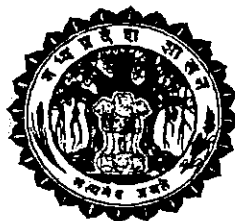


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MADHYA PRADESH

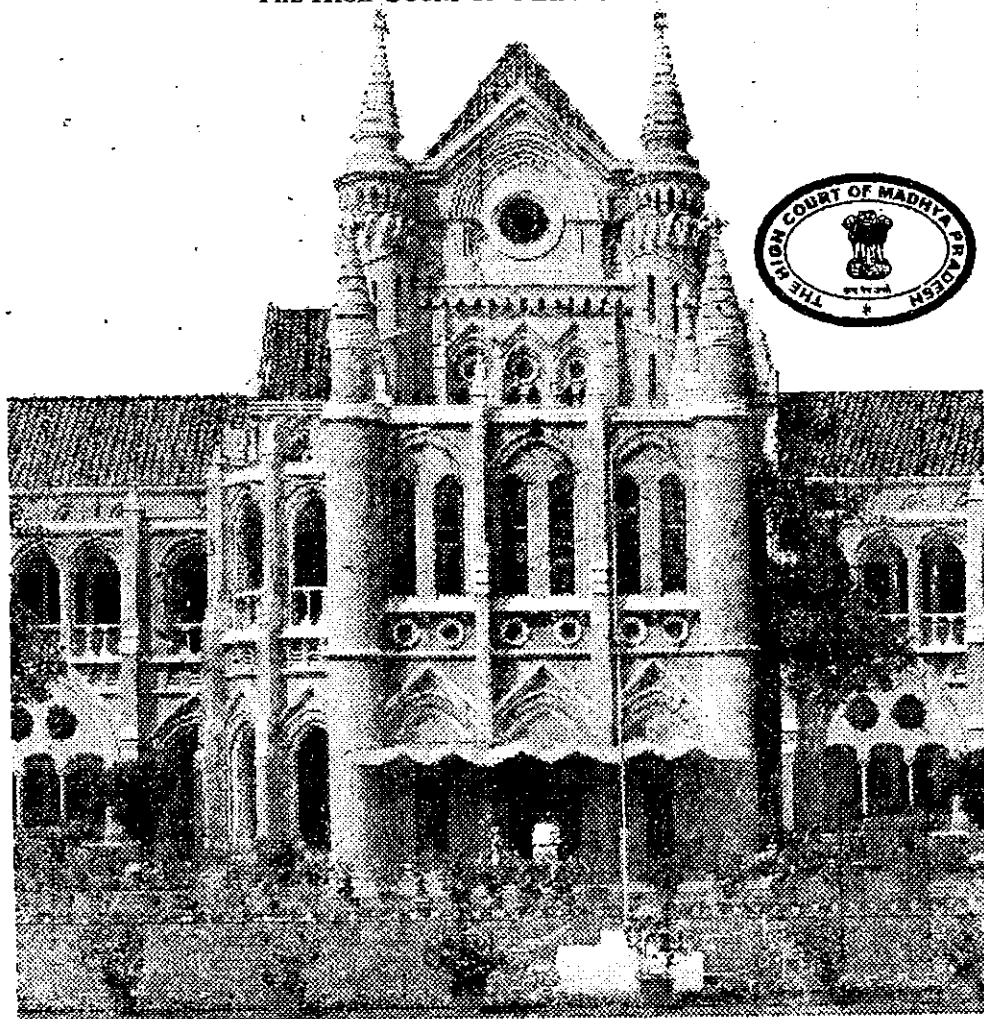


THE INDIAN LAW REPORTS

M. P. SERIES

CONTAINING

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



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Administrative Law - Exercise of discretion by Administrative Authority
 - When discretion is to be exercised by an authority then it would be free to exercise the discretion as it likes but that does not mean that such authority can exercise the discretion in illegal, unjudicious or arbitrary manner - Arbitrariness runs contrary to the justice, principles of equity and equality - If on the given set of facts, the discretion is exercised in favour of one party then on the same facts, an authority cannot refuse to exercise the discretion in favour of the other party. [Managing Director M.P. State Mining Corporation Ltd. v. M/s. Narmada Enterprises] ...2956

Administrative Tribunal Act, (13 of 1985), Section 3(q) & 14 - See - Constitution, Articles 14, 16, 21, 226, 227, 257, 323-A, 323-B [Vinay Shukla v. State of M.P.] ...2898

Arbitration and Conciliation Act (26 of 1996), Sections 28, 34, 35 & 37 - Award - Challenge of award - The appellant No.1 entering into an agreement with respondent No.1 for lifting of sand from various places/mines for the period 24.05.2003 to 23.05.2006 - Clause 16 of the agreement provided that in special circumstances, M.D. is entitled to extend the period of lease and it would be imperative upon him to increase the proportionate quantity and amount of instalment - Period of lease was not extended by M.D. without assigning any reason - A dispute was raised before arbitrator - Arbitrator in award extended the further period of 15 to 17 months - Civil court affirmed the award - In appeal award challenged on the ground that the arbitrator exceeded in his jurisdiction by extending the period of contract - Held - Clause 19 of the agreement provided that in case of any dispute between the parties, the matter could be decided either by the M.D. or by a person nominated by him under the Act - At this stage, the appellants would not be allowed to say that the question referred to the arbitrator could not be decided by him and he committed an error in excess of the jurisdiction conferred upon him - Appeal dismissed. [Managing Director M.P. State Mining Corporation Ltd. v. M/s. Narmada Enterprises] ...2956

Arms Act (54 of 1959), Sections 25 & 27 - See - Penal Code, 1860, Section 302 [Ganesh @ Ganesha @ Ganesh Prasad v. State of M.P.] ...3026

Chikitsa Shiksha Niyamtran Adhiniyam, M.P. (19 of 1973), Section 10, Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2005, Rule 21(4), Post Graduate Medical Education Regulation, 2000, Regulation 10(3) - Transfer from one college to another college or transfer/migration from one course to another - Permissibility - Held - Once Medical Council of India (MCI) has framed the regulations putting an absolute ban on migration/transfer of the student/students undergoing any post graduate course/degree/diploma then Regulation 10(3) would cause an eclipse on the right of the student/students seeking transfer/

(Note An asterisk (*) denotes Note number)

प्रशासनिक विधि - प्रशासनिक प्राधिकारी द्वारा विवेकाधिकार का प्रयोग - जब किसी प्राधिकारी द्वारा विवेकाधिकार का प्रयोग किया जाना है तब वह जैसे वह चाहे विवेकाधिकार का प्रयोग करने के लिए स्वतंत्र है किन्तु उसका तात्पर्य यह नहीं है कि ऐसा प्राधिकारी विवेकाधिकार का प्रयोग अवैधानिक, अन्यायिक या मनमाने तरीके से कर सकता है - मनमानापन न्याय, साम्य के सिद्धांतों और समानता के विपरीत है - यदि दिये गये तथ्यों पर विवेकाधिकार का प्रयोग एक पक्षकार के पक्ष में किया जाता है तब समान तथ्यों पर कोई प्राधिकारी विवेकाधिकार का प्रयोग अन्य पक्षकार के पक्ष में करने से इंकार नहीं कर सकता। (मेनेजिंग डायरेक्टर एम.पी. स्टेट माइनिंग कारपोरेशन लि. वि. नर्मदा इंटरप्राइजेस) ...2956

प्रशासनिक अधिकरण अधिनियम, (1985 का 13), धारा 3(क्यू) व 14, - देखें - संविधान, अनुच्छेद 14, 16, 21, 226, 227, 257, 323-ए, 323-बी (विनय शुक्ला वि. म.प्र. राज्य) ...2898

माध्यस्थ और सुलह अधिनियम (1996 का 26), धाराएँ 28, 34, 35 व 37 - अधिनिर्णय - अधिनिर्णय को चुनौती - अपीलार्थी क्र. 1 ने प्रत्यर्थी क्र. 1 के साथ विभिन्न स्थानों/खदानों से रेत उठाने का अनुबंध 24.05.2003 से 23.05.2006 की अवधि के लिए किया - अनुबंध के खण्ड 16 में उपबंधित है कि विशेष परिस्थितियों में, प्रबंध संचालक पट्टे की अवधि को बढ़ाने के लिए हकदार है और उसके लिए किस्त की समानुपातिक मात्रा और राशि में वृद्धि करना अनिवार्य होगा - प्रबंध संचालक द्वारा बिना कोई कारण बताये पट्टे की अवधि नहीं बढ़ाई गई - मध्यस्थ के समक्ष विवाद उठाया गया - मध्यस्थ ने अधिनिर्णय में कालावधि 15 से 17 माह आगे बढ़ा दी - सिविल न्यायालय ने अधिनिर्णय की पुष्टि की - अपील में अधिनिर्णय को इस आधार पर चुनौती दी कि मध्यस्थ ने उसके क्षेत्राधिकार से परे अनुबंध की अवधि बढ़ाई - अभिनिर्धारित - अनुबंध के खण्ड 19 में उपबंध है कि पक्षकारों के मध्य किसी विवाद की दशा में मामला या तो प्रबंध संचालक द्वारा या उसके द्वारा अधिनियम के अंतर्गत नामित व्यक्ति द्वारा विनिश्चित किया जा सकता है - इस प्रक्रम पर अपीलार्थियों को यह कहने की अनुमति नहीं दी जायेगी कि मध्यस्थ को जो प्रश्न संदर्भित किया गया था वह उसका विनिश्चय नहीं कर सकता था और उसने उसे प्रदत्त क्षेत्राधिकार से अधिक का प्रयोग कर त्रुटि की - अपील खारिज। (मेनेजिंग डायरेक्टर एम.पी. स्टेट माइनिंग कारपोरेशन लि. वि. नर्मदा इंटरप्राइजेस) ...2956

आयुध अधिनियम, (1959 का 54), धाराएँ 25 व 27 - देखें - दण्ड संहिता, 1860, धारा 302 (गनेश उर्फ गनेशा उर्फ गनेश प्रसाद वि. म.प्र. राज्य) ...3026

चिकित्सा शिक्षा नियंत्रण अधिनियम, म.प्र. (1973 का 19), धारा 10, चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2005, नियम 21(4), स्नातकोत्तर चिकित्सा शिक्षा विनियम, 2000, विनियम 10(3) - एक महाविद्यालय से दूसरे महाविद्यालय में स्थानांतरण या एक पाठ्यक्रम से दूसरे में स्थानांतरण/प्रवास - अनुज्ञेयता - अभिनिर्धारित - एक बार जब भारतीय चिकित्सा परिषद ने स्नातकोत्तर पाठ्यक्रम/डिग्री/डिप्लोमा में अध्ययनरत विद्यार्थी/विद्यार्थियों के प्रवास/स्थानांतरण पर आत्यंतिक रोक लगाते हुए विनियम विरचित किये तब विनियम 10(3) में ऐसे विद्यार्थी जो नियम 21(4) के अन्तर्गत स्थानांतरण/प्रवास चाहते हों उनके अधिकार पर रोक लग गयी - नियम 21(4) केवल राज्य सरकार की पूर्व अनुशंसा

migration under Rule 21(4) - Rule 21(4) can be used and utilized in favour of a student only with prior recommendation of State Government and approval of MCI - MCI by making rules has statutorily refused the approval in general - In absence of any order of approval, the transfer/migration cannot be permitted by university or any authority - With this clarification appeal disposed of. [Medical Council of India v. Dr. Teena Khatri] ...2799

Civil Procedure Code (5 of 1908) [As stood prior to amendment came into force w.e.f. 01.02.1977], Sections 2(2) & 47 - Prior to amendment, determination of any question u/s 47 of CPC was having force of a decree as prior to amendment defined u/s 2(2) CPC. [Sheikh Hameed v. Sheikh Majhar]...2947

Civil Procedure Code (5 of 1908) [As stood prior to amendment came into force w.e.f. 01.02.1977], Section 11 - Prior to amendment, an adjudication or determination of any question u/s 47 of CPC determining rights of the parties was a decree between parties - Such order has attained finality and is having effect of res judicata between the parties - Held - Suit filed by plaintiffs was barred u/s 11 of CPC - They were not entitled to file a fresh suit for adjudication of questions which were already decided u/s 47 of CPC. [Sheikh Hameed v. Sheikh Majhar] ...2947

Civil Procedure Code (5 of 1908), Section 2(11) - Legal Representative - Probate - Decree of eviction passed in favour of Smt. Gouri Bahu who died during pendency of appeal - Applicant claiming herself to be legal representative on the basis of will - Executing court accepting the objection hold that applicant would be free to execute decree after obtaining the probate certificate - Held - Property is situated within State of M.P. - Obtaining of probate not necessary - Applicant has a right to execute decree as property has been devolved on the applicant - Revision allowed. [Gouri Bahu (Smt.) Through L.R. Smt. Shashi Devi v. Gopaldas] ...3037

Civil Procedure Code (5 of 1908), Section 151, Order 21 Rule 64, 66, 67, 83, 90, 92, Order 34 Rule 5 - Auction of mortgaged property for realisation of the decree amount - Proclamation of sale made on a particular date but sale taking on some other day for which separate proclamation not made - After auction the sale certificate issued in favour of respondent No.5 - Action challenged in for setting-aside the sale - Held - Order is governed by Order 34 and its rules of CPC and that itself is a code to deal with the decree passed in mortgage suit - In the entire scheme of Order 34 of CPC, there is no provision like Order 21 Rule 64, 66, 67 and 69 of CPC - Therefore, objection filed by appellant before executing court u/o 21 Rule 92 was not entertainable and executing court has not committed any error in dismissing the same - Appeal dismissed. [Mohd. Aleem v. Bank of India] ...2942

Civil Procedure Code (5 of 1908) [As stood prior to amendment came into force w.e.f. 01.02.1977], Order 21 Rules 99, 100, 101 & 103 -

और भारतीय चिकित्सा परिषद् के अनुमोदन पर ही विद्यार्थी के पक्ष में प्रयुक्त किया जा सकता है — भारतीय चिकित्सा परिषद् ने नियम निर्मित करके सामान्य अनुमोदन से वैधानिक रूप से इंकार कर दिया — अनुमोदन के किसी आदेश के अभाव में विश्वविद्यालय या किसी प्राधिकारी द्वारा स्थानांतरण/प्रवास की अनुमति नहीं दी जा सकती — इस स्पष्टीकरण के साथ अपील निपटाई गई। (मेडिकल काउंसिल ऑफ इंडिया वि. डॉ. टीना खत्री) ...2799

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सिविल प्रक्रिया संहिता (1908 का 5) [01.02.1977 से प्रभाव में आये संशोधन के पूर्व की स्थिति], धारा 11 — संशोधन के पूर्व पक्षकारों के अधिकारों को अवधारित करते हुए सि.प्र.सं. की धारा 47 के अन्तर्गत किसी प्रश्न का न्यायनिर्णयन या अवधारण पक्षकारों के मध्य डिक्री था — ऐसा आदेश अंतिम हो गया और पक्षकारों के मध्य पूर्व न्याय का प्रभाव रखता है — अभिनिर्धारित — वादियों द्वारा पेश वाद सि.प्र.सं. की धारा 11 के अन्तर्गत वर्जित था — वे सि.प्र.सं. की धारा 47 के अन्तर्गत पहले ही विनिश्चित कर दिये गये प्रश्न के न्यायनिर्णयन के लिए नवीन वाद पेश करने के हकदार नहीं थे। (शेख हमीद वि. शेख मजहर) ...2947

सिविल प्रक्रिया संहिता (1908 का 5), धारा 2(11) — विधिक प्रतिनिधि — प्रोबेट — बेदखली की डिक्री श्रीमती गौरी बहू के पक्ष में पारित की गई जिसकी अपील के लम्बित रहने के दौरान मृत्यु हो गई — आवेदक ने वसीयत के आधार पर स्वयं को विधिक प्रतिनिधि होने का दावा किया — विचारण न्यायालय ने आपत्ति स्वीकार करते हुए अभिनिर्धारित किया कि आवेदक प्रोबेट प्रमाण पत्र प्राप्त करने के पश्चात् डिक्री का निष्पादन कराने के लिए स्वतंत्र होगी — अभिनिर्धारित — सम्पत्ति म.प्र. राज्य के भीतर स्थित है — प्रोबेट प्राप्त करना आवश्यक नहीं — आवेदक को डिक्री निष्पादित कराने का अधिकार है क्योंकि सम्पत्ति आवेदक पर न्यागत हो गई है — पुनरीक्षण मंजूर। (गौरी बहू, (श्रीमति) द्वारा विधिक उत्तराधिकारी श्रीमति शशि देवी वि. गोपाल दास) ...3037

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151; आदेश 21 नियम 64, 66, 67, 83, 90, 92, आदेश 34 नियम 5 — डिक्री धन की वसूली के लिए बंधक सम्पत्ति की नीलामी — विक्रय की उद्घोषणा विशिष्ट तारीख को की गई किन्तु विक्रय किसी अन्य तारीख को किया गया जिसके लिए पृथक उद्घोषणा नहीं की गई — नीलामी के बाद विक्रय प्रमाण पत्र प्रत्यर्थी क्र. 5 के पक्ष में जारी किया गया — विक्रय को अपास्त कराने के लिए कृत्य को चुनौती दी गई — अभिनिर्धारित — आदेश सि.प्र.सं. के आदेश 34 और उसके नियमों से शासित होता है और वह स्वयं बंधक वादों में पारित डिक्री के लिए एक संहिता है — सि.प्र.सं. के आदेश 34 की पूरी स्कीम में सि.प्र.सं. के आदेश 21 नियम 64, 66, 67 और 69 के समान कोई उपबंध नहीं है — इसलिए अपीलार्थी द्वारा आदेश 21 नियम 92 के अन्तर्गत निष्पादन न्यायालय के समक्ष पेश आपत्ति ग्रहण किये जाने योग्य नहीं थी और निष्पादन न्यायालय ने उसे खारिज करने में कोई त्रुटि नहीं की — अपील खारिज। (मोहम्मद अलीम वि. बैंक ऑफ इंडिया) ...2942

सिविल प्रक्रिया संहिता (1908 का 5) [01.02.1977 से प्रभाव में आये संशोधन के पूर्व की स्थिति], आदेश 21 नियम 99, 100, 101 व 103 — आपत्तिकर्ताओं की सि.प्र.सं. के

Objectors' objections u/O 21 Rules 99, 100 & 101 CPC were dismissed by the trial court on 16.10.1975 - After dismissal of the objections objectors ought to have filed a suit as required u/O 21 Rule 103 CPC and limitation of one year was provided under Article 98 of Limitation Act, 1963 - Order 21 Rule 103 CPC was amended and a new rule was substituted w.e.f. 01.02.1977 - Now rule specifically provides that order deciding an application under Rule 98 or Rule 100 of Order 21 shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree, meaning thereby that an order u/O 21 Rules 98 & 100 CPC has been given effect to as of decree and no fresh suit is maintainable. [Sheikh Hameed v. Sheikh Majhar]...2947

Civil Procedure Code (5 of 1908), Order 7 Rule 11, Mohammedan Law - Inheritance - Suit for declaration, partition and separate possession - Dismissed on the ground that in Mohammedan Law sons of predeceased son are not entitled to claim property of their grandfather - Appellate court reversed the finding and remanded the case - Held - Suit involved mixed questions of law and fact - Property was agriculture holdings and what would be the position of devolution of agriculture holdings of a person governed by Mohammedan Law has to be decided on merits - Appellate court committed no error in remanding case - Revision dismissed. [Sheikh Ikar v. Sheikh Shamim Ahmad] ...3041

Civil Procedure Code, (5 of 1908), Order 41 Rule 33 - See - Motor Vehicles Act, 1988, Section 170 [Samundra Devi v. Narendra Kaur]SC...2743

Constitution, Article 14 - Service Law - Promotion - Denial of promotion to petitioner on account of two adverse entries in his preceding five years ACRs - One adverse entry was never communicated and the other which was though communicated but petitioner's representation against it was not decided - Held - Non-communication of an entry in the ACRs and the denial of opportunity to represent against it, are violation of natural justice - Impugned order set-aside-petition allowed. [Om Prakash Lashkari v. State of M.P.] ...2863

Constitution, Articles 14, 16, 21, 226, 227, 257, 323-A, 323-B, Administrative Tribunal Act, 1985, Section 3(q) & 14, Reorganisation Act, M.P. 2000, Section 72 - Maintainability of writ petition at the first instance in respect of service matter pertaining to a member of All India Services - Petitioner, member of All India Services incorrectly allocated to State of Chhattisgarh - Central Government cancelled the order and directed M.P. State Government to issue posting orders - Order not complied - Writ petition filed before High Court - Held - With regard to 'service matters' and service dispute relating to an employee of All India Services the court of first instance where the matter should be agitated is to CAT - Jurisdiction to deal with the matter vests exclusively with the CAT - Against the order passed by CAT, matter

आदेश 21 नियम 99, 100 व 101 के अन्तर्गत आपत्तियाँ विचारण न्यायालय द्वारा 16.10.1975 को खारिज की गई— आपत्तियों के खारिज होने के बाद आपत्तिकर्ताओं को सि.प्र.सं. के आदेश 21 नियम 103 की अपेक्षानुसार वाद पेश करना चाहिए था और परिसीमा अधिनियम, 1963 के अनुच्छेद 98 के अन्तर्गत एक वर्ष की परिसीमा उपबंधित की गई थी — सि.प्र.सं. का आदेश 21 नियम 103 संशोधित हो गया और तारीख 01.02.1977 से नया नियम प्रतिस्थापित किया गया — अब नियम विनिर्दिष्ट रूप से उपबंधित करता है कि आदेश 21 नियम 98 या नियम 100 के अन्तर्गत किसी आवेदन को विनिश्चित करने वाला आदेश वही प्रभाव रखेगा और उन्ही शर्तों के अधधीन होगा जैसा कि किसी अपील या अन्य कार्यवाही की लिए होती, यदि वह डिक्री होता, इसका तात्पर्य यह है कि सि.प्र.सं. के आदेश 21 नियम 98 व 100 के अन्तर्गत आदेश को डिक्री के समान प्रभाव दिया गया है और कोई नवीन वाद पोषणीय नहीं है। (शेख हमीद वि. शेख मजहर) ...2947

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11, मुस्लिम विधि — उत्तराधिकार — घोषणा, विभाजन और पृथक कब्जे के लिए वाद — इस आधार पर खारिज किया गया कि मुस्लिम विधि में पूर्वमृत पुत्र के पुत्र अपने दादा की सम्पत्ति में दावा करने के हकदार नहीं हैं — अपीलीय न्यायालय ने निष्कर्ष को उलट दिया और मामला प्रतिप्रेषित किया — अभिनिर्धारित — मामले में विधि और तथ्य के मिश्रित प्रश्न अन्तर्ग्रस्त हैं — सम्पत्ति कृषि खाता था और मुस्लिम विधि से शासित होने वाले किसी व्यक्ति के कृषि खाते के न्यागमन की स्थिति क्या होगी यह गुणदोषों पर विनिश्चित किया जाना है — अपील न्यायालय ने मामला प्रतिप्रेषित करने में कोई त्रुटि नहीं की — पुनरीक्षण खारिज। (शेख इकर वि. शेख शमीम एहमद) ...3041

सिविल प्रक्रिया संहिता, (1908 का 5), आदेश 41 नियम 33 — देखें — मोटर यान अधिनियम, 1988, धारा 170 (समुन्द्रा देवी वि. नरेन्द्र कौर) SC ... 2743

संविधान, अनुच्छेद 14 — सेवा विधि — पदोन्नति — याची के पूर्ववर्ती पाँच वर्षों के वार्षिक गोपनीय प्रतिवेदनों में दो प्रतिकूल प्रविष्टियाँ होने के कारण याची को पदोन्नति देने से इंकार — एक प्रतिकूल प्रविष्टि कभी संसूचित नहीं की गई और दूसरी जो यद्यपि संसूचित की गई किन्तु इसके विरुद्ध याची का अभ्यावेदन विनिश्चित नहीं किया गया — अभिनिर्धारित — वार्षिक गोपनीय प्रतिवेदनों में प्रविष्टि संसूचित न करना और उसके विरुद्ध अभ्यावेदन करने के अवसर से इंकारी नैसर्गिक न्याय का उल्लंघन है — आक्षेपित आदेश अपास्त — याचिका मंजूर। (ओम प्रकाश लश्करी वि. म.प्र. राज्य) ...2863

संविधान, अनुच्छेद 14, 16, 21, 226, 227, 257, 323—ए, 323—बी, प्रशासनिक अधिकरण अधिनियम, 1985, धारा 3(क्यू) व 14, पुनर्गठन अधिनियम, म.प्र. 2000, धारा 72 — अखिल भारतीय सेवा के किसी सदस्य से सम्बन्धित सेवा मामले के सम्बन्ध में प्रथम अवसर पर रिट याचिका की पोषणीयता — याची, अखिल भारतीय सेवा के सदस्य को गलत रूप से छत्तीसगढ़ राज्य को आवंटित किया गया — केन्द्र सरकार ने आदेश रद्द किया और म.प्र. राज्य सरकार को पदस्थापना आदेश जारी करने का निदेश दिया — आदेश का पालन नहीं किया गया — रिट याचिका उच्च न्यायालय के समक्ष पेश की गई — अभिनिर्धारित — 'सेवा मामलों' और अखिल भारतीय सेवा के कर्मचारी से सम्बन्धित सेवा विवाद के सम्बन्ध में प्रथम अवसर का न्यायालय, जहाँ मामला उठाया जाना चाहिए, केन्द्रीय प्रशासनिक अधिकरण है — मामले पर कार्यवाही करने की अधिकारिता अनन्य रूप से केन्द्रीय प्रशासनिक अधिकरण में निहित है — केन्द्रीय प्रशासनिक अधिकरण

has to be agitated under Article 226 & 227 before High Court - Petition dismissed with liberty to take recourse to the remedy available under the Act of 1985. [Vinay Shukla v. State of M.P.] ...2898

Constitution, Article 19, Foreign Liquor Rules, M.P. 1996, Rule 8 - *For the year 2006-07 Government has taken decision that licence of existing licence holders shall be renewed after payment of 20% extra licence fee - It is contended that this decision is contrary to the provision of Rule 8 of Rules 1996 - It is further contended that such a policy restrained from applying a new person for licence and this policy is violative of Fundamental Rules and Article 19 of the Constitution - Held - Provision of Rule 8(a) is amply clear that the State Government is having power to issue direction from time to time with regard to the grant of licence in form FL-1 and under this provision if direction has been issued or the policy decision has been taken that is within the power of Government - No case is made out for interference. [Madan Mohan Chaturvedi v. State of M.P.] ...2776*

Constitution, Article 226, Panchayat Shiksha Karmis (Recruitment and Condition of Service) Rules, M.P. 1997 - Scope - *Petitioners selected are either sons, daughter, sisters, sister-in-law of the members of Selection Committee - After appreciating all these factors, the finding concurrently arrived at by the appellate authority (Collector) and revisional authority (Commissioner) - Order challenged in writ petition - Held - While exercising jurisdiction under Article 226 of the Constitution and while considering the question of interference into administrative or quasi judicial orders passed, if reasonable and prudent approach is adopted and if it is found that the approach of the authorities, administrative or quasi judicial in nature, is not vitiated by any statutory provisions or malafides, interference should not be made. [Shyama Dwivedi (Smt.) v. State of M.P.] ...2885*

Constitution, Article 226 - Service Law - Termination of service - Natural Justice - *Appointment of appellant as teacher with a condition, subjected to verification of antecedents - It was found that appellant was involved in seven criminal cases - Appointment cancelled by State Government - Order challenged - Held - A teacher having criminal antecedents cannot be permitted to continue in service - Nature of job of teacher is of immense significance not only in the context of a school but also in the context of national scenario - A teacher builds the character of students who in turn participate in playing the role of building of the nation - Order of Single Judge upheld - Writ Appeal dismissed. [Narayan Singh Yadav v. State Government of M.P.] ...2783*

Constitution, Article 226 - Subsistence allowance can be claimed on the basis of deemed suspension - *As a result of departmental proceedings applicant dismissed from service by order dated 29.02.1996 - Departmental*

द्वारा पारित आदेश के विरुद्ध मामला संविधान के अनुच्छेद 226 व 227 के अन्तर्गत उच्च न्यायालय के समक्ष उठाया जाना चाहिए - याचिका 1985 के अधिनियम के अन्तर्गत उपलब्ध उपचार का आश्रय लेने की स्वतंत्रता के साथ खारिज की गई। (विनय शुक्ला वि. म.प्र. राज्य) ...2898

संविधान, अनुच्छेद 19, विदेशी मदिरा नियम, म.प्र. 1996, नियम 8 - वर्ष 2006-07 के लिए सरकार ने निर्णय लिया कि विद्यमान लायसेंस धारकों के लायसेंस 20 प्रतिशत अतिरिक्त लायसेंस शुल्क भुगतान करने पर नवीनीकृत किये जायेंगे - यह प्रतिवादित किया गया कि यह निर्णय नियम 1996 के नियम 8 के उपबंध के प्रतिकूल है - यह भी प्रतिवादित किया गया कि ऐसी नीति नये व्यक्तियों को लायसेंस के लिए आवेदन करने से प्रतिषिद्ध करती है और यह नीति मूलभूत नियम और संविधान के अनुच्छेद 19 के अतिक्रमणकारी है - अभिनिर्धारित - नियम 8(ए) का उपबंध व्यापक रूप से स्पष्ट है कि राज्य सरकार को प्रारूप एफएल-1 में लायसेंस प्रदान करने के सम्बन्ध में समय-समय पर निदेश जारी करने की शक्ति है और इस उपबंध के अन्तर्गत यदि निदेश जारी किया गया है या नीति निर्णय लिया गया है वह सरकार की शक्ति के अन्तर्गत है - हस्तक्षेप के लिए कोई मामला नहीं बनता। (मदन मोहन चतुर्वेदी वि. म.प्र. राज्य) ...2776

संविधान, अनुच्छेद 226, पंचायत शिक्षा कर्मी (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1997 - क्षेत्र - चयनित याची चयन समिति के सदस्यों के पुत्र, पुत्री, बहिनें, मामी हैं - इन सभी कारकों का विवेचन करने के बाद अपील प्राधिकारी (कलेक्टर) और पुनरीक्षण प्राधिकारी (कमिशनर) द्वारा समवर्ती रूप में निष्कर्ष निकाले गये - आदेश को रिट याचिका में चुनौती दी गई - अभिनिर्धारित - संविधान के अनुच्छेद 226 के अन्तर्गत अधिकारिता का प्रयोग करते समय और पारित प्रशासनिक या अर्ध-न्यायिक आदेशों में हस्तक्षेप के प्रश्न पर विचार करते समय, यदि युक्तियुक्त और बुद्धिमत्तापूर्ण दृष्टिकोण अपनाया जाता है और यदि यह पाया जाता है कि प्राधिकारियों के दृष्टिकोण की प्रकृति प्रशासनिक या अर्ध-न्यायिक है, किसी भी कानूनी उपबंध या असदभावना द्वारा दूषित नहीं है, हस्तक्षेप नहीं किया जाना चाहिए। (श्यामा द्विवेदी (श्रीमति) वि. म.प्र. राज्य) ...2885

संविधान, अनुच्छेद 226 - सेवा विधि - सेवा समाप्ति - नैसर्गिक न्याय - अपीलार्थी की शिक्षक के रूप में नियुक्ति पूर्वचरित सत्यापन की शर्त के साथ की - यह पाया गया कि अपीलार्थी सात दाण्डिक मामलों में संलिप्त था - नियुक्ति राज्य सरकार द्वारा निरस्त की गई - आदेश को चुनौती - अभिनिर्धारित - एक शिक्षक जिसका आपराधिक पूर्वचरित हो उसे सेवा में बने रहने की अनुमति नहीं दी जा सकती - शिक्षक के कार्य की प्रकृति न केवल विद्यालय के संदर्भ में बल्कि राष्ट्रीय परिदृश्य के संदर्भ में भी असीम महत्व की होती है - एक शिक्षक विद्यार्थियों के चरित्र का निर्माण करता है जो देश के निर्माण में महत्वपूर्ण भूमिका निभाते हैं - एकल न्यायाधीश के आदेश की पुष्टि की गई - रिट अपील खारिज। (नारायण सिंह यादव वि. राज्य सरकार म.प्र.) ...2783

संविधान, अनुच्छेद 226 - जीवन-निर्वाह भत्ते का दावा माने गये निलम्बन के आधार पर किया जा सकता है - विभागीय कार्यवाही के परिणामस्वरूप आवेदक को आदेश तारीख 29.02.1996 द्वारा सेवा से पदच्युत किया गया - विभागीय अपील भी खारिज की गई - उच्च

appeal also dismissed - High Court in writ petition quashed the order of dismissal and applicant was directed to be reinstated in service - Order of High Court was assailed in writ appeal - Appellate court set-aside all the orders and remitted the matter back to Disciplinary Authority with certain directions - Fresh order of dismissal passed on 16.04.2007 - Applicant claimed subsistence allowance from the date of his first dismissal i.e. 29.02.1996 till the date of his second dismissal i.e. 16.04.2007 - Held - Finding and order of Disciplinary Authority was set-aside and was directed to re-decide issue after affording adequate opportunity to applicant - Position of applicant as it existed prior to his dismissal from service as charged officer under suspension was restored - Applicant should be deemed to be under suspension till the date of subsequent order of dismissal - Applicant entitled for subsistence allowance - Application allowed. [Gurmit Singh v. The Zonal Manager, Punjab & Sindh Bank, Bhopal] ...3049

Constitution, Article 226 - Transfer - Mala fides - Allegations of mala fide have to be established and proved to such a extent that the Court can record positive finding. [Pareekshit Singh (Dr.) v. State of M.P.] ...2849

Constitution, Article 226 - Transfer - Number of complaints and enquiries pending against petitioner - Transfer of employee to facilitate enquiry or disciplinary action is a proper exercise of power. [Pareekshit Singh (Dr.) v. State of M.P.] ...2849

Constitution, Article 226 - Transfer - Scope of Judicial Review - Transfer order can be interfered only if mala fides are established or if the transfer is found to be contrary to statutory provisions or provisions having force of law. [Pareekshit Singh (Dr.) v. State of M.P.] ...2849

Constitution, Article 227 - Supervisory Jurisdiction - Scope - High Court in exercise of its supervisory jurisdiction can only look into the dispute that was raised before the Industrial Court and examined as to whether the Industrial Court has committed any patent error which is manifest and apparent from the face of record which has resulted in gross injustice or failure of justice. [Katni Pottery Karamchari Sangh v. M/s. Associated Cement Companies Ltd.] ...2870

Constitution, Article 311 - Departmental Enquiry - Acquittal in criminal case - Appellant was Asstt. Manager in State Bank of India - He was custodian of extension counter - On surprise check Rs. 1 lacs were found short - He was prosecuted u/ss 409 & 477A of I.P.C. - Departmental Enquiry on the allegation that he had failed to protect the Bank's interest as a result of which Bank has been saddled with pecuniary loss of Rs. 1 lacs initiated - Charges were found proved and appellant was dismissed from service - Appellant thereafter acquitted in criminal proceedings - Held - Scope of criminal proceedings and scope of departmental proceedings are quite distinct, exclusive and independent of each other - Both the proceedings were on a

न्यायालय ने रिट याचिका में पदच्युति का आदेश अभिलिखित किया और आवेदक को सेवा में पुनर्नियुक्त किये जाने के निदेश दिये — उच्च न्यायालय के आदेश को रिट अपील में चुनौती दी गई — अपीलीय न्यायालय ने सभी आदेश अपास्त किये और मामला कुछ निदेशों के साथ अनुशासनिक प्राधिकारी को वापस भेज दिया — पदच्युति का नवीन आदेश 16.04.2007 को पारित किया गया — आवेदक ने उसकी प्रथम पदच्युति की तारीख अर्थात् 29.02.1996 से द्वितीय पदच्युति की तारीख अर्थात् 16.04.2007 तक जीवन-निर्वाह भत्ते का दावा किया — अभिनिर्धारित — अनुशासनिक प्राधिकारी का निष्कर्ष और आदेश अपास्त किया गया और आवेदक को सुनवाई का पर्याप्त अवसर देने के बाद विवाद पुनः विनिश्चित करने का निदेश दिया — आवेदक की स्थिति जैसी उसकी सेवा से पदच्युति के पूर्व निलम्बन के अन्तर्गत आरोपित अधिकारी के रूप में थी पुनः स्थापित की गई — आवेदक को सेवा समाप्ति के पश्चात्तर्वर्ती आदेश की तारीख तक निलम्बन के अधीन माना जाना चाहिए — आवेदक जीवन-निर्वाह भत्ते का हकदार — आवेदन मंजूर। (गुरमीत सिंह वि. द. जोनल मैनेजर, पंजाब एंड सिंध बैंक, भोपाल) ...3049

संविधान, अनुच्छेद 226 — स्थानांतरण — असदभाव — असदभाव का अभिकथन ऐसी सीमा तक स्थापित और सिद्ध किया जाना चाहिए कि न्यायालय सकारात्मक निष्कर्ष अभिलिखित कर सके। (परीक्षित सिंह (डॉ.) वि. म.प्र. राज्य) ...2849

संविधान, अनुच्छेद 226 — स्थानांतरण — याचिका के विरुद्ध कई शिकायतें और जाँचें लम्बित — कर्मचारी का स्थानांतरण जाँच या अनुशासनात्मक कार्यवाही को सुकर बनाने के लिए शक्तियों का उचित प्रयोग है। (परीक्षित सिंह (डॉ.) वि. म.प्र. राज्य) ...2849

संविधान, अनुच्छेद 226 — स्थानांतरण — न्यायिक पुनर्विलोकन का क्षेत्र — स्थानांतरण आदेश में हस्तक्षेप सिर्फ तभी, यदि असदभाव स्थापित होता है या स्थानांतरण वैधानिक उपबंधों या ऐसे उपबंधों जो विधि का प्रभाव रखते हैं, के प्रतिकूल है। (परीक्षित सिंह (डॉ.) वि. म.प्र. राज्य) ...2849

संविधान, अनुच्छेद 227 — पर्यवेक्षण अधिकारिता — क्षेत्र — उच्च न्यायालय अपनी पर्यवेक्षण अधिकारिता के प्रयोग में केवल विवाद की जाँच पड़ताल कर सकता है जो औद्योगिक न्यायालय के समक्ष उठाया गया और यह परीक्षा कर सकता है कि क्या औद्योगिक न्यायालय ने कोई प्रत्यक्ष त्रुटि की जो अभिलेख से प्रकट होती है जिसके परिणामस्वरूप घोर अन्याय हुआ या न्याय के विफलता हुई। (कटनी पॉटरी कर्मचारी संघ वि. में. एसोसिएटेड सीमेंट कं. लि.) ...2870

संविधान, अनुच्छेद 311 — विभागीय जाँच — दाण्डिक मामले में दोषमुक्ति — अपीलार्थी भारतीय स्टेट बैंक में सहायक प्रबंधक था — वह विस्तार पटल का संरक्षक था — आकस्मिक जाँच पर 1 लाख रुपये कम पाये गये — उसे भा.द.सं. की धारा 409 व 477ए के अन्तर्गत अभियोजित किया गया — विभागीय जाँच इन आरोपों पर प्रारम्भ की गई कि वह बैंक के हितों की रक्षा करने में असफल हो गया था जिसके परिणामस्वरूप बैंक पर 1 लाख रुपये का आर्थिक भार डाला गया — आरोप साबित पाये गये और अपीलार्थी को सेवा से पदच्युत किया गया — अपीलार्थी उसके बाद दाण्डिक कार्यवाहियों में दोषमुक्त हो गया — अभिनिर्धारित — दाण्डिक कार्यवाहियों का क्षेत्र और विभागीय कार्यवाहियों का क्षेत्र एक-दूसरे से बिल्कुल भिन्न, अनन्य और स्वतंत्र है — दोनों कार्यवाहियाँ तथ्यों और आरोपों के पूर्णतः भिन्न समूहों पर थीं — आरोपों की भिन्न प्रकृति, तात्पर्य और रूप रेखा

totally different sets of facts and charges - Charges have a different character, tenor and contour - No scintilla of doubt that charge sheet is absolutely different - Appeal dismissed. [R.K. Geete v. Deputy Managing Director and Corporate Development Officer] ...2771

Constitution, Article 311 - Departmental Enquiry - Principles of Natural Justice - Appellant himself chosen not to participate in disciplinary proceeding - It does not lie in his mouth that principles of Natural Justice have been given indecent burial. [R.K. Geete v. Deputy Managing Director and Corporate Development Officer] ...2771

Constitution, Articles 327 & 329 - See - Delimitation Act, 2002, Sections 9 & 10(1) [Association of The Resident of Mhow v. Delimitation Commission of India] ...2809

Court Fees Act (7 of 1870), Schedule I, Section 7(iv)(a) - Suit filed by plaintiff for declaring the order dated 10.08.2006 as illegal by which security amount of Rs.44,75,000/- has been forfeited - Trial court directed to pay ad valorem court fee on consequential relief - Held - Security amount is in possession of defendants and has to be prayed for by plaintiff for its refund - Suit for declaration will not be enough until amount is refunded to plaintiff - Plaintiff has to pay ad valorem court fee as prescribed in Schedule I - Petition dismissed. [Bansal Highway (M/s.) v. General Manager, Gramin Sadak Vikas Pradhikaran Pariyojna Kriyanvayan] ...2912

Criminal Procedure Code, 1973 (2 of 1974), Section 126(2) - See - Muslim Woman (Protection of Rights on Divorce) Rules, 1986, Rule 4 [Mohiuddin v. Smt. Azra Bano] ...*88

Criminal Procedure Code, 1973 (2 of 1974), Sections 133, 137, 138, 482 - Public Nuisance - Quashing of proceedings - Proceeding u/s 133 of Code initiated against the applicant for encroaching the public way - Applicant filed a civil suit and the civil court passed an order of injunction - Despite the order of injunction in favour of the applicant, the S.D.M. passed a conditional order of removal of encroachment - Proceeding challenged - Held - Magistrate has to first make an inquiry u/s 137(1) of Code - In such inquiry, if he finds there is reliable evidence in support of denial of the existence of a public way on the disputed land, he shall stay the proceedings until the matter of existence of such right is decided by civil court - If he finds there is no evidence, he shall proceed in accordance with Section 138 of Code - Petition disposed of. [Mohammad Ausaph v. Mohammad Shaid]...*87

Criminal Procedure Code, 1973 (2 of 1974), Section 154 - F.I.R. - F.I.R. is not substantial piece of evidence - It can be used only for corroboration and proving the contradiction, omission and improvements in the statement of prosecution witnesses - Only on the basis of F.I.R. conviction cannot be upheld. [Ganesh @ Ganesha @ Ganesh Prasad v. State of M.P.] ...3026

होती है — जरा भी संदेह नहीं, कि आरोप पत्र पूर्ण रूप से भिन्न था — अपील खारिज। (आर. के. गीते वि. डिप्टी मेनेजिंग डायरेक्टर एंड कारपोरेट डेवेलपमेंट आफीसर) ...2771

संविधान, अनुच्छेद 311 — विभागीय जाँच — नैसर्गिक न्याय के सिद्धांत — स्वयं अपीलार्थी ने अनुशासनिक कार्यवाही में भाग लेना पसंद नहीं किया — वह यह नहीं कह सकता कि नैसर्गिक न्याय के सिद्धांतों को अशिष्ट रूप से दफन कर दिया गया। (आर. के. गीते वि. डिप्टी मेनेजिंग डायरेक्टर एंड कारपोरेट डेवेलपमेंट आफीसर) ...2771

संविधान, अनुच्छेद 327, 329 — देखें — परिसीमन अधिनियम, 2002, धारा 9 व 10(1), (एसोसिएशन ऑफ द रेसीडेन्ट ऑफ महू वि. डीलिटेशन कमीशन ऑफ इंडिया) ...2809

न्यायालय फीस अधिनियम (1870 का 7), अनुसूची 1, धारा 7(iv)(ए) — वादी द्वारा आदेश तारीख 10.08.2006 को अवैध घोषित करने के लिए वाद पेश किया जिसके द्वारा 44,75,000/- रुपये की प्रतिभूति राशि समपहत की गई — विचारण न्यायालय ने पारिणामिक अनुतोष पर एडवलरम न्यायालय फीस अदा करने का निदेश दिया — अभिनिर्धारित — प्रतिभूति राशि प्रतिवादियों के कब्जे में है और उसकी वापसी के लिए वादी द्वारा प्रार्थना की जानी है — घोषणा का वाद पर्याप्त नहीं होगा जब तक राशि वादी को वापस नहीं की जाती — वादी को अनुसूची 1 में विहित न्यायालय फीस अदा करना चाहिए — याचिका खारिज। (बंशल हाईवे (मे.) वि. जनरल मेनेजर ग्रामीण सड़क विकास प्राधिकरण परियोजना क्रियान्वयन) ...2912

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 126(2) — देखें — मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) नियम, 1986, नियम 4 (मोहउद्दीन वि. श्रीमति अजरा बानो) ---*88

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 133, 137, 138, 482 — लोक न्यूसेंस — कार्यवाहियों का अभिखण्डन — आवेदक के विरुद्ध लोक मार्ग पर अतिक्रमण करने के लिए संहिता की धारा 133 के अन्तर्गत कार्यवाही प्रारम्भ की गई — आवेदक ने सिविल वाद पेश किया और सिविल न्यायालय ने व्यादेश जारी किया — व्यादेश का आदेश आवेदक के पक्ष में होने के बावजूद एस.डी.एम. ने अतिक्रमण हटाने के लिए सशर्त आदेश पारित किया — कार्यवाही को चुनौती दी — अभिनिर्धारित — मजिस्ट्रेट को सर्वप्रथम संहिता की धारा 137(1) के अन्तर्गत जाँच करना चाहिए — ऐसी जाँच में, यदि वह पाता है कि विवादित भूमि पर लोक मार्ग के अस्तित्व से इंकारी के समर्थन में विश्वसनीय साक्ष्य है, तो वह सिविल न्यायालय द्वारा ऐसे अधिकार का अस्तित्व विनिश्चित किये जाने तक कार्यवाहियाँ रोक देगा — यदि वह पाता है कि कोई साक्ष्य नहीं है तो संहिता की धारा 138 के अन्तर्गत कार्यवाही करने के लिए अग्रसर होगा — याचिका निपटाई गई। (मोहम्मद ओसफ वि. मोहम्मद सईद) ---*87

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 — एफ.आई.आर. — एफ.आई.आर. साक्ष्य का सारवान अंश नहीं है — यह केवल सम्पुष्टि करने और अभियोजन साक्षियों के कथन में विरोधाभास, लोप और सुधारों को साबित करने के लिए प्रयुक्त की जा सकती है — केवल एफ.आई.आर. के आधार पर दोषसिद्धि पुष्ट नहीं की जा सकती। (गनेश उर्फ गनेशा उर्फ गनेश प्रसाद वि. म.प्र. राज्य) ...3026

Criminal Procedure Code, 1973 (2 of 1974), Section 154, Police Regulations, Regulation 744 - *F.I.R. dictated by I.O. to another Sub-Inspector and scribe not examined in court - Held - F.I.R. shall be reduced to writing by officer-in-charge of police station to whom the report was made or can be recorded under his direction - There is no requirement to examine scribe - Case of prosecution not vitiated on account of flaw in F.I.R. or procedure adopted for recording F.I.R. - Regulation 744 is not applicable in the matters relating to the recording of F.I.R.* [Ashok v. State of M.P.] ...2997

Criminal Procedure Code, 1973 (2 of 1974), Section 157 - Duty of investigator - *Where during the investigation, previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court, and if, this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused - The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors.* [Hari Singh Gond v. State of M.P.] SC...2764

Criminal Procedure Code, 1973 (2 of 1974), Section 161, Police Regulations, Regulation 744 - *Criticism levelled with regard to Section 161 statements having not recorded by I.O. as per provision of Regulation 744 - Held - The reference or allusion made to the diary in the regulation is not to the statements recorded but to the entries made with regard thereto.* [Ashok v. State of M.P.] ...2997

Criminal Procedure Code, 1973 (2 of 1974), Section 161, Police Regulations, Regulation 744 - *161 statements do not form an integral part of the case diary, although the I.O. is required to record substance of the statement of the witnesses examined u/s 161 of the Code.* [Ashok v. State of M.P.] ...2997

Criminal Procedure Code, 1973 (2 of 1974), Sections 162 - See - *Evidence Act, 1872, Section 9* [State of M.P. v. Tidda @ Sonu] ...*90

Criminal Procedure Code, 1973 (2 of 1974), Section 197, Penal Code, 1860, Sections 166, 294, 451 - *Sanction of prosecution - Magistrate taking cognizance against non-applicant for offence u/s 166, 294, 451 I.P.C. - Order set-aside in revision on the ground that sanction u/s 197 of Code was not obtained - Order challenged before High Court - Held - At the time of incident, non-applicant was probationary Naib Tahsildar - He was acting in discharge of his duties - He was not removable from service except the order of State Government - Sanction of State Government necessary prior to taking cognizance of the alleged offence - The same has not been taken - Revisional court has rightly held the application of bar of Section 197 of Code - Revision dismissed.* [Shameem Khatoon (Smt.) v. R.P. Ramanwal] ...*89

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154, पुलिस विनियम, विनियम 744 — एफ.आई.आर. अनुसंधान अधिकारी द्वारा अन्य उपनिरीक्षक को लिखवाई गई और लेखक का न्यायालय में परीक्षण नहीं कराया — अभिनिर्धारित — एफ.आई.आर. पुलिस थाने के भारसाधक अधिकारी द्वारा, जिसको रिपोर्ट की गई है, लेखबद्ध की जाएगी या उसके निदेश के अन्तर्गत लेखबद्ध की जा सकती है — लेखक का परीक्षण कराने की कोई आवश्यकता नहीं है — अभियोजन का मामला एफ.आई.आर. में त्रुटि या एफ.आई.आर. लेखबद्ध करने के लिए अपनाई गई प्रक्रिया के कारण दूषित नहीं होता — एफ.आई.आर. लेखबद्ध करने से सम्बन्धित मामलों में विनियम 744 लागू नहीं होता। (अशोक वि. म.प्र. राज्य) ...2997

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 — अनुसंधानकर्ता का कर्तव्य — जहाँ अनुसंधान के दौरान पागलपन का पूर्व इतिहास प्रकट होता है तो एक ईमानदार अनुसंधानकर्ता का यह कर्तव्य है कि अभियुक्त को चिकित्सकीय परीक्षण के लिए भेजे और वह साक्ष्य न्यायालय के समक्ष पेश करे, और यदि ऐसा नहीं किया जाता है, तो यह अभियोजन के मामले में गम्भीर अशक्तता पैदा करता है और संदेह का लाभ अभियुक्त को देना पड़ता है — तथापि, अभियुक्त के अपराध के तत्काल पूर्व के आचरण और अपराध के समय या उसके तुरन्त बाद के आचरण के बारे में उसकी मानसिक दशा और अन्य सुसंगत कारकों का साक्ष्य पेश करके इस भार से उन्मोचित हो सकता है। (हरीसिंह गौड़ वि. म.प्र. राज्य) SC--- 2764

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161, पुलिस विनियम, विनियम 744 — अनुसंधान अधिकारी द्वारा 161 के कथन विनियम 744 के अनुसार लेखबद्ध न करने के सम्बन्ध में आलोचना — अभिनिर्धारित — विनियम में डायरी की ओर संदर्भ या संकेत कथनों के लेखबद्ध करने से नहीं है बल्कि डायरी में की गई प्रविष्टियों से है। (अशोक वि. म.प्र. राज्य) ...2997

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161, पुलिस विनियम, विनियम 744 — धारा 161 के कथन केस डायरी का अभिन्न अंग नहीं हैं, यद्यपि अनुसंधान अधिकारी से अपेक्षित है कि साक्षियों की संहिता की धारा 161 के अन्तर्गत की गई परीक्षा का सार लेखबद्ध करे। (अशोक वि. म.प्र. राज्य) ...2997

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 162 — देखें — साक्ष्य अधिनियम 1872, धारा 9 (म.प्र. राज्य वि. टिड्डा उर्फ सोनू) ---*90

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197, दण्ड संहिता, 1860, धाराएँ 166, 294, 451 — अभियोजन की मंजूरी — मजिस्ट्रेट ने अनावेदक के विरुद्ध भा.द.सं. की धारा 166, 294, 451 के अन्तर्गत अपराध के लिए संज्ञान लिया — आदेश पुनरीक्षण में इस आधार पर अपास्त कर दिया गया कि संहिता की धारा 197 के अन्तर्गत मंजूरी प्राप्त नहीं की गई — आदेश को उच्च न्यायालय के समक्ष चुनौती दी गई — अभिनिर्धारित — घटना के समय अनावेदक परिवीक्षाधीन नायब तहसीलदार था — वह अपने कर्तव्यों का निर्वहन कर रहा था — उसे राज्य सरकार के आदेश के बिना सेवा से पृथक नहीं किया जा सकता था — कथित अपराध का संज्ञान लेने से पूर्व राज्य सरकार की मंजूरी आवश्यक — जो नहीं ली गई — पुनरीक्षण न्यायालय ने संहिता की धारा 197 की बाधा लागू करना उचित रूप से अभिनिर्धारित किया — पुनरीक्षण खारिज। (शमीम खातून (श्रीमति) वि. आर. पी. रमनवाल) ...*89

Criminal Procedure Code, 1973 (2 of 1974), Section 374(2), Narcotics Drugs and Psychotropic Substances Act, 1985, Section 8 r/w 20(b)(iii)(b) - Appellant No.1 was convicted for the charge that on search of his house 12 Kg Ganja was found - Whereas appellant No.2 was convicted on the allegation that at the time of search he was present and weights, measures and Rs.743/- were seized from him - Appellants challenged their conviction before High Court - Held - No evidence is produced that appellant No.2 was also selling Ganja with appellant No.1 - Merely his presence is not sufficient to prove that he was dealing in Ganja - There is no evidence to connect complicity of appellant No.2 with this offence - Defence story of appellant No.2 that he suggested police officer not to use third degree methods against appellant No.1 on account of which he has been implicated in this case - Cannot be said to be unreasonable - Conviction of appellant No.2 set-aside - Appeal partly allowed. [Kuldeep Sahu v. State of M.P.] ...2985

Criminal Procedure Code, 1973 (2 of 1974), Section 438 - Period of Anticipatory Bail - Cognizance of offences u/s 406 & 420 r/w 34 I.P.C. was taken upon the complaint - Applicants granted anticipatory bail for a period of 60 days - Petition u/s 482 of Code filed to quash proceedings - High Court stayed further proceedings - Prayer made to extend the period of anticipatory bail till decision of petition u/s 482 of Code - Held - Anticipatory bail orders cannot be kept in abeyance or cannot be extended for indefinite period - In case petition u/s 482 of Code is dismissed, applicants can re-agitate prayer for extension of anticipatory bail within period of 10 days from the date of order. [Gopichand Khatri v. Sushil Kumar Pamnani] ...*85

Criminal Procedure Code, 1973 (2 of 1974), Section 452 - Disposal of property - Appellant denied seizure of property from himself - He failed to lead any evidence to establish entitlement to have possession of property - Held - For return of property the appellant has to claim property and establish that he is the person entitled for possession - Appellant not entitled for property - Cash amount directed to be returned to the society instead of complainant who was employee of that society - Judgment of trial court amended. [Mahendrasingh v. State of M.P.] ...2989

Delimitation Act (33 of 2002), Section 9(2) - Delimitation of constituencies - Mhow was to be included in Indore parliamentary constituency as per notification dated 19.01.2007 - Residents of Mhow did not file any objection - Commission decided to include Mhow in Dhar parliamentary constituency instead of Indore parliamentary constituency - Held - No provision requiring Delimitation Commission to again publish proposal or invite objections and suggestions and hold public meetings if the Commission decides to change the original proposal as published - Commission was not required to publish its decision and invite objections and hold one or more

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 374(2), स्वापक औषधि और मनःप्रभावी प्रदार्थ अधिनियम, 1985, धारा 8 सहपठित 20(बी)(iii)(बी) - अपीलार्थी क्र. 1 इस आरोप के लिए दोषसिद्ध किया गया कि उसके घर की तलाशी पर 12 किग्रा गांजा पाया गया - जबकि अपीलार्थी क्र. 2 को इस आरोप पर दोषसिद्ध किया गया कि तलाशी के समय वह उपस्थित था और तराजू बांट और 743/- रुपये उससे अभिग्रहीत किये गये - अपीलार्थियों ने उनकी दोषसिद्धि को उच्च न्यायालय के समक्ष चुनौती दी - अभिनिर्धारित - कोई साक्ष्य पेश नहीं की गई कि अपीलार्थी क्र. 2 भी अपीलार्थी क्र. 1 के साथ गांजा बेच रहा था - केवल उसकी उपस्थिति यह साबित करने के लिए पर्याप्त नहीं है कि वह गांजे का संव्यवहार कर रहा था - इस अपराध से अपीलार्थी क्र. 2 की सह-अपराधिता जोड़ने के लिए कोई साक्ष्य नहीं है - अपीलार्थी क्र. 2 की प्रतिरक्षा की कहानी कि उसने पुलिस अधिकारी को अपीलार्थी क्र. 1 के विरुद्ध थर्ड डिग्री पद्धति का प्रयोग न करने का सुझाव दिया जिसके कारण उसे इस मामले में आलिप्त किया गया - अयुक्तियुक्त नहीं कही जा सकती - अपीलार्थी क्र. 2 की दोषसिद्धि अपास्त - अपील अंशतः मंजूर। (कुलदीप साहू वि. म.प्र. राज्य) ...2985

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 - अग्रिम जमानत की कालावधि - परिवाद पर भा.द.सं. की धारा 406 व 420 सहपठित धारा 34 के अपराध का संज्ञान लिया गया - आवेदकों को 60 दिनों की कालावधि के लिए अग्रिम जमानत प्रदान की गई - संहिता की धारा 482 के अन्तर्गत कार्यवाहियों को अभिखण्डित करने के लिए याचिका पेश की गई - उच्च न्यायालय ने आगे की कार्यवाहियाँ रोक दीं - अग्रिम जमानत की कालावधि संहिता की धारा 482 के अन्तर्गत याचिका के विनिश्चय तक बढ़ाने के लिये प्रार्थना की गई - अभिनिर्धारित - अग्रिम जमानत के आदेश मुलतवी नहीं रखे जा सकते या अनिश्चित कालावधि के लिए विस्तारित नहीं किये जा सकते - यदि संहिता की धारा 482 के अन्तर्गत याचिका निरस्त हो जाती है तो आवेदक आदेश दिनांक से 10 दिन की कालावधि में अग्रिम जमानत आगे बढ़ाने के लिए पुनः प्रार्थना कर सकते हैं। (गोपीचंद खत्री वि. सुशील कुमार पमनानी) ---*85

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 452 - सम्पत्ति का व्ययन - अपीलार्थी ने उससे सम्पत्ति अभिग्रहीत की जाना अस्वीकार किया - वह सम्पत्ति का कब्जा रखने की हकदारी स्थापित करने के लिए कोई साक्ष्य प्रस्तुत करने में असफल रहा - अभिनिर्धारित - सम्पत्ति की वापसी के लिए अपीलार्थी को सम्पत्ति का दावा करना चाहिए और यह स्थापित करना चाहिए कि वही कब्जे के लिए हकदार व्यक्ति है - अपीलार्थी सम्पत्ति के लिए हकदार नहीं - नगद राशि परिवारी, जो सोसायटी का कर्मचारी है, के स्थान पर सोसायटी को वापस किये जाने का निदेश दिया गया - विचारण न्यायालय का निर्णय संशोधित किया गया। (महेन्द्रसिंह वि. म.प्र. राज्य) ...2989

परिसीमन अधिनियम (2002 का 33), धारा 9(2) - निर्वाचन क्षेत्रों का परिसीमन - अधिसूचना तारीख 19.01.2007 के अनुसार महु को इन्दौर संसदीय निर्वाचन क्षेत्र में सम्मिलित करना था - महु के निवासियों ने कोई आपत्ति पेश नहीं की - आयोग ने महु को इन्दौर संसदीय निर्वाचन क्षेत्र के स्थान पर धार संसदीय निर्वाचन क्षेत्र में सम्मिलित करने का निर्णय किया - अभिनिर्धारित - यदि आयोग प्रकाशित मूल प्रस्ताव परिवर्तित करने का निर्णय करता है तो परिसीमन आयोग से अपेक्षा करने वाला कोई उपबंध नहीं कि दोबारा प्रस्ताव प्रकाशित करे या आपत्तियाँ और सुझाव आमंत्रित करे तथा लोक बैठकें आयोजित करे - आयोग को अपना निर्णय प्रकाशित करने, आपत्तियाँ आमंत्रित करने और एक या अधिक लोक बैठकें आयोजित करने की आवश्यकता नहीं थी -

public meetings - Petition dismissed. [Association of the Resident of Mhow v. Delimitation Commission of India] ...2809

Delimitation Act (33 of 2002), Sections 9 & 10(1), Constitution, Articles 327 & 329 - Delimitation - Delimitation Commission after inviting suggestions, objections and after conducting public hearings included Mhow in Dhar parliamentary constituency instead of Indore parliamentary constituency - Held - Once the order made by Commission is published in Gazette of India, it has the force of law and cannot be called in question in any Court. [Association of the Resident of Mhow v. Delimitation Commission of India] ...2809

Electricity Supply Code, M.P. 2004 (As amended w.e.f. 11.08.2006), Clause 4.17 - Effect of amendment in Rules - Petitioner purchased premises in auction - The premises carried a liability of electricity charges of Rs.46084/- - Petitioner requested for grant of fresh electricity connection relying upon Clause 4.17 of Code - Respondents declined to grant connection - Action challenged - Respondents contended that substitution of clause 4.17 in the Code has been brought into existence w.e.f. 11.08.2006 whereas the application for grant of new connection was prior to the amendment and is governed by unamended clause - Held - When a statute provides new remedies for enforcement of existing rights will apply to future as well as past causes of action, because they do not affect existing rights and are classified as procedural. [Uma Shukla (Smt.) v. M.P. Poorva Kshetra Vidyut Vitran Co.]...2915

Electricity Supply Code, M.P. 2004 (As amended w.e.f. 11.08.2006), Clause 4.17 - New electricity connection denied on the ground that electricity dues of the previous owner were outstanding - Held - The new electricity connection cannot be denied on the anvil that previous consumer did not clear the electricity dues - Petition allowed. [Uma Shukla (Smt.) v. M.P. Poorva Kshetra Vidyut Vitran Co.] ...2915

Employees Regulation, 1950, Regulations 31 & 31-C - See - Employees' State Insurance Act, 1948, Sections 39, 40, 75, 82, 85-B [Employees' State Insurance Corporation v. M/s. Reliable Carriers Private Ltd.] ...2973

Employees' State Insurance Act (34 of 1948), Sections 39, 40, 75, 82, 85-B, Employees Regulation, 1950, Regulations 31 & 31-C - Damages - Employer not deposited the contribution within prescribed period - E.S.I. Corporation imposing damages to the extent of 100% of the contribution after giving an opportunity of hearing -E.S.I. cum Labour Court reducing it to 25% - Order challenged before High Court - Held - Amount of contribution was deposited by employer after 4 to 7 years delay from the due dates of such payment - Notice was served in spite it was not replied on behalf of employer - E.S.I. Corporation's order imposing the damages was passed in consonance of Section 85-B of Act r/w Regulations 31 & 31-C - The case of

याचिका खारिज। (एसोसिएशन ऑफ द रेसीडेन्ट ऑफ महू वि. डीलिटिमिटेशन कमीशन ऑफ इंडिया) ...2809

परिसीमन अधिनियम (2002 का 33), धारा 9 व 10(1), संविधान, अनुच्छेद 327, 329 — परिसीमन — परिसीमन आयोग ने सुझाव, आपत्तियाँ आमंत्रित करने और लोक सुनवाई करने के बाद महू को इन्दौर संसदीय निर्वाचन क्षेत्र के स्थान पर धार संसदीय निर्वाचन क्षेत्र में सम्मिलित किया — अभिनिर्धारित — एक बार आयोग द्वारा किया गया आदेश भारत के राजपत्र में प्रकाशित हो जाता है तो वह कानून का प्रभाव रखता है किसी न्यायालय में प्रश्न में नहीं बुलाया जा सकता। (एसोसिएशन ऑफ द रेसीडेन्ट ऑफ महू वि. डीलिटिमिटेशन कमीशन ऑफ इंडिया) ...2809

विद्युत प्रदाय संहिता, म.प्र. 2004 (11.08.2006 से यथासंशोधित), खण्ड 4.17 — नियमों में संशोधन का प्रभाव — याची ने परिसर नीलामी में क्रय की — परिसर पर 46084/- रुपये विद्युत प्रभार का दायित्व था — याची ने संहिता के खण्ड 4.17 पर निर्भर करते हुए नवीन विद्युत कनेक्शन देने के लिए प्रार्थना की — प्रत्यर्थियों ने कनेक्शन देने से इंकार किया — कृत्य को चुनौती दी गई — प्रत्यर्थियों ने प्रतिवाद किया कि संहिता में खण्ड 4.17 का प्रतिस्थापन 11.08.2006 से अस्तित्व में लाया गया है जबकि नवीन कनेक्शन देने का आवेदन संशोधन के पूर्व का था और असंशोधित खण्ड से शासित होता है — अभिनिर्धारित — जब कोई अधिनियमिति विद्यमान अधिकारों के प्रवर्तन के लिए कोई नया अनुतोष उपबंधित करती है, मविष्यवर्ती और पूर्ववर्ती वाद हेतुकों को भी लागू होगी, क्योंकि वे विद्यमान अधिकारों को प्रभावित नहीं करते और प्रक्रियात्मक रूप से वर्गीकृत किये जाते हैं। (उमा शुक्ला (श्रीमति) वि. म.प्र. पूर्व क्षेत्र विद्युत वितरण कम्पनी) ...2915

विद्युत प्रदाय संहिता, म.प्र. 2004 (11.08.2006 से यथासंशोधित), खण्ड 4.17 — नवीन विद्युत कनेक्शन देने से इस आधार पर इंकार किया गया कि पूर्ववर्ती स्वामी के विद्युत देय बकाया थे — अभिनिर्धारित — नवीन विद्युत कनेक्शन इस आधार पर इंकार नहीं किया जा सकता कि पूर्ववर्ती उपभोक्ता ने विद्युत देय चुकता नहीं किये — याचिका मंजूर। (उमा शुक्ला (श्रीमति) वि. म.प्र. पूर्व क्षेत्र विद्युत वितरण कम्पनी) ...2915

कर्मचारी विनियमन, 1950, विनियम 31 व 31-सी — देखें — कर्मचारी राज्य बीमा अधिनियम 1948, धाराएँ 39, 40, 75, 82, 85-बी (एम्पलाईस स्टेट इश्योरेंस कारपोरेशन वि. मे. रिलायबल केरियर्स प्रा.लि.) ...2973

कर्मचारी राज्य बीमा अधिनियम (1948 का 34), धाराएँ 39, 40, 75, 82, 85-बी, कर्मचारी विनियमन, 1950, विनियम 31 व 31-सी — नुकसानी — नियोक्ता ने अंशदान विहित कालावधि में जमा नहीं किया — कर्मचारी राज्य बीमा निगम ने सुनवाई का अवसर देने के बाद अंशदान की 100 प्रतिशत नुकसानी अधिरोपित की — कर्मचारी राज्य बीमा सह श्रम न्यायालय ने इसे कम करते हुए 25 प्रतिशत किया — आदेश को उच्च न्यायालय के समक्ष चुनौती दी गई — अभिनिर्धारित — अंशदान की राशि नियोक्ता द्वारा निर्धारित तारीख से 4 से 7 वर्ष विलम्ब से जमा की गई — सूचनापत्र तामील करने के बावजूद नियोक्ता की ओर से उसका जवाब नहीं दिया गया — कर्मचारी राज्य बीमा निगम का नुकसानी अधिरोपित करने का आदेश अधिनियम की धारा 85-बी सहपठित विनियम 31 व 31-सी के अनुरूप पारित किया गया था — नियोक्ता का मामला किसी

employer was also not covered any of the proviso or exception - E.S.I. cum Labour Court has committed grave error in setting-aside the order passed by E.S.I. Corporation for imposing the 100% damages - Appeal allowed. [Employees' State Insurance Corporation v. M/s. Reliable Carriers Private Ltd.] ...2973

Evidence Act (1 of 1872), Section 3 - Benefit to the accused - It is clear that on the basis of evidence two views of the story appears to be probable hence, one view that was contended by the accused and favourable to the accused be accepted. [Chhota @ Chhotelal v. State of M.P.] ...3019

Evidence Act (1 of 1872), Section 3 - Reliability of hostile witness - The evidence of a hostile witness cannot be treated as effaced or washed off from the record altogether, but the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof. [Ramsiya v. State of M.P.] ...3010

Evidence Act (1 of 1872), Section 9, Criminal Procedure Code, 1973, Sections 162 - Test identification parade - Test identification parade conducted by police officer is not admissible in evidence - Any statement made by identifying witness to the police officers during investigation would be hit by Section 162 of Code and will not be admissible in evidence - Identification parade of the accused was to be conducted by some magistrate. [State of M.P. v. Tidda @ Sonu] ...*90

Evidence Act (1 of 1872), Section 9, Penal Code, 1860, Sections 395 & 397 - Test identification parade - Dacoity - Identification parade after more than 2 month of incident - No evidence lead by prosecution that after arrest till holding of identification parade, investigating agency observed requisite precautions to hide identity of accused - Witnesses did not disclose personality, description and special feature of accused in F.I.R. - Held - Evidence of solitary witness can not be relied upon for fixing the identity of accused - Appellants acquitted - Appeal allowed. [Mahendrasingh v. State of M.P.] ...2989

Evidence Act (1 of 1872), Section 9, Penal Code, 1860, Sections 395 & 397 - Test identification of articles - Dacoity - Recovery of articles from appellants - Cash without any specific mark of identification seized from appellants - No evidence adduced that other seized articles purchased from looted cash - Held - Prosecution failed to prove its case beyond all reasonable doubts against appellants - Appellants acquitted - Appeal allowed. [Mahendrasingh v. State of M.P.] ...2989

Evidence Act, (1 of 1872), Section 32 - See - Penal Code, 1860, Section 302 [Raju @ Rajendra Singh v. State of M.P.] ...3015

Evidence Act (1 of 1872), Section 104 - Medical negligence - Burden of proof - Burden to prove that in what circumstances appellants lost their mother was on the respondents - As the deceased was 30 years only and

परन्तुक या अपवाद के अन्तर्गत भी नहीं था — कर्मचारी राज्य बीमा सह श्रम न्यायालय ने कर्मचारी राज्य बीमा निगम द्वारा 100 प्रतिशत नुकसानी अधिरोपित करने के लिए पारित आदेश को अपास्त करने में गम्भीर त्रुटि की — अपील मंजूर। (एम्पलाईस स्टेट इश्योरेंस कारपोरेशन वि. मे. रिलायबल केरियर्स प्रा.लि.) ...2973

साक्ष्य अधिनियम (1872 का 1), धारा 3 — अभियुक्त को लाभ — यह स्पष्ट है कि साक्ष्य के आधार पर कहानी के दो दृष्टिकोण संभाव्य प्रतीत होते हैं इसलिए एक दृष्टिकोण जो अभियुक्त द्वारा प्रतिवादित किया गया और अभियुक्त के लिए अनुकूल था स्वीकार किया गया। (छोटा उर्फ छोटे लाल वि. म.प्र. राज्य) ...3019

साक्ष्य अधिनियम (1872 का 1), धारा 3 — पक्षद्रोही साक्षी की विश्वसनीयता — पक्षद्रोही साक्षी का साक्ष्य अभिलेख से पूरी तरह भिन्न गया या विलुप्त हो गया ऐसा नहीं माना जा सकता, बल्कि वह उस सीमा तक स्वीकार किया जा सकता है जितना सावधानीपूर्वक जाँच करने पर ऐसे साक्षी का बयान विश्वसनीय पाया जाए। (रामसिया वि. म.प्र. राज्य) ...3010

साक्ष्य अधिनियम (1872 का 1), धारा 9, दण्ड प्रक्रिया संहिता, 1973, धारा 162 — शनाख्त परेड — पुलिस अधिकारी द्वारा करवाई गई शनाख्त परेड साक्ष्य में ग्राह्य नहीं है — शनाख्त करने वाले किसी साक्षी द्वारा अनुसंधान के दौरान पुलिस अधिकारियों को दिया गया कोई कथन संहिता की धारा 162 के विरुद्ध होगा और साक्ष्य में ग्राह्य नहीं होगा — अभियुक्त की शनाख्त परेड मजिस्ट्रेट द्वारा करवाई जानी थी। (म.प्र. राज्य वि. टिड्डा उर्फ सोनू) ---*90

साक्ष्य अधिनियम (1872 का 1), धारा 9, दण्ड संहिता, 1860, धाराएँ 395 व 397 — शनाख्त परेड — डकैती — शनाख्त परेड घटना के दो माह पश्चात् — अभियोजन द्वारा कोई साक्ष्य पेश नहीं की गई कि गिरतारी के पश्चात् शनाख्त परेड करने तक अनुसंधानकर्ता ने अभियुक्त की पहचान छुपाने के लिए आवश्यक सावधानियों का पालन किया — साक्षियों ने एफ.आई.आर. में अभियुक्त का व्यवितत्व, वर्णन और विशिष्ट लक्षण प्रकट नहीं किये — अभिनिर्धारित — अभियुक्त की पहचान तय करने के लिए एकमात्र साक्षी की साक्ष्य पर विश्वास नहीं किया जा सकता — अपीलार्थी दोषमुक्त — अपील मंजूर। (महेन्द्रसिंह वि. म.प्र. राज्य) ...2989

साक्ष्य अधिनियम (1872 का 1), धारा 9, दण्ड संहिता, 1860, धाराएँ 395 व 397 — वस्तुओं की शनाख्त — डकैती — अपीलार्थियों से वस्तुओं की बरामदगी — पहचान के किसी विनिर्दिष्ट चिन्ह के बिना नगदी अपीलार्थियों से अभिग्रहीत की गई — कोई साक्ष्य पेश नहीं कि अन्य अभिग्रहीत वस्तुएँ लूटी गई नगदी से क्रय की गई — अभिनिर्धारित — अभियोजन अपीलार्थियों के विरुद्ध मामला सभी युवितयुवत संदेह से परे साबित करने में असफल हुआ — अपीलार्थियों को दोषमुक्त किया गया — अपील मंजूर। (महेन्द्रसिंह वि. म.प्र. राज्य) ...2989

साक्ष्य अधिनियम (1872 का 1), धारा 32 — देखें — दण्ड संहिता, 1860, धारा 302 (राजू उर्फ राजेन्द्रसिंह वि. म.प्र. राज्य) ...3015

साक्ष्य अधिनियम (1872 का 1), धारा 104 — चिकित्सकीय उपेक्षा — सबूत का भार — यह साबित करने का भार कि किन परिस्थितियों में अपीलार्थियों ने अपनी माता को खोया, प्रत्यर्थियों पर था — चूंकि मृतक केवल 30 वर्ष की थी और मृत्यु के दो दिन पूर्व उसने एक रक्ख

before two days of her death she delivered a healthy baby - Even if deceased was also willing for T.T. operation then it could not have been permitted in absence of anaesthetist - Mody's Medical Jurisprudence lays down that in case of death from anaesthesia, the surgeon or anaesthetist should at once report the matter to police to hold a public enquiry - No report was lodged by the respondents and dead body was not sent for postmortem report - Medical negligence proved. [Bharti (Ku.) v. State of M.P.] ...2935

Evidence Act (1 of 1872), Section 105 - See - Penal Code, 1860, Section 84, [Hari Singh Gond v. State of M.P.] SC...2764

Evidence Act (1 of 1872), Section 157 - The evidence of such witnesses to whom the incident is narrated soon after the incident, is admissible as corroborative evidence u/s 157 of the Act. [Ramsiya v. State of M.P.]...3010

Foreign Liquor Rules, M.P. 1996, Rule 8 - Sale of foreign liquor - It was argued that provision after words "or in such other manner as the State Government may direct from time to time", is only applicable for draw of lottery and not for exempting from inviting applications - Held - If one reads the latter provision of Clause 8(1)(a) after the word 'or', it would be clear that the same provides the power to the State Government to deal the subject in any other manner as the State Government may direct from time to time - These words cannot be read in isolation but they have to read in generality as they control the earlier provisions which includes the grant of licence on individual basis on fixed basic fee and licence fee by inviting the applications: [Madan Mohan Chaturvedi v. State of M.P.] ...2776

Foreign Liquor Rules, M.P. 1996, Rule 8 - See - Constitution, Article 19. [Madan Mohan Chaturvedi v. State of M.P.] ...2776

Income Tax Act (43 of 1961), Sections 11, 12A, 12AA, 260A - Whether a Krishi Upaj Mandi is entitled for registration u/s 12A & 12AA and exemption u/s 11 - The object of establishment of Krishi Upaj Mandi is to protect the interest of farmers and ensure that they are not exploited - Fees charged has nexus with service rendered - Mandi does not have any commercial activity - Mandi charges 2% from farmers and out of that 1.2% is directly transferred to State - Held - Mandies entitled for registration and exemption - Order of Income Tax Appellate Tribunal upheld - Appeal dismissed. [Commissioner of Income Tax v. Krishi Upaj Mandi Samiti] ...3045

Industrial Disputes Act (14 of 1947), Section 25-F - Badlidar daily wager employee worked for more than one year continuously i.e. for more than 240 days in one year - Termination without enquiry or one month prior notice or wages in lieu of such notice - Held - Badli employee is entitled for protection u/s 25-F of Act - Order of Labour Court and Tribunal, finding termination illegal and directing reinstatement; upheld - Petition dismissed. [M.P. Road Transport Corporation v. Anil Yadav] ...2867

शिशु को जन्म दिया — यदि मृतक, टी.टी. शल्यक्रिया के लिए इच्छुक थी, तो भी निश्चेतना विशेषज्ञ की अनुपस्थिति में इसकी अनुमति नहीं दी जा सकती थी — मोदी का विधिशास्त्र अधिकथित करता है कि निश्चेतना से मृत्यु की दशा में शल्यचिकित्सक या निश्चेतना विशेषज्ञ को लोक जाँच करने के लिए तुरन्त मामले की रिपोर्ट पुलिस को करनी चाहिए — प्रत्यर्थियों द्वारा कोई रिपोर्ट दर्ज नहीं कराई गई और मृत शरीर को शव परीक्षण रिपोर्ट के लिए नहीं भेजा गया — चिकित्सकीय उपेक्षा साबित। (भारती (कुमारी) वि. म.प्र. राज्य) ...2935

साक्ष्य अधिनियम (1872 का 1), धारा 105 — देखें — दण्ड संहिता, 1860, धारा 84, (हरीसिंह गोंड वि. म.प्र. राज्य) SC--- 2764

साक्ष्य अधिनियम (1872 का 1), धारा 157 — ऐसे साक्षियों का साक्ष्य, जिन्हें घटना के तत्काल बाद घटना बतायी गई हो, अधिनियम की धारा 157 के अन्तर्गत सम्पुष्टिकारक साक्ष्य के रूप में ग्राह्य है। (रामसिया वि. म.प्र. राज्य) ...3010

विदेशी मदिरा नियम, म.प्र. 1996, नियम 8 — विदेशी मदिरा का विक्रय — यह तर्क किया गया कि शब्द "या ऐसे अन्य प्रकार से जैसा राज्य सरकार समय-समय पर निदेशित करे" के बाद के उपबंध केवल लॉटरी निकालने के लिए लागू होते हैं न कि आवेदन आमंत्रित करने से छूट देने के लिए — अभिनिर्धारित — यदि शब्द 'या' के बाद खण्ड 8(1)(ए) का उपबंध एक बार पढ़ा जाए तो यह स्पष्ट हो जाएगा कि यह राज्य सरकार को विषय को ऐसे अन्य प्रकार से जैसा राज्य सरकार समय-समय पर निदेशित करे व्यवहार करने की शक्ति प्रदान करता है — ये शब्द अलग नहीं पढ़े जा सकते बल्कि वे व्यापकता में पढ़े जाना चाहिए क्योंकि वे पूर्ववर्ती उपबंधों को नियंत्रित करते हैं जिसमें आवेदन आमंत्रित करने के द्वारा नियत प्राथमिक शुल्क और लायसेंस शुल्क पर व्यक्तिगत आधार पर लायसेंस प्रदान किया जाना शामिल है। (मदन मोहन चतुर्वेदी वि. म.प्र. राज्य) ...2776

विदेशी मदिरा नियम, म.प्र. 1996, नियम 8 — देखें — संविधान, अनुच्छेद 19 (मदन मोहन चतुर्वेदी वि. म.प्र. राज्य) ...2776

आयकर अधिनियम (1961 का 43), धाराएँ 11, 12क, 12कक, 260क — क्या कोई कृषि उपज मण्डी धारा 12क एवं 12कक के अन्तर्गत पंजीयन और धारा 11 के अन्तर्गत छूट की हकदार है — कृषि उपज मण्डी को स्थापित करने का उद्देश्य किसानों के हितों का संरक्षण करना और यह सुनिश्चित करना है कि उनका शोषण न हो — आरोपित शुल्क का सम्बन्ध दी गई सेवा के साथ है — मण्डी की कोई वाणिज्यिक गतिविधि नहीं है — मण्डी किसानों से 2 प्रतिशत वसूल करती है और उसमें से 1.2 प्रतिशत सीधे राज्य को अंतरित करती है — अभिनिर्धारित — मण्डियाँ पंजीयन और छूट की हकदार — आयकर अपीलीय अधिकरण के आदेश की पुष्टि की गई — अपील खारिज। (कमिशनर ऑफ इनकम टैक्स वि. कृषि उपज मंडी समिति) ...3045

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ — बदलीदार दैनिक वेतनभोगी कर्मचारी ने लगातार एक वर्ष से अधिक अर्थात् एक वर्ष में 240 दिन से अधिक कार्य किया — सेवा समाप्ति, जाँच या एक माह की पूर्व सूचना या ऐसी सूचना के बदले वेतन के बिना — अभिनिर्धारित — बदली कर्मचारी अधिनियम की धारा 25-एफ के संरक्षण का हकदार — श्रम न्यायालय और अधिकरण का सेवा समाप्ति को अवैध पाने और पुनर्नियुक्ति के निदेश देने वाला आदेश पुष्ट — याचिका खारिज। (म.प्र. रोड ट्रांसपोर्ट कारपोरेशन वि. अनिल यादव) 2657

Industrial Relations Act, M.P. (27 of 1960), Sections 27, 31, 33 & 97.

