business of cloth in the name and style of "Mukesh Kumar Rakesh Kumar Garg". To me, when the rent note has been executed and the terms and conditions of contract have been reduced in form of rent note in writing, no evidence of any oral agreement or statement is admissible. In that regard section 92 of the Evidence Act is very clear. Thus, this argument of learned senior counsel is also not helpful to the tenant/defendant.

12. So far as third contention of learned senior counsel in regard to waiver of the ground on the basis of long possession of registered partnership firm "Mukesh Kumar Rakesh Kumar Garg" in the suit premises is concerned, it would be fruitful to mention that it was not in the knowledge of the plaintiff that actually who is carrying on the business since the partners of the registered partnership firm are thickly related to the defendant. In para 4-A of the plaint which was added by way of amendment by the plaintiff, it has been specifically pleaded that a week earlier i.e. on 14-15/10/1991 it came in the knowledge of the plaintiff that defendant has parted with the possession and has inducted a sub-tenant. From the statement of Ramlal Mehra (PW-1) (who is Assistant Sales Tax Officer and who adduced evidence by bringing relevant documents of registered partnership firm from Sales Tax Department) it is clear that sales tax number was issued to the registered partnership firm on 18/11/1985. In this view of the matter, it cannot be said that plaintiff was having knowledge about the possession of registered partnership

firm in the suit premises for a considerable long period and, therefore, the decision of Rajendra Kumar (supra) is also not applicable.

13. The finding recorded by the two Courts below of sub-letting is a finding of fact and cannot be interfered with in the second appeal as no perversity, misreading of evidence or misconstruction of pleading and evidence has been shown.

14. No substantial question of law is involved in this appeal. This appeal is hereby dismissed summarily.

15. Looking to the period of tenancy of the defendant since he was inducted in the year 1985 it would be justifiable to grant some breathing time to him to vacate the suit premises. Looking to the facts and circumstances, it is hereby directed that appellant/defendant shall submit an usual undertaking before the executing Court on or before 31st January, 2008 that he shall vacate the suit premises on or before 30th June, 2008. He shall also deposit the entire rent if not already deposited and shall also deposit the costs of the two Courts below within that period. He is further directed to deposit monthly rent on or before 15th day of each succeeding month. If he fails to comply any of the condition, the landlord shall be free to get the decree executed.

Appeal dismissed

I.L.R. [2008] M. P., 555
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
5 December, 2007

BANARSI DEVI JAIN ---Appellant*

Vs.

M.P. TRANSPORT COMPANY & anr. ---Respondent

A. Accommodation Control Act, M.P. (41 of 1961) - Sections 37,45 - Jurisdiction of Civil Court - Defendant carried out repair works after obtaining order from Rent Controlling Authority - Civil Court has no jurisdiction to direct deduction of repairing expenses from the rent, as it is barred by virtue of Section 45.

But the trial court committed error in permitting the respondents to deduct Rs.900/- per year from September,1995 till realization of Rs.28,155/-. Such finding was given by the trial court contrary to the provision of Section 37 of the Act. According to such provision, the trial court did not had jurisdiction to direct deduction of the amount from the rent after carrying-out the repairing of the premises in compliance of the order of the Rent Controlling Authority as the jurisdiction of the civil court in this regard by virtue of Section 45 of the Act, is barred. So firstly, such direction was given in lack of jurisdiction. Apart from this, such direction appears to be contrary to the provision of Section 37 of the Act which do not permit to deduct such amount for years together unless the order is passed by the Rent Controlling Authority in this regard. Hence, by setting aside

*F.A. No. 347/2002 (Jabalpur)

the findings of the trial court mentioned in para-12 of the impugned judgment, it is held that the respondents are not entitled to deduct the alleged amount of expenses by virtue of the impugned judgment of the trial court. (Para 11)

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f), Civil Procedure Code, 1908, Order 6 Rule 17 - Amendment of Plaint in Appeal - Plaintiff obtaining vacant possession of adjoining shop in execution of decree during pendency of suit - Unsuitability of alternative accommodation not pleaded in plaint although it was raised in written statement - Plaintiff filed application for amendment of plaint in appeal - Held - To avoid multiplicity of litigation - Application allowed on cost of Rs. 10,000 - Matter remanded back to Trial Court - Appeal allowed.

The appellant's IA 864/04 is allowed at the cost of Rs.10,000/-. The payment of this cost to the respondents shall be the condition precedent for incorporating such amendment. Subject to incorporation of such amendment in such a manner within 30 days the case is remitted back to the trial court with a direction that after extending the opportunity to the respondents for consequential amendment in written statement and recording the additional evidence of the parties on issue no.2 and 3 the case be decided afresh on such issues in accordance with law without influencing by any earlier findings of the trial court or by this court. If the amendment is not incorporated by the appellant in compliance of this order then the findings and decree of the trial court regarding the aforesaid issues shall be binding against the appellant. The trial court is further directed to take endeavor for deciding the case expeditiously. There shall be no order for any other cost. Decree be drawn-up accordingly. (Para 17 & 21)

Cases referred:

AIR 1981 SC 1711, 1977 (2) MPWN 450, AIR 1975 SC 1409, AIR 1967 SC 96, AIR 1999 SC 2507, AIR 2004 SC 3484.

N.K. Patel with S.B. Patel, for the appellant,
J.P. Chanpuria and B.J. Chourasia, for the respondents.

J U D G M E N T

U.C. Maheshwari, J:-This appeal is directed by the appellant/plaintiff under Section 96 of the CPC being aggrieved by the judgment and decree dated 17.5.2002 passed by the IIIrd Addl. District Judge Katni in Civil Original Suit No.17-A/2001 dismissing her suit for eviction filed against the respondents.

2. The factual matrix of the case in short is that appellant filed a suit against the respondents for eviction in respect of some non-residential accommodation situated in Katni as described in the plaint contending that respondents are the monthly tenant in such premises at the rate of Rs.900/- per month. The respondents being defaulter did not pay the rent of such accommodation Rs.19800/- for the period 1.4.92 to 31.1.1994. The accommodation in dispute became dilapidated in the lack of proper maintenance by the respondents. It requires major repairing which is not possible without vacating the premises. The appellant has sufficient

fund of Rs.50,000/- the estimated cost of such repairing. Besides this, the suit is also filed on the ground of bonafide and genuine requirement for the business and godown of her son for which she did not have any other alternate accommodation of her own in Katni. On asking the respondents to vacate the premises on the aforesaid ground by the appellant, the same was not vacated. On the contrary, they filed an application under Section 37 of the M.P.Accommodation Control Act (in short the Act) before the Rent Controlling Authority, Katni just to harass the appellant, thereby they committed an act of nuisance. In such premises,the suit for eviction was filed on the grounds mentioned under Section 12(1)(a),(c),(f)& (g).

3. In the written statement, the respondents admitted the tenancy in the alleged premises but denied the fact of arrears of rent saying that the entire rent has been paid to the appellant. The alleged premises has already been repaired in compliance of the order of the Rent Controlling Authority, hence it does not require any further repairing. The alleged requirement of the appellant regarding his son is denied with the averment that her son is doing the business in his own shop situated near Gurudwara in Golbazar Katni. The appellant has also given some shops of that house to other persons on rent for non-residential purposes. In pending suit by amendment it is pleaded that during pendency of the suit the appellant got vacated the adjoining premises under execution of the decree from New Delhi MP Transport Company. The same is also available with the appellant for the alleged need. Besides this, availability of some other alternate accommodations with the appellant are also pleaded. In addition, prayer for awarding Rs.20,000/- as compensatory cost is made. Accordingly, the grounds of eviction mentioned by the appellant are denied.

4. In view of the pleadings of the parties, as many as seven issues were framed by the trial court. After recording the evidence, at the stage of appreciation, the suit of the appellant was dismissed on all the grounds, on which the appellant has come to this court with this appeal.

5. In pendency of the appeal, the appellant moved IA No.864/04 under Order 6 Rule 17 read with Section 151 of the CPC to amend the plaint explaining the circumstance that available alternate accommodation with her is not in a condition to fulfill the alleged need of her son. The same has been replied on behalf of the respondents by denying the averments of it. In addition it is pleaded that with malafide intention the appellant removed the roof of such available alternate accommodation which she got vacated from some other tenant under execution of the decree of eviction. Such IA is also to be considered in this appeal.

6. Shri N.K.Patel, learned Senior Advocate assisted by Shri S.B.Patel, while arguing the case fairly conceded that the findings of the trial court regarding Section 12(1)(a) and (C) of the Act are not under challenge in this appeal. Only the findings relating to Section 12(1)(f) and (g) are challenged by the appellant. While arguing the case on the ground of bonafide and genuine requirement of the appellant , he said that in view of the available evidence, the accommodation acquired by the appellant under execution of the decree from the other tenant,

although it is adjoining premises, but the same is in dilapidated condition and does not fulfill the alleged requirement of the appellant. However, he fairly conceded that such alternate accommodation is not pleaded in the plaint. Simultaneously, he said that in order to explain the unsuitability of the aforesaid alternate accommodation, he moved an application in pendency of the appeal. In any case, by allowing his application, the case be remanded to the trial court to decide afresh by extending an opportunity to the respondents to amend their written statement and also after extending an opportunity to lead the evidence on it. He also said that so far suitability of the alternate accommodation is concerned, the respondents failed to prove by any cogent and reliable evidence. Not a single word is stated by any of the respondents witnesses in this regard. He also said that in order to avoid the multiplicity of the litigation and to decide the entire dispute between the parties, his application for amendment should be allowed in the present matter.

7. So far dismissal of his suit regarding Section 12(1)(g) of the Act is concerned, he said that on the date of the suit, the alleged accommodation was unfit and unsafe for human habitation and was genuinely required by the appellant for carrying-out repairs. But, during pendency of the suit, on the strength of the order of the Rent Controlling Authority, the respondents got it repaired. As per order of said authority they were permitted to spent the sum of one month's rent of a year on such repairing but they spent in thousands for which neither any notice was given to the appellant nor any permission was taken by the Rent Controlling Authority, therefore, the respondents were not entitled to recover or adjust such expenses from the appellant except the rent of one month. Inspite it, the trial court permitted the respondents to deduct Rs.28155/- towards the rent of Rs.900/- per year in this regard. Firstly, in view of the provision of Section 37 of the Act, the civil court did not have any jurisdiction to give such finding and secondly in view of the order of the Rent Controlling Authority dated 25.7.94, the respondents are not entitled to adjust the rent of more than one month. In this premises he prayed for setting aside the findings of the trial court mentioned in para-12 of the impugned judgment in this regard. He also placed his reliance on some decisions of the Apex Court saying that bonafide, genuine requirement should be considered on the circumstances existed on the date of the suit and not on the basis of any subsequent change in it. With these submissions, he prayed for allowing his appeal.

8. In response of the aforesaid arguments, Shri J.P.Chainpuria by supporting the impugned judgment and decree said that the suit of the appellant has rightly been dismissed by the trial court and it does not require any interference at this stage. The appellant was duty bound to plead the available alternate accommodation with her; either it was available on the date of the suit or acquired subsequent to it and also bound to explain the unsuitability of such acquired alternate accommodation. In the lack of such pleadings in the plaint, the explanation putforth by the appellant's counsel regarding unsuitability of such alternate accommodation, cannot be considered. So far amendment application is concerned, he said that during pendency of the suit, appellant got vacated the premises adjoining to the

disputed premises and the same was in her knowledge. The plaintiff witnesses were cross-examined on the basis of availability of such alternate accommodation even then such application for amendment was not moved before the trial court. Thus, the appellant's application is apparently, malafide and the same is filed to defeat the interest of the respondents. It is not only belated but also changing the nature of the suit and prayed for dismissal of such I.A. So far the findings of the trial court regarding deduction of Rs.900/- per year from the amount of rent is concerned, he said that in view of the order of the Rent Controlling Authority, such finding is correct. In the alternate, he said that such amount is neither deducted nor any proceedings in this regard was filed on behalf of the respondents. In any case, if such finding is set aside by this court, even then, the decree of eviction could not be passed against the respondents. He also placed reliance on some decided cases and prayed for dismissal of this appeal.

9. Having heard the learned counsels, I have carefully gone through the record of the trial court and also perused the impugned judgment.

10. The findings of the trial court in respect of Section 12(1)(a) and (C)of the Act is not under challenge, hence the same has got finality, therefore, such question does not require further consideration in this appeal.

11. So far question relating to section 12(1)(g) of the Act the ground for eviction regarding repairing purposes is concerned, the appellant filed a notice dated 19.8.88 (Ex.P/4) issued by the Commissioner, Municipal Corporation, Mundwara district Katni contending that the accommodation in dispute along with some other accommodation are in dilapidated condition, unsafe and unfit for human habitation and the same may fall at any time and may cause injury to person or property. The appellant also filed the order dated 25.7.94 (Ex.P/3) passed by the Rent Controlling Authority in Case No.2-A/90(7) 93-94 whereby by virtue of Section 37 of the Act, the respondents were permitted to repair the disputed premises by allowing their estimate of Rs.33000/- in this regard with a direction to deduct the amount of one month Rent of a year. On recording the deposition of Jai Kumar Jain (PW 1), the son and the power of attorney holder of the appellant deposed that inspite the aforesaid order of the Rent Controlling Authority, no repairing was carried-out by the respondents and under wrong premises they want to recover the same on account of such repairing. Bhola Ram Kawar (DW 1) while recording his statement deposed that he, at the instance of the respondents, carried-out the repairing of the disputed premises and also stated description of such repairing along with receipts (Ex.D/4) by which he took the payment of such work.He further stated that all the material for repairing was made available by the respondents. On going through his cross-examination, I have not found anything destroying his version deposed in-chief examination. The other witness Nirbhay Ram Thakkar (D.W.2), the power of attorney holder of the respondents and looking after their business in the disputed premises categorically stated that in compliance of the aforesaid order of the Rent Controlling Authority the repairing of said premises was carried-out by him and the Manager Shri Tripathi. He also proved the documents in this regard (Ex.D/5 to D/45) along with its consolidated statement

(Ex.D/46). His testimony is not destroyed even in the cross-examination. Besides this, the respondents also proved the notice dated 8.6.99 (Ex.D/3) issued by the Commissioner. Municipal Corporation, Mundwara Katni contending that the disputed premises got repaired and is in fit condition. The adjoining part of the southern side which is kept closed is in dilapidated condition, its major part has fallen and the remaining part may fall at any time. A copy of such notice was sent to the appellant as well as to the respondent No.1. This notice shows that after passing the order by the Rent Controlling Authority on dated 25.7.94 permitting respondents to carry-out the repairing, the same was carried out by the respondents and the accommodation did not remain in dilapidated condition. Hence it is held that the decree has rightly been refused by the trial court under Section 12(1)(g) of the Act. But the trial court committed error in permitting the respondents to deduct Rs.900/- per year from September, 1995 till realization of Rs.28,155/-. Such finding was given by the trial court contrary to the provision of Section 37 of the Act. According to such provision, the trial court did not had jurisdiction to direct deduction of the amount from the rent after carrying-out the repairing of the premises in compliance of the order of the Rent Controlling Authority as the jurisdiction of the civil court in this regard by virtue of Section 45 of the Act, is barred. So firstly, such direction was given in lack of jurisdiction. Apart from this, such direction appears to be contrary to the provision of Section 37 of the Act which do not permit to deduct such amount for years together unless the order is passed by the Rent Controlling Authority in this regard. Hence, by setting aside the findings of the trial court mentioned in para-12 of the impugned judgment, it is held that the respondents are not entitled to deduct the alleged amount of expenses by virtue of the impugned judgment of the trial court.

12. Coming to the question of Section 12(1)(f) of the Act regarding bonafide, genuine requirement of disputed premises to the appellant for business and godown of her son is concerned, it is apparent from the plaint that on the date of filing the suit or subsequent to it, at any point of time, the available alternate accommodation, was neither pleaded nor any application in this regard was moved by the appellant. Although in the written statement of the respondents, the plea regarding availability of alternate accommodation is taken by the respondent and on vacating the premises by the tenant of adjoining premises under execution of the decree from the tenant New Delhi-MP Transport Company, the written statement was amended and such alternate accommodation is also pleaded. Inspite such pleadings, the appellant did not take any steps to putforth the explanation and the accounts regarding unsuitability of such available accommodation by amending the suit. Although in support of the pleadings of alternate accommodation, the witnesses of the respondents did not state anything in their deposition but the witnesses of the appellant were cross-examined on this count. Jai Kumar Jain (PW 1) son of the appellant admitted in para-6 of his deposition that her mother has got possession of the adjoining premises from the other tenant. In view of the settled preposition of the law that the plaintiff like appellant is bound to built-up her case with all probabilities to get the decree she could not be benefited on the weaknesses of

the respondent/defendant, the aforesaid admission is sufficient to draw an inference that the appellant has got adjoining alternate accommodation during pendency of the suit and as per available evidence in the lack of any evidence regarding unsuitability of such accommodation for the alleged need, the suit could not be decreed at this stage on this ground by setting aside the findings of the trial court in this regard. My aforesaid view is fully fortified by the dictum of the Apex court announced in the matter of *Hasmat Rai and another* Vs. *Ragunath Prasad* - .AIR 1981 SC 1711.

13. The law is well settled that the appeal is a continuation of the suit and the appellate court in first appeal is empowered to consider the factual matrix of the case as it is the last court of facts. In continuation of the suit, during pendency of the appeal, the appellant moved the aforesaid application to insert the amendment in the plaint regarding unsuitability of the adjoining alternate accommodation for the alleged need. Although, the averments of such IA are denied by the respondents in their reply, it is not under disputed that such alternate accommodation got vacated by the appellant during pendency of the suit and was not available on the date of filing the suit.The merits or demerits of the proposed amendment could not be examined at the stage of consideration of such application as law laid down by this court in the matter of Soni Ram Vs. Srimati Asharfi Bai-1977(2) MPWN 450.

14. Long back the Apex Court in the matter *Pasupuleti Venkateswarlu V.Motor and General Traders* reported in AIR 1975 SC1409 considering the eviction matter between landlord and the tenant under Rent Control Act, held that the subsequent events could be considered while disposing of the matter. The same reads as under :-

> "4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-a-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice, subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations, for applications of this equitable rule are myriad. We affirm the proposition that

> for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view. The later recovery of another accommodation by the landlord, during the pendency of the case has as the High Court twice pointed out, a material bearing on the right to evict, in view of the inhibition written into S. 10 (3) (iii) itself. We are not disposed to disturb this approach in law or finding of fact."

15. The aforesaid question was decided by the Apex Court taking into consideration that after passing the judgment by the trial court, the subsequent events were placed before the High Court and the same was not considered. In the present matter, the trial court has concluded the matter but the same is pending in the first appeal. Although in the reported case the subsequent event happened during pendency of the revision before the High Court but in the present case such subsequent event happened during pendency of the suit before the trial court. Mere on this ground, the application of the appellant cannot be dismissed or thrown away . Therefore, just to avoid the multiplicity of the litigations between the parties subject to some conditions; such application can be considered at this stage.

16. Apart the above, the proposed amendment appears to be additional approach from the facts already pleaded in para-4 of the plaint. Hence, the same could be allowed in view of the principle laid down by the Apex Court in the matter of *A. K. Gupta and Sons Ltd. V.Damodar Valley Corporation-* AIR 1967 SC 96 in which it is held as under :-

> 7. It is not in dispute that at the date of the application for amendment, a suit for a money claim under the contract was barred. The general rule no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred : Weldon v. Neale, (1887) 19 QBD 394. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than, a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: see *Charan Das* v. *Amir Khan*, 47 Ind App 255 (AIR 1921 PC 50) and *L. J. Leach and Co Ltd* v. *Jardine Skinner and Co.*, 1957 SCR 438 (AIR 1957 SC 357).

17. In view of the aforesaid, the appellant's application for amendment deserves to be allowed but the same is filed at very belated stage even after disclosing the alternate accommodation by the respondents. Although, it does not change the nature of the suit but the respondents suffered the agony of this litigation for

years together and again he has to defend the case after allowing such amendment, therefore,he should be compensated by imposing sufficient cost on the appellant, on allowing the aforesaid application. Therefore, the IA No.864/04 is allowed on the cost of Rs.10,000/-. The same is payable to the respondents before incorporating the amendment in the plaint.

18. Although, the counsel for the appellant cited the cases in the matter of *Shiv Sarup Gupta* V. *Mahesh Chand Gupta*- AIR 1999 SC 2507 and *Shakuntala Bai* V. *Narayan Das*-AIR 2004 SC 3484 but those cases are distinguishable in the factual circumstances of the case at hand. In the aforesaid first case, by deciding the terminology of bonafide and genuine need the suitability of the alternate accommodation of such need was considered, while in the present matter, in the lack of the pleadings in the plaint such question could not be elaborately examined by the trial court with proper approach; while the later case was decided on the background that during pendency of the suit, the plaintiff-landlord for whose requirement the suit was filed, died and between the date of the suit and his death, his legal representatives became major and the suit was continued by them and the plaint was amended for their requirement. Inspite that, the decree of eviction was set aside by the High Court and the suit was dismissed. But considering the aforesaid subsequent events pleaded by the legal representatives, the suit was decreed by the Apex Court. Accordingly, such case is based on the death of the landlord for whose requirement the suit was filed. Such situation is not here in the case at hand and, therefore, such principle is not applicable to the present case. Although, this court has no dispute regarding the principles laid down in the aforesaid cases.

19. In view of the aforesaid it is held that the trial court has not committed any error, perversity, illegality in dismissing the suit of the appellant on the grounds enumerated under Section 12(1)(a) 12(1)(c) and 12(1)(g) of the Accommodation Control Act. Hence, subject to setting aside the findings of para-12 of the impugned judgment, the remaining findings in that regard are hereby affirmed.

20. So far the findings of the trial court in respect of issue No.2 and 3 relating to Section 12(1)(f) of the Act regarding bonafide, genuine requirement for non-residential purposes is concerned; at present in view of available evidence and pleadings it does not require any interference but the same requires further consideration in view of allowing the aforesaid amendment application of the appellant.

21. Therefore, by allowing this appeal in part, the findings of the trial court regarding deduction of rent Rs.900/- per month in para 12 of the impugned judgment is set aside and the appellant's IA 864/04 is allowed at the cost of Rs.10,000/-. The payment of this cost to the respondents shall be the condition precedent for incorporating such amendment. Subject to incorporation of such amendment in such a manner within 30 days the case is remitted back to the trial court with a direction that after extending the opportunity to the respondents for consequential amendment in written statement and recording the additional evidence of the parties on issue no.2 and 3 the case be decided afresh on such issues in accordance with law without influencing by any earlier findings of the trial court or by this court. If the amendment is not incorporated by the appellant in compliance of this order.

then the findings and decree of the trial court regarding the aforesaid issues shall be binding against the appellant. The trial court is further directed to take endeavor for deciding the case expeditiously. There shall be no order for any other cost. Decree be drawn-up accordingly.

Order accordingly.

I.L.R. [2008] M. P., 564
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi
6 December, 2007

SHAKUNTALA DEVI ---Appellant*
Vs.
LAND ACQUISITION OFFICER, SATNA-REWA RAILWAY LINK PROJECT & anr. ---Respondents

A. Land Acquisition Act (1 of 1894), Sections 23, 51A - Acquisition of Land - Relevant factors for determination of Market Value - Test of a Prudent Buyer has to be applied - Relevant considerations - Sale Deeds relating to closest or nearest piece of land carries more value - Distance of land covered under Sale Deeds from land acquired - Potential value on the date of notification and nature -In case of large piece of land grant of compensation per sq. ft. after certain deduction for development - Distance from city also relevant factor. (Para 7)

B. Land Acquisition Act (1 of 1894) - Section 18 - Reference - Reference is not appeal - Case has to be proved by independent evidence - Reference has to be treated as original proceedings. (Para 6)

C. Land Acquisition Act (1 of 1894) - Section 18 - Reference - Reference Court determined the market value on inadmissible piece of evidence i.e., basic valuation register - Market Value not determined in accordance with relevant factors - Matter remanded back to record evidence and render fresh decision. (Para 8)

Cases referred:

(1995) 1 SCC 717, AIR 1988 SC 1652, (2004) 10 SCC 745 = AIR 2004 SC 2006, AIR 1997 SC 2625, AIR 1994 SC 1160, AIR 2004 SC 1179, AIR 1972 SC 1417, AIR 1997 SC 3661, AIR 1996 SC 531, (1998) 11 SCC 170, AIR 1997 SC 2159, AIR 1998 SC 700.

Atulanand Awasthy, A.K. Pathak & Malti Dadaria, for the appellants,
Sudhir Shrivastava, for Railways.

ORDER

The Order of the Court was delivered by ARUN MISHRA J.:– In the appeals preferred by the claimants award dated 21st December,2000, award dated 15.11.2000 and award dated. 16.1.2001 are in question.

2. Matter relates to acquisition of land by the Land Acquisition Officer,

*F.A. No. 158/2001 (Jabalpur)

Satna Rewa {railway Link Project, Tahsil-Huzur, District-Rewa, the compensation determined with respect to land situated at. Village Kheri, Ramkui and Para Suharantola,etc.is in question. Land was acquired as per notification dated 20th May, 1985 issued under Section 4(1) read with Section 17(1) of Land Acquisition Act. Reference was sought by the owners for enhancement, of compensation amount with respect to land acquired under the aforesaid acquisition. Land situated at Village-Kheri 8.774 hectare was acquired. Land Acquisition Officer as per award dated 26.5.87 determined the valuation at Rs.44,632 per acre and Rs.1,10,240 per hectare. The reference Court has awarded compensation of Rs.1,20,000 per hectare. In FA No.363/01 LAO passed award on 26.5.87 determining the compensation at Rs.1,10,240 per hectare. Reference Court has determined the valuation at. Rs. 2 sq. ft. Aggrieved by the award, the appeals have been preferred by the appellants for enhancement, of compensation.

3. Shri Atulanand Awasthy, Shri A.K.Pathak and Ms.M.Dadaria, learned counsel appearing for appellants have submitted that the valuation determined by the Reference Court is inadequate, the valuation ought to have been determined at Rs. 5 per sq.ft. considering the development in area and existing user as on the date of acquisition. In addition, taking into consideration the potential user as on the date of acquisition, thus, price of land assessed by Reference Court was not proper considering the development in surrounding areas, some of the land was abutting the National Highway such as Survey No.46, it was of higher value as compared to the land situated at the distance, that has not been taken into consideration by the Reference Court, there was nothing to discard sale deed (Ex. P/l) dt.17.7.84 by which 2500 sq. ft. land was sold for a sum of Rs.25,000 at the rate of Rs.10 per sq.ft, sale deed (Ex.P/2) dt.6.7.84 was also executed before one year of the date of acquisition by which 2400 sq.ft. land was sold for a sum of Rs. 9,600 at. the rate of Rs.4 persq.ft., sale deed (Ex.P/4) dt. 13.6.84 by which 4000 sq.ft.land was sold for a sum of Rs. 19,000 at the rate of Rs.4.75 per sq.ft, beside as per sale deed (Ex.P/5) dt.9.4.84 land admeasuring 2800 sq.ft.was sold for a sum of Rs. 7,000 at the rate of Rs.2.50 per sq.ft. The reference Court has committed error of law while considering the basic valuation register and has acted as if it was acting as an appellate Court over the award passed by the Land Acquisition Officer, proceedings were the original proceedings and the evidence adduced ought to have been taken into consideration, that has not been done, inadequate compensation has been determined. On the one hand it has been found that there was an error of calculation done while determining the value per acre, on the other hand finding has not been given effect to while ultimately working out the compensation in the award dated 21st December, 2000 passed by the Reference Court. Compensation offered for house and well to Arjundas is also inadequate. Statement and report of valuer Vinod Singh (CW.I) has not been considered by Reference Court.

4. Shri Sudhir Shrivastava, learned counsel appearing for respondents/Railway has submitted that no case for interference in appeals is made out, the sale deeds were for smaller plots of land, that could not have formed the basis for determination

of price for per acre or per hectare of the land, even if the land was capable of being used as house site, 50%-60% deduction is permissible to be made for development, that aspect when taken into consideration, the price/compensation would not come more than what has been awarded by the Reference Court.

5. It is apparent that Land Acquisition Officer as well as the Reference Court have found that land was capable of being used as house site, land was having potential value as on the date of issuance of notification under Section 4 of Land Acquisition Act on 20th May, 1985. While determining the compensation reference Court has acted upon the basic value register as apparent from the discussion made in para 49 onwards in award dated 21st December, 2000. Similar is the position in the awards assailed in other appeals. Basic valuation register cannot be the basis for determination of price as held by Apex Court in *Land Acquisition Officer, Eluru and others vs. Jasti Rohini (Smt.) and another* (1995) I SCC 717 .

6. The Reference Court has acted as if it was hearing an appeal against the decision, findings recorded by the Land Acquisition Officer too have been resorted to whereas there should have been independent application of mind to the evidence adduced before the Reference Court. Reference case is not an appeal, the evidence on record of the case of LAO has to be proved by independent evidence, the reference has to be treated as original proceedings, it has to be established that price offered is inadequate as held by Apex Court in *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona and another* AIR 1988 SC 1652 and in *Kiran Tandon vs. Allahabad Development Authority and another* (2004) 10 SCC 745 = AIR 2004 SC 2006.

7. It is well settled that price has to be determined applying the test of a prudent buyer as held by Apex Court, in *Special Deputy Collector and another vs. Kurra SambasivRao*AIR 1997 SC 2625. Sale deeds relating to closest or nearest piece of land carries more value as laid down in *M/s Printers House Pvt.Ltd. vs. Mst.Saiyadan (Deceased) by LRs and others* AIR 1994 SC 1160. Similarly potentiality and nature is to be seen as laid down in *Panna Lal Ghosh and others vs. Land Acquisition Collector and others* AIR 2004 SC 1179. The distance of the land covered under the sale deeds from the land acquired is also relevant consideration as held in *Smt.Tribeni Devi and others vs.Collector,Ranchi* AIR 1972 SC. 1417. Potential value on the date of notification under Section 4 is relevant not the subsequent user as held in *Special LAO, Karnataka Housing Board vs. P.M.Mallappa and others* AIR 1997 SC 3661. In case of acquisition of large piece of land, grant of compensation per sq.ft, was held to be illegal as held in Indumati Chitaley vs. Government of India and another AIR 1996 SC 531. It is also permissible to grant compensation at the rate of per sq.ft. even in the case of large piece of land but after certain deduction for the development to be made as held in *Karan Singh vs. Union of India* (1998) 11 SCC 170 wherein the Apex Court has upheld grant of compensation of Rs. 10 per sq.ft. Offer of two different price for the land abutting the road and the land which was low lying area was upheld in *G.Rameshan vs. State of Kerala* AIR 1997 SC 2159. Distance from

the city was also one of the relevant, consideration, compensation of Rs. 1/- sq.ft.was awarded and 50 paisa was deducted for development in *Hasanali Walirnchand (dead) by LRs vs. State of Maharashtra* AIR 1998 SC 700. How much deduction has to be made for development of the land depends on factual matrix of each case.

8. It is also pertinent to mention that time gap between the sale transaction and date of acquisition .genuineness of the transaction are relevant factors while determining the price, size of plot, small or large is also a relevant factor. Opening on the frontage on road, nearness to developed area whether the area is low lying etc. are also relevant consideration as held in *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona and another* (supra) . In the instant case inadmissible piece of evidence was considered that is basic valuation register. The decision rendered by the Reference Court ' cannot be allowed to be sustained whereas sale deeds which were before the date of notification under Section 4 issued on 20th May, 1985, sale deeds of 1984 have also been discarded without going deep into the question whether sale deeds were not bona fide and they were with a view to fetch higher-compensation in the case of acquisition of land, whether there were any steps taken by the respondents and how the claimants/ villagers could have known that their land was going to be acquired in the year 1984 was relevant consideration, that has not been adverted to before discarding the sale deeds placed on record. It appears that the finding of LAO that Rs.2.40 was the price per sq.ft.has been commented upon on the one hand by the Reference Court that there was error of calculation made while determining the per hectare price , but how much deduction for development was required to be made , even if the price was Rs.2.40 or any other amount such as Rs.2 as determined in other cases or the land was of capable of fetching much value or lesser value at the hands of prudent buyer.at the same time the Court has not taken into consideration the distinction between the small plots and large tract of land, large tract would not fetch the same valuation though it is permissible to award the compensation per sq.ft.,but after making certain deduction depending upon the development in the area in question, nothing of that sort has been done, thus, we have no hesitation in setting aside the awards passed by Reference Court. At this stage, Shri Atulanand Awasthy, Shri A.K.Pathak and Ms. Malti Dadaria and Shri Sudhir Shrivastava, learned counsel appearing for the parties have jointly prayed that further opportunity be given to adduce evidence in the light of observations made in the order as the counsel have jointly consented for adducing further evidence. The Reference Court shall record the evidence as may be adduced by the parties and render-fresh decision in accordance with law in the light of observations made in this order. It is made clear that we have not commented upon the adequacy of compensation determined by the Court below in these cases, that has to be considered in the facts and circumstances of the case unfettered by any observation made in this order by this Court.

9. We allow the appeals, set aside the awards and remit the cases to the Reference Court. Reference Court to record the evidence as far as possible within

four months from the date of first appearance of parties and render a decision within six months from the date of first appearance. Parties are directed to appear before the Reference Court on 21st January, 2008. It will not be necessary to issue fresh notice to the parties as date is given in presence of parties. As cases are being remanded, certificate of refund of Court Fees be issued to the appellants interms of Section 13 of Court Fees Act. We leave the parties to bear their own costs as incurred of the appeals.

Appeal allowed.

I.L.R. [2008] M. P., 568
APPELLATE CIVIL
Before Mr. Justice S.K. Seth
3 January, 2008

RAMCHANDRA ---Appellant*
Vs.
KAMLADEVI & ors. ---Respondents

A. Civil Procedure Code (5 of 1908), Section 100 - Substantial Question of Law - Finding of fact - Based upon misreading of evidence or suffers from any legal infirmity or perverse - High Court can set aside such finding in Second Appeal. (Para 5)

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e) - Bonafide Requirement - Appellant besides his wife having 2 major sons and 4 major daughters - Space available on first floor insufficient - They have to share bedroom and there is hardly any privacy - Appellant having no other alternative suitable accommodation in city - Bonafide requirement of appellant established - Appeal allowed.

From the material available on record it is clearly established that besides appellant and his wife, there are two major sons and four major daughters. All of them are unmarried and residing together. Appellant's wife is a patient of hypertension. From the evidence, it is clear that the space available with the appellant on the first floor is insufficient, keeping in view the large number of members of the family. They have to share bed-room and there is hardly any privacy. After marriage, family will certainly grow and a lot more space and privacy would be required for decent living, if not luxurious. Thus, it is clear that entire approach of the learned lower appellate Court is unrealistic and as such is unsustainable in law and facts, and if allowed stand, it would result in travesty of justice. Plaintiff set up and established the bonafide need of himself and his family members in respect of the suit accommodation and for that he has no other reasonably suitable accommodation in city concerned. (Para 6)

Case Referred:

AIR 2002 SC 827

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*S.A. No. 323/2003 (Indore)

JUDGMENT

S.K. SETH, J:-This is landlord's appeal against the reversing judgment and decree in an eviction suit.