- All employees including office bearers of petitioner Union have filed affidavits and accepted the agreements and stated that the award in terms of agreements be passed - Though the petitioner Union has seriously contended that the agreements are no agreements in eye of law and could not be accepted as they were neither signed by their office bearers nor were they legally tenable in view of the provisions of Section 31 & 33 of Act - Held - It has neither opposed these agreements before Registrar at the time of registration u/s 33 of Act nor did it raise any dispute under various provisions of Act under Chapter XVI before any of the authorities under the Act - Therefore, issues as to whether the agreements were valid or not or obtained by fraud or a nullity, were neither subject matter of dispute before Industrial Court nor this court - Once agreements are registered u/s 33 of Act, they are binding on all concerned as per the provisions of Section 97 of Act - There is no legal infirmity or illegality in the award. [Katni Pottery Karamchari Sangh v. M/s. Associated Cement Companies Ltd.] ...2870

Industrial Relations Act, M.P. (27 of 1960), Sections 27, 31, 33 & 97

- Award challenged on the ground that it was passed in terms of the settlement arrived at between the parties without answering or adjudicating upon the disputes that were referred to Industrial Tribunal by State Government - Held - If a settlement is arrived at between the disputing parties even during the pendency of a reference before the Industrial Tribunal, the tribunal has power to pass an award in terms of the settlement and tribunal was not bound to answer the reference. [Katni Pottery Karamchari Sangh v. M/s. Associated Cement Companies Ltd.] ...2870

Jail Manual - Release - State Government's order dated 24.01.2004 whereby convicts of 65 years of age or above who underwent 4 years or excess punishment on 26.01.2004 were directed to be released unconditionally - Held - The benefit of Government's order cannot be snatched away from petitioner - Merely on account of absence of his proposal in the year 2004 - Petitioner was not a author of such a mistake and no fault could be found with him for denying him release pursuant to Government's order - It is not a case of granting retrospective benefits to the petitioner - It rather amounts to rectify the mistake which was committed by Jail Authority. [Chhidu alias Kanchhedi Lal v. State of M.P.] ...2860

Jail Manual, Rule 361(1) & 361(6), Penal Code, 1860, Section 302 - Release - Petitioner was undergoing sentence for offence punishable u/s 302 I.P.C. - As per Jail Superintendent's order u/r 361(1) of Manual, he was released on ground of sickness - State Government issued an order that convicts of 65 years of age or more who have undergone 4 years imprisonment or more should be released - At the relevant time, when the Government's

औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धाराएँ 27, 31, 33 व 97 — याची यूनियन के पदाधिकारियों सहित सभी कर्मचारियों ने शपथपत्र पेश किये और अनुबंधों को स्वीकार किया और कथन किया कि अनुबंधों के निबंधनों के अनुरूप अधिनिर्णय पारित किया जाए — यद्यपि याची यूनियन ने गम्भीर रूप से प्रतिवादित किया कि अनुबंध विधि की दृष्टि में अनुबंध नहीं हैं और स्वीकार नहीं किये जा सकते क्योंकि वे न तो उनके पदाधिकारियों द्वारा हस्ताक्षरित किये गये और न वे अधिनियम की धारा 31 व 33 के उपबंधों की दृष्टिगोचरता में विधिक रूप से मान्य किये जाने योग्य थे — अभिनिर्धारित — उसने न तो रजिस्ट्रार के समक्ष अधिनियम की धारा 33 के अन्तर्गत पंजीयन के समय इन अनुबंधों का विरोध किया और न ही उसने अधिनियम के अध्याय 16 के विभिन्न उपबंधों के अन्तर्गत किसी प्राधिकारी के समक्ष विवाद को उठाया — इसलिए विवादक, कि अनुबंध वैध थे या नहीं या कपटपूर्वक प्राप्त किये या शून्य थे, न तो औद्योगिक न्यायालय और न ही इस न्यायालय के समक्ष विवाद की विषयवस्तु थे — एक बार जब अनुबंध अधिनियम की धारा 33 के अन्तर्गत रजिस्ट्रीकृत हो जाते हैं, तो वे सभी सम्बद्ध पक्षकारों पर अधिनियम की धारा 97 के उपबंधों के अनुसार बंधनकारी हैं — अधिनिर्णय में कोई विधिक अशक्तता या अवैधता नहीं है। (कटनी पॉटरी कर्मचारी संघ वि. में. एसोसिएटेड सीमेंट कं. लि.) ...2870

औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धाराएँ 27, 31, 33 व 97 — अधिनिर्णय को इस आधार पर चुनौती दी गई कि यह पक्षकारों के मध्य हुए समझौते के निबंधनों के अनुसार राज्य सरकार द्वारा औद्योगिक अधिकरण को निर्दिष्ट विवादों का समाधान या न्यायनिर्णय किये बिना पारित किया गया — अभिनिर्धारित — यदि औद्योगिक अधिकरण के समक्ष निर्देश के लम्बित रहने के दौरान भी पक्षकारों के मध्य समझौता होता है तो अधिकरण को समझौते के निबंधनों के अनुसार अधिनिर्णय पारित करने की शक्ति है और अधिकरण निर्देश का उत्तर देने के लिए बाध्य नहीं था। (कटनी पॉटरी कर्मचारी संघ वि. में. एसोसिएटेड सीमेंट कं. लि.) ...2870

जेल मेन्युअल — छोड़ देना — राज्य सरकार का आदेश तारीख 24.01.2004 जिसके द्वारा 65 वर्ष या उससे अधिक उम्र के सिद्धदोषियों को, जो तारीख 26.01.2004 को 4 वर्ष या उससे अधिक सजा भुगत चुके हैं, बिना शर्त छोड़े जाने का निर्देश दिया गया — अभिनिर्धारित — वर्ष 2004 में याची के प्रस्ताव के अभाव के कारण — याची को सरकार के आदेश के लाभ से वंचित नहीं किया जा सकता — याची ऐसी गलती के लिए दोषी नहीं था और सरकार के आदेश के अनुसरण में उसे छोड़ने से इंकार करने में उसका कोई दोष नहीं पाया गया — यह याची को भूतलक्षी लाभ प्रदान करने का मामला नहीं है — बल्कि यह गलती को सुधारने के समान है जो जेल प्राधिकारी के द्वारा की गई। (छिद्दू उर्फ कंछेदी लाल वि. मं.प्र. राज्य) ...2860

जेल मेन्युअल, नियम 361(1) व 361(6), दण्ड संहिता, 1860, धारा 302 — छोड़ देना — याची भा.द.सं. की धारा 302 के अन्तर्गत दण्डनीय अपराध के लिए दण्डादेश भुगत रहा था — मेन्युअल के नियम 361(1) के अन्तर्गत जेल अधीक्षक के आदेशानुसार वह बीमारी के आधार पर छोड़ा गया — राज्य सरकार ने आदेश जारी किया कि 65 वर्ष या उससे अधिक उम्र के सिद्धदोषियों को, जो 4 वर्ष या उससे अधिक कारावास भुगत चुके हैं, छोड़ दिया जाना चाहिए — सुसंगत समय पर, जब सरकार का आदेश प्रवृत्त था, याची छूटा हुआ था और इस प्रकार उसका मामला विचार के

order was in force petitioner was on release and thus his case could not be proposed for consideration - Action challenged - Held - Object of Government's order was of beneficial nature for the convicted prisoners who were 65 years of age - As per rule 361(6), the period of release would be deemed to be the period in imprisonment - Petitioner having been released u/r 361(1) could not be deprived of the benefit of Government's order. [Chhiddu alias Kanchhedi Lal v. State of M.P.] ...2860

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Sections 2(1)(a), 2(1)(mmm) & 19 [As amended by Krishi Upaj Mandi (Sanshodhan) Vidheyak, M.P. 1990] -*Petitioners in the business of manufacture and sale of tobacco Choor, tobacco Rawa, tobacco dust, tobacco Kandy - Mandi Samiti levying Mandi fees on it - Action challenged by them - Held - The object of amendment in the Act of 1972 to drop out the word 'processed' was to exempt the processed goods from Mandi fees - The tobacco Choor, tobacco Rawa, tobacco dust and tobacco Kandy cannot be classified as 'processed goods', but they are 'agriculture produce' - Hence, aforesaid products cannot be exempted from payment of Mandi tax or fees - Mandi Samiti is entitled to levy Mandi fees on the aforesaid agriculture produce - Petition dismissed. [Tapa Traders, Gwalior (M/s) v. Krishi Upaj Mandi Samiti] ...2906*

Land Revenue Code, M.P. (20 of 1959), Section 51 - Review of Orders -*Suo motu review of order after 7 years - Cannot be held to be within a reasonable time. [Ashok Kumar Dubey v. Smt. Parvati Bai] ...2831*

Land Revenue Code, M.P. (20 of 1959), Sections 59(5), 258(2)(iii) - Regulation of assessment of land revenue on diversion of land - Town Planning -*Validity of Rule 14 of Notification dated 24.01.2002 fixing rates for the premium of different cities challenged as arbitrary and unreasonable as relevant factors mentioned in Code not taken into consideration - Held - Important cities classified differently from smaller cities and towns, according to their population - Villages also classified differently - Rates prescribed accordingly - Schedule based on reasonable differentia and therefore, rates prescribed therein are not arbitrary or discriminatory - Appeal dismissed. [Raj Homes Pvt. Ltd. v. State of M.P.] SC...2749*

Land Revenue Code, M.P. (20 of 1959), Section 170-B -*Petitioner purchased agricultural land from member of aboriginal tribe after obtaining due permission from Collector - S.D.O. directed reversion of land on the ground that petitioner did not inform about sale within stipulated period - Held - Object of provision is to examine that possession of non-tribal purchaser is lawful and to ensure that tribal transferor was not defrauded - Order of S.D.O. is bad as it was passed without considering permission granted by Collector - Petition allowed. [Ashok Kumar Dubey v. Smt. Parvati Bai]...2831*

लिए प्रस्तावित नहीं किया जा सका - कृत्य को चुनौती दी गई - अभिनिर्धारित - सरकार के आदेश का उद्देश्य सिद्धदायक बंदियों के लिए, जो 65 वर्ष की उम्र के थे, लाभप्रद प्रकृति का था - नियम 361(6) के अनुसार, छूटे रहने की कालावधि कारावास में होने की कालावधि समझी जायेगी - याची धारा 361(1) के अन्तर्गत छूटा हुआ होने से सरकार के आदेश के लाभ से वंचित नहीं किया जा सकता था। (छिददू उर्फ कंछेदी लाल वि. म.प्र. राज्य) ...2860

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धाराएँ 2(1)(ए), 2(1)(एमएमएम) व 19 [कृषि उपज मण्डी (संशोधन) विधेयक, म.प्र. 1990 द्वारा यथासंशोधित] - याची तम्बाकू चूर, तम्बाकू रवा, तम्बाकू डस्ट, तम्बाकू केण्डी का कारोबार करते हैं - मण्डी समिति ने उस पर मण्डी शुल्क उदग्रहण किया - उनके द्वारा कृत्य को चुनौती दी गई - अभिनिर्धारित - अधिनियम 1972 में शब्द 'प्रसंस्कृत' को हटाने के संशोधन का उद्देश्य प्रसंस्कृत माल को मण्डी शुल्क से छूट प्रदान करना था - तम्बाकू चूर, तम्बाकू रवा, तम्बाकू डस्ट और तम्बाकू केण्डी 'प्रसंस्कृत माल' के रूप में वर्गीकृत नहीं किये जा सकते, बल्कि वे 'कृषि उत्पाद' हैं - इसलिए, उपर्युक्त उत्पादों को मण्डी कर या शुल्क के भुगतान से छूट प्रदान नहीं की जा सकती - मण्डी समिति उपर्युक्त कृषि उत्पादों पर मण्डी शुल्क उग्रहीत करने की हकदार है - याचिका खारिज। (तापा ट्रेडर्स, ग्वालियर (मे.) वि. कृषि उपज मंडी समिति) ...2906

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 51 - आदेशों का पुनर्विलोकन - आदेश का 7 वर्ष बाद स्वप्रेरणा से पुनर्विलोकन - युक्तियुक्त समय के भीतर होना अभिनिर्धारित नहीं किया जा सकता। (अशोक कुमार दुबे वि. श्रीमति पार्वती बाई) ...2831

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 59(5), 258(2)(iii) - भूमि के व्यवर्तन पर भू राजस्व निर्धारण का विनियमन - नगर योजना - विभिन्न शहरों के लिए प्रीमियम की दरें नियत करने वाली अधिसूचना तारीख 24.01.2002 के नियम 14 की विधिमान्यता को मनमाना और अयुक्तियुक्त होने से चुनौती क्योंकि संहिता में उल्लिखित सुसंगत कारकों को विचार में नहीं लिया गया - अभिनिर्धारित - महत्वपूर्ण शहर उनकी जनसंख्या के अनुसार छोटे शहरों और नगरों से भिन्न रूप से वर्गीकृत किये गये हैं - गाँव भी भिन्न रूप से वर्गीकृत किये गये हैं - तदनुसार दरें विहित की गई हैं - अनुसूची युक्तियुक्त वर्गीकरण पर आधारित है और इसलिए उसमें विहित दरें मनमानी और विभेदकारी नहीं हैं - अपील खारिज। (राज होम्स प्रा. लि. वि. म.प्र. राज्य) SC---2749

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170-बी - याची ने कलेक्टर से सम्यक अनुमति लेने के बाद आदिम जनजाति के सदस्य से कृषि भूमि क्रय की - उपखण्ड अधिकारी ने भूमि के प्रत्यावर्तन का निदेश इस आधार पर दिया कि याची ने विक्रय के बारे में नियत समय के भीतर सूचित नहीं किया - अभिनिर्धारित - उपबंध का उद्देश्य गैर जनजाति क्रेता का कब्जा विधिपूर्ण होने की जाँच करना और यह सुनिश्चित करना है कि जनजाति अंतरणकर्ता को टगा न गया हो - याचिका मंजूर। (अशोक कुमार दुबे वि. श्रीमति पार्वती बाई) ...2831

Land Revenue Code, M.P. (20 of 1959), Section 170-B - Settled position of law - Presumption u/s 170-B(2) is only a rebuttable presumption which can duly be rebutted by producing the permission granted by Collector u/s 165(6) of Code. [Ashok Kumar Dubey v. Smt. Parvati Bai] ...2831

Land Revenue Code, M.P. (20 of 1959), Section 247 - Government's title to minerals - Judgment passed in Premchand's case (1965 J.L.J. 413) is not applicable to grant of mining leases after enactment of Mines and Minerals (Regulation and Development) Act, 1957. [Shyam Bihari Singh v. State of M.P.] ...2820

Law of Torts - Medical negligence - Civil liability - Mother of appellants died during T.T. operation - Suit filed on ground of negligence of doctor - Suit dismissed - Appeal filed - Held - Simple lack of care incurred civil liability - Operation was not necessary for saving life - Lady doctor was negligent in discharging her duties in allowing an incompetent person (a dresser) to administer anaesthesia - At the time of incident appellants were aged between 11 to 2 years respectively, lost their mother - No amount of compensation can fill up the gap - Compensation of Rs.1,50,000/- with 6% interest awarded - Judgment & decree of trial court set-aside - Appeal allowed. [Bharti (Ku.) v. State of M.P.] ...2935

Law of Torts - Negligence - Death of 8 years girl due to contact with live electric wire while cleaning her hut from out side - M.P.E.B. has taken a plea that hut constructed illegally near pole - Trial court found that accident occurred because of negligence on the part of M.P.E.B. and awarded Rs.85,000/- with interest from date of judgment - Appeal filed for enhancement - Held - No appeal filed by M.P.E.B., challenging the findings of trial court regarding negligence - Plea cannot be looked into -- It was duty of M.P.E.B. to get hut removed - Thus, negligence of M.P.E.B. proved - Compensation enhanced by rupees One lac with interest from date of filing of suit - Appeal allowed. [Mangibai v. M.P. Electricity Board] ...*86

Limitation Act (36 of 1963), Section 5 - Dismissal of State's application for condonation of delay in filing appeal - Appeal barred by 12 days - Officer-in-charge was transferred and got busy in some government work and real brother became seriously ill who subsequently died - Held - State is impersonal machinery - Sufficient ground shown for condonation of delay - Court should have taken pragmatic approach in considering the application and should have considered the law laid down by the Apex Court in objective manner - Appeal allowed and case remanded to hear appeal on merits. [State of M.P. v. Suresh] ...2932

Limitation Act (36 of 1963), Article 58 - Suit for declaration that proceedings held by State and Competent Authority under the Urban Land

मू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170-बी - सुस्थापित विधि - धारा 170-बी(2) के अन्तर्गत उपधारणा खण्डन योग्य है जो कलेक्टर द्वारा संहिता की धारा 165(6) के अन्तर्गत प्रदान की गई अनुमति को पेश करके सम्यक रूप से खण्डित की जा सकती है। (अशोक कुमार दुबे वि. श्रीमति पार्वती बाई) ...2831

मू राजस्व संहिता, म.प्र. (1959 का 20), धारा 247 - खनिजों पर राज्य का स्वत्व - खान और खनिज (विनियमन और विकास) अधिनियम, 1957 के अधिनियमन के पश्चात् खनन पट्टों के प्रदान किये जाने के लिए प्रेमचंद के मामले (1965 JIJ 413) में पारित निर्णय लागू नहीं होता। (श्याम बिहारी सिंह वि. म.प्र. राज्य) ...2820

अपकृत्य विधि - चिकित्सकीय उपेक्षा - सिविल दायित्व - अपीलार्थियों की माता की टी.टी. शल्यक्रिया के दौरान मृत्यु हुई - चिकित्सक की उपेक्षा के आधार पर वाद पेश किया - वाद खारिज - अपील पेश - अभिनिर्धारित - सावधानी की साधारण कमी से सिविल दायित्व उत्पन्न होता है - जीवन बचाने के लिए शल्यक्रिया आवश्यक नहीं थी - महिला चिकित्सक ने अक्षम व्यक्ति (ड्रेसर) को निश्चेतना देने के लिए अनुमत करने में उसके कर्तव्य निर्वहन में उपेक्षा की थी - घटना के समय अपीलार्थी क्रमशः 11 से 2 वर्ष के बीच थे जब उन्होंने उनकी माता को खोया - प्रतिकर की कोई राशि इस कमी को पूरा नहीं कर सकती - 1,50,000/- रुपये 6 प्रतिशत ब्याज सहित प्रतिकर अधिनिर्णीत किया गया - विचारण न्यायालय का निर्णय व डिक्री अपास्त - अपील मंजूर। (भारती (कुमारी) वि. म.प्र. राज्य) ...2935

अपकृत्य विधि - उपेक्षा - 8 वर्षीय बालिका की अपनी झोंपड़ी को बाहर से साफ करते समय जीवित विद्युत तार के सम्पर्क में आने से मृत्यु - म.प्र.वि.मं. ने यह आपत्ति ली कि झोंपड़ी खम्बे के निकट अवैध रूप से निर्मित की गई - विचारण न्यायालय ने पाया कि म.प्र.वि.मं. ने उपेक्षा की इससे दुर्घटना घटी और निर्णय तारीख से ब्याज सहित 85,000/- रुपये का अधिनिर्णय पारित किया - वृद्धि के लिए अपील पेश की - अभिनिर्धारित - म.प्र.वि.मं. ने विचारण न्यायालय द्वारा उपेक्षा के संबंध में दिये गये निष्कर्ष को चुनौती देते हुए कोई अपील पेश नहीं की - इस तर्क पर विचार नहीं किया जा सकता - यह म.प्र.वि.मं. का कर्तव्य था कि झोंपड़ी को हटवाता - इस प्रकार म.प्र.वि.मं. की उपेक्षा सिद्ध है - प्रतिकर में वाद पेश करने की तारीख से ब्याज सहित एक लाख रुपये की वृद्धि की गई - अपील मंजूर। (मांगीबाई वि. म.प्र. इलेक्ट्रीसिटी बोर्ड) --- *86

परिसीमा अधिनियम (1963 का 36), धारा 5 - अपील पेश करने में हुए विलम्ब को क्षमा करने के लिए राज्य का आवेदन खारिज - अपील 12 दिन समय वर्जित - प्रभारी अधिकारी का स्थानान्तरण हो गया और वह कुछ सरकारी कार्यों में व्यस्त हो गया और सगा भाई गम्भीर रूप से बीमार हो गया जिसकी बाद में मृत्यु हो गई - अभिनिर्धारित - राज्य एक अवैयक्तिक संगठन है - विलम्ब माफी के लिए पर्याप्त कारण दर्शाया गया - न्यायालय को व्यवहारिक सोच अपनाते हुए शीर्ष न्यायालय द्वारा प्रतिपादित विधि पर वस्तुनिष्ठ रूप से विचार करते हुए आवेदन का निराकरण करना था - अपील मंजूर और अपील गुणदोषों पर सुनवाई के लिए प्रतिप्रेषित। (म.प्र. राज्य वि. सुरेश) ...2932

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 58 - घोषणा के लिए दावा कि राज्य और सक्षम प्राधिकारी द्वारा नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, 1976 के अन्तर्गत

(Ceiling and Regulation) Act, 1976 was null & void and prayed permanent injunction for protecting the possession - Plaintiff was very well aware of the proceedings under the Ceiling Act - Still plaintiff did not file the suit to challenge the order within the period of limitation - Possession was taken in the year 1982 - Suit has been filed on 23.06.2000 - It was hopelessly barred by limitation - Concurrent finding of both courts upheld by High Court. [Kamla Bai (Smt.) v. State of M.P.] ...2925

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2005, Rule 21(4) - See - Chikitsa Shiksha Niyam, M.P., 1973, Section 10 [Medical Council of India v. Dr. Teena Khatri] ...2799

Medical and Dental Post Graduate Course Entrance Examination Rules, 2007, Rule 20(2) - Counseling - Petitioner alleged that provisions of Rule 20(2) were not complied with as news regarding counseling was not properly circulated - Held - Respondent had circulated information with regard to the second counseling in all leading newspapers having the effective public circulation - Steps were taken for publication of intimation relating to second counseling in the popular Hindi and English newspapers at Division and District level - Information was also flashed on Akashwani in the Radio and Doorshan in the television - Rule complied with - Petition dismissed. [Ruchir Kumar Jain v. State of M.P.] ...2847

- Mines and Minerals (Regulation and Development) Act (67 of 1957), Section 24A - Rights and liabilities of a holder of prospecting licence or mining lease - Whether consent of owner of private land before grant of mining lease to third person is or is not required - Held - Consent of owner of private land in respect of which mining lease is sought to be given by Government is not mandatory - Reference answered accordingly. [Shyam Bihari Singh v. State of M.P.] ...2820

Motor Vehicles Act (59 of 1988), Section 170, Civil Procedure Code, 1908, Order 41 Rule 33 - Claims tribunal awarded compensation of Rs.13,32,000/- against the Owner & Driver - Claimants filed appeal for enhancement of compensation and saddling liability of Insurance Company also - Insurance Company contended that the compensation is excessive - High Court reduced compensation upto Rs.6,96,000/- - Held - No appeal filed by Driver or Owner - Insurance Company would have no right to question quantum of compensation in absence of any leave in terms of Section 170 of Act - Legally impermissible for Insurance Company to question a finding of fact taking umbrage under Order 41 Rule 33 of Code - Order 41 Rule 33 of Code was not applicable - Reduction of compensation erroneous - Appeal allowed. [Samundra Devi v. Narendra Kaur] SC...2743

- Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3(1), Muslim Woman (Protection of Rights on Divorce) Rules,

की गई कार्यवाहियाँ अवैध व शून्य थीं और कब्जे की सुरक्षा के लिए स्थायी व्यादेश की प्रार्थना की गई - वादी अधिकतम सीमा अधिनियम के अन्तर्गत कार्यवाहियों से अच्छी तरह अवगत थी - फिर भी वादी ने आदेश को चुनौती देने के लिए वाद परिसीमा में पेश नहीं किया - कब्जा वर्ष 1982 में लिया गया था - दावा तारीख 23.06.2000 को पेश किया - यह परिसीमा से पूरी तरह वर्जित था - उच्च न्यायालय द्वारा दोनों न्यायालयों के समवर्ती निष्कर्ष की पुष्टि की गई। (कमला बाई (श्रीमति) वि. म.प्र. राज्य) ...2925

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2005, नियम 21(4) - देखें - चिकित्सा शिक्षा नियंत्रण अधिनियम, म.प्र., 1973, धारा 10 (मेडीकल काउंसिल ऑफ इंडिया वि. डॉ. टीना खत्री) ...2799

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 20(2) - काउंसिलिंग - याची ने कथित किया कि नियम 20(2) का पालन नहीं किया गया क्योंकि काउंसिलिंग के संबंध में समाचार उचित रूप से परिचालित नहीं किया गया - अभिनिर्धारित - प्रत्यर्थी ने द्वितीय काउंसिलिंग के संबंध में जानकारी पर्याप्त लोक प्रचालन रखने वाले सभी मुख्य समाचार-पत्रों में परिचालित की थी - द्वितीय काउंसिलिंग से संबंधित सूचना के सम्भाग एवं जिला स्तर पर लोकप्रिय हिन्दी और अंग्रेजी समाचार-पत्रों में प्रकाशन के लिए आवश्यक कार्यवाही की गई - जानकारी रेडियो में आकाशवाणी पर और टेलीविजन में दूरदर्शन पर भी दी गई - नियम का पालन किया गया - याचिका खारिज। (रुचिर कुमार जैन वि. म.प्र. राज्य) ...2847

खान और खनिज (विनियमन और विकास) अधिनियम (1957 का 67), धारा 24ए - पूर्वक्षण अनुज्ञप्ति या खनन पट्टा धारक के अधिकार और दायित्व - क्या तृतीय व्यक्ति को खनन पट्टे के अनुदान के पूर्व निजी भूमि के स्वामी की सहमति अपेक्षित है या नहीं - अभिनिर्धारित - निजी भूमि, जिसके संबंध में सरकार द्वारा खनन पट्टा दिया जाना चाहा गया है, के स्वामी की सहमति आज्ञापक नहीं है - रिफरेंस तदनुसार उत्तरित। (श्याम बिहारी सिंह वि. म.प्र. राज्य) ...2820

मोटर यान अधिनियम (1988 का 59), धारा 170, सिविल प्रक्रिया संहिता, 1908, आदेश 41 नियम 33 - दावा अधिकरण ने 13,32,000/- रुपये का अधिनिर्णय स्वामी और चालक के विरुद्ध पारित किया - दावेदारों ने प्रतिकर में वृद्धि और बीमा कम्पनी पर भी दायित्व आरोपित करने के लिए अपील पेश की - बीमा कम्पनी ने यह प्रतिवाद किया कि प्रतिकर की राशि अत्यधिक है - उच्च न्यायालय ने प्रतिकर घटाकर 6,96,000/- रुपये किया - अभिनिर्धारित - चालक या स्वामी द्वारा कोई अपील पेश नहीं की गई - बीमा कम्पनी को अधिनियम की धारा 170 के निबंधनों के अनुसार किसी अनुमति के अभाव में प्रतिकर की मात्रा को प्रश्नगत करने का कोई अधिकार नहीं - बीमा कम्पनी के लिए संहिता के आदेश 41 नियम 33 का सहारा (umbrage) लेते हुए तथ्य के निष्कर्ष को प्रश्नगत करना, वैध रूप से अननुज्ञेय है - संहिता का आदेश 41 नियम 33 लागू होने योग्य नहीं - प्रतिकर घटाना त्रुटिपूर्ण - अपील मंजूर। (समुन्द्रा देवी वि. नरेन्द्र कौर) SC--- 2743

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3(1), मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) नियम, 1986, नियम 4

1986, Rule 4 - An application u/s 3(1) of the Act was filed by non-applicant for recovery of Mehar & maintenance - Before magistrate applicant and non-applicant have filed their evidence on affidavit - Order of maintenance passed by magistrate - Revisional court affirmed the order - Order challenged before High Court on the ground that evidence not be taken in the presence of applicant as per Rule 4 of Rules 1986 - Non-applicant has taken a plea that none of the parties have raised such objection before magistrate - Now applicant cannot take this objection in view of principle of estoppel - Held - There can be no estoppel against statute and no rule of estoppel between the parties - Cannot compel court to take any action contrary to express words of statute - Admittedly, evidence not recorded in the presence of applicant against whom order of maintenance was made - Order passed by magistrate and revisional court illegal - Therefore, set-aside with the direction to record fresh evidence in presence of applicant and pass order in accordance with law. [Mohiuddin v. Smt. Azra Bano] ...*88

Muslim Woman (Protection of Rights on Divorce) Rules, 1986, Rule 4, Criminal Procedure Code, 1973, Section 126(2) - The language of Section 126(2) of Code and Rule 4 of Rules 1986 is similar. [Mohiuddin v. Smt. Azra Bano] ...*88

Muslim Woman (Protection of Rights on Divorce) Rules, 1986, Rule 4 - See - Muslim Women (Protection of Rights on Divorce) Act, 1986, Section 3(1) [Mohiuddin v. Smt. Azra Bano] ...*88

Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Sections 8, 20 - Cannabis plants seized from field - Land record and map of field produced - Appellant denied ownership and possession of field - Held - Prosecution is required to prove that the appellant was in exclusive possession of the field where cannabis plants were seized and he was having conscious possession of contraband article - Neither name of Patwari who issued the record disclosed nor signature & handwriting proved - Land record and map not proved in accordance with provision of S. 67 of Evidence Act - Independent witness also did not support prosecution case - Prosecution failed to prove case beyond reasonable doubt - Conviction and sentence set-aside - Appeal allowed. [Bheru v. State of M.P.] ...3008

Narcotics Drugs and Psychotropic Substances Act, (61 of 1985), Section 8 r/w 20(b)(iii)(b) - See - Criminal Procedure Code, 1973, Section 374(2) [Kuldeep Sahu v. State of M.P.] ...2985

Negotiable Instruments Act (26 of 1881), Section 138 - Complaint can be signed and filed by Counsel on the basis of memo of appearance. [Kewal Kumar Jaggi v. Vinod Kumar Sahu] ...3055

Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - State Government and Collector have sanctioned and approved the posts to be

— अनावेदक द्वारा अधिनियम की धारा 3(1) के अन्तर्गत मेहर और भरण-पोषण की वसूली हेतु आवेदन पेश किया — मजिस्ट्रेट के समक्ष आवेदक और अनावेदक ने शपथपत्र पर अपनी साक्ष्य पेश की — मजिस्ट्रेट द्वारा भरण-पोषण का आदेश पारित किया गया — पुनरीक्षण न्यायालय ने आदेश की पुष्टि की — आदेश को उच्च न्यायालय के समक्ष इस आधार पर चुनौती दी गई कि नियम 1986 के नियम 4 के अनुसार साक्ष्य आवेदक की उपस्थिति में नहीं लिया गया — अनावेदक ने तर्क लिया कि किसी भी पक्षकार ने ऐसी आपत्ति मजिस्ट्रेट के समक्ष नहीं उठाई — अब आवेदक बिबन्ध के सिद्धांत के आलोक में यह आपत्ति नहीं ले सकता — अभिनिर्धारित — अधिनियमिति के विरुद्ध कोई बिबन्ध नहीं हो सकता और पक्षकारों के मध्य बिबन्ध का कोई नियम नहीं — न्यायालय को अधिनियमिति के अभिव्यक्त शब्दों के प्रतिकूल कार्यवाही करने को विवश नहीं किया जा सकता — स्वीकृत रूप से साक्ष्य आवेदक की उपस्थिति में नहीं लिया गया जिसके विरुद्ध भरण-पोषण का आदेश किया गया था — मजिस्ट्रेट और पुनरीक्षण न्यायालय द्वारा पारित आदेश अवैध — इसलिए आवेदक की उपस्थिति में पुनः साक्ष्य अभिलिखित करने और विधि अनुसार आदेश पारित करने के निदेश के साथ अपास्त किया गया। (मोहिउद्दीन वि. श्रीमति अजराबानो) ---*88

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) नियम, 1986, नियम 4, दण्ड प्रक्रिया संहिता, 1973, धारा 126(2) — संहिता की धारा 126(2) और नियम 1986 के नियम 4 की भाषा समान है। (मोहिउद्दीन वि. श्रीमति अजराबानो) ---*88

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) नियम, 1986, नियम 4 — देखें — मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986, धारा 3(1) (मोहिउद्दीन वि. श्रीमति अजराबानो) ---*88

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8, 20 — गांजे के पौधे खेत से अभिग्रहीत — खेत का भू अभिलेख और नक्शा पेश — अपीलार्थी ने खेत के स्वामित्व और कब्जे से इंकार किया — अभिनिर्धारित — अभियोजन को यह साबित करना अपेक्षित है कि अपीलार्थी खेत के एकमात्र कब्जे में था जहाँ से गांजे के पौधे अभिग्रहीत किये गए और वह निषिद्ध वस्तु का सचेतन कब्जा रखता था — न तो अभिलेख जारी करने वाले पटवारी का नाम प्रकट किया गया और न ही हस्ताक्षर और हस्तलेख साबित किये — भू अभिलेख और नक्शा साक्ष्य अधिनियम की धारा 67 के उपबंध के अनुसार साबित नहीं किये — स्वतंत्र साक्षी ने भी अभियोजन के मामले का समर्थन नहीं किया — अभियोजन मामला युक्तियुक्त संदेह से परे साबित करने में असफल — दोषसिद्धि और दण्डादेश अपास्त — अपील मंजूर। (मेरू वि. म.प्र. राज्य) ...3008

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, (1985 का 26), धारा 8 सहपठित 20(बी)(iii)(बी) — देखें — दण्ड प्रक्रिया संहिता, 1973, धारा 374(2) (कुलदीप साहू वि. म.प्र. राज्य) ...2985

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 — परिवाद मेमो ऑफ एपीअरेंस के आधार पर अधिवक्ता द्वारा हस्ताक्षरित और पेश किया जा सकता है। (केवल कुमार जग्गी वि. विनोद कुमार साहू) ...3055

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 — राज्य सरकार और कलेक्टर ने भरे जाने वाले पद स्वीकृत और अनुमोदित किये — शिक्षा कर्मियों के नियुक्ति आदेश

filled up - Order of appointment of Shiksha Karmis bears the signature of an Additional Assistant Development Commissioner - Held - It cannot be construed that this order is passed by some authority of State Government or its officers and not by the Janpad Panchayat - Collector competent to deal with the appeal u/R 3 - Revision maintainable u/R 5 before Commissioner. [Shyama Dwivedi (Smt.) v. State of M.P.] ...2885

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(2) - "Questioned" and "decided" are to be read as one - The word 'and' certainly can be read as 'or' if the intention of the legislature is not clear or the law requires the word "and" to be used as "or". [Bhuvaneshwar Prasad @ Guddu Dixit v. State of M.P.] ...2788

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(2) - Sub-section (2) would simply mean that the jurisdiction of Collector is not required to be invoked in a case where the question was raised and finally decided by Election Tribunal - Collector could not proceed to make an enquiry and re-decide the issue u/s 36(3) of the Act contrary to the findings recorded by the tribunal. [Bhuvaneshwar Prasad @ Guddu Dixit v. State of M.P.] ...2788

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(2) & (3) - Appellant elected as Sarpanch - Election was challenged by filing election petition beyond the period of limitation - S.D.O. issued notices but thereafter referred the matter to Collector with a submission that matter can be decided by Collector u/s 36 - Held - When an election petition not duly constituted is filed before S.D.O. and S.D.O. finds that question can be decided by a higher officer in exercise of power u/s 36, then a reference can certainly be made by him - Section 36(3) provides that Collector may give his decision either on an application made to him by any person or on his own motion - Proceedings before Collector were maintainable - Appeal dismissed. [Bhuvaneshwar Prasad @ Guddu Dixit v. State of M.P.] ...2788

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(3) - Sub-section (3) clearly show that legislature wanted the Collector to exercise powers to see that no disqualified person contests the election after concealing disqualification or no person who has become disqualified after the elections are over is continued as an office bearer in Panchayat - Collector also has to see that whether the disqualification is removable and, if yes, but not removed, then in such a case the Collector may declare that the office has become vacant. [Bhuvaneshwar Prasad @ Guddu Dixit v. State of M.P.] ...2788

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 70, 86(2) - Gram Panchayat failed to appoint a Panchayat Karmi

पर अतिरिक्त सहायक विकास कमिश्नर के हस्ताक्षर — अभिनिर्धारित — यह अर्थ नहीं लगाया जा सकता कि यह आदेश राज्य सरकार के किसी प्राधिकारी या उसके अधिकारियों द्वारा पारित किया गया न कि जनपद पंचायत द्वारा — कलेक्टर नियम 3 के अन्तर्गत अपील पर कार्यवाही करने के लिए सक्षम — नियम 5 के अन्तर्गत कमिश्नर के समक्ष पुनरीक्षण पोषणीय। (श्यामा द्विवेदी (श्रीमति) वि. म.प्र. राज्य) ...2885

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(2) — “प्रश्नगत” और “विनिश्चित” को एक साथ पढ़ा जाना चाहिए — शब्द “और” निश्चित रूप से “या” पढ़ा जा सकता है यदि विधायिका का आशय स्पष्ट नहीं है या विधि की अपेक्षा है कि शब्द “और” को “या” के रूप में प्रयुक्त किया जाए। (भुवनेश्वर प्रसाद उर्फ गुड्डा दीक्षित वि. म.प्र. राज्य)...2788

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(2) — उपधारा (2) का सामान्यतः अर्थ होता है कि कलेक्टर की अधिकारिता का प्रयोग वहाँ अपेक्षित नहीं है जहाँ प्रश्न उत्पन्न हुआ और उसका अंतिम विनिश्चय चुनाव अधिकरण द्वारा कर दिया गया — अधिनियम की धारा 36(3) के अन्तर्गत कलेक्टर अधिकरण के निष्कर्षों के विरुद्ध जाँच और विवादक का पुनः विनिश्चय नहीं कर सकता। (भुवनेश्वर प्रसाद उर्फ गुड्डा दीक्षित वि. म.प्र. राज्य)...2788

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(2) व (3) — अपीलार्थी सरपंच के रूप में चुना गया — चुनाव को परिसीमा की कालावधि के उपरांत चुनाव याचिका पेश करके चुनौती दी गई — एस.डी.ओ. ने सूचनापत्र जारी किये किन्तु उसके बाद मामला इस निवेदन के साथ कलेक्टर को निर्देशित किया कि धारा 36 के अन्तर्गत मामला कलेक्टर द्वारा विनिश्चित किया जा सकता है — अभिनिर्धारित — जब कोई चुनाव याचिका सम्यक् रूप से संस्थापित किये बिना एस.डी.ओ. के समक्ष पेश की जाती है और एस.डी.ओ. यह पाता है कि प्रश्न का विनिश्चय धारा 36 के अन्तर्गत शक्तियों के प्रयोग में उच्चतर अधिकारी द्वारा किया जा सकता है तब उसके द्वारा निश्चित रूप से निर्देश (reference) किया जा सकता है — धारा 36(3) उपबंधित करती है कि कलेक्टर या तो किसी व्यक्ति द्वारा उसे किये गये आवेदन पर या स्वप्रेरणा से अपना विनिश्चय दे सकता है — कलेक्टर के समक्ष कार्यवाहियाँ पोषणीय थीं — अपील खारिज। (भुवनेश्वर प्रसाद उर्फ गुड्डा दीक्षित वि. म.प्र. राज्य) ...2788

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(3) — उपधारा (3) स्पष्ट रूप से दर्शाती है कि विधायिका कलेक्टर से यह चाहती है कि वह शक्तियों का प्रयोग यह देखने में करे कि कोई अयोग्य व्यक्ति अयोग्यता को छिपाकर चुनाव नहीं लड़े या जो व्यक्ति चुनावों के पश्चात् अयोग्य हो गया है पंचायत में पदधारी के रूप में बना नहीं रहे — कलेक्टर को यह भी देखना चाहिए कि क्या अयोग्यता हटाये जाने योग्य है और, यदि हाँ, किन्तु हटायी नहीं गई है, तब ऐसे मामले में कलेक्टर यह घोषित कर सकता है कि पद रिक्त हो गया है। (भुवनेश्वर प्रसाद उर्फ गुड्डा दीक्षित वि. म.प्र. राज्य) ...2788

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 70, 86(2) — ग्राम पंचायत विनिर्दिष्ट कालावधि में पंचायत कर्मों की नियुक्ति करने में असफल रही —

within the specified period - Therefore, Collector being a prescribed authority, in exercise of powers u/s 86(2) of the Adhiniyam authorized the C.E.O. to appoint Panchayat Karmi - C.E.O. appointed Panchayat Karmi - Appointment challenged on the ground that under the Adhiniyam only Gram Panchayat can appoint Panchayat Karmi - Held - U/s 86(2) of the Adhiniyam, expression "all necessary powers" will include the power to authorize any authority to perform the duty of Panchayat such as appointment of a Panchayat Karmi u/s 70(1) of Adhiniyam - Therefore, Collector as prescribed authority had a power u/s 86(2) of the Adiniyam to authorize the C.E.O., Janpad Panchayat to appoint a Panchayat Karmi - The order of appointment is to be treated as of order passed by the prescribed authority - Petition dismissed. [Leelawati (Smt.) v. State of M.P.] ...2817

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 - Election Petition after expiry of 30 days in accordance with Section 122(2) of the Act was nothing but an exercise in futility - Even if the S.D.O. issued notices to the parties, the same would not confer any jurisdiction upon him because he had no jurisdiction to condone the delay and proceed further with the matter. [Bhuvaneshwar Prasad @ Guddu Dixit v. State of M.P.] ...2788

Panchayat Shiksha Karmis (Recruitment and Condition of Service) Rules, M.P. 1997 - Petitioners appointed as Shiksha Karmis - Appointments cancelled as petitioners were close relatives of the members of selection committee - Action challenged on the ground of non-observance of principles of natural justice - Held - It is established principle that when action or orders are challenged on the ground of non-grant of hearing, mechanical interference is not to be resorted to until & unless prejudice caused due to non-grant of hearing and the effect of the final outcome is established before the court, except that an exception carved out in such cases where a statutory provision for grant of hearing is contemplated - Petitioners were given full & reasonable opportunity of hearing by the Commissioner and thereafter, during the course of hearing in this petition also - Petitioners were not in a position to demonstrate as to what was the prejudice caused for non-grant of hearing by the Collector - No case made out for interference - Petition dismissed. [Shyama Dwivedi (Smt.) v. State of M.P.] ...2885

Panchayat Shiksha Karmis (Recruitment and Condition of Service) Rules, M.P. 1997 - See - Constitution, Article 226 [Shyama Dwivedi (Smt.) v. State of M.P.] ...2885

Passports Act (15 of 1967), Section 5 - Change of Date of Birth - Petitioner has recourse of getting date of birth corrected in birth certificate and after having the same corrected, she may submit application with corrected entry of her birth certificate - Petitioner may also institute a civil suit for declaration about date of birth and mandatory injunction directing PIA to effect change in the passport with regard to date of birth. [Neetu Jain (Smt.) v. Union of India] ...2841

इसलिए, कलेक्टर ने विहित प्राधिकारी होने से अधिनियम की धारा 86(2) की शक्तियों को प्रयोग में लाते हुए सी.ई.ओ. को पंचायत कर्मों को नियुक्त करने के लिए प्राधिकृत किया - सी.ई.ओ. ने पंचायत कर्मों को नियुक्त किया - नियुक्ति को इस आधार पर चुनौती दी गई कि अधिनियम के अन्तर्गत पंचायत कर्मों की नियुक्ति केवल ग्राम पंचायत कर सकती है - अभिनिर्धारित - अधिनियम की धारा 86(2) के अन्तर्गत अभिव्यक्ति "सभी आवश्यक शक्तियों" में किसी प्राधिकारी को पंचायत के कर्तव्य, जैसे अधिनियम की धारा 70(1) के अन्तर्गत किसी पंचायत कर्मों की नियुक्ति करने के लिए प्राधिकृत करने की शक्ति भी शामिल है - इसलिए कलेक्टर को विहित प्राधिकारी के रूप में अधिनियम की धारा 86(2) के अन्तर्गत पंचायत कर्मों की नियुक्ति के लिए सी.ई.ओ., जनपद पंचायत को प्राधिकृत करने की शक्ति थी - नियुक्ति का आदेश विहित प्राधिकारी द्वारा पारित आदेश के समान माना जाना चाहिए - याचिका खारिज। (लीलावती (श्रीमति) वि. म.प्र. राज्य) ...2817

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 - चुनाव याचिका अधिनियम की धारा 122(2) के अनुसार तीस दिन की समाप्ति के पश्चात् निरर्थक प्रयोग के अलावा कुछ नहीं - यद्यपि एस.डी.ओ. ने पक्षकारों को सूचनापत्र जारी किये, यह उसको कोई अधिकारिता प्रदान नहीं करेगा क्योंकि उसे विलम्ब क्षमा करने और मामले में आगे कार्यवाही करने की कोई अधिकारिता नहीं थी। (भुवनेश्वर प्रसाद उर्फ गुड्डा दीक्षित वि. म.प्र. राज्य)...2788

पंचायत शिक्षा कर्मों (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1997 - याचियों को शिक्षा कर्मों के रूप में नियुक्त किया गया - नियुक्तियाँ रद्द की गईं क्योंकि याची चयन समिति के सदस्यों के नजदीकी रिश्तेदार थे - कृत्य को नैसर्गिक न्याय के सिद्धांतों के अननुपालन के आधार पर चुनौती दी गई - अभिनिर्धारित - यह स्थापित नियम है कि जब कृत्य या आदेशों को सुनवाई प्रदान न किये जाने के आधार पर चुनौती दी जाती है, तकनीकी हस्तक्षेप नहीं किया जाना चाहिए जब तक कि न्यायालय के समक्ष सुनवाई प्रदान न किये जाने से पूर्वाग्रह कारित होना और अंतिम परिणाम प्रभावित होना, स्थापित जाए, ऐसे आपवादिक मामलों के सिवाय जहाँ कि वैधानिक उपबंधों के अन्तर्गत सुनवाई का अवसर देना अपेक्षित हो - याचियों को कमिशनर द्वारा और उसके बाद इस याचिका में सुनवाई के समय भी सुनवाई का पूर्ण और युक्तियुक्त अवसर दिया गया - याची यह प्रमाणित करने की स्थिति में नहीं थे कि कलेक्टर द्वारा सुनवाई प्रदान न किये जाने से क्या पूर्वाग्रह कारित हुआ - हस्तक्षेप का कोई मामला नहीं बनता - याचिका खारिज। (श्यामा द्विवेदी (श्रीमति) वि. म.प्र. राज्य) ...2885

पंचायत शिक्षा कर्मों (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1997 - देखें - संविधान, अनुच्छेद 226 (श्यामा द्विवेदी (श्रीमति) वि. म.प्र. राज्य) ...2885

पासपोर्ट अधिनियम (1967 का 15), धारा 5 - जन्मतिथि का परिवर्तन - याची को जन्म प्रमाण पत्र में सुधार करा पाने का आश्रय है और उसमें संशोधन कराने के बाद वह अपने जन्म प्रमाण पत्र की संशोधित प्रविष्टि के साथ आवेदन पेश कर सकती है - याची जन्मतिथि के बारे में घोषणा और जन्मतिथि के संबंध में पासपोर्ट में परिवर्तन प्रमाणी करने के लिए पासपोर्ट जारीकर्ता प्राधिकारी को निदेशित करने के लिए आज्ञात्मक व्यादेश के लिए वाद भी संस्थित कर सकती है। (नीतू जैन (श्रीमति) वि. यूनिन ऑफ इंडिया) ...2841

Passports Act (15 of 1967), Section 5 - Date of Birth in Passport - *Petitioner made application for issuance of passport mentioning her date of birth as 15.06.1983 which was duly supported by birth certificate - Petitioner sought correction of date of birth in passport as 15.06.1982 on the basis of school certificates - Held - Rectification/correction in matter of date of birth may be made, obviously if petitioner is found entitled to seek correction/rectification after following procedure prescribed by circulars - Since, PIA has relied upon birth certificate submitted by petitioner herself, no fault can be found with it. [Neetu Jain (Smt.) v. Union of India] ...2841*

Penal Code (45 of 1860), Section 84, Evidence Act, 1872, Section 105 - Act of a person of unsound mind - Burden of proof & degree of proof - *Burden of proof rests on accused to prove his insanity - Burden is not so onerous as that upon the prosecution - The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. [Hari Singh Gond v. State of M.P.] SC...2764*

Penal Code (45 of 1860), Section 84 - Kinds of unsound mind persons - *(1) An idiot, (2) One made non-compos by illness, (3) A lunatic or a made man and (4) One who is drunk. [Hari Singh Gond v. State of M.P.] SC...2764*

Penal Code (45 of 1860), Section 84 - Mere absence of motive of a crime, how so ever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section - Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under this section. [Hari Singh Gond v. State of M.P.] SC...2764

Penal Code (45 of 1860), Section 84 - What factors are to be considered - *The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place - In coming to that conclusion, the relevant circumstances are to be taken into consideration - It would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. [Hari Singh Gond v. State of M.P.] SC...2764*

Penal Code (45 of 1860), Section 84 - When provisions are attracted - *The benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act, he was doing or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. [Hari Singh Gond v. State of M.P.] SC...2764*

Penal Code (45 of 1860), Section 84 - When the provisions are not attracted - Explained. [Hari Singh Gond v. State of M.P.] SC...2764

Penal Code (45 of 1860), Sections 166, 294, 451 - See - Criminal Procedure Code, 1973, Section 197 [Shameem Khatoon (Smt.) v. R.P. Ramanwall] ...*89

पासपोर्ट अधिनियम (1967 का 15), धारा 5 — पासपोर्ट में जन्मतिथि — याची ने अपनी जन्मतिथि 15.06.1983 उल्लिखित करते हुए पासपोर्ट जारी करने के लिए आवेदन पेश किया जो जन्म प्रमाण पत्र द्वारा सम्यक् रूप से समर्थित था — याची ने विद्यालय प्रमाण पत्रों के आधार पर पासपोर्ट में जन्मतिथि 15.06.1982 करने का संशोधन चाहा — अभिनिर्धारित — जन्मतिथि के मामले में सुधार/संशोधन किया जा सकता है, यदि याची परिपत्रों द्वारा विहित प्रक्रिया का पालन करने के बाद स्पष्ट रूप से संशोधन/सुधार कराने की हकदार पायी जाती है — चूंकि पासपोर्ट जारीकर्ता प्राधिकारी ने स्वयं याची द्वारा प्रस्तुत जन्म प्रमाण पत्र पर विश्वास किया, उसका कोई दोष नहीं पाया जा सकता। (नीतू जैन (श्रीमति) वि. यूनियन ऑफ इंडिया) ...2841

दण्ड संहिता (1860 का 45), धारा 84, साक्ष्य अधिनियम 1872, धारा 105 — विकृत चित्त व्यक्ति का कृत्य — सबूत का भार और सबूत की मात्रा — सबूत का भार अभियुक्त पर है कि उसकी विकृत चित्तता साबित करे — भार उतना अधिक नहीं जितना कि अभियोजन पर होता है — अभियुक्त पर सबूत का भार उससे अधिक नहीं होता जितना कि सिविल कार्यवाही में वादी या प्रतिवादी पर होता है। (हरीसिंह गौंड वि. म.प्र. राज्य) SC---2764

दण्ड संहिता (1860 का 45), धारा 84 — विकृतचित्त व्यक्तियों के प्रकार — (1) जड़, (2) जो व्याधि के कारण विकृत चित्त हो गया हो, (3) पागल या विक्षिप्त व्यक्ति तथा (4) जो मत्त हो। (हरीसिंह गौंड वि. म.प्र. राज्य) SC---2764

दण्ड संहिता (1860 का 45), धारा 84 — किसी अपराध के हेतु का अभाव मात्र, चाहे वह कितना भी नृशंस हो, विधिक विकृत चित्तता के अभिवचन और सबूत के अभाव में, मामले को इस धारा के अधीन नहीं ला सकता — मनोरोगी का केवल मस्तिष्क की असामान्यता या आंशिक भ्रम, अप्रतिरोध्य आवेग या बाध्यकारी व्यवहार इस धारा के अन्तर्गत कोई संरक्षण प्राप्त करने के लिए समर्थ नहीं। (हरीसिंह गौंड वि. म.प्र. राज्य) SC---2764

दण्ड संहिता (1860 का 45), धारा 84 — किन कारकों पर विचार किया जाता है — यह विनिश्चित करने के लिए कि क्या इस धारा का लाभ दिया जाना चाहिए या नहीं त्रिप्रायिक समय वह तात्त्विक समय है जब अपराध कारित किया हो — इस निष्कर्ष पर आने के लिए सुसंगत परिस्थितियाँ विचार में ली जाना चाहिए — केवल अपराध की प्रकृति पर से किये गये तर्कों से विकृत चित्तता की प्रतिरक्षा स्वीकार करना जोखिमपूर्ण होगा। (हरीसिंह गौंड वि. म.प्र. राज्य) SC---2764

दण्ड संहिता (1860 का 45), धारा 84 — उपबंध कब आकृष्ट होते हैं — यह साबित करने के पश्चात् ही लाभ उपलब्ध होता है कि कृत्य करते समय अभियुक्त मस्तिष्क के रोग के कारण तर्क की ऐसी त्रुटि से ग्रस्त था कि उसे उस कृत्य की प्रकृति या गुण का ज्ञान नहीं था जो वह कर रहा था या फिर यदि उसे यह ज्ञान नहीं था कि यह गलत या विधि के प्रतिकूल था, तब यह धारा लागू की जानी चाहिए। (हरीसिंह गौंड वि. म.प्र. राज्य) SC---2764

दण्ड संहिता (1860 का 45), धारा 84 — उपबंध कब आकृष्ट नहीं होते — स्पष्ट किया। (हरीसिंह गौंड वि. म.प्र. राज्य) SC---2764

दण्ड संहिता, (1860 का 45), धाराएँ 166, 294, 451 — देखें — दण्ड प्रक्रिया संहिता, 1973, धारा 197 (शमीम खातून (श्रीमति) वि. आर पी रमनवाल) ---*89

Penal Code (45 of 1860), Section 300 Exception 4 - Murder or Culpable Homicide not amounting to murder - Appellant No.4 had scuffled with deceased and appellant No.2 picked up a spade and dealt repeated blows from its blunt side on the head of deceased - Lacerated wounds with depressed fractures of skull bone and laceration of brain found - Lower jaw was also broken at three places - Held - For bringing in operation the Exception 4 of Section 300, it has to be established that act was committed without premeditation in a sudden fight in heat of passion upon a sudden quarrel without offender taking undue advantage and having not acted in cruel or unusual manner - Appellant No.2 has caused death of deceased with intention of causing death - Conviction of appellant No.2 u/s 302 upheld. [Tok Singh v. State of M.P.] ...2980

Penal Code (45 of 1860), Section 302, Arms Act, 1959, Sections 25 & 27 - Allegation that appellants chased deceased and appellant Ganesh fired on deceased and committed his murder - Trial court convicted appellants u/s 302 r/w Section 34 I.P.C. and Sections 25 & 27 Arms Act - Appeal filed - Held - Evidence of eye witnesses do not inspire confidence and their presence on spot at the time of incident and the fact that they saw the appellant Ganesh fired on deceased is doubtful - Prosecution has not examined material witnesses which leads to the presumption against prosecution - No explanation by prosecution that why the weapons & empty cartridge were sent after 10 days to FSL - No evidence the weapons which were seized from possession of the appellants, the same were sent for analysis - Appeal allowed - Appellants acquitted. [Ganesh @ Ganesha @ Ganesh Prasad v. State of M.P.] ...3026

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - Dying declaration - Appellant alleged to have poured kerosene oil over his wife and set her ablaze - Executive magistrate recorded her dying declaration after doctor testified that she is fully conscious and fit to give dying declaration - Held - Dying declaration can form the sole basis of conviction if found to be true and voluntary - Appeal dismissed. [Raju @ Rajendra Singh v. State of M.P.] ...3015

Penal Code (45 of 1860), Section 302 - Eye-witness, who is a son of deceased, was present and witnessed the occurrence of deadly assault on his parents by appellant - Corroborated from F.I.R. lodged by him and also corroborated from testimony of witnesses to whom the incident is narrated soon after the incident - No reason why he would twice deposed against appellant - It does not appeal to reason that he would falsely implicate the appellant who is real uncle - Witness cannot be disbelieved merely on ground that he has been declared hostile by the prosecution - Conviction and sentence u/s 302 affirmed - Appeal dismissed. [Ramsiya v. State of M.P.] ...3010

Penal Code (45 of 1860), Section 302 - Murder - Appellants assaulted

दण्ड संहिता (1860 का 45), धारा 300 अपवाद 4 — हत्या या हत्या की कोटि में न आने वाला सदोष मानव वध — अपीलार्थी क्र. 4 ने मृतक के साथ हाथापाई की और अपीलार्थी क्र. 2 ने फावड़ा उठाया और उसकी भोथरी तरफ से मृतक के सिर पर कई प्रहार किये — सिर की हड्डी के दबे हुए अस्थि भंग के साथ चिरे-फटे घाव और मस्तिष्क चिरा पाया गया — निचला जबड़ा भी तीन स्थानों पर टूटा हुआ था — अभिनिर्धारित — धारा 300 के अपवाद 4 को प्रवर्तन में लाने के लिए यह स्थापित करना पड़ता है कि कार्य बिना किसी पूर्वचिन्तन के अचानक झगड़ने पर आवेश की तीव्रता में अचानक लड़ाई में किया गया अपराधी के अनुचित लाभ लिये बिना और क्रूर या असामान्य तरीके से कार्य नहीं करते हुए — अपीलार्थी क्र. 2 ने मृत्यु कारित करने के आशय से मृतक की मृत्यु कारित की — धारा 302 के अन्तर्गत अपीलार्थी क्र. 2 की दोषसिद्धि पुष्ट की गई। (तोक सिंह वि. म.प्र. राज्य) ...2980

दण्ड संहिता (1860 का 45), धारा 302, आयुध अधिनियम, 1959, धाराएँ 25 व 27 — आरोप है कि अपीलार्थियों ने मृतक का पीछा किया और अपीलार्थी गनेश ने मृतक पर गोली चलाई और उसकी हत्या की — विचारण न्यायालय ने अपीलार्थियों को भा.द.सं. की धारा 302 सहपठित धारा 34 और आयुध अधिनियम की धारा 25 व 27 के अन्तर्गत दोषसिद्ध किया — अपील पेश की गई — अभिनिर्धारित — प्रत्यक्षदर्शी साक्षियों का साक्ष्य विश्वास प्रेरित नहीं करता है और उनकी घटना के समय घटना स्थल पर उपस्थिति और यह तथ्य कि उन्होंने अपीलार्थी गनेश को मृतक पर गोली चलाते देखा, शंकास्पद है — अभियोजन ने सारवान साक्षियों का परीक्षण नहीं कराया जिससे अभियोजन के विरुद्ध उपधारणा की जाएगी — अभियोजन द्वारा कोई स्पष्टीकरण नहीं कि आयुध और खाली कारतूस न्यायालयिक विज्ञान प्रयोगशाला को 10 दिन बाद क्यों भेजे गये — कोई साक्ष्य नहीं कि आयुध, जो अपीलार्थियों के कब्जे से अभिग्रहीत किये गये, वही विश्लेषण के लिए भेजे गये — अपील मंजूर — अपीलार्थियों को दोषमुक्त किया गया। (गनेश उर्फ गनेशा उर्फ गनेश प्रसाद वि. म.प्र. राज्य) ...3026

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 32 — मृत्युकालिक कथन — अपीलार्थी ने कथित रूप से अपनी पत्नी पर मिट्टी का तेल डाला और उसको आग लगा दी — कार्यपालिक मजिस्ट्रेट ने चिकित्सक के यह प्रमाणित करने के बाद कि वह मृत्युकालिक कथन देने के लिए पूर्णतः सचेतन और स्वस्थ है, उसका मृत्युकालिक कथन अभिलिखित किया — अभिनिर्धारित — मृत्युकालिक कथन दोषसिद्धि का एकमात्र आधार बनाया जा सकता है यदि सत्य और स्वैच्छिक होना पाया जाए — अपील खारिज। (राजू उर्फ राजेन्द्र सिंह वि. म.प्र. राज्य)...3015

दण्ड संहिता (1860 का 45), धारा 302 — प्रत्यक्षदर्शी साक्षी, जो मृतक का पुत्र है, घटनास्थल पर उपस्थित था और अपीलार्थी द्वारा उसके माता-पिता पर घातक हमला करने की घटना का साक्षी था — उसके द्वारा दर्ज कराई गई एफ.आई.आर. से सम्पुष्टि हुई और साक्षियों के अभिसाक्ष्य से भी पुष्टि हुई जिन्हें घटना के तत्काल बाद घटना बतायी गई — इसका कोई कारण नहीं कि वह दो बार अपीलार्थी के विरुद्ध बयान देवे — यह कारण भी मानने योग्य नहीं है कि अपीलार्थी जो कि सगा चाचा है उसे वह मामले में झूठा फसायेगा — साक्षी पर केवल इस आधार पर अविश्वास नहीं किया जा सकता है कि उसे अभियोजन ने पक्षद्रोही घोषित किया — धारा 302 के अन्तर्गत दोषसिद्धि और दण्डादेश की पुष्टि — अपील खारिज। (रामसिया वि. म.प्र. राज्य) ...3010

दण्ड संहिता (1860 का 45), धारा 302 — हत्या — अपीलार्थियों ने मृतक पर घातक

deceased with deadly weapons - Evidence of eye witness corroborated by report of F.S.L. - In doctors report appellants were not shown as assailants - Held - Primary duty of doctor is to treat a patient and not to find out by whom the injury was caused - Non-disclosure of names to doctor is of no consequence - Conviction and sentence affirm - Appeal dismissed. [Ashok v. State of M.P.]...2997

Penal Code, (45 of 1860), Section 302 - See - Jail Manual, Rule 361(1) & 361(6) [Chhidu @ Kanchhedi Lal v. State of M.P.] ...2860

Penal Code (45 of 1860), Section 306 - Abatement to commit suicide - Applicant No.1 grabbed money of deceased - Deceased was assaulted by applicants when he demanded his money back - Held - No material to show that applicants in any manner instigated, incited or provoked deceased to commit suicide - Nothing to indicate any intention on their part that deceased should commit suicide - Order framing charge u/s 306 set-aside - Revision allowed. [Babbi @ Jitendra v. State of M.P.] ...3042

Penal Code (45 of 1860), Section 376(2)(f) - Appellant alleged to have committed offence of rape on a minor girl aged 8 years - Prosecutrix and her mother supporting prosecution case in their examination-in-chief - Their statements are corroborated by medical evidence & F.I.R. - Trial court convicted appellant u/s 376(2)(f) of IPC - Conviction & sentence challenged - Held - Prosecutrix and her mother took somersault in cross-examination and contradicted their statements of examination-in-chief with the explanation that on insistence of police they stated against the appellant in examination-in-chief - Father and brother of prosecutrix turned hostile - Appellant was in police custody previous to the date of incident - Factum of non-sustaining injury on genitile organ of appellant also weakens prosecution case - Evidence of prosecutrix and her mother cannot be relied beyond doubt - Conviction and sentence not tenable - Appellant acquitted. [Chhota @ Chhotelal v. State of M.P.] ...3019

Penal Code (45 of 1860), Sections 395 & 397 - See - Evidence Act, 1872, Section 9 [Mahendra Singh v. State of M.P.] ...2989

Police Regulations, Regulation 744 - See - Criminal Procedure Code, 1973, Section 154 [Ashok v. State of M.P.] ...2997

Post Graduate Medical Education Regulation, 2000, Regulation 10(3) - See - Chikitsa Shiksha Nyantran Adhiniyam, M.P., 1973, Section 10 [Medical Council of India v. Dr. Teena Khatri] ...2799

Reorganization Act, M.P. (20 of 2000), Section 68 - Allocation - Employees getting Kramonnati forming separate group as per notification dated 22.03.2001 - Circular dated 26.12.2001 issued by State Government making provision that only those employees will be included in Karmonnati Pay Scale whose orders have been issued prior to publication of Tentative Final Allocation

आयुध से हमला किया - प्रत्यक्षदर्शी साक्षी के साक्ष्य की न्यायालयिक विज्ञान प्रयोगशाला की रिपोर्ट द्वारा पुष्टि की गई - चिकित्सक की रिपोर्ट में अपीलार्थियों को हमलावर के रूप में नहीं दर्शाया गया - अभिनिर्धारित - चिकित्सक का प्राथमिक कार्य मरीज का इलाज करना है न कि यह पता लगाना कि क्षतियाँ किसके द्वारा कारित की गई - चिकित्सकों को नाम प्रकट न करने का कोई परिणाम नहीं है - दोषसिद्धि और दण्डादेश की पुष्टि - अपील खारिज। (अशोक वि. म.प्र. राज्य) ...2997

दण्ड संहिता, (1860 का 45), धारा 302 - देखें - जेल मेन्युअल, नियम 361(1) व 361(6), (छिद्दू उर्फ कन्हेदी लाल वि. म.प्र. राज्य) ...2860

दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या का दुष्प्रेरण - आवेदक क्र. 1 ने मृतक की धनराशि छीनी - जब मृतक ने अपनी धनराशि वापस माँगी तो आवेदकों द्वारा उस पर हमला किया गया - अभिनिर्धारित - यह दर्शाने के लिए कोई सामग्री नहीं कि आवेदकों ने मृतक को आत्महत्या करने के लिए किसी तरीके से उकसाया, उदीप्त या प्रकोपित किया - उनकी ओर से किसी आशय को उपदर्शित करने के लिए कुछ नहीं कि मृतक को आत्महत्या करनी चाहिए - धारा 306 के अन्तर्गत आरोप विरचित करने का आदेश अपास्त - पुनरीक्षण मंजूर। (बब्बी उर्फ जितेन्द्र वि. म.प्र. राज्य) ...3042

दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) - अपीलार्थी ने कथित रूप से 8 वर्ष की अवयस्क बालिका के साथ बलात्संग का अपराध किया - अभियोक्त्री और उसकी माँ ने उनके मुख्य परीक्षण में अभियोजन के मामले का समर्थन किया - उनके कथनों की चिकित्सकीय साक्ष्य और एफ.आई.आर. से पुष्टि हुई - विचारण न्यायालय ने अपीलार्थी को भा.द.सं. की धारा 376(2)(एफ) के अन्तर्गत दोषसिद्ध किया - दोषसिद्धि और दण्डादेश को चुनौती दी गई - अभिनिर्धारित - अभियोक्त्री और उसकी माँ ने प्रतिपरीक्षण में बयान पलट दिये और उनके मुख्य परीक्षण में दिये बयान के सम्बन्ध में स्पष्टीकरण दिया कि मुख्य परीक्षा में पुलिस के आग्रह पर अपीलार्थी के विरुद्ध बयान दिया था - अभियोक्त्री के पिता और भाई पक्षद्रोही हो गये - अपीलार्थी घटना तारीख के पहले ही पुलिस की अभिरक्षा में था - अपीलार्थी के प्रजनन अंग पर कोई क्षति न होने के तथ्य से अभियोजन का मामला कमजोर हुआ - अभियोक्त्री और उसकी माता के साक्ष्य को शंका से परे विश्वसनीय नहीं माना जा सकता - दोषसिद्धि और दण्डादेश स्थिर रखने योग्य नहीं - अपीलार्थी दोषमुक्त किया गया। (छोटा उर्फ छोटे लाल वि. म.प्र. राज्य) ...3019

दण्ड संहिता, (1860 का 45), धाराएँ 395 व 397 - देखें - साक्ष्य अधिनियम 1872, धारा 9 (महेन्द्र सिंह वि. म.प्र. राज्य) ...2989

पुलिस विनियम, विनियम 744 - देखें - दण्ड प्रक्रिया संहिता, 1973, धारा 154 (अशोक वि. म.प्र. राज्य) ...2997

स्नातकोत्तर चिकित्सा शिक्षा विनियम, 2000, विनियम 10(3) - देखें - चिकित्सा शिक्षा नियंत्रण अधिनियम, म.प्र., 1973, धारा 10 (मेडीकल काउंसिल ऑफ इंडिया वि. डॉ. टीना खत्री) ...2799

पुनर्गठन अधिनियम, म.प्र. (2000 का 20), धारा 68 - आबंटन - क्रमोन्नति प्राप्त करने वाले कर्मचारी अधिसूचना तारीख 22.03.2001 के अनुसार पृथक समूह बना रहे - राज्य सरकार द्वारा यह उपबंध करते हुए परिपत्र तारीख 26.12.2001 जारी किया गया कि केवल वे कर्मचारी क्रमोन्नति वेतनमान में शामिल होंगे जिनके आदेश प्रायोगिक अंतिम आबंटन सूची के प्रकाशन के पूर्व जारी किये गये हैं - अभिनिर्धारित - क्रमोन्नति वेतनमान पाने वाले कर्मचारी पृथक समूह निर्मित करते

List - Held - Government servants getting Krammonati Pay Scale forms separate group - It was incumbent on Government to have harmonized Clause 6(4) and (5) instead further classify by picking up separate cut off date - State Government was not justified in carving out a separate rule by introducing new cut off date vide its circular dated 26.12.2001 - Does not satisfy principle of equality enshrined under Article 14 of Constitution - Allocation of appellants to Chhatisgarh quashed - Appeal allowed. [R.S. Chourasiya v. Union of India] ...2802

- Reorganisation Act, M.P. (20 of 2000), Section 72 - See - Constitution, Articles 14, 16, 21, 226, 227, 257, 323-A, 323-B, [Vinay Shukla v. State of M.P.] ...2898

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Sections 4, 10, 12, 13 & 38, The Security Interest (Enforcement) Rules, 2002, Rules 8 & 9(2) - Whether authorised officer is bound to sell the immovable property with the consent of the borrower and secured creditor, if he fails to obtain higher price than reserve price or it is the discretion of the authorised officer to obtain the consent of the borrower and secured creditor or without consent he can effect the sale lower than the reserve price - Held - Bank is obliged not to auction sale the property below the reserve price - However the word 'may' used cannot be interpreted as mandatory dictate to the Bank to not sell the property below the reserve price - Petition disposed of. [Godawari Shridhar (Smt.) v. Union Bank of India] ...2918

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Sections 13 & 14, Transfer of Property Act, 1882, Section 53-A - The accounts of the borrowers become non-performing assets and thus action u/s 14 of Act 2002 was initiated for taking possession of mortgaged property - The appellants contended that substantial consideration was paid by them in pursuance of an agreement to sale, therefore, entitled to retain possession of mortgaged property u/s 53-A of T.P. Act - Learned Single Judge held that agreement of sale was on plain paper and did not disclose the mode of payment, therefore, agreement was doubted and unreliable - Order challenged in W.A. - Held - Appellants can, on the basis of agreement on plain paper, claim that in pursuance of agreement to sale they were inducted - The claim of appellants is anchored on the provisions of Section 53-A of T.P. Act and such disputed questions cannot normally be decided in a Writ Petition - Admittedly, appellants are in possession of the property, therefore, time granted upto 31.10.2008 to vacate the property. [Abhay Kumar v. Chief Manager, State Bank of Indore] ...2780

The Security Interest (Enforcement) Rules, 2002, Rules 8 & 9(2) - See - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sections 4, 10, 12, 13 & 38 [Godawari Shridhar (Smt.) v. Union Bank of India] ...2918

हैं - सरकार के लिए यह बाध्यकारी था कि पृथक कट ऑफ तारीख चुनने के द्वारा अतिरिक्त वर्गीकरण करने के बजाय खण्ड 6(4) व (5) को समरूप करती - राज्य सरकार परिपत्र तारीख 26.12.2001 द्वारा नवीन कट ऑफ तारीख प्रस्तावित करके एक अलग नियम बनाने में न्यायसंगत नहीं थी - संविधान के अनुच्छेद 14 के अन्तर्गत संरक्षित समानता के सिद्धांत की तुष्टि नहीं करती - अपीलार्थियों का छत्तीसगढ़ को आबंटन अभिखण्डित - अपील मंजूर। (आर.एस. चौरसिया वि. यूनिन ऑफ इंडिया) ...2802

पुनर्गठन अधिनियम, म.प्र. (2000 का 20), धारा 72 - देखें - संविधान, अनुच्छेद 14, 16, 21, 226, 227, 257, 323-ए, 323-बी (विनय शुक्ला वि. म.प्र. राज्य) * ...2898

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम (2002 का 54), धाराएँ 4, 10, 12, 13 व 38, प्रतिभूति हित (प्रवर्तन) नियम, 2002, नियम 8 व 9(2) - क्या प्राधिकृत अधिकारी, यदि वह आरक्षित कीमत से उच्चतर कीमत प्राप्त करने में असफल हो जाता है, स्थावर सम्पत्ति ऋणी और प्रतिभूत लेनदार की सहमति से विक्रय करने के लिए बाध्य है या यह प्राधिकृत अधिकारी का विवेकाधिकार है कि ऋणी और प्रतिभूत लेनदार की सहमति प्राप्त करे या बिना सहमति के वह आरक्षित कीमत से कम पर विक्रय को प्रभावी कर सकता है - अभिनिर्धारित - बैंक सम्पत्ति की विक्रय नीलामी आरक्षित कीमत से कम पर न करने के लिए बाध्य है - तथापि शब्द 'may' का प्रयोग किया गया, इसका निर्वचन बैंक को आज्ञापक आदेश कि आरक्षित कीमत से कम पर विक्रय न करें, नहीं हो सकता - याचिका निपटाई गई। (गोदावरी श्रीधर (श्रीमति) वि. यूनिन ऑफ इंडिया) ...2918

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम (2002 का 54), धारा 13 व 14, सम्पत्ति अंतरण अधिनियम, 1882, धारा 53-ए - ऋणियों के खाते अपालन योग्य आस्तियाँ हो गये और इस प्रकार बंधक सम्पत्ति का कब्जा लेने के लिए अधिनियम 2002 की धारा 14 के अन्तर्गत कार्यवाही प्रारम्भ की गई - अपीलार्थियों ने अभिकथित किया कि उनके द्वारा विक्रय अनुबंध के अनुसरण में सारवान प्रतिफल अदा कर दिया इसलिए सम्पत्ति अंतरण अधिनियम की धारा 53-ए के अन्तर्गत बंधक सम्पत्ति का कब्जा बनाए रखने के हकदार हैं - विद्वान एकल न्यायाधीश ने अभिनिर्धारित किया कि विक्रय अनुबंध सादा कागज पर था और उसमें भुगतान के तरीके का खुलासा नहीं किया इसलिए अनुबंध शंकास्पद और अविश्वसनीय था - आदेश को रिट अपील में चुनौती दी - अभिनिर्धारित - अपीलार्थी सादे कागज पर किये गये अनुबंध के आधार पर दावा कर सकते हैं कि विक्रय अनुबंध के अनुसरण में उन्हें कब्जा दिया गया - अपीलार्थियों का दावा सम्पत्ति अंतरण अधिनियम की धारा 53-ए के उपबंधों पर अच्छी तरह आधारित है और ऐसे विवादित प्रश्न सामान्यतः रिट याचिका में विनिश्चित नहीं किये जा सकते - स्वीकृत रूप से अपीलार्थी सम्पत्ति के कब्जे में हैं इसलिए सम्पत्ति रिक्त करने के लिए 31.10.2008 तक का समय दिया गया। (अभय कुमार वि. चीफ मैनेजर, स्टेट बैंक ऑफ इंदौर) ...2780

प्रतिभूति हित (प्रवर्तन) नियम, 2002, नियम 8 व 9(2) - देखें - वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम, 2002, धाराएँ 4, 10, 12, 13 व 38 (गोदावरी श्रीधर (श्रीमति) वि. यूनिन ऑफ इंडिया) ...2918

Transfer of Property Act (4 of 1882), Section 53-A - See - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sections 13 & 14 [Abhay Kumar v. Chief Manager, State Bank of Indore]...2780

Urban Land (Ceiling and Regulation) Act (33 of 1976), Sections 2(f), 4(b) & 6 - Filing of return on behalf of family - Land held by plaintiff and her husband as 'joint holder' as per Section 4(b) - Plaintiff's husband filed the return on behalf of 'family' as defined in Section 2(f) - 5.62 acres of land declared surplus by Competent Authority - Plaintiff herself did not file return as an individual holder as per Section 6 - Held - No separate notice by Competent Authority under Act was necessary to the plaintiff - Appeal dismissed. [Kamla Bai (Smt.) v. State of M.P.] ...2925

Urban Land (Ceiling and Regulation) Act (33 of 1976), Sections 10(5), (6) & 11 - Possession - After serving notice possession was taken by State from husband of plaintiff - Possession receipt mentioning that possession has been taken from husband of plaintiff - In the revenue papers entry of State of M.P., Nazul Department was made - Notice u/s 11 was also issued to husband of plaintiff to collect compensation - In these circumstances, on the date of suit plaintiff remained in possession cannot be accepted - Appeal dismissed. [Kamla Bai (Smt.) v. State of M.P.] ...2925

Urban Land (Ceiling and Regulation) Repeal Act (15 of 1999) - Effect on concluded proceedings - Since possession was already taken by the State - Land has vested in the State - The proceedings have been concluded - Possession had been obtained after issuance of due notification - Proceedings could not be reopened - No benefit of Repeal Act could be obtained by the plaintiff. [Kamla Bai (Smt.) v. State of M.P.] ...2925

WORDS & PHRASES :

'Arbitrator' & 'Conciliator' - Distinguished - The arbitrator acts as an arbitrator and not as a conciliator - Arbitrator cannot ignore the law or misapply it in order to do what he thinks just and reasonable - The arbitrator acts as a tribunal and decides the matter in accordance with law and according to the 'legal rights' of the parties. [Managing Director M.P. State Mining Corporation Ltd. v. M/s. Narmada Enterprises] ...2956

Word 'may' - Interpreted - Rules 8 & 9 of the Security Interest (Enforcement) Rules, 2002 - The word 'may' cannot be construed as mandatory because the Act has been enacted to facilitate recovery of loan by financial institutions. [Godawari Shridhar (Smt.) v. Union Bank of India] ...2918

सम्पत्ति अंतरण अधिनियम (1882 का 4), धारा 53-ए - देखें - वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम, 2002, धारा 13 व 14 (अमय कुमार वि. चीफ मैनेजर, स्टेट बैंक ऑफ इंदौर) ...2780

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धाराएँ 2(एफ), 4(बी) व 6 - परिवार की ओर से विवरणी पेश करना - भूमि वादी और उसके पति द्वारा धारा 4(बी) के अनुसार 'संयुक्त धारक' के रूप में धारित - वादी के पति ने धारा 2(एफ) में परिभाषित 'परिवार' की ओर से विवरणी पेश की - सक्षम प्राधिकारी द्वारा 5.62 एकड़ भूमि अधिशेष घोषित की गई - स्वयं वादी ने धारा 6 के अनुसार वैयक्तिक धारक के रूप में विवरणी पेश नहीं की - अभिनिर्धारित - सक्षम प्राधिकारी द्वारा वादी को अधिनियम के अन्तर्गत कोई पृथक सूचनापत्र देना आवश्यक नहीं था - अपील खारिज। (कमला बाई (श्रीमति) वि. म.प्र. राज्य)...2925

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धाराएँ 10(5), (6) व 11 - कब्जा - राज्य द्वारा सूचनापत्र तामील करने के बाद वादी के पति से कब्जा लिया गया - कब्जा रसीद उल्लेखित करती है कि वादी के पति से कब्जा लिया गया है - राजस्व कागजातों में म.प्र. राज्य, नजूल विभाग की प्रविष्टि की गई - वादी के पति को प्रतिकर प्राप्त करने के लिए धारा 11 के अन्तर्गत सूचनापत्र भी जारी किया गया - इन परिस्थितियों में वाद की तारीख पर वादी कब्जे में थी, स्वीकार नहीं किया जा सकता - अपील खारिज। (कमला बाई (श्रीमति) वि. म.प्र. राज्य) ...2925

नगर भूमि (अधिकतम सीमा और विनियमन) निरसन अधिनियम (1999 का 15) - समाप्त कार्यवाहियों पर प्रभाव - चूंकि राज्य द्वारा कब्जा पहले ही ले लिया गया - भूमि राज्य में निहित हो गयी - कार्यवाहियाँ समाप्त हो गयीं - सम्यक अधिसूचना जारी करने के बाद कब्जा प्राप्त किया गया था - कार्यवाहियाँ पुनर्जीवित नहीं की जा सकतीं - वादी द्वारा निरसित अधिनियम का कोई लाभ प्राप्त नहीं किया जा सकता। (कमला बाई (श्रीमति) वि. म.प्र. राज्य) ...2925

शब्द और वाक्यांश

'मध्यस्थ' और 'सुलहकर्ता' - सुभिन्न - मध्यस्थ, मध्यस्थ के रूप में कार्य करता है न कि सुलहकर्ता के रूप में - मध्यस्थ, जो वह उचित और तर्कसंगत समझता है, करने के लिए विधि की उपेक्षा या विधि का दुष्प्रयोग नहीं कर सकता - मध्यस्थ अधिकरण के रूप में कार्य करता है और मामले का विनिश्चय विधि और पक्षकारों के 'विधिक अधिकारों' के अनुसार करता है। (मेनेजिंग डायरेक्टर एम.पी. स्टेट माइनिंग कारपोरेशन लि. वि. नर्मदा इंटरप्राइजेस) ...2956

शब्द 'may' - निर्वचन - प्रतिभूति हित (प्रवर्तन) नियम, 2002 के नियम 8 व 9 - शब्द 'may' का आज्ञापक के रूप में अर्थ नहीं लगाया जा सकता क्योंकि अधिनियम वित्तीय संस्थानों द्वारा ऋण की वसूली को सुकर बनाने के लिए अधिनियमित किया गया है। (गोदावरी श्रीधर (श्रीमति) वि. यूनियन ऑफ इंडिया) ...2918

THE INDIAN LAW REPORTS
(M.P. SERIES)
NOTES OF CASES SECTION

(85)

R.C. Mishra, J

GOPICHAND KHATRI & ors.

Vs.

SUSHIL KUMAR PAMNANI & anr.

Criminal Procedure Code, 1973 (2 of 1974), Section 438 - Period of Anticipatory Bail - Cognizance of offences u/s 406 & 420 r/w 34 I.P.C. was taken upon the complaint - Applicants granted anticipatory bail for a period of 60 days - Petition u/s 482 of Code filed to quash proceedings - High Court stayed further proceedings - Prayer made to extend the period of anticipatory bail till decision of petition u/s 482 of Code - Held - Anticipatory bail orders cannot be kept in abeyance or cannot be extended for indefinite period - In case petition u/s 482 of Code is dismissed, applicants can re-agitate prayer for extension of anticipatory bail within period of 10 days from the date of order. (1980) 4 SCC 286 (ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 — अग्रिम जमानत की कालावधि — परिवाद पर मा.द.सं. की धारा 406 व 420 सहपठित धारा 34 के अपराध का संज्ञान लिया गया — आवेदकों को 60 दिनों की कालावधि के लिए अग्रिम जमानत प्रदान की गई — संहिता की धारा 482 के अन्तर्गत कार्यवाहियों को अभिखण्डित करने के लिए याचिका पेश की गई — उच्च न्यायालय ने आगे की कार्यवाहियाँ रोक दीं — अग्रिम जमानत की कालावधि संहिता की धारा 482 के अन्तर्गत याचिका के विनिश्चय तक बढ़ाने के लिये प्रार्थना की गई — अभिनिर्धारित — अग्रिम जमानत के आदेश मुत्तवी नहीं रखे जा सकते या अनिश्चित कालावधि के लिए विस्तारित नहीं किये जा सकते — यदि संहिता की धारा 482 के अन्तर्गत याचिका निरस्त हो जाती है तो आवेदक आदेश दिनांक से 10 दिन की कालावधि में अग्रिम जमानत आगे बढ़ाने के लिए पुनः प्रार्थना कर सकते हैं। (1980) 4 SCC 286 (संदर्भित)

R.K. Nanhoriya, for the applicant.

None, for the respondent No.1.

S.K. Kashyap, Dy.G.A., for the respondent No.2/State.

*M.Cr.C. No.7778/2007 (Jabalpur), D/- 18 March, 2008.

Short Note

(86)

N.K. Mody, J

MANGIBAI & anr.

Vs.

M.P. ELECTRICITY BOARD

Law of Torts - Negligence - Death of 8 years girl due to contact with live electric wire while cleaning her hut from out side - M.P.E.B. has taken a plea that hut constructed illegally near pole - Trial court found that accident occurred because of negligence on the part of M.P.E.B. and awarded

NOTES OF CASES

Rs. 85,000/- with interest from date of judgment - Appeal filed for enhancement - Held - No appeal filed by M.P.E.B., challenging the findings of trial court regarding negligence - Plea cannot be looked into -- It was duty of M.P.E.B. to get hut removed - Thus, negligence of M.P.E.B. proved - Compensation enhanced by rupees One lac with interest from date of filing of suit - Appeal allowed. 2001 ACJ 1735, 2005 ACJ 894 (ref.)

अपकृत्य विधि - उपेक्षा - 8 वर्षीय बालिका की अपनी झोंपड़ी को बाहर से साफ करते समय जीवित विद्युत तार के सम्पर्क में आने से मृत्यु - म.प्र.वि.मं. ने यह आपत्ति ली कि झोंपड़ी खम्बे के निकट अवैध रूप से निर्मित की गई - विचारण न्यायालय ने पाया कि म.प्र.वि.मं. ने उपेक्षा की इससे दुर्घटना घटी और निर्णय तारीख से ब्याज सहित 85,000/- रुपये का अधिनिर्णय पारित किया - वृद्धि के लिए अपील पेश की - अभिनिर्धारित - म.प्र.वि.मं. ने विचारण न्यायालय द्वारा उपेक्षा के संबंध में दिये गये निष्कर्ष को चुनौती देते हुए कोई अपील पेश नहीं की - इस तर्क पर विचार नहीं किया जा सकता - यह म.प्र.वि.मं. का कर्तव्य था कि झोंपड़ी को हटवाता - इस प्रकार म.प्र.वि.मं. की उपेक्षा सिद्ध है - प्रतिकर में वाद पेश करने की तारीख से ब्याज सहित एक लाख रुपये की वृद्धि की गई - अपील मंजूर। 2001 ACJ 1735, 2005 ACJ 894 (संदर्भित)

Tarun Kushwah, for the appellant.

Vivek Sharan with S.S. Joshi, for the respondent.

***F.A. No.597/2007 (Indore), D/- 11 March, 2008.**

Short Note

(87)

R.C. Mishra, J.

MOHAMMAD AUSAPH

Vs.

MOHAMMAD SHAID

Criminal Procedure Code, 1973 (2 of 1974), Sections 133, 137, 138, 482 - Public Nuisance - Quashing of proceedings - Proceeding u/s 133 of Code initiated against the applicant for encroaching the public way - Applicant filed a civil suit and the civil court passed an order of injunction - Despite the order of injunction in favour of the applicant, the S.D.M. passed a conditional order of removal of encroachment - Proceeding challenged - Held - Magistrate has to first make an inquiry u/s 137(1) of Code - In such inquiry, if he finds there is reliable evidence in support of denial of the existence of a public way on the disputed land, he shall stay the proceedings until the matter of existence of such right is decided by civil court - If he finds there is no evidence, he shall proceed in accordance with Section 138 of Code - Petition disposed of. 1992 MPWN 29 (ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 133, 137, 138, 482 - लोक न्यूसेंस - कार्यवाहियों का अखिखण्डन - आवेदक के विरुद्ध लोक मार्ग पर अतिक्रमण करने के लिए संहिता की धारा 133 के अन्तर्गत कार्यवाही प्रारम्भ की गई - आवेदक ने सिविल वाद पेश किया और सिविल न्यायालय ने व्यादेश जारी किया - व्यादेश का आदेश आवेदक के पक्ष में होने

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के बावजूद एस.डी.एम. ने अतिक्रमण हटाने के लिए सशर्त आदेश पारित किया - कार्यवाही को चुनौती दी - अभिनिर्धारित - मजिस्ट्रेट को सर्वप्रथम संहिता की धारा 137(1) के अन्तर्गत जाँच करना चाहिए - ऐसी जाँच में, यदि वह पाता है कि विवादित भूमि पर लोक मार्ग के अस्तित्व से इंकारी के समर्थन में विश्वसनीय साक्ष्य है, तो वह सिविल न्यायालय द्वारा ऐसे अधिकार का अस्तित्व विनिश्चित किये जाने तक कार्यवाहियाँ रोक देगा - यदि वह पाता है कि कोई साक्ष्य नहीं है तो संहिता की धारा 138 के अन्तर्गत कार्यवाही करने के लिए अग्रसर होगा - याचिका निपटाई गई। 1992 MPWN 29 (संदर्भित)

Ashok Chakravarti, for the applicant.

Vivek Morya, for the non-applicant No.1.

Naman Nagrath, for the non-applicant No.2.

Sanjeev Mishra, for the non-applicant No.3.

*M.Cr.C. No.6540/2007 (Jabalpur), D/- 20 March, 2008.

Short Note

(88)

S.C. Sinho, J

MOHIUDDIN

Vs.

SMT. AZRA BANO

A. Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3(1), Muslim Woman (Protection of Rights on Divorce) Rules, 1986, Rule 4 - An application u/s 3(1) of the Act was filed by non-applicant for recovery of Mehar & maintenance - Before magistrate applicant and non-applicant have filed their evidence on affidavit - Order of maintenance passed by magistrate - Revisional court affirmed the order - Order challenged before High Court on the ground that evidence not be taken in the presence of applicant as per Rule 4 of Rules 1986 - Non-applicant has taken a plea that none of the parties have raised such objection before magistrate - Now applicant cannot take this objection in view of principle of estoppel - Held - There can be no estoppel against statute and no rule of estoppel between the parties - Cannot compel court to take any action contrary to express words of statute - Admittedly, evidence not recorded in the presence of applicant against whom order of maintenance was made - Order passed by magistrate and revisional court illegal - Therefore, set-aside with the direction to record fresh evidence in presence of applicant and pass order in accordance with law. 2005(II) MPJR 20 (ref.)

क. मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3(1), मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) नियम, 1986, नियम 4 - अनावेदक द्वारा अधिनियम की धारा 3(1) के अन्तर्गत मेहर और भरण-पोषण की वसूली हेतु आवेदन पेश किया - मजिस्ट्रेट के समक्ष आवेदक और अनावेदक ने शपथपत्र पर अपनी साक्ष्य

पेश की - मजिस्ट्रेट द्वारा भरण-पोषण का आदेश पारित किया गया - पुनरीक्षण न्यायालय ने आदेश की पुष्टि की - आदेश को उच्च न्यायालय के समक्ष इस आधार पर चुनौती दी गई कि नियम 1986 के नियम 4 के अनुसार साक्ष्य आवेदक की उपस्थिति में नहीं लिया गया - अनावेदक ने तर्क लिया कि किसी भी पक्षकार ने ऐसी आपत्ति मजिस्ट्रेट के समक्ष नहीं उठाई - अब आवेदक बिबन्ध के सिद्धांत के आलोक में यह आपत्ति नहीं ले सकता - अभिनिर्धारित - अधिनियमिति के विरुद्ध कोई बिबन्ध नहीं हो सकता और पक्षकारों के मध्य बिबन्ध का कोई नियम नहीं - न्यायालय को अधिनियमिति के अभिव्यक्त शब्दों के प्रतिकूल कार्यवाही करने को विवश नहीं किया जा सकता - स्वीकृत रूप से साक्ष्य आवेदक की उपस्थिति में नहीं लिया गया जिसके विरुद्ध भरण-पोषण का आदेश किया गया था - मजिस्ट्रेट और पुनरीक्षण न्यायालय द्वारा पारित आदेश अवैध - इसलिए आवेदक की उपस्थिति में पुनः साक्ष्य अभिलिखित करने और विधि अनुसार आदेश पारित करने के निर्देश के साथ अपास्त किया गया। 2005(II) MPJR 20 (संदर्भित)

B. Muslim Woman (Protection of Rights on Divorce) Rules, 1986, Rule 4, Criminal Procedure Code, 1973, Section 126(2) - The language of Section 126(2) of Code and Rule 4 of Rules 1986 is similar.

ख. मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) नियम, 1986, नियम 4, दण्ड प्रक्रिया संहिता, 1973, धारा 126(2) - संहिता की धारा 126(2) और नियम 1986 के नियम 4 की भाषा समान है।

Imtiaz Hussain, for the applicant.

Dinesh Koushal, for the non-applicant.

*M.Cr.C. No.7364/2006 (Jabalpur), D/- 22 August, 2008.

Short Note

(89)

K.S. Chauhan, J

SHAMEEM KHATOON (SMT.)

Vs.

R.P. RAMANWAL

Criminal Procedure Code, 1973 (2 of 1974), Section 197, Penal Code, 1860, Sections 166, 294, 451 - Sanction of prosecution - Magistrate taking cognizance against non-applicant for offence u/s 166, 294, 451 I.P.C. - Order set-aside in revision on the ground that sanction u/s 197 of Code was not obtained - Order challenged before High Court - Held - At the time of incident, non-applicant was probationary Naib Tahsildar - He was acting in discharge of his duties - He was not removable from service except the order of State Government - Sanction of State Government necessary prior to taking cognizance of the alleged offence - The same has not been taken - Revisional court has rightly held the application of bar of Section 197 of Code - Revision dismissed.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197, दण्ड संहिता, 1860, धाराएँ 166, 294, 451 - अभियोजन की मंजूरी - मजिस्ट्रेट ने अनावेदक के विरुद्ध भा.द.सं. की धारा

NOTES OF CASES

166, 294, 451 के अन्तर्गत अपराध के लिए संज्ञान लिया - आदेश पुनरीक्षण में इस आधार पर अपास्त कर दिया गया कि संहिता की धारा 197 के अन्तर्गत मंजूरी प्राप्त नहीं की गई - आदेश को उच्च न्यायालय के समक्ष चुनौती दी गई - अभिनिर्धारित - घटना के समय अनावेदक परिवीक्षाधीन नायब तहसीलदार था - वह अपने कर्तव्यों का निर्वहन कर रहा था - उसे राज्य सरकार के आदेश के बिना सेवा से पृथक नहीं किया जा सकता था - कथित अपराध का संज्ञान लेने से पूर्व राज्य सरकार की मंजूरी आवश्यक - जो नहीं ली गई - पुनरीक्षण न्यायालय ने संहिता की धारा 197 की बाधा लागू करना उचित रूप से अभिनिर्धारित किया - पुनरीक्षण खारिज।

Saurabh Sunder, for the applicant.

Rajkamal Chaturvedi, for the non-applicant.

*Cr.R. No.546/1997 (Jabalpur), D/- 28 March, 2008.

Short Note

(90)

B.M. Gupta, J

STATE OF M.P.

Vs.

TIDDA @ SONU

Evidence Act (1 of 1872), Section 9, Criminal Procedure Code, 1973, Sections 162 - *Test identification parade - Test identification parade conducted by police officer is not admissible in evidence - Any statement made by identifying witness to the police officers during investigation would be hit by Section 162 of Code and will not be admissible in evidence - Identification parade of the accused was to be conducted by some magistrate.*

साक्ष्य अधिनियम (1872 का 1), धारा 9, दण्ड प्रक्रिया संहिता, 1973, धारा 162 - शनाख्त परेड - पुलिस अधिकारी द्वारा करवाई गई शनाख्त परेड साक्ष्य में ग्राह्य नहीं है - शनाख्त करने वाले किसी साक्षी द्वारा अनुसंधान के दौरान पुलिस अधिकारियों को दिया गया कोई कथन संहिता की धारा 162 के विरुद्ध होगा और साक्ष्य में ग्राह्य नहीं होगा - अभियुक्त की शनाख्त परेड मजिस्ट्रेट द्वारा करवाई जानी थी।

Mohd. Irshad. P.P., for the applicant/State.

*M.Cr.C. No.4648/2008 (Gwalior), D/- 9 September, 2008.

I.L.R. [2008] M. P., 2743

SUPREME COURT OF INDIA

Before Mr. S.B. Sinha & Mr. Justice Cyriac Joseph

1 August, 2008*

SAMUNDRA DEVI & ors.

... Appellants

Vs.

NARENDRA KAUR & ors.

... Respondents

Motor Vehicles Act (59 of 1988), Section 170, Civil Procedure Code, 1908, Order 41, Rule 33 - Claims tribunal awarded compensation of Rs.13,32,000/- against the Owner & Driver - Claimants filed appeal for enhancement of compensation and saddling liability of Insurance Company also - Insurance Company contended that the compensation is excessive - High Court reduced compensation upto Rs.6,96,000/- - Held - No appeal filed by Driver or Owner - Insurance Company would have no right to question quantum of compensation in absence of any leave in terms of Section 170 of Act - Legally impermissible for Insurance Company to question a finding of fact taking umbrage under Order 41 Rule 33 of Code - Order 41 Rule 33 of Code was not applicable - Reduction of compensation erroneous - Appeal allowed.

(Paras 16 & 18)

मोटर यान अधिनियम (1988 का 59), धारा 170, सिविल प्रक्रिया संहिता, 1908, आदेश 41 नियम 33 - दावा अधिकरण ने 13,32,000/- रुपये का अधिनिर्णय स्वामी और चालक के विरुद्ध पारित किया - दावेदारों ने प्रतिकर में वृद्धि और बीमा कम्पनी पर भी दायित्व आरोपित करने के लिए अपील पेश की - बीमा कम्पनी ने यह प्रतिवाद किया कि प्रतिकर की राशि अत्यधिक है - उच्च न्यायालय ने प्रतिकर घटाकर 6,96,000/- रुपये किया - अभिनिर्धारित - चालक या स्वामी द्वारा कोई अपील पेश नहीं की गई - बीमा कम्पनी को अधिनियम की धारा 170 के निबंधनों के अनुसार किसी अनुमति के अभाव में प्रतिकर की मात्रा को प्रश्नगत करने का कोई अधिकार नहीं - बीमा कम्पनी के लिए संहिता के आदेश 41 नियम 33 का सहारा (umbrage) लेते हुए तथ्य के निष्कर्ष को प्रश्नगत करना, वैध रूप से अननुज्ञेय है - संहिता का आदेश 41 नियम 33 लागू होने योग्य नहीं - प्रतिकर घटाना त्रुटिपूर्ण - अपील मंजूर।

Case referred :

(2007) 11 SCC 75.

J U D G M E N T

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

2. This appeal is directed against a judgment and order dated 16.05.2005 passed by the High Court of Madhya Pradesh at Jabalpur reducing the amount of compensation awarded in favour of the appellants herein by the Tribunal from Rs.13,32,000/- to Rs.6,96,000/- in an appeal preferred by the claimants in terms of Section 173 of the Motor Vehicles Act, 1988.

3. One Shiv Shakti Singh while proceeding in a car on 9.4.1998 met with an accident having been hit by a truck bearing registration No.MP-09-KA-6899. The said truck was owned by the first respondent herein and was being driven at the relevant time by the second respondent. The said truck was insured with the respondent No.3. As a result of the injuries sustained in the said accident, Shiv Shakti Singh died. The car was also damaged.

4. Appellants herein filed an application under Section 166 of the Motor Vehicles Act, 1988 claiming compensation for a sum of Rs.31,89,000/-. One of the contentions raised by respondent No.1 was that the accident took place owing to the acts of negligence on the part of the deceased himself. Respondent No.3 furthermore contended that the respondent No.2 did not possess a valid and effective driving licence.

Several issues were framed by the Tribunal, inter alia, as regards the breach of policy conditions as also the quantum of compensation.

By an award dated 8.2.2001, the Motor Vehicles Accident Claim Tribunal, held :

(a) The accident took place due to the negligence of the driver of the truck;

(b) The deceased having been earning a sum of Rs.10,000/-, the amount of contribution to his family was about 8,000/- per month and, thus, on application of the multiplier of 16, the total loss of dependency would be a sum of Rs.12,80,000/- A sum of Rs.15,000 as loss of companionship for applicant No.2, a sum of Rs.2,000/- towards funeral expenses and Rs.35,000/- towards costs of repairing of the Maruti Car, were also granted.

(c) The driver of the truck did not possess a valid driving licence and, therefore, breach of policy of the contract of insurance was established as a result whereof the respondent No.3 was not liable to reimburse the owner of the vehicle any such amount payable by him by way of compensation payable.

5. Appellants preferred an appeal thereagainst, contending :

a) The insurer ought to have been found to be liable to pay the amount of compensation along with the owner and driver; and

b) The appropriate multiplier adopted should have been 20 instead of 16.

6. Admittedly, no appeal was preferred against the said judgment and award by the owner and driver of the vehicle as also the insurer thereof. Before the High Court, the respondent No.3, inter alia, contended that in the event it be held that it was liable to reimburse the owner of the vehicle, it was entitled to contest the quantum of compensation as being excessive.

In view of the said contention, the High Court formulated the following questions for its consideration :

"(i) Whether the insurer is liable to indemnify the owner of the vehicle and therefore liable to pay the compensation?

(ii) If so, what will be the just compensation?"

7. The High Court, on perusal of the driving licence, the contract of insurance as also the testimonies of witnesses examined on behalf of the parties, held :

"8. We accordingly hold that the Insurer having established that the driver was not 'duly licenced' to drive the truck in question and also having established want of care on the part of the insured in allowing the insured truck to be driven by a driver who possessed only a LMV (Private) licence, on paying the compensation amount to the Appellants/ Claimants and recover the same from the Insured (Respondent No.1)."

8. Despite noticing the fact that the appeal was by the claimants, the High Court took into consideration the contention raised by the respondent No.3 that no documentary evidence having been produced to establish the income of the deceased, it should be reduced to 49,000/- for the period ending 31.3.1996 and Rs.53,000/- for the year 31.3.1997. As regards to the finding of the learned Tribunal that the deceased had income from the agricultural lands, it was opined that as agricultural land continued to be owned by the family; what was lost was only the valuable supervision of the deceased. On the said findings, it was held :

"14. On an overall consideration of the evidence, we are of the view that the income of the deceased from the profession and the value (cost) of supervision of agriculture land should be as Rs.5,000/- per month or Rs.60,000/- per annum. If one-third is deducted towards personal and living expenses of the deceased, the contribution to the family would be Rs.40,000/- per annum. As the deceased was 39 years, the appropriate multiplier is 16. Therefore, the total loss of dependency will be Rs.6,40,000/-.....

15. Normally, we would not have interfered by reducing the compensation in an appeal filed by the claimants. But as noticed above, the insurer was exonerated and when it is sought to be made liable, it can point out that the compensation is excessive. Though we pointed to the Appellants' counsel that by not pressing the appeal, the claimants may have the advantage of an award for Rs.13,32,000/- against the owner as the owner has not challenged the award, he submitted that unless the insurer is made liable, the chances of recovery are difficult and therefore the appellants would like to pursue the appeal."

9. The appeal was, thus, allowed, directing :

"(a) The insurer (Third Respondent) is also jointly and severally made liable to pay the compensation to Appellants.

(b) The compensation is reduced from Rs.13,32,000/- to Rs.6,96,000/- with interest @ 12% per annum from the date of petitioner till date of deposit.

(c) On payment by the Insurer, it shall be entitled to recover the amount paid from the owner of the vehicle (insured), namely the First Respondent, by executing the award."

"Normally, we would not have interfered by reducing the compensation in an appeal filed by the claimants. But as noticed above, the insurer was exonerated and when it is sought to be made liable, it can point out that the compensation is excessive. Though we pointed to the Appellants' counsel that by not pressing the appeal, the claimants may have the advantage of an award for Rs.13,32,000/- against the owner as the owner has not challenged the award, he submitted that unless the insurer is made liable, the chances of recovery are difficult and therefore the appellants would like to pursue the appeal."

10. The appellant is, thus, before us.

11. Ms. Kamini Jaiswal, learned counsel appearing on behalf of the appellant, would submit that the High Court committed a serious error in reducing the amount of compensation from Rs.13,32,000/- to Rs.6,96,000/-. It was urged that the reasonings of the High Court are not legally sustainable as the owner and driver as also the insurer had not preferred any appeal against the award dated 8.2.2001 passed by the learned Motor Vehicles Accident Claims Tribunal.

12. Mr. M.K. Dua, learned counsel appearing on behalf of the respondent, on the other hand, would support the judgment.

13. The claimants/appellants filed an application for grant of compensation on the premise that they suffered damages owing to the acts of rashness and negligence in driving on the part of the respondent No.2. The owner of the vehicle as also the driver thereof were, thus, principally liable to pay compensation to the dependents of the deceased.

14. A contract of insurance as is well known is a contract of indemnity. In a case of accident, the primary liability under law for payment of compensation is that of the driver. The owner of the vehicle also becomes vicariously liable therefor. In a case involving a third-party to the contract of insurance in terms of Section 147 of the Motor Vehicles Act, 1988 providing for a compulsory insurance, the insurer becomes statutorily liable to indemnify the owner. Indisputably, the insurance company would be liable to indemnify the insured in respect of loss suffered by a third party or in respect of damages of property. In a case, therefore, where the liability is fastened upon the insurer, the insurer would be bound to indemnify the insured unless the exceptions contained in Section 149 of the Act are attracted.

15. It has not been disputed before us that in certain situations while opining that the insurance company would not be liable to reimburse the insured, a direction upon the insurance company to pay the amount of compensation to a third party and recover the same from the owner of the vehicle is permissible. Such a direction has been issued by the High Court. The said directions are not under challenge.

Keeping in view the aforementioned principle in mind, the question which arises for our consideration is as to whether it was permissible for the High Court to interfere with the quantum of compensation as awarded by the learned Tribunal, although no appeal was preferred either by the owner or the driver of the vehicle nor any appeal was preferred by the insurance company.

16. Indisputably, in relation to a third party, the grounds upon which the insurer can deny its liability are contained sub-section (2) of Section 149 of the Act. Ordinarily and subject to just exceptions, the insurance company would have no right to question the quantum of compensation in absence of any leave having been granted in its favour in terms of Section 170 of the Act. The High Court, with respect, failed to consider this aspect of the matter. Appellants preferred appeals before it on limited grounds. Their contentions could have been rejected or accepted. The High Court, however, could not have considered the contention raised on behalf of the respondent No.3 which was not available to them in law. It was legally impermissible for the respondent No.3 to question a finding of fact arrived at by the Tribunal, taking umbrage under Order 41 Order Rule 33 of the Code of Civil Procedure or otherwise. It could not have been permitted to do so. It is well settled that what cannot be permitted to be done directly, cannot be permitted to be done indirectly. Indisputably, no leave was obtained in terms of Section 170 of the Act. The quantum of compensation awarded by the learned Tribunal was accepted by the owner. Only in some exceptional cases and that too when the liability to pay the amount of compensation is fastened upon the insurance company and insured, it can be heard on issues relating to the quantum of compensation and not otherwise.

17. In this case, the respondent No.3 has been given liberty to recover the amount of compensation from the owner of the vehicle. The insurance company has been held to have no statutory liability as one of its contentions that the driver was not holding a valid and effective driving licence has been upheld.

18. In the aforementioned situation, we are of the opinion that even Order 41 Rule 33 of the Code of Civil Procedure was not applicable as in a situation of this nature, the respondent No.3 ordinarily could not have maintained an independent appeal on the quantum of compensation having regard to the fact situation obtaining herein, and, thus, in our opinion, the High Court committed a serious error in issuing the impugned directions, despite noticing that even no appeal has been preferred by the owner or driver of the vehicle as also respondent No.3.

19. Order 41 Rule 33 of the Code of Civil Procedure has limited application.

When there exists a legal interdict, the same would not apply. It was so held in *S. Nazeer Ahmed v. State Bank of Mysore & Ors.* [(2007) 11 SCC 75], stating :

"8. We also see considerable force in the submission of learned Counsel for the appellants that the High Court has misconceived the object of Order XLI Rule 33 of the Code and has erred in invoking it for the purpose of granting the plaintiff Bank a decree. This is a case where the suit filed by the plaintiff Bank had been dismissed by the trial court. The plaintiff Bank had come up in appeal. It was entitled to challenge all the findings rendered against it by the trial court and seek a decree as prayed for in the plaint, from the appellate court. Once it is found entitled to a decree on the basis of the reasoning of the appellate court, the suit could be decreed by reversing the appropriate findings of the trial court on which the dismissal of the suit was based. For this, no recourse to Order XLI Rule 33 is necessary. Order XLI Rule 33 enables the appellate court to pass any decree that ought to have been passed by the trial court or grant any further decree as the case may require and the power could be exercised notwithstanding that the appeal was only against a part of the decree and could even be exercised in favour of the respondents, though the respondents might not have filed any appeal or objection against what has been decreed. There is no need to have recourse to Order XLI Rule 33 of the Code, in a case where the suit of the plaintiff has been dismissed and the plaintiff has come up in appeal claiming a decree as prayed for by him in the suit. Then, it will be a question of entertaining the appeal considering the relevant questions and granting the plaintiff the relief he had sought for if he is found entitled to it. In the case on hand therefore there was no occasion for applying Order XLI Rule 33 of the Code. If the view of the High Court was that the suit was barred by Order II Rule 2 of the Code, it is difficult to see how it could have resorted to Order XLI Rule 33 of the Code to grant a decree to the plaintiff in such a suit. In that case, a decree has to be declined. That part of the reasoning of the High Court is therefore unsustainable."

20. In view of our findings aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 2749

SUPREME COURT OF INDIA

Before Mr. Justice Dalveer Bhandari & Mr. Justice Lokeshwar Singh Panta

26 August, 2008*

RAJ HOMES PVT. LTD. & anr.

... Appellants

Vs.

STATE OF M.P. & ors.

... Respondents

Land Revenue Code, M.P. (20 of 1959), Sections 59(5), 258(2)(iii) - *Regulation of assessment of land revenue on diversion of land - Town Planning - Validity of Rule 14 of Notification dated 24.01.2002 fixing rates for the premium of different cities challenged as arbitrary and unreasonable as relevant factors mentioned in Code not taken into consideration - Held - Important cities classified differently from smaller cities and towns, according to their population - Villages also classified differently - Rates prescribed accordingly - Schedule based on reasonable differentia and therefore, rates prescribed therein are not arbitrary or discriminatory - Appeal dismissed.* (Para 27)

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 59(5), 258(2)(iii) - भूमि के व्यवर्तन पर भू राजस्व निर्धारण का विनियमन - नगर योजना - विभिन्न शहरों के लिए प्रीमियम की दरें नियत करने वाली अधिसूचना तारीख 24.01.2002 के नियम 14 की विधिमान्यता को मनमाना और अयुक्तियुक्त होने से चुनौती क्योंकि संहिता में उल्लिखित सुसंगत कारकों को विचार में नहीं लिया गया - अभिनिर्धारित - महत्वपूर्ण शहर उनकी जनसंख्या के अनुसार छोटे शहरों और नगरों से भिन्न रूप से वर्गीकृत किये गये हैं - गाँव भी भिन्न रूप से वर्गीकृत किये गये हैं - तदनुसार दरें विहित की गई हैं - अनुसूची युक्तियुक्त वर्गीकरण पर आधारित है और इसलिए उसमें विहित दरें मनमानी और विभेदकारी नहीं हैं - अपील खारिज।

J U D G M E N T

The Judgment of the Court was delivered by DALVEER BHANDARI, J. :- The appellants aggrieved by the order of the High Court of Judicature at Jabalpur dated 26.8.2003 in Writ Petition Nos.6269 and 27171 of 2003 have preferred this appeal with the prayer that the respondent State of Madhya Pradesh be restrained from imposing and collecting any premium under the impugned rule 14 of the Notification dated 24.1.2002.

2. Brief facts giving rise to the present appeal are recapitulated as under:

The respondent State of Madhya Pradesh has imposed premium at flat rate irrespective of use and purpose of the diverted land or any relation whatsoever with the land revenue imposed on the land. According to the appellants, the impugned rule 14 of the Madhya Pradesh Land Revenue Code, 1959 (for short "the Code") is arbitrary, unreasonable and as such violative of Article 14 of the Constitution of India. The imposition of premium under rule 14 has been assailed, therefore, it would be imperative to refer to the relevant provisions regarding imposition of premium as under:

"IMPOSITION OF PREMIUM

13. When the land assessed for any non-agricultural purpose is diverted to any agricultural purpose no premium shall be imposed under Sub-section (5) of Section 59 of the Code.

14. (1) For the purpose of levy of premium on agricultural land other than the land specified in the proviso to Sub-section (5) of Section 59 of the Code diverted to non-agricultural purposes, in any towns and villages in the State of Madhya Pradesh shall be divided into the following classes as specified in Column (1) of the Schedule appended to these rules and the premium shall be imposed according to the rates specified in Column (2) and (3) of the said Schedule as the case may be:

Provided that with the sanction of the State Government the Sub-Divisional Officer may include any particular village in higher or lower class than that prescribed in this rule:

Provided further that no premium shall be payable on agricultural land diverted into residential purposes if the area of diverted land is not exceeding one hundred square metre and "Kachha" construction is built on such land.

Explanation I.- When the 'abadi' of two or more villages adjoins, the population shall be taken as the population of the combined villages.

Explanation II.- 'Kachha' construction means such construction in which only clay and wood (excluding timber wood) are used.

The Schedule framed under rule 14 reads as under:

SCHEDULE

Classes	For residential and other purpose (excluding Commercial and Industrial Purpose)			For Commercial and Industrial Purpose		
(1)	(2)			(3)		
Class-I	In Municipal Corporation Area	Upto 4 kms. From Municipal Corporation Area	From 4 Kms. To 8 Kms. From the area of Municipal Corporation	In Municipal Corporation Area	Upto 4 Kms. From Municipal Corporation Area	From 4 Kms To 8 Kms. From the area of Municipal Corporation
	1	2	3	1	2	3
Entire Municipal Corporation area of Gwalior, Indore, Ujjain, Bhopal, Jabalpur, Raipur and Durg and	Rs. 10 per Square Metre	Rs.7.50 per Square Metre	Rs.5 per Square Metre	Rs.20 per Square	Rs.15 per Square Metre	Rs.10 per Square Metre

upto 8 Kms. from the outer limits of Municipal Corporation						

Classes	For residential and other purpose (excluding Commercial and Industrial Purpose)			For Commercial and Industrial Purpose		
(1)	(2)			(3)		
Class-II	In Municipal Corporation Area	Upto 4 kms. From Municipal Corporation Area	From 4 Kms. To 8 Kms. From the area of Municipal Corporation	In Municipal Corporation Area	Upto 4 Kms. From Municipal Corporation Area	From 4 Kms. To 8 Kms. From the area of Municipal Corporation
	1	2	3	1	2	3
Entire Municipal Corporation area excluding the abovementioned Municipal Corporations shown in Class I and upto 8 Kms. from the outer limits of Municipal Corporation.	Rs. 7.50 per Square Metre	Rs.5.00 per Square Metre	Rs.3.75 per Square Metre	Rs.15 per Square Metre	Rs.10 per Square Metre	Rs.7.50 per Square Metre

Classes	For residential and other purpose (excluding Commercial and Industrial Purpose)		For Commercial and Industrial Purpose	
(1)	(2)		(3)	
Class-III	In Municipal Council	Upto 5 Kms. From Municipal Council	In Municipal Council Area	Upto 5 Kms. From Municipal Council area
	1	2	1	2
Entire area of Municipal Council more than 50 thousand Population and upto 5 Kms. from the outer limits of Municipal Council.	Rs. 5.00 per Square Metre	Rs.3.75 per Square Metre	Rs.10 per Square Metre	Rs.7.50 per Square Metre

Classes	For residential and other purpose (excluding Commercial and Industrial Purpose)		For Commercial and Industrial Purpose	
(1)	(2)		(3)	
Class-IV	In Municipal Council	Upto 3 Kms. From Municipal Council area	In Municipal Council Area	Upto 3 Kms. From Municipal Council area
	1	2	1	2
Entire area of Municipal Council of 20 to 50 thousand population and upto 3 Kms. from the outer limits of Municipal Council.	Rs.3.00 per Square Metre	Rs.1.50 per Square Metre	Rs.6.00 per Square Metre	Rs.3.00 per Square Metre

Classes	For residential and other purpose (excluding Commercial and Industrial Purpose)		For Commercial and Industrial Purpose	
(1)	(2)		(3)	
Class-V	In the area of Nagar Panchayat	Upto 3 Kms. From Nagar Panchayat area	In the area of Nagar Panchayat	Upto 3 Kms. From Nagar Panchayat area
	1	2	1	2
Entire area of Nagar Panchayat and upto 3 Kms. from the outer limits of Nagar Panchayats	Rs.1.50 per Square Metre	Rs.1.00 per Square Metre	Rs.3.00 per Square Metre	Rs.1.50 per Square Metre

Class-VI	Within limits of village area	Outside the limits of village area	Within village area	Out of village area
	1	2	1	2
Villages whose population is more than 2 thousand	Rs.0.75 per Square Metre	Nil	Rs.1.50 per Square Metre	Nil

3. The appellants submitted that reading of section 59 with rules 1 to 12 and sections 77, 78, 79, 81, 82 and 98 of the Code shows that the land revenue is imposed on the land on the basis of use, purpose, location, area, size of plot, rental value, assessment rates, advantages and disadvantages etc. In this view of the matter, it would be appropriate to set out section 59 of the Code as under:

"Section 59. Variation of land revenue according to purpose for which land is used.- (1) The assessment of land revenue on any land shall be made with reference to the use of land--

- (a) for the purpose of agriculture or such farm house, which is situated on holding of one acre or more;
- (b) as sites for dwelling houses;
- (c) for purposes other than those specified in items (a), (b), (d) or (e);
- (d) for industrial or commercial purpose;
- (e) for the purpose of mining under a mining lease within the meaning of Mines and Minerals (Regulation and Development) Act, 1957 (No.67 of 1959);

Provided that the assessment of land revenue on any land situated in the areas which are constituted as reserved or protected forests under the Indian Forest Act, 1927 (16 of 1927), with reference to use of land for any of the purposes aforesaid shall not be proceeded with or any procedure relating to the assessment to be followed under the relevant provisions of the Code shall not be commenced except on a certificate permitting the use of land issued by an officer of the Forest Department duly authorised by the State Government in this behalf;

Explanation: For the purpose of clause (a) "Farm House" means such building or construction which is any improvement as defined in clause (j) of sub-section (1) of Section 2, the plinth area of which shall not exceed one hundred square meter and the built up area shall not exceed one hundred fifty square meter.

(2) Where land assessed for use for any one purpose is diverted to any other purpose, the land revenue payable upon such land shall, notwithstanding that the term for which the assessment may have been fixed has not expired, be liable to be altered and assessed in accordance with the purpose to which it has been diverted.

(2-a) The alteration or assessment referred to in sub-section (2) shall be carried out by the Sub-Divisional Officer.

(3) Where the land held free from the payment of land revenue on condition of being used for any purpose is diverted to any other purpose it shall become liable to the payment of land revenue and assessed in accordance with the purpose to which it has been diverted.

(4) The assessment made under sub-section (2) and (3) shall be in accordance with the rules made by State Government in this behalf and such rules shall be in accordance with the principles contained in Chapter VII or VIII, as the case may be.

(5) Where land for use for any one purpose is diverted to any other purpose, and land revenue is assessed thereon under the provisions of this section, the Sub-Divisional Officer shall also have power to impose

a premium on the diversion in accordance with rules made under this Code:

Provided that no premium shall be imposed for the diversion of any land for charitable purpose.

(6) Notwithstanding any usage or grant or anything contained in any law, the right of all persons holding land, which immediately before the coming into force of the Madhya Pradesh Land Revenue Code, 1954 (II of 1955), was held in malik makbuza right, to exemption from payment of premium on diversion of such land is hereby abolished; but every such person shall, on diversion of such land, be entitled in lieu of such right to a rebate equal to the land revenue for one year payable for such land from the amount of premium determined under sub-section (5)."

4. It would be appropriate to recapitulate rules pertaining to imposition of premium.

"RULES REGARDING ALTERATION OF ASSESSMENT AND IMPOSITION OF PREMIUM

[Notifications No.175-6477-VII-N (Rules); dated the 6th January 1960 and as amended by No.1400-VII-N-1, dated 21st May 1971, published in M.P. Raj. Pt. 4G, dated 11.6.1971, p. 270 and by No.F.11-7-VII-S-8-89 dated 24.1.2000]

1. In these rules "Code" means the Madhya Pradesh Land Revenue Code, 1959 (No.20 of 1959).

A. ALTERATION OF ASSESSMENT

(i) Diversion from a non-agricultural purpose to an agricultural purpose in non-urban and urban areas.

2. When land already diverted to a non-agricultural purpose and re-assessed on that basis is rediverted to an agricultural purpose the assessment as refixed shall be equal to the agricultural assessment on the land as fixed at the last settlement.

3. When land already diverted to a non-agricultural purpose and assessed on that basis is rediverted to an agricultural purpose and there is no agricultural assessment to fall back upon, the assessment on rediversion shall be fixed at the rate adopted for similar soil in the same village or in a neighbouring village at the last settlement.

4. The assessment fixed under rules 2 and 3 shall remain in force till the next succeeding settlement of the village.

(ii) diversion from an agricultural purpose to a non-agricultural purpose.

(a) Non-Urban areas

5. If any land assessed at agricultural rates is diverted to a non-agricultural purpose, the assessment thereon shall be revised in accordance with any of the methods specified below according to the circumstances of the case, Viz.:--

(a) If the area in which the land is situate has an assessment rate as approved by the State Government under Sub-section (2) of Section 77 of the Code, then in accordance with the assessment rate so prevailing.

(b) If there be no assessment rate in force as aforesaid, then the Sub-Divisional Officer shall calculate the estimated rental value of the land to be assessed in accordance with rules 33, 34, 35 and 36 of the rules framed under Clauses (viii), (ix), (x) & (xii) of Sub-section (2) of section 258 of the Code, as far as they may apply and fix the assessment of the land up to the maximum of 33 percent of the estimated rental value of the land, taking into account the advantages or disadvantages and other circumstances peculiar to the survey number to be assessed.

6. In fixing the actual assessment, the area of a survey number of Sub-division measuring less than 5 sq. metres shall be taken to be 5 sq. metres. In other cases areas up to 5 sq. metres shall be ignored, and areas exceeding 5 sq. metres but below 10 sq. metres shall be taken as 10 square metres. The assessment shall be correct to the nearest naye Paise.

7. The assessment fixed under rule 5 shall remain in force till the next succeeding settlement of the village.

(b) Urban Areas

8. If any land in an urban area assessed at agricultural rate is diverted to an non-agricultural purpose, its assessment shall be altered by fixing the actual assessment on the basis of the standard rate prevailing for the area in which the land is situated, if, in such area, a standard rate as approved by the State Government under rule 30 of the rules framed under clauses (xvi), (xvii) and (xviii) of Sub-section (2) of Section 258 of the Code, is in force.

9. If no such standard rate is in force, the average letting value of the land shall be calculated, as far as may be, in accordance with rules 25, 26, 27 and 28 of the rules made under the clauses specified in rule 8 above and a standard rate determined in accordance with the provisions of rule 30 of the said rules.

10. On such standard rate being calculated, the Sub-Divisional Officer shall fix the actual assessment on the land diverted to a non-agricultural purpose up to one-third of the estimated annual rental value

of the land, if the land is held for the purposes mentioned in clause (b) or (c) of Sub-section (1) of Section 59 of the code and up to one-half of the estimated annual rental value, if the land is held for purposes mentioned in clause (d) of the said Sub-section.

11. In fixing the actual assessment, the area of a plot measuring less than 5 sq. metres shall be taken to be 5 sq. metres. In other cases areas up to 5 sq. metres shall be ignored, and areas exceeding 5 sq. metres but below 10 sq. metres shall be taken as 10 sq. metres. The assessment shall be correct to the nearest naye paise.

12. The assessment fixed under rule 10 shall remain in force till the next succeeding settlement of the village.

x x x x "

5. Sections 77, 78, 79, 81, 82 and 98 are also set out.

Section 77. Fixation of assessment rates.- (1) On completing the necessary inquiries, as may be prescribed, the Settlement Officer shall forward to the State Government his proposals for assessment rates for different classes of land in such form and along with such other particulars as may be prescribed.

(2) The State Government may approve the assessment rates with such modifications as it may deem fit.

Section 78. Maximum and minimum limits for the rate of assessment.- The maximum and minimum limits for the assessment rate shall respectively be one and quarter times and three-fourth of the assessment rate in force for the time being:

Provided that in the event it is considered desirable to alter the minimum or maximum limits, aforesaid, a proposal to that effect shall be laid on the table of the Legislative Assembly for its approval and the limits of assessment rate shall thereafter be altered in accordance with the proposals as approved.

Section 79. Fixation of fair assessment.- The Settlement Officer shall fix the assessment on each holding in accordance with the assessment rates approved under section 77 and the provisions of the section 81 and such assessment shall be the fair assessment of such holding.

Section 81. Principles of assessment.- (1) The fair assessment of all lands shall be calculated in accordance with the principles and restrictions set forth in the section.

(2) No regard shall be had to any claim to hold land on privileged terms.

(3) Regard shall be had in the case of agricultural land to the profits of agriculture, to the consideration paid for leases to the sale prices of land and to the principal moneys on mortgages, and in the case of non-agricultural land, to the values of the land for the purpose for which it is held.

(4) The fair assessment on land used for non-agricultural purposes shall not exceed thirty-three per centum of the estimated rental value of the land.

(5) Where an improvement has been effected at any time in any holding held for the purpose of agriculture by or at the expense of the holder thereof, the fair assessment of such holding shall be fixed as if the improvement had not been made.

(6) Except for special reasons to be approved in each case by the State Government, no increase in the fair assessment of a holding for the purpose of agriculture shall exceed fifty per centum of the existing assessment.

Section 82. Announcement of settlement.- (1) When the assessment of any land has been fixed in accordance with section 79, notice thereof shall be given in accordance with rules made under this Code, and such notice shall be called the announcement of the settlement.

(2) The assessment of any land, as announced under this section, shall be the land revenue payable annually on such land during the term of the settlement unless it is modified in accordance with the provisions of this Code, or any other law.

Section 98. Fixation of standard rates of assessment.- The Collector shall keep a record in accordance with the rules made under this Code of all registered sales and leases of lands in the different blocks in urban areas in respect of land held for each of the purpose mentioned in sub-section (1) of section 59.

(2) The average annual letting value of lands in each block in respect of land held for purposes mentioned in sub-section (1) of section 59 shall be determined separately in the prescribed manner on the basis of transactions of sales and leases in respect of the land held for each of the aforesaid purposes in such block during the period of five years immediately preceding the year in which the letting value is being determined, so far as the information about such transactions is available:

Provided that if the transactions which have taken place in any block in respect of any land held for any of the aforesaid purpose are not sufficiently representative transactions in respect of the land held for the corresponding purpose during the same period in adjacent block may be taken as basis for determining the letting value.

(3) The standard rate of assessment for lands held for purposes mentioned in clause (b) or (c) of sub-section (1) of section 59 shall be equal to one-third of the average annual letting value determined or the block in respect of such land under sub-section (2) and for purposes mentioned in clause (b) of sub-section (1) of section 59 shall be one half of the average annual letting value determined for the block in respect of such land.

(4) The standard rates for lands held for agricultural purposes shall be fixed with due regard to soil and position of land and to the profits of agriculture to the consideration paid for leases and to the sale prices of such lands.

6. Mr. A.K. Sanghi, the learned counsel for the appellants submitted that there are restrictions for not exceeding the rental value and assessment rates under sections 81(4) & 81 (6) and rule 5 (b) of section 59, which are quoted above. Mr. Sanghi also submitted that the imposition of land revenue is guided by number of factors, principles, restraints which are not to be found while imposing premium under section 59(5) or the impugned rule 14. There are no guidelines or nexus either with section 59 or the Code itself.

7. Mr. Sanghi further submitted that the impugned Rule 14 which imposed a flat rate of premium irrespective of the factors or considerations which go in imposing land revenue is in excess and violative of section 59(5) and section 258(2)(iii) of the Code. The premium which is sought to be levied cannot exceed the land revenue itself. The land revenue is the main object and purpose of the M.P. Land Revenue Code, 1959.

8. Mr. Sanghi contended that the preamble of the Code says that it is an Act to consolidate and amend the law relating to land revenue, the powers of the Revenue Officers, rights and liabilities of the holders of land from the State Government, agriculture tenures and other matters relating to land and the liabilities incidental thereto in Madhya Pradesh. As such, the premium under sub-section (5) to section 59 which has been charged for diverting the land use from agricultural to non-agriculture is only a part of the land revenue and is being charged by way of additional revenue.

9. According to Mr. Sanghi, the premium has to be less than the land revenue imposed on the diverted land. It cannot exceed the land revenue itself. According to him, in the present case, the premium sought to be imposed is about 100 times than the existing one and is admittedly more than the land revenue in most of the cases.

10. Ms. Vibha Datta Makhija, learned counsel appearing for the respondent State of Madhya Pradesh submitted that the appellants own 10.48 acres of agricultural land situated in village Narela Shankari, Bhopal, Madhya Pradesh.

After obtaining permission for diversion of the land being sought from agricultural purpose to residential purpose, a demand of Rs.4,05,000/- was made on account of premium and the modified land revenue of Rs.52,756. In the case of Indraprastha Grah Nirman Sahakari Sanstha Ltd., a demand for Rs.1,72,054/- was made on account of premium under the impugned Rule 14 and a sum of Rs.2,42,400/- towards land revenue.

11. Ms. Makhija, learned counsel for the State submitted that the appellant herein made the following two submissions before the High Court:

i) The State did not have the power to impose premium since the power prescribed under section 258 which is the source of rule making power in the Code is limited to "regulation" of land revenue; and

ii) Rule 14 and the Schedule appended thereto was ultra vires the constitutional provisions since it violated the mandate of Article 14, inasmuch as, it was arbitrary, and the categories of land therein did not take into account any intelligible differentia while prescribing different slabs of flat rates for imposing premium upon diversion of the use of land."

12. Other grounds which were though challenged in the High Court were not pressed by the appellants before this court. Learned counsel for the appellants has also conceded that there is no lack of power on behalf of the State to impose the premium but has argued that the classification of the rates is illegal and arbitrary since it does not take into account various factors that are statutorily required to be taken into account for the purpose of assessment of land revenue. It has been argued that there is a cap on the quantum of land revenue that can be imposed under section 81(4) and rule 5(b) regarding alteration of assessment and imposition of premium, the premium could also be imposed only within the limits of such a cap.

13. Ms. Makhija, learned counsel for the respondent submitted that the objects and reasons of the Revenue Code state that the Code has been enacted to consolidate the different set of laws regarding land revenue, agricultural tenures and other matters relating thereto in force in different regions of the State of Madhya Pradesh with the purpose of having uniform legislation in the whole of the State.

14. Section 258 is the source of the rule making power of the State which reads as under:

"258. General rule making power.- (1) The State Government may make rules generally for the purpose of carrying into effect the provisions of this Code.

(2) In particular and without prejudice to the generality of the foregoing powers such rules may provide for--

(i)

(ii)

(iii) regulation of assessment of land revenue on diversion of land to other purposes and imposition of premium under section 59.

..... "

15. Learned counsel for the State also submitted that the Revenue Code is comprehensive Code encompassing all aspects pertaining to land. Under the scheme of the Code, ownership of all lands of the State is vested in the Government except for legally vested private rights in lands. Section 58 of the Revenue Code empowers the State Government to levy land revenue on all land except the land that has been exempted from such liability by special grant or contract with the State Government. Learned counsel for the State also contended that section 58(2) states that such revenue is "land revenue", and that the term includes all moneys payable to the State Government for land, notwithstanding that such moneys may be described as premium, rent lease money, quit-rent or in any other manner, in any enactment, rule, contract, or deed. As such, the State Government has been empowered to levy "land revenue" on all land, under different heads which would not only include the yearly assessment of revenue on the land, but also other heads like premium, quit-money etc.

16. Section 59 mandates the variation of land revenue according to the purpose for which land is used. Thus, in the event of diversion of land from a particular land use to another land use, a reassessment of the land revenue is prescribed. In addition, the Government has also been empowered to impose a premium for such a purpose.

17. Section 59(2) empowers the State Government to re-assess and re-fix the land revenue leviable on such a parcel of land the use of which is required to be converted/diverted. In addition to the levy of the land revenue, section 59(5) prescribes a one time levy of premium on such conversion/diversion in accordance with the Rules made under the Revenue Code.

18. Learned counsel for the State further submitted that in exercise of powers under section 258 and section 59, the State Government framed the Rules regarding alteration of assessment and imposition of premium vide notification No. 175-6477-VII-N (Rules); dated the 6th January 1960 and as amended by Notification No. 1400-VII-N-1, dated 21st May 1971, published in M.P. Raj. Pt. 4G, dated 11.6.1971, p. 270 and by Notification No.F.11-7-VII-S-8-89 dated 24.1.2000. As per the amendment made in the year 2000, the Schedule prescribes the premium leviable on the conversion of the use of land increased manifold keeping in account the steep escalation in land values.

19. Learned counsel for the State also argued that it is clear that the Government has full power to not only fix land revenue rates, re-fix them upon conversion/

diversion of land for another use, but also charge premium upon the diversion of land for another use. Thus, the levy of premium on conversion of the use of land by the Government is unequivocal, legal and valid and cannot be questioned.

20. In reply to the argument of learned counsel for the appellants with regard to arbitrary imposition of rates of revenue, the learned counsel for the State submitted that the imposition of the land revenue is guided by number of factors and principles. According to various provisions of the Code, they are not imposed in an arbitrary fashion.

21. Learned counsel for the State further submitted that bare perusal of the scheme of Revenue Code clearly empowers the State Government to impose a premium in addition to the land revenue. The Statement of Objects and Reasons of the Revenue Code as well as the explanation of the term "land revenue" in section 58(2) clearly establishes that land revenue includes a recurrent periodic levy and other levies on the land as prescribed under the Code. According to the learned counsel for the State, reliance of the appellants on sections 75 to 98 is of no relevance in the present case since they pertain to the initial fixation of the land revenue. The factors as prescribed in these provisions mandate that the land revenue should be directly proportionate to the use and value of land and must be arrived at after determining all the factors that would govern the value of a particular parcel of land.

22. Learned counsel for the State further submitted that the factors that determine the land revenue of a particular parcel of land cannot be the determining factors for fixing the rates of premium to be imposed on conversion/diversion of the land for a different use. Learned State counsel submitted that the factors governing the imposition of premium are inherently different from those governing the assessment/determination of land revenue. This is so since the purpose and object of both the levies are inherently different in character. While the land revenue is a levy closely identifiable with the benefits arising out of occupation of land, premium is a charge on the benefit arising out of betterment of ones holding. The land revenue is of a recurrent nature which is required to determine in relation to a particular parcel of land and its actual value whereas premium is a one time charge, the basis of determination of which is the estimated value of benefit that is estimated to accrue by virtue of a change in better land use. This basis is fortified by the existence of rule 13 which prescribes that when any land assessed for any non-agricultural purpose is diverted to any agricultural purpose no premium shall be imposed under section 59(5). Similarly, rule 15 prescribes that upon re-diversion of land from other uses to agricultural, although the premium shall not be refunded, no further premium shall be charged for re-diversion. Thus, upon amalgamation of agricultural lands in urban areas, the value of such lands inherently undergo a betterment in value and thus the premium is validly charged a condition for granting permission to better the usage of land. Thus, the charge i.e. the premium

which has a direct nexus to the opportunity of betterment of a parcel of land shall be valid and legal.

23. Learned counsel for the State further submitted that the classes prescribed in Schedule under rule 14 are based on an intelligible differentia taking into account the location of land. Since the location of land is determinative of the value of the potential use of the land, the criteria of classifying the categories according to the area in which the property falls has a direct nexus to the potential value of the land. The Schedule prescribes different classes according to the municipal area or the rural area that the parcel of land is situated. Within the categories of various municipal areas/village areas, the distance of the property from the center of municipal area is also taken into account. Different rates for different areas are prescribed. As such, the estimated appreciation of value is assessed on the basis of the location of the property which is the determinative factor for this purpose. The said criteria are clearly directly related to the development policies of the government to amalgamate rural holdings falling within and/or outside the municipal areas of various cities. The classification of various cities is again determined as per the values of land in these cities, the extent of population of these cities, and the character of cities. Thus, the important cities of the State are classified differently from the smaller cities and towns, as also according to their population. Further, the villages are also classified differently, and the rate for levying premium for conversion is accordingly prescribed. As such, the schedule is based on a reasonable differentia after taking into account relevant factors for this purpose, and is thus non-arbitrary and non-discriminatory. As such, neither the rule 14 nor the Schedule prescribed therein is ultra vires Article 14 of the Constitution of India.

24. Learned counsel for the State also submitted that the requirement of classifying various cities, towns and villages according to rational criteria is also based on the requirement of having uniformity of levies in the whole of the State, which is the very primary object of the Revenue Code. Learned counsel for the State submitted that in the instant case, the legislature has not exceeded its jurisdiction in legislating the impugned rule 14 and the schedule thereto. Rule 14 and schedule thereto are not arbitrary and have a direct nexus with the objective still to be achieved.

25. Learned counsel for the State submitted that in the impugned judgment, the Division Bench of the High Court was justified in arriving at the conclusion that the rule which has been assailed on the ground that the rule making authority has gone beyond the statute is totally without any basis or foundation. Learned counsel further submitted that the High Court was justified in coming to the conclusion that the classification made therein neither suffers from absence of intelligible differentia nor does it invite the wrath of equality clause as engrafted under Article 14 of the Constitution. According to the learned counsel for the respondent, the Division Bench was justified in concluding that the respondent was fully

empowered to the premium on conversion of land. Learned counsel for the respondent also submitted that the impugned judgment has correctly analysed and interpreted the various provisions of the Revenue Code and hence no interference is warranted by this court.

26. We have carefully perused the pleadings, impugned judgment and the submissions made on behalf of the appellants and respondent State of Madhya Pradesh.

27. Careful analysis of the facts and reasons of the Revenue Code lead to the following conclusions:-

I) The State Government enjoys ample powers of not only to fix land revenue rates or to re-fix them upon conversion/diversion of the land for another use but also charges premium upon diversion of land for another use.

II) The premium is one time charge for diversion of land for better land use under rule 14 of the Code. Rule 13 prescribes when land is assessed for any non-agricultural purpose is diverted to any agriculture purpose, no premium shall be imposed under section 59 (5). The scheme of the Act clearly reveals that the premium is charged only when land use is converted for betterment. In this view of the matter, the State is fully justified in charging the premium and the same is in consonance with the spirit, objects and reasons of the M.P. Land Revenue Code.

On careful analysis of the entire scheme of the Act and the provisions of the Code it cannot be said that rule 14 is violative of Article 14 of the Constitution.

III) The classification of various cities in the State is determined as per the values of land in different cities, the extent of population of those cities and the character of those cities. The important cities of the State are classified differently from smaller cities and towns as also according to their population. Similarly, villages are also classified differently and rate of levying premium for conversion is accordingly prescribed. The Schedule is based on reasonable differentia taking into account relevant factors for the purpose and it cannot be called arbitrary or discriminatory.

28. In view of our aforesaid findings these appeals filed by the appellants being devoid of any merit are accordingly dismissed. In the facts and circumstances of the case, the parties are directed to bear their own costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2764

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Justice Mukundakam Sharma

29 August, 2008*

HARI SINGH GOND

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 84 - *Kinds of unsound mind persons - (1) An idiot, (2) One made non-compos by illness, (3) A lunatic or a made man and (4) One who is drunk.* (Para 7)

क. दण्ड संहिता (1860 का 45), धारा 84 — विकृतचित्त व्यक्तियों के प्रकार — (1) जड़, (2) जो व्याधि के कारण विकृत चित्त हो गया हो, (3) पागल या विक्षिप्त व्यक्ति तथा (4) जो मत्त हो।

B. Penal Code (45 of 1860), Section 84, Evidence Act, 1872, Section 105 - *Act of a person of unsoundmind - Burden of proof & degree of proof - Burden of proof rests on accused to prove his insanity - Burden is not so onerous as that upon the prosecution - The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding.* (Para 5)

ख. दण्ड संहिता (1860 का 45), धारा 84, साक्ष्य अधिनियम 1872, धारा 105 — विकृत चित्त व्यक्ति का कृत्य — सबूत का भार और सबूत की मात्रा — सबूत का भार अभियुक्त पर है कि उसकी विकृत चित्तता साबित करे — भार उतना अधिक नहीं जितना कि अभियोजन पर होता है — अभियुक्त पर सबूत का भार उससे अधिक नहीं होता जितना कि सिविल कार्यवाही में वादी या प्रतिवादी पर होता है।

C. Penal Code (45 of 1860), Section 84 - *What factors are to be considered - The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place - In coming to that conclusion, the relevant circumstances are to be taken into consideration - It would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime.* (Para 9)

ग. दण्ड संहिता (1860 का 45), धारा 84 — किन कारकों पर विचार किया जाता है — यह विनिश्चित करने के लिए कि क्या इस धारा का लाभ दिया जाना चाहिए या नहीं निर्णायक समय वह तात्त्विक समय है जब अपराध कारित किया हो — इस निष्कर्ष पर आने के लिए सुसंगत परिस्थितियाँ विचार में ली जाना चाहिए — केवल अपराध की प्रकृति पर से किये गये तर्कों से विकृत चित्तता की प्रतिरक्षा स्वीकार करना जोखिमपूर्ण होगा।

D. Penal Code (45 of 1860), Section 84 - *Mere absence of motive of a crime, how so ever atrocious it may be, cannot in the absence of, plea*

and proof of legal insanity, bring the case within this section - Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under this section. (Para 9)

घ. दण्ड संहिता (1860 का 45), धारा 84 - किसी अपराध के हेतु का अभाव मात्र, चाहे वह कितना भी नृशंस हो, विधिक विकृत चित्तता के अभिवचन और सबूत के अभाव में, मामले को इस धारा के अधीन नहीं ला सकता - मनोरोगी का केवल मस्तिष्क की असामान्यता या आंशिक भ्रम, अप्रतिरोध्य आवेग या बाध्यकारी व्यवहार इस धारा के अन्तर्गत कोई संरक्षण प्राप्त करने के लिए समर्थ नहीं।

E. Penal Code (45 of 1860), Section 84 - When provisions are attracted - *The benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act, he was doing or that even if he did not know it, it was either wrong or contrary to law then this section must be applied.* (Para 9)

ङ. दण्ड संहिता (1860 का 45), धारा 84 - उपबंध कब आकृष्ट होते हैं - यह साबित करने के पश्चात् ही लाभ उपलब्ध होता है कि कृत्य करते समय अभियुक्त मस्तिष्क के रोग के कारण तर्क की ऐसी त्रुटि से ग्रस्त था कि उसे उस कृत्य की प्रकृति या गुण का ज्ञान नहीं था जो वह कर रहा था या फिर यदि उसे यह ज्ञान नहीं था कि यह गलत या विधिक के प्रतिकूल था, तब यह धारा लागू की जानी चाहिए।

F. Penal Code (45 of 1860), Section 84 - When the provisions are not attracted - Explained.

The mere fact that an accused is conceited, odd, irascible and his brain is not quite alright or that the physical & mental ailments from which he suffered had rendered his intellect, weak and had affected his immotions and will or that he had committed certain unusual act, in the past or that he was liable to recurring feets of insanity at short intervals, or he was subject to getting epileptic feets, but there was nothing abnormal in his behaviour or that his behaviour was queer, cannot be sufficient to attract the application of this section. (Para 10)

च. दण्ड संहिता (1860 का 45), धारा 84 - उपबंध कब आकृष्ट नहीं होते - स्पष्ट किया।

G. Criminal Procedure Code, 1973 (2 of 1974), Section 157 - Duty of investigator - *Where during the investigation, previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court, and if, this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused - The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors.* (Para 6)

छ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 – अनुसंधानकर्ता का कर्तव्य – जहाँ अनुसंधान के दौरान पागलपन का पूर्व इतिहास प्रकट होता है तो एक ईमानदार अनुसंधानकर्ता का यह कर्तव्य है कि अभियुक्त को चिकित्सकीय परीक्षण के लिए भेजे और वह साक्ष्य न्यायालय के समक्ष पेश करे, और यदि ऐसा नहीं किया जाता है, तो यह अभियोजन के मामले में गम्भीर अशक्तता पैदा करता है और संदेह का लाभ अभियुक्त को देना पड़ता है – तथापि, अभियुक्त के अपराध के तत्काल पूर्व के आचरण और अपराध के समय या उसके तुरन्त बाद के आचरण के बारे में उसकी मानसिक दशा और अन्य सुसंगत कारकों का साक्ष्य पेश करके इस मार से उन्मोचित हो सकता है।

Cases referred :

1972 CrLJ 1523 (SC), (1843) 4 St.Tr. (NS) 847.

J U D G M E N T

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT, J. :- Challenge in this appeal is to the judgment of a Division Bench of the Madhya Pradesh High Court at Jabalpur confirming the conviction of the appellant for offences punishable under Sections 302 and 201 of the Indian Penal Code, 1860 (in short the 'IPC') as recorded by learned Sessions Judge Mandla in Sessions Case No. 66 of 1995 who imposed sentences of imprisonment for life and three years respectively.

2. Background facts, as projected by the prosecution, during trial are as follows:

Harilal Gond (hereinafter referred to as the 'deceased') was the maternal grandfather in law of the accused and in the night of incident accused, deceased and his samdhi Motilal were sleeping in the same house.

Shyamlal (PW1), son in law of the deceased brought his son in law accused Hari Singh on 23.2.1995 to Mohda from Singanpuri for treatment. On 25.2.1995 in the evening Motilal (PW2) the father of Shyamlal and his samdhi i.e. deceased and son in law i.e. accused Hari Singh were sleeping in the same room after having their meal. Shyamlal alone was sleeping in his room. Shyamlal got up around 3-3.30 after hearing the shouting of his son in law who was pushing his door. Then accused ran towards him to beat and in fact beat Shyamlal with the lathi which he was carrying in his hand. Shyamlal ran away and went to the house of Baldan. After sometime he observed that his house was burning. Then he came running towards his house and conveyed the same to the villagers. When he went along with villagers to his house then the villagers Mulloo Singh, Chamru Singh etc. caught hold of accused Hari Singh and they observed that there was a fire in the room where Harilal the father in law of Shyamlal was sleeping and his father in law was burnt and had died. Motilal the father of the Shyamlal told him that Hari Singh had slapped him at his cheek and had also kicked him at his back and by taking lathi and trishul he ran after him, then he also ran away. Then accused started beating deceased Harilal with stick and accused hit Harilal several times due to which Harilal died. Then accused put some grains on fire which were lying in that room, due to which not only the house caught the fire but Harilal was also

burnt. The incident was reported by Shyam Lal in writing to police chowki Maneri of police station Bija Dandi at 9.00 A.M. in the morning and the report is Ex.P-1. On conducting the post-mortem of Harilal, the whole dead body was found to have been burnt, there were many injuries on his body and there was fracture in the head and all the injuries were ante mortem.

After investigation, charge sheet was filed. Since accused pleaded innocence, trial was held.

The trial court relied on the evidence of eye witness Moti Lal (PW 2) while Kali Bai (PW 4) corroborated the statement of eye witness about the unusual behaviour of the accused.

The trial court found the evidence to be cogent and accordingly recorded conviction and imposed sentence as noted above. It did not accept the plea that Section 84 IPC has application. In appeal before the High Court the stand about unsoundness of mind and protection under Section 84 IPC was pressed into service.

The prosecution on the other hand submitted that Section 84 has no relevance or application. High Court accepted State's stand and accordingly dismissed the appeal.

3. In the present appeal it was submitted that the unusual behaviour of the accused has been stated by even the eye witness PW2 and PW 4 and, therefore, the courts below were not justified in rejecting the plea of protection under Section 84 of the Act.

4. Learned counsel for the respondent on the other hand supported the judgment of the trial court and the High Court.

5. Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of "unsoundness of mind" in the IPC. Courts have, however, mainly treated this expression as equivalent to insanity. But the term "insanity" itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A Court is concerned with legal insanity, and not with medical insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Indian Evidence Act, 1972 (in short the 'Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See *Dahyabhai v. State of Gujarat* AIR 1964 SC 1563). In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane.

In all cases, where previous insanity is proved or admitted, certain considerations have to be borne in mind. Mayne summarises them as follows:

"Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detections whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case: 'Would the prisoner have committed the act if there had been a policeman at his elbow? It is to be remembered that these tests are good for cases in which previous insanity is more or less established. These tests are not always reliable where there is, what Mayne calls, "inferential insanity".

6. Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

7. There are four kinds of persons who may be said to be non compos mentis (not of sound mind), i.e., (1) an idiot; (2) one made non compos by illness (3) a lunatic or a mad man and (4.) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and

Misdemeanors, 12th Edn. Vol., p.105; 1 Hala's Pleas of the Crown 34). A person made non compos mentis by illness is excused in criminal cases from such acts as are committed while under the influence of his disorder, (See 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

8. Section 84 embodies the fundamental maxim of criminal law, i.e., *actus non reum facit nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furios is nulla voluntas est*).

9. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. Stephen in 'History of the Criminal Law of England, Vo. II, page 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section. This Court in *Sherall Walli Mohammed v. State of Maharashtra*: (1972 Cr.LJ 1523 (SC)), held that the mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated Naughton rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to

them by the House of Lords, in *M Naughton's case* (1843) 4 St. Tr. (NS) 847. Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or perfect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

10. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section.

11. The trial Court and the High Court have, on the facts of the case, rightly held that Section 84 IPC has no application.

12. It is submitted that the accused-appellant is in custody since 23.1.1996 and Section 339 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C') has application. We express no opinion in that regard.

13. Appeal is dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2771

WRIT APPEAL

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

22 February, 2008*

R.K. GEETE

... Appellant

Vs.

DEPUTY MANAGING DIRECTOR &

CORPORATE DEVELOPMENT OFFICER & ors.

... Respondents

A. Constitution, Article 311 - Departmental Enquiry - Principles of Natural Justice - Appellant himself chosen not to participate in disciplinary proceeding - It does not lie in his mouth that principles of Natural Justice have been given indecent burial. (Para 6)

क. संविधान, अनुच्छेद 311 - विभागीय जाँच - नैसर्गिक न्याय के सिद्धांत - स्वयं अपीलार्थी ने अनुशासनिक कार्यवाही में भाग लेना पसंद नहीं किया - वह यह नहीं कह सकता कि नैसर्गिक न्याय के सिद्धांतों को अशिष्ट रूप से दफन कर दिया गया।

B. Constitution, Article 311 - Departmental Enquiry - Acquittal in criminal case - Appellant was Asstt. Manager in State Bank of India - He was custodian of extension counter - On surprise check Rs. 1 lacs were found short - He was prosecuted u/ss 409 & 477A of I.P.C. - Departmental Enquiry on the allegation that he had failed to protect the Bank's interest as a result of which Bank has been saddled with pecuniary loss of Rs. 1 lacs initiated - Charges were found proved and appellant was dismissed from service - Appellant thereafter acquitted in criminal proceedings - Held - Scope of criminal proceedings and scope of departmental proceedings are quite distinct, exclusive and independent of each other - Both the proceedings were on a totally different sets of facts and charges - Charges have a different character, tenor and contour - No scintilla of doubt that charge sheet is absolutely different - Appeal dismissed. (Paras 8 & 9)

ख. संविधान, अनुच्छेद 311 - विभागीय जाँच - दाण्डिक मामले में दोषमुक्ति - अपीलार्थी भारतीय स्टेट बैंक में सहायक प्रबंधक था - वह विस्तार पटल का संरक्षक था - आकस्मिक जाँच पर 1 लाख रुपये कम पाये गये - उसे भा.द.सं. की धारा 409 व 477ए के अन्तर्गत अभियोजित किया गया - विभागीय जाँच इन आरोपों पर प्रारम्भ की गई कि वह बैंक के हितों की रक्षा करने में असफल हो गया था जिसके परिणामस्वरूप बैंक पर 1 लाख रुपये का आर्थिक भार डाला गया - आरोप साबित पाये गये और अपीलार्थी को सेवा से पदच्युत किया गया - अपीलार्थी उसके बाद दाण्डिक कार्यवाहियों में दोषमुक्त हो गया - अभिनिर्धारित - दाण्डिक कार्यवाहियों का क्षेत्र और विभागीय कार्यवाहियों का क्षेत्र एक-दूसरे से बिल्कुल भिन्न, अनन्य और स्वतंत्र हैं - दोनों कार्यवाहियों तथ्यों और आरोपों के पूर्णतः भिन्न समूहों पर थीं - आरोपों की भिन्न प्रकृति तात्पर्य और रूप रेखा होती है - जरा भी संदेह नहीं कि आरोप पत्र पूर्ण रूप से भिन्न था - अपील खारिज।

Cases referred :

(2003) 3 SCC 583, (2005) 7 SCC 764.

Rahul Rawat, for the appellant.

Sujoy Paul, for the respondents.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- In this writ appeal preferred under Section 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth ko Appeal) Adhiniyam, 2005 justifiability and cogency of the order dated 18-4-2006 passed by the learned single Judge in W.P. No.281/99 is called in question. .

2. The facts which are imperative and indispensable to be enumerated are that the appellant-petitioner [hereinafter referred to as 'the appellant'] was serving on the post of Assistant Manager in Jain Mandir Gas Relief Extension Counter, Bhopal of the State Bank of India and was the custodian of the said Extension Counter. On a surprise cheque made on 28-4-1992 it was found that there was shortage of Rs.1,00,000/- and accordingly an FIR was lodged. The appellant was prosecuted under Section 409 of the Indian Penal Code (for short 'the IPC') and was convicted by the trial Court. On an appeal being preferred the learned Additional Sessions Judge reversed the judgment of conviction and recorded acquittal on the ground that the prosecution had failed to establish the fact that the appellant had misappropriated the amount in question. The said judgment in appeal was rendered on 9-4-2004. After the said judgment came to be passed the appellant submitted a representation to consider the penalty in view of the decision of the criminal Court by letter dated 11-4-2005 but the same was not considered. As is discernible from the expose of facts a departmental enquiry was initiated against the appellant. A charge-sheet was issued on 25-7-1994. In the departmental proceeding the charges levelled against the appellant were found proven and on the basis of the same the disciplinary authority imposed the punishment of dismissal. The order passed by the disciplinary authority was assailed before the appellate authority who concurred with the order passed by the disciplinary authority on 18-8-1997. The order of dismissal passed by the disciplinary authority and affirmation thereof by the appellate authority was the subject-matter of attack before the learned Single Judge in invocation of extraordinary jurisdiction under Article 226 of the Constitution of India. It was contended that once an order of acquittal has been recorded in his favour he was entitled to be reinstated. It was further put forth that the allegations in the departmental charge-sheet and the prosecution that was launched against the appellant being based on selfsame facts the decision rendered in criminal case has to be given due prevalence and the order of punishment was to be axed. Quite apart from the above, it was urged before the learned single Judge that the Department has given indecent burial to the principles of natural justice and ex parte proceeding was held against him which has entailed in his dismissal and, therefore, the said order deserves to be quashed.

3. The contentions put forth by the appellant before the learned single Judge, was strongly resisted by the Department contending, inter alia, that criminal prosecution and the charges levelled against the appellant, delinquent employee were quite different and acquittal in the criminal case ipso facto would not inure to his benefit. It was also canvassed that the departmental enquiry was an ex parte one and in fact, ample opportunity of hearing was afforded to the appellant who chose not to avail the same and, therefore, in fact, the appellant had appeared before the enquiry officer on number of occasions but chose to avoid the proceedings and under these circumstances, there was no justification to contend that the principles of natural justice have not been followed. The learned single Judge upon hearing the learned counsel for the parties came to hold that charge-sheet in the criminal case was under Section 409 of the IPC and falsification of accounts under Section 477 of the IPC but the charges levelled against the appellant in the departmental proceeding was different; that the allegation that the appellant was proceeded ex parte was not acceptable inasmuch as the appellant had not participated in the proceedings and tried to submit medical certificates which cannot be given credence to; that the acquittal in respect of the offence would not consequently entail dislodging the order of dismissal inasmuch as in the departmental proceeding misconduct had been proved and parameters and standard of proof in a departmental proceeding are different than a criminal case.

4. We have heard Mr. Rahul Rawat, learned counsel for the appellant and Mr. Sujoy Paul, learned counsel for the respondents.

5. It is not disputed that the appellant was working as an Officer-in-Charge of Jain Mandir Gas Relief Extension Counter. It is not in dispute that he was prosecuted for the offence punishable under Sections 409 and 477-A of the IPC. There is no cavil over the fact that during the pendency of the criminal case a departmental proceeding was initiated and eventually he was dismissed from service and that was affirmed in appeal. It is admitted that the appellant was initially convicted and later on he was acquitted by the learned appellate Judge. The questions that emanate for consideration whether by virtue of acquittal in the criminal case the appellant is entitled to be reinstated in service and further the departmental proceeding is vitiated due to non-compliance of principles of natural justice.

6. First we would advert to the facet whether there has been compliance of the principles of natural justice. The learned single Judge in the order impugned had addressed himself to the certificate issued by Jaslok Hospital and Research Centre dated 11-10-1994 wherein it has been certified that the appellant would be fit to resume the work from 1-11-1994. After that date the appellant appeared in the departmental enquiry but thereafter remained absent. It is worth-noting that the appellant had produced certain certificates issued by a Homeopathic doctor. Said certificates have not been given credence to by the learned single Judge on

the ground that they were availed from a private Homeopathic doctor and further ex parte proceeding was taken up against the appellant on 15-7-1995. The learned single Judge has further opined that there is no certificate on record to show that the appellant was ill. When the appellant had himself chosen not to participate in the disciplinary proceeding it does not lie in his mouth that the principles of natural justice have been given indecent burial. On a scrutiny of the record and the reasonings given by the learned single Judge on this score, we are of the considered opinion that the finding recorded on that count is absolutely impeccable.

7. Another facet of violation of principles of natural justice which has been canvassed before us, is that the appellant was not permitted to engage an advocate. It is noteworthy to mention the presenting officer engaged by the Bank was a bank employee and not an advocate. There can be no scintilla of doubt that the same did not involve any complex question of law and, therefore, engagement of any advocate was not necessary. Thus, it cannot be said that there has been violation of principles of natural justice. The next submission of the learned counsel for the appellant is that once he has been acquitted in the criminal appeal and the charges are similar, he is entitled to be reinstated. To appreciate the said submission it is seemly to reproduce the charges that were framed in the departmental proceedings:

“Statement of allegations

While you were working as Officer-in-Charge at Jain Mandir Gas Relief Extension Counter (under Hamidia Road (Bhopal) Branch, on 28-4-92, a shortage of Rs.1.00 lac was found in the cash balance held in your sole custody, by the Branch Manager, Hamidia Road Branch, who carried out the surprise verification of the cash of the extension counter on that date. You, being the sole custodian of the cash of the Extension Counter and personally responsible for the correctness of the cash held in your single custody, failed to protect the Bank's interests and the Bank has been saddled with a pecuniary loss of Rs.1 lac.

Articles of Charges

You are charged with gross negligence in the performance of your duties unmindful of Bank's interests. By failing to protect the Bank's interests/cash, you have exhibited lack of devotion to duty. Your acts are unbecoming of a Bank official and contravenes Rule No.50(4) of the State Bank of India Officers Service Rules governing your services in the Bank.”

8. The appellant was prosecuted for the offence punishable under sections 409 and 477A of the IPC. The charges, as we perceive, have a different character, tenor and contour. In *T.N.C.S. Corporation Ltd. and others vs. K. Meerabai*, (2006)2 SCC 255 a two-Judge Bench of the Apex Court took note of the fact that the respondent therein was an accused in criminal case instituted against him for

offence punishable under section 409 of the IPC (criminal breach of trust) and falsification of accounts punishable under section 477A of the IPC whereas the charges in the departmental enquiry were violation to maintain prescribed records for issue of stock and for swindling the Corporation in collusion with the other members of the staff through misappropriation of stock and cash of the Corporation thereby causing huge loss to the Corporation. The Bench expressed the opinion that the High Court had lost sight of the fact that scope of criminal proceedings in a criminal court and the scope of disciplinary proceedings in a departmental enquiry are quite distinct, exclusive and independent of each other; that criminal proceedings in criminal court and disciplinary proceedings were on totally different sets of facts and charges; and that the disciplinary authority has arrived at impeccable conclusions based on dispassionate appreciation of the evidence on record and supported by legally irrefutable reasons. After so stating their Lordships referred to the decisions rendered in *Lalit Popli v. Canara Bank*, (2003)3 SCC 583 and *Ajit Kumar Nag vs. G.M. (PJ), Indian Oil Corpn. Ltd.*, (2005) 7 SCC 764 came to hold as under:

“32. The scope of disciplinary proceedings and the scope of criminal proceedings in a court of criminal law are quite distinct, exclusive and independent of each other. The prosecution proceedings launched against the respondent herein were in respect of offences punishable under Sections 409 and 477-A IPC, whereas the departmental proceedings as initiated against her were in respect of the charges of misappropriation and other fraudulent practices such as deliberate omission to bring into account the stock received showing bogus issues in the records, falsification of accounts, submission of defective accounts, tampering of records, manipulation of accounts and records, etc. Thus, the respondent herein was proceeded against for quite different charges and on different sets of facts before the Court of Chief Judicial Magistrate, on the one hand, and before the departmental enquiry on the other.

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35. In the instant case, the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning and, therefore, in our opinion, the matter should be dealt with firmly with firm hands and not leniently. In the instant case, the respondent deals with public money and is engaged in financial transactions or acts in a fiduciary capacity and, therefore, highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, the conclusion of the learned Single Judge as affirmed by the Division Bench of the High Court do not appear to be proper. We

have no hesitation to set aside the same and restore the order passed by the disciplinary authorities upholding the order of dismissal.”

9. In the case at hand the allegations in the chargesheet are that the appellant was Officer-in-Charge of the Extension Counter and was responsible for the correctness of the cash, he has failed to protect the bank's interest as a result of which the Bank has been saddled with pecuniary loss of Rs.1,00,000/-. There was also allegation that he was grossly negligent in performance of his duties, unmindful of Bank's interests. It was also the allegation that he had exhibited lack of devotion to duty and failed to protect the Bank's interests. There is no scintilla of doubt that the charge-sheet is absolutely different. The enquiry officer has found in the enquiry that the appellant was guilty of the charges. The disciplinary authority has concurred with the same. We have already held that the learned Single Judge is absolutely justified in holding that the enquiry officer has correctly proceeded ex parte against him and nothing can be flawed in it.

10. In view of the aforesaid analysis we perceive no merit in this appeal, accordingly the same stands dismissed without any order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2776

WRIT APPEAL

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

17 April, 2008*

MADAN MOHAN CHATURVEDI

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 19, Foreign Liquor Rules, M.P. 1996, Rule 8 - *For the year 2006-07 Government has taken decision that licence of existing licence holders shall be renewed after payment of 20% extra licence fee - It is contended that this decision is contrary to the provision of Rule 8 of Rules 1996 - It is further contended that such a policy restrained from applying a new person for licence and this policy is violative of Fundamental Rules and Article 19 of the Constitution - Held - Provision of Rule 8(a) is amply clear that the State Government is having power to issue direction from time to time with regard to the grant of licence in form FL-1 and under this provision if direction has been issued or the policy decision has been taken that is within the power of Government - No case is made out for interference.* (Para 7)

क. संविधान, अनुच्छेद 19, विदेशी मदिरा नियम, म.प्र. 1996, नियम 8 - वर्ष 2006-07 के लिए सरकार ने निर्णय लिया कि विद्यमान लायसेंस धारकों के लायसेंस 20 प्रतिशत

अतिरिक्त लायसेंस शुल्क भुगतान करने पर नवीनीकृत किये जायेंगे – यह प्रतिवादित किया गया कि यह निर्णय नियम 1996 के नियम 8 के उपबंध के प्रतिकूल है – यह भी प्रतिवादित किया गया कि ऐसी नीति नये व्यक्तियों को लायसेंस के लिए आवेदन करने से प्रतिषिद्ध करती है और यह नीति मूलभूत नियम और संविधान के अनुच्छेद 19 के अतिक्रमणकारी है – अभिनिर्धारित – नियम 8(ए) का उपबंध व्यापक रूप से स्पष्ट है कि राज्य सरकार को प्रारूप एफएल-1 में लायसेंस प्रदान करने के सम्बन्ध में समय-समय पर निदेश जारी करने की शक्ति है और इस उपबंध के अन्तर्गत यदि निदेश जारी किया गया है या नीति निर्णय लिया गया है वह सरकार की शक्ति के अन्तर्गत है – हस्तक्षेप के लिए कोई मामला नहीं बनता।

B. Foreign Liquor Rules, M.P. 1996, Rule 8 - Sale of foreign liquor
- It was argued that provision after words "or in such other manner as the State Government may direct from time to time", is only applicable for draw of lottery and not for exempting from inviting applications - Held - If one reads the latter provision of Clause 8(1)(a) after the word 'or', it would be clear that the same provides the power to the State Government to deal the subject in any other manner as the State Government may direct from time to time - These words cannot be read in isolation but they have to read in generality as they control the earlier provisions which includes the grant of licence on individual basis on fixed basic fee and licence fee by inviting the applications.
 (Para 6)

खा. विदेशी मदिरा नियम, म.प्र. 1996, नियम 8 – विदेशी मदिरा का विक्रय – यह तर्क किया गया कि शब्द “या ऐसे अन्य प्रकार से जैसा राज्य सरकार समय-समय पर निदेशित करे” के बाद के उपबंध केवल लॉटरी निकालने के लिए लागू होते हैं न कि आवेदन आमंत्रित करने से छूट देने के लिए – अभिनिर्धारित – यदि शब्द ‘या’ के बाद खण्ड 8(1)(ए) का उपबंध एक बार पढ़ा जाए तो यह स्पष्ट हो जाएगा कि यह राज्य सरकार को विषय को ऐसे अन्य प्रकार से जैसा राज्य सरकार समय-समय पर निदेशित करे व्यवहार करने की शक्ति प्रदान करता है – ये शब्द अलग नहीं पढ़े जा सकते बल्कि वे व्यापकता में पढ़े जाना चाहिए क्योंकि वे पूर्ववर्ती उपबंधों को नियंत्रित करते हैं जिसमें आवेदन आमंत्रित करने के द्वारा नियत प्राथमिक शुल्क और लायसेंस शुल्क पर व्यक्तिगत आधार पर लायसेंस प्रदान किया जाना शामिल है।

N.S. Kirar, for the appellant.

Vivek Khedkar, G.A., for the respondent Nos.1 to 4.

ORDER

The Order of the Court was delivered by **ABHAY GOHIL, J. :-** The appellant being aggrieved with the order dated 31/12/2007 passed by the learned Single Judge in Writ Petition No.6001/07 has filed this Writ Appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

2. Briefly stated, the facts of the case are that appellant/petitioner has filed Writ Petition under Article 226 of the Constitution of India stating therein that though he is not having any liquor licence, but he intend to obtain the licence for

selling the liquor. Therefore, as per the recent liquor policy of 2006-07, he should also be treated at par with the existing licence holders. It is further contended that the Government has issued liquor policy for the year 2006-07 and has taken decision that the licence of the existing licence holders shall be renewed after payment of 20% extra licence fees. It is further contended that, this decision of the government is contrary to the provisions of Rule 8 of M.P. Foreign Liquor Rules, 1996 (hereinafter shall be referred as 'Rules of 1996'). It is further contended that though he is not the licenceholder but by issuing such a policy he has been restrained from applying for licence as the Government will renew the existing licences on payment of extra fees and this policy is violative of Fundamental Rules and Article 19 of the Constitution of India. Return was filed by the Government and government supported the policy and it was submitted that the policy is not violative of Rule 8 or any fundamental right of the petitioner.