2. Suit accommodation is situated in Narsinghgarh. Suit accommodation is residential situated on the ground floor. There is no dispute as regards the relationship of landlord and tenant between the parties. Plaintiff claimed eviction on three grounds, viz. Section 12 (1)(a)(e) and (m) of the Act. Defendant in the written statement denied the claim set up in the plaint. Based upon pleading of the parties, trial Court framed issues and allowed the parties to adduce evidence. Learned trial Judge, on appreciation of evidence, found in favour of the plaintiff and passed an eviction decree against the tenant vide Judgment and Decree dated 8-3-2000. Matter was carried in appeal by the tenant and plaintiff also filed cross objection against the finding recorded by the trial Judge on issue No. 3 and also sought eviction under Section 12(1)(a) of the Act. During the pendency of first appeal, original tenant died therefore, respondents herein, who are the legal representatives of the original tenant, were brought on record. Learned First appellate Court allowed the tenant's appeal by reversing findings on grounds under Section 12(1)(e) and 12(1)(m) of the Act. By the impugned judgment and decree, lower appellate Court partly allowed the cross objection and directed tenants to monthly rent @ Rs. 350/- from 1.8.1992. Aggrieved by judgment and decree of the lower appellate Court, plaintiff has now preferred this second appeal. The appeal was admitted on 26.8.2003 for final hearing on the following substantial questions of law:-

> "Whether the Lower appellate Court was justified in reversing the decree passed by the Trial Court holdin that ground u/s. 12(1)(e) is made out?
>
> Whether the reasoning assigned by theFirst Appellate Court for non suiting the plaintiff on ground contained in Section 12(1)(e) of the Act can be regarded reasonable and correct and if so whether decree u/s 12(1)(e) can sustain on those reasoning.
>
> Whether on facts pleaded and found proved a case for defendant's eviction u/s. 12(1)(e) of the Act is established?"

3. In view of the substantial questions of law formulated at the time of admission, learned counsel confined submission regarding eviction under Section 12(1)(e) of the Act, therefore, we do not have tackle any other issue. However, learned counsel for the appellant in the alternative submitted that he has already filed an application under Section 100(5) of the CPC (I.A.No. 6996/07) for formulating question of law relating to Section 12(1)(m) without precisely stating the substantial question of law. In this view of the matter, this Court is of the view that the application is devoid of any substance and as such it stands rejected and closed.

4. Now coming to merit of the case, Shri M.G. Upadhyaya, learned counsel appearing for the appellant invited attention to the averments made in the plaint and the evidence adduced by the parties. He contended that lower appellate Court

not only misread the pleading but also the evidence. According to him, impugned judgment and decree is unsustainable in law and this deserves to be allowed.

5. No doubt, ordinarily, conclusion of the first appellate Court represent finding of fact and it could not be interfered with by this Court in second appeal. However, it is equally true that when there is no evidence at all or the finding of fact is based upon misreading of evidence or suffers from any legal infirmity or finding is perverse, it would be open for the High Court to set aside such a finding and to take a different view. See *Neelakantan* vs. *Mallika Begum* -AIR 2002 SC 827.

6. From the material available on record it is clearly established that besides appellant and his wife, there are two major sons and four major daughters. All of them are unmarried and residing together. Appellant's wife is a patient of hyper-tension. From the evidence, it is clear that the space available with the appellant on the first floor is insufficient, keeping in view the large number of members of the family. They have to share bed-room and there is hardly any privacy. After marriage, family will certainly grow and a lot more space and privacy would be required for decent living, if not luxurious. Thus, it is clear that entire approach of the learned lower appellate Court is unrealistic and as such is unsustainable in law and facts, and if allowed stand, it would result in travesty of justice. Plaintiff set up and established the bonafide need of himself and his family members in respect of the suit accommodation and for that he has no other reasonably suitable accommodation in city concerned. After going through record, we are clearly of the view that the first appellate Court without assigning sufficient and cogent reasons interfered with the findings of facts recorded by the trial Court on due and proper appreciation of evidence. These findings recorded by the first appellate Court are based upon misreading of evidence. Having regard to evidence adduced before it, the trial Judge came to conclusion that appellant had established his claim for eviction on the bonafide ground, the first appellate Court could not have reversed the said finding without recording sufficient and cogent reasons therefore. If such reversal the judgment and decree passed by the trial Court is allowed to stand then instead of landlord, the Courts would become the rationing authorities regarding the need and suit premises. This is impermissible in law and as such findings of the first appellate Court are unsustainable in law.

7. In view of the foregoing discussion, the appeal is hereby allowed and the judgment and decree passed by the trial Court is restored. Impugned judgment and decree passed by the learned Additional District Judge Narsinghgarh is hereby set aside with costs through out to be borne by the respondent. Counsel's fee Rs. 1000/- if certified.

Appeal allowed.

I.L.R. [2008] M. P., 571
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare

13 December, 2007

NAFISA --- Appellant*

Vs.

STATE OF M.P. --- Respondent

Penal Code, Indian (45 of 1860), Sections 302, 201, Evidence Act, Indian 1872, Sections 106, 114 (Illustration g) - Burden of proving fact especially within knowledge - When prosecution discharge from its general and primary burden of proving its case beyond reasonable doubt then only burden will shift on accused to prove a plea specially set up by him.

Corpse of infant male child found floating in river. Appellant tried on the allegation that she was unmarried woman and killed child after giving birth to him. Section 106 of Evidence Act would apply only when prosecution proves that body of child found in river was that of appellant. No evidence that child was given birth by appellant or was seen with appellant. No evidence that appellant on interrogation failed to give whereabouts of child. No presumption can be raised under Section 114 Illustration (g). Adverse inference can be drawn only when prosecution establishes the identity of child with appellant. Appellant acquitted. Appeal allowed. (Paras 9 and 11)

Cases Referred:

AIR 1974 SC 778, 2007 (1) SCC (Cri) 732, AIR 2006 SC 1319, 2006(1) SCC (Cri) 86.

Sanjay Sharma, for the appellant

G. Desai, Deputy Advocate General for the respondent.

JUDGMENT

The Judgment of the Court was delivered by

S.L. Kochar, J- :The appellant, by filing this appeal, has lodged her grievance against the judgment dated 19.11.1998 passed by the learned Addl. Sessions Judge, Garoth District Mandsaur in Sessions Trial No. 225/93 thereby convicting the appellant under sections 302 and 201 of the Indian Penal Code and sentencing her to imprisonment for life with fine of Rs. 2,000/-, in default of payment of fine to suffer additional R.I. for one year and to suffer R.I. for five years with fine of Rs. 1,000/-, in default of payment o/f fine to suffer additional R.I. for one year respectively.

2. Laconically, the facts of the prosecution case as put forth before the trial Court are that on 26.02.93, at village Boliyua in Kanthali river a corpse of an infant male child was found floating by Chowkidar Narayan who re;ported this fact to Police Station Garoth. The police registered a MARG intimation Ex.P/1. A Panchnama Ex. P/2 was prepared by the police and the corpse of the male infant was sent for postmortem examination to the hospital, which was conducted

*Cr.A. No. 1404/1998 (Indore)

by Dr S.S. Vijayavargiya (PW-11) The postmortem re;port is Ex.P/12. According to the medical expert, the death of the child was homicidal in natured and the cause of death was asphyxia within 48 hours from the time of postmortem examination. In MARG inquiry, it was revealed that the appellant was an unmarried woman having a foetus and she gave birth to a male child and thereafter committed murder of this child by strangulating and threw the corpse in the river. The spot map prepared is Ex. P/4. The appellant was also got medically examined and her medical report is Ex. P/10 given by Dr Chaudhary (PW-13). Police registered crime against the appellant. The FIR is Ex. P/14. After due investigation, the appellant was charge-sheeted for the above noted offences.

3. The appellant denied the charges and submitted that she was never having any pregnancy while she was virgin and only after her marriage she gave birth to a male child and that she has been falsely implicated due to enmity in the village.

4. In order to prove its case, the prosecution examined as many as 15 witnesses whereas the appellant did not examine any witness in defence. On conclusion of trial, the learned trial Court, finding the appellant guilty, convicted and sentenced her as indicated herein-above.

5. We have heard learned counsel for the parties and perused the entire material available on record carefully.

6. Learned counsel for the appellant has not disputed the homicidal death of the child and submitted that the prosecution has failed to establish that the appellant gave birth to the said child. He also submitted that the learned trial Court in para 27 of the impugned judgment has erred in holding that the appellant gave birth to a live male child, but failed to adduce any evidence as to where the child was an d whether he was alive or dead, whereas the prosecution has failed to establish the identity of the child with the appellant.

7. Learned counsel appearing for the state, in oppugnation, has submitted that the prosecution has proved the homicidal death of the male child found floating in the river on 26.02.93 and the appellant gave birth to the male child on 19.02.93. During that period in village Boliya only two ladies viz. the appellant and one Ushabai had the deliveries. Therefore, the burden was on the appellant, as per provision under section 106 of the Indian Evidence Act to show as to where the child was and whether the child was alive or dead. He has further submitted that since the appellant failed to discharge this burden, presumption can be drawn against her as per provision under section 114 Illustration (g) of the Indian Evidence Act and therefore, the learned Trial Court has rightly come to the conclusion and convicted the appellant.

8. To resolve the controversy, it would be apposite to reproduce section 106 of the Indian Evidence Act, which reads as under:-

> **"106. Burden of proving fact especially within knowledge.-** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

9. In our considered view, there is no application of provision of section 106 of the Evidence Act in the facts and circumstances of the present case, because there is absolutely no evidence led by the prosecution to establish that the body of the child which was found floating in the river was of the same male child to whom the appellant had given birth. There is no direct evidence available on record to show that that male child was given birth of by the appellant or prior to finding his dead body in the river he was seen with the appellant. In the absence of this evidence, the ;prosecution has failed to discharge its burden to establish beyond reasonable doubts that the appellant gave birth to a live male child body of whom was found floating in the river.

10. The Supreme Court in the case of *Sawal Das* V/s *State of Bihar* (AIR 1974 SC 778) while interpreting the provision of section 106 of the Evidence Act, observed as under:-

> **"The burden of proving a plea specially set up by an accused certainly lies upon him But, neither section 103 nor section 106 can absolve prosecution from discharging its general or primary burden of proving its case beyond reasonable doubt. It is only when prosecution has led evidence which if believed will sustain conviction, or makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused."**

[Also see: *Vikramjit Singh* V/s *State of Punjab* [2007(1) SCC (Cri) 732] and *P.Mani* V/s *State of Tamil Nadu* (AIR 2006 SC 1319)].

11. As discussed herein-above, the prosecution has failed to discharge its onus to establish that the dead child was found in the river was the same child to whom the appellant gave birth. Apart from this, there is also no evidence on record to show that the appellant was not having any male child in her lap or in her house or in her custody and on interrogation, she failed to give the whereabouts of the child. In absence of this evidence. In our considered view, there would be no application of section 106 of the Evidence Act to say that the fact was especially within the knowledge of the appellant and she failed to prove the said fact. Similarly, there would be no application of section 114(g) of the Evidence Act for raising presumption against the appellant. If the identity of the male child would have been established by the prosecution with the appellant and, thereafter, the appellant would have failed to give explanation about his death, only then an adverse inference could have been drawn against the appellant. [(See: *Murlidhar and others* V/s *State of Rajasthan* [2006(1) SCC (Cri) 86].

12. In view of the aforementioned factual and legal discussion, i n our opinion, the trial Court has committed error of law by holding in para 27 of the impugned judgment that the appellant did not adduce any evidence regarding newly born male child and whether he was alive or dead because as discussed above, no evidence has been adduced by the prosecution to establish that a male child found dead in the river was the child to whom the appellant gave birth and no question to this effect that the child was not available on search being made

with the appellant or her relatives and the appellant failed to give the whereabouts of the child was put to the appellant in her statement recorded under section 313 of the Code of Criminal Procedure, in order to explain this situation. Therefore, it could not be said that the appellant has failed to give explanation or furnish information as to where the child was and whether the male child was alive or dead.

13. In the wake of foregoing factual and legal analysis, we have absolutely no hesitation to hold that the prosecution has miserably failed to bring home the guilt of the appellant beyond reasonable doubt. Thus, this appeal is allowed. The impugned judgment of conviction and sentence is hereby set aside. The appellant is on bail. Her bail and surety bonds stand discharged. Let a copy of this judgment be transmitted to the trial Court along with its record in due course.

Appeal allowed.

I.L.R. [2008] M. P., 574
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
3 January, 2008

HALKU & anr. ... Appellants*
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act, Indian, (1 of 1872) - Section 154 - Hostile Witness - Seizure witnesses did not support seizure of Ganja from Accused - Prosecution did not declare them hostile - Defence can rely upon the evidence of these witness and it would be binding upon prosecution. (Para 11)

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8(c), 20(b)(i) - Possession of Ganja - Investigation Officer not in a position to identify appellants in Court to establish fact regarding seizure of Ganja - Seizure witnesses not supported prosecution case - Appellants entitled for acquittal. (Para 12)

C. Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Section 55 - Police to take charge of articles seized - No weighment panchnama prepared - Weight of Ganja shown only by guess - Sample not sealed on spot but in Police Station - Sample not drawn by Investigating Officer but by Town Inspector - No evidence that Ganja was kept in intact condition in Police Station - Appellants acquitted - Appeal allowed. (Paras 13 to 16)

D. Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Section 42 (i) (ii) - Power of entry, search, seizure and arrest without warrant or authorization - Recording of grounds of belief - Appellants apprehended in night - Grounds of belief to immediate superior officer not sent - Provision mandatory - Trial Vitiated. (Paras 18 and 19)

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*Cr.A. No. 484/1993 (Jabalpur)

Cases Referred:

2005 SCC (Cr) 1050, 2003 SCC (Cr) 1494, 2005 SCC (Cr) 1037, (2003) 9 SCC 159, (2006) 12 SC 321, (1994) 3 SCC 299.

S.C. Datt, with G.P. Patel, for the appellants.

G.S. Thakur, Panel Lawyer, for the respondent.

JUDGMENT

K.S. Chauhan, J. :–This criminal appeal has been preferred under Section 374(2) of Cr.P.C. being aggrieved by the judgment, finding and sentence dated 03-05-1993 passed by Special Sessions Judge, Sagar, in Special Sessions Trial No.17/92 whereby the appellants have been convicted under Section 8 (c) read with section 20(b)(i) of NDPS Act and sentenced to R.I. for 2 years with fine of Rs.5000/-, each, in default, to undergo further R.I. for 1 year.

2. The prosecution case, in brief, is that in the intervening night of 7th and 8th April, 1992, Jagmohan Singh Batti, SDO(P) Rehli was on patrolling duty by Jeep No. MPP 2733. He saw a TVS- XL No. CPV 310 standing on road near Chanaua village in the suspicion condition. Two persons were standing there. On asking, they told that the belt of vehicle has been broken. They could not give satisfactory answer regarding their presence in so late night. He felt smell of Ganja, hence searched the bag which was hanging on handle of this vehicle and found 3 pollythin packets of Ganja in it. Halku Raikwar stated that this Ganja is of him. Then, dickey of vehicle was also searched wherein Ganja was found in 2 packets. Ramesh Dubey stated that this Ganja belongs to him. They could not give satisfactory reply regarding the possession of Ganja, hence 2 kg Ganja from Halku and 1½ kg Ganja from Ramesh Dubey was seized. Vehicle TVS No.CPV 301 was also seized. They were found to have committed an offence under section 8-B/20-A of NDPS Act hence were arrested at 2.25 A.M. Dehati Nalisi Ex.P-4 was recorded. On return to P.S. Garhakota, Crime No.83/92 was registered under Section 8-B/20-A of NDPS Act. The statements were recorded. Seized articles were sent for chemical examination to FSL Sagar wherefrom report received that there is Ganja in item no. A B C D & E. After completing the investigation, charge sheet was filed in the Special Court for trial.

3. The accused persons were charged under Section 8(c) read with section 20-B(i) of NDPS Act that on 8.4.1992 at village Chanaua, they were found having 1½ and 2 kg Ganja.

4. The accused persons abjured the guilt and claimed to be tried mainly contending that they have been falsely implicated.

5. The prosecution examined as many as 4 witnesses and the defence did not examine any witness. After appreciating the evidence, trial court found them guilty under section 8(c) read with section 20-B(i) of NDPS Act and sentenced thereunder as mentioned in para No.1 of this judgment. Being aggrieved by the judgment finding and sentence of the trial court, this appeal has been preferred by the appellants on the grounds mentioned in the memo of appeal.

6. The learned counsel for the appellants submitted that the trial court has not

appreciated the evidence in the proper perspective. The seizure witnesses Manaklal PW-2 and Rakesh Kumar-PW-3 have not corroborated the fact regarding recovery of Ganja from the appellants. They have not been declared hostile. Therefore. their evidence is binding upon the prosecution. He has further submitted that Jagmohan Singh Batti has not identified these appellants in Court. Other witness Rakesh Kumar PW-3 also could not identify them. Trial Court has wrongly held that Ganja was seized from be appellants. No weighment Panchnama was prepared. It was necessary to establish whether Ganja was of smaller quantity or of greater quantity. No sample was drawn. No such Panchnama was prepared. It was not proved that the articles sent for chemical examination were the same which were seized from appellants. There is inordinate delay in sending the sample for analysis. No satisfactory explanation has been given by prosecution for such delay. He has further submitted that the provisions of Section 42, 52 and 57 of NDPS Act have not been followed. The trial Court has committed an illegality in finding them guilty and sentencing under section 8 (c) read with section 20-B(i) of NDPS Act. The finding of guilt deserves to be set aside and hence are entitled for acquittal.

7. On the other hand, Shri G.S.Thakur, Panel Lawyer, appearing on behalf of the State/respondent supported the judgment, finding and sentence passed by the trial Court mainly contending that prosecution has proved that the appellants were having Ganja in their possession illegally. The report of FSL is positive wherein the sample was found of Ganja, therefore, the trail Court has not committed any illegality in convicting and sentencing the appellant. Hence it does not call for any interference.