3. By the impugned order, the learned Single Judge dismissed the Writ Petition holding therein that the right to carry on business of liquor is not a fundamental right though the petitioner has right of equality before the law. Learned Single Judge has further held that until and unless validity of Rule 8 under which the shops are allotted is challenged, this court can not strike down the said rules. Learned Single Judge has also considered the provisions of Rule 8 of Rules of 1996 and it was held that this rule does not provide that application shall be invited every year and the learned Single Judge was of the view that it is a contractual matter until and unless the State acted arbitrarily or malafidely, no interference can be made in the contractual matters and dismissed the petition, against which the petitioner has filed this Writ Appeal.

4. We have heard the learned counsel for the parties and perused the record. Shri S.N. Kirar, learned counsel for the appellant submitted that during the pendency of Writ Peition, the petition was amended and he has prayed for quashment of policy, which was Annexure R/1, but the amended petition was not considered. His contention was that without amending the rules of Rule 8, a contrary policy can not be issued and a person can not be debarred from filing an application for getting the licence FL-1 and the decision taken by the Government and published by the Commissioner is contrary to law and the Government can not take any decision for renewal of old licences on the basis of enhanced fees but the Government has to invite applications for grant of licence and by issuing the aforesaid policy, Government has indirectly debarred the petitioner from filing any application for grant of licence of liquor.

5. In reply Shri Vivek Khedkar, learned Govt. Advocate submitted that according to the policy Annexure R/1, Government has authorized the Commissioner to renew the licences on payment of 20% extra licence fees. The policy is in accordance with the rules of 1996 and the aforesaid rule does not prohibit the government to adopt the aforesaid mode. It was further submitted

that lot of shops are lying vacant for allotment through licences, but the appellant has not filed any application for grant of any licence for any of the area and still 17 blocks are lying vacant where shops are not allotted to anybody else. It was further submitted that the appellant is free to apply for licence under those blocks but he cannot be treated as licensee for the purpose of renewal of existing shops without he being the licence holder.

6. After considering the rival contentions of the learned counsel for the parties, first of all we have considered the provisions of Rule 8 (1) (a) of the Rules of 1996, which reads as under :-

"8. Sale of Foreign Liquor.-(1) Categories of licences.-Licences for the sale of foreign liquor shall be of the following categories and the mode of grant of these licences shall be as indicated hereunder :-

(a) F.L.1 (Licence for retail sale of foreign liquor in sealed bottles, not to be consumed on the premises).- The licence in Form F.L.1 shall be granted individually on fixed basis licence fee and licence fee, by inviting applications for each shop, and if the number of applications are more than one then by disposing of applications by draw of lottery or in such other manner as the State Government may direct from time to time. The F.L.1 licensee shall sell foreign liquor in sealed bottles to consumers and to F.L.3, F.L.4, F.L.4-A and F.L.5 licences.

Provided that if no application is received, then the State Government may grant licence in such other manner as directed by general or special order."

This Rule specifically provides that the licence in Form F.L.1 shall be granted individually on fixed basis licence fee and licence fee, by inviting applications for each shop, and if the number of applications are more than one then by disposing of applications by draw of lottery or in such other manner as the State Government may direct from time to time. This provision makes it clear that licence in Form F.L.1 shall be granted individually by inviting applications for each shop and if the number of applications are more than one then by disposing of applications by draw of lottery or in such other manner as the State Government may direct from time to time. It was argued that provision after words - "or in such other manner as the State Government may direct from time to time", is only applicable for draw of lottery and not for exempting from inviting applications. The provision added to this clause is also clear that if no application is received, then the State Government may grant licence in such other manner as directed by general or special order. If one reads the latter provision of this clause after the word "or", it would be clear that the same provides the power to the State Government to deal the subject in any other manner as the State Government may direct from time to time. Therefore, these words can not be read in isolation but they have to be read in generality as they control the earlier provisions which includes the

grant of licence on individual basis on fixed basic fee and licence fee by inviting the applications.

7. From the aforesaid provision of Rule 8 (a), it is amply clear that the State Government is having power to issue directions from time to time with regard to the grant of licence in form FL-1 and under this provision if directions have been issued, or policy decision has been taken that is within the power of the Government. We are impressed with the submissions made by the learned Government Advocate that the State has not granted licences for the 17 blocks and they are lying vacant, if any party or the petitioner is interested in taking licences under those 17 blocks they are free to apply and in the policy there is no bar that their applications can not be considered, where licence has not been issued.

8. As was pointed out that in the W.P.No.1099/06, the Division Bench at Main Seat, Jabalpur has refused to interfere in the matter of the aforesaid policy on the ground that it is a matter of academic interest and petitioner is not licence holder he can not come to the Court for this purpose. The similar situation exists in this case. Therefore, in our considered opinion that the appellant may apply for licence under the blocks which are lying vacant. Thus, no case is made out for any interference by this Court. Consequently, this appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2780

WRIT APPEAL

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

26 June, 2008*

ABHAY KUMAR

... Appellant

Vs.

CHIEF MANAGER, STATE BANK OF INDORE & ors.

... Respondents

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Sections 13 & 14, Transfer of Property Act, 1882, Section 53-A - *The accounts of the borrowers become non-performing assets and thus action u/s 14 of Act 2002 was initiated for taking possession of mortgaged property - The appellants contended that substantial consideration was paid by them in pursuance of an agreement to sale, therefore, entitled to retain possession of mortgaged property u/s 53-A of T.P. Act - Learned Single Judge held that agreement of sale was on plain paper and did not disclose the mode of payment, therefore, agreement was doubted and unreliable - Order challenged in W.A. - Held - Appellants can, on the basis of agreement on plain paper, claim that in pursuance of agreement to sale they were inducted - The claim of appellants is anchored on the provisions of Section 53-A of T.P. Act and such disputed questions*

*W.A. No.549/2008 (Indore)

cannot normally be decided in a Writ Petition - Admittedly, appellants are in possession of the property, therefore, time granted upto 31.10.2008 to vacate the property. (Paras 9 & 10)

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम (2002 का 54), धारा 13 व 14, सम्पत्ति अंतरण अधिनियम, 1882, धारा 53-ए - ऋणियों के खाते अपालन योग्य आस्तियाँ हो गये और इस प्रकार बंधक सम्पत्ति का कब्जा लेने के लिए अधिनियम 2002 की धारा 14 के अन्तर्गत कार्यवाही प्रारम्भ की गई - अपीलार्थियों ने अभिकथित किया कि उनके द्वारा विक्रय अनुबंध के अनुसरण में सारवान प्रतिफल अदा कर दिया इसलिए सम्पत्ति अंतरण अधिनियम की धारा 53-ए के अन्तर्गत बंधक सम्पत्ति का कब्जा बनाए रखने के हकदार हैं - विद्वान एकल न्यायाधीश ने अभिनिर्धारित किया कि विक्रय अनुबंध सादा कागज पर था और उसमें भुगतान के तरीके का खुलासा नहीं किया इसलिए अनुबंध शंकास्पद और अविश्वसनीय था - आदेश को रिट अपील में चुनौती दी - अभिनिर्धारित - अपीलार्थी सादे कागज पर किये गये अनुबंध के आधार पर दावा कर सकते हैं कि विक्रय अनुबंध के अनुसरण में उन्हें कब्जा दिया गया - अपीलार्थियों का दावा सम्पत्ति अंतरण अधिनियम की धारा 53-ए के उपबंधों पर अच्छी तरह आधारित है और ऐसे विवादित प्रश्न सामान्यतः रिट याचिका में विनिश्चित नहीं किये जा सकते - स्वीकृत रूप से अपीलार्थी सम्पत्ति के कब्जे में हैं इसलिए सम्पत्ति रिक्त करने के लिए 31.10.2008 तक का समय दिया गया।

G.K. Patidhar, for the appellant.

Manoj Munshi, for the respondent No.1.

ORDER

The Order of the Court was delivered by **S.K. KULSHRESTHA, J. :-** This order shall also govern the disposal of W.A. No.548/2008 as both arise from the common order dated 12/6/2008, passed by the learned Single Judge in W.P. No.3429/2008 and W.P. No.3430/2008. The said writ petitions were filed by the petitioners assailing the action of the respondent/Bank under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(here-in-after referred to as "the Act"), by which on the allegation that the account of the borrower had become a non-performing asset, the properties were auctioned and steps were taken under Section 14 of the said Act for obtaining possession thereon.

2. It is not disputed before us that the appellants were in possession of the properties mortgaged by the borrower, and after the account was declared as non-performing, remedy under Section 13 of the Act was resorted to. Since the property was in possession of the appellants, action was initiated under Section 14 to obtain possession in accordance therewith.

3. The case of the petitioners as unraveled by the pleadings before us was that the petitioners had come into possession of the property after payment of substantial consideration in accordance with an agreement executed in the year 2004 and were, therefore, entitled to retain possession under the provisions of Section 53-A of the Transfer of Property Act and to enforce the said agreement

and seek specific performance. Learned counsel for the respondent No.1 has, however, submitted that since the act has overriding effect under Section 35, the claim founded on the possession under the provisions of the Transfer of Property Act on the basis of the part performance of the contract allegedly entered into by the appellants with the principal borrower, was untenable.

5. On examining the merits of the case of the petitioners, the learned Single Judge observed that the agreement of sale on which strong reliance was placed was on a plain paper which did not disclose the mode of payment. The learned Single Judge observed that a prudent man is not expected to part with substantial amount to the vendor without any receipt. The agreement was also doubted on the ground that it was allegedly executed on 20/2/2004, but notarised on 2/5/2007 after the respondent/Bank had already published the notice on 23/3/2007.

6. From the facts taken into consideration by the learned Single Judge, while there can be no dispute that the agreement relied upon by the petitioners was of a dubious character and unreliable, the fact remains that in-so-far-as the petitioners are concerned, they were in possession and, therefore, they were also the persons aggrieved within the meaning of Section 13 (4) (a). Learned counsel for the respondent, however, urges that under the provisions of Section 17 of the Act, the petitioners should have approached the Debt Recovery Tribunal.

7. In-so-far-as the objection with regard to the alternative remedy is concerned, this point was not raised before the learned Single Judge and, therefore, we are refraining to delve into the manner.

8. The action under Section 14 directly affects the interest of the appellants. We are surprised to find that although the Bank vide letter dated 19/6/2008, had informed that the property had been sold and the entire amount outstanding against the principal borrower had been paid, no instruction was given by the Bank to its counsel to inform the Court while the petition was pending before the learned Single Judge that the property already stood sold and money recovered.

9. Be that as it may, in-so-far-as the rights of appellants are concerned, they can, on the basis of agreement on plain paper, claim that it was in pursuance of an agreement to sale that he was inducted. Learned counsel for the respondent/Bank has referred to the decision of the Punjab and Haryana High Court *M/s. Delhi Punjab Goods Carrier Pvt. Ltd. v. Bank of Baroda* (A.I.R. 2008 Punjab and Haryana 107), in support of his contention that if in the mortgaged property, tenancy is created; the tenant cannot seek protection under the tenancy law unless it is proved that the tenancy was created prior to the creation of the charge.

10. In the present case, the claim of the appellants is anchored on the provisions of Section 53 (A) and such disputed questions cannot normally be decided in a writ petition. However, since it is an admitted position that the appellants are in possession of the property in question, we grant time to the appellants upto 31st

October, 2008 to vacate the property. The action of the Bank and any other person claiming under it, shall remain stayed upto the said date.

11. With the above liberty to continue in possession of the property upto 31st October, 2008, both these appeals are dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2783

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice S.K. Gangele

22 July, 2008*

NARAYAN SINGH YADAV

... Appellant

Vs.

STATE GOVERNMENT OF M.P. & ors.

... Respondents

Constitution, Article 226 - Service Law - Termination of service - Natural Justice - Appointment of appellant as teacher with a condition, subjected to verification of antecedents - It was found that appellant was involved in seven criminal cases - Appointment cancelled by State Government - Order challenged - Held - A teacher having criminal antecedents cannot be permitted to continue in service - Nature of job of teacher is of immense significance not only in the context of a school but also in the context of national scenario - A teacher builds the character of students who in turn participate in playing the role of building of the nation - Order of Single Judge upheld - Writ Appeal dismissed. (Paras 10 & 11)

संविधान, अनुच्छेद 226 - सेवा विधि - सेवा समाप्ति - नैसर्गिक न्याय - अपीलार्थी की शिक्षक के रूप में नियुक्ति पूर्वचरित सत्यापन की शर्त के साथ की - यह पाया गया कि अपीलार्थी सात दण्डिक मामलों में संलिप्त था - नियुक्ति राज्य सरकार द्वारा निरस्त की गई - आदेश को चुनौती - अभिनिर्धारित - एक शिक्षक जिसका आपराधिक पूर्वचरित हो उसे सेवा में बने रहने की अनुमति नहीं दी जा सकती - शिक्षक के कार्य की प्रकृति न केवल विद्यालय के संदर्भ में बल्कि राष्ट्रीय परिदृश्य के संदर्भ में भी असीम महत्व की होती है - एक शिक्षक विद्यार्थियों के चरित्र का निर्माण करता है जो देश के निर्माण में महत्वपूर्ण भूमिका निभाते हैं - एकल न्यायाधीश के आदेश की पुष्टि की गई - रिट अपील खारिज।

Cases referred :

AIR 2003 SC 1789, AIR 2003 SC 1843, AIR 1993 SC 2155, AIR 1958 SC 36, 2000(3) MPLJ SN 21, 2004(2) MPLJ 299, (2003) 3 SCC 437, (1996) 11 SCC 605, (2008) 1 SCC 660.

S.R. Muley, for the appellant.

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

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- In this intra-court appeal preferred under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, the substantiality and defensibility of the order dated 31.01.2006 passed by the learned Single Judge in W.P. No.3036/03 is called in question.

2. The appellant, a handicapped person, was appointed as a Teacher on 19th May, 1992 in Government Girls High School Chanderi, regard being had to his physical incapacity and the post graduate qualification in Political Science. While he was working in the said School he was visited with an order of termination which compelled him to knock at the doors of this court invoking its extraordinary jurisdiction for quashment of the same on the base that despite his satisfactory work, the order of termination had been passed; that the doctrine of *audi alteram partem* had not been followed before passing the order of termination as a consequence of which the said order is vitiated in law; that though the order of appointment was issued after due approval and sanction of the Governor yet the Principal of the Institute had passed the order of termination which nullifies the order; that the order of termination has been passed on the basis of police verification pertaining to criminal cases instituted against him though said cases were instituted out of political vendetta; and that in most of the cases the appellant had been acquitted and, therefore, the foundation on which the order has come into vogue gets foundered.

3. Before the learned Single Judge reliance was placed on the decisions rendered in *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd. and others*, AIR 2003 SC 1789, *Indian Railway Construction Co. Ltd. vs. Ajay Kumar*, AIR 2003 SC 1843, *Ratan Lal Sharma v. Managing Committee Dr. Hari ram (Co-education) Higher Secondary School and others*, AIR 1993 SC 2155, *Parshotam Lal Dhingra v. Union of India*, AIR 1958 SC 36, *Jagdish Ram Sahu v. State of M.P. and others*, 2000(3) MPLJ SN.21, and *Praveen Kumar Karal v. High Court of M.P. and another*, 2004(2) MPLJ 299 and it was propounded by the learned counsel for the writ petitioner that the order of termination suffered from incurable fallacy and, therefore, deserved to be quashed.

4. The learned Counsel for the State, per contra, propounded before the learned Single Judge that the appointment was cancelled in terms of the order of appointment inasmuch as the appointment was subject to verification of antecedents and when it was found that the incumbent was involved in seven criminal cases commencing 1988 to 1992 and he was imparting education in a school, it was thought apposite to cancel the appointment. It was also urged that the State Government had taken the decision to cancel the appointment and such cancellation being within the ambit and purview of law laid down by the Apex Court did not warrant interference in exercise of inherent and extraordinary jurisdiction under Article 226 of the Constitution.

5. Learned Single Judge, as is unmistakably clear, distinguished the decisions cited on behalf of the appellant-petitioner on the bedrock that it was a case of cancellation of appointment in terms of letter of appointment issued and the facts, as discernible from the record were absolutely clear as crystal that the writ petitioner had criminal antecedents. He placed reliance on the decision rendered in *Kendriya Vidyalaya Sangathan and others v. Ram Ratan Yadav*, (2003) 3 SCC 437 and dismissed the writ petition.

6. We have heard Mr. S.R. Muley, learned counsel for the appellant and Mr. Vivek Khedkar, learned Govt. Advocate on behalf of the State.

7. Mr. Muley in his assail of the order passed by the learned Single Judge has submitted that an enquiry was imperative before the order of termination was passed and the competent authority should have passed the order and that having not been done, the learned Single Judge should have quashed the order of termination. The learned Counsel further canvassed that the appellant is a handicapped person and when he had been acquitted in number of cases, the criminal antecedents which were an outcome of political, malice, should have been allowed to melt into insignificance; thereby, permitting the order of appointment to spring into life. Learned counsel also contended that the Principal had no authority to pass the order and, therefore, the order of termination suffers from total incompetence and, hence is liable to be set aside.

8. Mr. Khedkar learned Government Advocate, resisting the aforesaid contentions of the appellant, contended that learned Single Judge is absolutely correct while holding that competent authority had passed the order as there was material on record and the State Government had passed the order and Principal has communicated it. It is the further submission of the learned counsel for the State that when the criminal antecedents are patent and manifest, the same cannot be ignored and further the reliance placed by the learned Single Judge on *Ram Ratan Yadav* (supra) cannot be found fault with.

9. First we shall deal with the contention whether the order has been passed by an authority who was not competent to pass an order. On a perusal of the order passed by the learned Single Judge it is perceptible that he has referred to Annexure-A/16 to the writ petition by which the Principal of the Institution had communicated the decision of terminating the services of the appellant whereas on an actual fact the decision had been taken by the State Government and forwarded by the Joint Director, Education to the Principal. In view of the aforesaid, we have no hesitation in repelling the submission of Mr. Muley that incompetent authority had passed the order and accordingly we so do.

10. The next aspect which requires to be adverted to is whether; despite the criminal antecedents the order of appointment should have been allowed to stand. As is perceivable the order of appointment was a conditional one. It clearly postulated that his appointment is subject to the condition that he is found

fit and produce the fitness certificate from the Civil Surgeon and further his character and antecedents are verified from the Superintendent of Police. We are not concerned with the first limb of the conditions. The second aspect gathers signification since the condition is unequivocally clear that his appointment was subject to police verification. On police verification, it has been found that the appellant was involved in various criminal cases under Sections 457, 380, 107, 393, 352, 294, 506-B, 323 and 307 of the Indian Penal Code. It is submitted by Mr. Muley that a handicapped person was made a target in the prime of his youth because of political reasons and when he has been acquitted his appointment should be saved. It is worth noting most of the orders of acquittal were brought on record by way of rejoinder affidavit and the same had been passed after submission of the police verification report. In any case, fact remains that the appellant was prosecuted in number of criminal cases. The appellant was appointed in a Girls High School as a teacher. The said order of appointment was subject to condition of verification of antecedents. The Apex Court in *Ram Ratan Yadav* (supra) was dealing with furnishing of information in column 12 and 13 of the attestation form and certification thereafter by the candidate. Their Lordships took note of the fact that a criminal case was pending against the incumbent when he filled up the attestation form. True it is, the same was regarded as a material suppression of fact but their Lordships apart from the same proceeded to state the importance of making such information available to the employer. We think it condign to reproduce paragraph 12 of the said decision:-

"12. The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify the character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had discretion to terminate his services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence of the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya. The character, conduct and antecedent of a teacher will have some impact on the minds of the students of impressionable age. The

appellants having considered all the aspects passed the order of dismissal of the respondent from service. The Tribunal after due consideration rightly recorded a finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State Government and that the case was not of a serious nature to set aside the order of the Tribunal on that ground as well. The respondent accepted the offer of appointment subject to the terms and conditions mentioned therein with his eyes wide open. Para 9 of the said memorandum extracted above in clear terms kept the respondent informed that the suppression of any information may lead to dismissal from service. In the attestation form, the respondent has certified that the information given by him is correct and complete to the best of his knowledge and belief; if he could not understand the contents of column Nos. 12 and 13, he could not certify so. Having certified that the information given by him is correct and complete, his version cannot be accepted. The order of termination of services clearly shows that there has been due consideration of various aspects. In this view, the argument of the learned counsel for the respondent that as per para 9 of the memorandum, the termination of service was not automatic, cannot be accepted."

From the aforesaid enunciation of law, it is clear to us that character, conduct and antecedents of a teacher are of paramount consideration. That apart, when an order of appointment is accepted with such conditions it has its own significance. Nature of employment cannot also be marginalised. A teacher has an important role and his conduct from all spectrums has a tremendous impact on students who are at an impressionable age. An incumbent might have been acquitted in criminal cases afterwards but the fact remains that he was being prosecuted at the time of appointment. The police verification being against him, the same has to be treated to be in consonance of the conditions of appointment. It is not the case of the appellant that the criminal cases were never instituted against him. It is not a case that wrong cases have been cited in the verification report. In the absence of assertion in that regard, the submission that the principles of natural justice have been violated, if we permit ourselves to say so, is quite spacious and not acceptable. In this context we may refer with profit to the decision in *Delhi Admn. v. Sushil Kumar*, 1996(11) SCC 605 wherein it has been held as under :-

"3. The Tribunal in the impugned order allowed the application on the ground that since the respondent had been discharged and/or acquitted of the offence punishable under Section 304 IPC, under Section 324 read with Section 34 IPC and under Section 324 IPC, he cannot be denied the right of appointment to the post under the State. The question

is whether the view taken by the Tribunal is correct in law." It is seen that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a Constable to the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted."

11. Recently in the case of *R. Radhakrishnan v. Director General of Police and others*, (2008) 1 SCC 660, a two-Judge bench of the Apex Court had again emphasised on the aspect of antecedents. Their Lordships have opined that the standard expected of a person intended to serve in a uniformed service is different from the one of a person who intended to serve in other services. In the instant case the appellant was offered the appointment for a teacher in a Government Girls High School. The nature of job of teacher is of immense significance not only in the context of a School but also in the context of national scenario. A teacher builds the character of students who in turn participate in playing the role of building of the Nation. A teacher has the role of in-loco-parentis and the students and the guardians of students look-forward to conceptual ideology and imitable immaculate qualities in the character of a teacher. Tested on these parameters and scrupulously scrutinised on the aforesaid paradigms, we have no hesitation in holding that the order passed by the authority cancelling the appointment is absolutely just and proper and affirmation thereof by the learned Single Judge, by no stretch of imagination, can be regarded to be faulty. On the contrary, the order passed by the learned Single Judge is absolutely faultless and impeccable and accordingly we concur with the same.

12. Consequently, the writ appeal, being devoid of substance, stands dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2788

WRIT APPEAL

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

24 July, 2008*

BHUVANESHWAR PRASAD @ GUDDU DIXIT

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(2) - "Questioned" and "decided" are to be read as one -

The word 'and' certainly can be read as 'or' if the intention of the legislature is not clear or the law requires the word "and" to be used as "or".

(Para 21)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(2) — 'प्रश्नगत' और 'विनिश्चित' को एक साथ पढ़ा जाना चाहिए — शब्द 'और' निश्चित रूप से 'या' पढ़ा जा सकता है यदि विधायिका का आशय स्पष्ट नहीं है या विधि की अपेक्षा है कि शब्द 'और' को 'या' के रूप में प्रयुक्त किया जाए।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(2) - Sub-section (2) would simply mean that the jurisdiction of Collector is not required to be invoked in a case where the question was raised and finally decided by Election Tribunal - Collector could not proceed to make an enquiry and re-decide the issue u/s 36(3) of the Act contrary to the findings recorded by the tribunal.

(Para 25)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(2) — उपधारा (2) का सामान्यतः अर्थ होता है कि कलेक्टर की अधिकारिता का प्रयोग वहाँ अपेक्षित नहीं है जहाँ प्रश्न उत्पन्न हुआ और उसका अंतिम विनिश्चय चुनाव अधिकरण द्वारा कर दिया गया — अधिनियम की धारा 36(3) के अन्तर्गत कलेक्टर अधिकरण के निष्कर्षों के विरुद्ध जाँच और विवादक का पुनः विनिश्चय नहीं कर सकता।

C. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(2) & (3) - Appellant elected as Sarpanch - Election was challenged by filing election petition beyond the period of limitation - S.D.O. issued notices but thereafter referred the matter to Collector with a submission that matter can be decided by Collector u/s 36 - Held - When an election petition not duly constituted is filed before S.D.O. and S.D.O. finds that question can be decided by a higher officer in exercise of power u/s 36, then a reference can certainly be made by him - Section 36(3) provides that Collector may give his decision either on an application made to him by any person or on his own motion - Proceedings before Collector were maintainable - Appeal dismissed.

(Paras 27 & 28)

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(2) व (3) — अपीलार्थी सरपंच के रूप में चुना गया — चुनाव को परिसीमा की कालावधि के उपरांत चुनाव याचिका पेश करके चुनौती दी गई — एस.डी.ओ. ने सूचनापत्र जारी किये किन्तु उसके बाद मामला इस निवेदन के साथ कलेक्टर को निर्देशित किया कि धारा 36 के अन्तर्गत मामला कलेक्टर द्वारा विनिश्चित किया जा सकता है — अभिनिर्धारित — जब कोई चुनाव याचिका सम्यक् रूप से संस्थापित किये बिना एस.डी.ओ. के समक्ष पेश की जाती है और एस.डी.ओ. यह पाता है कि प्रश्न का विनिश्चय धारा 36 के अन्तर्गत शक्तियों के प्रयोग में उच्चतर अधिकारी द्वारा किया जा सकता है तब उसके द्वारा निश्चित रूप से निर्देश (reference) किया जा सकता है — धारा 36(3) उपबन्धित करती है कि कलेक्टर या तो किसी व्यक्ति द्वारा उसे किये गये आवेदन पर या स्वप्रेरणा से अपना विनिश्चय दे सकता है — कलेक्टर के समक्ष कार्यवाहियाँ पोषणीय थीं — अपील खारिज।

D. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(3) - Sub-section (3) clearly show that legislature wanted the Collector to exercise powers to see that no disqualified person contests the election after concealing disqualification or no person who has become disqualified after the elections are over is continued as an office bearer in Panchayat - Collector also has to see that whether the disqualification is removable and, if yes, but not removed, then in such a case the Collector may declare that the office has become vacant. (Para 19)

घ. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(3) - उपधारा (3) स्पष्ट रूप से दर्शाती है कि विधायिका कलेक्टर से यह चाहती है कि वह शक्तियों का प्रयोग यह देखने में करे कि कोई अयोग्य व्यक्ति अयोग्यता को छिपाकर चुनाव नहीं लड़े या जो व्यक्ति चुनावों के पश्चात् अयोग्य हो गया है पंचायत में पदधारी के रूप में बना नहीं रहे - कलेक्टर को यह भी देखना चाहिए कि क्या अयोग्यता हटाये जाने योग्य है और, यदि हाँ, किन्तु हटायी नहीं गई है, तब ऐसे मामले में कलेक्टर यह घोषित कर सकता है कि पद रिक्त हो गया है।

E. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 - Election Petition after expiry of 30 days in accordance with Section 122(2) of the Act was nothing but an exercise in futility - Even if the S.D.O. issued notices to the parties, the same would not confer any jurisdiction upon him because he had no jurisdiction to condone the delay and proceed further with the matter. (Para 17)

ड. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 - चुनाव याचिका अधिनियम की धारा 122(2) के अनुसार तीस दिन की समाप्ति के पश्चात् निरर्थक प्रयोग के अलावा कुछ नहीं - यद्यपि एस.डी.ओ. ने पक्षकारों को सूचनापत्र जारी किये, यह उसको कोई अधिकारिता प्रदान नहीं करेगा क्योंकि उसे विलम्ब क्षमा करने और मामले में आगे कार्यवाही करने की कोई अधिकारिता नहीं थी।

Rohit Arya with Bhagwan Singh, for the appellant.

Rahul Jain, G.A., for the respondent Nos. 1 to 4.

R.S. Verma, for the respondents No. 5 to 10.

J U D G M E N T (O R A L)

The Judgment of the Court was delivered by R.S. GARG, J. :-The original petitioner/appellant being aggrieved by order dated 10.4.2008 passed in Writ Petition No. 3140/2007 by the learned Single Judge, whereunder the petition filed by the petitioner/appellant against the order dated 6.1.2007 passed by the Collector has been dismissed, has filed this appeal under Section 2(1) of *Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005*.

2. To put the records straight and crease out the wrinkles which are creating problems to all concerned, we are required to detail some facts.

3. The petitioner contested the election for the office of Sarpanch of Gram Panchayat Badari. As the results were notified on 27.1.2005, any person aggrieved by the declaration of the result could certainly file an election petition within thirty days from the declaration of the results i.e. on or before 26.1.2005.

4. One Vansh Gopal S/o Nand Gopal Dubey (respondent no. 5) filed Writ Petition No. 947 of 2005 submitting inter alia that the High Court should interfere in the matter but the learned Single Judge of this Court vide his order dated 29.3.2005 disposed of the petition observing that if petitioner files an election dispute before the Tribunal, the Tribunal shall consider the same and dispose of the matter within a period of six months from the date of receipt of the order passed in the said writ petition. It appears that said Vansh Gopal Dubey filed an election petition on 5.5.2005. Notices were issued to the parties but before anything else could be done in the matter, the Sub Divisional Officer vide his order dated 5.8.2005 referred the matter to the Collector with a submission that the question could be conveniently decided by the Collector under Section 36(3) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 ('Act' for short). It appears that said Vansh Gopal Dubey again came to this Court in Writ Petition No. 13747/2006 which came to be disposed of by a learned Single Judge on 4.10.2006. Copy of the said order has not been filed before this Court by either side but a reference to the said order is found in the impugned order passed by the learned Single Judge. The said order reads as under:

“Considering the short grievance of the petitioner, matter is pending before the Collector, Katni as referred by the S.D.O. by the order Annexure/P-5 dated 5.8.2005 which deserves to be heard and decided by the Collector, Katni expeditiously. This petition is finally disposed of with following directions:-

(i) Petitioner may file an application for expeditious hearing of the matter to the Collector, Katni. Alongwith the application, petitioner shall enclose copy of this petition and order dated 5.8.2005 of the S.D.O. Vijayraghavgarh for ready reference of the Collector, Katni.

(ii) On filing aforesaid application the Collector, Katni shall look into the matter and expedite the hearing of the case and shall make all endeavour to decide the matter expeditiously as far as possible within three months from the date of receipt of the aforesaid application.”

5. Said Vansh Gopal Dubey filed an application for expeditious hearing of the matter to the Collector, Katni alongwith the copy of the said Writ Petition and the order dated 5.8.2005 passed by the Sub Divisional Officer, Vijayraghavgarh. The Collector on the said application directed issuance of notice to the present petitioner-appellant to show cause as to why an action be not taken against him and he be not disqualified to hold the office in view of the disqualification incurred by him under Section 36(2) of the Act. The petitioner-appellant for the reasons best

known to him did not file his written statement or reply but, however, took part in the enquiry and contended that the fourth child was born much before 26.1.2001 and not on 13.5.2003 as contended and alleged by Vansh Gopal Dubey. However, no evidence was led by him.

6. After hearing the parties, the Collector vide his order dated 16.1.2007 held that the petitioner begot a child on 13.5.2003 and to arrive to this finding he relied upon certain documents which were required to be maintained by the Gram Panchayat in which name of the petitioner's wife was shown as a pregnant and expecting mother and thereafter her name was again shown as lactating mother in yet another document. The Collector also relied upon the certificate issued by one Dr. Vinod Kumar who certified that the petitioner/appellant begot a child on 13.5.2003.

7. The petitioner being aggrieved by the said order dated 16.1.2007 had filed Writ Petition No. 3140/2007 which came to be dismissed by the impugned order dated 10.4.2008, therefore, the petitioner is before the Division Bench.

8. Shri Rohit Arya, learned senior counsel for the appellant submitted that if an election petition had already been filed and the Sub Divisional Officer assumed jurisdiction then for no good reason he could make a reference to the Collector for Collector's decision under Section 36(3) of the Act. It is also submitted that the Collector, Katni could not assume jurisdiction under Section 36(3) of the Act because the election petition was already filed and as the disqualification was already questioned in the election petition but not decided, therefore, also the Collector could not assume jurisdiction. It is also submitted that the findings of the Collector though have been approved by the learned Single Judge but from the records it would appear that the said findings are absolutely perverse. It is also submitted that vide first order, the High Court did not condone the delay for filing the election petition but simply disposed of the Writ Petition No. 947/2005 by its order dated 29.3.2005 permitting the petitioner to file an election petition. It is also his submission that as the election petition was already filed, the Collector could not assume jurisdiction under Section 36(3) of the Act in view of the language employed in Section 36(2) of the Act. It is also submitted by him that as the election petition was filed beyond limitation the question of limitation assumed importance and therefore in absence of decision on the question of limitation, the Collector could not assume jurisdiction.

9. Shri Jain and Shri Verma, learned counsel for the respondents on the other hand submitted that the Collector could certainly assume jurisdiction under Section 36(3) of the Act especially in view of the fact that the Sub Divisional Officer thought fit that case on hand could be conveniently decided by the Collector in view of the disqualification incurred subsequently or as the petitioner was elected to the office after suppressing the material disqualification. It is also submitted by them that the Sub Divisional Officer acting as person could have made a reference

to the Collector for exercising his powers under Section 36(3) and if such reference is made, no illegality can be found. It is also submitted by them that the words employed in Section 36(2) of the Act are "questioned and decided" which would mean that not only an election petition has been filed where the disqualification is questioned but there must have been a conscious decision on such question raised before the Tribunal. It is also submitted by them that a perusal of Section 122 of the Act would make it clear that an election petition is to be filed within thirty days from the date of the notification of the returned candidate and as there are no powers to condone the delay in filing the election petition even otherwise filing of the election petition would not come in the way of any person to make a reference to the Collector for his decision under Section 36(3) of the Act.

10. We have heard the parties.

11. It is not in dispute before us that Section 36 (1) (clause 'm') as it was before its deletion provided that no person shall be eligible to be an office bearer of Panchayat who has more than two living children one of whom is born on or after the 26th day of January 2001. Undisputedly, this disqualification has already been deleted by the State Government by amending the Act under Act 27 of 2006 with effect from 1.9.2006. It would be necessary to quote that the stand of the State Government all through had been that deletion of Clause-m shall have perspective effect and would not have the effect of removing the disqualification.

12. Under the circumstances, one of the question for consideration would be that whether the petitioner begot a child after 26.1.2001. For proper appreciation of the matter, we would refer to Section 36(1)(m) (excepting clause 'a to k') and Sub-section 2, 3 and 4. The same read as under:-

"36(1) is so disqualified by or under any law made by the legislature of the State.

(m) has more than two living children one of whom is born on or after the 26th day of January, 2001.

(2) If any person having been elected as an office bearer of Panchayat:-

(a) subsequently becomes subject to any of the disqualification mentioned in sub-section (1) and such disqualification is not removable or being removable is not removed (of becomes office bearer concealing his disqualification for it which has not been questioned and decided by any election petition under Section 122);

(underlined by us)

(b)

(c)

(3) In every case the authority competent to decide whether a vacancy has occurred under the sub-section (2) shall be Collector in

respect of Gram Panchayat and Janpad Panchayat and Commissioner in respect of Zila Parishad who may give his decision either on an application made to him by any person or on his own motion. Until, the Collector or the Commissioner, as the case may be, decides that the vacancy has occurred, the person shall not cease to be an office bearer:

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

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

13. It would also be profitable to quote Section 122 of the Act which provides for filing of an election petition. The said Section reads as under:-

"122. Election petition.- (1) An election under this Act shall be called in question only by a petition presented in the prescribed manner:-

(i) in case of Gram Panchayat or Gram Sabha to the Sub-Divisional Officer (Revenue);

(ii) in case of Janpad Panchayat to the Collector; and

(iii) in case of Zila Panchayat to the Divisional Commissioner and not otherwise.

(2) No such petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.

(3) Such petition shall be inquired into or disposed of according to such procedures as may be prescribed."

14. According to Section 122, an election can be called in question only by a petition presented in the prescribed manner and not otherwise. Sub-section(2) provides a complete bar to entertainment of a petition which is filed beyond the period of thirty days. Sub-section 3 provides that the petition shall be inquired into or disposed of according to such procedures as may be prescribed.

15. During course of the argument, it was fairly conceded by Mr. Rohit Arya, learned senior counsel that the prescribed authority as provided under Section 122 shall have no jurisdiction to condone the delay or entertain the election petition filed beyond the period of limitation because Section 122(2) of the Act provides a complete bar against entertainment of the election petition.

16. The argument of Shri Rohit Arya, learned senior counsel is and the facts also certify that the election result was notified on 27.1.2005, therefore, an election petition could be filed within thirty days i.e. on or before 26.2.2005. If the election petition was required to be filed on or before 26.2.2005 then in accordance with law an election petition could not be entertained after 26.2.2005 and if such an

election petition could not be filed or entertained then bar contained under Section 36(2), in our opinion, would not at all come into way. Such an election petition could be taken to be a representation to the Sub Divisional Officer and the Sub Divisional Officer finding that the Collector would be a competent authority to entertain such dispute could certainly refer the matter to the Collector and the Collector on receipt of such information on strength of the reference made by the Sub Divisional Officer could issue notices to the parties and make enquiry under Section 36(2) read with Section 36(3) and come to a finding that the allegations made against the returned candidate were or were not true.

17. In the present case, true it is that the Sub Divisional Officer issued notices to the parties but if the law is understood in its true perspective and the intention of the legislature is taken to be appropriate that, an election petition cannot be entertained after thirty days then we must hold that filing of the election petition after expiry of thirty days in accordance with Section 122 (2) of the Act was nothing but an exercise in futility and even if the Sub Divisional Officer issued notices to the parties, the same would not confer any jurisdiction upon him because he had no jurisdiction to condone the delay and proceed further with the matter.

18. Issuance of notice by any Court or tribunal in a matter which is not maintainable or is barred by limitation would not amount to taking cognizance of the matter. In such a matter, on petitioner's application or request, a notice is required to be issued to the other side to show cause as to why the delay in taking the steps before the Court or tribunal be not condoned. If an authority has power to condone the delay then such authority in exercise of its powers can condone the delay. If an authority, court or tribunal does not have the power to condone the delay and entertain the proceedings after the period of limitation has expired then issuance of notice to the other side would not make the proceedings/petition maintainable. In our opinion, election petition before the S.D.O. was not maintainable as it was filed beyond the period of 30 days.

19. The question still would be of interpretation of Section 36 (2) of the Act. The aforesaid referred Section 36 clearly provides that if any person having been elected as an office bearer of Panchayat-(a)- becomes office bearer concealing his disqualification for it which has not been questioned and decided by any election petition under Section 122 ; he shall, subject to the provisions of sub-section (3), cease to be such office bearer and his office shall become vacant. Sub-section 3, if is read in its true perspective and in accordance with legislature then would clearly show that legislature wanted the Collector to exercise the powers to see that no disqualified person contests the election after concealing the disqualification or no person who has become disqualified after the elections are over is continued as an office bearer in the Panchayat. Not only this, the Collector also has to see that whether the disqualification is removable and if yes, but not removed then in such a case the Collector may declare that the office has become vacant.

20. According to Shri Arya, the language employed in Section 36(2) (a) is "concealing his disqualification for it which has not been questioned and decided by any election petition under Section 122" would mean that filing of the election petition itself would arrest the jurisdiction of the Collector.

21. In our considered opinion, the words used "questioned and decided" are to be read as one qualifying condition. The words "questioned" and "decided" are to be read as one. The word 'and' certainly can be read as 'or' if the intention of the legislature is not clear or the law requires the word "and" to be used as "or".

22. In the present matter, though we have already held that the election petition was not maintainable being barred by limitation but even if we assume that the election petition was maintainable then the words "questioned and decided" would not come into play because not only the question should have been raised by somebody in a validly constituted election petition filed within limitation but should have also been decided by the competent tribunal.

23. The effort of Shri Arya is to read the word "and" as "or". His contention is that once the election is questioned in an election petition, whether the decision has been given or not, the bar would operate. We are unable to concede to this argument.

24. If the legislature wanted simple filing of an election petition to be a bar against exercise of the jurisdiction by the Collector under Section 36(3) of the Act, then the words could have been "concealing his disqualification for it which has either been questioned or decided in any election petition under Section 122 of the Act." The legislature could have easily used the phrase "either has been questioned or has been decided" in place of "has not been questioned and decided".

25. If the argument of Shri Arya is accepted then it would lead to yet another fallacious situation because the question if has already been raised and decided by the election petition under Section 122 then question of jurisdiction of the Collector would not arise because the findings recorded in the election petition would bind the parties. Once the competent tribunal before whom a question is raised decides the question then such finding would bind the parties and if finding is binding upon the parties then the jurisdiction of the Collector is not required to be invoked. A fair understanding of sub-section 2 would simply mean that the jurisdiction of the Collector is not required to be invoked in a case where the question was raised and finally decided by the election tribunal because contrary to the findings recorded by the tribunal, the Collector could not proceed to make an enquiry and re-decide the issue u/s 36(3) of the Act.

26. The further questions which have been raised by Shri Arya in view of our findings recorded above are not necessary to be considered but as Shri Arya has found fault with the orders passed by the Collector and the learned Single Judge in dismissing his petition, we will proceed to take up the said question.

27. The question that the S.D.O. after receiving the election petition if had issued notices then he abruptly could not make a reference to the Collector because the S.D.O. does not have a power to make a reference. In our opinion, when an election petition was not duly constituted is filed before the S.D.O. and the S.D.O. finds that the question raised in the petition can be conveniently decided by a higher officer in exercise of the powers under Section 36 then a reference certainly could be made by him because section 36(3) clearly provides that the Collector may give his decision either on an application made to him by any person or on his own motion.

28. In the present case, the S.D.O. though referred the matter to the Collector but if we assume it to be an application made by the S.D.O., the reference was competent. In the alternative we can also hold that on the reference made by the S.D.O. the Collector being satisfied that the person who was absolutely disqualified, was elected because of suppression of the disqualification then on coming to know of the facts, he could take action on his own motion. In either of the situation, the proceedings before the Collector were maintainable and if the S.D.O. thought that an illegality should not be allowed to perpetuate then he could refer the matter to the Collector under Section 36 of the Act. Any person who is a subordinate in the system is required to be vigilant and alive to the legal position. If such an officer in some incompetent proceedings is unable to adjudicate the matter, then such officer always can refer the matter to a higher authority or in the alternative can always bring the facts to the notice of the competent officer that an illegality is continuing then in such a case the higher authority would certainly be entitled to exercise his powers.

29. At this juncture, we again would refer to Section 122(2) of the Act. If an election petition is filed beyond the period of limitation, the same would not be maintainable and from a perusal of such election petition the officer finds that he would otherwise be incompetent to exercise his jurisdiction but at the same time he finds that the illegality is floating on the surface of record then he can certainly refer the matter or bring to the notice of the higher authorities that an illegality is continued. In the present matter, we certainly would agree with Mr. Arya that the election petition submitted before the S.D.O. was patently incompetent as the same was filed beyond the period of limitation.

30. We will again come back to Section 36(2) of the Act to consider argument of Mr. Arya who on one side submitted that in view of filing of the election petition where a question was raised but not decided, the Collector could not exercise the jurisdiction under Section 36(3) of the Act and on the other admits that proceedings before S.D.O. were not maintainable. We must now hold that if incompetent proceedings were submitted before the S.D.O then the question "questioned and decided by an election petition" would not come up as a bar because a question can be raised and decided in a validly constituted election petition.

31. In the present matter, it is not disputed before us that the question regarding the disqualification and suppression of the same was raised in incompetent proceedings and as the delay could not be condoned, the question could never be decided by the election tribunal. As a tale argument, Shri Arya submitted that so long the election petition was pending consideration, a reference could not be made by the S.D.O. but if the election petition was dismissed as barred by limitation then the question could be raised before the Collector that whether the petitioner/appellant had suppressed the disqualification. In our opinion, the question of dismissal of election petition would not assume any importance because it is the case of all parties that the delay could not be condoned and S.D.O. could not proceed with the matter.

32. It is also submitted by Shri Arya that the findings of the Collector in relation to child born on 13.5.2003 are patently illegal and are contrary to the records. In our opinion, the findings recorded by the learned Collector cannot be found fault with because the learned Collector has referred to the Anganwadi Register wherein petitioner's wife Shanti Dixit, W/o Bhuneshwar Prasad is shown to be a pregnant mother in April 2003 and May 2003 and yet another entry shows that she had delivered a child on 13.5.03 and her name was recorded in the Anganwadi Register in June 2003 as lactating mother. Not only this, one Doctor Vinod Kumar working at Community Health Centre had also issued a certificate that the present petitioner/appellant begot a child on 13.5.03. Apart from this oral evidence has also been led by the complainant/respondent no.5 to convince the Collector that the child was born on 13.5.03. A finding recorded by subordinate tribunal can be set aside by the High Court in its writ jurisdiction or writ appellate jurisdiction only if the finding is patently perverse which means that the finding is based on no evidence or the material evidence has been ignored by saying that there is no evidence on record or that the finding is so absurd which a prudent man cannot arrive at. In the present case, we are unable to hold that the findings recorded by the learned Collector are wrong, illegal, contrary to the records or perverse.

33. From the order passed by the Collector it would clearly appear that Doctor Vinod Kumar, Medical Officer of the Society Health Centre, Vijay Raghavgarh was examined by the Collector on 13.6.06 and the said witness clearly stated that the petitioner begot a child on 13.5.03 and in his cross examination he has stated that he had issued a certificate to that effect. Smt. Dorthi Charls had also stated before the Collector that in her presence and with her assistance on 13.5.03 a child was delivered by wife of the present appellant/petitioner. Smt. Kalpana Tiwari, an anganwadi worker stated before the Court on the basis of the register that the date of birth of Ku. Kanchan Dixit, D/o . Bhuneshwar Prasad is recorded as 13.5.03. From her evidence it would clearly appear that petitioner had four children, one of whom was born after 26.1.03. On this evidence, we can certainly hold that the original petitioner/appellant suppressed the disqualification which

was attached to him in view of Section 36(1) clause-m (since repealed) of the Act. It is also to be seen that in rebuttal, the petitioner/appellant for the reasons best known to him did not lead any evidence.

34. It is trite law that if the positive evidence led by a particular party is not rebutted by the other party by leading cogent and reliable evidence then the case of first party would be accepted. The principle for appreciation of the evidence is that if the positive evidence is led by a party then the Court would say that the fact is proved. In case the evidence is not reliable then the Court may say that such fact remains unproved but if the other side or contesting side leads further evidence and convinces the Court that the evidence led by the first party is not reliable or not accepted and the evidence of the contesting party is accepted by the Court then the Court would record a finding that the fact stands disproved.

35. In the present case, in absence of any positive evidence from the side of the appellant, a finding recorded by the Collector and the learned Single Judge cannot be interfered with.

36. For the reasons stated aforesaid and taking into consideration the fact that the petitioner/appellant has suppressed the fact of his disqualification and contested the election, the Collector on the information received had jurisdiction to entertain and decide the matter in accordance with law.

37. We find no reason to interfere. The appeal deserves to and is accordingly dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2799

WRIT APPEAL

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

6 August, 2008*

MEDICAL COUNCIL OF INDIA

... Appellant

Vs.

DR. TEENA KHATRI

... Respondent

Chikitsa Shiksha Niyamtran Adhiniyam, M.P. (19 of 1973), Section 10, Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2005, Rule 21(4), Post Graduate Medical Education Regulation, 2000, Regulation 10(3) - Transfer from one college to another college or transfer/migration from one course to another - Permissibility - Held - Once Medical Council of India (MCI) has framed the regulations putting an absolute ban on migration/transfer of the student/students undergoing any post graduate course/degree/diploma then Regulation 10(3) would cause an eclipse on the right of the student/students seeking transfer/migration under Rule 21(4) - Rule 21(4) can be used and utilized in favour

of a student only with prior recommendation of State Government and approval of MCI - MCI by making rules has statutorily refused the approval in general - In absence of any order of approval, the transfer/migration cannot be permitted by university or any authority - With this clarification appeal disposed of. (Paras 5 & 6)

चिकित्सा शिक्षा नियंत्रण अधिनियम, म.प्र. (1973 का 19), धारा 10, चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2005, नियम 21(4), स्नातकोत्तर चिकित्सा शिक्षा विनियम, 2000, विनियम 10(3) - एक महाविद्यालय से दूसरे महाविद्यालय में स्थानांतरण या एक पाठ्यक्रम से दूसरे में स्थानांतरण/प्रवास - अनुज्ञेयता - अभिनिर्धारित - एक बार जब भारतीय चिकित्सा परिषद् ने स्नातकोत्तर पाठ्यक्रम/डिग्री/डिप्लोमा में अध्ययनरत विद्यार्थी/विद्यार्थियों के प्रवास/स्थानांतरण पर आत्यंतिक रोक लगाते हुए विनियम विरचित किये तब विनियम 10(3) में ऐसे विद्यार्थी जो नियम 21(4) के अन्तर्गत स्थानांतरण/प्रवास चाहते हों उनके अधिकार पर रोक लग गयी - नियम 21(4) केवल राज्य सरकार की पूर्व अनुशंसा और भारतीय चिकित्सा परिषद् के अनुमोदन पर ही विद्यार्थी के पक्ष में प्रयुक्त किया जा सकता है - भारतीय चिकित्सा परिषद् ने नियम निर्मित करके सामान्य अनुमोदन से वैधानिक रूप से इंकार कर दिया - अनुमोदन के किसी आदेश के अभाव में विश्वविद्यालय या किसी प्राधिकारी द्वारा स्थानांतरण/प्रवास की अनुमति नहीं दी जा सकती - इस स्पष्टीकरण के साथ अपील निपटाई गई।

Indira Nair with Jasmeet Chana, for the appellant.

Rahul Jain, for the respondent Nos.2, 3 & 4.

Prabhat K. Asati, for the respondent No.1.

ORDER

Shri Asati submits that in pursuance to the order dated 20.04.05 passed in Writ Petition No.344/2005, the respondent no.1/original petitioner approached the authorities that she could be accommodated at Jabalpur and after her admission at Jabalpur, the respondent no.1/original petitioner has passed the course in April, 2006.

2. For the respondent no.1/original petitioner, this would be the end of the matter but according to Smt. Nair, orders of this type are creating number of problems because number of persons who have taken admission in different colleges/universities are obtaining such orders and before anything can be done in the appeal, they secure admission in different colleges/universities and when the matter comes up for final hearing such students would always say that as they have passed the examination, nothing is required to be done.

3. In exercise of powers conferred by Section 10 of Madhya Pradesh Chikitsa Shiksha Niyamtran Adhiniyam, 1973 (19 of 1973), the State Government has made the rules relating to entrance to Post Graduate Medical (MD & MS), Course Post Graduate Diploma and Dental (MDS), course in Medical and Dental Colleges in the State of Madhya Pradesh. The said rules are to be called as "Madhya Pradesh Medical and Dental Post Graduate Course Entrance Examination Rules, 2005."

Rule 21 of the said rules relates to admission. Sub-rule 4 of rule 21 provides as under:-

"The candidate so admitted to a particular subject, course and college will not be entitled for any change on any ground. Migration/Transfer/ Mutual Transfer of students undergoing any postgraduate course Degree/Diploma shall not be permitted by university or any other authority without the prior recommendation of the State Govt. and approval of Medical Council of India."

From a perusal of Sub-rule 4 of Rule 21, it would clearly appear that a candidate once admitted to a particular subject, course and college would not be entitled for any change on any ground and he shall not be permitted by University or any other authority without prior recommendation of the State Government and approval of Medical Council of India. If the permission for change is to be accorded then it is to be preceded by the recommendation made by the State Government and approval to be granted by the Medical Council of India.

4. The Medical Council of India has made Post Graduate Medical Education Regulations, 2000 to provide general conditions regulating Post Graduate Teaching Institutions. Regulation 10 relates to period of training, while regulation 10(3) clearly provides that the period of training for obtaining a Post Graduate Diploma shall be two completed years including the examination period. It also provides that migration/transfer of the students undergoing any Post Graduate course – Degree/Diploma shall not be permitted by any University or any authority.

5. Once the Medical Council of India has framed the regulations putting an absolute ban on migration/transfer of the student/students undergoing any postgraduate course/degree/diploma then said Regulation 10(3) would cause an eclipse on the right of the student/students seeking transfer/migration under sub-rule 4 of Rule 21 because Rule 21(4) of the Entrance Examination Rules, 2005 can be used and utilized in favour of a student only with prior recommendation of the State Government and approval of Medical Council of India.

6. If the Medical Council of India by making the rules has statutorily refused the approval in general then in absence of any order of approval the transfer/migration cannot be permitted by University or any authority.

7. In the present case it does not appear that except submission of copy of the order passed by the learned single Judge the student ever filed the recommendation before the other University or College, any recommendations made by the State Government or any order of approval passed by the Medical Council of India. The grant of admission to the respondent in any other College/University would certainly be illegal but we, refuse to interfere in that matter because there are some lapses on the part of the appellants also.

8. On the merits, we are unable to approve the order passed by the learned

Single Judge but we, refuse to interfere in the matter because since after passing of the order passed by the learned single Judge the original petitioner/respondent no.1 has completed the course.

9. We dispose of the appeal with the clarification aforesaid in relation to the legal provisions, legal law and the legal authority of the students, University/College.

The appeal is accordingly disposed of.

Appeal disposed of.

I.L.R. [2008] M. P., 2802

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice Sanjay Yadav

13 August, 2008*

R.S. CHOURASIYA

... Appellant

Vs.

UNION OF INDIA & ors.

... Respondents

Reorganization Act, M.P. (20 of 2000), Section 68 - Allocation - Employees getting Kramonnati forming separate group as per notification dated 22.03.2001 - Circular dated 26.12.2001 issued by State Government making provision that only those employees will be included in Kramonnati Pay Scale whose orders have been issued prior to publication of Tentative Final Allocation List - Held - Government servants getting Kramonnati Pay Scale forms separate group - It was incumbent on Government to have harmonized Clause 6(4) and (5) instead further classify by picking up separate cut off date - State Government was not justified in carving out a separate rule by introducing new cut off date vide its circular dated 26.12.2001 - Does not satisfy principle of equality enshrined under Article 14 of Constitution - Allocation of appellants to Chhatisgarh quashed - Appeal allowed.
(Paras 19 & 20)

पुनर्गठन अधिनियम, म.प्र. (2000 का 20), धारा 68 - आबंटन - क्रमोन्नति प्राप्त करने वाले कर्मचारी अधिसूचना तारीख 22.03.2001 के अनुसार पृथक समूह बना रहे - राज्य सरकार द्वारा यह उपबंध करते हुए परिपत्र तारीख 26.12.2001 जारी किया गया कि केवल वे कर्मचारी क्रमोन्नति वेतनमान में शामिल होंगे जिनके आदेश प्रायोगिक अंतिम आबंटन सूची के प्रकाशन के पूर्व जारी किये गये हैं - अभिनिर्धारित - क्रमोन्नति वेतनमान पाने वाले कर्मचारी पृथक समूह निर्मित करते हैं - सरकार के लिए यह बाध्यकारी था कि पृथक कट ऑफ तारीख चुनने के द्वारा अतिरिक्त वर्गीकरण करने के बजाय खण्ड 6(4) व (5) को समरूप करती - राज्य सरकार परिपत्र तारीख 26.12.2001 द्वारा नवीन कट ऑफ तारीख प्रस्तावित करके एक अलग नियम बनाने में न्यायसंगत नहीं थी - संविधान के अनुच्छेद 14 के अन्तर्गत संरक्षित समानता के सिद्धांत की तुष्टि नहीं करती - अपीलार्थियों का छत्तीसगढ़ को आबंटन अभिखण्डित - अपील मंजूर।

Cases referred :

(2004) 4 SCC 646, (1974) 1 SCC 19, (2005) 1 SCC 394, (2006) 8 SCC 399.

Ajay Mishra with B.S. Shukla, for the petitioner.

Dharmendra Sharma, A.S.G., for the respondent No.1.

Deepak Awasthy, G.A., for the respondent Nos.2 & 3.

Ajay Ojha, for the respondent No.4.

J U D G M E N T

The Judgment of the Court was delivered by SANJAY YADAV, J. :- The orders passed in present appeal shall govern the final disposal of W.A. No. 784/2007 and W.A. No. 785/2007, as common question of law is involved in these Writ Appeals, which are filed under Section 2 of Madhya Pradesh, Uchcha Nyayalaya (Khand Nayaypeeth Ko Appeal) Adhiniyam, 2005, against a common order passed by learned Single Judge in W.P.No. 4643/2007(S), W.P.No. 4645/2007(S) and W.P.No. 4730/2007(S) on 16.4.2007 whereby the challenge put forth by the Appellants/Petitioners against the allocation of their services to newly constituted State of Chattisgarh has been negatived.

2. The brief facts common to all the cases are that the Appellants are Rural Agriculture Extension Officer (For short RAO) engaged in the erstwhile State of Madhya Pradesh respectively w.e.f. 7/9/1987, 18/9/1987 and 19/10/1987 in the Department of Agriculture in grade Rs.4000-6000/-. There exist a Kramonanti grade of Rs.4500-7000/- which is granted on completion of 12 year of service in lower grade of Rs.4000-6000/-. Pertinent it will be to note, that the Appellants were granted this benefit of Kramonnati prior to 23.9.2000. That year 2000 witnessed the bifurcation of the State of Madhya Pradesh when a new State of Chattisgrah was carved out by virtue of M.P. Reorganisation Act, 2000; whereunder, besides other things, provisions were made for allocation of 26.23% post, along with the employees, to the State of Chattisgarh. Section 68(2) of the Act of 2000 empowered the Central Government to frame Rules to facilitate the implementation of the provisions of Act of 2000. The broad principle of allocation inter-alia included allocation first by options, followed by Domicile (Home District) and lastly by inclusion of junior most personnel in the reverse order of seniority i.e. if the number of posts allocated to the successor State of Chattisagarh was more than the total number of officer and Domicile (Home District) then people lower down in the seniority position in the cadre were considered for allocation even against their options, in order to fill up the balance posts.

3. Keeping in view the aforesaid broad principles for allocation of the services of employees to the successor State on bifurcation of State of Madhya Pradesh various directions were issued by the Central Government in exercise of the powers under Section 68(2) of the Act of 2000, one such direction, which we are concerned within the present case, was issued on 22.3.2001 which was published in M.P. Gazette (Extra Ordinary) dated 23.3.2001, stipulating therein certain norms by way of clarification for final allocation of Government servants, including therein within its fold the parameters to be adhered to in allocating on the basis of option,

domicile and the reverse order of seniority. In the case at hand, since we are concerned with the allocation on the basis of reverse order of seniority qua Kramonanti, Clause 6(4) and 6(5) provided necessary stipulations which one will advert to little later.

4. The Appellants/Petitioners being the beneficiary of Kramonant Pay Scale of Rs.4500-7000/- formed a separate group under clause 6(4) of the Notification dated 22.3.2001 and since they were placed lower in the list, their services were allocated to the State of Chattisgarh.

5. Aggrieved of such allocation grievances were raised mainly on the ground that there were other juniors in grade Rs.4000-6000/- in the Cadre of RAE0 who were given the Kramonant Pay Scale effective from prior to 23.9.2000, though by a subsequent orders, were not included in the group under Clause 6(4) and were therefore, retained in the State of Madhya Pradesh. Writ Petitions were filed, which were disposed of with the direction to the Central Government and the State Government to decide the representations by giving credence to the objections raise by the employees.

6. Consequence thereof, the case of the Appellants/Petitioners were re-considered and respective orders were passed on 4.10.2006, rejecting their claim against allocation to State of Chattisgarh. These orders were subjected to challenge in Writ Petitions and by the impugned order these Writ Petitions were dismissed thereby upholding their final allocation to the State of Chattisgarh. It is these orders which are under challenge in the present set of Writ Appeals.

7. The challenge is on the ground that the order of allocation being ex-facie arbitrary, illegal and violative of policy of allocation as prescribed by the Central Government the learned Writ Court fell in to patent error by upholding the same, resulting therein the retention of Junior RAE0's and the allocation of the Senior RAE0's to the State of Chattisgarh. It is further urged that the respondents were not consistent in adhering to the policy laid down for allocation because while the junior were being retained by not including them within the group of Kramonati beneficiary, whereas a similarly situated RAE0 as the Appellants/Petitioners, viz, Shri S.C. Jain, was retained in the State of Madhya Pradesh and the petitioners were discriminated by not been treated similarly as Shri S.C Jain. It is further contended that the respondents having deliberately withheld the release of orders of Kramonati of Juniors caused grave prejudice to the Appellants/Petitioners so much so that the Juniors have been retained in the State of Madhya Pradesh, this act of delay in passing order of Kramonnati is willful and deliberate. It is accordingly urged that the action of respondent is violative of principle enunciated under Article 14 and 16 of the Constitution of India.

8. The respondent Union of India on its turn has supported the order of allocation, contending therein, that the same is strictly in accordance with the norms laid down and clarification issued thereof from time to time. It is further

stated that on receiving representation from the respective Appellants/Petitioners, their cases were considered as per direction of this Court and the feed back provided by the State of M.P. It is urged that no error has been committed by not adding the Kramonanti beneficiaries who were granted the benefit from a retrospective date and by an order passed after the cut off date, viz, 23.9.2000. The respondent State of Madhya Pradesh joined the submissions put forth by the Union of India, contending, inter- alia, that the allocation of the Appellants/Petitioners is in accordance with the policy of allocation and therefore the learned Writ Court did not commit any error in rejecting the plea put forth by the Appellants/Petitioners.

9. Heard the learned counsel for the parties at length.

10. Before, advertng to the rival submissions, worth it would be to note the broad features which were the outcome of State reorganization vide the Madhya Pradesh Reorganisation Act (referred to as Act of 2000) qua the division of Government Service which was one of the major consequences of the State re-organisation.

11. Part VIII of the Act of 2000 relates to provisions as to service, providing therein, allocation of serving Government Servants in successor State, protection of service conditions regarding employees, transitional provisions, etc. Section 68 stipulates provisions relating to services in Madhya Pradesh and Chattisgarh; Section 69 refers to provisions relating to other service; Section 70 relates to provisions as to continuance of Officer in the same post, while Section 71 pertains to Constitution of Advisory Committees; Section 72 empowers the Central Government to give directions to State Government.

12. The Central Government in exercise of its power under Section 68(2) the Act of 2000 issued guidelines containing the principles and modalities of handling personnel and service matters vide letter dated 13.9.2000, whereupon, the State of Madhya Pradesh issued comprehensive instructions vide Memorandum No.F-1-3/2000/4(2)/SRC dated 23.9.2000. In sequel whereof, certain clarifications were issued for proper and effective implementation of allocation and one such, which we are presently concerned with, was issued on 22.3.2001 and published in M.P. Gazette dated 23.3.2001, whereunder Clause 6 provided for allotment of service of employees getting Krammonat Pay Scale, on the basis of reverse order of seniority in the following terms:

"6. कनिष्ठता के आधार पर आबंटन :

(4) क्रमोन्नत वेतनमान : यदि समान पद पर एक ही संवर्ग में क्रमोन्नति योजनांतर्गत अगला वेतनमान दिया जा रहा है तब क्रमोन्नत वेतनमान के आधार पर उस वेतनमान के कर्मचारियों को पृथक समूह मान कर आबंटन किया जायें ।

(5) दिनांक 23.9.2000 के पूर्व जारी / प्रभावशील क्रमोन्नत वेतनमान आदेशों को आबंटन का आधार माना जाये भले ही क्रमोन्नति आदेश इसके पश्चात की तिथि में प्रसारित किये गये हों । "

13. Thus Clause 6 facilitated the creation of a separate class who got the benefit of higher pay scale, viz, the Krammonat Pay Scale prior 23.9.2000. As noted above, the grant of Krammonat Pay Scale being the continuous process, the orders came to be passed by the State Government even at subsequent dates making it effective from prior to 23.9.2000 and taking care of such situation Clause 6(5) provided, that all such persons who are given a Krammonat Pay Scale retrospectively, irrespective of the date of order, will be in the group along with all such persons who are included in the group constituted under Clause 6(4). Thus an homogeneous class was brought into existence vide Clause 6(4) and Clause 6(5).

14. In the cases at hand, the Central Government in compliance to the order passed in Writ petition considered the representations filed by the Appellants/Petitioners in the light of detailed comments given by the Department of Agriculture and came to hold that since a provision has been made in Government of Madhya Pradesh, General Administration Department, (State Reorganization Cells) letter dated 26.12.2001, that only those employees will be included in the Kramonnati Pay Scale whose orders have been issued before the publication of Tentative Final Allocation list and the employees whose Kramonnati Pay Scale orders were issued after publication of TFAL will not be included in the Kramonnati Pay Scale group for the purpose of allocation, their representations were rejected and accordingly the Appellants/Petitioners were allocated.

15. The Central Government, thus while deciding the representation, besides relying upon the detailed comments by the Department, also relied upon the letter dated 26.12.2001 the stipulations wherein in respect of delayed order of Kramonnati were in the following terms:

“राज्य सलाहकार समिति की बैठक दिनांक 29.11.2001 में विलंब से क्रमोन्नति के बारे में विचार किया गया एवं यह निर्णय हुआ कि चूंकि (पदोन्नति की भांति) क्रमोन्नति की कार्यवाही सतत रूप से चलती रहने की प्रशासनिक कार्यवाही है और इस कार्यवाही के चलते आबंटन को अंतिम रूप नहीं दिया जा सकता है, किसी भी विभाग द्वारा “प्रस्तावित अंतिम आबंटन सूची” के प्रकाशन की तिथि के बाद जारी क्रमोन्नति प्रदेश की प्रस्तावित अंतिम आबंटन में संशोधन हेतु मान्य न किया जाये।”

Meaning thereby, that in a meeting held on 29.11.2001 the matter pertaining to delayed Kramonnati was considered and it was decided that since the Kramonnati, like the promotion, is a continuous process and the allocation could not be finalized therefore any order of Kramonnati issued after the date of publication of TFAL will not be taken into consideration. This was a decision taken in the meeting of State Advisory Committee which was constituted by the Central Government in exercise of its power under Section 71 of the Act of 2000 to assist the Central Government in discharge of their Authority.

16. The question is whether the respondent State were justified in diluting the

effect of clause 6(5) which aimed at removing disparity by including all such RAO's who got the benefit of Kramonnati prior to 23.9.2000, irrespective of the date of order by creating a separate class resulting thereby in the retention of juniors by excluding them from forming a part of homogeneous group.

17. True it is, that Article 14 does not forbid a reasonable classification but subject to the conditions that it is based on an intelligible differentia and the differentia must have a rational relation to the object sought, the concept of equality thus varies from fact to fact and subject-matter to subject matter as held by the Apex Court in the case of *M.P. Rural Agriculture Extension Officers Assn. Vs. State of M.P. & another* (2004) 4 SCC 646; wherein their Lordships were pleased to opine in paragraphs 14 to 16 in the following terms:

"14. Article 14, it is trite, does not forbid a reasonable classification.

15. Article 14 forbids class legislation but permits reasonable classification subject to the conditions that it is based on an intelligible differentia and that the differentia must have a rational relation to the object sought to be achieved.

16. Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact, situation to situation and subject matter to subject matter."

In the case of *State of Jammu and Kashmir Vs. Triloki Nath Kosha* 1974(1) SCC 19 their lordships were pleased to observe in paragraph 31 the following terms:

"31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved".

Similarly in the case of *E.V. Chinnaiah Vs. State of A.P.* (2005) 1 SCC 394 it was observed by their Lordships of the Apex Court regarding sub-classification standing the test of reasonable classification in the following terms:

"39. Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically

backward, the State's jurisdiction while exercising its executive or legislative function is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. In our opinion, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class".

18. In the case of *Confederation of Ex-Serviceman Assns. V. Union of India*: (2006) 8 SCC 399 it was held by the Apex Court that for a classification to be legal, valid and permissible, it must fulfill twin test, namely,

"(i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and

(ii) such a differentia must have rational nexus to the object sought to be achieved by the Statute on legislation in question".

19. In the case at hand one of the mode for allocation of service to the State of Chattisgarh being the reverse seniority and the government servants getting Krammonat Pay Scale forms a separate group it was incumbent on the government to have harmonized clause 6(4) and 6(5) instead further classify by picking up a separate cut off date i.e. publication of TFAL for determination of a group, this action reflects a discriminative approach and does not satisfy the principle of equality enshrined under Article 14 of the Constitution of India.

20. Having thus considered, we are of the considered opinion that the State were not justified in carving out a separate rule by introducing a new cut off date vide its circular dated 26.12.2001 and thus Central Government was not justified in treating such persons who were otherwise covered by Clause 6(5) to be separate than those who formed part of the group constituted under Clause 6(4). As a result the allocation of the Appellants/Petitioners to the State of Chattisgarh vide Annexure P-6 is hereby set aside and consequent thereof, order dated 4.10.2006 (Annexure P-15) and order dated 3.3.2007 (Annexure P-16) are also quashed. The respondents are directed to retain the appellants in the State of Madhya Pradesh.

21. The petition is allowed to the extent above. However, no costs.

Petition allowed.

I.L.R. [2008] M. P., 2809

WRIT PETITION.

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

23 April, 2008*

ASSOCIATION OF THE RESIDENT OF MHOW & anr.

... Petitioners

Vs.

DELIMITATION COMMISSION OF INDIA & ors.

... Respondents

A. Delimitation Act (33 of 2002), Section 9(2) - *Delimitation of constituencies - Mhow was to be included in Indore parliamentary constituency as per notification dated 19.01.2007 - Residents of Mhow did not file any objection - Commission decided to include Mhow in Dhar parliamentary constituency instead of Indore parliamentary constituency - Held - No provision requiring Delimitation Commission to again publish proposal or invite objections and suggestions and hold public meetings if the Commission decides to change the original proposal as published - Commission was not required to publish its decision and invite objections and hold one or more public meetings - Petition dismissed.* (Para 7)

क. परिसीमन अधिनियम (2002 का 33), धारा 9(2) — निर्वाचन क्षेत्रों का परिसीमन — अधिसूचना तारीख 19.01.2007 के अनुसार महु को इन्दौर संसदीय निर्वाचन क्षेत्र में सम्मिलित करना था — महु के निवासियों ने कोई आपत्ति पेश नहीं की — आयोग ने महु को इन्दौर संसदीय निर्वाचन क्षेत्र के स्थान पर धार संसदीय निर्वाचन क्षेत्र में सम्मिलित करने का निर्णय किया — अभिनिर्धारित — यदि आयोग प्रकाशित मूल प्रस्ताव परिवर्तित करने का निर्णय करता है तो परिसीमन आयोग से अपेक्षा करने वाला कोई उपबंध नहीं कि दोबारा प्रस्ताव प्रकाशित करे या आपत्तियाँ और सुझाव आमंत्रित करे तथा लोक बैठकें आयोजित करे — आयोग को अपना निर्णय प्रकाशित करने, आपत्तियाँ आमंत्रित करने और एक या अधिक लोक बैठकें आयोजित करने की आवश्यकता नहीं थी — याचिका खारिज।

B. Delimitation Act (33 of 2002), Sections 9 & 10(1), Constitution, Articles 327 & 329 - *Delimitation - Delimitation Commission after inviting suggestions, objections and after conducting public hearings included Mhow in Dhar parliamentary constituency instead of Indore parliamentary constituency - Held - Once the order made by Commission is published in Gazette of India, it has the force of law and cannot be called in question in any Court.* (Para 12)

ख. परिसीमन अधिनियम (2002 का 33), धारा 9 व 10(1), संविधान, अनुच्छेद 327, 329 — परिसीमन — परिसीमन आयोग ने सुझाव, आपत्तियाँ आमंत्रित करने और लोक सुनवाई करने के बाद महु को इन्दौर संसदीय निर्वाचन क्षेत्र के स्थान पर धार संसदीय निर्वाचन क्षेत्र में सम्मिलित किया — अभिनिर्धारित — एक बार आयोग द्वारा किया गया आदेश भारत के राजपत्र में प्रकाशित हो जाता है तो वह कानून का प्रभाव रखता है किसी न्यायालय में प्रश्न में नहीं बुलाया जा सकता।

Cases referred :

AIR 1987 SC 1239, 1995 Supp. (2) SCC 305, AIR 1967 SC 669, 46 ELR 309.

A.M. Mathur with Manoj Munshi, Ashutosh Upadhyay, Sanjay Agrawal, for the petitioners.

K.K. Trivedi with S.K. Maindiretta, for the respondents.

J U D G M E N T

The Judgment of the Court was delivered by A.K. PATNAIK, C. J. :—Petitioner No. 1 is an Association of the residents of Mhow and has been registered as a Society under the Madhya Pradesh Society Registration Act. Petitioner No.2 is a resident of Mhow. Mhow was earlier included in the Indore Parliamentary Constituency. By a notification in the Extraordinary Gazette of India dated 19th January, 2007, the Delimitation Commission of India (for short 'the Commission') published its proposals relating to delimitation of different Parliamentary Constituencies in Madhya Pradesh and specified therein 1st February, 2007 as the date on or after which the proposals will be further considered by the Commission. In the notification dated 19th January, 2007, the Commission also stated that any objections or suggestions in regard to the proposals should reach the Secretary of the Commission on or before 1st February, 2007. Thereafter, the Commission conducted public hearings on different dates and decided *inter-alia* to include Mhow in Dhar Parliamentary-Constituency instead of Indore Parliamentary Constituency in its meeting held on 12th of April, 2007. The Commission finally issued an order dated 14.5.2007 under Section 10(1) read with Section 4(2) and Section 9(2) of the Delimitation Act, 2002 (for short 'the Act') determining the delimitation of Parliamentary Constituencies in Madhya Pradesh and in the order has included Mhow in Dhar Parliamentary Constituency instead of Indore Parliamentary Constituency. Aggrieved, the petitioners have filed this writ petition under Article 226 of the Constitution praying for quashing the order dated 14.5.2007 in so far as it includes Mhow in Dhar Parliamentary Constituency instead of Indore Parliamentary Constituency.

2. Mr. A.M. Mathur, learned counsel for the petitioners submitted that the impugned order dated 14.5.2007 of the Commission was in gross violation of the provisions of Section 9(2) of the Act. Mr. Mathur submitted that Section 9(2) of the Act provided that the Commission shall publish its proposals for the delimitation of constituencies and also specify a date on or after which the proposals shall be further considered and Commission shall consider all objections and suggestions which may have been received by it before the date so specified and for the purpose of such consideration hold one or more public sittings and only thereafter by one or more orders determine the delimitation of parliamentary constituencies. He submitted that the entire purpose of Section 9(2) of the Act is to ensure that members of the public get an opportunity to submit their objections to the proposals

of the Commission and to be heard before the Commission finally passes the orders. He submitted that the only-proposal that was published by notification dated 19.1.2007 was that Mhow will be included in Indore Parliamentary Constituency and the residents of Mhow did not submit any objection to such proposal because they agreed with the proposal. He submitted that since no proposal was at all published by the Commission to include Mhow in Dhar Constituency the residents of Mhow did not file any objection to such a proposal and also did not remain present at the time of public hearing by the Commission.

3. Mr. Mathur cited the observations of the Supreme Court in *Baldev Singh and others vs. State of Himachal Pradesh and others*, AIR 1987 SC 1239 that it is necessary that people affected by any change should be given an opportunity of being heard, otherwise they would be visited with serious civil consequences and that denial of such opportunity of hearing is not in consonance with the scheme of the Rule of Law governing a society.

4. Mr. Mathur submitted that since the impugned order dated 14.5.2007 has been issued in violation of the procedure laid down under Section 9(2) of the Act as well as the principles of natural justice the High Court in exercise of its powers under Article 226 of the Constitution should quash the impugned order. He submitted that in *State of U.P. vs. Pradhan Sangh Kshettra Samiti and others*, 1995 Supp. (2) SCC 305, a question arose before the Supreme Court whether an order with regard to delimitation of panchayat areas could be called in question before the High Court under Article 226 of the Constitution in view of the bar under Article 243-0(a) of the Constitution that validity of law relating to delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243K cannot be called in question in the Court, but the Supreme Court held that an order for delimitation of Constituencies could be challenged on the ground that before delimitation no objections were invited and no hearing was given.

5. Mr. K.K. Trivedi and Mr. S.K. Maindiretta, learned counsel appearing for the Commission, on the other hand, submitted that the impugned order of the Commission has already been published in the Gazette of India on 14.5.2007. They submitted that Section 10(1) of the Act provides that the Commission shall cause its orders made under Section 8 or 9 to be published in the Gazette of India and Section 10(2) of the Act further provides that upon publication of Gazette of India, such order of the Commission shall have the force of law and shall not be called in question in any Court. They further submitted that Article 329(b) of the Constitution similarly provides that notwithstanding anything in the Constitution the validity of law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 327 of the Constitution shall not be called in question by any Court. They submitted that

the aforesaid provisions of Section 10 of the Act as well as Article 329 of the Constitution were considered by the Supreme Court in *Meghraj Kothari vs. Delimitation Commission and others*, AIR 1967 SC 669 and the Supreme Court held that upon publication in the Gazette of India an order of the Commission under Section 10(1) of the Act has the force of law and cannot be called in question in any Court. They also cited the decision of the Andhra Pradesh High Court in *M.M. Ratnam vs. The Delimitation Commission*, 46 ELR 309 and *M. Yellappa and another vs. The Delimitation Commission, New Delhi and another*, 49 ELR 272 in which the aforesaid decision of the Supreme Court in *Meghraj Kothari vs. Delimitation Commission and others* (supra) has been followed.

6. Mr. Trivedi and Mr. Maindiretta further submitted that in any case the proposals regarding Indore Parliamentary Constituency and Dhar Parliamentary Constituency were published by the Commission by the notification dated 19th January, 2007 and after public hearing it was decided by the Commission to include Mhow in Dhar Parliamentary Constituency instead of Indore Parliamentary Constituency and therefore the provisions of Section 9(2) of the Act were complied with. They submitted that there was no provision in Section 9(2) of the Act requiring the Commission to publish again its decision to include Mhow in Dhar Parliamentary Constituency instead of Indore Parliamentary Constituency and invite objections to the decision from the public and conduct another public hearing before issuing the impugned order.

7. Section 9 of the Act on which Mr. Mathur has placed reliance is quoted herein below :

9. Delimitation of constituencies.

(1) The Commission shall, in the manner herein provided, then, distribute the seats in the House of the People allocated to each State and the seats assigned to the Legislative Assembly of each State as readjusted on the basis of 1971 census to single-member territorial constituencies and delimit them on the basis of the census figures as ascertained, at the census held in the year 1991, having regard to the provisions of the Constitution, the provisions of the Act specified in Section 8 and the following provisions, namely:

(a) all constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to physical features, existing boundaries of administrative units, facilities of communication and public convenience;

(b) every assembly constituency shall be so delimited as to fall wholly within one parliamentary constituency;

(c) constituencies in which seats are reserved for the Scheduled Castes shall be distributed in different parts of the State and located, as far as

practicable, in those areas where the proportion of their population to the total is comparatively large; and

(d) constituencies in which seats are reserved for the Scheduled Tribes shall, as far as practicable, be located in areas where the proportion of their population to the total is the largest.

(2) The Commission shall -

(a) publish its proposals for the delimitation of constituencies, together with the dissenting proposals, if any, of any associate member who desires publication thereof, in the Gazette of India and in the Official Gazettes of all the States concerned and also in such other manner as it thinks fit;

(b) specify a date on or after which the proposals shall be further considered by it;

(c) consider all objections and suggestions which may have been received by it before the date so specified, and for the purpose of such consideration, hold one or more public sittings at such place or places in each State as it thinks fit; and

(d) thereafter by one or more orders determine-

(i) the delimitation of parliamentary constituencies; and

(ii) the delimitation of assembly constituencies,

of each State.

8. Sub-section (1) of Section 9 quoted above provides that the Commission shall in the manner provided in Section 9 of the Act distribute the seats in the House of the People allocated to each State and the seats assigned to the Legislative Assembly of each State and delimit them on the basis of the census figures as ascertained at the census held in the year 1991 having regard to the provisions of the Constitution, the provisions specified in Section 8 of the Act and also the provisions specified in Clauses (a) to (d) in sub section (1) of Section 9 of the Act. Sub-section (2) of Section 9 of the Act provides the manner in which the Commission has to distribute the seats and delimit the constituencies. Clause (a) of Section 9(2) states that the Commission shall publish its proposals for delimitation of constituencies, together with the dissenting proposals, if any. Clause (b) of Sub-section (2) of Section 9 of the Act provides that the Commission shall specify a date on or after which the proposals shall be further considered by it. Clause (c) of Sub-section (2) of Section 9 of the Act provides that the Commission shall consider all objections and suggestions which may have been received by it before the date so specified and for the purpose of such consideration, hold one or more public sittings at such place or places as it thinks fit. Clause (d) of Sub-section (2) of Section 9 of the Act provides that after following the aforesaid

requirements of Clauses (a), (b) and (c), the Commission by one or more order determine the delimitation of constituencies. There is no provision in any of the clauses of Section 9(2) of the Act quoted above requiring the Commission to again publish a proposal or invite objections and suggestions and hold public meetings if the Commission decides to change the original proposal as published. In the absence of any such provision, we cannot hold that the Commission was required to publish its decision to include Mhow in Dhar Parliamentary Constituency instead of Indore Parliamentary Constituency again and invite objections and hold one or more public sittings as contended by Mr. Mathur, learned counsel for the petitioners.

9. Moreover, once an order made by the Commission is published in the Gazette of India, such an order has the force of law and cannot be called in question in any Court. This is clear from the provisions of Article 329 read with Article 327 of the Constitution and the provisions of sub-sections 1, 2 and 4 of Section 10 of the Act are quoted herein below:

327. Power of Parliament to make provision with respect to elections to Legislatures- Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

329. Bar to interference by courts in electoral matters-

Notwithstanding anything in this Constitution -

(a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

(b) No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

10. Publication of orders and their date of operation.

(1) The Commission shall cause each of its orders made under Section 8 or Section 9 to be published in the Gazette of India and the Official Gazettes of the States concerned and simultaneously cause such orders to be published at least in two vernacular newspapers and publicize on radio, television and other possible media available to the

public and after such publication in the Official Gazettes of the States concerned, every District Election Officer shall cause to be affixed, the Gazette version of such orders relating to the area under his jurisdiction, on a conspicuous part of his office for public notice.

(2) Upon publication in the Gazette of India, every such order shall have the force of law and shall not be called in question in any court.

(4) Subject to the provisions of sub-section (5), the readjustment of representation of the several territorial constituencies in the House of the People or in the Legislative Assembly of a State and the delimitation of those constituencies provided for in any such order shall apply in relation to every election to the House or to the Assembly, as the case may be, held after the publication in the Gazette of India of that order and shall so apply in supersession of the provisions relating to such representation and delimitation contained in any other law for the time being in force or any order or notification issued under such law insofar as such representation and delimitation are inconsistent with the provisions of this Act.