8. The main point for consideration in this appeal is that whether trial court has committed an illegality in convicting and sentencing the appellants under Section 8(c) read with section 20-B(i) of NDPS Act, 1985.

9. I have perused entire case and the evidence adduced therein.

10. Jagmohan Singh Batti (PW-4) has deposed that while he was on patrolling duty, he found a TVS-50 in stationary condition on the road. Two persons were standing there. On smell of Ganja, he searched a bag which was hanging on the handle of the vehicle and found a pollythin bag containing 1 ½ kg of Ganja. Then, he searched dickey of that vehicle and found 2 kg. Of Ganja in a pollythin bag. Ganja was seized from accused persons vide seizure memo Ex.P-1 and P-2 in presence of witnesses. However, this witness could not identify the appellants in the court.

11. Manaklal (PW-2) and Rakesh Kumar (PW-3) are the seizure witnesses. They have not corroborated the fact of seizure of Ganja from the accused persons in their presence, but admitted their signatures on the seizure memo Ex.P-1 and P-2. Surprisingly enough the prosecution did not declare them hostile. In such situation, the defence can rely upon the evidence of these witness and it would be binding upon the prosecution as held in the case of *Rajaram v. State of Rajasthan* 2005 SCC(Cr.)1050; *Jagan M. Sheshadri* v. *State of Tamil Nadu* 2003 SCC (Cr.) 1494; *Mukhtiar Ahmad Ansari* v. *State* (NCT of Delhi) 2005 SCC (Cr.) 1037.

12. It is crystal clear that seizure witnesses are not giving the evidence that Ganja was seized from these appellants and Jagmohan Singh Batti (PW-4) himself was not in a position to identify the appellants in the Court to establish the fact regarding seizure of Ganja from these appellants. In the case of Jagdish v. State of Madhya Pradesh (2003) 9 SCC 159 and *Ritesh Chakravarty v. State of MP* (2006) 12 SCC 321, the judgment of conviction was set aside when the Panch witnesses denied the search and seizure of the appellants in their presence.

13. The seized articles were not weighed. No weighment Panchnama was prepared. It was necessary to come to the conclusion whether the seized articles are covered in smaller quantity or not. The weight of seized Ganja has been shown only by guess.

14. Jagmohan Singh Batti (PW-4) has himself admitted that the sample was not sealed on the sot. But it was sealed at P.S. Garhakota in his presence. In seizure memo Ex.P-1 and P-2, it is mentioned that Ganja was sealed when seized. Thus, sealing of Ganja at the spot appears to be wrongly mentioned in these documents.

15. No sample has been drawn by this witness. He has deposed that T.I. Garhakota, took sample and sent to F.S.L. Sagar for chemical analysis. In such situation, it was obligatory on the prosecution to prove that the sample which was sent for chemical examination was taken from the contraband articles seized from appellants.

16. No any document showing as to when the sample was sent to F.S.L. Sagar has been filed. However, it is found from F.S.L. report that the sample was sent by P.S. Garhakota on 22.4.92. Thus, it is apparent that this sample was kept at P.S. Garhakota from 8.4.92 to 21.4.1992 but the evidence has not been adduced on behalf of prosecution that the sample was kept in intact condition during this period and this fact has also not been explained as to why the sample was sent so late.

17. Jagmohan Singh Batti (PW-4) has deposed that he cannot identify the packets containing Ganja. However, when the packets - article A & B were produced, he stated that these are the same packets which he seized but he has not assigned any reason as to how he identified these packets later on.

18. In the *State of Punjab v. Balbeer Singh* (1994) 3 SCC 299, it has been held that under the proviso to section 42(1), if such officer has to carry out search between sun set and sun rise, he must record the grounds of his belief. To this extent, these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. Section 42 (ii) of NDPS Act.

19. Under Section 42(ii) of the Act, there is a provision that the officer shall within 72 hours send a copy of ground of belief to his immediate superior officer but in the present case, no such ground has been recorded and no copy has been forwarded to his immediately superior officer. Therefore, no compliance of Section 42 (ii) of the Act has been made.

20. Section 55 of the Act also does not appear to have been made complied with which runs as follows :-

"55. **Police to take charge of articles seized and delivered.-** An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station"

21. Thus, several infirmities are found in the prosecution case. The prosecution has failed to establish the guilt against the appellants beyond reasonable doubt, therefore, the trial court has committed an illegality in convicting and sentencing the appellants under section 8(c) read with section 20-B(i) of NDPS Act. Such finding is set aside and the appellants are entitled for acquittal.

22. Consequently, the appeal succeeds and is allowed. The conviction and sentenced passed by the trial Court in Special Sessions Trial No.17/92 is hereby set aside. Appellants are acquitted of the charge levelled against them. They are on bail. They be set at liberty. Fine amount, if paid, be refunded to them as per provisions of law.

23. The order regarding disposal of criminal properties passed by the trial Court is hereby maintained.

Appeal allowed.

I.L.R. [2008] M. P., 578
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi
16 January, 2008

NARAYAN ---Appellant*
Vs.
STATE OF M.P. ---Respondent

Penal Code, Indian (45 of 1860), Sections 302, 304 Part I - Murder or Culpable Homicide not amounting to murder - Appellant after having talk with deceased regarding loan amount got annoyed - Went to his house came back with khalnia and while saying that he will kill the deceased, gave a severe blow on head of deceased resulting in fracture of tempo parietal bone and damage to brain - Injury was sufficient in ordinary course of nature to cause death - Act of appellant can not be termed as act without any pre meditation - Case falls within Clause III of Section 300 of IPC - Conviction U/s 302 IPC upheld. (Paras 12 to 14)

Manish Sharma, for the appellant
G. Desai, Dy. Advocate General, for the respondent/State

*Cr. A. No. 332/2006 (Indore)

JUDGMENT

The Judgment of the Court was delivered by **S.L. KOCHAR, J:-** The appellant has filed this appeal against his conviction under Section 302 of the I.P.C., sentence to R.I for life and fine of Rs.500/-, in default of payment of fine, he shall suffer additional S.I. for six months', passed by learned Additional Sessions Judge, Kukshi, District Dhar in S.T. No.45/02 judgment dated 30th October, 2002.

2. According to the prosecution case, on 5/10/2001, at 6.00 p.m., deceased Ramsingh came to his house on motorcycle and was standing in front of his house. At that time, appellant met him and deceased demanded loan amount from the appellant, on which, appellant got annoyed and went to his house. Deceased Ramsingh was talking with Juwansingh(P.W.4) while standing in front of his house, at that juncture, appellant Narayan reached over there having wooden log(Khalnia, used in bullock-cart for giving support to luggage) and while saying that today he will kill him as deceased was demanding money again and again, gave a blow on the head of the deceased by Khalnia. At the time of causing injury by Khalnia on the head, appellant was picking up Khalnia by both the hands and dealt a blow on the head of the deceased resulting into his fall on the ground. The deceased became unconscious and was immediately taken to the hospital, where on examination, doctor declared him dead. Report of the incident was lodged immediately on 5/10/2001 at 8.00 p.m. by Surajbai(P.W.1), wife of the deceased. Police party reached on the spot and prepared the spot map. Inquest of the dead body (Exhibit-P/7)was prepared and after arrest of the appellant, on his disclosure statement, weapon of the offence 'Khalnia' was seized through seizure memo(Exhibit-P/9). The dead body was sent for postmortem examination and the same was performed by Dr. F.S. Chouhan(P.W.2). The postmortem report is Exhibit-P/2. The seized 'Khalnia' Article-'A' was sent for opinion to the doctor with letter(Ex-P/3) and opinion was given by the doctor on the same letter at place A to A that injury could be caused to the deceased by the said 'Khalnia'. The police also effected the seizure of blood stained and controlled earth as well as chappal of deceased from the spot through seizure memo(Ex-P/11). Seized articles were sent to Forensic Science laboratory, Indore for examination. On completion of investigation, charge-sheet was filed against the appellant under Section 302 of the I.P.C.

3. The appellant denied the charges and pleaded innocence, therefore, put to trial. The appellant has not examined any witness in defence whereas the prosecution examined in total six witnesses and got proved fifteen documents to prove its case. The learned Trial Court, found the appellant guilty and convicted him as mentioned here-in-above.

4. Learned counsel for the appellant has not disputed the homicidal death of deceased Ramsingh, which is also proved by the evidence of Dr. F.S. Chouhan(P.W.2), Autopsy Surgeon. Dr. Chouhan noted one lacerated wound 2" x 1" x Bone deep on left temporal parietal region of the skull and upon opening of

this injury, he found clotted blood inside. There was fracture of tempo parietal region 3" x 2" and brain was also damaged. In the opinion of Dr. Chouhan, deceased died because of shock due to head injury and excessive bleeding. He proved postmortem report(Ex-P/2). Dr. Chouhan also opined that the injury was sufficient in ordinary course of nature to cause death. Exhibit-P/3, was sent to Dr. Chouhan by the police with seized 'Khalnia ' and on examination, the doctor gave opinion that injury could be caused to the deceased by 'Khalnia' Article-'A'.

5. The learned counsel for the appellant has submitted only argument that the incident occurred all of a sudden, in which, on account of demand of loan amount by the deceased, the appellant got annoyed and gave a solitary blow by 'Khalnia', which resulted into death of the deceased. Under these circumstances, according to the learned counsel, the offence at the most would fall under Section 304, Part-I of the I.P.C., culpable homicide not amounting to murder.

6. On the other hand, learned Dy. A.G. Shri Desai has submitted that the appellant, after talk with the deceased regarding loan amount, went to his house which was situated at some distance and returned back with 'Khalnia', which is ordinarily a thick wooden log and dealt a blow by picking up 'Khalnia' with both the hands on the head of the deceased saying that he will kill him today. This act of the appellant would be sufficient to constitute the offence punishable under Section 302 of the I.P.C. and the learned Trial Court, considered all these aspects in detail and rightly convicted the appellant under Section 302 of the I.P.C.

7. Having heard the learned counsel for the parties and after perusing the entire record, it emerged that conviction of the appellant is based on the eye-witnesses account of Surajbai(P.W.1), wife of the deceased, who has specifically stated that after talk regarding loan amount between the appellant and the deceased, the appellant went to his house and returned back with 'Khalnia' of the bullock-cart and dealt a blow on the head of the deceased while saying that he will kill him. Because of the blow, the eyes bowls of the deceased had come out and blood started oozing from the head. She alongwith Laxman(P.W.3) and Juwansingh(P.W.4) took the deceased immediately to the hospital, where on examination, he was declared dead and report(Ex-P/4) was lodged in the Police Station, Kukshi in the same night on 5/10/2001, at 8.00 p.m. The version of Surajbai(P.W.1) is fully corroborated by her F.I.R.(Exhibit-P/1). This witness also identified the seized Khalnia, Article-'A' in the Court by which the appellant caused the injury on the head of the deceased Ramsingh. She also identified Article-'C' Chappal of the deceased. In the cross-examination, nothing substantial has come to fragile the testimony of this witness. The only omission found in her police statement(Ex-D/1) regarding non-mention of the fact that 'Khalnia' was having blood stains.

8. In our considered view, this is not a material omission and the same will not amount contradiction.. Therefore, it will not cause any damage to the evidence of this witness Surajbai(P.W.1). The incident had occurred in front of the house of Juwansingh(P.W.4). He has also supported the version of Surajbai(P.W.1). The

third eye-witness Laxman(P.W.3) was also residing near the house of deceased Ramsingh and Juwansingh(P.W.4). He has also supported the prosecution case and there is absolutely nothing in the record to corrode their testimony.

9. The learned counsel for the appellant has criticized the statement of all these three eye-witnesses on the ground that they are close relatives of the deceased that is, wife, brother and nephew(sister's son) respectively. Therefore, they have exaggerated the incident.

10. We have considered the statement of all these three witnesses and find no substance in the argument of learned counsel for the appellant because the incident occurred in front of their house, therefore, their presence was natural at the time of incident at 6.00 p.m. They immediately took the deceased to the hospital and from hospital to the police station where report was lodged without any delay. The distance of police station was three kilometre from the place of the incident. The statement of all these three witnesses is also fully corroborated by the medical evidence of Dr. Chouhan(P.W.2) as discussed here-in-above.

11. The moot question for us is to consider whether the offence would fall under Section 304, Part-I of the I.P.C. or not ?

12. In the instant case, the appellant after having talk with the deceased regarding loan amount got annoyed and went to his house and returned back with Khalnia, thereafter, dealt a Khalnia blow by picking it with both the hands on the head of the deceased, who fell on the ground. Because of the blow, there was a fracture of tempo parietal bone and also damage to the brain. Dimension of the fracture was 3" x 2". The deceased fell unconscious and died. In the opinion of the doctor, the injury was sufficient in ordinary course of nature to cause death. At the time of causing blow, the appellant also made utterance that he will kill the deceased. On the basis of the evidence on record and the facts and circumstances of the present case, the act of the appellant would fall under Section 300, Clause-III, which reads as under:-

> Section 300. Murder:-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-
>
> **Thirdly:-** "If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary curse of nature to cause death, or."

13. The appellant intended to cause injury by 'Khalnia' on the head of the deceased. It is not a case of sudden quarrel or sudden fight. There was a talk between the appellant and the deceased regarding loan amount. Thereafter, the appellant went towards his house and returned back with Khalnia and dealt a blow on the head of the deceased, this shows that he returned back with pre-meditation for assaulting the deceased and intended to cause head injury. He picked up Khalnia by both the hands and gave a severe blow on the head, which caused injury on the head, sufficient in ordinary course of nature to cause death.

14. The learned counsel for the appellant has also pointed out paragraph 10 of the statement of Juwansingh(P.W.4) that appellant picked up Khalnia lying among the other wooden logs near the house of one Kansingh situated adjacent to the house of the appellant. This statement of Juwansingh(P.W.4) will not make any difference because all the three eye-witnesses have said that after talk regarding loan amount with the deceased, the appellant got annoyed and went towards his house, thereafter, returned back with Khalnia and dealt a blow on the head of the deceased. This act of the appellant cannot be termed as act without any pre-meditation. It is not a case that during the course of talk with the deceased, appellant picked up lathi lying there and dealt a blow without intending to cause injury on the head, but blow unfortunately landed on the head. The witnesses have specifically stated that the appellant went towards his house and returned back with Khalnia, thereafter, by picking up Khalnia by both the hands while saying that he will kill the deceased, gave a blow on the head. These statements of all the three eye-witnesses brings this case within the four corners of Section 300, Clause-III of the I.P.C. In our considered view, the learned Trial Court has rightly convicted the appellant under Section 302 of the I.P.C.

15. Resultantly, we find no substance in this appeal. Therefore, same is hereby dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 582

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi

17 January, 2008

MAHESH ---Appellant*

Vs.

STATE OF M.P. ---Respondent

A. Penal Code, Indian (45 of 1860), Section 302/34, Indian Evidence Act, 1872 - Section 3 - Evidence - Nature of injuries - Appellant alleged to have caused injuries by lathi - Total absence of injuries which could be caused by lathi - Overt act is belied by medical evidence - Cannot be convicted with the aid of S. 34 I.P.C.

In view of the aforesaid classification, the case of appellant Kalu would fall within the first category i.e. total absence of injuries which are normally caused by lathi, therefore, he is entitled for getting benefit. When overt act of Kalu was belied by medical evidence, he cannot be convicted with the aid of Section 34 of the IPC. (Para 8)

B. Penal Code, Indian (45 of 1860), Section 302/34, Criminal Procedure Code, 1974, Section 161 - Police Statement - Omission regarding specific overt act of appellant in police statement - Appellant entitled to get benefit of doubt.

*Cr. A. No. 163 2002 (Indore)

But there is clear omission which amount to contradiction of important and material fact regarding specific overt act of appellant Mahesh in the police statements of both witnesses that appellant Mahesh caused injuries to deceased by Chhoori or Gupti. Therefore, in our considered view, appellant Mohan is also entitled to get benefit of doubt. (Para 11)

C. Penal Code, Indian (45 of 1860), Section 302/34, Indian Evidence Act, 1872 - Section 3 - Evidence - Independent witness - Investigating Officer interrogated independent witnesses of locality but none disclosed any material thing - Not a case where independent witnesses were available but not tried to interrogate them or examined during investigation but not produced in Court - Evidence of family members trustworthy - Conviction upheld. (Para 13)

Cases Referred:

(2003) 6 SCC 380, AIR 1976 SC 951, 2007 AIR SCW 5941

Asif Warsi, for the appellant,

Girish Desai, Dy. A.G. for the respondent/State

JUDGMENT

The Judgment of the Court was delivered by **S.L.KOCHAR, J:-** The aforesaid appeals are arising out of one judgment and order, hence, they are being disposed of by this common judgment.

2. The appellants have challenged their conviction under Section 302/34 of the IPC, sentenced to R.I. for life and fine of Rs.500/- each, in default of payment of fine additional R.I. for 6 months. All the sentences ordered to run concurrently.

3. Prosecution case as put forth before the Trial Court is that appellants and complainant party were close relatives and residing adjacent to each other. Kuntabai(PW-3) and her cousin sister (daughter of her mother's sister) Geetabai were married in one family resident of Village Shivgarh, Police Station Betma. Both had come on Rakhi festival to Gautampura at their parental house. On 08.08.2001, in day time Geetabai demanded her ornament (Kadi), on which Kuntabai told her to wait till arrival of father-in-law and she will give her ornament. On this issue, brother-in-law of Geetabai and appellant Karansingh, brother appellant Kalu, nephew, appellant Mahesh and brother-in-law juvenile accused Prakash jointly hurled filthy abuse in the name of mother and sister. After this incident, all the 4 accused reached in front of the house of the complainant PW-5 Mohan having Chhoori, Lathi, Ballam(spear) and assaulted complainant Mohan(PW-5) by their respective weapons. Complainant Mohan sustained 5 injuries by sharp edged weapon. When father of Mohan deceased Jagannath tried to save Mohan, juvenile accused Prakash gave Ballam blow on the chest of deceased Jagannath. Appellant Karansingh caused injury to him by Chhoori on thigh. All accused persons assaulted the deceased by their respective weapons. Deceased Jagannath sustained 4 injuries caused by sharp pointed and edged weapon. He died instantaneously. Incident was witnessed by injured witness PW-5 Mohan and PW-3 Kuntabai, PW-4 Ramkanyabai, PW-6 Kailash. PW-5 Mohan immediately reached to the Police Station and lodged the FIR (Ex.D/4), recorded

by PW-8 Shivpalsingh Chouhan, S.H.O.. Witness Mohan was seriously wounded, therefore, sent to hospital for treatment. After preparation of inquest, dead body of Jagannath was sent for postmortem examination and the same was conducted by PW-1 Dr.P.C.Kashyap. Dr.Kashyap also medically examined PW-5 Mohan and issued Medico Legal Certificate (Ex.P/1) as well as postmortem report of deceased Jagannath (Ex.P/2). PW-8 Shivpal Singh Chouhan, Station House Officer reached on the spot and effected seizure of blood stained and controlled earth. The accused persons were nabbed and on their disclosure statements, weapons were seized. Seized articles were sent for medical examination to Forensic Science Laboratory and its report is Ex.P/21. Spot map (Ex.P/22) was got prepared by Patwari and Investigating Officer Shri Chouhan also prepared map (crime details form) Ex.P/11. On due investigation appellants were charge-sheeted for commission of offence under Section 302/34 and 307/34 of the IPC. The fourth juvenile co-accused Prakash was produced before Juvenile Court.

4. Appellants abjured their guilt and pleaded innocence, therefore, put to trial. They have not examined any witness in defence. The learned Trial Court finding the appellants guilty, convicted and sentenced them as mentioned here-in-above.

5. Learned counsel for the appellant Mahesh has submitted that there is no cogent and reliable evidence on record regarding participation of this appellant in the incident and his presence could be in normal course being next door neighbour of the complainant party. The learned counsel for the appellant Karansingh and Kalu has submitted that overt act attributed to Kalu causing lathi blows is not corroborated by the medical evidence, therefore, he is entitled for getting benefit and act of Karansingh would at the most fall under Section 304 Part-I of the IPC, because there was no pre meditation and pre plan of this appellant with main accused Prakash, who was produced before the Juvenile Court.

6. The core question for consideration before us is whether all the accused persons are responsible for the acts of each other with the aid of Section 34 of the IPC and as to what offence would be made out against them.

The conviction of the appellants is based on eye witnesses account of PW-3 Kuntabai, PW-4 Ramkanyabai, PW-5 injured eye witness Mohan, who lodged the report Ex.D/4 and PW-6 Kailash. The presence of all these 4 witnesses on the spot cannot be doubted because they were residing in one house and at another side of wall of their house, the houses of the accused persons were situated. The incident occurred in front of the house of the appellants. While appreciating the evidence of all these 4 eye witnesses, we have reminded ourselves to keep in mind that all the eye witnesses are of one family and related to deceased. The accused persons were also closely related to them and both families were not having old inimical term. Eye witnesses and the close relatives of the deceased would not leave the real culprit by implicating falsely the other person, but at the same time, they are not immune to involve innocent person/persons alongwith real culprit. Therefore, we have to judge the evidence of all the 4 eye witnesses with great care and caution. All the 4 eye witnesses have specifically stated that dispute arose in day time between Kuntabai (PW-3) and Geetabai regarding ornament

which was demanded by Geetabai from Kuntabai. They are the cousin sisters. PW-3 Kuntabai has deposed that when Geetabai, younger sister of wife of appellant Karansingh demanded her ornament, she asked her to call her father-in-law and she would return the ornament. There was some verbal altercation between wife of Karansingh and this witness on this issue. She has also stated that wife of Karansingh entered into quarrel with her brother Kailash(PW-6) and struck him by a piece of brick upon which Kailash also assaulted her causing injury on the hand of Narmadabai and Narmadabai challenged them to take revenge after arrival of her husband i.e. Karansingh. But, all these facts are not mentioned in her statement recorded by police under Section 161 of the Cr.P.C. There is also omission of the fact that appellant Mahesh was having Katar in his possession and all the appellants with juvenile co-accused Prakash consumed liquor in their house. The further say of this witness Kuntabai is that appellants alongwith co-accused attacked at her house and beaten the door by lathi on which her brother PW-5 Mohan went out of the house to admonish the accused persons, but he was assaulted by all the 4 accused persons. According to this witness, Karansingh, Kalu, Prakash and Mahesh were having Chhoora, Lathi, Ballam(spear) and Katar respectively and they all assaulted Mohan, who fell unconscious. Appellants also assaulted her father Jagannath. PW-5 Mohan after regaining consciousness went to Police Station for lodging the report and appellants were assaulting her father, who died on the spot. This witness does not give specific overt act of the appellants and her version is not corroborated by the medical evidence of PW-1 Dr.P.C.Kashyap, who examined PW-5 Mohan and proved his MLC Ex.P/1 as well as postmortem report Ex.P/2, regarding causing injury to Mohan and deceased Jagannath by lathi by appellant Kalu. Witness Mohan sustained 5 incised wounds caused by sharp edged weapon and in the opinion of Dr.Kashyap all the injuries were simple in nature. Deceased Jagannth sustained two stab injuries and two incised wounds. These injuries could be caused by sharp edged and pointed object and not by hard and blunt object like lathi.

7. Supreme Court in case of *Thaman Kumar V/s. State of Union Territory of Chandigarh (2003) 6 SCC 380* has explained the situation regarding conflict between oral testimony and medical evidence as under :-

> "The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye witnesses. The same kind of inference cannot be drawn in the three categories of

apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony.

8. In view of the aforesaid classification, the case of appellant Kalu would fall within the first category i.e. total absence of injuries which are normally caused by lathi, therefore, he is entitled for getting benefit. When overt act of Kalu was belied by medical evidence, he cannot be convicted with the aid of Section 34 of the IPC. Supreme Court has dealt with such situation in case of *Nachhettar Singh and others V/s. State of Punjab* (AIR 1976 Supreme Court Page No.951) and held that when prosecution choose to give the details of the story of assault with the different different weapons by the appellants, it cannot escape the consequence when a vital part of the details is demonstrably found to be wrong and accused persons cannot be convicted with the aid of Section 34 of the IPC. The appellant Kalu and Karansingh are the real brother and were the next door neighbour of the complainant party, therefore, presence of Kalu in front of their house could be in usual course.

9. The star eye witness PW-5 Mohan in para-2 of his statement has specifically stated that he was assaulted by appellant Karansingh by Katar causing injury on his head, neck, abdomen and eye, he fell unconscious and regained consciousness after half an hour and went to lodge the report and that after his going to Police Station his father was assaulted. In view of this admission, it is crystal clear that he did not witness the incident of assault of his father deceased Jagannath. His version about causing injury by Katar, a sharp edged weapon is fully corroborated by medical evidence of PW-1 Dr.P.C.Kashyap, who examined him and also proved MLC report (Ex.P/1) as well as by the eye witness account of PW-4 Ramkanyabai and PW-3 Kuntabai.

10. Eye witness PW-6 Kailash son of the deceased has deposed that at the time of incident, appellants after consuming liquor came in front of his house and abused them, on which his father deceased Jagannath and brother PW-5 Mohan went out of the house to admonish them, whereupon accused persons started assaulting them. The further say of this witness is that he was inside the house. His mother did not permit him to go out of the house and chained the door from inside. He came out of the house when the incident was over and his father was already killed. He saw spear injury on chest and scapula region of his father. Further in paragraph-7, he specifically admitted that he was inside the house and door was chained by her mother because of which he could not witness the incident occurred outside the house. In view of this statement, the testimony of this witness Kailash can be useful upto the extent that quarrel took place in front of his house.

11. PW-3 Kuntabai and PW-4 Ramkanyabai had witnessed whole incident and according to Kuntabai Karansingh, Prakash and Mahesh were having Chhoora, Ballam and Katar. All the three assaulted by their respective weapons to her brother Mohan (PW-5) and her father was also assaulted, but she failed to explain the material omission in her police statement about possession and use of Katar by appellant Mahesh. She has also specifically admitted in paragraph 12 that which accused caused how many blows on the person of her father, she could not see because of darkness. At the same time, she has stated that in the light she saw the weapon in the possession of the appellants. In paragraph 5, this witness Kuntabai has also stated that appellants had consumed liquor because of which her brother and father went to admonish them. This factual position has also been stated by Ramkanyabai (PW-4), the daughter of deceased and according to this witness, appellants first assaulted her brother PW-5 Mohan and when he became unconscious and their father Jagannath tried to rescue Mohan, he too was assaulted by spear by juvenile accused Prakash whereas appellant Karansingh caused injury by Chhoora, Mahesh caused injury by Gupti and appellant Kalu used lathi. In the statement of Kuntabai (PW-3) and Ramkanyabai(PW-4), there is consistency regarding use of Chhoora by appellant Karansingh and spear by appellant Prakash. In the police statement of PW-3 Kuntabai, there is omission of the fact that appellant Mahesh was having Katar and there is omission in the police statement of PW-4 Ramkanyabai regarding possession and use of Gupti for causing injury to deceased by appellant Mahesh. The learned counsel for the appellant Mahesh has strenuously argued that there is contradiction between the statements of PW-3 Kuntabai and PW-4 Ramkanyabai as to what was the weapon in the hand of appellant Mahesh. On due consideration, we do not find much difference between weapon Chhoori and Gupti and there could be mistake in understanding or naming the weapon by these two witnesses because of distance and visibility, but there is clear omission which amount to contradiction of important and material fact regarding specific overt act of appellant Mahesh in the police statements of both witnesses that appellant Mahesh caused injuries to deceased by Chhoori or Gupti. Therefore, in our considered view, appellant Mohan is also entitled to get benefit of doubt. There is consistency in the statements of both the eye witnesses PW-3 Kuntabai and PW-4 Ramkanyabai for causing injury to Mohan(PW-5) and deceased Jagannath by appellant Karansingh by Chhoora (big knife) and by juvenile co-accused Prakash by spear (Ballam). Their version against both these appellants is fully corroborated by the medical evidence of PW-1 Dr.P.C.Kashyap.

12. Learned counsel for the appellants Karansingh and Kalu has placed reliance on Supreme Court judgment passed in case of *Jagannath V/s. State of M.P.* 2007 AIR SCW 5941. In this case, the incident occurred all of a sudden on account of collection of pieces of wood and stealing the same by accused and when deceased and his companion obstructed carrying away wood there upon accused inflicted fatal axe blow to deceased. In this factual backdrop, the Supreme Court has held that there was no pre-meeting of mind and pre-meditation between the accused persons for causing death of deceased and appellant Jagannath did not cause any

injury to deceased Ramsingh, who was caused serious injury by co-accused Ramsingh by axe on his head. In the instant case, facts and evidence are altogether different in day time between women folk of two families, quarrel took place on account of returning of ornaments. The matter was complained to the male members of one family i.e. accused persons on which accused persons reached in front of the house of the deceased and appellant Karansingh as well as juvenile accused Prakash assaulted PW-5 Mohan and deceased Jagannath by Chhoori and Ballam (spear). It was not a sudden quarrel. The appellants Karansingh and Prakash reached in front of the house of the complainant party having deadly weapon in their hands. They abused them and when PW-5 Mohan and his father came out from their house, they assaulted them. PW-5 Mohan sustained 5 injuries by sharp edged weapon and deceased Jagannath sustained 4 injuries. Two injuries of stab wounds could be caused by sharp pointed piercing object spear and rest injuries could be caused by sharp edged weapon like Chhoora by appellant Karansingh, therefore, looking to the number and nature of injuries caused by appellant Karansingh on the person of Mohan and deceased Jagannath it is easy to discern that he was having common intention with co-accused Prakash to commit murder of Jagannath and in furtherance of common intention committed murder of Jagannath and caused injuries to Mohan. Looking to the nature of weapon, number of injuries caused on the person of witness Mohan as well as deceased Jagannath. It can also be said that they developed common intention to commit murder of Jagannath on the spot when repeated blows by dangerous weapons were given by both accused persons (as held by Supreme Court in paragraph 13 of the case of *Jagannath* (supra)).

13. This is true that incident occurred in a residential area and witnesses have admitted presence of inhabitants of the said area but none was examined as independent witness by the prosecution. This situation has been explained by PW-8 Investigating Officer, Shivpalsingh Chouhan in paragraph 10 of his deposition that he interrogated persons of the locality but they were not disclosing any material thing regarding incident, therefore, he did not record their statements. We have given our anxious consideration to this aspect and are of the opinion that Investigating Agency tried to examine the independent witnesses but when none came forward, their statements were not recorded. It is not a case where independent witnesses were available but police did not try to interrogate them or make them witness or examined during the course of investigation, but did not examine in the Court. Presence of aforementioned all the 4 witnesses is fully established in the instant case as incident occurred in front of their house and accused persons were their next door neighbour. Between their houses there was only a wall.

14. In the wake of aforesaid legal and factual screening of the case the appeal of appellant Mahesh (Cr.A.No.163/2002) is allowed, his conviction and sentence passed by the Trial Court are hereby set aside. He is on bail. His bail and surety bonds stand discharged.

15. Cr.A.No.179/2002 is allowed in part. The conviction and sentence of appellant No.2 Kalu are hereby set aside. He is on bail. His bail and surety bonds

stand discharged and appeal of appellant No.1 Karansingh is hereby dismissed.

16. Original judgment is retained in Cr.A.No.163/2002 and a copy whereof be placed in the record of connected Cr.A.No.179/2003.

Appeal dismissed.

I.L.R. [2008] M. P., 589
APPELLATE CRIMINAL
Before Mr. Justice S.K. Kulshrestha
28 January, 2008

NANDA ---Appellant*
Vs.
STATE OF M.P. ---Respondent

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

None, for the appellant, (Para 6)

Girish Desai, Dy. Adv. General with *G.S. Chauhan*, GA for the respondent/ State.

J U D G M E N T

S.K. KULSHRESTHA, J:- The appellant has preferred this appeal against the judgment dated 16.3.1995 of the learned Sessions Judge, Ratlam in Sessions Trial No. 72/1994 by which the appellant has been convicted under Section 8 read with Section 20 of the Narcotic Drugs and psychotropic Substances Act, 1985 and sentenced to R.I. for one year and fine of Rs. 3,000/-. In case of default in payment of fine, the judgment directs him to suffer further imprisonment for three months.

2. According to the case of the prosecution, on 2.4.1994, information was received by the SHO Sunil Yadav (P.W.4) from a source that in Village Manankheda the accused had, in his field, cultivated Ganja (Cannabis) Plant without any license for the said cultivation. The information was recorded in Ex.P/1 and Sunil Yadav proceeded to the spot along with the Police force where he found the accused. The accused was informed that the Police wanted to take search of his field and if he desired search by any Gazetted Officer, the same would be arranged. The accused gave consent for being searched of which Panchnama Ex.P/2 was prepared. After the Police and the witnesses gave their search of which Memo Ex.P/3 was prepared, they entered the field and found that the same contained 90 Cannabis Plants in violation of the provisions of the NDPS Act, 1985. The Plants were seized vide Ex.P/4 and the accused was arrested of which Memo Ex.P/5 was prepared. The copies of the revenue record pertaining to the holding of the

*Cr. A. No. 272/1995 (Indore)

appellant were also procured from the Patwari and on coming back to the Police Station, Report Ex.P/8 was recorded. Samples of the Plants were forwarded to the Chemical Examiner and, according to his Report Ex.P/9, found the articles seized to be Cannabis Plants. Accordingly, after completion of the investigation, the appellant accused was prosecuted.

3. The accused pleaded before the Court below that he had already given his field to Puna for a sum of Rs. 10,000/- under the agreement Ex.D/1 but not believing the defence of the accused, he was convicted and sentenced as hereinabove stated. Hence, this appeal.

4. The appeal hinges mainly on the testimony of P.W.-4 Sunil Yadav SHO who had participated in the matter from the beginning till the end. In his evidence while Sunil Yadav has deposed to the steps that were taken, he has frankly conceded that he did not make any spot map to show the position of the Plants. His explanation was that since photographs had been taken, it was not thought necessary to prepare a spot map. However, he could not tell the whereabouts of the photographs.

5. On account of the omission of P.W.-4 Sunil Yadav to make a spot map or to produce the photographs, even if it is assumed that it was the field of the accused of which he was Bhumiswami and in possession, the question arises whether the Cannabis was cultivated by the accused. It is also not clear whether the Plants which were found were scattered or were in a row or in a bed so as give any indication that the Cannabis were grown by the accused. There is also nothing to suggest that it was not a case of spontaneous growth. There is also no evidence to suggest that anybody had noticed that the accused was cultivating the field and growing cannabis.

6. The learned Sessions Judge has referred to the testimony of Sunil Yadav P.W.4 Rameshwar P.W.-1 and Rameshchandra P.W.-5 with regard to the ownership and possession of the accused of the field concerned. Patwari Madanlal P.W.-2 has also been examined but Rameshwar and Rameshchandra have not supported the prosecution. It is, therefore, clear that even on the finding arrived at by the learned Sessions Judge with regard to the ownership and possession of the field, the quantity of Plants being only 90, and there being no evidence that they were systematically grown in the absence of spot map and the photographs, it is not unlikely that while the field had the Maize Plants, there may have been wild growth of the Cannabis. It is otherwise not comprehensible that if the accused wanted to grow Cannabis, he would confine the growth only to 90 Plants.

7. In view of the above discussion, the accused becomes entitled to the benefit of doubt on the ground that there was also possibility of spontaneous growth of the Plants.

8. In the result, this appeal is allowed and the accused is acquitted. The accused is on bail. His bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2008] M. P., 591

CRIMINAL REVISION

Before Mr. Justice Rakesh Saksena

5 March, 2008

IN REFERENCE

Vs.