10. It will be clear from Article 327 of the Constitution quoted above that power has been vested in Parliament to make provision by law from time to time with respect to matters relating to delimitation of constituencies. In exercise of such power, parliament has made the Act. Section 10(1) of the Act provides that the Commission shall cause its order passed under Section 8 or 9 to be published in the Gazette of India and Section 10(2) of the Act states that upon publication in the Gazette of India, every such order shall have force of law and shall not be called in question in any Court. Section 10(4) of the Act further provides that after the publication in the Gazette of India of such order, the readjustment of representation of several territorial constituencies in the House of the People and the delimitation of those constituencies provided for in any such order shall apply in relation to every election to the House and "shall so apply in supersession of the provisions relating to such representation and delimitation contained in any other law for the time being in force" or any other order or notification issued under such law in so far as such representation and delimitation are inconsistent with the provision of the Act.

11. In *Meghraj Kothari vs. Delimitation Commission and others* (supra), the Supreme Court considered provisions similar to Section 10(2) and Section 10(4) of the Act contained in the Delimitation- Commission Act, 1962 and held that although the notification issued under Section 10(2) of the said Act was not a Statute passed by Parliament, it was a law relating to delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 327 of the Constitution and observed:

In this case we are not faced with that difficulty because the Constitution itself provides under Art. 329 (a) that any law relating to the delimitation of constituencies etc. made or purporting to be made under Art. 327 shall not be called in question in any court. Therefore an order under S. 8 or 9 and published under S. 10 (1) would not be saved merely because of the use of the expression "shall not be called in question in any court." But if by the publication of the order in the Gazette of India it is to be treated as law made under Art. 327, Art. 329 would prevent any investigation by any court of law.

Thus, the Supreme Court has clearly held in *Meghrag Kothari*, that an order made under Section 10(1) of the Act and published in the Gazette of India under Section 10(2) of the Act is to be treated as law made under Article 327 of the Constitution and cannot be called in question in any Court as provided in Article 329 of the Constitution. The learned Single Judge and the Division Bench of the Andhra Pradesh High Court in *M.M. Ratnam vs. The Delimitation Commission* and *M. Yellappa and another vs. The Delimitation Commission, New Delhi and another* (supra) have also held following the decision of the Supreme Court in *Meghrag Kothari* that having regard to Article 329 of the Constitution, an order of the Delimitation Commission passed under Section 9(2)(d) of the Act and published under Section 10(2) of the Act has the force of law and was not justiciable.

12. In *State of U.P. vs. Pradhan Sangh Kshettra Samiti and others* (supra) cited by Mr. Mathur, Clause (1) of Article 242-0 of the Constitution which provides that validity of any law relating to delimitation of the constituencies of panchayats or the allotment of seats to such constituencies made or purporting to be made under Article 243K of the Constitution shall not be called in question in any Court was considered and the Supreme Court referred to its earlier decision in *Meghrag Kothari* (supra) and observed :

"If we read Articles 243-C, 243-K and 243-O in place of Article 327 and Sections 2(kk), 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged nor the court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given."

Mr. Mathur relied on the unlined portion of the observations of the Supreme Court quoted above and submitted that where no objections were invited and no hearing was given, the Court can entertain a challenge to an order issued and published by the Commission relating delimitation of constituencies. But as we have indicated above, the proposals regarding Indore Parliamentary Constituency and Dhar

Parliamentary Constituency were published and objections were invited and public hearings were held and there is no requirement in Section 9(2) of the Act for the Commission to publish the proposal again, invite objections and hold further public hearing after the Commission decided to include Mhow in Dhar Parliamentary Constituency instead of Indore Parliamentary Constituency. Thus, the decision of the Supreme Court in *State of U.P. vs. Pradhan Sangh Kshettra Samiti and others* (supra) is of no assistance to the petitioners.

13. *Baldev Singh and others vs. State of Himachal Pradesh and others* (supra) cited by Mr. Mathur is a case in which the Supreme Court has held that inclusion of a locality in a notified area under Section 256 of the Himachal Pradesh Municipal Act, 1968 involves civil consequences and hence prior opportunity of hearing to the residents must be afforded though not provided in Section 256 of the aforesaid Act. The order for inclusion of a locality in the notified area under Section 256 of the aforesaid Act was not equivalent to law made by the Legislature. Infact the order issued under Section 256 of the aforesaid Act was held by the Supreme Court as an administrative decision of the State Government and not law made by the Legislature and such an administrative decision affecting the people of the locality, according to the Supreme Court should not have been taken without affording an opportunity of being heard to the residents of the concerned locality. Therefore, this decision has no application to the present case in which the order of the Delimitation Commission once published under Section 10(2) of the Act is law-made under Article 327 of the Constitution and cannot be called in question in any Court by virtue of Article 329 of the Constitution.

14. For the aforesaid reasons, we dismiss the writ petition, but order that the parties shall bear their own costs.

Petition dismissed.

I.L.R. [2008] M. P., 2817

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Sanjay Yadav

30 April, 2008*

LEELAWATI (SMT.) & anr.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 70, 86(2) - Gram Panchayat failed to appoint a Panchayat Karmi within the specified period - Therefore, Collector being a prescribed authority, in exercise of powers u/s 86(2) of the Adhiniyam authorized the C.E.O. to appoint Panchayat Karmi - C.E.O. appointed Panchayat Karmi - Appointment challenged on the ground that under the Adhiniyam only Gram Panchayat can appoint Panchayat

Karmi - Held - U/s 86(2) of the Adhiniyam, expression "all necessary powers" will include the power to authorize any authority to perform the duty of Panchayat such as appointment of a Panchayat Karmi u/s 70(1) of Adhiniyam - Therefore, Collector as prescribed authority had a power u/s 86(2) of the Adiniyam to authorize the C.E.O., Janpad Panchayat to appoint a Panchayat Karmi - The order of appointment is to be treated as of order passed by the prescribed authority - Petition dismissed. (Para 4)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 70, 86(2) - ग्राम पंचायत विनिर्दिष्ट कालावधि में पंचायत कर्मों की नियुक्ति करने में असफल रही - इसलिए, कलेक्टर ने विहित प्राधिकारी होने से अधिनियम की धारा 86(2) की शक्तियों को प्रयोग में लाते हुए सी.ई.ओ. को पंचायत कर्मों को नियुक्त करने के लिए प्राधिकृत किया - सी.ई.ओ. ने पंचायत कर्मों को नियुक्त किया - नियुक्ति को इस आधार पर चुनौती दी गई कि अधिनियम के अन्तर्गत पंचायत कर्मों की नियुक्ति केवल ग्राम पंचायत कर सकती है - अभिनिर्धारित - अधिनियम की धारा 86(2) के अन्तर्गत अभिव्यक्ति "सभी आवश्यक शक्तियों" में किसी प्राधिकारी को पंचायत के कर्तव्य, जैसे अधिनियम की धारा 70(1) के अन्तर्गत किसी पंचायत कर्मों की नियुक्ति करने के लिए प्राधिकृत करने की शक्ति भी शामिल है - इसलिए कलेक्टर को विहित प्राधिकारी के रूप में अधिनियम की धारा 86(2) के अन्तर्गत पंचायत कर्मों की नियुक्ति के लिए सी.ई.ओ., जनपद पंचायत को प्राधिकृत करने की शक्ति थी - नियुक्ति का आदेश विहित प्राधिकारी द्वारा पारित आदेश के समान माना जाना चाहिए - याचिका खारिज।

Abhishek Arjaria, for the petitioners.

Vivekanand Awasthy, G.A., for the respondent Nos.1 to 5.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :- The petitioners are permanent residents of Gram Panchayat, Baroli in Tehsil Ajaygarh. The Gram Panchayat, Baroli failed to appoint a Panchayat Karmi within the specified period and, therefore, the Collector in exercise of power under Section 86(2) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short 'the Adhiniyam') authorised the Chief Executive Officer, Janpad Panchayat, Ajaygarh to appoint a Panchayat Karmi of Gram Panchayat, Baroli. The Chief Executive Officer, Janpad Panchayat, Ajaygarh issued an advertisement inviting applications for appointment of Panchayat Karmi in Gram Panchayat, Baroli. Petitioners and other candidates applied in pursuance to the advertisement to the Chief Executive Officer, Janpad Panchayat, Ajaygarh. Thereafter, the Chief Executive Officer, Janpad Panchayat, Ajaygarh appointed the respondent No.6 as Panchayat Karmi of Gram Panchayat, Baroli. Aggrieved, the petitioners have filed this writ petition under Article 226 of the Constitution.

2. Mr. Abhishek Arjaria, learned counsel for the petitioners submitted that under Section 70 of the Adhiniyam only the Gram Panchayat can appoint a Panchayat Karmi and hence the appointment of respondent No.6 as Panchayat Karmi made by the Chief Executive Officer, Janpad Panchayat, Ajaygarh is without jurisdiction and is void ab initio.

3. We are unable to accept the aforesaid submission of Mr. Arjaria. Section 86 of the Adhiniyam is quoted herein below:

"86. Power of State Government to issue order directing Panchayat for execution of works in certain cases .- (1) The State Government or the prescribed authority may, by an order in writing, direct any Panchayat to perform any duty imposed upon it, by or under this Act, or by or under any other law for the time being in force or any work as is not being performed or executed, as the case may be, by it and the performance or execution thereof by such Panchayat is, in the opinion of the State Government or prescribed authority, necessary in public interest."

(2) The Panchayat shall bound to comply with direction issued under sub-section(1) and if it fails to do so [the State Government or the prescribed authority shall have all necessary powers to get the directions complied with at the expense, if any, of the Panchayat] and in exercising such powers it shall be entitled to the same protection and the same extent under this Act as the Panchayat or its officers or servants whose powers are exercised."

It will be clear from sub-section (1) of Section 86 of the Adhiniyam that the State Government and the prescribed authority may by an order direct any panchayat to perform any duty imposed upon it by or under the Act or under any other law for the time being in force. It will be further clear from sub-section (2) of Section 86 of the Adhiniyam that the panchayat shall be bound to comply with the direction issued under sub-section (1) and if it fails to do the State Government or the prescribed authority shall have all necessary powers to get the directions complied with at the expense, if any, of the panchayat and in exercising such powers it will be entitled to the same protection and the same extent under the Act as the panchayat or its officers or servants exercise such powers.

4. In the instant case, it is not disputed that Collector who was the prescribed authority issued a direction to the Gram Panchayat, Baroli to perform its duty of appointing a Panchayat Karmi under Section 70(1) of the Adhiniyam and that the Gram Panchayat, Baroli failed to comply with such directions. Hence, under sub-section (2) of Section 86 of the Adhiniyam, the Collector as the prescribed authority had the power to get this direction complied with. Under sub-section (2) of Section 86 of the Adhiniyam the State Government or the prescribed authority also have all necessary powers to get the directions complied with. The expression "all necessary powers" will include the power to authorise any authority to perform the duty of the panchayat such as appointment of a Panchayat Karmi under sub-section (1) of Section 70 of the Adhiniyam. Hence the Collector as the prescribed authority had the power under sub-section (2) of Section 86 of the Adhiniyam to authorise the Chief Executive Officer, Janpad Panchayat, Ajaygarh to appoint a Panchayat Karmi and the Chief Executive Officer, Janpad Panchayat, Ajaygarh by virtue of such authorisation had also the power to select and appoint a Panchayat

Karmi of the Gram Panchayat. But since the order of appointment is issued pursuant to authorisation by the prescribed authority, the order of appointment is to be treated as an order passed by the prescribed authority.

5. Moreover, pursuant to the advertisement issued by the Chief Executive Officer, Janpad Panchayat, Ajaygarh the two petitioners also submitted applications and had participated in the selection alongwith other candidates. Having participated in the selection conducted by the Chief Executive Officer, Janpad Panchayat, Ajaygarh for appointment of Panchayat Karmi, they cannot turn round at this stage and raise a contention before this Court that the Chief Executive Officer, Janpad Panchayat, Ajaygarh had no power or jurisdiction to conduct the selection and make appointment of Panchayat Karmi.

6. Mr. Abhijit Arjaria, learned counsel for the petitioners next submitted that the Chief Executive Officer, Janpad Panchayat, Ajaygarh had not appreciated the merits of the candidates properly and that the appointment of the respondent No.6 as Panchayat Karmi was in violation of the Scheme of 1995 made by the State Government regarding appointment of Panchayat Karmi. This is a matter which can be agitated by the petitioners by way of an appeal or a revision against the order of the Collector as the prescribed authority before the Commissioner under Rule 3 or 5 of the Madhya Pradesh Panchayats (Appeal and Revision) Rules, 1995, as the case may be.

With the aforesaid observations and directions, this writ petition is disposed of. In case, such an appeal or revision is filed by the petitioners, we hope and trust that the Commissioner will dispose of such appeal/revision as expeditiously as possible.

Petition disposed of.

I.L.R. [2008] M. P., 2820

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Sanjay Yadav

2 May, 2008*

SHYAM BIHARI SINGH

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 247 - Government's title to minerals - Judgment passed in Premchand's case (1965 J.L.J. 413) is not applicable to grant of mining leases after enactment of Mines and Minerals (Regulation and Development) Act, 1957. (Para 16)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 247 - खनिजों पर राज्य का स्वत्व - खान और खनिज (विनियमन और विकास) अधिनियम, 1957 के अधिनियमन के पश्चात्

खनन पट्टों के प्रदान किये जाने के लिए प्रेमचंद के मामले (1965 JIJ 413) में पारित निर्णय लागू नहीं होता।

B. Mines and Minerals (Regulation and Development) Act (67 of 1957), Section 24A - Rights and liabilities of a holder of prospecting licence or mining lease - Whether consent of owner of private land before grant of mining lease to third person is or is not required - Held - Consent of owner of private land in respect of which mining lease is sought to be given by Government is not mandatory - Reference answered accordingly. (Para 16)

ख. खान और खनिज (विनियमन और विकास) अधिनियम (1957 का 67), धारा 24ए - पूर्वक्षण अनुज्ञप्ति या खनन पट्टा धारक के अधिकार और दायित्व - क्या तृतीय व्यक्ति को खनन पट्टे के अनुदान के पूर्व निजी भूमि के स्वामी की सहमति अपेक्षित है या नहीं - अभिनिर्धारित - निजी भूमि, जिसके संबंध में सरकार द्वारा खनन पट्टा दिया जाना चाहा गया है, के स्वामी की सहमति आज्ञापक नहीं है - रिफरेंस तदनुसार उत्तरित।

Cases referred :

AIR 1970 SC 1436, 1965 JIJ (CN)73, 1989 MPLJ 265, AIR 2007 SC 2458, (1997) 4 SCC 559, (1995) 2 SCC 402.

V.K. Tankha & A.P. Singh, for the petitioner.

R.N. Singh, A.G., for the respondent/State.

S.P. Upadhyay, for the respondent No.4.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :- By a common order dated 2.12.2006 passed in the writ petitions, a learned single Judge of this Court has referred the following two questions for opinion of the Division Bench:

(i) Whether under Section 247 of the M.P. Land Revenue Code 1959 for assignment of the right by the Government to any person in respect of land of which surface right vests in third person, the consent of land owner (Bhumiswami) is necessary? Any grant by the Government without any consent of such Bhumiswami is sustainable under the law?

(ii) Whether the Division Bench in *Premchand* (supra), has rightly held that for assignment of rights in respect of any minerals, mines and quarries by the Government to a third person under Section 247 of the Code, an opportunity of hearing or consent of the Bhumiswami is not required?

2. Mr. Vivek Tankha, learned senior counsel appeared for the petitioner in W.P.No.3548 of 2008 and Mr. A.P. Singh, learned counsel appeared for the petitioners in W.P.Nos.7745 of 2006, 8873 of 2006, 8874 of 2006, 8876 of 2006, 10706 of 2006, 10707 of 2006 and 1308 of 2008. Mr. Tankha leading the arguments

on behalf of all the petitioners submitted that under Entry 54 of List-I of the Seventh Schedule read with Art. 246 of the Constitution, Parliament has power to make law on regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest. He submitted that the State Legislature also has power under Entry 23 of List-II read with Art. 246 of the Constitution to make a law on regulation of mines and minerals but such powder of the State legislature is subject to the power of Parliament under Entry 54 of List-I of the Seventh Schedule to the Constitution. He submitted that after Parliament enacted the Mines and Minerals (Development and Regulation) Act, 1957 (for short 'the 1957 Act') covering almost the entire field of regulations and development of mines and minerals, Section 247 of the M.P. Land Revenue Code, 1959 (for short 'the Code') stood over ridden by the provisions of the 1957 Act. In support of his submission, he cited the decision of the Supreme Court in *Baijnath Kedia vs. State of Bihar*, AIR 1970 S.C. 1436. He submitted that the Division Bench of this Court in *Premchand vs. State*, 1965 J.L.J. 413 (CN 73) had not considered the provisions of the 1957 Act and had taken a view that Section 247 of the Code conferred on State Government unfettered power to exercise its powers over mines and quarries even though the right on surface of the land owned by a third person was attracted. He submitted that in a later decision in *Ramchandra Badri Prasad Gour and others vs. Associated Cement Co. Ltd. and others*, 1989 M.P.L.J. 265, a Division Bench of this Court has clarified the decision in *Premchand* (supra) and has held that grant of lease creates interest in the lessee providing a right to carry on a mining operation as right to enjoy immovable property and such a mining lease has the characteristics of a lease contemplated under Section 105 of the Transfer of Property Act and that the provisions of Section 247 of the Code are only subsidiary provisions having little to do with assignment of right in minerals, mines and quarries.

3. Mr. Tankha submitted that Section 10(1) of the 1957 Act states that an application for inter-alia mining lease in respect of any land in which minerals vests in the Government shall be made to the State Government concerned in the prescribed form and shall be accompanied by the prescribed fee. He submitted that Section 10 (3) of the 1957 Act further provides that on receipt of an application for mining lease, the State Government may, having regard to the provisions of the 1957 Act and the rules made thereunder, grant or refuse to grant the permit, licence or lease and therefore relevant rules have to be read along with Section 10 of the 1957 Act. He submitted that Rule 22 of the Mineral Concession Rules, 1960 (for short 'the 1960 Rules') made under the 1957 Act is titled '**Applications for grant of mining leases**' and sub-rule (3) (1) (h) of Rule 22 of the 1960 Rules provides that every application for grant of mining lease shall be accompanied by a statement in writing that the applicant has, where the land is not owned by him, obtained surface rights over the area or has obtained the consent of the owner for

starting mining operations. He submitted that Section 10 of the 1957 Act read with Rule 22 of the 1960 Rules thus makes it clear that an application for grant of mining lease has to be accompanied by consent of the owner of a private land where lease is to be granted in respect of minerals located on private land. He submitted that these provisions in Section 10 of the 1957 Act read with Rule 22 of the 1960 Rules have to be read along with the Constitutional right to property guaranteed to every person under Art. 300-A of the Constitution.

4. Mr. Tankha cited the observations of the Supreme Court in the recent case of *Chairman, Indore Vikas Pradhikaran vs. M/s Pure Industrial Cock and Chemicals Ltd. and others*, AIR 2007 S.C. 2458 that the right to property is not only a constitutional right but also a human right. He referred to the words of President John Adams, quoted in para 57 of the judgment of the Supreme Court in the aforesaid case that 'property is surely a right of mankind as real as liberty'. He submitted that in the aforesaid case, the Supreme Court also observed that Courts must make an endeavour to strike a balance between public interest, on the one hand, and protection of a constitutional right to hold property, on the other. He vehemently argued that if mining leases are given for minerals located in land owned by private persons without their consent and without hearing them, the most valuable right to property will be affected by the Government granting mining leases in respect of minerals located on private land in favour of influential lessees without realizing the serious consequences of such leases on the right to property of such private owners. According to Mr. Tankha, therefore, no mining lease in respect of minerals located on private land can be granted without the consent of the owner of the private land or without hearing him.

5. Mr. Tankha submitted that it is for this reason that the Supreme Court in *Pallava Granites Industrial India (P) Ltd. vs. Government of A.P. and others*, (1997) 4 S.C.C. 559 has held that the right to excavate the mines from the land of private owner is based on agreement and unless the lessor gives his consent, no lessee has a right to enter upon his land and carry on mining operations and that the right to grant mining lease to excavate the mines beneath the surface is subject to the agreement with the land owner. He submitted that the law laid down by the Supreme Court in *Pallava Granites Industrial India (P) Ltd.* (supra) is the correct law and accordingly we should answer question No. 1 referred to by learned single Judge by saying that the consent of the land owner (Bhumiswami) is necessary for grant of a mining lease by the Government and any grant of mining lease without the consent of the Bhumiswami is not sustainable. He submitted that we should also answer question No.2 by saying that the Division Bench in *Premchand* (supra) did not lay the correct law when it said that assignment of right in respect of minerals by the Government to the third person was under Section 247 of the Code and that consent of the Bhumiswami and an opportunity of hearing to a Bhumiswami are not required before such grant.

6. Mr. R.N. Singh, learned Advocate General appearing for the State and Mr. S.P. Upadhyaya, learned counsel appearing for respondent Mo.4 in all the writ petitions, on the other hand, submitted that under Section 247 read with Section 57 of the Code, the right to all minerals, mines and quarries vests in the State Government and the State Government has all necessary powers for proper enjoyment of such rights. They submitted that the Division Bench in *Premchand* (supra) has laid down the correct law that if the right to mine is vested in the State, such right must include the right to access to land for the purpose of mining and the right to occupy such land as may be necessary for the purpose subsidiary thereto even though the surface of the land affected may be owned by a third person, and accordingly along with the right to minerals, mines and quarries, the right to access to the land for purposes of mining and right to occupy such land may be assigned in favour of the lessee. They submitted that independently of Section 247 of the Code, Section 24-A (1) of the 1957 Act conferred on the lessee of a mining lease the statutory right to enter into the land over which such lease has been granted at all times during the currency of the lease and to carry out mining operations subject to payment of compensation to the owner for any damage or loss suffered by the owner when the surface rights are owned by a private person. They submitted that Rules 22 and 26 of the 1960 Rules also show that consent of the owner of a private land in respect of which an applicant has submitted the application for mining lease is not mandatory but directory and that there is no requirement of affording an opportunity of hearing to the owner of the private land.

7. Mr. Singh and Mr. Upadhyaya cited the decision in *State of Tamilnadu vs. M.P.P. Kavery Chetty*, (1995) 2 S.C.C. 402 in which the Supreme Court has held after taking note of Section 24-A of the 1957 Act that consent of the occupier of a private land is not required before grant of mining lease. They submitted that in *Pallava Granites Industrial India (P) Ltd.* (supra), the Supreme Court has not taken note of Section 24-A of the 1957 Act that it was a case where the agreement of lease in respect of granite located on a private land was under the Rules as applicable to the State of Andhra Pradesh.

8. We have considered the submissions of learned counsel for parties and we agree with Mr. Tankha that after the enactment of 1957 Act by Parliament, the question whether consent of the owner of private land is or is not required has to be decided in accordance with the provisions of the 1957 Act and the 1960 Rules made thereunder and not in accordance with the provisions of Section 247 of the Code. This is because under Entry 54 of List-I of the Seventh Schedule read with Art. 246 of the Constitution, regulation of mines and mineral development to the extent to which such regulation and development under the control of Union is declared by Parliament by law to be expedient in public interest, is a field within the exclusive legislative powers of Parliament and in exercise of such exclusive legislative powers, Parliament has made the 1957 Act. Section 2 of the 1957 Act states: "It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and development of

minerals to the extent herein after provided." Accordingly, in all matters in respect of which provisions have been made in the 1957 Act, the provisions of the 1957 Act will apply and the powers of the State Legislature under Entry 23 of List-II read with Art. 246 of the Constitution will stand excluded. This is what has been held by the Supreme Court in *Bajjnath Kedia vs. State of Bihar* (supra) cited by Mr. Tankha.

9. We will, therefore, have to look into the provisions of 1957 Act to find out whether the consent of the owner of the private land and an opportunity of hearing to the owner of the private land are mandatory before grant of a mining lease. It is not disputed that the right over the minerals in respect of which a mining lease can be granted is vested in the State by virtue of Section 57 read with Section 247 of the Code. Accordingly the State is owner of the minerals lying beneath even on a private land and as the owner of such minerals, the State can grant a lease in favour of a lessee by way of transfer or assignment. Neither Section 10 of the 1957 Act nor Rule 22 of the 1960 Rules on which Mr. Tankha has placed great reliance, lays down anywhere that a mining lease in respect of minerals vested in the Government where the surface land belongs to a private person cannot be granted without the prior consent of the owner of such private land. In the absence of such clear statutory provisions, either in the 1957 Act or in the 1960 Rules, the State Government as the owner of the minerals can grant a mining lease in favour of a lessee without the consent of the owner of a private land, even where the minerals are embedded in such private land, 10. A person owning a private land, however, has a constitutional right to property as guaranteed under Art. 300-A of the Constitution, which provides that no person shall be deprived of his property save by authority of law. Hence, the right of 'a private person over his land can only be affected by authority of law. Unless, therefore, there are clear provisions in the 1957 Act conferring any right on a lessee of a mining lease to enter upon a private land and carry out mining operations, he cannot enter upon such private land to carry out the mining operations without the consent of the owner of the land. Section 24-A of the 1957 Act which contain such provisions is quoted herein below:

"24A. Rights and liabilities of a holder of prospecting licence or mining lease

(1) On the issue of a [reconnaissance permit, prospecting licence or mining lease] under this Act and the rules made thereunder, it shall be lawful for the [holder of such permit, licence or lease], his agents or his servants or workmen to enter the lands over which [such permit, lease or licence had been granted] at all times during its currency and carry out all such [reconnaissance, prospecting or mining operations] as may be prescribed:

Provided that no person shall enter into any building or upon an

enclosed court or garden attached to a dwelling-house (except with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

(2) The holder of a [reconnaissance permit, prospecting licence or mining lease] referred to in sub-section (1) shall be liable to pay compensation in such manner as may be prescribed to the occupier of the surface of the land granted under [such permit, licence or lease] for any loss or damage which is likely to arise or has arisen from or in consequence of the [reconnaissance, mining or prospecting operations].

(3) The amount of compensation payable under sub-section (2) shall be determined by the State Government in the manner prescribed."

11. It will be clear from the language of sub-section (1) of Section 24-A of the 1957 Act, quoted above, that on a issue of a mining lease under the 1957 Act and the 1960 Rules made thereunder, it shall be lawful for the holder of mining lease, his agents or his servants or workmen to enter the land over which lease has been granted at all times during the currency and carry out all such mining operations as may be prescribed. Thus, there is a clear authorization in law for a lessee of a mining lease to enter the land in respect of which mining lease is granted during the currency of the lease and to carry out mining operations in accordance with the 1960 Rules. Sub-section (2) of Section 24-A of the 1957 Act, however, provides that holder of a mining lease shall be liable to pay compensation in such manner as may be prescribed to the occupier of the surface of the land for any loss or damage likely to arise or has arisen from or in consequence of the mining operations. The right of the owner of surface of the land to compensation for the damage or loss that he suffers on account of entry and mining operations carried out in the mining lease is thus provided for in sub-section (2) of Section 24-A of the 1957 Act. Sub-section (3) of Section 24-A of the 1957 Act provides that the amount of such compensation shall be determined by the State Government in the manner prescribed.

12. The relevant provisions of Rule 22 and Rule 26 of the 1960 Rules on which learned counsel for the parties relied upon are quoted herein below:

"22. Applications for grant of mining leases.-

(1) XX XX XX

(3)(i) Every application for the grant of renewal of a mining lease shall be accompanied by -

(a) XX XX XX

(d) XX XX XX

(f) XX XX XX

(g) XX XX XX

(h) a statement in writing that the applicant has, where the land is not owned by him, obtained surface rights over the area or has obtained consent of the owner for starting mining operations:

Provided that no such statement shall be necessary where the land is owned by the Government:

Provided further that such consent of the owner for starting mining operations in the area or part thereof may be furnished after execution of the lease deed but before entry into the said area:

Provided also that no further consent would be required in the case of renewal where consent has already been obtained during grant of the lease.

The State Government may, for reasons to be recorded in writing, relax the provisions of sub-clause (d) of clause (i)."

"26. Refusal of application for grant and renewal of mining lease. -

(1) The State Government may, after giving an opportunity of being heard and for reasons to be recorded in writing and communicated to the applicant, refuse to grant or renew a mining lease over the whole or part of the area applied for.

(2) An application for the grant of renewal of a mining lease made under rule 22 or rule 24A, as the case may be, shall not be refused by the State Government only on the ground that Form I or Form J, as the case may be, is not referred to in sub-clauses (d), (e), (f), (g) and (h) of clause (i) of sub-rule 22.

(3) Where it appears that the application is not complete in all material particulars or is not accompanied by the required documents, the State Government shall, by notice, require the applicant to supply the omission or, as the case may be, furnish the documents, without delay and in any case not later than thirty days from the date of receipt of the said notice by the applicant."

13. A reading of Rule 22 (3) (i) (h), quoted above, would show that where the land is owned by some private owner, the statement in writing has to be made by the applicant that the consent of such owner for starting mining operations has been obtained. The language of Clause (h) is clear that consent of the owner is required "for starting mining operations" and not for grant of mining lease. Similarly, the second Proviso to Clause (h) states that consent of the owner "for starting mining operations" in the area or part thereof may be furnished "after the execution of the lease-deed" but "before entry into the area". The expression "after execution of the lease deed" again would show that no consent is required for execution of the lease-deed. The expression "before entry into the area" confirms that consent is required not for execution of lease-deed but for entering into the lease area. Rule 22 (3) (i) (h) therefore does not indicate that consent of the owner of the

land is a pre-condition for a mining lease in favour of the lessee. All that it indicates is that such consent is required before entering into the lease area.

14. The next question is what happens if an owner of a private land in respect of which an application is made for a mining lease withholds his consent. The answer to this question is in Form-K which provides the terms and conditions of the mining lease as prescribed under Rule 31 of the 1960 Rules. Part-VII of Form-K is titled "The covenants of the lessee/lessees" and Clause (4) of Part VII reads thus:

"To indemnify Government - against all claims:

(4) The lessee/lessees shall make and pay such reasonable satisfaction and compensation as may be assessed by lawful authority in accordance with the law in force on the subject for all damage, injury or disturbance which may be done by him/them in exercise of the powers granted by this lease and shall indemnify and keep indemnified fully and completely the State Government against all claims which may be made by any person or persons in respect of any such damage, injury or disturbance and all costs and expenses in connection therewith."

This clause thus provides that the lessee of a mining lease has to indemnify and keep indemnified fully and completely the State Government against all claims which may be made by any person or persons in respect of any damage and all costs and expenses in connection with the mining lease. Part VIII of Form-K is titled "The Covenants of the State Government" and Clause (2) of Part-VIII of Form-K reads as follows:

"Acquisition of land of third parties and compensation thereof:

(2) If in accordance with the provisions of clause 4 of Part-VII of this Schedule, the lessee/lessees shall offer to pay to an occupier of the surface of any part of the said lands compensation for any damage or injury which may arise from the proposed operations of the lessee/lessees and the said occupier shall refuse his consent to the exercise of the right and powers reserved to the State Government and demised to the lessee/lessees by these presents and the lessee/lessees shall report the matter to the State Government and shall deposit with it the amount offered as compensation and if the Central/State Government is satisfied that the amount of compensation offered is fair and reasonable or if it is not so satisfied and the lessee/lessees shall have deposited with it such further amount as the State and Central Government shall consider fair and reasonable the State Government shall order the occupier to allow the lessee/lessees to enter the land and to carry out such operations as may be necessary for the purpose of this lease. In assessing the amount of such compensation the State Government shall be guided by the principles of the Land Acquisition Act."

Hence clause (2) is titled "Acquisition of land of third parties and compensation thereof" and provides that the lessee shall offer to pay to an occupier of a surface of any part of the land compensation for any loss or injury which may arise from the proposed operations by the lessee and if the occupier refuses his consent to the exercise of the right and powers reserved to the State Government and demised to the lessee by the mining lease, the lessee shall report the matter to the State Government and shall deposit with the State Government the amount offered as compensation and if the Central/State Government is satisfied that the amount of compensation offered is fair and reasonable, the Central/State Government shall order the occupier to allow the lessee to enter the land and carry out such operations as may be necessary for the purpose of mining lease. It will, thus, be clear that the consequence of refusal by the owner of the private land is not that a mining lease cannot be granted by the Government.

15. Sections 10 and 24-A of the 1957 Act and Rules 22 and 26 of the 1960 Rules on which learned counsel for the parties have relied upon also do not provide that before a mining lease is granted by the State Government in respect of a private land, the owner of the private land will have to be afforded an opportunity of hearing by the State Government. Rule 26 (1) of the 1960 Rules only provides for affording an opportunity of hearing to the applicant for a mining lease or for a renewal of the mining lease before the State Government refuses to grant or renew a mining lease over the whole or part of the area. Thus, it appears that Parliament or the rule making authority have not intended to afford an opportunity of hearing to the owner of a private land in respect of which mining lease is proposed to be granted before grant of renewal of a mining lease.

16. Coming now to the argument of Mr. Tankha that if grant of mining lease in respect of minerals located in the private land can be made by the Government without the consent of the owner of the private land, then the valuable right to property which is not only a constitutional right but also human right will be seriously affected, we may say that as and when a challenge to the provisions of the 1957 Act and the 1960 Rules is made on this ground, the same can be considered by the Court, but so long as the language of Section 24-A of the 1957 Act and of the 1960 Rules, discussed above, is clear, we have no option but to hold that consent of the owner of the private land in respect of which mining lease is sought to be given by the Government is not mandatory. We are supported by para 14 of the judgment of a three Judge Bench of the Supreme Court in *State of Tamilnadu vs. M.P.P. Kavary Chetty* (supra), which is quoted herein below:

"14. Learned counsel for the respondents submitted that under the first Proviso of Rule 19-A a consent of the owner of the land was not made a condition and it was bad in law on that account. The submission does not take note of Section 24-A of the said Act. Thereunder the holder of a mining lease under the said Act or Rules made under it is

empowered to enter the land on which the lease has been granted and carry out mining operations. He is obliged to compensate the land owner for any loss or damage that his operations may cause. Consent of the occupier is required only when the holder of the lease desires entry into any building or enclosed court or garden.”

The three Judge Bench of the Supreme Court thus clearly held that the consent of the owner of a private land is not a condition precedent for grant of mining lease or for entering upon the land on which mining lease is granted for carrying out mining operations and the lessee is only obliged to pay compensation for any loss or damage to the owner of the private land.

17. The judgment in *Pallava Granites Industrial India (P) Ltd.* (supra) has been delivered by a two Judge Bench of the Supreme Court and has not noticed either Section 24-A of the 1957 Act or the decision of the Three Judge Bench of the Supreme Court in *State of Tamilnadu* (supra). The decision in *Pallava Granites Industrial India (P) Ltd.* (supra) also is not based on interpretation of Section 10 of the 1957 Act or Rule 22 of the 1960 Rules.

16. In the result, we answer the questions referred to us as follows:

(i) The Division Bench in *Premchand vs. State* (supra) based on Section 247 of the M.P. Land Revenue Code, 1959 is not applicable to grant of mining leases after the enactment of Mines and Minerals (Development and Regulation) Act, 1957 and the rights of the lessee and the owner of the private land in respect of which the mining lease is granted will be governed by the provisions of the 1957 Act and the 1960 Rules made thereunder.

(ii) The consent of the owner of the private land or opportunity of hearing to such owner of the private land is not mandatory for grant of a mining lease under the Mines and Minerals (Development and Regulations) Act, 1957 and the grant of mining lease by Government without such consent or opportunity of hearing is sustainable in law.

The cases will now go back to the learned single Judge as per roster for hearing and disposal in the week commencing 16th June, 2008.

Answered accordingly.

I.L.R. [2008] M. P., 2831

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

5 May, 2008*

ASHOK KUMAR DUBEY

... Petitioner

Vs.

SMT. PARVATI BAI & ORS.

... Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 51 - Review of Orders - Suo motu review of order after 7 years - Cannot be held to be within a reasonable time. (Para 12)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 51 - आदेशों का पुनर्विलोकन - आदेश का 7 वर्ष बाद स्वप्रेरणा से पुनर्विलोकन - युक्तियुक्त समय के भीतर होना अभिनिर्धारित नहीं किया जा सकता।

B. Land Revenue Code, M.P. (20 of 1959), Section 170-B - Petitioner purchased agricultural land from member of aboriginal tribe after obtaining due permission from Collector - S.D.O. directed reversion of land on the ground that petitioner did not inform about sale within stipulated period - Held - Object of provision is to examine that possession of non-tribal purchaser is lawful and to ensure that tribal transferor was not defrauded - Order of S.D.O. is bad as it was passed without considering permission granted by Collector - Petition allowed. (Paras 13, 14 & 17)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170-बी - याची ने कलेक्टर से सम्यक अनुमति लेने के बाद आदिम जनजाति के सदस्य से कृषि भूमि क्रय की - उपखण्ड अधिकारी ने भूमि के प्रत्यावर्तन का निदेश इस आधार पर दिया कि याची ने विक्रय के बारे में नियत समय के भीतर सूचित नहीं किया - अभिनिर्धारित - उपबंध का उद्देश्य गैर जनजाति क्रेता का कब्जा विधिपूर्ण होने की जाँच करना और यह सुनिश्चित करना है कि जनजाति अंतरणकर्ता को ठगा न गया हो - याचिका मंजूर।

C. Land Revenue Code, M.P. (20 of 1959), Section 170-B - Settled position of law - Presumption u/s 170-B(2) is only a rebuttable presumption which can duly rebutted by producing the permission granted by Collector u/s 165(6) of Code. (Para 17)

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170-बी - सुस्थापित विधि - धारा 170-बी(2) के अन्तर्गत उपधारणा खण्डन योग्य है जो कलेक्टर द्वारा संहिता की धारा 165(6) के अन्तर्गत प्रदान की गई अनुमति को पेश करके सम्यक रूप से खण्डित की जा सकती है।

Cases referred :

AIR 1986 MP 122, 1995 MPLJ 633, 2000 RN 161, AIR 1969 SC 1297, 1990 MPLJ 353, 1990 RN 407, 1997 RN 219, 1999(1) MPLJ 178.

D.N. Shukla, for the petitioner.

L.M. Tripathi, for the respondent Nos.1 to 7.

N.K. Tiwari, Panel Advocate, for the respondent Nos.8 to 10.

ORDER

PRAKASH SHRIVASTAVA, J. :-The present writ petition has been filed challenging the order dated 25.6.1992 passed by the Sub Divisional Officer under section 170-B of the M.P.Land Revenue Code, 1959 (hereinafter referred to as the Code) directing reversion of land situated in Khasra No.33 area 5.93 acres to its original owner i.e. the legal heirs of Sukhlal. The order dated 15.12.1995 passed by the Additional Collector in appeal and 7.1.2005 passed by the Additional Commissioner in revision declining to interfere in the order of the Sub Divisional Officer dated 25.6.1992 have also been challenged.

2. The material facts are that one Sukhlal was the original owner of the land situated in Khasra No.33 area 5.93 acres. There were certain outstanding dues against Sukhlal and for the recovery of which his land was being auctioned. The petitioner was intending to purchase the said land. Since the land belong to tribal therefore an application under section 165 of the Code was made and the Collector passed the order dated 21.4.1969 (Annexure-P/1) under section 165 of the Code granting permission to sell the land. There was some ambiguity in the order of Collector as regards land for which permission was granted. In the earlier part of the order of the Collector Khasra No.33 was mentioned whereas in the later part Khasra No.252/2 was mentioned. Thereafter, sale deed dated 8.5.1969 was executed by Sukhlal in favour of the petitioner alienating Khasra No.33 area 5.93 acres.

3. A dispute arose in respect of Khasra number for which the permission was granted by Annexure-P/1. Sub Divisional Officer on receiving the information from Patwari about the alleged illegal transfer of the land of the tribal, by order dated 17.1.1982, initiated proceedings under section 170-B for violating the provisions of section 165(6) of the Code and issued notice to the petitioner. In these proceedings record of the Collector in Case No. 95 (A-21) 68-69 was called for examination. The Sub Divisional Officer dropped the proceedings under section 170-B of the Code by order dated 28.12.83 by recording that in the first part of the order dated 21.4.1969 correction was done and Khasra No.33 area 5.93 was recorded in place in Khasra No.252/2 but in the tenth line of the order dated 21.4.1969 correction was not done and by the typographical error Khasra No.252/2 area 5.92 remained, therefore, the sale made by Sukhlal was not an illegal sale. With these findings, the Sub Divisional Officer closed the case under section 170-B of the Code.

4. Thereafter, sometime in 1991, the matter was taken up in suo motu review under section 51 of the Code by the Sub Divisional Officer and enquiry was directed. In that enquiry, the petitioner appeared and produced the permission granted to him by the Collector on 21.4.1969. The Sub Divisional Officer passed the order

dated 25.6.1992 against the petitioner on the ground that the petitioner did not inform about the sale within the stipulated time under section 170-B of the Code, which he was required to do since the sale was affected between the period 2.10.1959 to 23.10.1980. By this order, the Sub Divisional Officer directed the petitioner to return the land to the legal heirs of vender Sukhlal. Appeal against this order was dismissed by Additional Collector on the ground of limitation by order dated 15.12.1995 and the revision, was also dismissed by Additional Commissioner by order dated 7.1.2005. Present writ petition has been filed challenging the order of the Sub Divisional Officer dated 25.6.1992, order of the Additional Collector dated 15.12.1995 and order of Additional Commissioner dated 7.1.2005.

5. Shri D.N.Shukla, learned counsel appearing for the petitioner, submitted that the sale deed dated 8.5.1969 was executed by Sukhlal in favour of the petitioner after obtaining due permission as required by section 165 of the Code therefore the sale cannot be held to be illegal. He further submitted that the typographical error, which had occurred in the order of the Collector dated 21.4.1969, was later corrected by order dated 28.12.1983 and thereafter there remains no doubt about the Khasra number for which permission was granted. The matter had attained finality by order dated 28.12.1983 and Sub Divisional Officer could not have reopened the matter in suo motu exercise of revision after a long lapse of time in 1991. He further submitted that the Sub Divisional Officer while passing the order dated 25.6.1992 did not consider the permission dated 21.4.1969 which was granted in favour of the petitioner. In support of his contention, he has placed reliance upon the judgment of this court in the matter of *Dhirendra Nath Sharma versus State of Madhya Pradesh and another* (AIR 1986 MP 122), *Atmaram Rohulla and others versus State of Madhya Pradesh* (1995 MPLJ 633) and *Ravi Narayan versus State of M.P. and others* (2000 RN 161).

6. Shri L.M.Tripathi, learned counsel appearing for respondents 1 to 7, has submitted that the permission dated 21.4.1969 was in respect of Khasra No.252/2 area 5.92 acres and on the basis of this permission Khasra No.33 could not be sold by the original owner by the sale deed (Annexure-P/2) in favour of the petitioner. He has also placed reliance upon the additional document (Annexure-D) in support of his submission that the respondents are still in possession of Khasra No.33.

7. Shri N.K.Tiwari, learned counsel appearing for the respondents 8 to 10, has placed reliance upon the order dated 21.7.83 and 28.12.1983 of the Sub Divisional Officer in support of his submission that the permission was only for Khasra No.252/2 area 5.93 acres and not for Khasra No.33 which was sold by the original owner to the petitioner. He has submitted that since the sale was effected in violation of provisions of section 165 of the Code and the requirement of section 170-B of the Code was not complied with therefore sale deed is void and the order dated 25.6.1992 passed by the Sub Divisional Officer does not suffer from any error.

8. I have heard the counsel for the parties and perused the record. This court by order dated 31.7.2007 had directed the counsel for the State to produce the original record relating to the grant of permission (Annexure-P/1). In pursuance to the said direction, the State has produced the original record. On perusal of the original record, it is found that while considering the application for grant of permission, a report was called by the Collector from the Patwari and Patwari had submitted the report dated 24.3.1969 stating that the applicant Sukhlal was intending to sell Khasra No.33 area 5.93 acres. In that report, he had also mentioned that the average market value of said land is Rs.500/- per acre and Rs.3000/-, which was offered as consideration for the said land was proper consideration keeping in view the market value of land. He had also calculated the area, which would remain with the original owner Sukhlal after sale of area 5.93 acres Khasra No.33. A map is also enclosed in the original record marking Khasra No.33 area 5.93 acres with red ink, for which permission was applied for. The Collector in these proceedings had passed the order dated 21.4.1969 granting permission to sale. A perusal of the original order sheet dated 21.4.1969 indicates that in the fourth and tenth line of this order Khasra No.252/2 area 5.92 acre was originally written but later on correction was done in the fourth line and Khasra No.33 area 5.93 acres was written by scoring off Khasra No.252/2 area 5.92 acres but no such correction was carried out in the tenth line of the order, but the original record of the proceedings clearly indicates that the permission was sought for Khasra No.33 area 5.93 acres and Patwari had submitted report for Khasra No.33 on the basis of which order dated 21.4.1969 was passed.

9. The sale deed which was executed on 8.5.1969 by Sukhlal in favour of the petitioner also mentions that the permission for the sale of the land was obtained by Sukhlal from Collector in Case No.95 (A-21) 68-69 on 21.4.1969 and on the basis of this permission Khasra No.33 area 5.93 acres was sold. The order sheet of the Naib Tehsildar dated 17.1.1982 indicates that some complaints were received by the Naib Tehsildar in respect of violation of the provisions of section 165(6) of the Code in respect of sale of Khasra No.33 area 5.93 acres and Naib Tehsildar prima facie finding violation of section 170-B of the Code had sent the matter to the court of Sub Divisional Officer. The Sub Divisional Officer had issued notice to the legal heirs of original owner Sukhlal since in the meanwhile Sukhlal had expired. Thereafter Sub Divisional Officer had passed the final order dated 28.12.1983 recording that in the order dated 21.4.1969 granting permission to sale, Khasra number in the fourth line was corrected as Khasra No.33 area 5.93 acres but no correction was carried out in the tenth line of the order and in tenth line Khasra No.252/2 area 5.92 continued which apparently was a typographical error. The Sub Divisional Officer on reaching the said conclusion had found that the sale and transfer was not invalid and he had closed the proceedings. This order of the SDO was not challenged any further.

10. Sometime in 1991 exercising suo motu review power under section 51 of the Code, the Sub Divisional Officer reopened the proceedings and directed for fresh enquiry. Such a suo motu exercise of review power after a period of about 9 years is under challenge. Section 51 of the Code which deals with the power of review is as under:

"51. Review of orders. -(1) The Board and every Revenue Officer may, either on its/his own motion or on the application of any party interested review any order passed by itself/himself or by any of its/his predecessors in office and pass such order in reference thereto thereto as it/he thinks fit;

(i) if the Commissioner, Settlement Commissioner, Collector or Settlement Officer thinks it necessary to review any order which he has not himself passed, he shall first obtain the sanction of the Board, and if an officer subordinate to a Collector or Settlement Officer proposes to review any order, whether passed by himself or by any predecessor, he shall first obtain the sanction in writing of the authority to whom he is immediately subordinate;

(i-a) no order shall be varied or reversed unless notice has been given to the parties interested to appear and be heard in support of such order;

(ii) no order from which an appeal has been made, or which is the subject of any revision proceedings shall, so long as such appeal or proceedings are pending be reviewed;

(iii) no order affecting any question of right between private persons shall be reviewed except on the application of a party to the proceedings and no application for the review of such order shall be entertained unless it is made within ninety days from the passing of the order.

(2) No order shall be reviewed except on the grounds provided for in the Code of Civil Procedure, 1908 (V of 1908).

(3) For the purposes of this section the Collector shall be deemed to be the successor in office of any Revenue Officer who has left the district or who has ceased to exercise powers as a Revenue Officer and to whom there is no successor in the district.

(4) An order which has been dealt with in appeal or on revision shall not be reviewed by any Revenue Officer subordinate to the appellate or revisional authority.

11. Similar issue as regards the exercise of the review power under section 51 of the Code in the proceedings under section 170-B after lapse of considerable time had come up before this court in the matter of *Ravi Narayan (supra)* wherein this court held that under sections 50 and 51 of the Code, no limitation has been prescribed but rule of prudence says that such power should be exercised within reasonable time and the court is required to consider whether particular period is

a reasonable period for suo motu exercise of review or revisional powers. This court in that case had found that exercise of the review power after 9-years was not within the reasonable period by holding that:-

22. The words "at any time" used either in section 50 or in section 51 for exercise of the suo motu powers would ordinarily mean that question of limitation would not arise. But the rule of prudence says that such power should be exercised within reasonable time. The principle of interpretation says that if the plain words are given their plain meaning and they lead to absurdity then such interpretation should be avoided. In all matters referred above, Supreme Court and this court considering the totality of the circumstances and the facts before the said Courts, came to the conclusion that the words "at any time" would not mean an indefinite period. In some of the cases period of months and in some of the cases period of one year was considered to be belated.

23. When the courts are required to consider whether particular period is a reasonable period for exercising the suo motu revisional powers or suo motu review powers then the Courts are guided not only by the provisions of law or rule of prudence but are also guided by the principles of equity, fair play and justice. The Courts cannot ignore the fact that public at large deposes confidence in the Judicial system and they wish to say that some end should be brought to the litigation. Though from the plain language of Section 51 it does not appear that length of time would curtail or curb the powers of the authority to review its order by the judicial dictum it has been circumscribed. The words 'at any time' in view of the judgments of the Supreme Court, this Court and other Courts will have to mean 'within reasonable time'. The period in which powers can be exercised should be reasonable period. A man is entitled to feel that after a final order in his favour he is free and is entitled to use and enjoy his property and chattel. If it enters in his mind that some authority on some day may exercise suo motu review or revisional powers then it would be almost impossible for such person to enjoy the property which is in his possession. There must be some end to the litigation. If the things are kept in suspension and no finality is attached even to a final order it is going to shatter the public faith in the system. The law nowhere provides that the things may be kept in animated suspension so that someone or the other whenever wants transfusion of life into the suspended article may bring it back to life.

The law is to be respected and justice is to be done by those who have authority to dispense justice. One cannot forget that interpretation of the law should be in accordance with equity, fair play and justice. At some point somebody is entitled to say that enough is enough. Somebody must permit the deads to remain buried in their graves.

24. The resumption and initiation of the proceedings by the SDO prima facie shows non-application of mind. It simply records that effect of non-submission of the information was not considered nor the authority had considered the payment of proper consideration, therefore present was a fit case for suo motu review. In the opinion of this Court the initiation of proceedings almost after nine years of the close of the first chapter is not in accordance with law nor can be approved under the provisions of law. Even for the sake of repetition, it is again observed that in the first order the SDO had tacitly held that proper consideration was paid because the sale was affected after obtaining sanction from the Collector.

Similar view has been taken by the Supreme Court in the case of *State of Gujarat vs. Patel Raghav Natha and others* (AIR 1969 SC 1297), full bench judgment of this court in the case of *Ushadevi, wd/o Shankarrao and others vs. State of M.P. and others* (1990 MPLJ 353), Division Bench judgment in the case of *Rammulal and others vs. State of M.P.* (1990 RN 407), judgment of this court in the case of *Pratap Singh and another vs. State of M.P.* (1997 RN 219) and in the case of *Sitaram S/o Bhagatram vs. State of M.P. and others* [1999(1) MPLJ 178].

12. In the present case also, the sale was affected by the parties after getting permission by order dated 21.4.1969 as per the existing provisions of section 165(6) of the Code. The proceedings for alleged violation of the provisions of section 170-B were initiated in 1982 and the final order was passed by the Sub Divisional Officer on 28.12.1983 dropping the proceedings under section 170-B of the Code by holding that the permission dated 21.4.1969 was in respect of Khasra No.33 area 5.93 acres and there was no illegal transfer. The Sub Divisional Officer initiated the proceedings sometime in 1991 after a lapse of about 7 years under section 51 of the Code to suo motu review the order dated 28.12.1983. The order of the Sub Divisional Officer initiating suo motu review proceedings, filed by the petitioner as Annexure-P/6, does not bear any date but the petitioner in paragraph 5(f) of the writ petition has specifically stated that the proceedings were reopened on 27.3.1991 and this statement of the petitioner has not been disputed by the respondents in their reply. The order reopening the proceedings in suo motu review does not contain any reason for taking the matter in review after more than 7 years. The reopening of the proceedings and exercising suo motu review power in the facts of the present case, after lapse of 7 years, cannot be held to be within a reasonable time.

13. The order of the Sub Divisional Officer dated 25.6.1992 can not be sustained for yet another reason that the Sub Divisional Officer had passed the order dated 25.6.1992 in exercise of the suo motu review power and held that the petitioner had not submitted the information in terms of section 170-B between the period 2.10.1959 to 23.10.1980 and the land of the tribal is in possession of non tribal

petitioner without any legal right and consequently, directed the petitioner to return the land to legal heirs of the tribal owner Sukhlal. While passing the order dated 25.6.1992 the Sub Divisional Officer completely ignored the permission dated 21.4.1969 which was given to the tribal owner Sukhlal under section 165(6) of the Code. He also failed to take note of the fact that the presumption under section 170-B sub section (2) is only a rebuttable presumption and the object of section 170-B is to enable the Sub Divisional Officer to enquire into the bonafide nature of transactions or transfers made of agricultural land belonging to the tribal between the period 2nd October, 1959 when the Code came into force and the date of amendment in 170-B in the year 1980. This court while examining the question of constitutional validity of section 170-A and section 170-B of the Code in the matter of *Dhirendra Nath Sharma* (supra) has examined the object of the provisions and held that :

11. The substance of the meaning of Ss. 170-A and 170-B may be mentioned at this stage. Sub.Sec (1) of S. 170-A lays down that the Sub Divisional officer, on his own motion or on an application on or before 31st Dec, 1978 made by a transferor of agricultural land belonging to a tribal, shall enquire into the bonafide nature of such transfer effected in any manner including accrual of right of occupancy tenant at any time, during the period commencing on the 2nd Oct. 1959 and ending on the date on which the 1976 Amendment came into force. Sub.Sec (2) then lays down that if the Sub-Divisional Officer is satisfied as a result of an enquiry that such transfer was not bona fide, he may notwithstanding anything contained in this Code or any other enactment set aside such transfer and restore the land to the transferor; or where such land has been diverted for non agricultural purposes, he shall fix the price of such land and direct payment of the deficiency in the amount to be paid to the transferor within a period of six months. In short, S. 170-A was enacted to enable the Sub-Divisional Officer to enquire into the bona fide nature of all transfers made of agricultural land belonging to a tribal during the period commencing on 2nd October, 1959 when the code came into force and ending on the date on which the amendment of 1976 came into force, on his own motion or on an application made by the transferor up to 31st December, 1978.

12. Section 170-B was inserted later for the same purpose with a view to cover the remaining transfers of agricultural land belonging to tribals under which they had been exploited resulting from their unequal bargaining capacity at the time of the transaction. By enacting S. 170-B, a duty was cast on every person in possession of agricultural land, which belonged to a tribal at any time between 2nd Oct. 1959 and the date of commencement of the amendment Act of 1980 to notify the Sub-Divisional

Officer within the period specified in the prescribed manner all the information as to how he had come in possession of such land. Obviously, the provisions enacted in S. 170-A for initiation of the proceedings was not found sufficient and, therefore, such a provision became necessary to ensure that every such transaction of transfer of land belonging to a tribal at any time after 2nd Oct. 1959 when the M.P. Land Revenue Code 1959 came into force was brought to the notice of the Sub-Divisional Officer to enable examination of its validity on the basis of information supplied by the person in possession. Sub-sec (3) provides that on the receipt of such information, the Sub-Divisional Officer shall make such enquiry as may be deemed necessary about all such transactions of transfer and if he finds that the tribal transferor has been defrauded, the transaction shall be declared null and void and an order would be made revesting the agricultural land in the tribal transferor or his legal heirs, as the case may be. The order contemplated by sub-sec.(3) is to be passed only as a consequence of a finding reached after due enquiry that in the transaction of transfer, the tribal transferor had been defrauded of his legitimate right. Unless such a conclusion is reached, no question arises of declaring the transaction null and void and passing an order revesting the agricultural land in the tribal transferor or his legal heirs.

In that matter this court had also considered the scope of section 170-B sub section (2) of the Code and held that: -

13. Sub.sec (2) of S. 170-B merely lays down a rule of evidence. It says that where the person in possession fails to notify the information, as required by sub-sec (1) within the specified period, it shall be presumed that such person has been in possession of the agricultural land without any lawful authority and the land shall revert to the transferor or his legal heirs, as the case may be. Obviously, the presumption arising by virtue of sub-sec. (2) is based on the ground that if the person in possession has nothing to say nor show that his possession is under any lawful right and that the same is not derived as a result of a transaction defrauding the tribal transferor, the logical consequence must follow to presume that the transfer was void.

Thus, the object of the provision is to examine if possession of non-tribal purchaser is lawful and to ensure that tribal transferor was not defrauded in the transaction.

14. This court in the matter of *Atmaram Rohulla and others (supra)* while considering the scope of section 170-B(2) of the Code has held that the presumption under section sub-section (2) is only a rebuttable presumption and once in reply to the show cause notice, the purchaser submits statement stating that the land was purchased by him under valid registered sale deed for adequate consideration and

obtaining permission from the Collector then the order of the Sub Divisional Officer directing reversal of land to the vendor would not be proper. This court in the matter of *Atmaram Rohulla (supra)* while examining the nature of presumption under section 170-B(2) held that:-

"8. Section 4 of the Indian Evidence Act, 1872 deals with three kinds of presumptions : The first deals with a case where the court may presume a fact as proved it may regard such fact as proved unless and until it is disproved or may call for proof of it. This is the meaning of the words "may presume". The second deals with the words "shall presume", i.e. where the Evidence Act has directed that the Court shall presume a fact unless and until it is disproved. The third variety is what is referred to as "conclusive proof". When one fact is declared to be conclusive proof of another, the Court shall, on proof on one fact, regard the other as proved and shall not allow evidence to be given for the purchase of disproving it. Sub-section (2) of section 170-B of the Code merely uses the words "shall be presumed" and does not indicate that it shall amount to conclusive proof and does not bar any evidence being adduced for the purpose of disproving it. The presumption under sub-section (2) must, therefore, be regarded as a rebuttable presumption."

This court while considering the similar issue in the matter of *Ravi Narayan (supra)* took the view that if proper consideration was paid and the case is not one of fraudulent transfer then the proceedings would be dropped and held: -

11. In the matter of *Atmaram v. State of M.P.* [1995 RN 124= AIR 1995 MP 225], a Division Bench of this Court has held that even if the necessary information is not furnished by the present holder of the land, the SDO cannot straight way pass a declaratory order but he has to make an enquiry.

12. From perusal of the order of SDO dated 18.8.88, it would clearly appear that he was satisfied that proper consideration was paid and present was not a case of fraudulent transfer. If these two points were decided in favour of the present petitioner then it cannot be held that the SDO was unjustified in dropping or closing the original proceedings.

15. In the present case also, the report of Patwari, which was submitted prior to the grant of permission dated 21.4.1969 shows that the consideration was adequate. The permission under section 165(6) of the Code was granted by the Collector on 21.4.1969 and on that basis the registered sale deed was executed therefore the presumption under section 170-B sub-section (2) is rebutted by the petitioner.

16. Coming to the question of dismissal of the petitioner's appeal by Additional Collector by order dated 15.12.1995 on the ground of limitation; a perusal of the order sheet of Sub Divisional Officer filed as Annexure-P/6 shows that on 23.1.1992

the case was adjourned for want of report by Patwari. Thereafter, the matter was taken up on 27.1.1992 stating that the case was taken up and for orders. The order sheet dated 25.5.1992 states that the order passed, parties may be informed whereas the order of the Sub Divisional Officer (Annexure-P/5) is a subsequent order dated 25.6.1992. The petitioner had sufficient reason to allege that he was not aware of the order dated 25.6.1992. Since there is no order sheet of the Sub Divisional Officer dated 25.6.1992 which is the date of passing of the order therefore, if for that reason there was some delay on the part of the petitioner in filing the appeal against the order of the Sub Divisional Officer, the Additional Collector while dismissing the appeal on the ground of delay ought to have considered the said aspect. Even otherwise this aspect is no longer relevant since both the parties have advanced arguments on merit before this court and the issue is being decided finally with the consent of the parties.

17. Thus, the order dated 25.6.1992 can not be sustained since it was passed by the Sub Divisional Officer without considering the permission dated 21.4.1969 which was granted by the Collector under existing provisions of section 165(6) of the Code and without considering the settled position of law as regards the scope of section 170-B(2) and without considering the fact that as per the settled position of law the presumption under section 170-B(2) is only a rebuttable presumption which was duly rebutted by the petitioner by producing the permission granted by the Collector under section 165(6) of the Code read with the order dated 28.12.1983 and SDO even otherwise could not exercise the suo motu power of review under section 51 of the Code after a lapse of 7 years.

18. Thus, the writ petition is allowed. The order dated 25.6.1992 (Annexure-P/5), order dated 15.12.1995 (Annexure-P/8) and order dated 7.1.2005 (Annexure-P/9) are set aside. No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2841

WRIT PETITION

Before Mr. Justice Abhay M. Naik

7 May, 2008*

NEETU JAIN (SMT.)

... Petitioner

Vs.

UNION OF INDIA & anr.

... Respondents

A. Passports Act (15 of 1967), Section 5 - Date of Birth in Passport
- Petitioner made application for issuance of passport mentioning her date of birth as 15.06.1983 which was duly supported by birth certificate - Petitioner sought correction of date of birth in passport as 15.06.1982 on the basis of school certificates - Held - Rectification correction in matter of

date of birth may be made, obviously if petitioner is found entitled to seek correction/rectification after following procedure prescribed by circulars - Since, PLA has relied upon birth certificate submitted by petitioner herself, no fault can be found with it. (Paras 10 & 11)

क. पासपोर्ट अधिनियम (1967 का 15), धारा 5 - पासपोर्ट में जन्मतिथि - याची ने अपनी जन्मतिथि 15.06.1983 उल्लिखित करते हुए पासपोर्ट जारी करने के लिए आवेदन पेश किया जो जन्म प्रमाण पत्र द्वारा सम्यक् रूप से समर्थित था - याची ने विद्यालय प्रमाण पत्रों के आधार पर पासपोर्ट में जन्मतिथि 15.06.1982 करने का संशोधन चाहा - अभिनिर्धारित - जन्मतिथि के मामले में सुधार/संशोधन किया जा सकता है, यदि याची परिपत्रों द्वारा विहित प्रक्रिया का पालन करने के बाद स्पष्ट रूप से संशोधन/सुधार कराने की हकदार पायी जाती है - चूंकि पासपोर्ट जारीकर्ता प्राधिकारी ने स्वयं याची द्वारा प्रस्तुत जन्म प्रमाण पत्र पर विश्वास किया, उसका कोई दोष नहीं पाया जा सकता।

B. Passports Act (15 of 1967), Section 5 - Change of Date of Birth - *Petitioner has recourse of getting date of birth corrected in birth certificate and after having the same corrected, she may submit application with corrected entry of her birth certificate - Petitioner may also institute a civil suit for declaration about date of birth and mandatory injunction directing PLA to effect change in the passport with regard to date of birth.* (Paras 13 to 15)

खा. पासपोर्ट अधिनियम (1967 का 15), धारा 5 - जन्मतिथि का परिवर्तन - याची को जन्म प्रमाण पत्र में सुधार करा पाने का आश्रय है और उसमें संशोधन कराने के बाद वह अपने जन्म प्रमाण पत्र की संशोधित प्रविष्टि के साथ आवेदन पेश कर सकती है - याची जन्मतिथि के बारे में घोषणा और जन्मतिथि के संबंध में पासपोर्ट में परिवर्तन प्रमाणी करने के लिए पासपोर्ट जारीकर्ता प्राधिकारी को निदेशित करने के लिए आज्ञात्मक व्यादेश के लिए वाद भी संस्थित कर सकती है।

V.K. Shukla, for the petitioner.

Dharmendra Sharma, for the respondents.

ORDER

ABHAY M. NAIK, J. :- Petitioner submitted passport application form in the prescribed formate which was signed by her on 28.12.98. In this application, her date of birth was mentioned as 15.6.1983, which was duly supported by the birth certificate registered with the Registrar Births and Deaths. Passport No. A-8537993 was issued on 19.1.2000 in favour of the petitioner from the Passport Office, Bhopal, showing 15.6.1983 as her date of birth.

2. Case of the petitioner is that her real date of birth is 15.6.1982 as is entered in her High School Certificate Examination and marks list of High School Certificate Examination, 1998. Copy of High School Certificate Examination, Certificates issued from Saraswati Higher Secondary School, Kareli, and Saraswati Shishu Mandir, Kareli, as also School Leaving Certificate issued by Saraswati Shishu Mandir, Kareli, District Narsinghpur are cumulatively marked as Annx.P/2. Further,

the case of the petitioner is that her date of birth was wrongly mentioned in the application as 15.6.1983 which was a bonafide mistake on the part of her father. She submitted representation for rectification of the date of birth as mentioned in the documents contained in Annx.P/2. This representation was not decided. Consequently, the present writ petition has been preferred.

3. It is contended by Shri V.K. Shukla, learned counsel for the petitioner that real date of birth of the petitioner being 15.6.1982, the same is to be entered in the passport and the bonafide mistake with respect to the date of birth of the petitioner deserves to be corrected.

4. Per contra, Shri Dharmendra Sharma, learned Assistant Solicitor General, contended that the petitioner herself while submitting the passport application mentioned 15.6.1983 as her date of birth and the same was established by the birth certificate duly registered with the Registrar of Births and Deaths; a copy whereof was annexed to the passport application form. Accordingly, he contended that Passport Office was not at fault and the date of birth entered into the passport on the basis of birth certificate cannot be legally rectified. Shri Dharmendra Sharma, learned Assistant Solicitor General, referring to various circulars submitted today along with a copy of passport application form contended that the entry pertaining to date of birth in the passport of the petitioner cannot be rectified, moreso, since it is based on the birth certificate of the petitioner and is not a mistake, nonetheless a bonafide mistake.

5. Submissions of both the learned counsel have been considered in the light of the material on record.

6. Various circulars have been issued from time to time by the Ministry of External Affairs (CPV Division). Initially, it was opined that under the Passports Act, 1967, a Passport Issuing Authority (hereinafter referred to as PIA for brevity) functions in quasi-judicial manner in issuing grant orders or denying passport facilities on applications made by applicants. Thus, once a PIA has issued grant orders with a particular birth date, the PIA cannot review or revise its own grant order.

7. Afterwards, Ministry of External Affairs issued Circular No.VI/405/4/28/91 dated 22.12.1994. In the light of a decision rendered by the High Court of Kerala on 9.9.1994 in the case of *EliZabeth Vs. Union of India and others*. High Court of Kerala gave directions that in case of incorrect date of birth, the petitioner may file an affidavit along with relevant documents before the First Class Judicial Magistrate praying that an order may be passed to correct the date of birth. The Magistrate may conduct such an enquiry as he deems fit and pass relevant orders regarding correction of date of birth in the passport. The aforesaid circular dated 22.12.1994 was issued in supersession of earlier circular of Ministry of External Affairs bearing No. VI/405/4/28/91/CPO/CIR/12/91 dated 18.7.1991 to the effect that in all such cases where passport holder insists on change of date of birth, he/she should obtain an order from First Class Judicial Magistrate in India instructing that a correction in the date of birth be made.

8. Thereafter, another judgment was pronounced by the High Court of Judicature at Mumbai in CWP No.1072/2000. Ministry of External Affairs (PV-1 Section) in the light of the said judgment issued circular bearing No.VI/401/2/5/2001 dated 18.4.2001 which contained following clarifications :-

(a) Where an applicant is seeking rectification/correction of a mistake in the entry about date of birth/place of birth in the passport, PIA may after verifying/satisfying himself, effect the correction treating the same as a technical correction. There is no need for a declaratory order in such cases.

(b) Where a competent authority issuing a birth certificate or an educational board registering a date of birth along with place of birth as valid issues any correction or amendment, PIA may effect the necessary amendment in the passport without insisting on a Court Order. As per the provisions of Section 21 of the general clauses Act 1997, a competent authority issuing a Certificate could also make necessary amendments to the same.

(c) Where the initial entry has been made on the basis of a supportive document issued by one competent authority i.e. School/educational authority and the applicant subsequently requests for a change on the basis of a certificate issued by another competent authority i.e. municipal authorities resulting in conflicting sources of valid proof, the PIA should direct the applicant to obtain a civil order from a competent court of jurisdiction, certifying the valid date of birth/place of birth.

9. Latest circular bearing No.VI/401/2/5/2001 was issued by the Ministry of External Affairs (PV-I Section) on 29.10.2007 which contains mainly the following relevant provisions :-

(i) Where an applicant claims clerical/technical mistake in the entry relating to date of birth in the passport and asks for rectification/correction, the documents produced earlier as proof of date of birth at the time of issue of passport may be perused by PIA. In case, it is a clerical mistake attributable to the applicant, correction in respect of date of birth may be allowed by fresh passport booklet by charging fee for fresh passport.

(ii) Where a competent authority which issued a birth certificate issues any correction or amendment in the date of birth, PIA may effect the necessary amendment in the passport without insisting on a Court Order provided the same document was produced earlier with the passport application. Fresh fees will be charged.

(iii) Where initial entry has been made on the basis of a supportive document issued by one competent authority and the applicant subsequently requests for change on the basis of a certificate issued by

another competent authority resulting in conflicting document for valid proof, the PIA should direct the applicant to procure an order for the First Class Judicial magistrate to effect change from Passport Manual, 2001 (In some States, this function is discharged by Civil Magistrate).

10. In the light of the aforesaid position of circulars, contention of learned Assistant Solicitor General of India, Shri Dharmendra Sharma is not acceptable that in no case the date of birth entered in the passport can be corrected/rectified. It is crystal clear from various circulars issued by the Ministry of External Affairs, Government of India, referred to hereinabove that rectification/correction in the matter of date of birth may be made obviously, in case, if, the petitioner is found entitled to seek correction/rectification after following the procedure prescribed by the circulars.

11. Main problem in this case is that the petitioner herself had submitted a copy of her birth certificate in which the date of birth has been mentioned as 15.6.1983. This certificate was issued under the provisions of the Births, Deaths and Marriages Registration Act, 1886. Since the PIA has relied upon the birth certificate submitted by the petitioner herself alongwith the passport application form, no fault can be found with it.

12. Petitioner in view of the circulars is left with two recourses prescribed vide (ii) and (iii) of paragraph 9 of this order. In case of availing remedy (i), she is first required to seek correction of date of her birth in the birth certificate itself. Section 28 of the said Act makes a provision for correction of entry in register of births or deaths. This section is reproduced below for convenience :-

“28. Correction of entry in register of births or deaths.-(1) If it is proved to the satisfaction of a Registrar of Births and Deaths that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, he may, subject to such [rules] as may be made by the [State Government] with respect to the conditions and circumstances on and in which errors may be corrected, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction.

(2) If a certified copy of the entry has already been sent to the Registrar General of Births, Deaths and Marriages, the Registrar of Births and Deaths shall make and send a separate certified copy of the original erroneous entry and of the marginal correction therein made.”

13. No provision could be pointed out to this Court that the birth certificate issued under the said Act has presumptive value with regard to date of birth. Sub-section (2) of Section 35 of the said Act provides that certified copy of an entry given under Sec.35 shall be admissible in evidence for the purpose of proving the birth, baptism, naming, dedication, death, burial or marriage to which the entry relates. It will not give rise to presumption with regard to date of birth rather, it would be an evidence for merely proving the factum of birth.

14. Although, the date of birth of the petitioner is entered in her academic record as 15.6.1983, but again no provision could be pointed out that the certificate issued by the Board of Secondary Education or entered in other documents like driving license or marriage certificate shall have overriding effect in the matter of date of birth. This being the position, the petitioner cannot compel the PIA to make correction in the passport in respect of date of birth in the light of various circulars which do not provide for rectification of the mistake without first getting corrected the birth certificate containing 15.6.1983 as date of birth. Since the PIA has made entry of date of birth as 15.6.1983 on the basis of the birth certificate as well as the information provided by the petitioner herself under her own signature, the petitioner may seek correction of entry in the register of birth under Section 28 and after having the same corrected, the petitioner may submit an application with the corrected entry of her birth certificate in the passport office in the light of aforesaid circular.

15. Second recourse is also open to the petitioner. It was the initial entry in her passport which was made on the basis of supportive document in the nature of birth certificate issued by the Registrar of Births and Deaths which is a competent authority under the Birth, Deaths and Marriages Registration Act, 1886. Petitioner now requests for change on the basis of the certificate issued by the Board of Secondary Education which is also one of the competent authorities. Date of birth entered in the certificate issued by the Board of Secondary Education is though taken as a proof of date of birth for number of purposes, it is not shown to have any presumptive value under law. Thus, there are conflicting documents (Birth Certificate and High School examination Certificate). The petitioner may procure a judicial order from the Court having competent jurisdiction to effect change in the passport with regard to date of birth. In the State of Madhya Pradesh, no such power is conferred on the judicial Magistrate, therefore, the petitioner in order to procure a judicial order shall have to institute a Civil Suit for declaration about date of birth and mandatory injunction directing the PIA to effect a change in the passport with regard to date of birth.

16. Thus, it is open for the petitioner to invoke any of the aforesaid two recourses. It is directed that if the petitioner submits an application with corrected birth certificate or submits an application with a certified copy of decree for correction in the date of birth, the PIA shall consider the same in the light of circulars referred to hereinabove and shall take a decision in an expeditious manner, preferably, within a period of two months from the date of receipt of application accompanied by corrected birth certificate/Court decree (as the case may be) and certified copy of this order.

17. In the result, writ petition is allowed in the aforesaid terms.

No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2847

WRIT PETITION

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

16 May, 2008*

RUCHIR KUMAR JAIN

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

Medical and Dental Post Graduate Course Entrance Examination Rules, 2007, Rule 20(2) - Counseling - Petitioner alleged that provisions of Rule 20(2) were not complied with as news regarding counseling was not properly circulated - Held - Respondent had circulated information with regard to the second counseling in all leading newspapers having the effective public circulation - Steps were taken for publication of intimation relating to second counseling in the popular Hindi and English newspapers at Division and District level - Information was also flashed on Akashwani in the Radio and Doorshan in the television - Rule complied with - Petition dismissed.

(Para 7)

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 20(2) - काउंसिलिंग - याची ने कथित किया कि नियम 20(2) का पालन नहीं किया गया क्योंकि काउंसिलिंग के संबंध में समाचार उचित रूप से परिचालित नहीं किया गया - अभिनिर्धारित - प्रत्यर्थी ने द्वितीय काउंसिलिंग के संबंध में जानकारी पर्याप्त लोक प्रचालन रखने वाले सभी मुख्य समाचार-पत्रों में परिचालित की थी - द्वितीय काउंसिलिंग से संबंधित सूचना के सम्भाग एवं जिला स्तर पर लोकप्रिय हिन्दी और अंग्रेजी समाचार-पत्रों में प्रकाशन के लिए आवश्यक कार्यवाही की गई - जानकारी रेडियो में आकाशवाणी पर और टेलीविजन में दूरदर्शन पर भी दी गई - नियम का पालन किया गया - याचिका खारिज।

Cases referred :

(2005) 9 SCC 779, (2006) SCC (L&S) 1893, 2006(4) MPHT 426, (2005) 2 SCC 65, 2007(2) J LJ 78, Order dated 16.03.2007 passed by Hon'ble Apex Court in case of Amit Gupta Vs. Union of India.

Rajendra Shrivastava with Nilesh Kotecha, for the petitioner.

Deepak Awasthy, for the respondent No.1.

Anoop Nair, for the Medical Council of India.

Greeshm Jain, for the intervenor.

ORDER

The Order of the Court was delivered by PRAKASH SHRIVASTAVA, J:-This writ petition has been filed with a prayer to issue writ of mandamus to the respondents to admit the petitioner in M.D.Course in Medicine at MGM Medical College, Indore or in M.S. Course in General Surgery at S.S.Medical College, Rewa on the vacant seat of 2007 batch.

2. The material facts in brief, as stated in the writ petition, are that the petitioner after passing M.B.B.S Examination from S.S. Medical College, Rewa had appeared in Pre P.G. Test-2007 and secured 124.70 marks out of 200 and was placed at Serial No.280 in waiting merit list of unreserved category. It is alleged that the programme for the second counselling was not advertised in the newspapers in terms of Rule 20(2) of Madhya Pradesh Medical and Dental Post Graduate Course Entrance Examination Rules, 2007 (in brief 'the Rules'), consequently, the petitioner could not appear in the second counselling which closed at rank No.299 for unreserved category. Aggrieved, the petitioner has filed the present writ petition.

3. Learned counsel appearing for the petitioner submitted that the petitioner during the relevant time was residing at Tikamgarh whereas the programme of counseling was advertised in the newspapers published from Rewa which is not proper compliance of Rule 20(2) of the Rules therefore the petitioner is entitled for the relief claimed in the writ petition. Learned counsel for the petitioner in support of his submission has placed reliance upon the judgments in the matters of *Dolly Chhanda versus Chairman, Jee and others* [2005(9) SCC 779], *Aman Deep Jaiswal Versus State of Punjab and others* [2006 SCC (L&S) 1893], *Sunil Harioudh Vs. State of Madhya Pradesh and others* [2006(4) MPHT 426], *Mridul Dhar (Minor) and another versus Union of India and others* [2005(2) SCC 65] and *Anshu Dubey vs. State of M.P. and others* [2007(2) J LJ 78].

4. Learned counsel appearing for the respondents submitted that the schedule form for P.G. counseling was approved by the Hon'ble Supreme Court in the order dated 16.3.2007 passed in the case of the *Amit Gupta Vs. Union of India*, according to which the second round of counselling was to start from 26th May. He further submitted that information for holding second counselling between 25th to 28th May, 2007 at Gandhi Medical College, Bhopal was widely circulated. He further submitted that the petitioner had done MBBS from Rewa and his postal address throughout in the College as well as in the examination body was the address at Rewa, therefore, once it is admitted that the programme of counselling was published in daily newspapers published from Rewa, the petitioner cannot claim that he had no information about the counselling.

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

6. The controversy involved in the matter is confined to the question as to whether the respondents have complied with Rule 20(2) of the Rules. Rule 20(2) of the Rules provides that:-

20 Counselling:

(1) xxxxxxxxxxxxxxxx

(2) The programme for counselling will be advertised in the leading

newspapers of the State. Separate call letters will not be sent to the candidates.

7. A perusal of the reply filed by the respondents and the documents annexed therewith show that the respondents had circulated the information with regard to the second counselling in all leading newspapers having the effective public circulation. Undisputedly the programme of counselling was also advertised in daily newspaper "Dainik Jagran" Rewa Edition which is stated to have the circulation in Tikamgarh District also. Annexure-R/2 shows that steps were taken for publication of intimation relating to second counselling in the popular Hindi and English newspapers at Division and District level. Thus, it is apparent that the respondents had advertised programme for counselling in the leading newspapers of the State and Rule 20(2) was substantially complied with. The information relating to the date of second counselling was also flashed on 'Akashwani' in the radio and 'Doordarshan' in the television. The respondents have placed on record Annexure-R/1 in support of their stand that the information relating to the second counselling was broadcast in 'Akashwani' and 'Doordarshan'.

8. The reliance of the petitioner in the judgments reported in the matters of *Dolly Chhanda*, *Aman Deep Jaswal*, *Sunil Hariqudh* (supra) etc. does not take the petitioner's case any further since these are the pronouncement where the candidate in question was denied admission for wholly unjustified and unlawful reason ignoring his rightful claim. The petitioner also cannot get the benefit of judgment of this court in the matter of *Anshu Dubey Vs. State of M.P. and others* (supra) since in the present case there is substantial compliance of Rule 20(2) of the Rules and inspite of wide publication of schedule of second counselling the petitioner had not participated in the counselling.

9. In view of the aforesaid, we do not find any merit in the writ petition and the same is accordingly dismissed. No orders as to cost.

Petition dismissed.

I.L.R. [2008] M. P., 2849

WRIT PETITION

Before Mr. Justice Rajendra Menon

25 June, 2008*

PAREEKSHIT SINGH (DR.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 226 - *Transfer - Mala fides - Allegations of mala fide have to be established and proved to such a extent that the Court can record positive finding.* (Para 24)

क. संविधान, अनुच्छेद 226 - स्थानांतरण - असदभाव - असदभाव का

अभिकथन ऐसी सीमा तक स्थापित और सिद्ध किया जाना चाहिए कि न्यायालय सकारात्मक निष्कर्ष अभिलिखित कर सके।

B. Constitution, Article 226 - Transfer - Number of complaints and enquiries pending against petitioner - Transfer of employee to facilitate enquiry or disciplinary action is a proper exercise of power. (Para 27)

ख. संविधान, अनुच्छेद 226 - स्थानांतरण - याची के विरुद्ध कई शिकायतें और जाँचें लम्बित - कर्मचारी का स्थानांतरण जाँच या अनुशासनात्मक कार्यवाही को सुकर बनाने के लिए शक्तियों का उचित प्रयोग है।

C. Constitution, Article 226 - Transfer - Scope of Judicial Review - Transfer order can be interfered only if mala fides are established or if the transfer is found to be contrary to statutory provisions or provisions having force of law. (Para 28)

ग. संविधान, अनुच्छेद 226 - स्थानांतरण - न्यायिक पुनर्विलोकन का क्षेत्र - स्थानांतरण आदेश में हस्तक्षेप सिर्फ तभी, यदि असदभाव स्थापित होता है या स्थानांतरण वैधानिक उपबंधों या ऐसे उपबंधों जो विधि का प्रभाव रखते हैं, के प्रतिकूल है।

Cases referred :

(2003) 4 SCC 739, (2004) 7 SCC 405, (2007) 8 SCC 150.

Mrigendra Singh, for the petitioner.

Shailesh Mishra, Dy. G.A., for the respondent No.1.

Vibudhendra Mishra, for the respondent Nos. 2 & 3.

Pankaj Dubey, for the respondent No.4.

Paritosh Gupta, for the respondent No.5.

ORDER

RAJENDRA MENON, J. :-Challenging the order-dated 20.2.2008 (Annexure P/1) passed by the State Government transferring the petitioner, who is working as Registrar, Awadhesh Pratap Singh Vishwavidyalaya, Rewa (hereinafter referred to 'APSV') in the same capacity to Dr. Hari Singh Gour Vishwavidyalaya, Sagar, petitioner has filed this petition.

2. Challenge to the order of transfer is made mainly on two grounds: (a) Frequent transfer; and, (b) Malafides attributed to respondent No.4 and the role played by respondent No.4 in getting the petitioner transferred from Rewa.