PRAKASH KUMAR THAKUR

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

Alleged offence under Section 2 of the Prevention of Insults to National Honour Act, 1971 was committed at Perth (Australia) and the offence in itself was completed outside India and no act of the accused amounting to offence was committed in India, no inquiry or trial of such offence could be initiated in India except with the previous sanction of the Central Government. (Paras 7,8)

Case relied on:

(1993) 3 SCC 609

Shashank Shekhar, for the non-applicant

ORDER

RAKESH SAKSENA, J:- This revision has suo-motu arisen from the order dated 09.01.2008 passed by the Chief Judicial Magistrate, Bhopal in R.T. No.305/2008, on the complaint of Prakash Kumar Thakur, under Section 2 of the Prevention of Insults to National Honour Act, 1971, against Sania Mirza, a rising star on tennis firmament, on the allegation that she by placing her feet on the table in the manner that thereby she insulted the National Flag fixed on the table, as displayed from her photographs published in the news papers. Taking cognizance on the said complaint, learned Chief Judicial Magistrate, Bhopal has issued notice of appearance to the accused. In the revision, jurisdiction of the learned Chief Judicial Magistrate, Bhopal to take cognizance of the said offence and issuance of notice to the accused, are under question.

2. Learned counsel for the respondent submits that the complaint has been filed under Section 200 of the Code of Criminal Procedure and no procedural lapse under Section 200 or Section 204 of the Code of Criminal Procedure has taken place. He submits that in view of the provision of Section 188 of the Code of Criminal Procedure, when an offence is committed outside India by a citizen of India or by a person not being a citizen of India, he may be dealt with in respect of such an offence as if it had been committed in any place within India at which he may be found. Though a previous sanction of the Central Government is required for the inquiry or trial of the above offence in India, but such sanction is not a condition precedent to take cognizance of the offence. Sanction can be obtained

*Cr. Rev. No. 176/2008 (Jabalpur)

before commencement of the trial. He placed strong reliance on *Ajay Aggarwal Vs. Union of India & others*, (1993)-3-SCC-609 in support of his contention.

3. For inquiry or trial of an offence, two things are essential. First, alleged facts should disclose commission of an offence prima-facie and second, the Court or Magistrate deciding about this question should be empowered by law to take cognizance of the matter. Magistrates assume jurisdiction in virtue of the empowering provision of Section 190 of the Code of Criminal Procedure, as in this case also, learned Chief Judicial Magistrate, has done, but this case is apart from the usual cases in as much as, in this case, admittedly, the offence is alleged to have been committed in a foreign country i.e. at Perth (Australia). This made the provision of Section 188 of the Code of Criminal Procedure applicable to the present case which puts an embargo on the Courts and the Magistrates to take cognizance of the offence committed abroad without previous sanction of the Central Government.

4. Before dilating about the requirement of the sanction engrafted by the provision of Section 188 of the Code of Criminal Procedure, it is necessary to look into the said provision which is reproduced herein under :-

> **"Section 188 :- Offences committed outside India-**When an offence is committed outside India -
>
> (a) by a citizen of India, whether on the high seas or elsewhere, or
>
> (b) by a person, not being such citizen, on any ship or aircraft registered in India,
>
> he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found :
>
> Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."

5. Bare perusal of the proviso to Section 188 of the Code of Criminal Procedure makes it clear that the proviso begins with the words "notwithstanding anything in any of the preceding sections of this Chapter". This explicitly makes observance of the provision mandatory. But it would come into play only when it is established that an offence has been committed outside the country.

6. Learned counsel for the respondent appears to have misconceived the ratio of the case of *Ajay Aggarwal* (supra), in which the appellant, a non resident Indian running a concern at Dubai and four others residing in India hatched a conspiracy to cheat the Punjab National Bank. In pursuance thereof, they acted and succeeded in cheating the Bank of an amount of Rs.40,30,329/-. It was found that the foreign letters of credit were fabricated on the basis of false and forged shipping documents submitted by the appellant to a Dubai Bank. When the charge sheet was laid against the appellant and others for the offences under Sections 120-B, 420, 468 and 471 of the Indian Penal Code, the Chief Judicial Magistrate, Chandigarh discharged all the accused for the said offences on the ground that

conspiracy and acts done in furtherance thereof had taken place outside India, therefore, sanction under Section 188 of the Code of Criminal Procedure was mandatory, and no such sanction having been produced, the prosecution was not maintainable. Considering the facts of the case, the Supreme Court held that the conspiracy was initially hatched at Chandigarh which itself was a completed offence. It being a continuing offence, even accepting the appellant's case that he was at Dubai and part of conspiracy and overt acts in furtherance thereof had taken place at Dubai and partly at Chandigarh; and in consequence thereof other offences had ensued, since the offences have been committed during the continuing course of transaction culminated in cheating the Punjab National Bank at Chandigarh, the need to obtain sanction for various offences under proviso to Section 188 was obviated. Therefore, there was no need to obtain sanction from the Central Government. It was further observed that the case would be different if the offences were committed outside India and were completed in themselves without conspiracy. It is apparent that in the context of Section 120-B of the Indian Penal Code, the Supreme Court held that sanction under Section 188 of the Code of Criminal Procedure was not a condition precedent to take cognizance of the offence. If need be it could be obtained before trial begins. The Apex Court approved *In Re M.L. Verghes case*, AIR 1947 Mad. 352, where the offence charged under Section 409 of the Indian Penal Code had taken place outside British India and it was held that sanction under Section 188 was necessary. In *Ajay Aggarwal* (supra), the Apex Court observed that "the case may be different if the offences were committed outside India and are completed in themselves without conspiracy. Perhaps that question may be different for which we express no opinion on the facts of this case". It was further observed that "proviso to S.188, Cr.P.C. however provides the safeguard for the NRI to guard against any unwarranted harassment by directing "that notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government." Since the proviso begins with a non obstante clause, its observance is mandatory. But it would come into play only if the principal clause is applicable, namely, it is established that an offence as defined in clause 'n' of S.2 of the Cr.P.C. has been committed and it has been committed outside the country."

7. Thus, it is evident that where an offence is committed outside India and is complete in itself without any conspiracy or any part of it having been committed in India, it shall not be inquired into or tried in India except with the previous sanction of the Central Government. To hold otherwise would virtually amount to nullify the proviso of Section 188 of the Code of Criminal Procedure entirely.

8. Since the accusation in the present case is that the alleged offence under Section 2 of the Prevention of Insults to National Honour Act, 1971 was committed at Perth (Australia) and the offence in itself was completed outside India and no act of the accused amounting to offence was committed in India, no inquiry or trial of such offence could be initiated in India except with the previous sanction of the Central Government.

9. In the instant case, there is nothing on record, not even averment, to show that the requisite sanction of the Central Government to inquire into or try the aforesaid offence in India was obtained. Its absence inevitably rendered the learned Chief Judicial Magistrate, Bhopal without jurisdiction and the complaint filed before him incompetent and, consequently, the entire proceedings including the impugned order of taking cognizance deserve to be quashed and are quashed accordingly.

10. Revision allowed.

Revision allowed.

I.L.R. [2008] M. P., 594
INCOME TAX APPEAL
Before Mr. Justice Dipak Misra & Mr. Justice S.C. Sinho
21 January, 2008

DEPUTY COMMISSIONER OF INCOME TAX ... Appellant*
Vs.
SUNITI SINGH, BHOPAL ... Respondent

A. Income Tax Act (43 of 1961) - Section 48 - Assessee who is running a dairy and sells cow milk - Income from the sale of calves - Can not be regarded as capital gain since the cost of acquisition is not a ascertainable. (Paras 19,20)

B. Circular issued by Central Board of Direct Taxes - Binding on Tax Authorities - CBDT vide instruction dated 28-10-1992 fix the monetary limit for preferring appeal or reference before the High Court at Rs. 50,000/- - Tax involved for Rs. 15,984/- - In the light of circular Appeal is not maintainable. (Para 21)

Cases Referred:

(1977) 107 ITR, 637 (Guj), (1984) 148 ITR 741, (1969) 73 ITR 751 (SC), (1954) 26 ITR 765 (SC), (1967) 19 STC 1 (SC), (1964) 15 STC 644, (1981) 128 ITR 294, (1985) 156 ITR 509, (1995) 169 ITR 291, (2002) 30 ITC 446 .

Rohit Arya with Sanjay Lal, for the appellant.
Sumit Nema, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by **Dipak Misra, J.**:-In the present appeal preferred under Section 260-A of the Income Tax Act, 1961 (in short 'the Act') the following substantial question of law emanates for consideration:

> "Whether in the facts and circumstances of the case the Income Tax Appellate Tribunal is justified in holding the decision of Commissioner of Income Tax (Appeal) in deleting the addition of Rs.68,000/- on the foundation that in the sale of calves no cost of

*I.T.A. No. 2/1999 (Jabalpur)

acquisition is involved and hence, the question of income by way of capital gain does not arise.?"

2. The facts which are essential to be adumbrated for adjudication of this appeal are that the assessee is running a dairy and sells cow milk. The assessing officer observed that the assessee had claimed depreciation on calves forming a part and parcel of the live stock and, therefore, it was stock in trade of the assessee and income from the sale of such stock in trade is liable to tax. Thus, the assessing officer treated the calves to be stock in trade and assessed it to tax.

3. Being dissatisfied with the aforesaid order the assessee preferred an appeal and the appellate authority dislodged the finding of the assessing officer and deleted a sum of Rs.68,000/-

4. Being aggrieved by the order passed by the appellate authority, the Revenue preferred an appeal before the Income Tax Appellate Tribunal (for short 'the tribunal') which concurred with the view expressed by the appellate authority.

5. We have heard Mr. Rohit Arya, learned senior counsel along with Mr. S. Lal for the Revenue and Mr. Sumit Nema and Mr. Mukesh Agrawal, learned counsel for the respondent assessee.

6. Mr. Rohit Arya, learned senior counsel assailing the impugned orders submitted that the appellate authority as well as the tribunal has fallen into serious error by coming to hold that no capital gain arose as there was no cost in acquisition though in the instant case, the question involved was whether the calves which form a part of the live stock and the income from the sale of such stock-in-trade constitutes the business and income would be liable to tax.It is urged by him that the issue raised before the tribunal was that the sale of calves gave rise to income which was liable to be taxed as business income but the tribunal erroneously did not address to the same and confirmed the order passed by the CIT (A) in respect of the capital gain. It is further submitted by him that the cost has been incurred by the assessee in the acquisition of calves and hence, the conclusion arrived at by the tribunal is totally unsustainable. To bolster his submission he has placed reliance on the decision rendered in the case of *CIT* Vs. *V. Ramaswamy Mudaliar*, 196 ITR 939. Learned senior counsel has also commended us to the decision rendered in *CIT* Vs. *P.C. Srinivas Reddy*, 128 ITR 294.

7. Mr. Sumit Nema, learned counsel appearing for the assessee per contra, submitted that the calves, as the entire factual scenario would exposit, do not form a part of stock-in-trade. It is canvassed by him that no amount has been spent in the process of acquisition of calves as has been soundly held by the first appellate authority as well as the tribunal and the said conclusion being within the parameters of law does not warrant any interference. It is argued by him that the business of the assessee relates to sale of milk and the female cows constitute the asset which was for production of milk and sale thereof and, therefore, the fertilization of the cows was for production of milk and the calves were obtained as mere capital gain. Learned counsel has further submitted that sale of calves is by no stretch of imagination a part of the business activity of the assessee as the

business of the assessee entirely constitutes sale of milk and judged in proper perspective it cannot constitute stock-in-trade business activity of the assessee. Learned counsel for the assessee submitted that the sale of calves has to be put in the compartment of capital receipt which is to be taxed in accordance with the provisions of Section 45 of the Act and its computation has to be made in accordance with Section 48. It is propounded by him that in the present case the cost of acquisition of the calves cannot be ascertained because there are no expenses directly attributed towards bringing them into existence inasmuch as all the expenditure is in the nature of revenue expenditure such as fodder, medicines, etc. which are already claimed as deductible expenditure in the profit and loss account and there is no direct capital expenditure which can be attributed to give birth to the calves. The learned counsel contended that the entire expenses related to production of milk which has been shown as income from sale of milk and, therefore, the tribunal has correctly concurred with the finding of the first appellate authority. It is highlighted by Mr. Nema that the tax effect in the instant case is less than Rs.50,000/- and as per CBDT instructions dated 28.10.1992, the monetary limit for filing of appeal or reference before the High Court has been fixed at Rs.50,000/- and the CBDT instructions are binding on the Revenue and hence, the appeal deserves to be dismissed on that score also.

8. To appreciate the submissions raised at the Bar it is apposite to refer to the concept of stock-in-trade and the concept of business. In *H. Mohammed & Co.* Vs. *Commissioner of Income Tax, Gujarat*, (1977) 107 ITR 637 (Guj) while dealing with the concept of 'stock-in-trade it has been held as under:

> "The essential characterstics of stock-in-trade are: it must be commodity in which there is dealing, i.e. which is bought and sold as distinguished from a commodity with which the business is carried on, viz., from the exploitation of which the income is derived. The distinction is between selling outright in the course of the business activity as distinguished from deriving income from exploitation of one's own assets."

9. The High Court of *Karnataka in C.G. Thimmaiah* Vs. *CIT*, (1984) 148 ITR 741 has held as follows:

> " merely because the trees were cut, dressed and sized into logs for the purpose of convenient sale, it could not be construed as converting them into stock-in-trade. Therefore, the profit derived from the sale of rosewood trees was assessable to tax under the head "Capital gains".

10. At this juncture, it is seemly to refer to the concept of business as has been defined under Section 2(13) of the Act and to certain decisions in the said sphere. In *CIT* Vs. *A. Dharma Reddy*, (1969) 73 ITR 751 (SC) the Apex Court has opined that business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.

11. In *Narain Swadeshi Weaving Mills* Vs. *CEPT*, (1954) 26 ITR 765 (SC), the Apex Court has held that business connotes some real, substantial and systematic or organized course of activity or conduct with a set purpose.

12. In State of *Gujarat* Vs. *Raipur Mfg. Co. Ltd.*, (1967) 19 STC 1(SC), their Lordships have ruled that to infer from a course of transactions that if it is intended thereby to carry on business ordinarily the characteristics of volume, frequency, continuity and regularity indicating an intention to continue the activity of carrying on the transaction must exist but no test is decisive of that a person desires to carry on the business may be raised.

13. In State of *Andhra Pradesh* Vs. *H. Abdul Bakshi & Bros*, (1964) 15 STC 644, the Apex Court opined that business without profit is not business, any more than a pickle is candy. To regard an activity as business there must be course of dealings, either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure.

14. Keeping the aforesaid concepts in view it has to be scrutinised whether in the obtaining factual matrix calves form a part of stock. Certain conditions which emerge in the present case are that the assessee is engaged in the business of sale of milk and cows constitute an asset for production of milk; that the primary motive to have the cows is for production of milk; that the income is from sale of milk and all expenses and maintenance like fodder and medicines are designed to obtain milk; that the calves which have been sold are male and they cannot produce milk which is the business activity of the assessee. Two aspects are to be taken into consideration, namely, (1) the expenses made by the assessee to maintain the cows has already been put in the compartment of profit and loss account; and (2) the calves came into existence in the aforesaid process.

15. First we shall advert to the facet whether the calves under the aforesaid fact foundation can be regarded as stock-in-trade. From the facts that have been exposited it is discernible that the business of the assessee relates to sale of milk and the female cows constitute the asset and they are exploited for production of milk. The primary motive of the assessee to fertilise the cows so that they can yield milk. The income is derived through the sale of milk and all expenses which have gone into is to upkeep them and maintenance of cows like purchase of fodder, medicines etc are exclusively designed for obtaining milk and the said expenditure has been shown as revenue expenditure in the profit and loss account. The calves came into being in the process so that the female cows can be utilised to produce and eventually the milk is sold. The male cows are sold as they are of no value to the assessee as they cannot produce milk. There is no material on record to show that selling of calves is a part of the business activity of the assessee. Facts brought on record clearly show that the assessee is engaged in the business activity which relates to sale of milk.

16. The sale of calves by the assessee, as has been indicated herein above, relates to sale of male calves. The sale of calves is not on account of realisation of stock in trade or as a business activity. It is submitted by Mr. Nema, learned

counsel for the assessee that if the factual matrix is properly appreciated it would be vivid that the sale of calves can only be regarded as capital receipt and not a part of business activity. Learned Counsel has submitted that it is to be taxed in accordance with the provision of Section 45 of the Act and its computation should be done in accordance with Section 48. It is urged by him that if the provisions contained under Sections 45 and 48 are scanned there can be no shadow of doubt that the cost of acquisition being unworkable in the case of this nature, no taxable income would be accrued. In *CIT Vs. B.C. Srinivasa Setty*, (1981) 128 ITR 294 the Apex Court has held that Section 45 is a charging section and Section 48 provides base for computation. Their Lordships further proceeded to hold that there is a quantitative difference between the charging provision and computation provision and ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. If in the facts of a particular case, computation under Section 48 is not possible, the charge under Section 345 fails because it cannot be effectuated.

17. In *Sunil Sidharth Bhai* Vs. *CIT*, (1985) 156 ITR 509, the Apex Court has expressed the opinion as under:

> ".....At the time when the petitioner tranfers his personal asset to the partnership firm; there can be no reckoning of the liabilities and losses which the firm may suffer in the years to come. All that lies within the womb of future. It is impossible to conceive of evaluating the consideration acquired by the partner when he brings his personal asset be envisaged nor can there be any ascertainment of liabilities and prior charges which may not have even arisen yet. Therefore, the consideration which a partner acquires or making over his personal asset to the firm as his contribution to its capital cannot fall within the terms or of Section 48. And as that provision is fundamental to the computation machinery incorporated in the scheme relating to the determination of the charge provided in Section 45, such a case must be regarded as falling outside the scope of capital gains taxation altogether."