3. Petitioner was appointed as an Assistant Registrar after he was selected by the Public Service Commission, in the year 1986. He was promoted as Deputy Registrar in the year 1991 and thereafter as a Registrar in the year 2001. It is the case of the petitioner that he has an unblemished service record and in the petition averments are made to indicate the exemplary service record of the petitioner. It is stated by the petitioner that the present order of transfer issued by the State Government on 20.2.2008 vide Annexure P/1, amounts to frequent transfer of the petitioner from one place to another and to demonstrate the aforesaid fact, it is

stated that vide order-dated 8.7.2005 (Annexure P/2) petitioner was transferred from Sagar to Rewa. He remained in Rewa upto 16.5.2006, when vide order (Annexure P/3), he was transferred from Rewa to Indore. After working in Indore for two months, vide Annexure P/4 dated 31.7.2006, he was transferred as an Officer on Special Duty to the Higher Education Department at Bhopal. Even though petitioner is transferred from Indore to Bhopal in the Higher Education Department, vide the above order-dated 31.7.2006, the said transfer was challenged by the petitioner by filing Writ Petition No.4871/2006 before the Indore Bench of this High Court and as an interim order was passed on 28.8.2006, the order was not given effect to and subsequently vide order-dated 12.3.2007 (Annexure P/6), posting of the petitioner to Bhopal was modified and instead petitioner was posted at Rewa as Registrar. Petitioner continued to work at Rewa from 12.3.2007 onwards and now within less than an year, it is argued that he is transferred from Rewa to Sagar.

4. On the basis of the aforesaid fact the first ground urged by the petitioner is that the aforesaid action of the respondents in transferring the petitioner to various places on more than four occasions within a short period of less than three years amounts to frequent transfer and, therefore, the transfer is vitiated on the aforesaid ground.

5. Further contention of the petitioner is that that after he was posted in Rewa in March 2007, certain complaints were received against respondent No.4 Dr. Ajay Kumar Awasthy, Professor in the Department of Environmental Science and for conducting an enquiry into the allegations levelled against the said respondent, petitioner was appointed as Enquiry Officer vide Annexure P/8 dated 17.8.2007. In furtherance to the appointment made and for conducting the enquiry, it is stated that petitioner issued notice to respondent No.4 vide Annexure P/9 on 12.1.2008 and on various other dates directing him to file his reply to the charge-sheet, so that the enquiry can commence. It is the case of petitioner that respondent No.4 is holding an important post of President of Swades Jagran and is an office-bearer of RSS, a patron organization of the ruling party in the State of Madhya Pradesh, all the Ministers and bureaucrats are working in the State of Madhya Pradesh under the dictates of RSS and as respondent No.4 is holding the post of President in such organization, using his influence and to somehow stall the enquiry being conducted by the petitioner, respondent No.4 has managed to get the petitioner transferred. Accordingly contending that transfer of the petitioner is at the instance of respondent No.4, who was instrumental in getting the petitioner transferred because an enquiry was being conducted by the petitioner, malafides are attributed in the matter of transferring the petitioner and by contending that transfer at the instance of respondent No.4 amounts to malafide exercise of power and is arbitrary, interference into the matter is sought for.

6. Shri Mrigendra Singh, learned counsel for the petitioner, during the course

of hearing, by referring to various documents available on record tried to emphasize that in the present case, the entire action against the petitioner is taken because of the influence of respondent No.4, no administrative necessity is existing in the matter and the transfer being a colourable exercise of powers, warrants interference.

7. Respondents have refuted the aforesaid and the State Government by filing a detailed reply and documents has tried to point out that whenever and wherever the petitioner is posted, he has indulged in serious acts of commission and omission as a result enquiries are to be held against him on complaints received and he was transferred from one place to another only because of complaints. It is stated by the respondents that petitioner is a resident of District Rewa, his village is very near to Rewa and he has spent most of his career in APSV, at Rewa. Interalia contending that transfer of the petitioner is because of some complaints and cases registered against him by the Lokayukt and is to facilitate enquiry into the matter, as enquiry by permitting the petitioner to work as Registrar in Rewa is not possible, State Government has tried to justify the action by stating that the transfer is on administrative consideration and the contention of the petitioner with regard to influence of respondent No.4, in transferring the petitioner, is denied by the State Government. It is the case of the State Government that certain complaints were received against the petitioner, both by the Lokayukt and the Governor of the State, who happens to be Chancellor of the University, enquiry is to be conducted on the complaints received and to facilitate the said enquiry, transfer of the petitioner is necessary.

8. That apart, respondent No.4 has filed a separate return and by filing various documents, has tried to indicate that he has no role to play in the transfer of the petitioner and it is stated that transfer of the petitioner is done by the State Government only because of complaints received against the petitioner. Respondent No.4 has filed various documents and some of the documents are communications made by the Lokayukt Organization to the State Government and the University authorities.

9. Respondent Nos. 2, 3 and 5 have also filed separate returns and Shri Vibudhendra Mishra, learned counsel representing respondent Nos. 2 and 3, has submitted that transfer of the petitioner is only to facilitate proper conduct of enquiry pending against him and as the State Government has issued an order on administrative consideration, it is stated that no case is made out for interference.

10. During the course of hearing Shri Mrigendra Singh, learned counsel representing the petitioner, and Shri Pankaj Dubey, learned counsel representing respondent No.4, vehemently attacked and made serious allegations against each other.

11. Shri Mrigendra Singh, learned counsel for the petitioner, questioned the bonafide of respondent No.4 in contesting the matter by bringing on record various

documents which normally cannot be obtained by respondent No.4 and by taking me through the documents tried to indicate that respondent No.4 was very much interested in the matter and it is at his instance that the transfer is being initiated. It was also argued by Shri Mrigendra Singh that the documents filed pertaining to complaints against the petitioner are all false and fabricated documents, produced alongwith the return only to justify the action before this Court. Shri Mrigendra Singh pointed out that some of the allegations levelled in the complaints pertain to the year 1999 and 2000, for which enquiry has already been held and petitioner is exonerated. By bringing on record one such enquiry report filed as Annexure RJ-1, Shri Mrigendra Singh emphasized that petitioner having been exonerated in this enquiry, no case is made out for transferring the petitioner on the basis of these complaints. That apart, it was submitted by him that the basis for transferring the petitioner i.e... the communication received vide Annexure R/5 dated 4.3.2008 is not sufficient to justify the action. On the contrary this communication is made after the impugned order is passed on 20.2.2008 and, therefore, this document and the complaint enclosed therewith cannot form the basis for the transfer. That apart, referring to the complaints made by one Shri Anand Udaypure, the allegations contained therein, so also the complaint made by one Shri Balendra Kumar Shukla, Advocate of Rewa and a communication received by the petitioner from the said Shri Balendra Kumar Shukla, vide Annexure RJ/2, Shri Mrigendra Singh tried to emphasize that the complaint filed by Shri Balendra Kumar Shukla has been withdrawn and as there is no complaint against the petitioner and even if the complaints are there, they being false and frivolous and an afterthought, only to harass the petitioner, cannot form the basis for transferring the petitioner. Attributing malafides particularly on respondent No.4 and indicating the influence played by him, petitioner seeks interference into the matter.

12. It is further stated by Shri Mrigendra Singh that petitioner has specifically averred in this petition that respondent No.4 is holding the post of President, Swades Jagran, and is the office bearer of the RSS, which fact is not specifically denied by respondent No.4 and, therefore, this has to be accepted and interference drawn, in absence of specific denial to the averments made by the petitioner in para 6.1 of the petition against respondent No.4.

13. Shri Pankaj Dubey, learned counsel for respondent No.4, submits that respondent No.4 has denied his role in the matter and by filing a separate application, I.A.No.5622/2008, has tried to indicate to this Court that petitioner has made false averments in this petition particular in para 5.6, has used fabricated documents and, therefore, action under section 340 CrPC should be taken against him. Shri Pankaj Dubey also refutes the contentions raised in this petition and submits that respondent No.4 has nothing to do in the matter of transfer of the petitioner.

14. By placing reliance on the law laid down by the Supreme Court in the case of *N.K. Singh Vs. Union of India* [1994(6) SCC 98], Shri Vibudhendra Mishra,

learned counsel for respondent Nos. 2 and 3, has prayed for dismissal of this petition.

15. I have heard learned counsel for the parties at length and perused the record. From the submissions made and on the basis of material available on record, it is seen that transfer in question is challenged mainly on two grounds: the first pertains to frequent transfer; and, the second malafides attributed to respondent No.4 and the role played by him in getting the petitioner transferred.

16. As far as frequent transfer is concerned, it is seen from the records and in particular from the enquiry report (Annexure RJ-1) filed by the petitioner, that because of some complaint received against the petitioner one Professor (Smt.) Ramesh Rani Mathur was appointed as enquiry officer and the said officer conducted an enquiry into the allegations levelled against the petitioner and submitted her report on 28.9.99, vide Annexure RJ-1, filed by the petitioner alongwith his rejoinder. Even though allegations in this enquiry are found not to be established, but in the said enquiry report certain factual aspects with regard to posting of the petitioner at Rewa, after his appointment on 10.1.1986 is indicated. It is indicated in this report that after his appointment on 10.1.1986 and upto the date of submission of the report on 28.9.99, out of the total period of 13 years, petitioner has been at Rewa for more than 10 years. It is indicated in this report that out of 13 years of service except for a short period of 2 years and 8 months, petitioner has continued to remain at Rewa. Thereafter, records indicated that on 8.7.2005, petitioner was transferred from Sagar to Rewa. While working in Rewa, it is the case of the respondents that some complaints were received against him and, therefore, he was transferred to Indore. While working in Indore again complaints were received against him and, therefore, he was transferred to Bhopal on 31.7.2006 vide Annexure P/4. This order was never implemented, but it was cancelled and vide Annexure P/6 dated 12.3.2007, petitioner again came back to Rewa. If these facts are analysed, it would be seen that petitioner after 8.7.2005 was only transferred once to Indore, where he remained for only 10 months and even though on the basis of the complaints received, he was transferred to the Higher Education Department, but the said order was not enforced, instead vide Annexure P/6 dated 12.3.2007, the order was modified and petitioner was again brought back to Rewa. Transfer of the petitioner on 16.5.2006 from Rewa to Indore and the fact of his working in Indore for only 10 months and thereafter coming back to Rewa after 10 months shows that petitioner was always managing his transfer to Rewa. It is a case where petitioner has been transferred to various places on complaints received, he was shifted, but for the reasons which remain unexplained petitioner managed to come back to Rewa every time and infact has spent most of his career in one University at Rewa. Considering the aforesaid factual aspect of the matter, which is apparent from the face of record, this Court is unable to hold that the case in hand is one of frequent transfer. On the contrary records indicate that for most of the period during his entire service career

petitioner has managed to remain at Rewa and even if he has been transferred to some other University, serious complaints have been received against him and the transfer orders are mostly issued because of the complaints received against the petitioner.

17. Analyzing the entire service career of the petitioner and the various places where petitioner was transferred, as indicated hereinabove, and on considering the fact that petitioner had spent most of his career in Rewa, this Court does not find any merit in the first ground urged with regard to transfer of the petitioner being a case of frequent transfers. Accordingly, the first ground canvassed by Shri Mrigendra Singh, learned counsel for the petitioner, being devoid of merits and substance is accordingly rejected.

18. As far as the second ground is concerned, petitioner attributes malafide and contends that transfer order is passed by the State Government because of the influence, which respondent No.4 has in the working of the State Government. A statement is made to this effect merely on the basis of some post said to have been held by respondent No.4 in some organization, which is said to be the patron organization of a particular ruling party that is in power in the State of Madhya Pradesh. Except for making the aforesaid allegation, the material available on record are not sufficient to record a positive finding with regard to the allegations made in connection with the influence of respondent No.4 in the matter of transferring the petitioner.

19. Merely because petitioner is appointed as an enquiry officer and respondent No.4 is facing the enquiry, a conclusion positive in nature cannot be drawn to hold that the contention of the petitioner is right. The aforesaid allegations of the petitioner has to be evaluated in the light of the facts that have been brought on record by the State Government. If the allegations made by the petitioner against respondent No.4 and the counter-allegations made by respondent No.4 against the petitioner are ignored, the material available on record if analysed on the basis of all the contentions raised by the State Government are enough to hold that there are serious complaints against the petitioner with regard to his working in Rewa and at the instance of Lokayukt and the Chancellor of the University enquiries are contemplated against the petitioner. If this aspect of the matter is taken into consideration and the reasons given by the State Government for transferring the petitioner is considered, then this Court does not see any reason to hold that the transfer amounts to colourable exercise of power or is arbitrary in nature. From the return filed by respondent No.1 State Government, it is seen that throughout his service career allegations have been levelled against the petitioner and at various levels enquiries have been conducted against him. Even though some of the allegations, pertain to the period 1997, 1999 and 2000, but available on record are Annexure R/3, a complaint submitted by one Shri Balendra Kumar Shukla, Advocate; Annexure R/5, a communicated dated 4.3.2008 issued from the office

of Lokayukt, Madhya Pradesh; and further communications submitted by respondent No.4 with regard to enquiry initiated by the Lokayukt Organization as contained in Annexure R/4/1 dated 19.2.2008 and Annexure R/4/2 dated 14.1.2008. Similarly, Annexure R/4/3 is a complaint submitted by certain persons on 26.12.2007, wherein allegations are made and Lokayukt Organization has registered a case.

20. Even though Shri Balendra Kumar Shukla, Advocate by submitting a letter to the petitioner has tried to point out that he has no complaint against the petitioner, but the communication received by the State Government from the office of Governor indicates that the University has been directed to conduct an enquiry into the working of the petitioner and the allegations levelled against him. Thereafter, complaints have been received against the petitioner on 9.1.2008 by the office of Lokayukt and the Lokayukt, Madhya Pradesh has made communication to the University and it is seen that cases have been registered against the petitioner and the Lokayukt Organization has called for various documents from the University to facilitate enquiry into the matter.

21. Merely because one such communication made by the office of Lokayukt vide Annexure R/5 on 4.3.2008 is after the transfer of the petitioner, that cannot be a ground to hold that no enquiry was pending against the petitioner before the order of transfer was passed on 20.2.2008. The communication Annexure R/5, even though made on 4.3.2008, indicates that the complaints were received against the petitioner on 9.1.2008 and the office of Lokayukt had been in constant touch with the State Government and the Accounts Officer of the University right from January 2008, asking for various documents to conduct an enquiry and a case bearing No.219/2007 has been registered against the petitioner. It is seen that Case No.219/2007 is registered in the office of Lokayukt with regard to various irregularities in the University concerned and petitioner is also figuring in the complaints made.

22. Similarly, the complaints submitted to the Lokayukt on 5.1.2008 on the basis of which communication was made on 4.3.2008 vide Annexure R/5, indicates that these complaints pertain to working of Shri Parikshit Singh Chouhan, Registrar of APSV, Rewa and there can be no doubt that the person against whom these complaints are made is the petitioner, and no one else. A complete scrutiny of the documents available on record indicates that there are serious allegations against the petitioner and complaints are made by various persons pertaining to working of the petitioner as Registrar in APSV, Rewa. These complaints may be right, the allegations may be true or they may be false. At this state in this writ petition, this court is not required to evaluate these complaints on merit and take a decision with regard to the complaints being false, frivolous or otherwise. This Court is only required to evaluate as to whether on the basis of these complaints State Government was justified in taking action of transferring the petitioner or the transfer is vitiated being tainted with malafides attributable to respondent No.4 and the influence made by him in getting the petitioner transferred.

23. As already indicated hereinabove except for making the allegations with regard to respondent No.4, petitioner has not produced any cogent material so as to record a positive finding to uphold the contention of the petitioner. On the contrary available on record are various complaints and communications made particularly by the Lokayukt Organization and the office of Governor, who is Chancellor of the University to indicate that enquiries are contemplated against the petitioner and to facilitate a proper enquiry, it was decided by the State Government to transfer the petitioner.

24. When the allegation of malafides are made and when the prayer is to interfere with a particular action of the State Government on the ground of malafides, the allegations of malafide have to be established and proved to such an extent that this Court can record a positive finding to the effect that malafides as pleaded are established in the given set of circumstances. In the present case, if the allegation of malafides are analysed in the backdrop of the principles laid down for holding malafides to be established, it would be seen that the grounds raised in this petition are not such on the basis of which it can be said that the grounds of malafide raised are found to be correct. Infact on the basis of the material available on record, this Court can only record a finding that petitioner has made serious allegations of malafide, but has not adduced cogent material to hold the malafides to be established.

25. The legal meaning of 'malice' and the grounds for holding an action of the State to be malafide is considered by the Supreme Court in the case of *State of AP and Others Vs. Goverdhanlal Pitti* [(2003) 4 SCC 739]. In the said case, malafides were attributed to the State in the matter of acquiring of land. The question of malafides is considered by the Supreme Court in paras 12, 13 and 14, in the following manner:

"(12) THE legal meaning of malice is "ill-will" or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others. (See Words and Phrases legally defined in Third Edition. London Butterworths 1989).

(13) WHERE malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in its authoritative work on Administrative Law (Eighth Edition at page 414) based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seek

to 'acquire land' 'for a purpose not authorised by the Act'. The State, if it wishes to acquire land, should exercise its power bona fide for the statutory purpose and for none other'.

(14) THE legal malice, therefore, on the part of the State as attributed to it should be understood to mean that the action of the State is not taken bona fide for the purpose of the Land Acquisition Act and it has been taken only to frustrate the favourable decisions obtained by the owner of the property against the State in the eviction and writ proceedings."

26. If the case in hand and the malafides attributed particularly to respondent No.4 and his influencing the action of the State is analysed, it would be seen that petitioner has failed to prove as to how respondent No.4 has influenced the decision making process of the State Government. On the contrary, the State has established its bonafide in transferring the petitioner by pointing out that enquiries are contemplated against the petitioner and, therefore, his continuation in Rewa is not conducive for conducting the enquiry.

27. Transfer of an employee to facilitate enquiry or disciplinary action is held by the Supreme Court to be a proper exercise of power warranting no interference in a petition under Article 226 of the Constitution. The aforesaid principle is laid down in the case of *State of UP and Another Vs. Siya Ram and Another* [(2004) 7 SCC 405].

28. Scope of judicial review into an order of transfer and the principles governing interference by exercising discretionary jurisdiction under Article 226 of the Constitution has been considered by the Supreme Court in the case of *Mohd. Masood Ahmad Vs. State of UP and Others* [(2007) 8 SCC 150]. In the aforesaid case, after considering various judgments on the question and in para 7 of the aforesaid judgment, the principle is so laid down by the Supreme Court:

"7. The scope of judicial review of transfer under Article 226 of the Constitution of India has been settled by the Supreme Court in *Rajendra Roy Vs. Union of India* (8), *National Hydroelectric Power Corpn. Ltd Vs. Shri Bhagwan* (9), *State Bank of India Vs. Anjan Sanyal* (10). Following the aforesaid principles laid down by the Supreme Court, the Allahabad High Court in *Vijay Pal Singh Vs. State of UP* (11) and *Onkar Nath Tiwari Vs. Chief Engineer Minor Irrigation Department* (12), it has held that the principle of law laid down in the aforesaid decisions is that an order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a court of law in exercise of its discretionary jurisdiction under Article 226 unless the court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the order were not competent to pass the orders."

From the aforesaid principles laid down by the Supreme Court in various cases, it is clear that an order of transfer can be interfered with by this Court only if malafides are established or if the transfer is found to be contrary to statutory provisions or provisions having the force of law. In the present case, no statutory provisions, rule or regulation is alleged to be violated in transferring the petitioner. The only allegation is with regard to malafides of respondent No.4 and his influence in getting the petitioner transferred. This Court has already analysed the material available on record and it is found that even though allegations of malafide are made against respondent No.4, but the material available on record are not enough to hold the said malafides are established. Vague allegations of malafide cannot be a ground for interfering with an order of transfer.

29. When the allegations levelled by the petitioner of malafides are analysed in comparison to the submission made by the State Government with regard to complaints received against the petitioner and the fact that enquiry is contemplated to be held against these allegations, this Court has to hold that the administrative exigency do exists in the present case and there is nothing to hold that the transfer of the petitioner is because of malafides attributed to respondent No.4. On the contrary, the material available on record makes out a case of administrative exigency being available for transferring the petitioner and as the State Government, respondent No.1, has taken the action after evaluating the aforesaid administrative exigency in the absence of malafides being proved to the extent required for interference, no case is made out for granting any relief to the petitioner.

30. As the case in hand is a case of transfer of an employee from one place to another on complaints received to facilitate enquiry, that being the factual position, this Court does not find any merit in the claim made by the petitioner warranting interference.

31. During the course of hearing it was stated by the petitioner that in the light of status quo granted by this Court, petitioner has worked in Rewa and is, therefore, entitled to salary due for various periods.

32. Respondents have refuted the aforesaid and it is stated by them that petitioner was relieved even before the order of status quo was passed and, therefore, he is not entitled to salary. This is a disputed question of fact, accordingly it is directed that with regard to the working of the petitioner and his claim for salary, petitioner may represent the matter to the State Government and the State Government shall conduct an enquiry with regard to the working of the petitioner or otherwise, shall pass appropriate orders with regard to payment of salary and the order so passed by the State Government shall be complied with by the University.

33. Even though during the course of hearing serious allegations were levelled by the petitioner against respondent No.4 and respondent No.4 had also made serious counter-allegations against the petitioner and sought for taking action under section 340 CrPC, but considering the facts and circumstances of the case, this

Court is of the considered view that for deciding the present petition it is not necessary for this Court to consider all these factors. The question of transfer of the petitioner and its validity has been decided by this Court without entering into the above controversy and, therefore, this Court does not deem it proper to make any comment or take any action in this regard.

34. Accordingly, for the reasons indicated hereinabove, petition stands dismissed without any order so as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 2860

WRIT PETITION

Before Mr. Justice Abhay M. Naik

26 June, 2008*

CHHIDDU @ KANCHHEDI LAL

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

A. Jail Manual, Rule 361(1) & 361(6), Penal Code, 1860, Section 302 - Release - Petitioner was undergoing sentence for offence punishable u/s 302 I.P.C. - As per Jail Superintendent's order u/r 361(1) of Manual, he was released on ground of sickness - State Government issued an order that convicts of 65 years of age or more who have undergone 4 years imprisonment or more should be released - At the relevant time, when the Government's order was in force petitioner was on release and thus his case could not be proposed for consideration - Action challenged - Held - Object of Government's order was of beneficial nature for the convicted prisoners who were 65 years of age - As per rule 361(6), the period of release would be deemed to be the period in imprisonment - Petitioner having been released u/r 361(1) could not be deprived of the benefit of Government's order.

(Paras 8 to 10)

क. जेल मैन्युअल, नियम 361(1) व 361(6), दण्ड संहिता, 1860, धारा 302 - छोड़ देना - याची भा.द.सं. की धारा 302 के अन्तर्गत दण्डनीय अपराध के लिए दण्डादेश भुगत रहा था - मैन्युअल के नियम 361(1) के अन्तर्गत जेल अधीक्षक के आदेशानुसार वह बीमारी के आधार पर छोड़ा गया - राज्य सरकार ने आदेश जारी किया कि 65 वर्ष या उससे अधिक उम्र के सिद्धदोषियों को, जो 4 वर्ष या उससे अधिक कारावास भुगत चुके हैं, छोड़ दिया जाना चाहिए - सुसंगत समय पर, जब सरकार का आदेश प्रवृत्त था, याची छूटा हुआ था और इस प्रकार उसका मामला विचार के लिए प्रस्तावित नहीं किया जा सका - कृत्य को चुनौती दी गई - अभिनिर्धारित - सरकार के आदेश का उद्देश्य सिद्धदोष बंदियों के लिए, जो 65 वर्ष की उम्र के थे, लाभप्रद प्रकृति का था - नियम 361(6) के अनुसार, छूटे रहने की कालावधि कारावास में होने की कालावधि समझी जायेगी - याची धारा 361(1) के अन्तर्गत छूटा हुआ होने से सरकार के आदेश के लाभ से वंचित नहीं किया जा सकता था।

B. Jail Manual - Release - State Government's order dated 24.01.2004 whereby convicts of 65 years of age or above who underwent 4 years or excess punishment on 26.01.2004 were directed to be released unconditionally - Held - The benefit of Government's order cannot be snatched away from petitioner - Merely on account of absence of his proposal in the year 2004 - Petitioner was not a author of such a mistake and no fault could be found with him for denying him release pursuant to Government's order - It is not a case of granting retrospective benefits to the petitioner. - It rather amounts to rectify the mistake which was committed by Jail Authority. (Paras 10 & 11)

ख. जेल मेन्चुअल - छोड़ देना - राज्य सरकार का आदेश तारीख 24.01.2004 जिसके द्वारा 65 वर्ष या उससे अधिक उम्र के सिद्धदोषियों को, जो तारीख 26.01.2004 को 4 वर्ष या उससे अधिक सज़ा भुगत चुके हैं, बिना शर्त छोड़े जाने का निदेश दिया गया - अभिनिर्धारित - वर्ष 2004 में याची के प्रस्ताव के अभाव के कारण - याची को सरकार के आदेश के लाभ से वंचित नहीं किया जा सकता - याची ऐसी गलती के लिए दोषी नहीं था और सरकार के आदेश के अनुसरण में उसे छोड़ने से इंकार करने में उसका कोई दोष नहीं पाया गया - यह याची को भूतलक्षी लाभ प्रदान करने का मामला नहीं है - बल्कि यह गलती को सुधारने के समान है जो जेल प्राधिकारी के द्वारा की गई।

D.D. Bhargava, for the petitioner.

Vivekanand Awasthy, G.A., for the respondents.

ORDER

ABHAY M. NAIK, J. :-Facts involved herein that the petitioner was convicted under Section 302 of the Indian Penal Code and punishment of Rigorous Imprisonment for life was imposed by the Court of Second Additional Sessions Judge, Jabalpur, in Sessions Trial No. 164/1985 on 22.8.1986. In the year 2000, when petitioner was undergoing punishment, he developed severe chest pain and became unconscious in the jail itself. Case of the petitioner was examined under Rule 361 of the Jail Manual and the petitioner was directed to be released in exercise of powers under the said Rule.

2. State of Madhya Pradesh issued an order on 24.1.2004 marked as Annx. P/1, whereby the convicts of 65 years of age or above who underwent four years or excess punishment on 26.1.2004, were directed to be released unconditionally. Petitioner was at that time aged 65 years of age and had already undergone five years of Rigorous Imprisonment. Since he was released on health ground under rule 361 of the Jail Manual and was not in jail at the relevant time, his case was not proposed for being released pursuant to Annx.P/1 dated 24.1.2004. This has been challenged in the present writ petition.

3. Stand of the respondents is that the petitioner at the relevant time was not in jail since he was already released under Section 361 of the Jail Manual, his case was not proposed for being released in pursuance of Annx.P/1 which is revealed in Annx.P/4.

4. Heard the contentions of learned counsel for the parties.
5. Shri D.D. Bhargava, learned counsel appearing for the petitioner contended that the petitioner was fulfilling the requisite conditions under Annx.P/1. He was already above 65 years of age at the relevant time and had undergone more than five years of Rigorous Imprisonment. This being so, he ought to have been granted the benefit of Annx.1 by making his release. Contention of learned counsel Shri Bhargava, is that by virtue of sub-rule (6) of Rule 361 of the Jail Manual, the period spent by the petitioner after his release under rule 361, was liable to be treated as the period served in the prison and, thus, the petitioner ought to have been released in the light of Annx.P/1.
6. Shri Vivekanand Awasthy, learned Govt. Advocate contended on the other hand that the petitioner was not in jail at the relevant time when Annx.P/1 was issued. This being so, his name was not rightly proposed for being released pursuant to Annx.P/1. Learned Govt. Advocate contended further that the period enjoyed by the petitioner outside the jail by virtue of Section 361 of the Jail Manual is to be notionally treated as having served by the petitioner in the prison and it will not be beneficial for the petitioner within the purview of Annx.P/1.
7. Having heard the learned counsel counsel for the parties, I am of the considered opinion that the petition deserves to succeed for the following reasons.
8. Petitioner was admittedly above 65 years of age at the time of issuance of order Annx.P/1 and had undergone Rigorous Imprisonment for more than four years. Clause (1) of Rule 361 empowers for release whenever a Medical Officer of the prison is of opinion that a convicted prisoner suffering from sickness not due to infectious disease is likely to die if continued to be detained in the jail.

Rule 361 provides a complete mechanism for release of a convicted prisoner who on account of his sickness is likely to die if continued to be detained in the jail. Clause (6) of Rule 361 is reproduced below for convenience :-

“(6) The State Government may pass such orders as may be deemed necessary and in case the Superintendent's order of release is not confirmed, the Superintendent shall forthwith cause the prisoner to be readmitted to the prison the period between the date of release by the Superintendent and readmission to the prison necessitated under the aforesaid circumstances being treated as a part of his term served in the prison.”

9. From the aforesaid, it is clear that if the Superintendent's order of release is not confirmed, the prisoner would be liable to be readmitted in the prison and the intervening period would be treated as a part of his term served in the prison. Thus, even if, the petitioner was released under Rule 361, the period consumed by him outside the prison did not take away his right for being considered for unconditional release pursuant to Annx.P/1 dated 24.1.2004.

10. Object of Annx.P/1 was of beneficial nature for the convicted prisoners who were aged 65 years of age and had undergone 4 years or excess imprisonment. Petitioner having been released under Rule 361 could not be deprived of the benefits of the order contained in Annx.P/1 on account of his release made in exercise of the statutory power under Rule 361. This would be further clear from paragraph 5 of the impugned order (Annx.P/4) itself. It clearly shows that since the name of the petitioner was not proposed for release in accordance with Annx.P/1 at the relevant time, he was not considered and the name of the petitioner for being released was not forwarded. Had the name of the petitioner been forwarded, he definitely would have got the benefit of Annx.P/1. This cannot be snatched away from him, merely, on account of absence of his proposal in the year 2004. Petitioner was not an author of such a mistake and no fault could be found with him for denying him release pursuant to Annx.P/1.

11. This being so, petitioner is found to be entitled for the release pursuant to Annx.P/1. It is not a case of granting retrospective benefit to the petitioner vide Annx.P/1. It rather amounts to rectify the mistake which was committed by the authority by not including the petitioner's proposal at the relevant time for being released in the light of Annx.P/1. Thus, petitioner having been found entitled to the release according to Annx.P/1, his petition deserves to be and is, hereby, allowed. Respondent No.2 is directed to forward the proposal of the petitioner for his release in accordance with Ann.P/1 within fifteen days from the date of receipt of certified copy of this order. Needless to say further steps pursuant thereto are to be taken within a further period of one month. Annx.P/4 is, hereby, quashed.

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

Petition allowed.

I.L.R. [2008] M. P., 2863

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

11 July, 2008*

OM PRAKASH LASHKARI

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

Constitution, Article 14 - Service Law - Promotion - Denial of promotion to petitioner on account of two adverse entries in his preceding five years ACRs - One adverse entry was never communicated and the other which was though communicated but petitioner's representation against it was not decided - Held - Non-communication of an entry in the ACRs and the denial of opportunity to represent against it, are violation of natural justice - Impugned order set-aside-petition allowed.

(Paras 10 & 11)

संविधान, अनुच्छेद 14 — सेवा विधि — पदोन्नति — याची के पूर्ववर्ती पाँच वर्षों के वार्षिक गोपनीय प्रतिवेदनों में दो प्रतिकूल प्रविष्टियाँ होने के कारण याची को पदोन्नति देने से इंकार — एक प्रतिकूल प्रविष्टि कभी संसूचित नहीं की गई और दूसरी जो यद्यपि संसूचित की गई किन्तु इसके विरुद्ध याची का अभ्यावेदन विनिश्चित नहीं किया गया — अभिनिर्धारित — वार्षिक गोपनीय प्रतिवेदनों में प्रविष्टि संसूचित न करना और उसके विरुद्ध अभ्यावेदन करने के अवसर से इंकारी नैसर्गिक न्याय का उल्लंघन है — आक्षेपित आदेश अपास्त — याचिका मंजूर।

Case referred :

1985 JLI 783, AIR 1979 SC. 1622, 2008 AIR SCW 3486.

L.C. Patne, for the petitioner.

Arvind Gokhale, G.A., for the respondent Nos.1 & 2.

ORDER

SHANTANU KEMKAR, J. :—Being aggrieved of his super-session and promotion of his junior including the third respondent from the post of Lower Division Clerk to the post of Upper Division Clerk vide order dated 21.07.94 (Annexure A/4), the petitioner had filed OA No.546/96 before the M.P.State Administrative Tribunal (for short 'the Tribunal'). The said OA was disposed of by the Tribunal vide order dated 11.02.97 (Annexure A/12) directing the respondents to consider the representation made by the petitioner with liberty to the petitioner to approach the Tribunal afresh if aggrieved by the decision of the respondents on his representation.

2. Pursuant to the directions of the Tribunal the respondents considered the petitioner's representation against his super-session and promotion of his juniors including the third respondent and rejected the same vide order dated 17.05.97 (Annexure A/15). Feeling aggrieved the petitioner had approached the tribunal in OA No.637/97. On abolition of the Tribunal the said OA has been received by this Court for its adjudication in accordance with law.

3. The case of the petitioner is that initially he was appointed in the Labour Department of the State Government on the post of Peon on 05.01.97. He was promoted from the post of Peon to the post of Lower Division Clerk on 16.12.83. The third respondent was appointed on the post of Lower Division Clerk on 26.12.83 and being junior to him his name was below the name of the petitioner in the seniority list.

4. In the meeting of the Departmental Promotion Committee held on 21.02.94 the criteria fixed for promotion was that the employees who are falling in the zone of consideration for promotion from the post of Lower Division Clerk to the post of Upper Division Clerk should not have more than one 'Gha' (poor) in the preceding five years ACRs.

5. According to the petitioner the Departmental Promotion Committee considered the preceding five years ACRs of the petitioner and rejected the petitioner's claim for promotion on account of two 'Gha' in his preceding five years ACR's.

He stated that so far as the adverse ACR of 'Gha' for the year 1989-90 the same was never communicated to him. So far as the adverse ACR 'Gha' recorded for the year 1990-91 the same though was communicated to him vide letter dated 26.10.91 (Annexure A/2) calling upon him to submit representation against it, but the representation submitted by him on 22.11.91 (Annexure A/3) remained undecided.

6. The respondents filed return and produced the record of the Departmental Promotion Committee for perusal at the time of final hearing. According to the respondents the petitioner did not fulfill the criteria for promotion as there were two 'Gha' in his preceding five years ACR. As regards the adverse entry of 'Gha' for the year 1989-90 it has not been disputed by the respondents that the adverse entry for this year was not communicated to the petitioner. So far as the petitioner's representation in regard to the adverse entry of the ACR of the year 1990-91 it has been stated that in the absence of communication on their part about the decision on his representation the petitioner should have presumed that the representation must have been rejected.

7. Heard learned counsel for the parties.

8. From the averments made by the parties and the record produced at the time of hearing it is very clear that though the adverse remarks for the year 1989-90 was taken into consideration by the Departmental Promotion Committee for rejection of his claim for promotion but the said adverse entry was never communicated to the petitioner. It is also very clear that the adverse entry for the year 1990-91 was though communicated to the petitioner but his representation (Annexure A/3) to the said adverse entry remained undecided still it was also taken into consideration by the Departmental Promotion Committee for not holding him suitable for promotion. Thus the decision of the Departmental Promotion Committee to reject the petitioner's claim for promotion is based upon two years adverse entries one of which was not communicated and other though communicated but representation against it was not decided before consideration of his case for promotion by the Departmental Promotion Committee.

9. In the case of *Madan Kumar Gautam v. State of M.P. and others* (1985 J.L.J. 783) a learned single Judge of this Court quashed the adverse remarks made in the petitioner's character role by observing that the representation submitted by the petitioner against the adverse entries remained unattended for sufficiently long period. It was further observed that the representation against adverse entries requires to be attended with promptness. In the case of *Gurdial Singh Fijji v. State of Punjab and others* (AIR 1979 SC 1622) the Supreme Court has held that it is well settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading

to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. In the case of *Devdutta v. Union of India and others* (2008 AIR SCW 3486) the Supreme Court in paragraph 19, 20, 24 and 39 held thus:

Para 19 : "In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution bench decision of this Court in *Maneka Gandhi v. Union of India* (supra) that arbitrariness violates Article 14 of the Constitution.

" Para 20 : "Thus it is not only when there is a bench-mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

" Para 24 : "It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

" Para 39 : "In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O.

requiring communication of the entry, or even if there is a Rule/G O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders."

10. Having regard to the aforesaid legal position and the fact that the petitioner has been denied promotion on the basis of one adverse entry 'Gha' (poor) which was never communicated to him and on the basis of other adverse entry 'Gha' (poor) which though was communicated to him but his representation against the same was not decided in my considered view the decision of the Departmental Promotion Committee denying promotion to the petitioner and the impugned order dated 17.05.97 (Annexure A/15) cannot be sustained as the same are violative of principle of fairness which is the soul of natural justice.

11. In the circumstances the impugned order dated 17.05.1997 (Annexure A/15) is quashed. The respondent nos.1 & 2 are directed to communicate the entry 'Gha' pertaining to the year 1989-90 to the petitioner within a period of one month from the date of receipt of copy of this order. On being communicated the petitioner may make representation to it if he so desires within a period of one month thereafter. The said representation as well as the representation Annexure A/3 in regard to the adverse entry for the year 1990-91 shall be decided by the respondents within two months thereafter. If on consideration the petitioner is found eligible for consideration as per the criteria fixed in the DPC held on 21.02.94 the petitioner's case shall be considered for promotion retrospectively by the Departmental Promotion Committee within two months thereafter. In case the petitioner is promoted for the post of Upper Division Clerk pursuant to the decision as may be taken he shall be extended the consequential benefits flowing from such order of promotion.

12. The petition stands allowed to the extent indicated above. No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2867

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

28 July, 2008*

M.P., ROAD TRANSPORT CORPORATION

Vs.

ANIL YADAV

... Petitioner

... Respondent

**Industrial Disputes Act (14 of 1947), Section 25-F - Badlidar daily
wager employee worked for more than one year continuously i.e. for more**

than 240 days in one year - Termination without enquiry or one month prior notice or wages in lieu of such notice - Held - Badli employee is entitled for protection u/s 25-F of Act - Order of Labour Court and Tribunal, finding termination illegal and directing reinstatement, upheld - Petition dismissed.

(Paras 7 & 8)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ - बदलीदार दैनिक वेतनभोगी कर्मचारी ने लगातार एक वर्ष से अधिक अर्थात् एक वर्ष में 240 दिन से अधिक कार्य किया - सेवा समाप्ति, जाँच या एक माह की पूर्व सूचना या ऐसी सूचना के बदले वेतन के बिना - अभिनिर्धारित - बदली कर्मचारी अधिनियम की धारा 25-एफ के संरक्षण का हकदार - श्रम न्यायालय और अधिकरण का सेवा समाप्ति को अवैध पाने और पुनर्नियुक्ति के निदेश देने वाला आदेश पुष्ट - याचिका खारिज।

Cases referred :

1984(II) LLJ 75, 1993-Lab IC 1494, AIR 2005 SC 1933.

G.S. Patwardhan, for the petitioner.

ORDER

SHANTANU KEMKAR, J. :- Heard on the question of admission. By this petition filed under Article 227 of the Constitution of India, the petitioner has challenged the order dated 5.05.07 passed by the Labour Court, Indore in case No. 471/05 MPIR and also the order dated 7.9.2007 passed by the President Industrial Court Indore in Appeal No. 153/07.

2. Briefly stated the respondent filed an application under Section 31(3) read with Sections 61 and 62 of the Madhya Pradesh Industrial Relations Act (for short, 'the MPIR Act') before the Labour Court Indore challenging his termination order dated 1.06.2005. According to the respondent/employee he was in continuous service of the petitioner for a period of more than one year and the petitioner terminated his services without following the requirement of Section 25-F of the Industrial Disputes Act (for short, 'the I.D. Act'). According to him, neither any enquiry was conducted nor one month notice or wages in lieu of such notice was paid before terminating his services. He stated that he had not been paid even the retrenchment compensation.

3. The case of the petitioner was that the respondent was Badliidar employee engaged on daily wages, and therefore, there was no necessity to comply with the provisions contained in Section 25-F of the I.D. Act.

4. The Labour Court recorded the evidence led by both the sides and held that the respondent had worked for more than a year continuously without break in service and, therefore, he is entitled to the protection of Section 25-F of the I.D. Act. Accordingly, Labour Court held the termination to be illegal and directed reinstatement of the respondent without back-wages. The Labour Court, further, observed that in case it is not possible to reinstate the respondent, he may be paid retrenchment compensation and admissible benefits in the alternative.

5. The petitioner/employer challenged the aforesaid order of the Labour

Court by filing an appeal under Section 65 of the Act. The Industrial Court by order dated 7.9.77 dismissed the appeal. Feeling aggrieved, the petitioner has Filed this writ petition.

6. Having heard learned counsel for the petitioner, I find no ground to interfere in this petition.

7. The Labour Court, as well as the Industrial Court after appreciating the evidence on record, have recorded categorical finding that the respondent had worked for more than a year continuously without break in service. The Courts below have also recorded the finding that the work of the respondent was satisfactory. It is, further, held by the Courts below that the respondent having worked for more than 240 days in a year continuously for several years is entitled to the statutory protection of Section 25-F of the I.D. Act. The Industrial Court placed reliance on the Judgment of the Division Bench of Gujarat High Court in the case of *Sarabhai Chemicals v/s Subhash N.Pandya* [1984 (II) LLJ 75] and also on the judgment of the Bombay High Court in the case of *Raymond Woollen Mills Ltd. v/s C.S.Sonawane*, [1993 Lab IC 1494] in which it has been held that the Badii workman is a workman falling within Section 25-F of the I.D. Act, 1947. There is no reason to hold that the retrenchment of a badii worker, who has been in continuous service from 1972, without complying with the terms of Section 25-F of the Industrial Disputes Act within the scope of that section. The Industrial Court by considering the ratio of these decisions held that even badli employee is entitled to protection of Section 25-F of the I.D. Act if he has completed the service of one year within the meaning of Section 25-B of the I.D. Act. The Industrial Court after close scrutiny of the judgment of the Supreme Court relied upon by the petitioner before it, in the case of *K.S.R.T.C. Corporation v/s S.G.Kotturappa* (AIR 2005 SC 1933) found that in the said judgment the Supreme Court has held that even a badii employee who has rendered continuous service of 240 days or more during the period of twelve months proceeding the date of termination of his services, is entitled to the protection of Section 25-F of the I.D. Act.

8. Having regard to the aforesaid concurrent Findings of fact recorded by the Courts below that the respondent has rendered service for more than a year continuously and worked for more than 240 days in an year for several years and the legal position that even a badii employee is entitled for the protection of Section 25-F of I.D. Act in my considered view, no case is made out to interfere into the orders of the Labour Court as well as Industrial Court in this petition under Article 227 of the Constitution of India.

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

Petition dismissed.

I.L.R. [2008] M. P., 2870

WRIT PETITION

Before Mr. Justice R.S. Jha

29 July, 2008*

KATNI POTTERY KARAMCHARI SANGH

Vs.

... Petitioner

M/s. ASSOCIATED CEMENT COMPANIES LTD. & ors.

... Respondents

A. - Industrial Relations Act, M.P. (27 of 1960), Sections 27, 31, 33 & 97 - Award challenged on the ground that it was passed in terms of the settlement arrived at between the parties without answering or adjudicating upon the disputes that were referred to Industrial Tribunal by State Government - Held - If a settlement is arrived at between the disputing parties even during the pendency of a reference before the Industrial Tribunal, the tribunal has power to pass an award in terms of the settlement and tribunal was not bound to answer the reference. (Para 12)

क. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धाराएँ 27, 31, 33 व 97 - अधिनिर्णय को इस आधार पर चुनौती दी गई कि यह पक्षकारों के मध्य हुए समझौते के निबंधनों के अनुसार राज्य सरकार द्वारा औद्योगिक अधिकरण को निर्दिष्ट विवादों का समाधान या न्यायनिर्णय किये बिना पारित किया गया - अभिनिर्धारित - यदि औद्योगिक अधिकरण के समक्ष निर्देश के लम्बित रहने के दौरान भी पक्षकारों के मध्य समझौता होता है तो अधिकरण को समझौते के निबंधनों के अनुसार अधिनिर्णय पारित करने की शक्ति है और अधिकरण निर्देश का उत्तर देने के लिए बाध्य नहीं था।

B. Industrial Relations Act, M.P. (27 of 1960), Sections 27, 31, 33 & 97 - All employees including office bearers of petitioner Union have filed affidavits and accepted the agreements and stated that the award in terms of agreements be passed - Though the petitioner Union has seriously contended that the agreements are no agreements in eye of law and could not be accepted as they were neither signed by their office bearers nor were they legally tenable in view of the provisions of Section 31 & 33 of Act - Held - It has neither opposed these agreements before Registrar at the time of registration u/s 33 of Act nor did it raise any dispute under various provisions of Act under Chapter XVI before any of the authorities under the Act - Therefore, issues as to whether the agreements were valid or not or obtained by fraud or a nullity, were neither subject matter of dispute before Industrial Court nor this court - Once agreements are registered u/s 33 of Act, they are binding on all concerned as per the provisions of Section 97 of Act - There is no legal infirmity or illegality in the award. (Para 13)

ख. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धाराएँ 27, 31, 33 व 97 - याची यूनियन के पदाधिकारियों सहित सभी कर्मचारियों ने शपथपत्र पेश किये और अनुबंधों

को स्वीकार किया और कथन किया कि अनुबंधों के निबंधनों के अनुरूप अधिनिर्णय पारित किया जाए — यद्यपि याची यूनियन ने गम्भीर रूप से प्रतिवादित किया कि अनुबंध विधि की दृष्टि में अनुबंध नहीं हैं और स्वीकार नहीं किये जा सकते क्योंकि वे न तो उनके पदाधिकारियों द्वारा हस्ताक्षरित किये गये और न वे अधिनियम की धारा 31 व 33 के उपबंधों की दृष्टिगोचरता में विधिक रूप से मान्य किये जाने योग्य थे — अभिनिर्धारित — उसने न तो रजिस्ट्रार के समक्ष अधिनियम की धारा 33 के अन्तर्गत पंजीयन के समय इन अनुबंधों का विरोध किया और न ही उसने अधिनियम के अध्याय 16 के विभिन्न उपबंधों के अन्तर्गत किसी प्राधिकारी के समक्ष विवाद को उठाया — इसलिए विवादक, कि अनुबंध वैध थे या नहीं या कपटपूर्वक प्राप्त किये या शून्य थे, न तो औद्योगिक न्यायालय और न ही इस न्यायालय के समक्ष विवाद की विषयवस्तु थे — एक बार जब अनुबंध अधिनियम की धारा 33 के अन्तर्गत रजिस्ट्रीकृत हो जाते हैं, तो वे सभी सम्बद्ध पक्षकारों पर अधिनियम की धारा 97 के उपबंधों के अनुसार बंधनकारी हैं — अधिनिर्णय में कोई विधिक अशक्तता या अवैधता नहीं है।

C. Constitution, Article 227 - Supervisory Jurisdiction - Scope -
High Court in exercise of its supervisory jurisdiction can only look into the dispute that was raised before the Industrial Court and examined as to whether the Industrial Court has committed any patent error which is manifest and apparent from the face of record which has resulted in gross injustice or failure of justice. (Para 17)

ग. संविधान, अनुच्छेद 227 — पर्यवेक्षण अधिकारिता — क्षेत्र — उच्च न्यायालय अपनी पर्यवेक्षण अधिकारिता के प्रयोग में केवल विवाद की जाँच पड़ताल कर सकता है जो औद्योगिक न्यायालय के समक्ष उठाया गया और यह परीक्षा कर संकता है कि क्या औद्योगिक न्यायालय ने कोई प्रत्यक्ष त्रुटि की जो अभिलेख से प्रकट होती है जिसके परिणामस्वरूप घोर अन्याय हुआ या न्याय के विफलता हुई।

Cases referred :

(2003) 6 SCC 675, AIR 1958 SC 1018, AIR 1964 SC 160, 1970 LIC 661, 1981 LLJ 429, 1973 MPLJ 1025, 1978 SC 982, AIR 2000 SC 469, AIR 2004 SC 4516, AIR 1988 SC 2168.

Rohit Arya with Brahmadatt Singh, for the petitioner.

P.S. Nair with P.K. Shrivastava, for the respondents.

ORDER

R.S. JHA, J. :- The petitioner has filed this petition assailing the validity of the award dated 15.5.2001, of the Industrial Court, Jabalpur, on the ground that the Industrial Court has committed gross illegality and passed an award in terms of the agreements entered into between the parties without answering or adjudicating upon the disputes that were referred to it by the State Government vide order dated 4.1.1991.

2. The case of the petitioner, before this Court, is that the petitioner is a representative Union duly recognized as such under the provisions of Section 27 of the M.P. Industrial Relations Act, 1960 (hereinafter referred to as 'the Act') and is the only Union competent to represent the interest of the employees of the

respondent Company. On failure of conciliation proceedings, the petitioner Union moved the State Government for referring the dispute for adjudication to the Industrial Court and the State Government vide order dated 4.1.1991 referred the following disputes for adjudication before the Industrial Court, Jabalpur:

“ अनुसूची

(1) क्या सेवानियुक्तों को सिमेंट उद्योग के अनुक्रम वेतन, जिसमें वेतनमान भी सम्मिलित है, मंहगाई भत्ता एवं अन्य हितलाभ दिये जाने का औचित्य है ? यदि नहीं तो सेवानियुक्तों का वेतन, जिसमें वेतनमान भी सम्मिलित है, मंहगाई-भत्ता एवं अन्य हितलाभ क्या होने चाहिये ?

(2) क्या सन्दर्भ की शर्त कमांक (1) पर निर्णय होने तक एवं यह दृष्टिगत रखते हुए कि वेतन पुनरीक्षण सम्बन्धी ठहराव की समयावधि दिनांक 31-03-1986 को पूर्ण हो चुकी है, सेवानियुक्तों को तदर्थ धनराशि रूपये 3100/- का भुगतान किया जा चुका है एवं दिनांक 1-04-1986 से रूपये 68/- प्रतिमाह को अन्तरिम राहत का भुगतान किया जा रहा है, ----- अन्तरिम राहत दिये जाने का औचित्य है ? यदि हां, तो द्वितीय अन्तरिम राहत की मात्रा क्या होना चाहिए ?”

3. It is submitted that during the pendency of the petition, the respondent company filed an application on 16.4.2001 stating that the petitioner Union and the Company had entered into agreements on 2.11.1991, 17.4.1995 and 21.7.1998 and, therefore, the disputes be decided in terms of the settlement arrived at between the parties without answering the disputes referred to it. The petitioner Union opposed the said application by filing their reply on 17.4.2001. It was stated by the petitioner Union in its reply that the respondent Company had initially brought on record the alleged agreements/settlement between the parties dated 2.11.1991 and on an objection being raised by the petitioner Union, the following four issues had been framed by the Industrial Court which needed to be answered before any further proceedings could be taken up by the Industrial Court:-

“ 1. क्या मेनेजमेंट और चार यूनियन के बीच समझौता दिनांक 2.9.91 को हुवा है वह वैधानिक है ।

2. क्या अधिकांश श्रमिकों ने इसे स्वीकार किया है और यदि हां तो प्रभाव ।

3. क्या श्री आर. के. खरे एवं रामनाथ दाहिया दिनांक 2.11.91 को कटनी पोटरकर्मचारी संघ के सदस्य थे एवं क्या वे समझौता करने हेतु अधिकृत एवं सक्षम थे ।

4. क्या समझौता दिनांक 2.11.91 म.प्र.औ.सं.अधि. के प्रावधान के अंतर्गत मान्यता प्राप्त कटनी पोटर कर्मचारी संघ के साथ किया गया है यदि नहीं हो क्या प्रभाव ।”

4. It is further submitted that the alleged agreements said to have been entered into between the Union and the Company were not signed by the authorized representatives of the petitioner Union and, therefore, were not binding on the petitioner nor could they be said to be agreements in the eyes of law. The learned counsel for the petitioner submits that in the reply as well as before this Court the

main contention raised by them is that the Industrial Court could not have decided the case by simply passing an award in terms of the settlement as the Industrial Court, being the creation of a statute and being bound by the limitations prescribed by the statute, is bound to answer the disputes referred to it irrespective of and inspite of a settlement being arrived at between the parties.

5. In response, it is submitted by the learned counsel for the respondent Company that during the pendency of the dispute before the Industrial Court, the Company entered into agreements with all the Unions notified in their establishment including the petitioner Union and by way of a settlement gave a package deal to all the employees which included pay, bonus, etc., which was fully accepted by the Unions and was implemented during the pendency of the proceedings before the Labour Court. It is further submitted that on objections being raised by the petitioner Union before the Industrial Court, affidavits of each and every employee including the office bearers of the petitioner Union were filed by them before the Industrial Court wherein each one of them has accepted and affirmed the agreements, accepted the terms of the agreements, stated that they are willing to abide by the terms of the agreement, stated that the affidavits have been signed on their own free will without any duress and that they are willing for adjudication of the reference in terms of the agreement. It is submitted by the learned counsel for the respondent Company that such affidavits have been filed by each and every employee in respect of all the three agreements i.e. the agreement dated 2.11.1991, 17.4.1995 and 21.7.1998 and in support of the aforesaid contention, the respondents have filed the affidavits sworn by Shri R. L. Nakra who is the General Secretary of the petitioner Union and through whom the petitioner Union has filed the present petition before this Court. The learned counsel for the respondents have further submitted that the main object and purpose of the Act being a pious one namely to settle all industrial disputes between employer and employee, the Industrial Court, which has passed the award in terms of the settlement and agreement which has been affirmed, accepted and implemented having received the consent of each and every employee, no fault can be found with the impugned award. In the ultimate, it is submitted that the present petition, being one under Article 227 of the Constitution of India, this Court is only required to look into the legality and propriety of the order passed by the Industrial Tribunal and no other issues can be gone into in the present petition and as the impugned award is in accordance with law and does not suffer from any perversity or manifest illegality, the present petition filed by the petitioner Union deserves to be dismissed.

6. Before I advert to the legal issues involved in the present petition, it would be appropriate to elaborate upon the scope of interference by this Court in exercise of its supervisory jurisdiction, in the award passed by the Industrial Court dated 15.5.2001. In the case of *Surya Dev Rai vs. Ram Chandra Rai and Others*, (2003) 6 SCC 675, the Supreme Court while summarizing the law in this regard has held that the power of this Court to issue a writ of certiorari or to exercise its

supervisory jurisdiction under Article 227 of the Constitution of India is mainly for the purposes of keeping the subordinate courts within the bounds of their jurisdiction and can be exercised in cases where such a subordinate court has assumed the jurisdiction not vested in it or failed to exercise jurisdiction which has been vested in it or in cases where the jurisdiction so exercised is not in the manner permitted by law resulting in failure of justice or grave injustice. It has been emphasized that this Court in exercise of its supervisory jurisdiction cannot exercise its power to correct mere errors of fact or of law unless the error is manifest and apparent on the face of the proceedings like in the cases where it is based on clear ignorance or utter disregard to the provisions of law or in cases where gross injustice or gross failure of justice has occasioned thereby. It has further been laid down that the supervisory jurisdiction of this Court has to be exercised sparingly and cannot be exercised by converting itself into a court of appeal by indulging in reappraisal or evaluation of evidence. To further elaborate, it would be appropriate to quote the relevant parts of the aforesaid judgment which is in the following terms:-

"38(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure

of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

7. In the instant case, for the purpose of determining the question as to whether there is some manifest error or gross illegality in the impugned award, it is necessary to take into consideration the following admitted facts:-

(i) The dispute referred to the Industrial Court was as to whether the members of the petitioner Union were entitled to wages at par with the persons working in the cement industry and that in view of the fact that the previous agreement between the parties had lapsed on 31.3.1987 and the wages of the employees had been increased as an adhoc measure, whether the second interim relief was required to be given to the employees and if so to what extent.

(ii) During the pendency of the reference, 3 agreements were placed before the Industrial Court by the respondents i.e. the agreements dated 2.11.1991, 17.4.1995 and 21.7.1998.

(iii) These agreements were allegedly signed by Shri R. K. Khare, Treasurer and Shri Ramnath Dahiya, Member, Executive Committee of the petitioner Union namely; the Katni Pottery Karmachari Sangh, Katni, who were at the relevant time neither members of the petitioner Union nor its elected or authorized representatives.

(iv) The respondents filed an application for passing an award in terms of the agreements dated 2.11.1991, 17.4.1995 and 21.7.1998 after they were duly registered under Section 33 of the Act, on 12.4.2001.

(v) These agreements have not been challenged, objected to or referred for adjudication by the petitioner Union before any authority though they were within their knowledge since 1991 itself.

(vi) The Union opposed the passing of an award in terms of the agreement dated 2.11.1991 and four issues were framed by the Industrial Court on 4.8.1992 including the issue as to the impact of the fact that most of the employees had accepted the agreement.

(vii) The respondent Company has filed affidavits of all its employees including all the members of the petitioner Union as well as its office bearers accepting the terms of all the three agreements and agreeing to passing of an award in terms of the said agreements. The fact of signing the affidavits has not been denied by any person.

(viii) Shri R. L. Nehra, General Secretary of the petitioner Union, was also examined before the Industrial Court and he has stated in unequivocal terms in his cross-examination that he has signed the agreements and that he was deriving benefits under the agreements and has also stated that the agreements were obtained by the respondents by oblique means.

8. From a perusal of the impugned award, it is apparent that the Industrial Court has recorded the submissions of both the parties in detail including the objections of the petitioner Union regarding the agreements and has thereafter taken into consideration the statements made by Shri R. L. Nehra in his cross-examination, the fact that all the employees of the respondent Company have filed affidavits accepting the agreements, the fact that the petitioner Union has not objected to the agreements either before the Registrar nor have they filed any application raising a dispute for referring the agreements before the appropriate Government and on that basis has passed the award in terms of the agreements by duly recording a finding that the mere assertion of Shri R. L. Nehra, that his affidavit was obtained without disclosing the purpose for which it was being

executed, cannot be accepted as the contents of the affidavit were self explanatory and as all the employees have accepted the agreements by filing their affidavits.

9. The Industrial Court has relied upon the judgments of the Supreme Court in the cases of *State of Bihar vs. D. N. Ganguly and others*, AIR 1958 SC 1018, *Sirsilk Ltd. vs. Government of Andhra Pradesh and another*, AIR 1964 SC 160, *M/s Garment Cleaning Works vs. D. M. Aney and another*, 1970 LIC 661, *Tata Engineering and Locomotive co. Ltd vs. Workmen*, 1981 LLJ 429, *Bhilai Steel Employees Association, Bhilai and another vs. A. W. Kanmadikar, Member Judge, Industrial Court, Madhya Pradesh, Indore (Arbitrator) and another*, 1973 MPLJ 1025, *New Standard Engineering Co. Ltd. vs. N. L. Abhyankar and another*, 1978 SC 982, and *National Engineering Industries Ltd. vs. State of Rajasthan and others*, 2000 LIC 260 (AIR 2000 SC 469), to come to the conclusion that an award in terms of the settlement and the agreements which has been acceded to by all the employees can be passed by the Industrial Court as the very purpose and object of creation of the Industrial Court and the law relating to Industrial disputes is to give quietus to industrial disputes and to maintain industrial peace and harmony. The Industrial Court has also recorded a specific finding that the agreements entered into between the parties by way of a package deal encompass all the issues referred for adjudication in the reference pertaining to payment of remuneration to the employees including wages, bonus, etc. etc. and therefore, as the parties to the dispute have arrived at a settlement in respect of the aforesaid issues, there was no need to answer the reference made to it by the State Government as the agreement entered into between the parties would cover the issue raised in the reference also.

10. Learned counsel appearing for the parties have cited several judgments before this Court including the ones relied upon by the Industrial Court in support of their respective contentions. In addition, the learned counsel for the respondents has also stated by placing reliance on the judgment of the Supreme Court rendered in the case of *Associated Cement Co. Ltd. vs. State of M.P. and others*, AIR 2004 SC 4516, in which the respondent Company was itself a petitioner, wherein, the Supreme Court has held that the product manufactured by them is refractory cement which is different from cement that the petitioner Union is not entitled to claim parity with the employees of the cement industry as the matter stands concluded by the aforesaid judgment.

11. The Supreme Court in the judgments cited by the learned counsel for the parties has held that the attempt of the Industrial Court must be to resolve industrial disputes and to bring about settlements so as to ensure industrial peace and harmony. In the case of *Calcutta Port Shramik Union vs. The Calcutta River Transport Association and others*, 1988 SC 2168 the Supreme Court in para-10 has observed that:-

"10. In all such cases an attempt should be made by Courts

exercising powers of judicial review to sustain as far as possible the awards made by industrial tribunals instead of picking holes here and there in the awards on trivial points and ultimately frustrating the entire adjudication process before the tribunals by striking down awards on hyper-technical grounds. Unfortunately the orders of the single Judge and of the Division Bench have resulted in such frustration and have made the award fruitless on an untenable basis."

In the case of *Sirsilk Ltd.* (supra) the Supreme Court has held that in a case where there is a conflict between the award passed by the Tribunal and the settlement arrived at between the parties, the award should not be published and the settlement should prevail in the following terms:-

"8. It is however urged that the view we have taken may create a difficulty inasmuch as it is possible for one party or the other to represent to the Government that the settlement has been arrived at as a result of fraud, misrepresentation or undue influence or that it is not binding as the workmen's representative had bartered away their interests for personal considerations. This difficulty, if it is a difficulty, will always be there even in a case where a settlement has been arrived at ordinarily between the parties and is binding under S. 18 (1), even though no dispute has been referred in that connection to a tribunal. Ordinarily however such difficulty should not arise at all, if we read Ss. 2 (p), 18 (1) and 19 (1) of the Act together. Section 2 (p) lays down what a settlement is and it includes "a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to the appropriate Government and the conciliation officer." Therefore, the settlement has to be signed in the manner prescribed by the rules and a copy of it has to be sent to the Government and the conciliation officer. This should ordinarily ensure that the agreement has been arrived at without any of those defects to which we have referred above, if it is in accordance with the rules. Then S. 18 (1) provides that such a settlement would be binding between the parties and S. 19 (1) provides that it shall come into force on the date it was signed or on the date on which it says that it shall come into force. Therefore, as soon as an agreement is signed in the prescribed manner and a copy of it is sent to the Government and the conciliation officer it becomes binding at once on the parties to it and comes into operation on the date it is signed or on the date which might be mentioned in it for its coming into operation. In such a case there is no scope for any inquiry by Government as to the bona fide character of the settlement which becomes binding and comes into operation once it is signed in the manner provided in the

rules and a copy is sent to the Government and the conciliation officer. The settlement having thus become binding and in many cases having already come into operation, there is no scope for any inquiry by the Government as to the bona fides of the settlement. In such a case in view of the possibility of conflict between the settlement in view of its binding nature under S. 18 (1) and an award which might become binding on publication under S. 18 (3), the proper course for the Government is to withhold the award from publication to avoid this conflict. If any dispute of the nature referred to above arises as to a settlement, that would be another industrial dispute, which the Government may refer for adjudication and if on such an adjudication the settlement is found not to be binding under S. 18 (1) of the Act it will always be open to the Government then to publish the award which it had withheld, though we do not think that such instances are likely to be anything but extremely rare. We are, therefore, of opinion that though S. 17 (1) is mandatory and the Government is bound to publish the award received by it from an industrial tribunal, the situation arising in a case like the present is of an exceptional nature and requires reconciliation between S. 18 (1) and S. 18 (3), and in such a situation the only way to reconcile the two provisions is to withhold the publication of the award, as a binding settlement has already come into force in order to avoid possible conflict between a binding settlement under S. 18 (1) and a binding award under S. 18 (3). In such a situation we are of opinion that the Government ought not to publish the award under S. 17 (1) and in cases where Government is going to publish it, it can be directed not to publish the award in view of the binding settlement arrived at between the parties under S. 18(1) with respect to the very matters which were the subject-matter of adjudication under the award. We therefore allow the appeals and direct the Government not to publish the awards sent to it by the industrial tribunal in these cases in view of the binding nature of the settlements arrived at between the parties under S. 18 (1) of the Act. In the circumstances we order the parties to bear their own costs."

In the case of *State of Bihar* (supra) it has again been held that where the parties have arrived at a settlement, the Industrial Tribunal need not insist on passing an award contrary to and in spite of the settlement in paragraph-13 as under:-

"13. It is, however, urged that if a dispute referred to the industrial tribunal under Sec. 10 (1) is settled between the parties, the only remedy for giving effect to such a compromise would be to cancel the reference and to take the proceedings out of the jurisdiction of the industrial tribunal. This argument is based on the assumption that the industrial tribunal would have to ignore the settlement by the parties of their dispute pending

before it and would have to make an award on the merits in spite of the said settlement. We are not satisfied that this argument is well-founded. It is true that the Act does not contain any provision specifically authorizing the industrial tribunal to record a compromise and pass an award in its terms corresponding to the provisions of O. XXIII, R. 3 of the Code of Civil Procedure. But it would be very unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on the merits even after it is informed that the dispute has been amicably settled between the parties. We have already indicated that amicable settlements of industrial disputes which generally lead to industrial peace and harmony are the primary objects of this Act. Settlements reached before the conciliation officers or boards are specifically dealt with by Ss. 12 (2) and 13 (3) and the same are made binding under Sec. 18. There can, therefore, be no doubt that if an industrial dispute before a tribunal is amicably settled, the tribunal would immediately agree to make an award in terms of the settlement between the parties. It was stated before us at the bar that innumerable awards had been made by industrial tribunals in terms of the settlements between the parties. In this connection we may incidentally refer to the provisions of Sec. 7 (2) (b) of the Industrial Disputes (Appellate Tribunal) Act, 1950, (XLVIII of 1950), which expressly refer to an award or decision of an industrial tribunal made with the consent of the parties. It is true that this Act is no longer in force; but when it was in force, in providing for appeals to the Appellate Tribunal set up under the said Act, the legislature had recognized the making of awards by the industrial tribunals with the consent of the parties. Therefore, we cannot accept the argument that cancellation of reference would be necessary in order to give effect to the amicable settlement of the dispute reached by the parties pending proceedings before the industrial tribunal."

In the case of *M/s Garment Cleaning Works* (supra) it has been held that a settlement can be arrived at between the parties to an industrial dispute during the pendency of the dispute and in such a case the dispute should be decided in terms of the dispute and the Tribunal cannot insist that the payment should either be increased or decreased if the workers are satisfied with the settlement, in the following terms:-

"10. Even on first principle, apart from anything else we do not see why a settlement cannot be arrived at between the employer and the employees in a pending industrial dispute. The Tribunal has to decide the matter on such evidence as is brought before it. If the representatives of the workers come and say that the payments now made are fully justified and they do not want any increase, it is difficult to understand why the Tribunal inspite of this must go reducing or increasing the

amount. There being nothing in the rules or the statute prescribed by the Government to enable the Tribunal to refuse to accept the settlement such a power of refusal cannot be implied. In our view, therefore, the settlement is operative and must have its full effect as required by Section 19(2) of the Act."

The Supreme Court, in paragraph 10 of the judgment, in the case of *Tata Engineering and Locomotive co. Ltd.* (supra) has held that an award can be passed in terms of a settlement arrived at by a vast majority of the workmen who have accepted it in totality as it is presumed to be just and fair even if it is objected to by a small number of workmen and even if the Tribunal feels that they are entitled to higher emoluments, in the following words:-

"10. The conclusion reached by the Tribunal that the settlement was not just and fair is again unsustainable. As earlier pointed out, the Tribunal itself found that there was nothing wrong with the settlement in most of its aspects and all that was necessary was to marginally increase the additional daily wage. We are clearly of the opinion that the approach adopted by the Tribunal in dealing with the matter was erroneous. If the settlement had been arrived at by a vast majority of the concerned workers with their eyes open and was also accepted by them in its totality, it must be presumed to be just and fair and not liable to be ignored while deciding the reference merely because a small number of workers (in this case 71, i.e. 11.18 per cent) were not parties to it or refused to accept it, or because the Tribunal was of the opinion that the workers deserved marginally higher emoluments than they themselves thought they did. A settlement cannot be weighed in any golden scales and the question whether it is just and fair has to be answered on the basis of principles different from those which come into play when an industrial dispute is under adjudication."

In the case of *National Engineering Industries Ltd.* (supra) the Supreme Court has again reiterated the aforesaid law by stating that a settlement is binding on all concerned and in case the bonafide of the settlement is disputed or it is alleged that it has been arrived at by practicing fraud, misrepresentation, concealment of facts or other inducements, such a dispute could be the subject matter of yet another industrial dispute which may be referred by the appropriate Government for adjudication in accordance with law. Additionally, the Court has also stated that settlements arrived at outside the conciliation proceedings are binding on the parties to the agreement and has laid down the law in the following terms in para-25:-

"25. It will be thus seen that High Court has jurisdiction to entertain a writ petition when there is allegation that there is no industrial dispute and none apprehended which could be subject matter of reference for

adjudication to the Industrial Tribunal under Section 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined by the High Court in its writ jurisdiction. It is the existence of the industrial tribunal which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended appropriate government lacks power to make any reference. A settlement of dispute between the parties themselves is to be preferred, where it could be arrived at, to industrial adjudication, as the settlement is likely to lead to more lasting peace than an award. Settlement is arrived at by the free will of the parties and is a pointer to there being goodwill between them. When there is a dispute that the settlement is not bona fide in nature or that it has been arrived at on account of fraud, misrepresentation or concealment of facts or even corruption and other inducements it could be subject matter of yet another industrial dispute which an appropriate Government may refer for adjudication after examining the allegations as there is an underlying assumption that the settlement reached with the help of the Conciliation Officer must be fair and reasonable. A settlement which is sought to be impugned has to be scanned and scrutinized. ..."

12. The law that emerges from a perusal of the aforesaid judgments of the Supreme Court is that the aim and object of the law relating to industrial disputes is to settle all disputes, to bring about industrial peace and harmony and that the attempt of the Labour Tribunal must also be towards resolving all industrial disputes to bring about industrial peace and harmony and, therefore, if a settlement is arrived at between the disputing parties even during the pendency of a reference before the Industrial Tribunal, the Tribunal has the power to pass an award in terms of the settlement. It has also been held that once the parties to the dispute arrive at a settlement, then the Tribunal cannot insist on passing an award contrary to the settlement specifically when the workmen states that they are satisfied with the settlement and they do not want any increase in the wage or emoluments. The Supreme Court has also held that once a settlement is arrived at between the parties during the pendency of the dispute and is registered in accordance with law, it is binding on all concerned and in case any person raises any dispute against the settlement by alleging fraud, misrepresentation, etc., that would be the subject matter of a separate dispute which has to be separately and specifically raised by that person and referred to adjudication by the appropriate Government to the Industrial Tribunal. The Supreme Court has also held that where a settlement is arrived at and an agreement has been entered into between the employer and employee, they are bound by the same and such settlement should not be unsettled on hypertechnical grounds.

13. In the instant case all the employees including the office bearers of the

petitioner Union have filed affidavits and accepted the agreements and stated that the award in terms of the agreement be passed. Though the petitioner Union has seriously contended that the agreements are no agreements in the eyes of law and that the agreements could not have been accepted as they were neither signed by their office bearers nor were they legally tenable in view of the provisions of Sections 31 and 33 of the Act, surprisingly, it has neither opposed these agreements before the Registrar at the time they were registered in the year 2001 under section 33 of the Act, nor did it raise any dispute in respect of these agreements under the various provisions of the Act under Chapter XVI before any of the authorities under the Act and, therefore, the issues as to whether the agreements were valid or not or as to whether they were obtained by fraud, etc. or were a nullity were neither subject matter of dispute before the Industrial Court nor can they be gone into by this Court in the present petition. On the contrary, once the agreements are registered under section 33 of the Act, they are binding on all concerned in view of the provisions of Section 97 of the Act and, therefore, in my considered opinion there is no legal infirmity or illegality in the award of the Industrial Court passed in terms of the agreements which have been accepted by each and every member of the petitioner Union as well as the employees of the respondent Company by filing affidavits and have not been assailed, challenged or objected to by any person before any competent authority nor has any dispute raised in that respect before the appropriate authority or Tribunal.

14. One of the most glaring aspect of the case is the conduct of the petitioner herein. Admittedly, the wages and other benefits of the workmen in the respondent company was being paid as per agreement entered into between the parties even prior to the agreement of 1991. In the year 1990 while the petitioner Union raised a dispute and got it referred to the Industrial Court, agreements continued to be entered into between the parties and the wages and other benefits were revised and paid to the workmen in accordance with the agreements. It was informed during the course of arguments by the learned counsel appearing for both the parties that even subsequent to 1998, three further agreements have been entered into between the petitioner Union and the respondent company which have been implemented without any protest. Surprisingly, while the petitioner Union professes to represent the employees of the respondent company and has allegedly taken up the issues with the management in the interest of its members. All the employees including each and every member of the petitioner Union and its governing body have admittedly signed and submitted affidavits accepting the agreements and agreeing for passing an award in terms of the agreements and, therefore, the stand of the petitioner Union professing to oppose the agreements is apparently contrary to the wishes of all the employees of the respondent company. On the one hand the employees of the respondent company including the office bearers of the petitioner Union have accepted the agreements and agreed to the passing of an award in terms of the agreement by filing affidavits, the petitioner Union

persists in pursuing the dispute which in the facts and circumstances of the case does not exist and, therefore, it is apparent that the petitioner Union has filed this petition only for the sake of justifying its existence. If all the workmen including the office bearers of the petitioner Union have accepted the agreements, the reason or justification for opposing the same in the same breath defies logic.

15. Quite apart, from the above, though the petitioner Union was well aware of the fact that the agreements were entered into in the year 1991, 1995 and 1998, they did not oppose the same at any point of time even when the agreements were registered in accordance with law on 12.4.2001 by the Registrar. The petitioner Union did not raise any objection against the registration nor have they raised any dispute in respect of the aforesaid agreements before the appropriate Government requesting it to refer them for adjudication before the Industrial Court. On the contrary, by executing separate individual affidavits, they have agreed to all the terms of the agreements, derived benefits thereunder and have also agreed to passing of an award in terms of the agreements.

16. In view of the aforesaid facts and circumstances, I am of the considered opinion that the Industrial court was fully justified in passing an award in terms of the agreements arrived at between the parties in order to bring about industrial peace and harmony. I am also of the considered opinion that the award in terms of the agreements, arrived at between the parties, would fully cover the terms of reference made by the State government vide order dated 4.1.1991 and, in view of the judgment of the Supreme Court quoted above, no illegality can be found with the impugned award which has been passed in terms of the agreements/settlements arrived at between the parties and, therefore, the main issue raised by the petitioner before this Court that the Industrial Court was bound to answer the reference and could not have passed an award in terms of the agreements even in case where all the workmen have accepted the agreements by filing affidavits deserves to be and is hereby rejected.

17. I am also of the considered opinion that this Court in exercise of its supervisory jurisdiction can only look into the dispute that was raised before the Industrial Court and examine as to whether the Industrial Court has committed any patent error which is manifest and apparent from the face on record which has resulted in gross injustice or failure of justice. In the present case, as the validity or otherwise of the agreements or the dispute as to whether they were entered into by fraud was neither referred to by the State Government nor was the subject matter of the dispute before the Industrial Court, the said issues cannot be gone into in the present proceedings moreso as the agreements have been duly registered by the Registrar in accordance with law without any objections from the petitioner in view of the law as laid down by the Supreme Court in the case of *Sirsilk Ltd.* (supra) and *National Engineering Industries Ltd.* (supra), moreso as there is an underlying presumption that the settlement arrived at between the

parties is fair, reasonable and binding on all concerned in view of the provisions of Section 33 and 97 of the Act, specially in view of the fact that in the present case each and every employee including all the office bearers of the petitioner Union have filed affidavits to accept and affirm the same.

18. In the circumstances, I do not find any illegality, manifest error or perversity in the impugned award passed by the Tribunal which has been passed with a view to settle all disputes between the parties and ensure industrial peace and harmony.

19. The petition, filed by the petitioner, being meritless is, accordingly, dismissed. In the peculiar facts and circumstances of the case, there shall be no order as to the costs.

Petition dismissed.

I.L.R. [2008] M. P., 2885

WRIT PETITION

Before Mr. Justice Rajendra Menon

31 July, 2008*

SHYAMA DWIVEDI (SMT.) & ors.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

A. Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - State Government and Collector have sanctioned and approved the posts to be filled up - Order of appointment of Shiksha Karmis bears the signature of an Additional Assistant Development Commissioner - Held - It cannot be construed that this order is passed by some authority of State Government or its officers and not by the Janpad Panchayat - Collector competent to deal with the appeal u/R 3 - Revision maintainable u/R 5 before Commissioner. (Para 15)

क. पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 - राज्य सरकार और कलेक्टर ने भरे जाने वाले पद स्वीकृत और अनुमोदित किये - शिक्षा कर्मियों के नियुक्ति आदेश पर अतिरिक्त सहायक विकास कमिश्नर के हस्ताक्षर - अभिनिर्धारित - यह अर्थ नहीं लगाया जा सकता कि यह आदेश राज्य सरकार के किसी प्राधिकारी या उसके अधिकारियों द्वारा पारित किया गया न कि जनपद पंचायत द्वारा - कलेक्टर नियम 3 के अन्तर्गत अपील पर कार्यवाही करने के लिए सक्षम - नियम 5 के अन्तर्गत कमिश्नर के समक्ष पुनरीक्षण पोषणीय।

B. Panchayat Shiksha Karmis (Recruitment and Condition of Service) Rules, M.P. 1997 - Petitioners appointed as Shiksha Karmis - Appointments cancelled as petitioners were close relatives of the members of selection committee - Action challenged on the ground of non-observance of principles of natural justice - Held - It is established principle that when action or orders are challenged on the ground of non-grant of hearing, mechanical interference is not to be resorted to until & unless prejudice

caused due to non-grant of hearing and the effect of the final outcome is established before the court, except that an exception carved out in such cases where a statutory provision for grant of hearing is contemplated - Petitioners were given full & reasonable opportunity of hearing by the Commissioner and thereafter, during the course of hearing in this petition also - Petitioners were not in a position to demonstrate as to what was the prejudice caused for non-grant of hearing by the Collector - No case made out for interference - Petition dismissed. (Paras 16 & 17)

खं. पंचायत शिक्षा कर्मी (मर्ती और सेवा की शर्तें) नियम, म.प्र. 1997 - याचियों को शिक्षा कर्मी के रूप में नियुक्त किया गया - नियुक्तियाँ रद्द की गई क्योंकि याची चयन समिति के सदस्यों के नजदीकी रिश्तेदार थे - कृत्य को नैसर्गिक न्याय के सिद्धांतों के अननुपालन के आधार पर चुनौती दी गई - अभिनिर्धारित - यह स्थापित नियम है कि जब कृत्य या आदेशों को सुनवाई प्रदान न किये जाने के आधार पर चुनौती दी जाती है, तकनीकी हस्तक्षेप नहीं किया जाना चाहिए जब तक कि न्यायालय के समक्ष सुनवाई प्रदान न किये जाने से पूर्वाग्रह कारित होना और अंतिम परिणाम प्रभावित होना, स्थापित जाए, ऐसे आपवादिक मामलों के सिवाय जहाँ कि वैधानिक उपबंधों के अन्तर्गत सुनवाई का अवसर देना अपेक्षित हो - याचियों को कमिशनर द्वारा और उसके बाद इस याचिका में सुनवाई के समय भी सुनवाई का पूर्ण और युक्तियुक्त अवसर दिया गया - याची यह प्रमाणित करने की स्थिति में नहीं थे कि कलेक्टर द्वारा सुनवाई प्रदान न किये जाने से क्या पूर्वाग्रह कारित हुआ - हस्तक्षेप का कोई मामला नहीं बनता - याचिका खारिज।

C. Constitution, Article 226, Panchayat Shiksha Karmis (Recruitment and Condition of Service) Rules, M.P. 1997 - Scope - *Petitioners selected are either sons, daughter, sisters, sister-in-law of the members of Selection Committee - After appreciating all these factors, the finding concurrently arrived at by the appellate authority (Collector) and revisional authority (Commissioner) - Order challenged in writ petition - Held - While exercising jurisdiction under Article 226 of the Constitution and while considering the question of interference into administrative or quasi judicial orders passed, if reasonable and prudent approach is adopted and if it is found that the approach of the authorities, administrative or quasi judicial in nature, is not vitiated by any statutory provisions or malafides, interference should not be made.* (Para 26)

ग. संविधान, अनुच्छेद 226, पंचायत शिक्षा कर्मी (मर्ती और सेवा की शर्तें) नियम, म.प्र. 1997 - क्षेत्र - चयनित याची चयन समिति के सदस्यों के पुत्र, पुत्री, बहिन, भाम्नी हैं - इन सभी कारकों का विवेचन करने के बाद अपील प्राधिकारी (कलेक्टर) और पुनरीक्षण प्राधिकारी (कमिशनर) द्वारा समवर्ती रूप में निष्कर्ष निकाले गये - आदेश को रिट याचिका में चुनौती दी गई - अभिनिर्धारित - संविधान के अनुच्छेद 226 के अन्तर्गत अधिकारिता का प्रयोग करते समय और पारित प्रशासनिक या अर्ध-न्यायिक आदेशों में हस्तक्षेप के प्रश्न पर विचार करते समय, यदि युक्तियुक्त और बुद्धिमत्तापूर्ण दृष्टिकोण अपनाया जाता है और यदि यह पाया जाता है कि प्राधिकारियों के दृष्टिकोण की प्रकृति प्रशासनिक या अर्ध-न्यायिक है, किसी भी कानूनी उपबंध या असदभावना द्वारा दूषित नहीं है, हस्तक्षेप नहीं किया जाना चाहिए।

Cases referred :

AIR 2006 SC 2571, AIR 2002 SC 2914, 2008(1) MPHT 254, AIR 1970 SC 150, (1996) 3 SCC 364.

M.L. Choubey, S.S. Shrivastava and S.K. Choubey, for the petitioners.

Shailesh Mishra & Aseem Dixit, G.As., for the respondent Nos.1 to 3.

P.S. Das, for the respondent No.4.

None, for the respondent Nos.5 & 6.

Vivek Rusia & Sarita Chourasia, for the interveners.

ORDER

RAJENDRA MENON, J. :-Challenging the orders passed by the Collector, District Chhatarpur on 2.6.99 vide Annexure P/21, holding appointment of the petitioners on the post of Shiksha Karmi - Grade III as illegal and setting aside the same, further challenging the order-dated 14.3.2000 passed by the Commissioner, Sagar Division dismissing the revision petition filed by the petitioners, and affirming the order (Annexure P/21) passed by the Collector, petitioners have filed this petition under Article 226/227 of the Constitution.

2. It is the case of the petitioners that they were duly appointed after selection on merits on the post of Shiksha Karmi - Grade III, by the Janpad Panchayat Gaurihar vide order-dated 17.9.98, that their appointments were made after complying with the requirements of M.P. Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules 1997 [hereinafter referred to as the 'Rules of 1997']. Being aggrieved by appointment of the petitioners it is stated that one Kunwar Vijay Bahadur Singh Bundela challenged the same by filing an appeal before Collector, Chhatarpur and the Collector vide order-dated 31.8.98 (Annexure P/17) quashed the entire selection and remanded the matter back for fresh selection. In pursuance to the directions passed by the Collector vide Annexure P/17 on 31.8.98, fresh process of selection was conducted, select list was prepared, it was finally published on 16.9.98 and 249 candidates were notified for appointment, after conducting the process of selection. Orders of appointment were issued on 17.9.98 vide Annexure P/18. Name of the petitioners appear in the aforesaid selection list. On selection petitioners joined the selected post and after the petitioners had joined the selected post, respondent No.4 Smt. Archana Mishra aggrieved by her non-selection preferred an appeal before the Collector Chhatarpur. Various allegations were made in the appeal filed by respondent Archana Mishra, as contained in Annexure P/20. However, without hearing the petitioners, without issuing notice to them and on the basis of the submissions made by the respondent and after hearing the Janpad Panchayat, finding selection of the 11 petitioners to be vitiated the Collector quashed the order of appointment vide Annexure P/21, dated 2.6.99.

3. Being aggrieved by this order petitioners herein preferred revision before the Commissioner, Sagar Division and the Commissioner vide order-dated 14.3.2000.

(Annexure P/22) has dismissed the revision petition and, therefore, petitioners are before this Court challenging the orders passed by the Collector and the Commissioner i.e., the appellate authority and the revisional authority.

4. During the course of hearing of this petition Shri M.L. Choubey, learned counsel for the petitioners, made the following submissions:

(1) His first submission was that the Collector committed grave error in quashing the appointment of the petitioners without hearing them, without issuing notice to them and without impleading the petitioners as parties in the proceedings held in the appeal. It was emphasized that cancelling of the appointment of the petitioners without hearing and without granting opportunity of defence is clearly unsustainable and the entire action taken behind the back of the petitioners is liable to be quashed on this ground alone.

(2) The second ground of challenge is that the Collector and the Commissioner have interfered with the selection of the petitioners only on the ground that petitioners' relatives were office bearers of the Janpad Panchayat and they had participated in the process of selection. It was emphasized by Shri Choubey that mere participation of the relatives will not vitiate the selection until and unless the role played by the relatives, the influence put by them in the process of selection and the manner in which the selection was influenced by their participation is not established. It was argued by Shri M.L. Choubey that in the present case merely because the relatives were members of the selection committee, interference has been made without making any consequential enquiry into the fact as to whether the presence of the relatives did influence the selection of the petitioners. It was his case that without conducting any enquiry into the consequential effect on the procedure for selection due to presence of the relatives, interference by the Collector and Commissioner was not warranted.

Shri M.L. Choubey tried to emphasize that petitioner were selected on their own merit, during the interview of each of the petitioners, the relatives concerned had left the process of selection and in their absence the marks to be allotted by the said relatives was allotted by the Chief Executive Officer of the Janpad Panchayat and, therefore, as the selection is not influenced in any manner whatsoever, the orders passed by the appellate authority and the revisional authority interfering with the selection merely on the grounds of presence of relatives in the Selection Committee, is wholly unsustainable and liable to be quashed.

(3) The third ground urged which was incorporated by a proposed amendment is contained in I.A.No.6910/08 and which was permitted

to be raised at the time of hearing is to the effect that the orders of appointment were not passed by the Janpad Panchayat. It is stated that petitioners were appointed vide order-dated 17.9.98 (Annexure P/18) by the Additional Assistant Development Commissioner. After concurrence of the Collector and against such an order no appeal under Rule 3 (d) of the Rules of 1995 lies to the Collector, that being so, exercise of power by the Collector under Rule 3(d) is said to be illegal and challenge is made to the order on this ground by the proposed amendment as indicated in I.A.No.6910/08. By taking me through the affidavit available on record and various other documents Shri M.L. Choubey, learned counsel, argued that the action taken and the orders passed are liable to be quashed for the grounds raised hereinabove.

5. In respect thereof, he placed reliance on the following three judgments: (i) *Inderpreet Singh Kahlon and Others Vs. State of Punjab and others* [AIR 2006 SC 2571]; (ii) *M/s Lakshmi Precision Screws Limited Vs. Ram Bahagat* [AIR 2002 SC 2914] to canvass the ground that the action taken without granting opportunity of hearing is unsustainable. A Division Bench judgment of this Court in the case of *Sagar Machhua Sahakari Samiti, Seoni Vs. Chief Executive Officer, Janpad Panchayat, Seoni and another* [2008 (1) MPHT 254] in respect of the contention that against a resolution of the Panchayat, held no appeal or revision lies under the Panchayat Raj Adhiniyam. Accordingly, on the aforesaid grounds Shri Choubey prays for interference into the matter.

6. Shri Shailesh Mishra, learned Government Advocate for the State; Shri P.S. Das, learned counsel for the respondents; Shri Vivek Rusia and Smt. Sarita Chourasia, learned counsel for the interveners, refuted the aforesaid contention and it was submitted by them that participation of various relatives of the petitioners in the selection process and such relatives being office bearers of the Janpad Panchayat is an admitted fact. As this was a material irregularity, which vitiates the entire selection, it was argued by the learned counsel that Collector and Commissioner have not committed any error in interfering with the selection process.

7. Taking me through the statements and the evidence adduced by the Janpad Panchayat, Shri Shailesh Mishra emphasized that in the proceedings held before the Collector and the Commissioner it was the specific case of the Janpad Panchayat that petitioners are related to Smt. Pushpa Dwivedi, President of the Shiksha Samiti, which conducted the selection, and Shri Sumer Singh, Member of the Shiksha Samiti and both of them are office bearer of the Panchayat. Accordingly Shri Shailesh Mishra submits that as the entire selection was influenced by the presence of these persons who are related to the petitioners, the authorities concerned have not committed any error in interfering with the selection of the petitioners.

8. By bringing on record some of the marks allotted to the petitioners by Members of the Selection Committee, interveners have tried to demonstrate before this Court that even though petitioners had received less marks on the basis of basic qualification, but by giving them higher marks in the interview they have been brought within the merit consideration and in this manner the selection is influenced.

9. Shri. Shailesh Mishra, learned Govt. Advocate, further argued that even though petitioners were not heard before the Collector, but when the revision was filed by them before the Commissioner, the entire selection records were adduced and the revision was dismissed after hearing the petitioners. Petitioners were given all the opportunity to give their say in the matter and the Commissioner having dismissed the revision after due consideration of the objections raised by the petitioner, Shri Shailesh Mishra emphasized that no prejudice is caused to the petitioners and, therefore, on the ground on non-grant of hearing in the facts and circumstances of the case, it is argued by him that no interference is called for.

10. It was further stated by Shri Shailesh Mishra that the order of appointment of the petitioners, which was subject matter of appeal before the Collector, under Rule 3 of the Rules of 1995, was issued by the Janpad Panchayat. Referring to the order of appointment Annexure A/18, learned counsel pointed out that the said order is issued from the office of Janpad Panchayat, Gaurihar Head Quarter Barigarh, District Chhatarpur. It is the order of appointment made by the Janpad Panchayat and the signature of the Additional Assistant Development Commissioner is not in the capacity of any officer of the State Government, but in his capacity as officer incharge of the Janpad Panchayat. It is stated that the order is issued by the Janpad Panchayat and, therefore, it was subject to appeal under Rule 3 before the Collector.

11. Accordingly, learned counsel for the respondents and the interveners submit that there is no merit in the claim made by the petitioners and the petition is liable to be dismissed as their appointment stands vitiated due to involvement of their relatives in the process of selection. Placing reliance on a judgment of the Supreme Court in the case of *A.K. Kraipak and Others Vs. Union of India and others* (AIR 1970 SC 150), Shri Vivek Rusia, learned counsel representing some of the interveners, argued that in the present case in the light of the fact that petitioners have been heard both by the Commissioner and also before this Court and as the prejudice caused is not established, interference on the ground of non-grant of opportunity is not called for. Accordingly, he prays for dismissal of this petition.

12. I have heard learned counsel at length.

13. During the course of hearing of this petition, as ordered earlier the Chief Executive Officer of the Janpad Panchayat was present with the original records of selection. Shri M.L. Choubey, learned counsel for the petitioners, was granted permission to inspect the records he inspected the records on 29.7.2008. The

records have been perused by this Court and is returned back to Shri Shailesh Mishra after perusal.

14. As already indicated hereinabove, mainly three disputes arise for determination in this petition:

(i) The first question would be as to whether the appeal was maintainable before the Collector under Rule 3;

(ii) The second question is as to what is the effect of cancellation of the appointment of the petitioners, ordered without hearing them and without impleading them as parties; and,

(iii) The third and final question would be as to whether the Collector and Commissioner were right in interfering with the selection of the petitioners for the reasons indicated by them in the impugned order i.e... the presence of the relatives as Members of the Selection Committee in which petitioners had participated.

15. The first question raised with regard to competency of the Collector to deal with the appeal under Rule 3 is wholly misconceived and can be out-rightly rejected for the following reasons. Challenge by respondent Smt. Archana Mishra in her appeal (Annexure P/20) under Rule 3 of the Rules of 1995 read with Section 91 of the M.P. Panchayat Raj Adhiniyam was made to the order of appointment dated 17.9.98 (Annexure P/18). A perusal of this order indicates that this order is issued by the Janpad Panchayat, Gaurihar with Head Quarter Barigarh, District Chhatarpur and the entire order indicates that a Selection Committee was constituted by the Janpad Panchayat in accordance to the statutory rule and the appointment is made by the Janpad Panchayat. Merely because the order bears the signature of an Additional Assistant Development Commissioner, it cannot be construed that this order is passed by some authority of the State Government or its officers and not by the Janpad Panchayat. On the contrary, the officer concerned after mentioning his designation has clearly indicated him to be a representative of Janpad Panchayat Gaurihar, District Chhatarpur. It is clear from the aforesaid order that this order has been passed as a consequence of the selection procedure conducted by the Janpad Panchayat. Merely because the State Government vide order-dated 24.1.98 and the Collector vide order-dated 21.5.98 have sanctioned and approved the posts to be filled up, it cannot be held that the order of appointment itself is issued by the State Government or the Collector. On the contrary, a complete reading of the order-dated 17.9.98 and the other documents available on record, which includes the documents constituting the Selection Committee, the resolution of the Janpad Panchayat prescribing the procedure to be followed by the Selection Committee and acceptance of the recommendations of the Selection Committee by the Janpad Panchayat, which are available on record as resolutions dated 1.8.98 Annexure R/6(1) and proceedings Annexure R/6(2), all go to indicate that the appointment in question was made by the Janpad

Panchayat and once it is held that the appointment is made by the Janpad Panchayat, then the order of appointment made by the Janpad Panchayat is amenable to the appellate jurisdiction of the Collector under Section 3 and the order of the Collector is further subject to revision before the Commissioner under Rule 5 of the Rules of 1995, that being so, finding the first ground urged by Shri Choubey to be wholly misconceived, the same is rejected.

16. As far as the second ground pertaining for cancellation of the appointments without hearing the petitioners and without granting them opportunity of hearing is concerned, the same is required to be tested on the touchstone of actual prejudice caused to the petitioners in the matter of non-grant of hearing. In the judgments relied upon by *Shri M.L. Choubey, in the case of M/s Laxmi Precision Screws Limited* (supra) and *Inderpreet Singh Kahlon* (supra), the principle laid down are that no person should be visited with an adverse order or action without granting him opportunity of hearing and without considering his defence. There is no dispute in accepting the aforesaid proposition, but at the same time another principle which is also equally established is that when action or orders are challenged on the ground of non-grant of hearing, mechanical interference is not to be resorted to until and unless prejudice caused due to non-grant of hearing and the effect on the final outcome is established before the Court, except that an exception carved out in such cases where a statutory provision for grant of hearing is contemplated. This principle is laid down by the Supreme Court in series of cases. Reference may be made to one such case i.e., *State Bank of Patiala and Others Vs. S.K. Sharma* [1996 (3) SCC 364]. That being so, this Court proposes to deal with the question of non-grant of hearing mainly on the basis of prejudice caused and the effect of the same into the final outcome, as it is not proper to quash the order directly on the ground of non-grant of hearing by the Collector.

17. Even though when the appeal was filed by respondent Smt. Archana Mishra before the Collector, petitioners were never heard and the Collector passed the order without hearing the petitioners, the matter did not end there. Petitioners availed of the opportunity of filing a revision before the Commissioner. When the matter travelled to the Commissioner in this manner, full opportunity of hearing was granted to the petitioners and the entire selection record and other documents, which formed the basis for passing of the order by the Collector, were available before the Commissioner, petitioners had access to the same and Commissioner decided the revision afresh on merits after considering each and every objection of the petitioners. Thereafter, during the course of hearing in this petition also, the entire selection proceedings and other documents were available on record and the petitioners were given full opportunity to demonstrate before this Court that their selection was proper or that the finding with regard to their relatives participating in the selection process is an incorrect or improper finding. Petitioners admitted that their relatives had participated in the selection, but only argued that their presence did not influence their selection. This is a matter which can be

looked into on the basis of the material available on record and during the course of hearing of this petition, the petitioners were not in a position to demonstrate as to what was the prejudice caused for non-grant of hearing by the collector. Even if no hearing was granted before the Collector, but when full opportunity of hearing was granted and was availed of by the petitioners before the Commissioner in the revision and when the Commissioner had passed the order after so hearing the petitioners, merely because petitioners were not impleaded as party in the proceedings held before the Collector it cannot be said that the entire action of the appellate authority and the revisional authority stands vitiated on this ground. This is a case where petitioners had ample opportunity of putting up their defence and objections before the Commissioner and the Commissioner having appreciated the dispute on merits after hearing the petitioners, this court is not inclined to interfere in the matter merely on the technical ground of non-grant of opportunity. It has to be held that non-grant of opportunity during the proceedings held before the Collector does not vitiate the action taken against the petitioners as they were given full and reasonable opportunity by the Commissioner before passing the order and petitioners having availed of the same, cannot have any grievance on this count. Accordingly, the second ground of attack also fails being unsustainable.

18. As far as the third ground with regard to propriety of the interference made by the Collector and the Commissioner is concerned, factual aspects of the matter require consideration.

19. A perusal of the order-dated 2.6.99 (Annexure P/21) passed by the Collector; the order-dated 14.3.2000 (Annexure P/22) passed by the Commissioner; and, the selection proceedings available on record indicate that in the present case selection is made to the post of Shiksha Karmi - Grade III and the procedure for such selection is contemplated under the M.P. Panchayat Shiksha Karmis (Recruitment and Service Condition) Rules, 1997. The method of selection and recruitment is provided in Rule 5 and the constitution of the Selection Committee and the manner of selection is provided for in sub-rule 8 and 9 of the aforesaid Rule. According to the procedure contemplated under Rule 5(9)(i)-(a), (b) and (c) - 60% of the marks obtained in the qualifying examination is to be taken note of; thereafter 25% marks can be added for teaching experience and 15% marks are fixed for oral test. Accordingly, the total marks fixed for selection is 100. Under sub-rule (8) of Rule 5, the constitution of the Selection Committee and its Members are indicated which is in accordance to the provisions specified in Schedule II to the Rules.

20. Item No.3 of Rule 2 deals with Shiksha Karmi - Grade III, the educational qualification is Higher Secondary Certificate Examination passed, and the Selection Committee is to consist of : (i) Chairperson, Standing Committee of Education of Janpad Panchayat; (ii) Chief Executive Officer, Janpad Panchayat; (iii) Block Education Officer (Member Secretary); (iv) Two specialists in the subject to be

nominated by the Standing Committee for Education of whom one shall be woman; and, (v) All members of the Standing Committee of Education of whom atleast one belongs to the Scheduled Castes, Scheduled Tribes or OBC. In the present case, there is no dispute that the Selection Committee was constituted as per the aforesaid provision, but presence of two members in the Selection Committee is to be taken note of. The President of the Selection Committee is one Smt. Pushpa Dwivedi. She is Chairman of the Education Committee and she has participated in the process of selection of various candidates. Another member of the Selection Committee was one Shri Swami Singh, who is a Member of the Janpad Panchayat and has participated in the process of selection as a Member of the Education Committee. It is found by the Collector and the finding of the Collector is affirmed by the Commissioner to the extent that petitioner No.1 Smt. Shyama Dwivedi is the sister-in-law of the President of the Selection Committee Smt. Pushpa Dwivedi. According to the finding recorded Smt. Pushpa Dwivedi's sister-in-law (Nanand) Smt. Shyama Dwivedi; her Devrani Smt. Vibha Dwivedi; two sisters Rashmi Dwivedi and Rita Dwivedi have been appointed. Apart from these persons, her nephew Devendra Awasthi and her two nieces Ku. Rekha Awasthi and Ku. Prabhesh Kumari have been appointed. That apart, it is found that Smt. Gita Rawat, petitioner No.8, is also sister of Smt. Pushpa Dwivedi. From the aforesaid facts, it is clear that eight members of the family belonging to the President Smt. Pushpa Dwivedi have been selected for appointment on the post in question. Apart from the aforesaid eight persons petitioner Smt. Ramrani Singh is found to be daughter-in-law of Shri Swami Singh, who was Member of the Committee; Shri Sumer Singh, petitioner No.6, is found to be son of Shri Swami Singh and one of his nephew Shri Rajesh Singh has also been found to be appointed. Finding in this regard is recorded by the Collector and the Commissioner on the basis of the statement made by the Chief Executive Officer. The order-sheets dated 4.6.2002 and 24.6.2002 indicates that petitioners were directed to file affidavits to show as to whether this is a correct fact or not. The order-sheet dated 24.6.2002 indicates that time was sought by learned counsel for the petitioners to file specific affidavit of the petitioners denying their relationship with Members of the Selection Committee or office bearers of the Janpad Panchayat. Even though in pursuance to the aforesaid order, affidavits have been filed, but in these affidavits the facts are not denied and during the course of hearing Shri M.L. Choubey fairly admitted that petitioners are related to Smt. Pushpa Dwivedi and Shri Swami Singh, as recorded by the Collector and the Commissioner and he accepts the same, that being so, the finding recorded by the Collector and the Commissioner to the effect that all the petitioners are very closely related either to the President of the Committee, or its Member is a correct finding. According to the Collector and the Commissioner, the Panchayat Raj Adhiniyam prohibits grant of any undue benefit by Members and office bearers of the Panchayat to any of its relatives or family members. Finding recorded is that in this case some benefit has been granted.

21. It is not in dispute that Smt. Pushpa Dwivedi and Shri Swami Singh were Members of the Selection Committee and they participated in the process of selection. However, the resolution and other documents only indicate that when relatives of Smt. Pushpa Dwivedi appeared for the interview, she left the interview board and the two marks available with her for allotment to the candidate were allotted by the Chief Executive Officer. Similarly, when relatives of Shri Swami Singh appeared for the interview, he is said to have left the proceedings and the two marks available with him were allotted by the Chief Executive Officer. On this ground, it was emphasized by Shri M.L. Choubey that the presence of relatives was of no consequence and it has not materially affected the process of selection. This aspect requires consideration.

22. As already indicated hereinabove under the statutory rules, out of 100 marks to be allotted 60% marks is based on the educational qualification. 25% marks is to be allotted by the Members of the Committee on the basis of experience and various other factors and thereafter 15% marks is to be allotted for oral interview. Records indicate that in the Selection Committee there were about 10 Members and out of these Members, two marks each were to be allotted by Smt. Pushpa Dwivedi, Shri Swami Singh, Smt. Rajrani Shukla - Member, Shri Bhurelal Khangar - Member, Shri Harshvardhan Singh, another Member. Thereafter, one mark each were to be allotted by Shri Ramdeo Patel, representative of MLA; Shri C.L. Maravi, Chief Executive Officer; Shri K.S. Chauhan - Block Education Officer; Ku. Meera Vishwakarma - Subject Expert; and, Shri A.P. Ahirwar, another Subject Expert. In this manner 15 marks were allotted. If the allotment made of marks under various category is taken note of and if it is compared with the marks allotted to some of the wait-listed candidates certain disparities can be apparently seen. Petitioner Smt. Shyama Dwivedi had obtained 50% in the Higher Secondary Certificate Examination. Accordingly, she has been allotted 30% marks for qualification. In the oral interview she is allotted 11.10 marks. After adding the marks for experience she has received 58.10 marks. Compared to this is the case of Shri Yogendra Nigam, Shri Yogendra Soni, Shri Shivsharan, Shri Dinesh Kumar and Shri Satyendra Kumar. All these persons have received more than 75% marks in the Higher Secondary Certificate Examination and, therefore, they have received very high marks approximately between 46-47% for educational qualification, but by giving them only 3 marks in the interview their overall total percentage is kept around 50 and they are eliminated from the process of selection. In this manner, some benefit is granted to each of the petitioners. That apart, petitioner Smt. Vibha Dwivedi has received 57% marks in the Higher Secondary Certificate Examination; petitioners Devendra Awasthy and Krishnadutt Awasthi have received 55% and 69% marks; whereas petitioner Sumer Singh son of Shri Swami Singh has received 53% marks, accordingly their percentage for the qualifying examination is very less compared to other wait-listed candidates. These persons have been allotted 12.25, 8.95 and 15 marks in the interview and their

overall mark is made over 55, so as to bring them within the zone of consideration. It is, therefore, apparent from a scrutiny of these results that most of the petitioners have received very less marks in the qualifying examination i.e.. Higher Secondary Certificate Examination, whereas many persons whose name appear in the wait-list have received 78% and 79% marks in the qualifying examination, but they are allotted very low marks in the interview and experience, in some cases even less than 3 marks is allotted in the oral interview, as a result their selection is adversely effected. This is the reason why the Collector and the Commissioner thought it appropriate to interfere in the matter.

23. Petitioner No.6 Sumer Singh is son of Shri Swami Singh, a Member of the Selection Committee, and he has been allotted full 15 marks i.e.. 100% marks have been allotted by each of the Committee Members. It is found that in this manner benefit in some way or the other is extended to each of the petitioners and this is the reason why the Collector and the Commissioner interfered in the matter. It is further found that one Badri Prasad, son of Bhagwat Prasad has been appointed and he has been given 9 marks for the experience, but in his file no experience certificate is available. It is found that petitioner Gita Rawat is the real sister of Smt. Pushpa Dwivedi and she has been selected after giving her high marks in the oral interview, even though she has only received 55% marks in the qualifying examination i.e.. Higher Secondary. It is clear from a perusal of the records that eight close relatives of Smt. Pushpa Dwivedi, president of the Selection Committee, and Shri Swami Singh, a Member of the Selection Committee, have been appointed. The relatives selected are either sons, daughter, sisters, sister-in-law of the Members and after appreciating all these factors, the Collector and the Commissioner found that the selection of these close relatives are vitiated.

24. The question is as to whether the aforesaid finding concurrently arrived at by the appellate authority and the revisional authority requires interference by this Court.

25. This Court has only made a prima facie assessment of the selection procedure, as indicated hereinabove, to consider as to whether the approach adopted by the Collector and the Commissioner was reasonable or was wholly arbitrary, so as to warrant interference in these proceedings under Article 226 of the Constitution.

26. It is well settled in law that while exercising jurisdiction in a writ petition under Article 226 of the Constitution and while considering the question of interference into administrative or quasi judicial orders passed, if reasonable and prudent approach is adopted and if it is found that the approach of the authorities, administrative or quasi judicial in nature, is not vitiated by any statutory provisions or malafides, interference should not be made. If the case in hand is evaluated in the backdrop of above principles, it would be seen that the Collector and the Commissioner have approached the problem in a pragmatic manner, they have

scrutinized the selection procedure and finding eight close relatives of the President and three of a Member of the Selection Committee to have been appointed, have cancelled their selection, suspecting nepotism and misuse of office by some of the Members. The aforesaid finding of the Commissioner and the Collector is further strengthened from the manner in which marks have been allotted in the oral interview, that being so, finding a reasonable and likelihood of bias having vitiated the selection of the petitioners, the Collector and the Commissioner have interfered with the matter. This action of the Collector and the Commissioner is a just and fair decision arrived at, after appreciating the totality of the facts and circumstances and conducting proper assessment of the entire selection process. That being so, it is not a fit case where extra-ordinary power under Article 226 of the Constitution should be exercised and interference made.

27. Somewhat similar circumstances pertaining to selection in the All India Service is considered by the Supreme Court in the case of *A.M. Kraipak* (supra) relied upon by Shri Vivek Rusia, and a five Judge Bench of the Supreme Court in the aforesaid case, has approached the question in the following manner:

"15. But then under the circumstances it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore, what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney-General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates."

28. In the present case also, the facts are somewhat similar. Mere absence of

Smt. Pushpa Dwivedi and Shri Swami Singh at the time of interviewing the petitioners is not sufficient to hold that their presence has not influenced the process of selection. If the principle laid down by the Supreme Court in the case of *A.M. Kraipak* (supra), as indicated hereinabove, is applied to the present case and the entire procedure evaluated, it has to be held that the Collector and the Commissioner in cancelling the selection of the petitioners have not committed any error warranting interference in these proceedings under Article 226/227 of the Constitution. -

29. Accordingly, finding no case made out for interference on the grounds raised in this petition, the petition stands dismissed without any order so as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 2898

WRIT PETITION

Before Mr. Justice Rajendra Menon

4 August, 2008*

VINAY SHUKLA

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

Constitution, Articles 14, 16, 21, 226, 227, 257, 323-A, 323-B, Administrative Tribunal Act, 1985, Section 3(q) & 14, Reorganisation Act, M.P. 2000, Section 72 - Maintainability of writ petition at the first instance in respect of service matter pertaining to a member of All India Services - Petitioner, member of All India Services incorrectly allocated to State of Chhattisgarh - Central Government cancelled the order and directed M.P. State Government to issue posting orders - Order not complied - Writ petition filed before High Court - Held - With regard to 'service matters' and service dispute relating to an employee of All India Services the court of first instance where the matter should be agitated is to CAT - Jurisdiction to deal with the matter vests exclusively with the CAT - Against the order passed by CAT matter has to be agitated under Article 226 & 227 before High Court - Petition dismissed with liberty to take recourse to the remedy available under the Act of 1985.
(Paras 16 & 17)

संविधान, अनुच्छेद 14, 16, 21, 226, 227, 257, 323-ए, 323-बी, प्रशासनिक अधिकरण अधिनियम, 1985, धारा 3(क्यू) व 14, पुनर्गठन अधिनियम, म.प्र. 2000, धारा 72 - अखिल भारतीय सेवा के किसी सदस्य से सम्बन्धित सेवा मामले के सम्बन्ध में प्रथम अवसर पर रिट याचिका की पोषणीयता - याची, अखिल भारतीय सेवा के सदस्य को गलत रूप से छत्तीसगढ़ राज्य को आवंटित किया गया - केन्द्र सरकार ने आदेश रद्द किया और म.प्र. राज्य सरकार को पदस्थापना आदेश जारी करने का निदेश दिया - आदेश का पालन नहीं किया

गया - रिट याचिका उच्च न्यायालय के समक्ष पेश की गई - अभिनिर्धारित - 'सेवा मामलों' और अखिल भारतीय सेवा के कर्मचारी से सम्बन्धित सेवा विवाद के सम्बन्ध में प्रथम अवसर का न्यायालय जहाँ मामला उठाया जाना चाहिए, केन्द्रीय प्रशासनिक अधिकरण है - मामले पर कार्यवाही करने की अधिकारिता अनन्य रूप से केन्द्रीय प्रशासनिक अधिकरण में निहित है - केन्द्रीय प्रशासनिक अधिकरण द्वारा पारित आदेश के विरुद्ध मामला संविधान के अनुच्छेद 226 व 227 के अन्तर्गत उच्च न्यायालय के समक्ष उठाया जाना चाहिए - याचिका 1985 के अधिनियम के अन्तर्गत उपलब्ध उपचार का आश्रय लेने की स्वतंत्रता के साथ खारिज की गई।

Cases referred :

(1997) 3 SCC 261.

M.N. Krishna Mani with K.M. Shukla & S.D. Mishra, for the petitioner.
S.S. Bisen, G.A., for the respondent No.1.

ORDER

RAJENDRA MENON, J. :-Even though notices have been issued to the respondents, but during the course of hearing of this petition today it has transpired that the petitioner is an officer belonging to the All India Service Cadre and as the matter pertains to service dispute of a member of the All India Services, it is only the Central Administrative Tribunal which has jurisdiction to deal with the matter. Therefore, learned Senior Advocate representing the petitioner was directed to address this Court on the question of jurisdiction.

2. Shri M.N. Krishna Mani, learned Senior Advocate representing the petitioner, argued that even though petitioner is a member belonging to the All India Services, but he seeks enforcement of a Notification issued by the Government of India and its compliance by the State of Madhya Pradesh under Article 257 (1) of the Constitution of India and as the act of the State Government amounts to violating the fundamental rights available to the petitioner under the constitution, it is argued by him that this Court can interfere in the matter and it is not necessary for the petitioner to take recourse to the remedy available under the Administrative Tribunals Act, 1985 (hereinafter referred to as 'Act of 1985').

3. Placing reliance on the various judgments and taking me through the observations made by the Supreme Court in the said judgments, learned Senior Advocate vehemently argued that this is a fit case where arbitrariness on the part of State of Madhya Pradesh is writ large and as the same amounts to depriving the rights guaranteed to the petitioner, fundamental in nature under the Constitution, interference by this Court exercising writ jurisdiction under Article 226/227 of the Constitution, can be made.

4. Shri M.N. Krishna Mani, learned Senior Advocate, emphasized that when the Government of India has already decided to cancel the allocation of the petitioner earlier made illegally to the State of Chattisgarh and when allocation of the petitioner is done to the State of Madhya Pradesh, the State of Madhya Pradesh is duty bound to follow the aforesaid direction under Section 72 of the State Re-

organization Act and in refusing to comply with the mandate of the Union of India, State Government is not only committing breach of Article 257 of the Constitution, but is also violating the provisions of Section 72 of the State Re-organization Act and, therefore, interference into the matter is sought for. It is emphasized that the action of the State Government amounts to violating the Fundamental Rights available to the petitioner under Article 14 and 21 of the Constitution.

5. Respondents represented by Shri S.S. Bisen have refuted the aforesaid and it is stated that as the dispute in this case pertains to the service dispute of a central government employee, an employee belonging to the All India Services, jurisdiction of this Court is ousted and it is only the Central Administrative Tribunal which can deal with the matter.

6. For considering the question of exercise of jurisdiction of this Court, it would be relevant to take note of certain facts and the relief that is claimed by the petitioner. According to the petitioner he belongs to the Indian Administrative Service, 1974 Batch and has been allocated to Madhya Pradesh Cadre. On 1.11.2000, the State of Madhya Pradesh was reorganized by the M.P. State Re-organization Act and a new State of Chattisgarh was created. By incorrectly mentioning the hometown of the petitioner as Bilaspur District, now in the State of Chattisgarh, petitioner's services were allocated to the State of Chattisgarh and on 28.11.2000 petitioner was illegally relieved from the post of Member, Board of Revenue, Gwalior and was directed to join in the State of Chattisgarh. Petitioner did not comply with the order and it seems that the matter went to the Government of India and finally by order-dated 24.8.2007 the Government of India decided the case of allocation of the petitioner and it was directed that the petitioner shall be reallocated to his original cadre, in the State of Madhya Pradesh. This was done by the Government of India Notification dated 24.8.2007 (Annexure P/1). Thereafter, an explanatory note with direction was also issued on 28.9.2007 by the Government of India to the State of Madhya Pradesh to implement this order-dated 24.8.2007, vide Annexure P/2 dated 28.9.2007.

7. It is stated that thereafter on 10.12.2007 and 8.1.2008, petitioner made two representations to the Government of Madhya Pradesh and the Central Government for implementing the Notification - Annexure P/1 dated 24.8.2007. In response thereof even though Government of India has issued a second direction on 12.12.2007 and another direction on 15.2.2008 (Annexure P/4), the Government of Madhya Pradesh is deliberately sitting tight over the matter and not taking any action without any rhyme or reason. The aforesaid deliberate inaction and non-compliance of the executive orders of the Government of India amounts to violating the provisions of Article 257 (1) of the Constitution of India by the State of Madhya Pradesh, which results in depriving the petitioner of his basic human right i.e. the right to livelihood. It is stated that for the last eight years petitioner is not being issued with any posting order, salary is not paid to him, he is being made to suffer.

8. Under such circumstances, the relief claimed for in this petition is as under:

"(i) Declare that the change of the cadre of the petitioner from his home State of MP to Chhattisgarh was viol abinitio as noticed in the GOI Notification dated 24.8.2007 (Annexure P/1) and directed the respondent No.1 to release the petitioner all the consequential relief's arising therefrom.

(ii) pass any other order or orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the case."

Further interim relief claimed is to the following effect:

"(i) pass an ad-interim ex-parte order directing the respondent No.1 to fall in line with the decision and the Executive Directions given by the Central Government (repeatedly conveyed) to the State Government and give posting to the petitioner effective from the date of his reporting on duty that is from 12.9.2007 with a copy of the Central Government Notification dated 24.8.2007 and accordingly release his emoluments forthwith.

(ii) pass any other order/orders as this Hon'ble Court deems fit in the present facts and circumstances of the case."

9. From the aforesaid narration of facts, it is clear that the petitioner wants enforcement of an order passed by the Government of India on 24.8.2007 (Annexure P/1), a direction to the respondent No.1 to release salary and all consequential relief to the petitioner, which includes posting order and other service benefits. The interim order sought for is also to the effect of permitting the petitioner to join duties and to release all the emoluments forthwith. Even though right to wages, livelihood and all other benefits are held to be rights available to a person or an employee under Article 14, 16 and 21 of the Constitution, but when enforcement of the aforesaid rights also results in direction to the respondents to grant certain service benefits to the employee, the question is as to whether this Court has jurisdiction in the matter in the light of provisions of Section 14 of the Act of 1985.

10. Service matter is defined in Section 3(q) of the Act of 1985, in the following manner:

"(q) 'service matters', in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or, as the case may be, of any corporation (or society) owned or controlled by the Government, as respects-

(i) remuneration (including allowances), pension and other retirement benefits;

- (ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;
- (iii) leave of any kind
- (iv) disciplinary matters; or
- (v) any other matter whatsoever.

The jurisdiction and power of the Central Administrative Tribunal is provided for in Section 14 of the Act of 1985, in the following manner:

"14. Jurisdiction, powers and authority of the Central Administrative Tribunal -

(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court) in relation to-

(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;

(b) all services concerning -

(i) a member of any All-India Service; or

xxx xxx xxx xxx
xxx xxx xxx xxx".

From a perusal of the definition of 'service matters' and the jurisdiction vested in the Central Administrative Tribunal under section 14, it is clear that 'service matters' in relation to a person means all matters relating to his condition of service in connection with the affairs of the Union or any State or of any local or other authority within the territory of India and the matters relating to the conditions of service are with respect to the person's remuneration, pension, other retiral benefits, tenure, confirmation, seniority, retirement - premature or on superannuation, leave, disciplinary matters or any other matter whatsoever. (Emphasis supplied)

11. From the aforesaid it is clear that all matters relating to payment of remuneration, tenure and any other matter by its nature pertaining to conditions of service would be a service matter.

12. In the present case even though petitioner has stated that action of the State Government amounts to violating his fundamental rights, the basic relief claimed for by the petitioner is to pay his salary and other monetary dues and a order for his posting. The aforesaid comes within the purview of 'service matters'

as defined under section 3(q) and the jurisdiction to exercise power and authority with regard to matters of recruitment and of service matter concerning a member of All India Service is now vested exclusively with the Central Administrative Tribunal constituted under the Act of 1985.

13. The jurisdiction of this Court to exercise power pertaining to 'service matters' of a member of the All India Services is ousted and instead the power is conferred on the Central Administrative Tribunal constituted under the Act of 1985, that being so, it is a case where this Court lacks inherent jurisdiction to deal in the matter. After enactment of the Act of 1985, all the powers to be exercised by the High Court under Article 226 of the Constitution pertaining to 'service matters' of an employee pertaining to All India Services is vested with the Central Administrative Tribunal and as the power is vested with the said authority, this Court does not see any reason to interfere with the matter on the grounds raised in this petition. Even if non-payment of salary or not allotting any work amounts to depriving the petitioner of his fundamental rights guaranteed under the Constitution, the dispute being canvassed by the petitioner in this petition pertains to 'service matter' of a member of All India Services and it is only the Central Administrative Tribunal which is conferred with the powers to adjudicate such a dispute. In that view of the matter, it is not a fit case where the powers and jurisdiction can be exercised by this Court.

14. If the arguments advanced by the learned Senior Advocate is accepted then in all cases where salary is denied to a central government employee or a member of the All India Services or where any right under the contract of service is deprived, it may also amount to violating some fundamental right or constitutional right of the employee and in such cases the employee would always approach this Court under Article 226 of the Constitution and seek enforcement of his right available under the terms and conditions of his employment and enforcement of his conditions of service on the ground of breach of fundamental right. If such a course is adopted, it would amount to frustrating the scheme formulated for redressal of grievance of such an employee by creation of Central Administrative Tribunal and in that view of the matter, this Court does not deem it proper to enter into the question on merits.

15. The constitutional validity and the powers of judicial review with regard to jurisdiction conferred on the High Courts under Article 226 and 227 of the Constitution and the Supreme Court under Article 32, was subject matter of adjudication by a Constitution Bench of the Supreme Court in the case of *L. Chandra Kumar Vs. Union of India and Others* [(1997) 3 SCC 261]. In the aforesaid case, the Supreme Court while considering the validity of the Act of 1985 and various other matters pertaining to functioning of the Tribunal's under the said Act, has laid down the following principles:

" ... The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution

is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution...." (Para 99).

93. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court, which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Court. We may add that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal." (para 93)

"We, therefore, hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls. This will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunals. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter." (Para 91 and 90)

"Under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of

the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution. (Para 92)

"Therefore, the Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislation (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal." (Para 99).

(Emphasis supplied)

16. A complete reading of the aforesaid principle makes it amply clear that with regard to 'service matters' and service dispute relating to an employee of the All India Services the Court of first instance where the matter should be agitated is to Central Administrative Tribunal constituted and created under Article 323-A and 323-B of the Constitution and against the order passed by the said Tribunal matter has to be agitated under Article 226 and 227 before a Division Bench of the High Court. When the Tribunal is competent to decide questions pertaining to vires of statutory legislation, the question of breach of fundamental rights resulting upon non-payment of salary or harassment by the employer can very well be adjudicated by the Tribunal at the very first instance and thereafter a remedy of writ petition is available to the petitioner.

17. Accordingly, this Court is of the considered view that dispute being agitated by the petitioner pertains to service matter of an employee belonging to the All India Service Cadre and the jurisdiction to deal with the same vests exclusively with the Central Administrative Tribunal under the Act of 1985 and, therefore, this Court lacks jurisdiction to deal with the matter.

18. Accordingly, finding no merit in the claim made by the petitioner warranting interference in this petition, this petition is dismissed with liberty to the petitioner to take recourse to the remedy available under the Act of 1985.

Petition dismissed.

I.L.R. [2008] M. P., 2906

WRIT PETITION

Before Mr. Justice S.K. Gangele

8 August, 2008*

TAPA TRADERS, GWALIOR (M/S)

... Petitioner

Vs.

KRISHI UPAJ MANDI SAMITI & anr.

... Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Sections 2(1)(a), 2(1)(mmm) & 19 [As amended by Krishi Upaj Mandi (Sanshodhan) Vidheyak, M.P. 1990] - *Petitioners in the business of manufacture and sale of tobacco Choor, tobacco Rawa, tobacco dust, tobacco Kandy - Mandi Samiti levying Mandi fees on it - Action challenged by them - Held - The object of amendment in the Act of 1972 to drop out the word 'processed' was to exempt the processed goods from Mandi fees - The tobacco Choor, tobacco Rawa, tobacco dust and tobacco Kandy cannot be classified as 'processed goods', but they are 'agriculture produce' - Hence, aforesaid products cannot be exempted from payment of Mandi tax or fees - Mandi Samiti is entitled to levy Mandi fees on the aforesaid agriculture produce - Petition dismissed.*

(Para 13)

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धाराएँ 2(1)(ए), 2(1)(एमएमएम) व 19 [कृषि उपज मण्डी (संशोधन) विधेयक, म.प्र. 1990 द्वारा यथासंशोधित] - याची तम्बाकू चूर, तम्बाकू रवा, तम्बाकू डस्ट, तम्बाकू केण्डी का कारोबार करते हैं - मण्डी समिति ने उस पर मण्डी शुल्क उदग्रहण किया - उनके द्वारा कृत्य को चुनौती दी गई - अभिनिर्धारित - अधिनियम 1972 में शब्द 'प्रसंस्कृत' को हटाने के संशोधन का उद्देश्य प्रसंस्कृत माल को मण्डी शुल्क से छूट प्रदान करना था - तम्बाकू चूर, तम्बाकू रवा, तम्बाकू डस्ट और तम्बाकू केण्डी 'प्रसंस्कृत माल' के रूप में वर्गीकृत नहीं किये जा सकते, बल्कि वे 'कृषि उत्पाद' हैं - इसलिए, उपर्युक्त उत्पादों को मण्डी कर या शुल्क के भुगतान से छूट प्रदान नहीं की जा सकती - मण्डी समिति उपर्युक्त कृषि उत्पादों पर मण्डी शुल्क उग्रहीत करने की हकदार है - याचिका खारिज।

Cases referred :

AIR 2002 SC 852, 2006 AIR SCW 6017, 1998(2) MPLJ 282, 2000(1) JLJ 391, (2007) 6 SCC 429, (1990) 1 SCC 224, AIR 1992 SC 224, AIR 1963 SC 79, (1991) 4 SCC 473, AIR 1979 Bom 38.

N.K. Jain with A.K. Jain, for the petitioner.

Yogesh Chaturvedi, for the respondent No.1.

P. Newaskar, Dy.G.A., for the respondent No.2.

ORDER

S.K. GANGELE, J. :-These petitions, W.P. No. 1348/05, M/s Tapa Traders, Gwalior v. Krishi Upaj Mandi Samiti Gwalior; W.P. No. 2839/05 M/s R.R. Patel v. Krishi Upaj Mandi Samiti Guna and another; W. P. No. 1021/05, M/s Ram

Avatar v. Kishi Upaj Mandi Samiti Morena; W.P.No. 1266/05, M/s Meera Stores, Morena v. Krishi Upaj Mandi Samiti Morena and W.P. No.1986/05, Kapoor Chand Jain v. Krishi Upaj Mandi Samiti Bhind, are inter-linked and have been taken up together for disposal because a common question of law is involved with regard to competence of Krishi Upaj Mandi Samiti to impose tax on Tobacco. Choor and similar form of Tobacco.

2. The facts narrated in Writ Petition No.1348/05 have been taken into consideration in to this order.

3. The petitioners are in business of selling Tobacco Choor. The aforesaid tobacco Choor has been brought by the petitioners for sale from out side of the State. As per petitioners it is a processed product, hence the Krishi Upaj Mandi Samiti has no authority and power to impose tax on the sale of aforesaid product. In para 5.3 of Writ Petition No. 1348/05 petitioner has stated that manufacturers of tobacco choor purchases tobacco leaves from farmers. Thereafter the leaves, stock and stems are processed by beating / thrashing, refining and sorting out in different categories and sizes. Processed product has been named as 'Tobacco Choor', 'Tobacco Rawa' and 'Tobacco dust'. Petitioners sale the aforesaid product to retail-sellers. The aforesaid form of tobacco mentioned above has been used by persons for personal consumption.

4. Respondent, Krishi Upaj Mandi Samiti, in the return stated that as per the decision of Hon'ble the Supreme Court in *I.T.C. Ltd. v. Agricultural Produce Market Committee and others*, AIR 2002 SC 852, the Secretary of the Krishi Upaj Mandi Samiti decided to impose Mandi Tax on tobacco in accordance with Section 19 of the M.P. Krishi Upaj Mandi Adhiniyam, 1972 because the petitioner had been selling agriculture produce, Tobacco in the market area of the respondent, Krishi Upaj Mandi Samiti. Along with the return the respondent also filed a copy of the Bill, which was sent by Balaji Traders, Patari. (Bihar) to the petitioner wherein it has been mentioned 'Bags of un-manufactured tobacco choor'.

5. Learned Senior Counsel, Shri N.K. Jain, appearing for the petitioner, has submitted that the Mandi Committee is not entitled to impose any tax on tobacco choor under the provisions of the Act of 1972 because it is a processed, manufactured item and it is not an agriculture produce. The definition of 'Processing' has been mentioned in the Act of 1972. The Legislature has cautiously exempted processed goods from Mandi tax by way of amendment in Section 2 of Madhya Pradesh Krishi Upaj Mandi Adhiniyam 1972. In support of his contentions the learned Senior Counsel relied upon the judgment of Hon'ble the Supreme Court in *Orient Paper & Industries Ltd. v. State of M.P. & others*, 2006 AIR SCW 6017 and decisions of this Court in *Goyal and Sons and another v. Krishi Upaj Mandi Samiti, Sabalgarh* 1998 (2) MPLJ 282 and *S.K. Goyal Mill (M/s.) and another v. Krishi Upaj Mandi Samiti and another*, 2000 (1) J LJ 391. Similar arguments have been advanced by the learned other counsels

engaged in other connected writ petitions. It has further been stated that the petitioners have not been selling any agriculture produce.

6. Contrary to this, learned counsel for Krishi Upaj Mandi Samiti, Mr. Chaturvedi, has submitted that the petitioners are in business of selling tobacco, a notified agricultural produce. It is clear from the Bill where it has been mentioned 'Unmanufactured tobacco choor'. The tobacco choor is a form of tobacco leaves, hence Krishi Upaj Mandi Samiti is competent to impose tax on sale of the aforesaid agriculture produce. In support of his contentions, learned counsel relied upon the judgments of Hon'ble the Supreme Court in *Commissioner of Income Tax, Kerala v. Tara Agencies*, (2007) 6 SCC 429; *M/s Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujrat* (1990) 1 SCC 532, *M/s Saraswati Sugar Mills v. Haryana State Board and others*, AIR 1992 SC 224 and *Union of India and another v. Delhi Cloth and General Mills Co. Ltd.* AIR 1963 SC 79. Learned counsel for the State accepted the arguments advanced by Mr. Chaturvedi, learned counsel appearing for Krishi Upaj Mandi Samiti.

7. The point for determination before this Court is whether Krishi Upaj Mandi Samiti is competent to impose tax on tobacco choor or other forms of tobacco as mentioned in the petition - tobacco Rawa or tobacco dust under the provisions of the Act of 1972 ?

8. Respondent No.1, Krishi Upaj Mandi Samiti has been constituted under the provisions of Madhya Pradesh Krishi Upaj Mandi Adhiniyam 1972. Section 2 (1) (a) of the aforesaid Act defines 'agricultural produce' which is under :-

"2 (1) (a) "agricultural produce" means all produce of agriculture, horticulture, animal husbandry, apiculture, pisciculture, or forest as specified in the Schedule;"

Section 2 (1) (mmm) defines "processing" as under :-

"processing" means powdering, crushing, decorticating, husking, parboiling, polishing, ginning, pressing, curing or any other treatment to which an agricultural produce or its product is subjected to before final consumption;

Section 19 of the Act of 1972 prescribes power to the Mandi Committee to levy market fee, which is as under :-

"19. Power to levy market fee .- (1) Every Market Committee shall levy market fee, -

- (i) on the sale of notified agricultural produce whether brought from within the State or from outside the State into the market area; and
- (ii) on the notified agricultural produce whether brought from within the State or from outside the State into the market areas and used for processing;

at such rates as may be fixed by the State Government from time to time subject to a minimum rate of fifty paise and a maximum of two rupees for every one hundred rupees of the price in the manner prescribed :

Provided that no Market Committee other than the one in whose market area the notified agricultural produce is brought for sale or processing by an agriculturist or trader, as the case may be, for the first time shall levy such market fee."

9. There was an amendment in Section 2 (1) (a) of the Act of 1972 by way of a "Sanshodhan Adhiniyam" named as 'The Madhya Pradesh Kirshi Upaj Mandi (Sanshodhan) Vidheyak, 1990'. By the aforesaid amendment the word "weather processed or not " has been omitted. As per the statement of objects and reasons of the aforesaid amendment the object of amendment was that there was a long standing demand by the owners of processing units in Madhya Pradesh to exempt processed goods from mandi fees. It is clear from the statement of objects and reasons mentioned in the Sanshodhan Vidheyak, which is as under :-

"There was a long standing demand by the traders and also owners of processing units in Madhya Pradesh to exempt process goods from mandi fees. Another demand was that once mandi fees has been charged in a market area in the State on any particular produce it should not be subject to mandi fees again in any subsequent transaction in any other market area."

10. In Schedule under section 2 (1) (a) under Chapter "Narcotics" 'tobacco' has been mentioned as "agricultural produce". Petitioners have been selling different types of tobacco such as tobacco choor, tobacco rawa or tobacco dust and tobacco kandy. Whether the aforesaid version of tobacco can be said to be processed product of tobacco or tobacco itself has to be decided in the light of definition of 'process' and 'processed'.

11. Hon'ble the Supreme Court in *Orient Paper & Industries Ltd. v. State of M.P. & others*, 2006 AIR SCW 6017 has held as under with regard to the meaning of the word "process" :-

"14. According to Oxford Dictionary one of the meanings of the word 'process' is "a continuous and regular action or succession of actions taking place or carried out in a definite manner and leading to the accomplishment of some result". The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to effect its conversion to some particular stage. There is nothing in the natural meaning of the word 'process' to exclude its application to handling. There may be a process, which consists only in handling and there may be a process, which consists only in handling and there may be a

process, which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture. Any activity or operation, which is the essential requirement and is so related to the further operations for the end result, would also be a process in or in relation to manufacture. (See : *C.C.E. v. Rajasthan State Chemical Works* (1991) 4SCC 473)."

The Hon'ble Supreme Court in *C.C.E. v. Rajasthan State Chemical Works* (1991) 4SCC 473 has held as under with regard to word 'Process' :-

"The word 'process' in the context in which it appears in the notification includes an operation or activity in relation to manufacture. The natural meaning of the word 'process' is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the subject matter in order to transform or reduce it to a certain stage. There is nothing in the natural meaning of the word 'process' to exclude its application to handling. There may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture. What is necessary in order to characterise an operation as "processing" is that the commodity must, as a result of the operation, experience some change. The question is not whether there is manual application of energy or there is application of mechanical force. Whatever be the means employed for the purpose of carrying out the operation, it is the effect of the operation on the commodity that is material for the purpose of determining whether the operation constitutes "processing". Thus, "processing" may be an intermediate stage in manufacture and until some change has taken place and the commodity retains a continuing substantial identity through the processing stage, it cannot be said that it has been manufactured. That does not, however, mean that any operation in the course of such process is not in relation to the manufacture."

A Division Bench of Bombay High Court in *Venkatrao Narayanrao Ambekar v. The Alma Sugar Mills and another*, AIR 1979 Bombay 38, in the context of Section 6 (1) of the Maharashtra Agricultural Produce Marketing (Regulation) Act (1964), has held as under with regard to word "process" :-

"The word 'process' has got several meanings and in fact may mean different things in different context. But looking to the context in which it is used and gathering the natural meaning of the word in this context,

the word 'process' must be held to mean to subject a particular product or a commodity with the object of making it finer or improving its quality. It may mean to treat a particular commodity by any method but not in such a way that the commodity itself is completely transferred into a new commodity. When a particular agricultural produce like sugarcane is crushed and a large part of the original commodity is thrown away and the juice is alone later by a series of processes converted into a new product like Khandsari sugar or sugar it will be difficult to say that the sugarcane has been subjected to a process or sugarcane has been processed."

12. As per the above cited judgments it is clear as held by Hon'ble the Supreme Court that in characterise a product as processed product the commodity must, as a result of the operation, experience some change. In the present case, the tobacco leaves have been crushed into small pieces and those small pieces, as mentioned in the writ petition, have been named as tobacco choor or different names of tobacco. It has been used for the purpose of consumption. There is no iota of doubt that this tobacco choor has been used as tobacco in consumption. There is no change in characteristic of tobacco neither any ingredients have been added in the tobacco. In such circumstances, in my opinion, the different types of tobacco named as tobacco Choor, tobacco Rawa, tobacco Kandy and tobacco dust cannot be said to be a processed product.

13. The word 'processing' which has been defined in Section 2 (mmm) has to be considered in the context of the word 'processing' which has been used in section 19 (1) (ii) of the Act of 1972. In the aforesaid section it has been stated that on notified agricultural produce whether brought from within the State or from outside the State into the market areas and used for processing. It means that if agricultural produce has been used for processing as defined under section 2 (mmm) then the Krishi Upaj Mandi Samiti is entitled to levy market fees on the aforesaid agricultural produce, however, the definition of the word 'processing' mentioned in section (mmm) cannot be used for the purpose of 'agricultural produce' which has been brought in the market area for the purpose of sale as mentioned in section 19 (1) (i) of the Act of 1972. It is settled principle of law that Taxing Statute has to be interpreted strictly in accordance with the meaning used in the Statute or Act. The purpose of the Act of 1972 is to provide facility to the agriculturist so they can sale notified agricultural produce in the market efficiently. The object of amendment in the Act of 1972 to drop out the word 'processed' was to exempt the processed goods from Mandi fees, as held earlier, the tobacco Choor, tobacco Rawa, tobacco Kandy and tobacco Kandy cannot be classified as 'processed goods'. Hence, in my opinion, aforesaid products cannot be exempted from payment of mandi tax or fees.

14. 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., 2912

WRIT PETITION

Before Mr. Justice R.K. Gupta

20 August, 2008*

BANSAL HIGHWAY (M/S.)

... Petitioner

Vs.

GENERAL MANAGER, GRAMIN SADAK VIKAS

PRADHIKARAN PARIYOJNA KRIYANVAYAN & ors.

... Respondents

Court Fees Act (7 of 1870), Schedule I, Section 7(iv)(a) - Suit filed by plaintiff for declaring the order dated 10.08.2006 as illegal by which security amount of Rs.44,75,000/- has been forfeited - Trial court directed to pay ad valorem court fee on consequential relief - Held - Security amount is in possession of defendants and has to be prayed for by plaintiff for its refund - Suit for declaration will not be enough until amount is refunded to plaintiff - Plaintiff has to pay ad valorem court fee as prescribed in Schedule I - Petition dismissed.

(Para 5)

न्यायालय फीस अधिनियम (1870 का 7), अनुसूची 1, धारा 7(iv)(ए) - वादी द्वारा आदेश तारीख 10.08.2006 को अवैध घोषित करने के लिए वाद पेश किया जिसके द्वारा 44,75,000/- रुपये की प्रतिभूति राशि समपद्धत की गई - विचारण न्यायालय ने पारिणामिक अनुतोष पर एडवलरम न्यायालय फीस अदा करने का निदेश दिया - अभिनिर्धारित - प्रतिभूति राशि प्रतिवादियों के कब्जे में है और उसकी वापसी के लिए वादी द्वारा प्रार्थना की जानी है - घोषणा का वाद पर्याप्त नहीं होगा जब तक राशि वादी को वापस नहीं की जाती - वादी को अनुसूची 1 में विहित न्यायालय फीस अदा करना चाहिए - याचिका खारिज। -

Cases referred :

(1970) 1 SCC 80, 2002(1) MPLJ 458, 2004 (4) MPLJ 470, 1974 MPLJ SN 14.

Arun Kumar Choubey, for the petitioner.

Vipin Mishra, for the respondent Nos.1 & 2.

ORDER

R.K. GUPTA, J. :- This is a petition filed by the petitioner, who is the plaintiff in the court below, invoking the writ jurisdiction of this Court under Article 227 of the Constitution of India whereby the petitioner challenges the order dated 30.11.06 (Annexure P/5) passed in Civil Suit No.13-A/06. By this order, the trial Court has directed the petitioner to pay the court fee. As a consequence of the same, an objection was raised on behalf of the respondent/defendant under Order 7 Rule 11 and 13 have been allowed.

2. The aforesaid objection was submitted on the ground that the suit has been filed for declaring the order dated 10.8.06 as illegal and as a consequence of the same, the amount of security which has been deposited by the plaintiff/petitioner for a sum of Rs.44,75,000/- be forfeited. The trial Court directed that since no

court fee has been paid by the petitioner/plaintiff for the consequential relief, therefore, the court directed the petitioner/plaintiff to pay ad-valorem court fee on the aforesaid amount.

3. On behalf of the petitioner/plaintiff, it is contended that in the present case ad valorem court fee is not payable which is fixed under the Schedule I but the court fee is payable under Section 7 sub-section 4(A) of the Act. It is contended that the suit filed on behalf of the petitioner was in fact a suit for declaration and when the suit for declaration is filed then no court fee for the consequential relief has to be paid.

4. Learned counsel for the petitioner relied upon the judgment passed by the Apex Court in the case of *State of Uttar Pradesh Vs. Ramkrishan Burman (Dead) By L.Rs. and others* 1970 (1) SCC 80 and it was contended that suit for declaration was enough. Not only the aforesaid suit is maintainable but no court fee is payable for the consequential relief for the possession. In this reference, the facts of the case are to be taken into account. The instant suit before the Civil Judge was filed for a declaration that the plaintiff is the "owner in possession" of the estate left. On that basis, it is clear that the property was in possession of the plaintiff therefore, the suit for declaration could only be filed as the relief with regard to possession could not have been claimed by the plaintiff because the plaintiff himself was in possession. Thus, this judgment has no application in the present case. The facts of the present case are different.

5. In the present case, the amount which has been directed to be forfeited in pursuance to the impugned order dated 10.8.06 against which the relief is sought to declare it illegal then the security amount is not being in possession of the plaintiff but being in possession of the defendant has to be prayed for by the plaintiff for its refund. Under the circumstances, mere suit for declaration will not be enough until the amount is to be refunded to the plaintiff and if this is the consequence of the same then the petitioner/plaintiff has to pay the court fee. In this reference with profit it may be mentioned that consequence to set at naught to the order dated 10.8.06 is the refund of the forfeited money. The security amount has been forfeited which vests with the State Govt. and the amount which vests with the State then it is necessary for the plaintiff to claim the relief of its possession by way of refund by paying the court fee, therefore, ad valorem court fee as prescribed in Schedule I has to be paid by the plaintiff.

6. Learned counsel appearing on behalf of the petitioner/plaintiff further relied upon the judgment of this Court in *Dharamraj Singh Chhotelal Singh Chouhan Vs. Vaidya Nath Prasad Khare and Others* 2002(1) M.P.L.J. 458. The aforesaid case also has no application in the present petition. In fact this court was considering the question with regard to pecuniary jurisdiction of the Court under Section 8 of the Suit Valuation Act. The suit for pecuniary jurisdiction was valued at Rs.85,500/- for the purposes of suit for declaration. In view of the aforesaid fact, the court

considered that question in the backdrop of that particular case. In the present case, the question in fact is entirely different.

7. Another judgment in this reference is also to be considered which is reported in 2004(4) M.P.L.J. 470 *State of M.P. and another Vs. Jiwanlal Chikotiya and another*. This is a judgment passed by the Division Bench of this Court and the Division Bench in para 11 of the judgment held that if the suit is filed for declaration with injunction as a consequential relief, the plaintiff is bound to pay ad-valorem court fee as per valuation of the suit for the relief of permanent injunction. Therefore, the judgment as has been relied upon by the respondent/defendant decides the question for payment of ad valorem court fee on a consequential relief.

8. Learned counsel for the petitioner further relied upon the judgment passed by the Apex Court which is reported in 1974 M.P.L.J. SN 14 *Rahim Khan Vs. Gaffar Khan*. In the aforesaid judgment it is seen that for the purposes of determining the court fee one has to look into the allegations made in the plaint. The court further held that it is a settled rule of law that it is not the form of plaint but the contentions of it which the court while taking into account to determine the question of the court fee shall be relevant.

9. On the basis of the aforesaid ratio of this judgment, if the plaint allegations are to be seen for the purposes of determining the court fee as viewed by the Court below then the petitioner/plaintiff prayed for quashment of the order dated 10.8.06 by which the security amount has been forfeited. In view of the above circumstances, mere declaring suit for declaring the order dated 10.8.06 to be illegal, is not enough. A particular amount of Rs.44,75,000/- by this order has been forfeited which vests with the State Govt. The aforesaid amount was not in physical possession of the plaintiff. On behalf of the petitioner/plaintiff it is submitted that in M.A. No. 1185/07, this Court while passing the order on 16.3.07 has directed that the Bank guarantee shall not be en-cashed until further orders. On this basis, it is submitted that the bank guarantee submitted by the petitioner has not yet been en-cashed. Under the circumstances, even assuming that the said bank guarantee is en-cashed but the same is not in physical possession of the plaintiff/petitioner. Thus mere declaration under these circumstances and keeping in view the nature of the suit, a consequential relief will also arise by refund of the said amount. The petitioner/plaintiff has not paid the court fee on the aforesaid amount.

10. In view of the aforesaid, I do not find that the court below has committed any illegality in directing the petitioner/plaintiff to pay the court fee on the amount which has been directed to be forfeited.

11. In view of the aforesaid, no ground is made out for the interference or to quash the impugned order Annexure P/5. As a consequence of the same, the present petition is misconceived and is dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 2915

WRIT PETITION

Before Mr. Justice Sanjay Yadav

27 August, 2008*

UMA SHUKLA (SMT.)

... Petitioner

Vs.

M.P., POORVA KSHETRA VIDYUT VITRAN Co. & ors.

... Respondents

A. Electricity Supply Code, M.P. 2004 (As amended w.e.f. 11.08.2006), Clause 4.17 - New electricity connection denied on the ground that electricity dues of the previous owner were outstanding - Held - The new electricity connection cannot be denied on the anvil that previous consumer did not clear the electricity dues - Petition allowed. (Para 13)

क. विद्युत प्रदाय संहिता, म.प्र. 2004 (11.08.2006 से यथासंशोधित), खण्ड 4.17 - नवीन विद्युत कनेक्शन देने से इस आधार पर इंकार किया गया कि पूर्ववर्ती स्वामी के विद्युत देय बकाया थे - अभिनिर्धारित - नवीन विद्युत कनेक्शन इस आधार पर इंकार नहीं किया जा सकता कि पूर्ववर्ती उपभोक्ता ने विद्युत देय चुकता नहीं किये - याचिका मंजूर।

B. Electricity Supply Code, M.P. 2004 (As amended w.e.f. 11.08.2006), Clause 4.17 - Effect of amendment in Rules - Petitioner purchased premises in auction - The premises carried a liability of electricity charges of Rs.46084/- - Petitioner requested for grant of fresh electricity connection relying upon Clause 4.17 of Code - Respondents declined to grant connection - Action challenged - Respondents contended that substitution of clause 4.17 in the Code has been brought into existence w.e.f. 11.08.2006 whereas the application for grant of new connection was prior to the amendment and is governed by unamended clause - Held - When a statute provides new remedies for enforcement of existing rights will apply to future as well as past causes of action, because they do not affect existing rights and are classified as procedural. (Para 10)

ख. विद्युत प्रदाय संहिता, म.प्र. 2004 (11.08.2006 से यथासंशोधित), खण्ड 4.17 - नियमों में संशोधन का प्रभाव - याची ने परिसर नीलामी में क्रय की - परिसर पर 46084/- रुपये विद्युत प्रभार का दायित्व था - याची ने संहिता के खण्ड 4.17 पर निर्भर करते हुए नवीन विद्युत कनेक्शन देने के लिए प्रार्थना की - प्रत्यर्थियों ने कनेक्शन देने से इंकार किया - कृत्य को चुनौती दी गई - प्रत्यर्थियों ने प्रतिवाद किया कि संहिता में खण्ड 4.17 का प्रतिस्थापन 11.08.2006 से अस्तित्व में लाया गया है जबकि नवीन कनेक्शन देने का आवेदन संशोधन के पूर्व का था और असंशोधित खण्ड से शासित होता है - अभिनिर्धारित - जब कोई अधिनियमिति विद्यमान अधिकारों के प्रवर्तन के लिए कोई नया अनुतोष उपबंधित करती है, भविष्यवर्ती और पूर्ववर्ती वाद हेतुकों को भी लागू होगी, क्योंकि वे विद्यमान अधिकारों को प्रभावित नहीं करते और प्रक्रियात्मक रूप से वर्गीकृत किये जाते हैं।

Cases referred :

AIR 2007 SC 2, AIR 1964 SC 1256, 2008(3) MPHT 149 = ILR [2008] MP 1678

Avinash Zargar, for the petitioner.

Vivek Rusia, for the respondents.

ORDER

SANJAY YADAV, J. :- Order passed in this Writ Petition No. 2775/2007 shall also lead to the final disposal of W.P. No. 1800/2007 because of the identical issue involved in both the writ petitions being same.

2. The issue is whether the respondent Madhya Pradesh Poorva Kshetra Vidyut Vitran Company is justified in its action in declining to grant fresh electricity connection to the premises, purchased in auction by the petitioners, in lieu of recovery of electric charges due on previous owner.

3. The brief facts of W.P. No. 2775/2007 are that the petitioner being successful in a bid in auction purchased M/s. Shri Ram Carbon Pvt. (Ltd.) District Centre Imlikheda Chhindwara (M.P.), a sale-deed in pursuance was executed in favour of the petitioner on 27.6.2004. The said premises carried a liability of electricity charges to the tune of Rs.46,084/-, therefore, when the petitioner requested for grant of fresh electricity connection the respondents relying upon clause 4.17 of M.P. Electricity Supply Code 2004 declined to grant the same vide communication dated 27.2.2006.

4. Similarly, in W.P. No. 1800/2007 the petitioner purchased the premises situated at Mouza Khamaria Tahsil and District Narsinghpur. The said premises had the electricity dues through its previous owner to the tune of Rs.1,51,000/- and the request for fresh electricity was turned down on the anvil of clause 4.17 of the Code 2004 vide communication dated 8.3.2004.

5. The issue, however, need not detain long, for the simple reason that the Regulatory Commission in exercise of powers under the Electricity Act 2003 vide its Ninth amendment has substituted 4.17 enabling thereby the auction purchaser from financial institutions to seek fresh electricity supply.

6. The amended clause 4.17 which now stand is in the following terms:

"4.17 If the consumer, in respect of an earlier agreement executed in his name or in the name of a firm or company with which he was associated either as a Partner, director or Managing Director or as occupier and or owner of the premises, has any arrears of electricity dues or other dues on the premises where the new connection is applied for and such dues are payable to the licensee, the requisition for supply may not be entertained by the Licensee until the dues are paid in full. However, release of new connections shall not be refused by the Distribution Licensee in following cases:

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

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

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

(emphasis supplied)

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

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

7. Clause 4.17 (iii) now enables the auction purchaser to seek fresh connection without shouldering the burden of charges of previous consumers.

8. Though valiant efforts were made by the learned counsel for the respondents to dislodge the case of the petitioner, but in view of the present amendment in Supply Code 2004 stipulating therein the exemption under clause 4.17 (iii) the force gets extinguished.

9. The judgment relied upon by the respondent, viz., *Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/s. Paramount Polymers Pvt. Ltd.* AIR 2007 SC 2 turn on its own facts and are distinguishable. It was a case where the new electricity connection was declined to a new owner of the premises on the basis of the provisions contained in clause 21-A inserted in the Terms and Conditions of Supply of electrical energy by the Dakshin Haryana Bijli Vitran Nigam Ltd. with effect from 27.11.2001 whereunder clause (b) stipulated that reconnection or new connection shall not be given to any premises where there are arrears on any account due to the Nigam unless these are cleared in advance. It further stipulated that if the new owner/occupier/allottee remits the amount due from the previous consumer, the Nigam shall provide reconnection or new connection depending upon whether the service remains disconnected/dismantled as the case may be. In the case at hand there is a provision as contained in clause 4.7 (iii) of Supply Code, 2004, which speaks otherwise. Therefore, the principle laid down in the case of *Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/s. Paramount Polymers Pvt. Ltd.* (supra) is not applicable in the present case.

10. Furthermore, a broader issue regarding the retrospectivity of the new clause 4.17 is sought to be ushered in by the learned counsel for the respondents, who

contended, inter alia, that the substitution of clause 4.17 in the Supply Code has been brought into existence w.e.f. 11.8.2006, whereas the application for grant of new electricity connection by the petitioner was prior to the amendment and is governed by the unamended clause. The said contention of the learned counsel for the respondent has been noted to be rejected for the reason that when a statute provides new remedies for enforcement of existing rights will apply to future as well as past causes of action, because they do not affect existing rights and are classified as procedural. (Please see : Principles of Statutory Interpretation : (Justice G.P. Singh 11th Edition).

11. In cases of *Memon Abdul Karim Haji Tayab, Central Cutlery Stores, Veraval vs. Deputy Custodian General, New Delhi and others* (AIR 1964 SC 1256), their Lordships of the Apex Court were of the opinion that "it is well settled that procedural amendments to a law apply, in the absence of any thing to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date.

12. Therefore, in the considered opinion of this Court the amended clause 4.17 substituted vide Madhya Pradesh Electricity Supply Code, 2004 (Ninth Amendment (AG-1(ix) of 2006) is applicable on all its fours in the case at hand. This view is supported by judgment rendered by this Court in the case of *Satish Gangrade v. M.P. Madhya Kshetra Vidyut Vitran Company Ltd. and others* - [(2008) 3 MPHT 149].

13. Consequently, the impugned communication whereby the new electricity connection has been denied on the anvil that previous consumer did not clear the electricity dues, is hereby set aside and the respondents are directed to consider the request for new electricity connection in accordance with Rules, within a period of two months from the date of communication of this order.

14. The petitions are allowed to the extent above. No costs.

Petition allowed.

I.L.R. [2008] M. P., 2918

WRIT PETITION

Before Mr. Justice S.K. Gangele

5 September, 2008*

GODAWARI SHRIDHAR (SMT.)

... Petitioner

Vs.

UNION BANK OF INDIA & anr.

... Respondents

A. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Sections 4, 10, 12, 13

& 38, The Security Interest (Enforcement) Rules, 2002, Rules 8 & 9(2) - Whether authorised officer is bound to sell the immovable property with the consent of the borrower and secured creditor, if he fails to obtain higher price than reserve price or it is the discretion of the authorised officer to obtain the consent of the borrower and secured creditor or without consent he can effect the sale lower than the reserve price - Held - Bank is obliged not to auction sale the property below the reserve price - However the word 'may' used cannot be interpreted as mandatory dictate to the Bank to not sell the property below the reserve price - Petition disposed of. (Paras 8 & 12)

क. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम (2002 का 54), धाराएँ 4, 10, 12, 13 व 38, प्रतिभूति हित (प्रवर्तन) नियम, 2002, नियम 8 व 9(2) - क्या प्राधिकृत अधिकारी, यदि वह आरक्षित कीमत से उच्चतर कीमत प्राप्त करने में असफल हो जाता है, स्थावर सम्पत्ति ऋणी और प्रतिभूत लेनदार की सहमति से विक्रय करने के लिए बाध्य है या यह प्राधिकृत अधिकारी का विवेकाधिकार है कि ऋणी और प्रतिभूत लेनदार की सहमति प्राप्त करे या बिना सहमति के वह आरक्षित कीमत से कम पर विक्रय को प्रभावी कर सकता है - अभिनिर्धारित - बैंक सम्पत्ति की विक्रय नीलामी आरक्षित कीमत से कम पर न करने के लिए बाध्य है - तथापि शब्द 'may' का प्रयोग किया गया, इसका निर्वचन बैंक को आज्ञापक आदेश कि आरक्षित कीमत से कम पर विक्रय न करें, नहीं हो सकता - याचिका निपटाई गई।

B. Words & Phrases - Word 'may' - Interpreted - Rules 8 & 9 of the Security Interest (Enforcement) Rules, 2002 - The word 'may' cannot be construed as mandatory because the Act has been enacted to facilitate recovery of loan by financial institutions. (Para 13)

ख. शब्द और वाक्यांश - शब्द 'may' - निर्वचन - प्रतिभूति हित (प्रवर्तन) नियम, 2002 के नियम 8 व 9 - शब्द 'may' का आज्ञापक के रूप में अर्थ नहीं लगाया जा सकता क्योंकि अधिनियम वित्तीय संस्थानों द्वारा ऋण की वसूली को सुकर बनाने के लिए अधिनियमित किया गया है।

Cases referred :

AIR 1962 SC 1543, AIR 1982 SC 137.

V.K. Bhardwaj with Raja Sharma, for the petitioner.

M.M. Qureshi, for the respondents.

ORDER

S.K. GANGELE, J. :- Petitioner has filed this petition challenging the notification of auction of a house, Annexure P-1, which was mortgaged with the respondent No. 1, Bank.

2. Petitioner is a partner of a firm, named as 'M/s Shridhar Radios'. The firm had been conducting business. In the year 1984 it had been provided facility of crash credit limit by the respondent - Bank and it was extended time to time upto Rs.35 lakhs.

3. As per the petitioner in the month of August 2005 there was a theft in the shop of the firm amounting to Rs.6,05,540/-. The theft amount could not be

recovered and due to the aforesaid circumstances the firm could not continue its business and on account of this it could not pay crash credit limit which it had encashed from the Bank. Consequently, Bank issued a notice demanding an amount of Rs.33,85,031/- failing to pay the amount Naib Tehsildar also issued a revenue recovery certificate of Rs.30,56,371/- on 12.01.2006. The petitioner firm filed a petition before this Court challenging the notice. The petition was registered as W.P. No.1256/2007. Initially, the Court granted stay in favour of the petitioner. Thereafter, vide order dated 13.08.2007 the Court disposed of the petition on the ground that there was a remedy available to the petitioner of filing appeal under section 13 of (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Thereafter, the petitioner filed an appeal before the Tribunal. The Member of the Tribunal is not working at present, in the mean while, the respondent - Bank issued a notification with regard to auction of the house of the petitioner, hence the petitioner has filed this petition.

4. The respondent - Bank in the return stated that the firm had taken a loan and thereafter the bank initiated proceedings with regard to recovery of loan because the firm had not deposited the amount of loan. The total loan amount Rs.36,37,725/- had been due to the petitioner, on 07.09.2007 when the notice to take possession of the house was issued to the petitioner. The house was mortgaged with the bank, hence the bank has power and authority to auction the house.

5. Learned Senior Counsel for the petitioner has submitted that the Bank itself valued the property, the house, at Rs.60 Lakhs, and it is auctioning the house at near about Rs.50 lakhs. In view of the provisions of Rule 8 (c) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2002 (hereinafter referred to as 'the Rules of 2002') the property in question cannot be auctioned below the reserve price fixed by the Bank. Hence, the auction proceedings are contrary to law. Contrary to this, learned counsel for the respondent - Bank has submitted that Bank has tried its best to fetch higher rates, however, it could not receive bid of more than Rs.50 lakhs. It is not mandatory for the bank to sell the house at more than Rs.60 lakhs. Bank has also offered the petitioner to sell the house for more than Rs. 60 lakhs but the petitioner has not answered about the aforesaid proposal of the Bank. Hence, there is no merit in this petition.

6. From the facts of the case, it is clear that the firm had taken a loan and there was a liability on the firm to deposit the loan as crash credit. The house which is going to be auctioned was mortgaged with the Bank. An appeal is pending before the Tribunal. There is no stay with regard to recovery of loan by the Tribunal and also with regard to auction of the house.

7. As per Annexure P-1 the Bank fixed the reserve price of the house at Rs.60 lakhs. As per the Bank, it has tried its best but there are no buyer of the house of more than Rs.50 lakhs. The Bank received a highest bid of Rs.50 lakhs.

It also informed the petitioner that if there is a buyer who can purchase the property for more than Rs.50 lakhs then the petitioner can sell the house. The learned Counsel for the respondent - bank has also given an undertaking before the Court that petitioner is free to sell the property for a value more than Rs.50 lakhs.

8. Parliament has enacted an Act named as the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In exercise of powers under section 38 read with sub-sections 4, 10, 12 and 13 of the aforesaid Act the Central Government framed Rules named as "The Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "Rules of 2002"). Rule 9 of the aforesaid Rules of 2002 prescribes procedure of time of sale, issue of sale certificate and delivery of possession of an immovable property. As per proviso of Rule 9 (2) no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price. However, proviso to aforesaid Rules gives power to the authorised officer that if authorised officer fails to obtain a price higher than the reserve price, he may with the consent of the borrower and the secured creditor effect the sale at such price. The provision as under.

relevant Rule is as under :-

"9. Time of sale, issues of sale certificate and delivery of possession, etc. - (1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor.

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9;

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price."

Rule 8 thereof prescribes procedure for sale of immovable secured assets, which is as under :-

"8. Sale of immovable secured assets .- (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods :-

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5)."

9. From the aforesaid provision of the Rules of 2002 it is clear that it is the duty of the authorised officer to obtain valuation of the property from an approved valuer and thereafter he can sale the property in accordance with the provisions prescribed in Rule 8 (5) of the Rules of 2002. One of the mode is by holding public auction.

10. In the present case, the Bank invited bids for sale of the house and as per the Bank it has received highest bid of Rs. 50 Lakhs and reserve price of the house has been fixed at Rs. 60 Lakhs by the Bank. Now, the question is that whether the Bank can sale the house in a price less than the reserve price ? As per proviso of Rule 9 (2) no sale under this Rule shall be confirmed if the amount offered by sale price is less than the reserve price, however, the proviso to the aforesaid Rule further provides that if the authorised officer fails to obtain a price higher than reserve price, he may with the consent of the borrower and the secured creditor effect the sale at such price. Now, the question is that whether authorised

officer is bound to sale the immovable property with the consent of the borrower and secured creditor, if he fails to obtain higher price than reserve price or it is the discretion of the authorised officer to obtain the consent of the borrower and secured creditor or without consent he can effect the sale lower than the reserve price ?

11. The Act of 2002 has been enacted by the Parliament with the object of providing assistance to the banks and other financial institutions for recovery of loans. It is clear from the object of the Act, which is as under :-

"Ever since we opened the doors for the multinationals to step in and, consequently, made out comparatively puny domestic industries stand against the deluge of mighty world players with immense resources and formidable worldwide reputation, the nation has become a productive, ever-churning whirlpool of fierce economic competition. And when money moves as fast as it has been for a decade or so, it needs extremely pragmatic regulations to check irregularities on one hand and to safeguard public exchequer on the other.

There was an acute need being felt for assistance to the banks and other financial institutions in the recovery of loans, for there were heavy losses being incurred on account of unpaid debts. To regulate securitisation and reconstruction of financial assets and enforcement of security interest the President, on 21st day of June, 2002, promulgated the Securitisation and Reconstruction of Financial assets and Enforcement of Security Interest Ordinance, 2002. To replace the said Ordinance by an enactment a Bill was introduced in the house of the People but it could not be passed. Whereas the Parliament was not in session and the President was satisfied that circumstances exist which render it necessary for him to take immediate action to give continuous effect to the provision of said Ordinance. In exercise of the powers conferred by clause (1) of article 123 of the Constitution the President, on 21st August, 2002, promulgated the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Second) Ordinance, 2002 (Ord. 3 of 2002).

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Bill, 2002 was introduced and passed by both the Houses of Parliament in the winter sessions of 2002."

12. Although as per the aforesaid Rule the Bank is obliged not to auction-sale the property below the reserve price, however, in the aforesaid Rule the word 'may' has been used and the word 'may' in the facts of the case cannot be interpreted as a mandatory dictate to the Bank not to sell the property below the reserve price. The Hon'ble Supreme Court in *Madanlal Fakirchand Dudheliya v. Shri Changdeo Sugar Mills Ltd. and others*, AIR 1962 SC 1543 has held as under with regard to interpretation of Rule' -

"The words used in a section must be given their plain grammatical meaning. Where the Court is dealing with two sub-sections of a section (for example, S. 76, Companies Act, 1956) it is necessary that the two sub-sections must be construed as a whole "each portion throwing light, if need be, on the rest." The two sub-sections must be read as parts of an integral whole and as being inter-dependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided. (Para 17.)

It is not legitimate for the Courts to re-write the sub-sections, particularly when on the alternative construction it is found that there is no repugnance between the two sub-sections. That clearly is the function of the Legislature which enacts laws and not of the Court which interprets them. (Para 22)"

The Hon'ble Supreme Court in *Chinnamarkathian alias Muthu Gounder and another v. Aayyavoo alias Periana Gounder and others*, AIR 1982 SC 137, has further held as under with regard to interpretation of Rule which have govern 'May' -

"In this situation it must be held that while the opportunity of depositing the arrears of rent cannot be denied to a cultivating tenant during the course of proceedings under sub-sec. (3), the same is not available as of right under cl. (b) of sub-sec. (4). The difference in the language used by the legislature is significant and not without purpose. The intention of the legislature appears to be that normally a defaulting tenant must seek the help of the Court all by himself and that if he does so he must be protected; but that a defaulting tenant who waits for payment of rent till he is sought to be evicted by the landlord is not necessarily entitled to the same protection. Circumstances may exist which may place him at par with a tenant covered by sub-sec. (3) but then it may not necessarily be so. That is why it is left to the discretion of the RDO to grant time to the cultivating tenant or to deny him that opportunity. An example of a case in which no time should be allowed would be that of a tenant who, although in affluent circumstances at all relevant points of time, has failed to make payment of rent year after year in spite of repeated demands from an otherwise indigent landlord and whose conduct is, therefore, contumacious calling for no sympathy or concession. The extension to him of the same facility which is afforded to a willing tenant under sub-sec. (3) would be uncalled for and in fact unjust.

Nor do I find why the word "may" occurring in cl. (b) of sub-sec. (4) be not given its ordinary meaning as denoting the conferment of a discretion on the RDO and be equated with "shall" so as to make it obligatory on him to grant time to the cultivating tenant."

13. From the above principle of law laid down by Hon'ble the Supreme Court it is clear that when the word 'may' has been used in statute or rule it cannot always be interpreted that it is a mandatory provision and in view of the provisions of the aforesaid Rule the word 'may' cannot be construed as mandatory because the Act has been enacted to facilitate recovery of loan by the financial institutions. I it may be possible that in certain circumstances, as in the present case, financial institution is not in a position to fetch or receive the reserve price, hence it has a discretion to sale the property below the reserve price of the property.

14. In the present case, the Bank has fairly offered the petitioner to sale the property on a higher price i.e. more than Rs.50 lakhs. From the aforesaid act of the Bank it is clear that the Bank is acting fairly and reasonably. The petitioner herself is not able to sell the property for more than Rs.50 lakhs. Hence, in my opinion, the auction proceedings and notification cannot be held to be arbitrary and illegal.

15. Consequently, the petition of the petitioner is disposed of with the following directions :-

- (1) That the petitioner is granted two months time from the date of this order to find out a purchaser for more than the value which has been received by the Bank in auction proceedings;
- (2) If the petitioner failed to find out purchaser within the aforesaid period then the Bank is free to auction the house as per bids received by it in the auction proceedings.
- (3) No order as to cost.

Petition disposed of.

I.L.R. [2008] M. P., 2925
APPELLATE CIVIL
Before Mr. Justice Arun Mishra
2 November, 2007*

KAMLA BAI (SMT.)