18. Submission of Mr. Nema is that in the present case the cost of acquisition of calves cannot be ascertained because there are no expenses directly attributable towards bringing them into existence. All the expenditure has to be treated as revenue expenditure which have been claimed by the assessee as deductible expenditure in the profit and loss account.

19. At this juncture, it is apposite to refer to the decision rendered in *Shree Krishna Dairy and Agricultural Farm Vs. CIT*, (1995) 169 ITR 291 wherein it has been held that birth of calves was incidental to the business activity of the assessee and it is difficult to accept them as asset as there was no cost of acquisition of calves and, therefore, gains which arose in such sale was not liable to tax as capital gain. Mr. Rohit Arya, learned senior counsel for the Revenue has placed heavy reliance on the decision rendered in *Ramaswami Mudaliar* (supra). We

have carefully perused the said decision. In our considered opinion the said decision is distinguishable on facts. The Madras High Court in the said decision was dealing with the expenditure incurred by the assessee for the purpose of nurturing, protecting and preserving the foetus of the colt and the filly in good shape and health so that healthy offspring were brought into existence by the mare. The maintenance or upkeep expenses of the mare was really intended to bring into being the offspring in the shape of colt and filly and in that sense, the sasme could be legitimately regarded as cost incurred by the assessee in the acquisition of the colt and the filly. The Bench has further observed that there is distinction between trained and untrained animals. Being of this view it treated that there was ascertainable cost of acquisition and, therefore, the assessee was liable to tax under Section 48 of the Act. It is worthnoting that in the said case the expenditure on mare did not result in production of milk which could result or entail in carrying of business. The amount spent on mare was for a different purpose which gave rise to the business and, therefore, it has been held therein that the expenditure incurred was available for capitalisation. In the case at hand, the entire expenses was attributable to the production of milk. The whole intention of the assessee is to produce milk and sell it and not to produce offspring and sell them. In view of the aforesaid, we are inclined to agree with the view taken in the case of *Shree Krishna Dairy and Agricultural Farm* (supra).

20. In view of the aforesaid premises we are disposed to think that the tribunal is right in holding that sale of calves by the assessee cannot be regarded as capital gain since the cost of acquisition is not ascertainable.

21. The present appeal can also be looked from another aspect. It is not disputed that the tax effect is less than Rs.50,000/-. The CBDT vide instruction dated 28.10.1992 fixed the monetary limit for preferring appeal or reference before the High Court at Rs.50,000/- . Later on that has been increased to Rs.2 Lakh. In *ACIT Vs. Aradhana Oil Mills,* (2002) 30 ITC 446, it has been held that CBDT circulars are binding on tax authorities and if the appeal involved an amount less than that fixed by the CBDT the appeal would be dismissed. In the instant case the quantum of addition involves Rs.68,000/- for the assessment year 1991-92. The tax effect is Rs.15,984/- which is much below the quantum fixed by the CBDT.

22. Judged from both the angles, we are of the considered opinion that the appeal is sans merit and liable to be dismissed and accordingly, we so direct without any order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 600

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

14 December, 2007

LARSEN & TOUBRO LTD. & ors. --- Applicants*

Vs.

MR. ANAND BANGAD & ors. --- Non-applicants

A. Penal Code, Indian (45 of 1860) - Section 420 - Cheating - Inducement which is important ingredient of offence is missing no offence of cheating is made out against petitioners.

Complainant alleged to have purchased 450 shares of L&T company and sent the same to company for their transfer. 200 shares were received back after due transfer however, remaining 250 shares were not sent back by Company. Company sent those 250 share certificates to its original holder as they were stolen by somebody while they were in the way and false entries on those certificates showing transfer were made.

No allegation that any of Petitioner ever met with complainant for making any false promise or for entering into any contract. In absence of any demand, meeting or promise it cannot be said that there was any inducement on the part of any of the petitioner to deliver the share certificates. As Inducement which is important ingredient of offence is missing no offence of cheating is made out against petitioners. Nothing to show that share certificates have not been transferred to complainant on account of some malafide intention. Criminal proceedings against Petitioners quashed. Application allowed. (Paras 11 & 13)

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - High Court is duty bound to exercise its inherent jurisdiction - To prevent abuse of process of Court or to secure the ends of justice.

There is no allegation of any inducement to deliver the share certificates to the petitioner's company. The dispute between the parties appears to be purely of civil nature. Criminal proceedings are not a short cut of other remedies available in law and by filing such complaint process of criminal law has been misused by the complainant and it appears to be a clear case of abuse of process of law. (Para 15)

Cases Referred :

(2004) 7 SCC 338, (1992) 1 SCC 217, AIR 2001 SC 2960, AIR 2003 SC 1069, (2000) 2 SCC 636, (2005) 2 SCC 568, AIR 1992 SC 1815, AIR 1992 SC 604, JT 2007 (11) SC 276, AIR 2005 SC 439.

A.M. Mathur with Brijesh Pandya, for the applicants

A.S. Kutumble with Purohit for the non-applicants.

*M.Cr.C. No. 178/2005 (Indore)

ORDER

S.C. VYAS, J.:- This is a petition filed under Section 482 of Cr.P.C., invoking extraordinary inherent jurisdiction of this High Court for quashment of the order of Judicial Magistrate, First Class, Ujjain dated 21.4.2001 and subsequent proceedings in Criminal Case No. 327/01, by which cognizance of the offence punishable under Section 420 of IPC was taken by that Court against the petitioners.

2. The undisputed facts are, that the Petitioner No. 1, Larsen & Toubro Company Ltd., is a company registered under the provisions of the Indian Companies Act, 1956 and other petitioners are its Directors. A private complain was filed by the respondents in the Court of Judicial Magistrate, First Class with the allegations that the complainants have purchased 450 shares of L & T Company through Swati Commercial Pvt. Ltd., Ujjain on 11.12.1997 and the same were sent to Mumbai office of the company for transfer on 19.2.1998. Out of these shares certificates 200 shares were returned after transfer in the name of the complainant, while remaining 250 shares were not sent back by the company. When complainant did not receive 250 shares certificates after the transfer, then notices were sent to the petitioners including notice sent by the registered post through his Advocate. It is alleged that no reply of those notices was sent by the company, then on 12.10.1999 complainant wrote a letter to the Stock Exchange, Mumbai and then Stock Exchange, Mumbai also wrote a letter to the Company Secretary of the L & T Company, Mumbai, but even then shares were not transferred in the name of the complainants. It is alleged in the complaint that the petitioners in conspiracy with Accused No. 21 (now deleted), by cheating, have transferred the shares in favour of Accused No. 21. With this allegation private complaint was filed by the complainants. Cognizance was taken by the Court of Judicial Magistrate, First Class on 24.11.2001 under Section 420 of IPC against petitioners and Accused No. 21 and also against Accused No. 2 H. Hollock Larsen (died in 2003) and summons were issued to them. Petitioners appeared through their lawyer, whereas Accused No. 21 remained unserved. Later on, on the application of the complainants, his name was deleted, as he could not be served. After appearing through their Advocate, petitioner filed an application under Section 202 and 204 of Cr.P.C. for recalling the order of taking cognizance of learned Magistrate dated 21.4.2001,that application is pending, but in the meantime Supreme Court in the case of Adalat Prasad Vs. Rooplal Jindal - (2004) 7 SCC 338, overruled earlier decision in the case of *K. M. Mathew Vs. State of Kerala* - 1992 (1) SCC 217, and held that in absence of any review power or inherent power with the subordinate criminal Courts, the remedy lies in invoking extraordinary inherent powers under Section 482 of Cr.P.C. That is how this petition has been filed before this Court.

3. Shri A. M. Mathur, Sr. Advocate assisted by Shri Brijesh Pandya, Advocate, for the petitioners contended that the ingredients of the offence punishable under Section 420 of IPC are totally absent in the facts of the case, as stated in the complaint filed by the complainants and also in the statement given by the complainant and witnesses under Section 200 and 202 of Cr P.C. It has also been

submitted that all the petitioners are Directors of the company and there is no averment in the complaint showing any specific role played by any of them in commission of the alleged offence. Nothing specific has been alleged against any of them. He further submitted that there is no averment to show that petitioners ever visited the complainants or ever met and made any inducement to them to deliver the shares certificates to the petitioners. He also submitted that there is also no averment to the effect that the share certificates were delivered to the petitioner company on account of some false promise made by the petitioners by deceiving the complainants. Complainants were not at all induced intentionally by the present petitioners to do or omit to do anything, which they would not do or omit to do, if they were not so deceived. It has been contended that the necessary ingredients of the offence punishable under Section 420 of IPC have been described by the Supreme Court in the case of *S. N. Palanitkar Vs. State of Bihar* - (AIR 2001 SC 2960) in paragraph No. 10 and those ingredients are totally missing in the facts of the present case. Attention of this Court has also been drawn towards another decision of the Supreme Court reported in AIR 2003 SC 1069- (*Ajay Mitra Vs. State of M.P.*) and it is contended that even if the averments made in the complaint are accepted as absolutely true and correct, then also the petitioners cannot be said to have committed any offence of cheating as provided in Section 420 of IPC. Case of *G. Sagar Suri Vs. State of U.P.* - (2002) 1 SCC 636 has also been referred by learned counsel for the petitioners and it has been submitted that omnibus statement is not enough and criminal act of every accused must be shown and details of the role of every accused must be given.

4. It has also been submitted by learned counsel for the petitioner that the complaint has been filed with an oblique motive, just to harass and to wreak personal vengeance and to pressurize the petitioners, so that share certificates which were sent to the company can illegally be transferred to the complainant. Whereas, in fact the share certificates which were sent by the complainant were belong to Accused No. 21, to whom they were sent by company through registered post, but the same were stolen by someone in the way and thereafter, false entries on those certificate showing transfer were made. It has further been submitted by learned counsel for the petitioners that, the matter was reported to the Mumbai police immediately, when the theft was notified by Accused No. 21 to the Larsen and Toubro Ltd. company. When the matter was under investigation, then in the meantime out of those share certificates which were stolen, 250 share certificates were sent by the present complainant to the company for transfer, company refuses to transfer those share certificates in the name of complainant, because they were obtained by them on the basis of some false entries of their transfer. Necessary information was given to the complainant and it was informed that it was a clear case of forgery, because the endorsement which was found on those 250 share certificates sent by the complainant were not done by the company and those endorsements do not match with the company's record.

5. Learned counsel for the petitioners further submitted that, complainants themselves obtained those share certificates by forgery and so were refused for

their transfer in their names. It has also been contended that the dispute between the complainant and the present petitioners is purely a civil dispute and when petitioners' company has refused to transfer the shares, then remedy for filing an appeal under Section 111 (3) of Companies Act was available to the complainants but at the place of availing that remedy a private criminal complaint has been filed. It has also been submitted that as per Clause 8 of the Appendix IX of the Company Secretary's Act, 1980 standard listing agreement, the company (petitioner No. 1) does not make any charge for registration of transfer of any share and, therefore, there is no question of any gain by the petitioners or of any loss caused to the complainants and so, no question of dishonesty is involved in this transaction.

6. Learned counsel for the petitioners has placed heavy reliance on the decisions of the Supreme Court in the cases of *State of Orissa Vs. Devendra Nath* - (2005) 2 SCC 568, *S. N. Palanitkar Vs. State of Bihar* (supra), *G. Sagar Suri Vs. State of U.P.* (supra), *Ajay Mitra Vs. State of M.P.* (supra), *PNB Vs. S. P. Sinha* - (AIR 1992 SC 1815), *State of Haryana Vs. Bajan Lal* - (AIR 1992 SC 604) and recent judgment in the case of *Maksud Vs. State of Gujarat* - (JT 2007 (11) SC 276), *Anil Ritolia Vs. State of Bihar* - (2007 (11) SCALE SC 401) and *Janki Vasudeo Vs. Indusind Bank Ltd.* - (AIR 2005 SC 439) have also been referred to show that the complaint has been filed by the Power of Attorney Holder of other two complainants and those two complainants have not been examined and, therefore, on this ground also the complaint is not maintainable.

7. To counter these arguments, learned counsel for the respondents/ complainants, Shri Kutumble, Sr. Advocate assisted by Shri Purohit Advocate, submitted that prima facie ingredients of the offence of cheating are available in the facts of the present case, because shares of the company were purchased by the complainants and were sent to the petitioners by registered post for their transfer, as per prescribed procedure. He submitted that at the place of transferring those shares in the names of complainants, petitioners deliberately transferred those share certificates in the name of Accused No. 21 and thereby deprived the complainants of their valuable property and deceived them so, they have committed the offence of cheating. It has also been submitted that there is nothing to show that Mumbai police has ever investigated any complaint regarding any theft of the share certificates and that a case of theft was found prima facie proved by that police. He further submitted that in absence of all these necessary facts at present it cannot be said that the action taken by the petitioners of transferring the shares to the third person and not returning the same to the complainants was a bona fide act. He further submitted that as petitioners were deprived of their property, therefore, necessary ingredients of the offence are available in the facts of the present case.

8. I have considered the rival contentions raised by learned counsel for both parties and also perused the record of the trial Court as well as the averments made in the complaint itself. From the complaint it is apparent that no specific allegation has been made against any of the petitioners and only general, omnibus and bald allegations have been made that, they were having criminal conspiracy with Accused No. 21 for transfer of those shares in their names and thereby

cheated the complainants. No specific overt act of any of the petitioner has been mentioned in the complaint.

9. Second thing which is clear from the reading of the complaint is that, there is no allegation that the complainants ever met with any of the petitioners. Neither petitioners ever came to the complainants nor complainants themselves went in person to the petitioners or had any interaction with them by any mode, including telephone, written communication or any thing of that sort, prior to sending share certificates for transfer to the petitioners' company. In all 450 shares were sent for transfer, out of which 200 shares were transferred, whereas, 250 shares were not transferred. Ex. P - 8 has been filed by the complainants themselves in the complaint case and has been proved by them, during his examination under Section 200 of Cr.P.C. This is a letter, which has been sent by Larsen and Toubro company Ltd. to the complainant Anand Bangad and in this letter it has been clearly stated that company has not received any letter from Anand Bangad and the only communication which has been received by them was a copy of letter written by the complainant to the Stock Exchange, which was sent by that Stock Exchange to the company and a request was made to send copies of legal notice and earlier letters to the company. It was informed in that letter that on verification of the record of the company, it was found that 250 shares were registered in the name of Discovery Credit Muritius Ltd., and they have demitted those 250 shares and are now in Electronic Mode. It has also been informed that once the shares are demitted and are in Electronic Mode, they do not have any control of the movement of these shares.

10. This letter clearly shows that the petitioners' company had already informed the complainant prior to the filing of the complainant that the shares, regarding which complaint has been made, are really standing in the name of Accused No. 21 in the record of the company and Accused No. 21 had already put them on Electronic mode and, therefore, company was not having any control on there movement. This letter also shows that the petitioner company had clearly informed in clear terms that shares were standing in the name of someone else.

11. The ingredients of offence punishable under Section 420 of IPC can very well be traced in Section 415 of IPC. In Section 415 of IPC, cheating has been defined as - "whoever by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do any thing which he would not do or omit if he were not so deceived, any which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

> *Explanation* - A dishonest concealment of facts is a deception within the meaning of this section."
>
> This definition shows that for the purpose of proving the offence of cheating the necessary ingredients which are required to be proved are that - "(i) there should be fraudulent or

dishonest inducement of a person by deceiving him, (ii) (a) - the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b)- the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) - in cases covered by (ii) (b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

12. In the case of *S. N. Palanitkar Vs. State of Bihar* (supra), the Apex Court has given these ingredients in Paragraph Nos. 9 and 10.

13. When we consider the facts of the present case, then it is clear that there is no allegation that any of the petitioner ever went to the complainant for making any false promise or for entering into any contract or agreement. There is nothing in the whole of the complaint to show that any of the petitioner ever met to the complainant or induced them in order to cheat them. In fact, the share certificates were sent by the complainant to the Petitioner No. 1 Company voluntarily and no demand was ever made by any of the petitioner to send those share certificates to the petitioners. In absence of any such demand, meeting or promise, it cannot be said that there was any inducement on the part of any of the petitioner, much less fraudulent or dishonest inducement to deliver the share certificates to the petitioners or consent to retain them. When the most important ingredient of the offence i.e. "inducement" is totally missing in the facts of the present case, then the very basic ingredient of the offence of cheating goes away and then if the entire facts as stated in the complaint even if they are taken at their face value and accepted, then also they do not, prima faice, constitute the offence of cheating or make out a case against present petitioners. It appears that the dispute between the parties is purely of civil nature and the remedy lies either in filing civil proceedings or in making an appeal under Section 111 (3) of Companies Act before a competent authority and the civil matter cannot be permitted to give shape of a criminal offence, as held by the Supreme Court in the case of *G. Sagar Suri Vs. State of U.P.* (supra). Hon'ble Apex Court in the case of *Anil Ritolia @ A. K. Ritolia Vs. State of Bihar* (supra) again recently held that "it is not a case where appellants cannot be said to have induced the respondent to enter into a transaction so as to deceive them with a view to cause unlawful losses to them and to make unlawful gain for themselves" and with this observation the criminal prosecution under Section 420 of IPC was quashed.

14. In the facts of aforesaid case of *Anil Ritolia* (supra), there were some commercial transactions between the parties and Form No. IX-C prescribed in terms of the Bihar Sales Tax Rules was required to be delivered by the appellants to the opposite party. When such form was not provided then complaint under Section 427, 384 and 420 read with Section 34 of IPC was filed and then the Supreme Court made the above referred remarks, by saying that "there cannot be any doubt or dispute whatsoever that an offence can be committed even if the parties had entered into a commercial transaction. In case of Rajesh Bajaj (supra)

this Court has held so. But it is equally well settled that the allegations contained in the complaint petition must, prima facie, show inducement of the victim by the accused by making a representation. In a case of this nature, we are of the opinion that no case has been made out to form an opinion that the appellant had the requisite intention." The law laid down by the supreme Court in this case also applies to the facts of the present case and because there was no inducement on the part of the present petitioners, therefore, necessary ingredients of the offence punishable under Section 420 of IPC are found totally missing.

15. It is clear from the above discussion that there is no allegation of any inducement to deliver the shares certificates to the petitioners' company, against any of the petitioners and in absence of any such allegation cognizance could not have been taken by the learned Magistrate against any of the petitioners. The dispute between the parties appears to be purely of civil nature and there is nothing to show that the shares certificates have not been transferred by the petitioner company to the complainant on account of some mala fide intention. In these circumstances the complainant cannot be permitted to give a cloak of criminal offence to a dispute which is essentially of civil nature. Criminal proceedings are not a short cut of other remedies available in law and by filing such complaint process of criminal law has been misused by the complainant and it appears to be a clear case of abuse of process of law. This Court is duty bound to exercise its inherent jurisdiction vested under Section 482 of Cr.P.C. to prevent abuse of process of any Court or otherwise to secure the ends of justice. I find that this is a fit case for exercising such jurisdiction.

16. It is not necessary to discuss other points raised by learned counsel for the petitioners, as the petition succeeds, on the ground of absence of necessary ingredient of the offence.

17. Resultantly, this petition succeeds and is allowed. The order of taking cognizance dated 21.4.2001 passed in Criminal Case No. 327/2001 by Judicial Magistrate, First Class, Ujjain and further proceedings of that case against the present petitioners are hereby quashed.

Petition allowed.

I.L.R. [2008] M. P., 606
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice A.K. Saxena
10 January, 2008

YOGESH GANORE ... Applicant*
Vs.
STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974) - Sections 437, 439 - Competent Court - Where an accused is arrested or detained by police or he appears or is brought before Court of Magistrate, in connection with any offence

* M.Cr.C. No. 10680/2007 (Jabalpur)

which may or may not be punishable with death or imprisonment for life - Application under Section 439 Cr.P.C. directly before Court of Sessions not maintainable - Competent Court would be Court of Magistrate to consider bail application under Section 437 Cr.P.C. (Para 20)

B. Criminal Procedure Code, 1973 (2 of 1974) - Sections 438, 439 - Regular bail - Competent Court - Where a person is granted Anticipatory bail by a Court, in case where the offence is punishable with death or imprisonment for life or the Magistrate takes cognizance of such offence which is punishable with death or imprisonment for life - In such cases the court of Sessions would be the Competent Court to consider the regular bail application under section 439 Cr.P.C- Court of Magistrate would not be the Competent Court. (Para 20)

Cases Referred :

1987(2) Crimes 604, 1983 Cr.L.J. 1737, 1985 (1) Crimes 1076, 2001 AIR SCW 1263 = (2001) 4 SCC 280, 1995 JLJ 21,(1978) 1 SCC 118, 2005 (2) MPLJ 406, AIR 1996 SC 1042, 2006(3) MPHT 65.

Manish Datt, for the applicant.
Sushila Paliwal, Government Advocate for the State.
N.P. Dubey, for the objector.

ORDER

A.K. Saxena, J. :–This is an application under Section 439 read with Section 439 (1) (b) of the Code of the Criminal Procedure, 1973 (hereinafter referred to as 'the Code') for regular bail in connection with M.J.C. No. 02/07 of the Court of Chief Judicial Magistrate Jabalpur and crime no. 546/06 of the Police Station Ranjhi, Jabalpur.

2. According to the facts of the case, the prosecutrix lodged the FIR in the Police Station Ranjhi, Jabalpur and the Crime No. 546/06 was registered under Section 376 of the Indian Penal Code against the applicant, but during investigation, the police found that no case is made out against the applicant and, therefore, a 'Khatma' report was submitted by the concerned Police Station. The Chief Judicial Magistrate issued the notice to the prosecutrix on this 'Khatma' report and thereafter, the statements of the prosecutrix and her witnesses were recorded and then the Court took the cognizance against the applicant. Thereafter, the non-bailable warrant was issued against the applicant.

3. An anticipatory bail application was filed by the applicant before the Court of Session but it was dismissed as not pressed because a revision petition was filed against the order of the Chief Judicial Magistrate. After rejection of revision petition, another application for anticipatory bail was filed in the Sessions Court and the same was allowed vide order dated 12.10.2007 with the conditions that the order shall remain in force for 30 days and in the meanwhile, the applicant, if so desires, may move an application for regular bail. Thereafter, the applicant moved an application under Section 439 of the Code, but the same was rejected by the Sessions Court vide order dated 2.11.2007 on the ground that this application

is not maintainable directly in the Sessions Court because an application under Section 437 of the Code should have been filed in the Court of Chief Judicial Magistrate before filing an application under section 439 of the code.

4. After rejection of bail application which was filed under Section 439 of the Code, the Sessions Court extended the anticipatory bail period upto 12.11.2007 vide order dated 6.11.2007 and, therefore, the application for regular bail has been filed before this Court.

5. The learned counsel for the applicant has submitted that since, the Magistrate was not empowered to grant bail under the provisions of Section 437 of the Code, as the case has been registered for the offence punishable under Section 376 of the I.P.C. and under this Section, the sentence of imprisonment for life has been provided, therefore, it was not necessary to file an application under Section 437 of the Code before the Court of Chief Judicial Magistrate and the applicant was at liberty to file regular bail application before the Sessions Court, directly as the Sessions Court was the competent Court for consideration of this bail application. He placed his reliance on the cases of *Sadiq Hussain Rizvi v .Sri Santosh Kumar Trivedi and others,* 1987 (2) Crimes 604, *Shyam Lal and others v. State of U.P.,* 1983 CRI.L.J.1737 and *Rafuquddin and others v. Bashir Ahmad and others,* 1985 (1) Crimes 1076.

6. The learned counsel for the objector has contended that there are discretionary powers of the Court other than the High Court or Court of Session to consider as to whether there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and if there are no reasonable grounds for believing such facts, the person can be granted bail by the Magistrate under Section 437 of the Code and, therefore, it was necessary for the applicant to file an application under Section 437 of the Code, rather filing an application under Section 439 of the Code directly before the Court of Session. He also placed his reliance on the cases of *Prahlad Singh Bhati v. N.C.T., Delhi and another,* 2001 AIR SCW 1263=[(2001) 4 SCC280], *Nirbhay Singh and another v. State of MP,* 1995 JLJ 21, and *Gurcharan Singh and others v. State (Delhi Administration),* (1978) 1 SCC 118.

7. The learned counsel for the objector also filed a written objection in this matter and further argued that the regular bail application of the applicant has not been dismissed on merits by the Sessions Court and the order impugned could have been challenged by filing revision only. It was also argued that after issuance of arrest warrant, an anticipatory bail order cannot be passed in favour of the applicant or in other words, the application for anticipatory bail is not maintainable. The anticipatory bail, granted by the Sessions Court, was for a limited duration and thereafter, if an application for regular bail was rejected by the Court below, the regular bail application is not maintainable in this Court as the applicant is not in custody. For the above arguments, the learned counsel for the objector relied on the cases of *Sunita Devi v. State of Bihar and another,* 2005 (2) MPLJ 406 and *Salauddin Abdulsamad Shaikh v. State of Maharashtra,* AIR 1996 SC 1042.

8. Both the learned counsels have also relied on the principles laid down in the case of *Rajul Rajendranath Dubey v. State of M.P.*, 2006 (3) MPHT 65.

9. Whether an anticipatory bail can be granted for a limited period or unlimited period, this is not the question for consideration here. Whether after issuance of arrest warrant, a person can be granted anticipatory bail or not, this is also not a question involved in the present matter and, therefore, this Court would refrain itself from considering all these points in this case.

10. No doubt, the bail application for regular bail was not considered by the Sessions Court on merits. It was dismissed only on this grounds that the application for regular bail should have been filed before the Court of Magistrate under Section 437 of the Code and an application under Section 439 of the Code cannot be filed in the Court of Session directly. No doubt, this Court is not considering the revision petition, but if an application under Section 439 of the Code is maintainable in this Court certainly, this Court can consider as to who is the competent Court to consider such type of bail applications. Therefore, it would be appropriate for this Court to consider whether the Sessions Judge could have considered the bail application on merits which was filed under Section 439 of the Code.

11. As far as the question of maintainability of this application is concerned, though the regular bail application of the applicant was not considered on merits by the Sessions Court but since the regular bail application was dismissed by the Sessions Court certainly, the application under Section 439 of the Code shall be maintainable before this Court for many reasons. Though, the applicant is not in custody and this Court has laid down in the case of *Rajul Rajendranath Dubey* (supra) that if a person is granted anticipatory bail and after rejection of regular bail application by the Court below, if he is not in custody, his regular bail application would not be maintainable in 'higher Court'. But this principle would not be applicable in the present case because after rejection of regular bail application, the Court of Session extended the anticipatory bail period. Whether the order of extension of period of anticipatory bail was legal or illegal, it is not a matter of consideration here because, the legality or illegality of this order is not challenged by the objector under the appropriate provisions of the Code and at the time of consideration of an application under Section 439 of the Code, it would not be proper for this Court to adjudicate legality or illegality of the order dated 6.11.2007 passed by the Sessions Court. Since the period of anticipatory bail was extended by the Sessions Court, the application filed under Section 439 of the Code is maintainable in this Court. The bail application, filed under Section 439 of the Code, was not decided on merits by the Sessions Court, therefore, this Court would refrain itself from considering this bail application on merits.

12. Now the question arises before this Court for consideration that if a person is granted anticipatory bail, which Court would be the competent to consider regular bail application where the offence is punishable with death or imprisonment for life ?

13. Wherever a person is granted anticipatory bail for a limited duration with liberty to file an application for regular bail before the competent Court, it is for

that person to file an application for regular bail before the competent Court, but who shall be the competent Court in case where the offence is punishable with death or imprisonment for life, there is an ambiguous position in this respect. It would be proper to refer the provisions of Section 437 (1) (i) and its two proviso's which run as follows:

> "437. When bail may be taken in case of non-bailable offence.- [(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-
>
> (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
>
> Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:
>
> Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

14. In the case of *Gurucharan Singh (supra)*, it has been laid down as follows:

> "21. Section 437, Cr.P.C. is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session. The language of Section 437 (1) may be contrasted with Section 437 (7) to which were have already made a reference. While under sub-section (1) of Section 437, Cr.P.C. the words are : "if there appear to be reasonable grounds for believing that he has been guilty", sub-section (7) says: "that there are reasonable grounds for believing that the accused is not guilty of such an offence". This difference in language occurs on account of the stage at which the two sub-sections operate. During the initial investigation of a case in order to confine a person in detention, there should only appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Whereas after submission of charge-sheet or during trial for such an offence the Court has an opportunity to form somewhat clear opinion as to whether there are reasonable grounds for believing that the accused is not guilty of such an offence. At that stage the degree of certainty of opinion in that behalf is more after the trial is over and judgment is deferred than at a pre-trial stage even after the charge-sheet. There is a noticeable trend in the above provisions of law that even in case of such non-bailable offences a person need not be detained in custody for any period

more than it is absolutely necessary, if there are no reasonable grounds for believing that he is guilty of such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence, there should be materials produced before the Court to come to a conclusion as to the nature of the case he is involved in or he is suspected of. If at that stage from the materials available there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the Court has no other option than to commit him to custody. At that stage, the Court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits".

15. It has also been observed in paragraph 13 of this case that -

There is no provision in the Code whereby the accused is for the first time produced after initial arrest before the Court of Session or before the High Court. Section 437 (1), Cr. P.C., therefore, takes care of the situation arising out of an accused being arrested by the police and produced before a Magistrate.

16. It has also been laid down in the case of *Prahlad Singh Bhati* (supra) that -

"6. Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of Session yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Session for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code in respect of a person who is suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negate the existence of reasonable ground for believing that such an accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case where the Magistrate has no occasion and in fact does not find, that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail.

7. Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Session, the Magistrate has no jurisdiction to grant bail unless the matter is

covered by the provisos attached to Section 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction".

17. The opening words of Section 437 of the Code are very important. According to it, when any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without any warrant by an officer-in-Charge of a Police Station or appears or is brought before the Court other than the High Court or Court of Session, he may be released on bail. Here, the words 'arrested', 'detained', 'appears' or 'brought before the Court', are very important. These words clearly indicate that while considering the bail application under Section 437 of the Code, a person must be arrested or detained by the police or he himself appears or brought before the Court and then only, the application for bail can be considered by the Magistrate as per provisions of Section 437 of the Code.

18. The provisions of Section 437 (1) (i) of the Code clearly indicate that the Magistrate must reach at a conclusion that there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life at the time of consideration of bail application under Section 437 of the Code. In other words, if a person is arrested or detained by the police or he appears or is brought before the Court where the offence is punishable with death or imprisonment for life and there appear reasonable grounds that he has been guilty of such an offence, the Magistrate has no power to grant bail. It means, the condition precedent for maintainability of bail application under Section 437 of the Code in the Court of Magistrate where the offence is punishable with death or imprisonment for life, shall be that the accused must appear or brought before the Court or he has been arrested or detained by the police otherwise the Magistrate would not be competent to consider the bail application under Section 437 of the Code of such an accused. So the position would be that where an accused has been arrested or detained by the police or he appears or is brought before the Court of Magistrate, he cannot file an application for bail under Section 439 of the Code before the Court of Session directly and in such circumstances, the competent Court would be the Court of Magistrate and not the Court of Session.

19. The above position of competency of the Court would be changed where a person is not arrested or detained by the police or he does not appear or is not brought before the Court and if he files an application for anticipatory bail before the competent Court and he was granted anticipatory bail with the liberty that he may move an application for regular bail before the competent Court. In such circumstances, the competent Court would be the Court of Session for consideration of regular bail application because the nature of the offence, a part from other facts, had been considered by a competent Court at the time of consideration of anticipatory bail application. It means, after considering this fact, expressly or impliedly, whether the person has been guilty of an offence punishable with death or imprisonment for life, the person was granted anticipatory bail by the Court. If this exercise has been done by a competent Court at the time of

consideration of anticipatory bail application, then no occasion arises for the Magistrate to consider all these aspects of the case. In such circumstances, the competent Court would be the Court of Session for consideration of regular bail application and not the Court of Magistrate. Where the Court considered the case of the prosecution or of the complainant at the time of consideration of anticipatory bail application and thereafter the anticipatory bail application was allowed certainly, it is not necessary for that person whose anticipatory bail application was allowed, to appear before the Court of Magistrate at the time of filing of an application under Section 437 of the Code as per law laid down by this Court in the case of *Rajul Rajendranath Dubey* (supra). Even if a *prima facie* case is made out for the offence punishable with death or imprisonment for life and the person has been granted anticipatory bail by the competent Court under Section 438 of the Code, then, also, it would be a futile exercise to file an application of bail under Section 437 of the Code before the Court of Magistrate. In the above circumstances, the competent Court would be the Court of Session and not the Court of Magistrate for the considerarion of regular bail application.

20. Having considered all the aspects, this Court is of the view that if a person is arrested or detained by the police or if he appears or is brought before the Court in connection with an offence punishable with death or imprisonment for life, the Magistrate shall be competent to consider the bail under Section 437 of the Court and such person shall not be entitled to file an application under Section 439 of the Code in the Court of Session, directly. But where a person is granted anticipatory bail by a Court in a case where the offence is punishable with death or imprisonment for life, after considering all the aspects of the case including the nature of offence and punishment provided for it, expressly or impliedly or the Magistrate, at the time of taking cognizance, applied his mind and found that a particular offence is made out *prima facie* for taking cognizance and if that offence is punishable with death or imprisonment for life, in such circumstances, the Court of Session would be the competent Court to consider the regular bail application under Section 439 of the Code and the Court of the Magistrate would not be the competent Court to consider the bail application because in such circumstances, the filing of an application under Section 437 of the Court, would be a futile exercise and it is not the intention of the legislature that a person must go into the jail before grant of regular bail. Though, he was granted anticipatory bail. This principle shall also be applicable to a woman or to those persons who are sick, infirm or under the age of sixteen years, irrespective of the fact that a special provision has been made under Section 437 of the Code for grant of bail.

21. In the present case, the position is much better for the applicant because when the 'Khatma' report was filed before the Court of Chief Judicial Magistrate, the notice was issued to the prosecutrix and after recording the statements of the prosecutrix, and her witnesses, the cognizance was taken in respect of the offence punishable under Section 376 of the I.P.C. It shows that in the opinion of the Magistrate, there appear reasonable grounds for believing that the applicant has been guilty of the offence punishable with imprisonment for life and because of

that, the non-bailable warrant was issued after taking cognizance. In these circumstances, the filing of an application under Section 437 of the Code, would be totally unnecessary because the bail application will not be allowed as the Magistrate had already applied his mind on this point that a *prima facie* case is made out against the applicant under Section 376 of I.P.C. which is punishable with imprisonment for life and, therefore, he has to reject the bail application and then the applicant will be sent to jail, whereas he had already been granted anticipatory bail by the competent Court. In these circumstances, it was not necessary at all for the applicant to file an application under Section 437 of the Code before the Court of Chief Judicial Magistrate and the application under Section 439 of the Code was maintainable directly before the Court of Session.

22. Since the bail application for regular bail has not been considered on merits by the Court of Session, therefore, the application filed under Section 439 read with Section 439 (1) (b) of the Code is disposed of with these directions that the applicant will be at liberty to move an application under Section 439 of the Code before the Court of Session within 10 days from today and the same shall be disposed of on merits within 20 days from the date of filing of bail application. The order passed by this Court on 5.12.2007 in this matter, shall remain in force till the disposal of regular bail application, if filed, before the Court of Session.

Order accordingly.