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

A. Urban Land (Ceiling and Regulation) Act (33 of 1976), Sections 2(f), 4(b) & 6 - Filing of return on behalf of family - Land held by plaintiff and her husband as 'joint holder' as per Section 4(b) - Plaintiff's husband

filed the return on behalf of 'family' as defined in Section 2(f) - 5.62 acres of land declared surplus by Competent Authority - Plaintiff herself did not file return as an individual holder as per Section 6 - Held - No separate notice by Competent Authority under Act was necessary to the plaintiff - Appeal dismissed.
(Paras 5 & 6)

क. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धाराएँ 2(एफ), 4(बी) व 6 - परिवार की ओर से विवरणी पेश करना - भूमि वादी और उसके पति द्वारा धारा 4(बी) के अनुसार 'संयुक्त धारक' के रूप में धारित - वादी के पति ने धारा 2(एफ) में परिभाषित 'परिवार' की ओर से विवरणी पेश की - सक्षम प्राधिकारी द्वारा 5.62 एकड़ भूमि अधिशेष घोषित की गई - स्वयं वादी ने धारा 6 के अनुसार वैयक्तिक धारक के रूप में विवरणी पेश नहीं की - अभिनिर्धारित - सक्षम प्राधिकारी द्वारा वादी को अधिनियम के अन्तर्गत कोई पृथक सूचनापत्र देना आवश्यक नहीं था - अपील खारिज।

B. Urban Land (Ceiling and Regulation) Act (33 of 1976), Sections 10(5), (6) & 11 - Possession - After serving notice possession was taken by State from husband of plaintiff - Possession receipt mentioning that possession has been taken from husband of plaintiff - In the revenue papers entry of State of M.P., Nazul Department was made - Notice u/s 11 was also issued to husband of plaintiff to collect compensation - In these circumstances, on the date of suit plaintiff remained in possession cannot be accepted - Appeal dismissed.
(Paras 7 to 11)

खा. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धाराएँ 10(5), (6) व 11 - कब्जा - राज्य द्वारा सूचनापत्र तामील करने के बाद वादी के पति से कब्जा लिया गया - कब्जा रसीद उल्लेखित करती है कि वादी के पति से कब्जा लिया गया है - राजस्व कागजातों में म.प्र. राज्य, नजूल विभाग की प्रविष्टि की गई - वादी के पति को प्रतिकर प्राप्त करने के लिए धारा 11 के अन्तर्गत सूचनापत्र भी जारी किया गया - इन परिस्थितियों में वाद की तारीख पर वादी कब्जे में थी, स्वीकार नहीं किया जा सकता - अपील खारिज।

C. Urban Land (Ceiling and Regulation) Repeal Act (15 of 1999) - Effect on concluded proceedings - Since possession was already taken by the State - Land has vested in the State - The proceedings have been concluded - Possession had been obtained after issuance of due notification - Proceedings could not be reopened - No benefit of Repeal Act could be obtained by the plaintiff.
(Paras 11 to 13)

ग. नगर भूमि (अधिकतम सीमा और विनियमन) निरसन अधिनियम (1999 का 15) - समाप्त कार्यवाहियों पर प्रभाव - चूंकि राज्य द्वारा कब्जा पहले ही ले लिया गया - भूमि राज्य में निहित हो गयी - कार्यवाहियाँ समाप्त हो गयीं - सम्यक अधिसूचना जारी करने के बाद कब्जा प्राप्त किया गया था - कार्यवाहियाँ पुनर्जीवित नहीं की जा सकतीं - वादी द्वारा निरसित अधिनियम का कोई लाभ प्राप्त नहीं किया जा सकता।

D. Limitation Act (36 of 1963), Article 58 - Suit for declaration that proceedings held by State and Competent Authority under the Urban

Land (Ceiling and Regulation) Act, 1976 was null & void and prayed permanent injunction for protecting the possession - Plaintiff was very well aware of the proceedings under the Ceiling Act - Still plaintiff did not file the suit to challenge the order within the period of limitation - Possession was taken in the year 1982 - Suit has been filed on 23.06.2000 - It was hopelessly barred by limitation, - Concurrent finding of both courts upheld by High Court. (Para 13)

घ. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 58 - घोषणा के लिए दावा कि राज्य और सक्षम प्राधिकारी द्वारा नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, 1976 के अन्तर्गत की गई कार्यवाहियाँ अवैध व शून्य थीं और कब्जे की सुरक्षा के लिए स्थायी व्यादेश की प्रार्थना की गई - वादी अधिकतम सीमा अधिनियम के अन्तर्गत कार्यवाहियों से अच्छी तरह अवगत थी - फिर भी वादी ने आदेश को चुनौती देने के लिए वाद परिसीमा में पेश नहीं किया - कब्जा वर्ष 1982 में लिया गया था - दावा तारीख 23.06.2000 को पेश किया - यह परिसीमा से पूरी तरह वर्जित था - उच्च न्यायालय द्वारा दोनों न्यायालयों के समवर्ती निष्कर्ष की पुष्टि की गई।

Cases referred :

AIR 1967 SC 3377, (1998) 4 SCC 387, (1996) 4 SCC 212, 2003(2) MPLJ 271.

N.S. Kale with Raghvendra Kumar, for the appellant.

Sudesh Verma, G.A., for the respondents.

J U D G M E N T

ARUN MISHRA, J. :- The appeal has been preferred by the plaintiff aggrieved by the judgment & decree passed by two courts-below. The District Judge, Bhopal, in in civil appeal no.117-A/02 as per judgment & decree dated 29.1.2003 has affirmed the judgment & decree dated 31.10.2002 in civil suit no.4-A/2002.

2. The plaintiff-appellant filed a civil suit for declaration that the proceedings held by the State of M.P. and the competent authority under the Urban Land (Ceiling & Regulation) Act, 1976 (hereinafter referred to as 'the Act of 1976') with respect to land admeasuring 6 acres bearing survey no.399/2 situated at village Barkhed Pathani, owned by the plaintiff was null & void and prayed by issuance of permanent injunction for protecting the possession. The plaintiff averred that land was purchased by her on 5.5.75 from one Lakshman s/o Bhagchand Sahu through a registered sale-deed (Ex.P.4) and her name was entered in the revenue records as Bhumiswami. She had been since then cultivating the land and paying revenue. In the year 1977 she came to know that entries in the revenue papers were recorded in the name of State of M.P. and her name had been deleted in consequence of the order passed in the proceedings initiated under the Act of 1976. Plaintiff had no notice of the proceedings. Plaintiff filed an application with the State of M.P. challenging the proceedings under the Act of 1976. The application was kept pending. No decision was taken. Plaintiff never filed any return under the Act of 1976. No notice was given, as such the proceedings taken behind her back were not binding.

3. The defendants in their written statement contended that husband of the plaintiff Shri Bhagwan Patil had filed a return u/s 6 of the Act of 1976 before the competent authority with respect to the disputed land. As per the return filed by the husband on behalf of the family the competent authority had declared 5.72 acres land as surplus and obtained the possession. The land had been vested in the State of M.P. The land was the family property of Bhagwan Patil, it was declared surplus. The plaintiff was not in possession of the land. She was not having any subsisting right, title or interest, as such prayed for dismissal of the suit. The trial court has held that plaintiff constituted joint Hindu family along with Bhagwan Patil. Her husband Bhagwan Patil filed the return in the capacity of his being "Karta" (manager) of the family and in the ceiling case 5.72 acres of land was declared as surplus. The possession of the land had been obtained by the State in the year 1982. The suit filed in the year 2000 was barred by limitation, aggrieved thereby the plaintiff filed appeal before the District Court, Bhopal. Same has also been dismissed as per impugned judgment & decree. Consequently the successive appeal has been preferred in this Court.

4. Shri N.S. Kale, learned Sr. counsel appearing with Shri Raghvendra Kumar, has submitted that the courts-below erred in holding that the suit filed by the plaintiff is barred by limitation, as the proceedings were void, the plaintiff remained in possession, suit could not have been dismissed as barred by limitation. No notice was given to the plaintiff. It was her individual land. She did not file any return under the Act of 1976, with respect to individual land it was necessary to file the return by the individual. Plaintiff's husband could not have filed the return on her behalf.

5. After hearing the learned counsel for the parties and going through the record, I find that there is no merit in the appeal. Both the courts-below have found that the property was belonging to the family of plaintiff and her husband. As per section 4(b) of the Act of 1976 husband & wife are to be treated as the joint holder for determination of the surplus area, that is the also intention of section 6 of the Act of 1976, thus, it was open to the husband of plaintiff to file the return on behalf of the family as defined in the Act of 1976. Such a return has to be taken as return on behalf of the family. Bhagwan Patil had indicated in the return also that it was a joint family property. It was not necessary to file separate return by the plaintiff. The possession had been taken after serving the notice on 4.5.82. It was not necessary to issue notice to the plaintiff. Suit was barred by limitation. As possession had been taken by the State, plaintiff was not entitled for relief owing to the provision of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 adopted by the State w.e.f. 17.2.2000.

6. Coming to the submission raised by Shri N.S. Kale, learned Sr. counsel that the plaintiff has to be treated as individual holder, thus, it was not open to her husband to file the return. No notice was issued to the plaintiff under the Act of

1976 as such the proceedings were void against her. I find no room to entertain the aforesaid submission. The family has been defined in section 2(f) of the Act of 1976. Under section 2(f) of the Act of 1976 'family' in relation to a person means the individual, the wife or husband, as the case may be of such individual and their unmarried minor children. The definition is quoted below :

"2(f) 'Family', in relation to a person, means the individual, the wife or husband, as the case may be, of such individual and their unmarried minor children."

The aforesaid definition has the purpose behind it to provide the limit of the land to be held by the family consisting of the individual, the wife and the husband as the case may be of such individual and their unmarried children, thus, husband, wife and their unmarried minor children are included in the definition of the family. Section 4 prescribed the ceiling limit, in case of every person, thus, the definition of family has to be given full effect in order to find out the extent of the land which could be held by the wife, her husband and their unmarried minor children, even the property held by the wife in her individual right, has to be included in the family as defined under the Act of 1976, even if it was not joint Hindu family though it has been found to be joint family property and was in fact joint family property of husband and wife. Plaintiff was residing with her husband. The return in ceiling case was also filed on behalf of the family treating the property as family property. Obviously the family has filed the return through Bhagwan Patil, husband of the plaintiff, thus, it could not be said that plaintiff did not file the return, the plaintiff's husband had filed the return on her behalf also being manager of the family. As per section 6 it was incumbent upon the every person holding vacant land in the excess of ceiling limit to file statement within such period as may be prescribed. Plaintiff herself did not file the return within the prescribed time as obviously she had treated the return filed by her husband on her behalf also and in fact it was on behalf of the family. In case plaintiff thought she was individual holder, it was incumbent upon to her to file the return within the prescribed period but that was not filed for the reason that return was already filed by her husband, thus, the conclusion reached by the courts-below that it was not necessary to issue separate notice to the plaintiff is found to be correct.

7. Coming to the submission that possession was not taken in the year 1982. There is concurrent finding recorded that notice was issued to the plaintiff's husband Shri Bhagwan Patil. Possession receipt (Ex.D.2) has been placed on record. In the possession receipt it has been mentioned that possession was taken from Bhagwan Patil in favour of the State of M.P. Notice was given but inspite of notice possession was not given, as such possession was taken by the State and Panchnama was drawn, demarcation was also made and in the revenue papers entry of State of M.P., Nazul Department was made. A notice u/s 11 of the Act of 1976 was also issued to the husband of the plaintiff Bhagwan Patil to collect

the compensation as it was determined. Ex.D.1 goes to indicate that State has also taken the possession on 4.5.82. Same is the date mentioned in the possession receipt (Ex.D.2), it was acted upon also in the khasra entries.

8. The Apex Court in *Tamil Nadu Housing Board vs. A. Viswam (Dead)* by LRs. AIR 1996 SC 3377 has held that recording of memorandum or panchnama in presence of witnesses signed by them would constitute taking of possession of land. The Apex Court has held thus :-

"9. It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or Panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not cooperate in taking possession of the land."

9. In *Larsen & Toubro Ltd. vs. State of Gujrat and others* (1998) 4 SCC 387 mode of taking of possession of land was also considered. It was held that recording of memorandum or panchnama in presence of witnesses signed by them was enough. The possession of the Company was recorded in revenue papers. It was held that possession was handed over to the Company, panchnama was supported by revenue entries, it was not open to the High Court to convert itself into a revenue Court and to hold that in spite of panchnama and revenue record, actual physical possession of the acquired land had not been handed over to the acquiring body, that is the Company. The Apex Court has held thus :-

"13. It was not disputed that in the revenue records, it was L&T Ltd. who was shown in possession of the land. Affidavits of the panchas filed in the High Court which contained statements contrary to what was recorded in Panchnama and against the revenue entries are quite meaningless and in our opinion the High Court unnecessarily put undue reliance on the same. The High Court could not convert itself into a revenue court and hold that in spite of the panchnama and the revenue records actual physical possession of the acquired land had not been handed over to the acquiring body. The High Court, in our opinion, has not correctly analysed the two judgments of this Court in *Balmokand Khatri Educational and Industrial Trust vs. State of Punjab* (1996) 4 SCC 212 and *Balwant Narayan Bhagde vs. M.D. Bhagwat* (1976) 1 SCC 700 to come to the conclusion that actual physical possession of the land was not taken over by the State."

10. In *Balmokand Khatri Educational and Industrial Trust, Amritsar vs. State of Punjab and others* (1996) 4 SCC 212 it was held that the normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of

taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession. The Apex Court has held thus :-

"4. It is seen that entire gamut of the acquisition proceedings stood completed by 17.4.1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well settled legal position that it is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession."

11. In *Gokul Prasad vs. State of M.P. and another* 2003 (2) MPLJ 271 this Court has held that when the land has vested in the State and possession was taken, repeal of the principal Act did not affect the land so vested in the State as no proceeding was pending.

12. Here there is concurrent finding of fact recorded by the courts-below that possession has been taken by the State, land has been vested in the State of M.P. There is absolutely nothing to disbelieve the possession receipt (Ex.D.2) in the light of the aforesaid decisions and the evidence adduced in the instant case.

13. Both the courts-below have rightly held that suit was hopelessly barred by limitation. Plaintiff was very well aware of the proceedings. Still she did not file the suit to challenge the order within the period of limitation. Possession was taken in the year 1982. Suit has been filed on 20th June, 2000. It was hopelessly barred by limitation. Since possession was already taken by the State of M.P. No benefit of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 could be obtained by the plaintiff. Suit was clearly an attempt to flog the dead horse which was not permissible under the Repeal Act, 1999, the proceeding that has been concluded, possession had been obtained after issuance of due notification could not be reopened.

14. Consequently, I find no substantial question of law involved in the appeal. Appeal being of merit, is hereby dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2932

APPELLATE CIVIL

Before Mr. Justice A.K. Gohil

7 February, 2008*

STATE OF M.P. & anr.

... Appellants

Vs.

SURESH & anr.

... Respondents

Limitation Act (36 of 1963), Section 5 - Dismissal of State's application for condonation of delay in filing appeal - Appeal barred by 12 days - Officer-in-charge was transferred and got busy in some government work and real brother became seriously ill who subsequently died - Held - State is impersonal machinery - Sufficient ground shown for condonation of delay - Court should have taken pragmatic approach in considering the application and should have considered the law laid down by the Apex Court in objective manner - Appeal allowed and case remanded to hear appeal on merits. (Para 4)

परिसीमा अधिनियम (1963 का 36), धारा 5 - अपील पेश करने में हुए विलम्ब को क्षमा करने के लिए राज्य का आवेदन खारिज - अपील 12 दिन समय वर्जित - प्रभारी अधिकारी का स्थानान्तरण हो गया और वह कुछ सरकारी कार्यों में व्यस्त हो गया और सगा भाई गम्भीर रूप से बीमार हो गया जिसकी बाद में मृत्यु हो गई - अभिनिर्धारित - राज्य एक अवैयक्तिक संगठन है - विलम्ब माफी के लिए पर्याप्त कारण दर्शाया गया - न्यायालय को व्यवहारिक सोच अपनाने हुए शीर्ष न्यायालय द्वारा प्रतिपादित विधि पर वस्तुनिष्ठ रूप से विचार करते हुए आवेदन का निराकरण करना था - अपील मंजूर और अपील गुणदोषों पर सुनवाई के लिए प्रतिप्रेषित।

Case referred :

AIR 1987 SC 1353.

Lokesh Bhatnagar, G.A., for the appellants.

None, for the respondents.

J U D G M E N T

A.K. Gohil, J. :- This Second Appeal filed by the appellant under Section 100 of the Code of Civil Procedure against the order dated 16.7.98 passed by Additional District Judge, Sardarpur, District Dhar in Regular Civil Appeal No.13-A/97, whereby dismissed the application filed by the State under Section 5 of the Limitation Act for condonation of delay in filing the appeal, which was barred by 12 days, saying therein that no sufficient ground is made out for condonation of delay. This Second Appeal was admitted on 16.4.1999 on the following substantial questions of law :-

"(a) Whether in the facts and circumstances of the case the appellate Court below erred in law in rejecting the appellant's application for condonation of delay and dismissing their appeal as time barred ?"

2. I have heard Shri Lokesh Bhatnagar, learned Government Advocate for the appellants, and perused the order passed by the lower appellate Court. In the application filed under Section 5 of the Limitation Act for condonation of 12 days delay it was submitted that the certified copy of the judgment was forwarded to the office of Collector which was not received in time and in the meantime, the Officer-in-charge/Tehsildar was transferred and he was also busy in some Government work. It was also submitted that in the meantime, the real brother of the Officer-in-charge became seriously ill and subsequently, he died on 9.5.1997, therefore, the Officer-in-charge could not contact to Government Advocate to file appeal in time. In support of application, the affidavit of Advocate was filed but the application was dismissed on the ground that the affidavit of Officer-in-charge was not filed and delay was not explained satisfactorily.

3. In case of *Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others*, reported in AIR 1987 SC 1353, Hon'ble Supreme Court has held as under:-

"3. The legislature has conferred the power to condone delay by enacting S.5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of the justice that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. The Courts therefore have to inform with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits."

4. Thus, considering the law laid down by the apex Court, it is not in dispute that the State is impersonnel machinery and for the reason mentioned above the Officer-in-charge could not file appeal and there was only 12 days delay. As explained by the Officer-in-charge, in my opinion, there was sufficient ground for condonation of delay in this case. Lower appellate Court should have taken pragmatic approach in considering the application and should have considered the law laid down by the apex Court in objective manner. Accordingly, this appeal is allowed. The impugned order passed by the lower appellate Court is set aside and I.A.No. 1/97, an application for condonation of delay is allowed and delay in filing appeal is condoned. The case is remanded back to the lower appellate Court to hear and decide the appeal on merits. The appellant/State shall appear before the lower Appellate Court on 10 th of April, 2008. The Court will summon the respondents and after hearing the parties shall decide the appeal preferably

within a period of six months. Office is directed to remit the record of the trial Court as well as lower appellate Court, so that it may reach on or before 10th of April, 2008. Parties to bear their own costs.

Appeal allowed.

I.L.R. [2008] M. P., 2935

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

11 March, 2008*

BHARTI (KU.) & ors.
Vs.

... Appellants

STATE OF M.P. & ors.

... Respondents

A. Law of Torts - Medical negligence - Civil liability - Mother of appellants died during T.T. operation - Suit filed on ground of negligence of doctor - Suit dismissed - Appeal filed - Held - Simple lack of care incurred civil liability - Operation was not necessary for saving life - Lady doctor was negligent in discharging her duties in allowing an incompetent person (a dresser) to administer anaesthesia - At the time of incident appellants were aged between 11 to 2 years respectively, lost their mother - No amount of compensation can fill up the gap - Compensation of Rs.1,50,000/- with 6% interest awarded - Judgment & decree of trial court set-aside - Appeal allowed.
(Paras 12, 13. & 14)

क. अपकृत्य विधि - चिकित्सकीय उपेक्षा - सिविल दायित्व - अपीलार्थियों की माता की टी.टी. शल्यक्रिया के दौरान मृत्यु हुई - चिकित्सक की उपेक्षा के आधार पर वाद पेश किया - वाद खारिज - अपील पेश - अभिनिर्धारित - सावधानी की साधारण कमी से सिविल दायित्व उत्पन्न होता है - जीवन बचाने के लिए शल्यक्रिया आवश्यक नहीं थी - महिला चिकित्सक ने अक्षम व्यक्ति (ड्रेसर) को निश्चेतना देने के लिए अनुमत करने में उसके कर्तव्य निर्वहन में उपेक्षा की थी - घटना के समय अपीलार्थी क्रमशः 11 से 2 वर्ष के बीच थे जब उन्होंने उनकी माता को खोया - प्रतिकर की कोई राशि इस कमी को पूरा नहीं कर सकती - 1,50,000/- रुपये 6 प्रतिशत ब्याज सहित प्रतिकर अधिनिर्णीत किया गया - विचारण न्यायालय का निर्णय व डिक्री अपास्त - अपील मंजूर।

B. Evidence Act (1 of 1872), Section 104 - Medical negligence - Burden of proof - Burden to prove that in what circumstances appellants lost their mother was on the respondents - As the deceased was 30 years only and before two days of her death she delivered a healthy baby - Even if deceased was also willing for T.T. operation then it could not have been permitted in absence of anaesthetist - Mody's Medical Jurisprudence lays down that in case of death from anaesthesia, the surgeon or anaesthetist should at once report the matter to police to hold a public enquiry - No report was

lodged by the respondents and dead body was not sent for postmortem report - Medical negligence proved.

(Paras 8 & 12)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 104 - चिकित्सकीय उपेक्षा - सबूत का भार - यह साबित करने का भार कि किन परिस्थितियों में अपीलार्थियों ने अपनी माता को खोया, प्रत्यर्थियों पर था - चूंकि मृतक केवल 30 वर्ष की थी और मृत्यु के दो दिन पूर्व उसने एक स्वस्थ शिशु को जन्म दिया - यदि मृतक टी.टी. शल्यक्रिया के लिए इच्छुक थी, तो भी निश्चेतना विशेषज्ञ की अनुपस्थिति में इसकी अनुमति नहीं दी जा सकती थी - मोदी का विधिशोऽत्र अधिकथित करता है कि निश्चेतना से मृत्यु की दशा में शल्यचिकित्सक या निश्चेतना विशेषज्ञ को लोक जाँच करने के लिए तुरन्त मामले की रिपोर्ट पुलिस को करनी चाहिए - प्रत्यर्थियों द्वारा कोई रिपोर्ट दर्ज नहीं कराई गई और मृत शरीर को शव परीक्षण रिपोर्ट के लिए नहीं भेजा गया - चिकित्सकीय उपेक्षा साबित।

Case referred :

(2000) 5 SCC 182, (2005) 6 SCC 1, (2005) 7 SCC 1.

Rohit Mangal, for the appellants.

S.D. Bohra, G.A., for the respondent Nos.1 to 4.

None, for the respondent Nos.5 to 11 though served.

J U D G M E N T

N.K. MODY, J. :-Being aggrieved by judgment and decree dated 25.10.83 passed by Additional District Judge, Jhabua in Civil Suit No.3-B/1981, whereby the suit filed by the appellants for compensation was dismissed, the present appeal has been filed.

2. Short facts of the case are that the appellants who were minors filed a suit against the respondents for realization of a sum of Rs.1,50,000/- on 17.06.77 alleging that deceased Maltidevi Gidwani was the mother of the appellants and was working in the office of Animal Husbandry, Jhabua as accountant. The salary of the deceased Maltidevi was Rs.373/ per month. It was alleged that on 19.07.1976 Smt. Maltidevi Gidwani was hospitalized at district hospital, Jhabua where she delivered a son Laxman. It was alleged that after the delivery Maltidevi was pressurized by respondent Nos.5 to 7 for T.T. operation and upon her denying the deceased and her husband were threatened that the deceased and her husband shall be terminated from their job and the husband of the deceased shall be arrested under the provisions of MISA. It was alleged that under the pressure of respondents deceased Maltidevi agreed for the said operation. It was alleged that generally such type of Family Planning Operations are being done after 5 days and within 10 days from the date of delivery but it was decided by the respondents to operate the deceased on 21.07.76 i.e. within 5 days. It was further alleged that respondent No.5 was not competent to perform the operation. It was alleged that since the anaesthesia was administered by an unauthorized person and life saving drugs were not available in the hospital, therefore, because of the carelessness and negligence on the part of the respondents, appellants lost their

mother. It was also alleged that thereafter the newly born baby also passed away. It was alleged that for the operation consent of the deceased was not taken. On the contrary, inspite of refusing, the operation was conducted after taking the consent by application of undue influence that the deceased and her husband will lose the job and will be booked in MISA, as it was a period of emergency. It was alleged that before administering the anaesthesia deceased was not informed about the probable dangers. It was alleged that before the operation, her blood pressure was not checked. Anaesthesia was given by one Dulesingh respondent No.8, who was a dresser and was not authorized to administer the anaesthesia but because of carelessness and negligence of the respondents the anaesthesia was administered by respondent No.8. Deceased was not examined clinically before administration of anaesthesia. It was also alleged that the operation ought to have been done after 5 days of delivery, but was administered only after 2 days. No permission was obtained from the Civil Surgeon. Respondent No.5 was not a competent doctor. There was no proper arrangement of oxygen and after the death of Maltidevi no post-mortem of the dead body was performed. It was alleged that husband of the deceased Maltidevi was sitting outside, who was informed at about 11.30 a.m. that Maltidevi his wife has expired. It was alleged that because of the negligence on the part of respondents, appellants lost their mother. Appellants claimed a sum of Rs.1,50,000/- on various heads.

3. The suit was contested by the respondent Nos.1 to 4 state and also by other respondents by filing the written statement, wherein it was denied that there was any negligence on the part of any of the respondents. It was also denied that the nature of the operation was serious. It was also denied that any type of carelessness or negligence was there on the part of respondents. It was alleged that there was shortage of doctor of anaesthesia, therefore, anaesthesia is being given by the dresser respondent No.8, who was competent because of experience. It was alleged that deceased was having 6 live children, therefore, deceased was also interested in T.T. operation. It was also alleged that cause of death was due to cardiac arrest during Tubertomy operation under general anaesthesia. It was alleged that since there was no negligence on the part of respondents, therefore, the suit deserves to be dismissed and same be dismissed.

4. On the basis of the pleadings of the parties, learned Trial Court framed the issued, recorded the evidence and dismissed the suit against which the present appeal has been filed.

5. Shri Rohit Mangal, learned counsel for the appellants argued at length and submits that the learned Trial Court committed error in dismissing the suit. It is submitted that from the pleadings itself, it was proved that the anaesthesia was given by a person, who was not competent, therefore, there was no justification on the part of learned Court below in dismissing the suit. It was alleged that deceased Maltidevi was a young lady and delivered the son before 2 days. It is

submitted that the burden of proof was on the respondents to prove that in what circumstances Maltidevi died at the time of T.T. operation and why she could not be saved. It is submitted that appeal be allowed and judgment and decree passed by learned Court below be set aside.

6. Shri S.D. Bohra, learned counsel for respondent Nos.1 to 4 submits that after due appreciation of evidence learned Trial Court dismissed the suit, which requires no interference.

7. From perusal of the record it is evident that to prove the case appellants examined Lakhmichand as PW/1, Chandrakant as PW/2, V.K. Shrivastava as PW/3 and Udhav Gidwani as DW/1. While, the respondents examined Basant Rao Pawar as DW/2, S.H.Yadav as DW/3, Martand Rao as DW/4, Omprakash Chaudhary as DW/5, Amerandranarayan Mishra as DW/6 and Dr.(Mrs.) Ratnamala Thakur as DW/7. Respondents filed 29 documents out of which Ex.D/7 to D/15 are the complaints made by the husband of the deceased. Ex.D/18 is the bed head ticket which also contains the consent of the husband of deceased for the operation. Ex.D/19 is the statement of husband of deceased recorded on 24.07.76. Ex.D/20 and 21 is record of availability of oxygen cylinder. Ex.D/22 and 23 is the report of blood and urine of the deceased. According to Ex.D/18 bed head ticket of deceased patient delivered the baby on 19.07.76. There is a note in the handwriting of Dr. Ratnamala Thakur to the effect that the massage was continued for one hour alongwith mouth to mouth respiration but PT. could not be revived. Hence efforts left and closed and PT. declared dead. It is also mentioned that Dr.O.P.Kelotra was present throughout and Dr.N.R.Bhargava was present during resuscitation.

8. Modi's Medical Jurisprudence and Toxicology (Twentieth Edition) lays down that in the case of death from anaesthesia the surgeon or anaesthetist should at once report the matter to the police for holding a public inquiry. In the jurisprudence it is also mentioned that sudden death during anaesthesia is of considerable medico-legal importance, one should remember that sometimes it may be to inexperience and defective judgment of an anaesthetist. Any of the following factors may be responsible for death during anaesthesia:-

- (a) Giving or repeating of drugs like morphia, atropine, nembutal etc. before anaesthesia at wrong time.
- (b) Vagal inhibition while putting an intratracheal tube.
- (c) As a result of faulty use of relaxants and hypotensive drugs.
- (d) Accidents which may cause obstruction of airway or spasm resulting in asphyxia.
- (e) The amount and type of drug used for anaesthesia and duration of anaesthesia may have a fatal effect.

- (f) Hypotension as a result of spinal anaesthesia.
- (g) In advertently giving a wrong gas during anaesthesia or rarely causing an explosion. Dangerous combinations are oxygen and cyclopropane or ether which may be ignited by an accidental spark.
- (h) Shock due to operation itself, myocardial or coronary disease of the heart, fat or air embolism, hypothermia or incompatible blood transfusion may be other causes. While doing a post-mortem, it is difficult to evaluate the cause of death, as usually there is no evidence of sudden fall of blood pressure, cardiac irregularities or glottic spasm, which may have been contributory of sudden death. Toxicological analysis may help.

9. In the matter of *State of Haryana V/s. Santra (Smt.)* Reported in (2000) 5 SCC 182, the Hon'ble Apex Court has held that Medical negligence plays its game in strange ways. Sometimes it plays with life; sometimes it gifts an "unwanted Child. Negligence is a "tort". Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This what is known as "implied undertaking" by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. Where a person is guilty of negligence per se, no further proof is needed. It was also observed that if it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent."

10. In the matter of *Jakob Mathew Vs. State of Punjab and Another* reported in (2005) 6 SCC 1, the Hon'ble Apex Court has held that "The essential components of negligence as recognized, are three : "duty", "breach" and "resulting damage", that is to say :

- (1) the existence of a duty to take care, which is owed by the defendant to the complainant;
- (2) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and
- (3) damage, which is both casually connected with such recognized by the law, has been suffered by the complainant."

"Thus, a clear distinction exists between simple lack of care incurring civil liability and "very high degree of negligence" which is required in criminal cases".

11. In the matter of *State of Punjab Vs. Shiv Ram and Others* Reported in (2005) 7 SCC 1, the Hon'ble Apex Court has observed that A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise with reasonable competence in the given case, the skill which he did possess.

The medical profession is one of the oldest profession of the world and is the most humanitarian one. There is no better service than to serve the suffering, wounded and the sick. Inherent in the concept of any profession is a code of conduct, containing the basic ethics that underline the moral values that govern professional practice and is aimed at upholding its dignity. Medical ethics underpin the values at the heart of the practitioner-client relationship. In recent times, professionals are developing a tendency to forget that the self-regulation which is at the heart of their profession is a privilege in return for an implicit contract with society to provide good, competent and accountable service to the public. It must always be kept in mind that a doctor's is a noble profession and the aim must be to serve humanity, otherwise this dignified profession will lose its true worth. In recent times the self-regulatory standards in the profession have shown a decline and this can be attributed to the overwhelming impact of commercialization of the sector. There are reports against doctors exploitative medical practices, misuse of diagnostic procedures, brokering deals for sale of human organs, etc. It cannot be denied that black sheep have entered the profession and that the profession has been unable to isolate them effectively. The need for external regulation to supplement professional self-regulation is constantly growing. The high costs and investments involved in the delivery of medical care have made it an entrepreneurial activity wherein the professional look to reaping maximum returns on such investment. Medical practice has always had a place of honour in society; currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation; whether internal or external. There is need for introspection by doctors – individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role.

12. In the light of the aforesaid position of law, it is to be examined whether the cause of death of Maltidevi was because of negligence on the part of respondents or not. Even if it is assumed that all the facilities were available at the district hospital, Jhabua for which number of documents has been filed, then too, fact remains that at the relevant time no competent person was available in the hospital to administer anaesthesia. Respondents have admitted in their respective written statement that the respondent No.8 was a dresser and because of the shortage of anaesthetist the respondent No.8 was administering the anaesthesia. The operation of Maltidevi was not necessary for saving her life. If that would have been the situation, then anaesthesia could have been administered by respondent No.8. Since there was no emergency, therefore, it was the duty of the respondent No.5/ Dr. Ratnamala Thakur not to allow the administration of anaesthesia by a person who was not competent for that job. Respondent No.5, who was a lady doctor was negligent in discharging her duties in allowing an incompetent person to administer anaesthesia. The burden to prove that in what circumstances appellants lost their mother was on the respondents, as the age of the deceased was 30

years only and before 2 days of her death, she delivered a healthy baby and mother and child were enjoying good health. Even if the deceased was also willing for T.T. operation as she was having 6 children, then it could not have been permitted in absence of anaesthetist. The bed head ticket does not disclose the date on which the operation took place. No report was lodged by respondent No.5. Dead body was not sent for post-mortem. Other doctors who were present at the relevant time whose names are mentioned in Ex.D/18 has not been examined. No more proof of negligence is necessary.

13. It appears that in those days when deceased was operated, it was made compulsory in the tribal areas for the patients for Family Planning Operation without any proper arrangements. Learned Court below has also held that the respondent No.8 was a dresser and was not possessing any qualification to administer anaesthesia, but since the Family Planning Operation was the cause of nation, therefore, respondent No.8, who was an experienced person was allowed to administer the anaesthesia in the tribal areas, and for which respondents can not be held liable. The findings of the learned Court below are illegal and deserves to be set aside. In the opinion of this Court Dr.Ratnamala Thakur and other doctors who were in-charge of the hospital did not take care about the patient and allowed an incompetent person to administer the anaesthesia.

14. Appellants who are 5 in numbers, were aged 11 years to 2 years respectively at that time when they lost their mother at the time when they were badly in need of. No amount of compensation can fill-up the gap. It is not in dispute that Smt. Maltidevi Gidwani was working woman and was in the services of State Govt. In the fact and circumstances of the case the appeal deserves to be allowed and is hereby allowed. Judgment and decree passed by the learned court below is set aside. Appellant shall be entitled for a sum of Rs.1,50,000/- as compensation on account of death of their mother. This amount shall carry interest @ of 6% per annum from the date of suit till realization. In case the amount is not deposited within two months then the respondents (except husband of deceased) shall be liable to pay interest @ 12% per annum. The enhanced interest shall be recoverable from the officers, who shall be found at fault in not making the payment in time. The amount shall be distributed by the learned Court below between the appellants equally. Respondent/state shall be at liberty to recover the amount from any of the respondent, who shall be found negligent (except respondent No.11). Respondents shall also bear the cost of appellants of both the courts.

Appeal allowed.

I.L.R. [2008] M. P., 2942

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

29 April, 2008*

MOHD. ALEEM

... Appellant

Vs.

BANK OF INDIA & ors.

... Respondents

Civil Procedure Code (5 of 1908), Section 151, Order 21 Rule 64, 66, 67, 83, 90, 92, Order 34 Rule 5 - Auction of mortgaged property for realisation of the decree amount - Proclamation of sale made on a particular date but sale taking on some other day for which separate proclamation not made - After auction the sale certificate issued in favour of respondent No.5 - Action challenged in for setting-aside the sale - Held - Order is governed by Order 34 and its rules of CPC and that itself is a code to deal with the decree passed in mortgage suit - In the entire scheme of Order 34 of CPC, there is no provision like Order 21 Rule 64, 66, 67 and 69 of CPC - Therefore, objection filed by appellant before executing court u/o 21 Rule 92 was not entertainable and executing court has not committed any error in dismissing the same - Appeal dismissed. (Para 12)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151, आदेश 21 नियम 64, 66, 67, 83, 90, 92, आदेश 34 नियम 5 - डिक्री धन की वसूली के लिए बंधक सम्पत्ति की नीलामी - विक्रय की उद्घोषणा विशिष्ट तारीख को की गई किन्तु विक्रय किसी अन्य तारीख को किया गया जिसके लिए पृथक उद्घोषणा नहीं की गई - नीलामी के बाद विक्रय प्रमाण पत्र प्रत्यर्थी क्र. 5 के पक्ष में जारी किया गया - विक्रय को अपास्त कराने के लिए कृत्य को चुनौती दी गई - अभिनिर्धारित - आदेश सि.प्र.सं. के आदेश 34 और उसके नियमों से शासित होता है और वह स्वयं बंधक वादों में पारित डिक्री के लिए एक संहिता है - सि.प्र.सं. के आदेश 34 की पूरी स्कीम में सि.प्र.सं. के आदेश 21 नियम 64, 66, 67 और 69 के समान कोई उपबंध नहीं है - इसलिए अपीलार्थी द्वारा आदेश 21 नियम 92 के अन्तर्गत निष्पादन न्यायालय के समक्ष पेश आपत्ति ग्रहण किये जाने योग्य नहीं थी और निष्पादन न्यायालय ने उसे खारिज करने में कोई त्रुटि नहीं की - अपील खारिज।

Cases referred :

(1997) 9 SCC 636, CR 786/2004 order dated 27.07.2002, (1994) 1 SCC 131, AIR 1995 SC 1971, AIR 1998 Kerala 395, AIR P&H 264, AIR 1999 SC 3750.

Pushpendra Yadav, for the appellant.

Rajesh Mainderetta, for the respondent No.1.

A.P. Singh, for the respondent No.5.

ORDER

U. C. MAHESHWARI.J. :-The appellant/judgment debtor No.3 has directed this appeal under Order 43 rule 1(J) of the CPC being aggrieved by the order dated 7.11.06 passed by the IInd Addl. District Judge, Bhopal in Execution Case

No.424/05. dismissing his application filed under Order 21 rule 90 read with Section 151 of the CPC for setting aside the auction proceedings in respect of the mortgaged and the charged property of the impugned decree.

2. The facts giving rise to this appeal in short are that respondent No.1/ plaintiff instituted the suit against the appellant and respondents 2 to 4 for recovery of Rs.5,85,677/- and interest with a prayer to sale the mortgaged property under Order 34 rule 5 of the CPC to recover such sum. The same was decreed on dated 15.2.99. Under execution of such decree the mortgaged property of appellant was placed on auction and the same was knocked down in favour of respondent No.5, on which the appellant filed the aforesaid application Under Order 21 rule 90 read with Section 151 of the CPC contending that the proclamation notice of such sale issued under Order 21 rule 66 of the CPC was never served personally on the appellant and respondents 2 to 4. The same was published in the Newspaper "Sandhya Prakash" on dated 21.6.02 whereby the date 13.11.02 for auction of such property was fixed. Having knowledge of the aforesaid proclamation, appellant filed an application under Section 151 of the CPC seeking permission to file his objections in that regard but the same was dismissed by the executing court vide order dated 13.7.04. Subsequent to it, the auction sale was not conducted on the date fixed by the aforesaid proclamation and thereafter without issuing any new proclamation under Order 21 rule 69 read with rule 67 of the CPC, the auction proceeding was carried out and the sale was knock-down in favour of respondent No.5 on dated 18.10.06 in consideration of Rs.7.00.000/-, whereas as per the present market rate the property was having the worth of Rs.20 lacs. The copy of the price-index obtained from the district registrar, Bhopal is also annexed with it. As per further averments, the impugned decree could have been satisfied by selling some part of the aforesaid property and executing court was bound to follow the mandatory provisions of Order 21 rule 64 of the CPC in that regard. In such premises the prayer for setting aside the aforesaid auction sale is prayed. The same was not replied on behalf of the respondent No. 1 the decree holder. On consideration, the executing court has dismissed the aforesaid application by the impugned order. Being dissatisfied with it the appellant, judgment debtor No.3 has come forward to this court with this appeal.

3. Shri Pushpendra Yadav, learned counsel for the appellant assailed the impugned order saying that the aforesaid auction proceeding was carried-out without following the mandatory provision of order 21 rule 66 to rule 69 of the CPC. By elaborating his arguments he said that after publication of the proclamation of sale if the auction proceeding was not carried on the date fixed then the court was duty bound to issue new proclamation in that regard under Order 21 rule 69 read with rule 67 of the CPC. The same was not complied with and contrary to it, the auction proceeding was carried-out. He further said that the alleged property was having the worth of Rs.20 lacs, while the impugned decree was passed for the

sum of Rs.5,85,677/- and its interest and cost. The same could have been satisfied only by disposing some part of such property and placing the entire property on auction was not necessary in view of Order 21 rule 64 of the CPC but such mandatory provision has not been complied with by the executing court and the property of the appellant having worth of Rs.20,00,000/- was knocked-down only for consideration of Rs.7,00,000/-, thereby the right of the appellant has been prejudiced at large and on upholding the aforesaid auction proceedings, the appellant has to suffer irreparable injury which could not be compensated subsequently in any manner. He also placed his reliance on some reported cases and prayed for setting aside the impugned order and the auction proceedings by allowing this appeal.

4. Responding the aforesaid arguments. Shri Rajesh Maineretta counsel for the respondent No. 1/decreed holder, by justifying the impugned order said that the provision of Order 21 relating to the execution of the decree are not applicable to the present case as the impugned decree has been passed by the trial court in favour of respondent No. 1 under the provision of Order 34 and its rules of CPC for recovery of the sum with a direction to recover the same by auctioning the charged and mortgaged property. By referring the provision of Order 34 of the CPC he said that the execution of the impugned decree is governed by such provision and provision of Order 21 does not have over-riding effect over such provision. By elaborating his arguments, he said that under Order 34, there is no such provision as enumerated under Order 21 rule 64 of the CPC, hence the executing court was not bound to direct to put the part of the property on auction on the contrary the trial court was bound to put the property for auction in accordance with the decree and the same was ordered. It was also argued that in accordance with the provision of Order 21 rule 83 of the CPC at any stage of the proceedings before knocking down the auction proceedings, the appellant did not show his desire to deposit the entire decretal sum to satisfy the decree. Thus, the impugned order does not require any interference and prayed for dismissal of this appeal.

5. Shri A.P.Singh, learned appearing counsel for respondent No.5 the auction purchaser, by adopting the arguments advanced by Shri Maineretta has further said that in compliance of the provision of Order 34 rule 4 and 5 of the C.P.C on completion of the sale proceedings, the sale certificate has also been issued in his favour. He further said that the provision of order 21 of the CPC is not applicable to the present case. hence, the Executing court has rightly dismissed the objection of the appellant and prayed for dismissal of this appeal.

6. Having heard the counsel after perusing the papers and the impugned order. I am of the view that the executing court has not committed any error in dismissing the aforesaid objections of the appellant. It is apparent on record that the impugned decree has been passed in a suit filed by respondent No.1 under Order 34 and its

rules of the CPC for recovery of the outstanding sum of the loan for which the appellant was one of the surety who placed the disputed property under the equitable mortgage with respondent No. 1. for repayment of the aforesaid loan. It is undisputed fact that under execution of such decree by holding the auction proceeding of the alleged property the sale was knocked-down in favour of respondent No.5, in whose favour, the sale-certificate has also been issued.

7. It is not a case of normal money-decree in which the property is attached during execution of the decree and then put for auction. In the decree impugned, the mortgaged property of the appellant was directed to be sold for recovery of the decretal sum. Since, the impugned property was the charged and mortgaged property in respect of the loan transaction.

8. The suit relating to the mortgaged property are governed by the provisions of Order 34 of the CPC and the decree of such suit is also governed by the same. In such premises the proceeding of final decree is carried-out under the same provision and not under the provision of Order 21 of the CPC. In other words the provision of Order 21 relating to the execution of the other decree are not applicable for the execution of the decree passed under Order 34 of the CPC. Such question was also answered by the Apex Court in the matter of *S.Sivaprakasam Vs. B.V. Muniraj and others*-1997(9) SCC 636 in which it was held as under :-

"6.....The procedure under Order 34 is entirely distinct and different from the procedure prescribed under Order 21. Order 21 deals with execution of decrees and orders and objections therein other than those relating to the property covered in mortgage decree. Order-34 is a special procedure prescribed relating to mortgages. Therefore, the procedure prescribed under Order 21, Rule 92 has no application as regards the passing of final decree under Order 34, Rule 5 CPC. Thus considered, we hold that the action taken by the executing court is not vitiated by any error of law, warranting interference."

The same principle is followed by this court in the matter of *Suraj Singh Vs. Union Bank of India and others* passed in Civil Revision No.786/2004 vide order dated 27.2.2002.

9. In view of the aforesaid dictum the Order 21 and its rules of CPC was not applicable for execution of the impugned decree then the objection filed by the appellant under Order 21 rule 90 of the CPC was also not entertainable and in that background the approach of the executing court appears to be in accordance with law, although such approach is based on appreciation of the facts in some different manner keeping in view the provision of Order 21 of the CPC.

10. So far Order 21 rule 64 of the CPC is concerned, this Court does not have any dispute that such provision is mandatory and on carrying-out any auction proceedings in violation of such provision, is liable to be vitiated. The same is laid

down by the Apex Court in the matter of *Desh Bandhu Gupta Vs. N.L. Anand & Rajinder Singh*-(1994) 1 SCC 131. But the same is not applicable to the present case in view of the findings of the foregoing paras of this order by which it was held that provision of Order 21 CPC is not applicable to the case at hand.

11. Although, on behalf of the appellant in support of his submissions the Case Laws' AIR 1995 SC 1971 (*Nani Gopal Paul V. T. Prasad Singh*), AIR 1998 (Kerala) 395 (*Regi George V. K.K. Bhaskaran Nair*), 2002 (*Punjab & Haryana*) 264 (*Randhir Singh Vs. New Bank of India*), 1999 SC 3750 (*U. Nilan V. Kannayyan*), are cited but all such decisions are based on the provision of Order 21 of the CPC although, this court did not have any dispute for the principle laid down in such cases but in the case at hand, in view of the aforesaid findings, the same are not helping to the appellant.

12. In view of the aforesaid, it is held that the impugned order is governed by Order 34 and its rules of the CPC and that itself is a code to deal with the decree passed in the mortgage suit. On perusing the entire scheme of Order 34 of the CPC, I have not found any provision like Order 21 rule 64 of the CPC in it. Even the provisions like Order 21 rule 66, 67 and 69 of CPC are also not there. Therefore, firstly, the objection filed by the appellant before the executing court under Order 21 rule 92 was not entertainable and secondly it is held that the executing court has not committed any error in dismissing the same. In such premises, the order of the executing court does not appear to be perverse or illegal in any manner. Apart the above, I would like to mention here that while holding the auction proceedings by the executing court some application for submitting the objection was filed by the appellant under Section 151 of the CPC. The same was dismissed on dated 13.7.2004, on which, no Appeal or Revision was preferred by the appellant. Subsequent to it, after completion of the auction proceeding, the impugned objection was filed by the appellant but it is apparent that at any point of time, he did not wish to satisfy the impugned decree by depositing the sum. Therefore, on this count also he does not deserve for any relief as prayed in this appeal.

13. Under the aforesaid premises, I have not found any merit in this appeal, hence by affirming the impugned order, this appeal is hereby dismissed. However, in the facts and circumstances of the case, there shall be no order as to the cost.

Appeal dismissed.

I.L.R. [2008] M. P., 2947

APPELLATE CIVIL

Before Mr. Justice K.K. Lahoti

19 June, 2008*

SHEIKH HAMEED & ors.

... Appellants

Vs.

SHEIKH MAJHAR & anr.

... Respondents

A. Civil Procedure Code (5 of 1908) [As stood prior to amendment came into force w.e.f. 01.02.1977], Sections 2(2) & 47 - *Prior to amendment, determination of any question u/s 47 of CPC was having force of a decree as prior to amendment defined u/s 2(2) CPC.* (Para 8)

क. सिविल प्रक्रिया संहिता (1908 का 5) [01.02.1977 से प्रभाव में आये संशोधन के पूर्व की स्थिति], धाराएँ 2(2) व 47 - संशोधन के पूर्व सि.प्र.सं. की धारा 47 के अन्तर्गत किसी प्रश्न का अवधारण डिक्री का प्रभाव रखता था जैसा कि संशोधन के पूर्व सि.प्र.सं. की धारा 2(2) में परिभाषित था।

B. Civil Procedure Code (5 of 1908) [As stood prior to amendment came into force w.e.f. 01.02.1977], Section 11 - *Prior to amendment, an adjudication or determination of any question u/s 47 of CPC determining rights of the parties was a decree between parties - Such order has attained finality and is having effect of res judicata between the parties - Held - Suit filed by plaintiffs was barred u/s 11 of CPC - They were not entitled to file a fresh suit for adjudication of questions which were already decided u/s 47 of CPC.* (Para 9)

ख. सिविल प्रक्रिया संहिता (1908 का 5) [01.02.1977 से प्रभाव में आये संशोधन के पूर्व की स्थिति], धारा 11 - संशोधन के पूर्व पक्षकारों के अधिकारों को अवधारित करते हुए सि.प्र.सं. की धारा 47 के अन्तर्गत किसी प्रश्न का न्यायनिर्णयन या अवधारण पक्षकारों के मध्य डिक्री था - ऐसा आदेश अंतिम हो गया और पक्षकारों के मध्य पूर्व न्याय का प्रभाव रखता है - अभिनिर्धारित - वादियों द्वारा पेश वाद सि.प्र.सं. की धारा 11 के अन्तर्गत वर्जित था - वे सि.प्र.सं. की धारा 47 के अन्तर्गत पहले ही विनिश्चित कर दिये गये प्रश्न के न्यायनिर्णयन के लिए नवीन वाद पेश करने के हकदार नहीं थे।

C. Civil Procedure Code (5 of 1908) [As stood prior to amendment came into force w.e.f. 01.02.1977], Order 21 Rules 99, 100, 101 & 103 - *Objectors' objections u/O 21 Rules 99, 100 & 101 CPC were dismissed by the trial court on 16.10.1975 - After dismissal of the objections objectors ought to have filed a suit as required u/O 21 Rule 103 CPC and limitation of one year was provided under Article 98 of Limitation Act, 1963 - Order 21 Rule 103 CPC was amended and a new rule was substituted w.e.f. 01.02.1977 - Now rule specifically provides that order deciding an application under Rule*

98 or Rule 100 of Order 21 shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree, meaning thereby that an order u/O 21 Rules 98 & 100 CPC has been given effect to as of decree and no fresh suit is maintainable. (Paras 10 & 11)

ग. सिविल प्रक्रिया संहिता (1908 का 5) [01.02.1977 से प्रभाव में आये संशोधन के पूर्व की स्थिति], आदेश 21 नियम 99, 100, 101 व 103 — आपत्तिकर्ताओं की सि.प्र.सं. के आदेश 21 नियम 99, 100 व 101 के अन्तर्गत आपत्तियाँ विचारण न्यायालय द्वारा 16.10.1975 को खारिज की गई — आपत्तियों के खारिज होने के बाद आपत्तिकर्ताओं को सि.प्र.सं. के आदेश 21 नियम 103 की अपेक्षानुसार वाद पेश करना चाहिए था और परिसीमा अधिनियम, 1963 के अनुच्छेद 98 के अन्तर्गत एक वर्ष की परिसीमा उपबंधित की गई थी — सि.प्र.सं. का आदेश 21 नियम 103 संशोधित हो गया और तारीख 01.02.1977 से नया नियम प्रतिस्थापित किया गया — अब नियम विनिर्दिष्ट रूप से उपबंधित करता है कि आदेश 21 नियम 98 या नियम 100 के अन्तर्गत किसी आवेदन को विनिश्चित करने वाला आदेश वही प्रभाव रखेगा और उन्ही शर्तों के अधीन होगा जैसा कि किसी अपील या अन्य कार्यवाही की लिए होती, यदि वह डिक्री होता, इसका तात्पर्य यह है कि सि.प्र.सं. के आदेश 21 नियम 98 व 100 के अन्तर्गत आदेश को डिक्री के समान प्रभाव दिया गया है और कोई नवीन वाद पोषणीय नहीं है।

Case referred :

AIR 1983 MP 82.

A.K. Choubey, for the appellants.

Sidharth Gulatee, for the respondents.

J U D G M E N T

K.K.LAHOTI, J.:—This appeal is directed against the judgment and decree dated 4.1.1993 by the First Additional Judge to the Court of District Judge, East Niwar, Khandwa in Civil Appeal No.24-A/84, by which the judgment and decree dated 4.4.1984 in Civil Suit No.48-A/1983 by First Additional Civil Judge to the Court of Civil Judge Class I, Khandwa, was affirmed.

2. This appeal was admitted on 15.9.1999 on the following substantial questions of law:

1. "Whether the plaintiff/appellants' suit is based on title or it is a suit under Order 21 Rule 103 C.P.C.
2. Whether the suit is within limitation?
3. From which date the limitation started running for this suit i.e. whether from the date of deciding of objections under Section 47 C.P.C or from the date of decision of its appeal or from the date of decision of objections under Order 21 rule 99 C.P.C or from the date of decision of appeal from that order or from the date of decision of revision from that order or any other date?

4. Whether the objections under Section 47 CPC filed by the plaintiffs earlier is to be treated as objections under Order 21 Rule 99 CPC for purposes of counting limitation?"

3. (a) The learned counsel for the appellants submitted that the Court below erred in dismissing the suit of the appellants on the grounds of limitation. The objections preferred by the appellants under Order 21 Rule 99 C.P.C were decided by the trial Court on 16.10.1975. Thereafter an appeal was preferred by the appellants which was registered as Civil Appeal No.35/75 and it was dismissed on 10.1.1976. Against this order, the appellants preferred a civil revision before the High Court which was registered as C.R. No.182/1976 and dismissed on 20th April, 1978.. Thereafter the present suit was filed under Order 21 rule 103 on 25.7.78 which was within a period of one year and under Article 98 of the Limitation Act, the suit was within the period of limitation. The Court below erred in dismissing the suit as barred by limitation. Reliance was placed to a Single Bench judgment of Allahabad High Court in *Gopal Lal vs. Ram Karan Singh*: AIR 1974 Allahabad 44.

(b) Though the objections were preferred by appellants Umraobi and Sheikh Hamid on 2.1.1999, but these persons were not parties in the earlier litigation filed by Sheikh Farid and Mst. Hayatbi under Section 47 of the C.P.C. which was registered as MJC no.15/73 and was dismissed on 1.8.1973, so the objections filed by Umraobi and Sheikh Hamid were independent to the objections suit filed under Section 47 of the CPC, but the Court below erred in taking into consideration the aforesaid order, while deciding the present suit filed by the appellants. It was submitted that this appeal be allowed and the judgment and decree passed by the Court below be set aside.

(c) That, the Courts below had not considered the case of the appellants on merits and rejected it merely on the ground of limitation. Earlier also there was no adjudication on merits in respect of the title of the appellants who purchased the property from Manohar Lal Barole by a registered sale deed dated 8.1.1973. The appellants were having independent title, filed the suit to establish their title. As earlier there was no adjudication on merits, so in the present suit, the trial Court ought to have adjudicated the title.

4. Shri Sidharth Gulati, appearing for the respondents, opposed the contention and submitted that the appellants had purchased the property after judgment and decree on 13.3.1972 in Civil Suit No. 88-A/71 filed by the respondents, against Mst. Hayatbi and Sheikh Farid. Against the aforesaid judgment and decree, appeal was preferred by Mst. Hayatbi and Sheikh Farid, as Civil Appeal No.40-A/72, which was dismissed on merits on 19.8.1972. After the decision of the eviction suit against Mst. Hayatbi and Sheikh Farid, these persons purchased the property

from Manoharlal Barole. Other two purchasers were son and mother of Sheikh Farid, who were also bound by the judgment and decree passed in earlier suit, against Mst. Hayatbi and Sheikh Farid under Section 23 of the Madhya Pradesh Accommodation Control Act, 1961.

That, even if the contention of the appellants is accepted that the civil suit was filed within a period of one year from 20th April, 1978 when Civil Revision No.182/1976 was dismissed, then at that time, the Civil Procedure Code was amended by Act No. 104 of 1976-with effect from 1.2.1977 and after dismissal of the objection under Order 21 rule 99 read with 103 C.P.C. a fresh suit was barred as held by the Division Bench in *Dattatray vs. Mangal* AIR 1983 MP 82 and submitted that this appeal is without merit and may be dismissed.

5. The appellant in reply to the contentions made by Shri Sidharth Gulatee submitted, that the appellants, bona fide contested the matter in appeal and revision after dismissal of the objections under Order 21 Rule 99 C.P.C. on 16.10.75 and the period be excluded under Section 14 of the Limitation Act. It was submitted by Shri Choubey that he has now moved an application in the High Court in this case under Section 14 of the Limitation Act S.A.No.6864/2008 on 19.6.2008 for exclusion of the time spent in the aforesaid proceedings. If the aforesaid application is allowed, the suit filed by the appellant can be treated as within the limitation.

6. To appreciate the aforesaid contentions, factual position in the present case may be looked into.

(a) The suit property is a residential house situated at Mohalla Khadakpur Ward No.16, in the township of Khandwa. This house belonged to Sheikh Babu, who was father of respondents Sheikh Mazar and Mst. Jebunisha. After the death of Sheikh Babu, respondents succeeded the property. In the aforesaid house, the appellants Mst. Hayatbi and Sheikh Farid were residing as tenants.

(b) Sheikh Mazar and Mst. Jaibunnisa filed a suit for eviction, based on landlord tenant relationship, against Mst. Hayatbi and Sheikh Farid, which was registered as Civil Suit No.88-A/71 in the Court of First Civil Judge Class-2, Khandwa and was decreed on 13.3.1972. Against the aforesaid judgment and decree, Mst. Hayatbi and Sheikh Farid preferred a Civil Appeal No. 40-A/72 which was also dismissed by the Additional District Judge, Khandwa judgment and decree dated 5.12.1972. These judgment and decree were not challenged further by the defendants and had attained finality.

(c) After the aforesaid judgment and decree, the plaintiffs of present case namely, Sheikh Hameed, Umraobi, Mst. Hayatbi & Sheikh Farid purchased the suit house from Manoharlal Barole by registered sale deed dated 8.1.1973. The aforesaid Manoharlal Barole sold the aforesaid property on the strength of a registered will dated 17.4.1961, allegedly

bequeathed by Sheikh Babu and after the death of Sheikh Babu on the basis of the will, he claimed property as an owner.

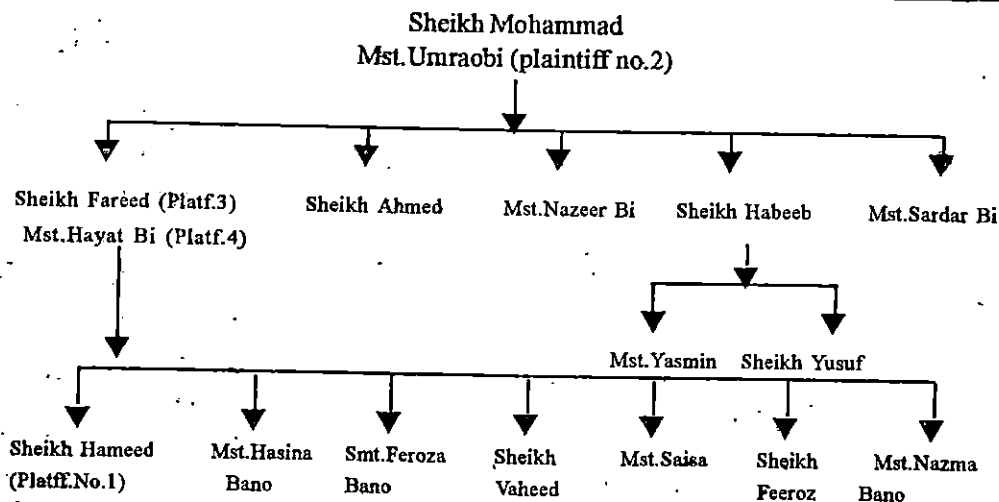
(d) After the purchase of property, Sheikh Farid and Mst. Hayatbi filed an application under Section 47 of the C.P.C. before the Civil Judge Class I, Khandwa which was registered as MJC No.51/73. These objections were dismissed by the aforesaid Court on 1.8.1973 against which an appeal M.A.No.24/73 was preferred by Sheikh Farid and Mst. Hayatbi, but it was dismissed by the order dated 30th June 1975. Against this order, no further appeal or revision was preferred by Sheikh Farid and Mst. Hayatbi and this order has also attained finality.

(e) After dismissal of the objections by the appellate Court on 30.6.1975 in Misc.Appeal No.24/73, on 4.7.1975 Umraobi and Sheikh Hamid filed an application under Order 21 Rules 99, 100 & 101 CP.C against Sheikh Mazar and Zebunnisa. This objection was dismissed by the trial Court on 16.10.1975. These persons preferred a Civil Appeal No.35/75 which was also dismissed on 10.1.1976. A civil Revision no.182/76 was preferred before this Court which was dismissed by the order dated 20th April, 78. This Court while dismissing the revision held thus:

"5. From a narration of the relevant facts, it is obvious that the present petitioners who are close relations of the judgment-debtors have obviously been set up to repeat the objections which have earlier been rejected after due enquiry. In M.J.C.No.51/73, to which the petitioners were also parties, the very same objection was taken by the judgment-debtors for themselves and also for the petitioners because joint title as purchasers was claimed in the judgment-debtors along with the petitioners. After rejection of that objection by the executing Court, the appeal against that order was also dismissed and that order has become final. This fact alone clearly shows that a fresh set of objections filed by the petitioners repeating the very same objections, to say the least, is an abuse of the process of Court.

6. It is not necessary in the present case to decide whether the appeal filed in the Court below against rejection of the objection by the executing Court was maintainable or not because I have no hesitation in holding that on merits the petitioners' objection was rightly dismissed. It is not necessary to discuss this matter any further."

(f) After dismissal of Civil Revision on 20.4.1978, Sheikh Hamid, Umraobi, Mst. Hayatbi and Sheikh Farid filed the present suit for declaration and permanent injunction against Sheikh Majhar and Smt. Zebunnisa. Before proceeding further it would be appropriate if the relationship is stated. The family tree of the appellants is as under:



These persons claimed the property on the basis of sale deed executed in their favour by Manoharlal Barole, who claimed the property from Sheikh Babu, on the basis of registered will dated 17.4.1961.

(g) In the suit, the respondents filed written statement and raised preliminary objection of res judicata, limitation, lis pendence and non-joinder of parties. The trial Court framed preliminary issues, heard the parties and found that the suit was barred by limitation. So far as other three issues were concerned, the trial Court found that no necessity was there to decide the aforesaid issues. The trial Court found that the objections preferred by the plaintiffs were dismissed on 16.10.1975. The civil suit was filed on 25.7.1978, while under Article 98 of the Limitation Act, 1963, a limitation of one year was provided from the date of rejection of the objections, so the suit was barred by limitation and dismissed the suit.

(h) Against the aforesaid judgment and decree, the appellants preferred an appeal, bearing no.24-A/84, but the appellate Court after considering the entire facts of the case, by judgment and decree dated 4.1.1993, dismissed the appeal. These orders are under challenge in this appeal.

7. To appreciate the contentions made by the parties, it would be pertinent to mention here that at the time when Civil Suit No.88-A/71 was filed and the objections under Order 21 Rules 99 and 100 C.P.C. were preferred, the provisions of C.P.C. which were existed prior to 1.2.77 were applicable. For ready reference, the provisions of Order 21 rule 98, 99 and 103 in the C.P.C prior to 1.2.77 in the statute book may be referred, which were thus:

98. "Resistance or obstruction by judgment- debtor :-

Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may be extended to thirty days.

99. Resistance or obstruction by bona fide claimant.-

Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

103 Rules not applicable to transferee pendente lite.-

Nothing in Rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."

Earlier Section 47 of the C.P.C, before the amendment of 1.2.1977, may be referred which was thus.

47. Questions to be determined by the Court executing decrees.-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, sub question shall, for the purposes of this section, be determined by the Court."

8. In this case, it is not in dispute that the plaintiff/appellant Sheikh Fareed and Mst. Hayatbi preferred objections under Section 47 of C.P.C, on 18.6.1973, which application was registered as MJC No.51/73. These objections were dismissed by the trial Court on 1.8.1973 and appeal M.A.No.24/73 was also dismissed on 30th June, 1975. The aforesaid objections were based on the same facts which were agitated in the present suit. The decision on objections under Section 47 of

C.P.C. prior to 1.2.77 was having force of the decree, as the definition of the 'Decree' prior to the amendment was as under:

2(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order or dismissal for default.

Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

9. An adjudication or determination of any question under Section 47 of C.P.C., determining of rights of the parties, was a decree between parties. The aforesaid order has attained finality and is having effect of res judicata between the parties. So the suit filed by Sheikh Farid and Mst. Hayatbi was barred under Section 11 of the C.P.C. and they were not entitled to file a fresh suit for adjudication of the questions, which were already decided in MJC No.51/1973 under Section 47 of C.P.C.

10. Now objections filed by Mst. Umraobi and Shiekh Hameed may be seen. These persons preferred objections under Order 21 rules 99, 100 & 101 C.P.C. The aforesaid objections were dismissed by the trial Court on 16.10.1975 and after dismissal of the aforesaid objections, these persons ought to have filed a suit as required under Order 21 Rule 103 C.P.C. and limitation of one year was provided under Article 98 of the Limitation Act, 1963, but in place of filing a suit, Sheikh Hamid and Mst. Umraobi preferred an appeal which was numbered as Appeal No. 35/75, but it was dismissed on 10.1.1976. Thereafter a Civil Revision No.182/76 was preferred which was heard and decided by this Court on 20th April, 1978. In the meantime, the C.P.C. was amended by Act No.104 on 1976 with effect from 1.2.77. The Order 21 rule 103 C.P.C. was amended and a new rule was substituted in the CPC which reads thus:

"103. Orders to be treated as decrees.- Where any application has been adjudicated upon under rule 98 or rule 100, the order made therein shall have the same force and be subject to the same conditions as to any appeal or otherwise as if it were a decree."

11. The aforesaid rule specifically provides that order deciding an application under Rule 98 or Rule 100 of Order 21 shall have the same force and be subject

to the same conditions as to an appeal or otherwise as if it were a decree, meaning thereby that and order under Order 21 rules 98 and 100 CPC has been given effect to as of decree and no fresh suit was maintainable.

12. This question came up for hearing before the Division Bench of this Court in *Dattatray Vs. Mangal* AIR 1983 MP 82 in which the Division Bench considering the effect of amendment in Order 21 Rule 103 C.P.C. held that if an order was passed by an Executing Court, after 1st Feb. 1977 viz. enforcement date of Amendment Act 104 of 1976 disposing of an application under Order 21 rule 97 C.P.C. which was pending on that date, the order was appealable under the provisions of Amended code of Civil Procedure and the aggrieved party has no right to file a suit under the provisions of the code as it stood before its amendment. If the application was decided after commencement of the Amendment Act, there was no accrual of any right of suit under the old Rule 103, and no such right is preserved by the provisions of Section 97(2) of the Amendment Act, 1976 or under Section 6 of the General Clauses Act. Section 97(3) of the Amendment Act, 1976, therefore, has full operation and the application. Under Rule 97, pending application at the commencement of the Amendment Act, has to be disposed of in accordance with the Code as amended. In view of the settled law by the Division Bench, the decision on an application, which was decided finally by Revisional Court on 20th April, 78, a civil suit was not maintainable, under Rule 103 of Order 21 which stood prior to 1.2.1977. In these circumstances, if the contentions of the appellants are accepted that cause of action arose on 20th April, 1978 when the Revision No.182/76 was decided, then in the light of the aforesaid judgment of Division Bench in *Dattatray*, no suit was maintainable.

13. Now another contention may be examined. The appellants submitted that the objection was decided on 16.10.1975. Thereafter the matter remained pending in appeal and civil revision and the aforesaid time can be excluded in filing present suit, under Section 14 of the Limitation Act. The aforesaid contention has no force. No such prayer was made before the trial Court. An appropriate forum for filing such an application was the trial Court and the appellants ought to have made such a prayer before the trial Court. The trial Court dismissed the suit. Appellate Court also affirmed the judgment and decree of the trial Court, dismissing the suit on the question of limitation. In these circumstances, after a period of nearabout 33 years, from the decision of the application under Order 21 rule 99, 100 C.P.C. on 16.10.75, this prayer or application cannot be allowed. This would cause serious prejudice to the respondents, who are litigating since 1972, when their Civil Suit No.88-A/71 was decided, directing a decree of eviction against Mst. Hayatbi and Sheikh Farid. Apart from this, the appellants preferred a Civil Appeal and thereafter Civil Revision, which were dismissed on merits vide orders dated 10.1.1976 and dated 20th April, 1978. The aforesaid matter decided finally after 1.2.1977 and as held by the Division Bench in *Dattatray* such civil suit is

barred. In view of decision of *Dattatray* such prayer cannot be allowed. In these circumstances, the application of the appellant, under Section 14 of the Limitation Act, cannot be allowed.

14. Now, the last contention of appellant may be examined. The appellants purchased jointly property by registered sale deed dated 1.8.1973 knowing it well that a judgment and decree was passed against them on 17.3.1972. The relationship of the appellant is very closed and all were residing in the same house. The appellants with the open eyes purchased the house in respect of which a decree of eviction was already passed. A decree against Mst. Hayat Bi and Sheikh Hamid was executable even against Sheikh Fareed and Mst Umrao Bi, in view of the specific provision under Section 23 of the M.P. Accommodation Act, 1961. To defeat the judgment and decree, if the appellants had purchased the property, they were not entitled to protect their possession or to get any benefit of the aforesaid sale deed.

In the result, this appeal is found without merit and is dismissed with cost. Counsel fee Rs.2,000/-

Appeal dismissed.

I.L.R. [2008] M. P., 2956

APPELLATE CIVIL

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

30 July, 2008*

MANAGING DIRECTOR, M.P. STATE MINING
CORPORATION LTD. & anr.

Vs.

M/s. NARMADA ENTERPRISES & ors.

... Appellants

... Respondents

A. Arbitration and Conciliation Act (26 of 1996), Sections 28, 34, 35 & 37 - Award - Challenge of award - The appellant No.1 entering into an agreement with respondent No.1 for lifting of sand from various places/mines for the period 24.05.2003 to 23.05.2006 - Clause 16 of the agreement provided that in special circumstances, M.D. is entitled to extend the period of lease and it would be imperative upon him to increase the proportionate quantity and amount of instalment - Period of lease was not extended by M.D. without assigning any reason - A dispute was raised before arbitrator - Arbitrator in award extended the further period of 15 to 17 months - Civil court affirmed the award - In appeal award challenged on the ground that the arbitrator exceeded in his jurisdiction by extending the period of contract - Held - Clause 19 of the agreement provided that in case of any dispute between the parties, the matter could be decided either by the M.D. or by a person nominated by him under the Act - At this stage, the appellants would not be

allowed to say that the question referred to the arbitrator could not be decided by him and he committed an error in excess of the jurisdiction conferred upon him - Appeal dismissed. (Para 53)

क. माध्यस्थ और सुलह अधिनियम (1996 का 26), धाराएँ 28, 34, 35 व 37 - अधिनिर्णय - अधिनिर्णय को चुनौती - अपीलार्थी क्र. 1 ने प्रत्यर्था क्र. 1 के साथ विभिन्न स्थानों/खदानों से रेत उठाने का अनुबंध 24.05.2003 से 23.05.2006 की अवधि के लिए किया - अनुबंध के खण्ड 16 में उपबंधित है कि विशेष परिस्थितियों में, प्रबंध संचालक पट्टे की अवधि को बढ़ाने के लिए हकदार है और उसके लिए किस्त की समानुपातिक मात्रा और राशि में वृद्धि करना अनिवार्य होगा - प्रबंध संचालक द्वारा बिना कोई कारण बताये पट्टे की अवधि नहीं बढ़ाई गई - मध्यस्थ के समक्ष विवाद उठाया गया - मध्यस्थ ने अधिनिर्णय में कालावधि 15 से 17 माह आगे बढ़ा दी - सिविल न्यायालय ने अधिनिर्णय की पुष्टि की - अपील में अधिनिर्णय को इस आधार पर चुनौती दी कि मध्यस्थ ने उसके क्षेत्राधिकार से परे अनुबंध की अवधि बढ़ाई - अभिनिर्धारित - अनुबंध के खण्ड 19 में उपबंध है कि पक्षकारों के मध्य किसी विवाद की दशा में मामला या तो प्रबंध संचालक द्वारा या उसके द्वारा अधिनियम के अंतर्गत नामित व्यक्ति द्वारा विनिश्चित किया जा सकता है - इस प्रक्रम पर अपीलार्थियों को यह कहने की अनुमति नहीं दी जायेगी कि मध्यस्थ को जो प्रश्न संदर्भित किया गया था वह उसका विनिश्चय नहीं कर सकता था और उसने उसे प्रदत्त क्षेत्राधिकार से अधिक का प्रयोग कर त्रुटि की - अपील खारिज।

B. Words & Phrases - 'Arbitrator' & 'Conciliator' - Distinguished -
The arbitrator acts as an arbitrator and not as a conciliator - Arbitrator cannot ignore the law or misapply it in order to do what he thinks just and reasonable - The arbitrator acts as a tribunal and decides the matter in accordance with law and according to the 'legal rights' of the parties. (Para 51)

ख. शब्द और वाक्यांश - 'मध्यस्थ' और 'सुलहकर्ता' - सुभिन्न - मध्यस्थ, मध्यस्थ के रूप में कार्य करता है न कि सुलहकर्ता के रूप में - मध्यस्थ, जो वह उचित और तर्कसंगत समझता है, करने के लिए विधि की उपेक्षा या विधि का दुरुपयोग नहीं कर सकता - मध्यस्थ अधिकरण के रूप में कार्य करता है और मामले का विनिश्चय विधि और पक्षकारों के 'विधिक अधिकारों' के अनुसार करता है।

C. Administrative Law - Exercise of discretion by Administrative Authority -
When discretion is to be exercised by an authority then it would be free to exercise the discretion as it likes but that does not mean that such authority can exercise the discretion in illegal, unjudicious or arbitrary manner - Arbitrariness runs contrary to the justice, principles of equity and equality - If on the given set of facts, the discretion is exercised in favour of one party then on the same facts, an authority cannot refuse to exercise the discretion in favour of the other party. (Para 42)

ग. प्रशासनिक विधि - प्रशासनिक प्राधिकारी द्वारा विवेकाधिकार का प्रयोग - जब किसी प्राधिकारी द्वारा विवेकाधिकार का प्रयोग किया जाना है तब वह जैसे वह चाहे विवेकाधिकार का प्रयोग करने के लिए स्वतंत्र है किन्तु उसका तात्पर्य यह नहीं है कि ऐसा प्राधिकारी विवेकाधिकार का प्रयोग अवैधानिक, अन्यायिक या मनमाने तरीके से कर सकता है - मनमानापन न्याय साम्य के सिद्धांतों

और समानता के विपरीत है - यदि दिये गये तथ्यों पर विवेकाधिकार का प्रयोग एक पक्षकार के पक्ष में किया जाता है तब समान तथ्यों पर कोई प्राधिकारी विवेकाधिकार का प्रयोग अन्य पक्षकार के पक्ष में करने से इंकार नहीं कर सकता।

Cases referred :

(2003) 5 SCC 705, (2003) 8 SCC 565, (1999) 5 SCC 651, (2006) 11 SCC 651, (2001) 5 SCC 629, (2007) 4 SCC 697, (2006) 11 SCC 181, (2003) 8 SCC 154.

R.N. Singh with Arpan J. Pawar, for the appellants.

Viplov Sharma with J.P. Shah, for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **R. S. GARG, J** :- This is an appeal under Section 37 of the Arbitration and Conciliation Act 1996 filed by the M.P. State Mining Corporation Limited, Bhopal, being aggrieved by the order dated 10.11.06 passed by the 6th Addl. District Judge, Bhopal, in Arbitration Case no. 36/2006 whereunder the learned lower court rejected the objections raised under Section 34. The result is that the award has attained finality under Section 35 of the Act.

2. The undisputed facts are that an agreement was entered into between the appellant no.1, Managing Director M.P. State Mining Corporation Limited, Bhopal, and the respondent no. 1 M/s. Narmada Enterprises for lifting of sand from various specific places/mines for the period between 24.5.03 and 23.5.06. The contract was for a period of 3 years during which the respondent, M/s. Narmada Enterprises was required to lift 56,51,000 sq meter of sand as per Clause 2 of the agreement.

3. Undisputedly during the validity of the period of the original contract, a supplementary agreement was also executed between the parties on 26.8.04 by virtue of which some more mines were allotted to respondent, M/s. Narmada Enterprises under the settled and existing terms and conditions. The non-applicant no.1 M/s. Narmada Enterprises operated the sand mines in accordance with the terms of the contract but in December 2005 it chose to file WP No. 15828/05 seeking the following reliefs :-

(a) "issue a writ in the nature of certiorari quashing the withdrawal order of supervision given to the Corporation Annexure P.13 & P.14.

(b) a writ in the nature of mandamus directing the respondents :

(i) To appoint a committee comprising of M.D. of the Mining Corporation and the Secretary of the Mining Department of the State Govt to investigate into the facts made in the writ petition and submit a report before the Hon'ble Court.

(ii) A writ in the nature of mandamus directing respondents to invoke clause 16 of the agreement and direct the respondent no.2 to grant extension of the time period of the contract as per proportionate lifting of the sand on the similar terms and condition.

(iii) A command to the respondents to call for the entire record of auctions made by the respondent no.3 and 4 of sand excavation in the district of Hoshangabad and Raisen nearby the petitioner's mines for perusal of the Hon'ble Court and cancel the contract of Ketu Dhan mines of Raisen District and direct the respondents to implement the circular of the State Government by not auctioning any mines within 10 kms loading of petitioner mines.

(iv) To grant any other relief deemed fit in the circumstances."

4. The present appellant appeared before the Court and submitted that as the dispute was covered by the arbitration agreement the present respondent no.1/petitioner of the said writ petition be asked to refer the dispute to the respondent no. 2 so that the matter is referred to the Arbitrator. The High Court disposed of WP No. 15828/05 with the following directions :-

(i) "Petitioner may submit its dispute to respondent no.2 within a period of two weeks from today, supported by all necessary documents.

(ii) Respondent no. 2 on receipt of the aforesaid dispute shall refer the matter to the arbitrator within a period of two weeks from the date of receipt of the dispute with a specific direction to the arbitrator to decide the dispute within a period of 60 days from the date of reference of the dispute. The arbitrator so appointed shall make all endeavor to decide the dispute within the time period as fixed by this Court."

5. Undisputedly M/s. Narmada Enterprises submitted its dispute to the present appellants who in terms of the directions issued in WP No. 15828/05 made a request to the Sole Arbitrator vide his letter dated 6.2.06 for a decision on the dispute raised by M/s. Narmada Enterprises in accordance with the provisions of Clause 19 of the Contract agreement. It is also not in dispute that after Arbitrator issued notices to the parties the present respondent M/s. Narmada Enterprises submitted its claim before the Sole Arbitrator with a specific prayer that he be granted extension of the contract period as per clause 16 till it is able to lift the quantity of sand which it could not lift because of the compelling reasons/circumstances. The appellant no.1 Mining Corporation submitted before the Arbitrator that time was of the essence of the contract and as there was no violation of the terms of the contract on the part of the appellant, the time could not be extended.

6. The arbitrator framed the point for determination as under :-

"Whether the claimant is entitled to loss or extension of period of lease.?"

7. It is again not in dispute before us that on the basis of statement of claims and affidavits submitted by M/s. Narmada Enterprises and the reply and affidavit submitted by appellant no.1, Mining Corporation, the sole Arbitrator Justice K.L.

Israni, decided the dispute and made his award. The arbitrator directed the Mining Corporation to extend the period of lease from the date of expiry for about 15-17 months in accordance with the terms contained in clause 16 of the agreement enabling the claimant to cope up with the losses suffered.

8. The award dated 3.5.06 being not palatable to the appellants they challenged the same by filing an application under Section 34 of the Act for setting aside the arbitral award.

9. From the order passed by the learned court below it appears that the questions raised before the lower court were that no right was conferred upon M/s. Narmada Enterprises to seek extension of the contract agreement under clause 16 because it could be invoked in special circumstances by mutual consent and even in those circumstances the final word was to be that of the Managing Director and proportionate increase in the quantity and amount of installment was a must. It was also submitted before the court below that the arbitrator erroneously assumed jurisdiction for extending the contract period under clause 16 without appreciating that the right to extend is vested in the Managing Director of the Mining Corporation. It was also submitted that the arbitrator erred in awarding claim made by the present respondent no.1. From the order passed by the court below it appears that the objections were controverted by the respondent submitting that the grounds of challenge raised by the present appellant were beyond the scope and spirit of Section 34 of the Act. It was submitted that M/s. Narmada Enterprises suffered huge losses due to present appellants violating the terms of the agreement and the Arbitrator rightly compensated the present respondent no.1 by directing the present appellant to extend the period. It was also submitted that the extension of the lease granted under Clause 16 was to enable the present respondent no.1 to cope up the losses suffered by it and not to earn the profits. It was also contended that if the present appellants submitted before the High Court that the matter fell within the scope of arbitration under clause 19 of the agreement then after the award is made, the appellants cannot be allowed to contend that the arbitrator had no jurisdiction. The lower court found that scope for interference under Section 34 of the Act was quite limited. The matter was referred to the arbitrator in accordance with the directions issued by the High Court in WP No. 14528/05, the present respondent was justified in contending that in accordance with the circulars of the Government terms of the agreement, mines within the periphery of 10 kms were to be leased out to the present respondent and as those were allotted in favour of private persons, the present respondent no.1 suffered unnecessary losses. The lower court also found that in relation to the said additional mines a supplementary agreement was executed between the parties and the mines were allocated to the respondents.

10. The court below found that clause 16 of the agreement clearly provided

for extension in the period of lease and therefore, the period could be extended by the Arbitrator.

11. The learned court below after hearing the parties and for the reasons aforesaid, rejected the objections and upheld the award.

12. For proper appreciation of the dispute it would be appropriate to refer to some observations and the discussions made in order dated 15.12.05 passed in WP no. 15828/05.

13. In the said matter various reliefs were sought by M/s. Narmada Enterprises with a submission that the petitioner was entitled for lease of aforesaid adjoining areas but the State Govt leased out those areas to some other persons which caused huge losses to the petitioner and because of the said losses M/s. Narmada Enterprises was entitled to the benefit flowing from clause 16 of the agreement for extension of period of lease so that petitioner may make up its losses. The further observations are that the counsel for the Managing Director M.P., State Mining Corporation Limited submitted before the Court that under Clause 19 of the Agreement, the matter was required to be referred to the arbitrator and unless the petitioner made such a prayer he was not entitled to any relief from the court. On said objection the counsel for M/s. Narmada Enterprises agreed to refer the matter to arbitrator but however, made a submission that the period of lease was to expire on 23.6.06 therefore, the arbitrator be requested to conclude the arbitration proceedings within a period of 3 months. This was agreed too by the counsel for the Mining Corporation. The court as referred to above, directed that M/s. Narmada Enterprises shall submit its dispute to respondent no.2/Managing Director and respondent no. 2 Managing Director on receipt of the aforesaid dispute shall refer the matter to the Arbitrator within a period of 2 weeks with a specific direction to the arbitrator to decide the dispute within a period of 60 days from the date of reference of the dispute.

14. In the following background it would now also be necessary to refer to clauses 15 and 16 of the agreement, which read as under :-

Clause 15 : यदि निगम ठेके की अवधि के दौरान ठेकेदार के ग्रुप के समीप अन्य कोई खदान/खदाने प्राप्त करता है तो उस ठेकेदार के ग्रुप में इस आधार पर शामिल किया जा सकेगा कि ठेकेदार इस खदान से निकाली गई रेत की मात्रा का पृथक हिसाब रखेगा तथा अनुबंधित दर से इस मात्रा पर भी भुगतान अतिरिक्त रूप से करेगा । यदि ठेकेदार द्वारा यह शर्त मान्य करते हुए खदान हेतु उन्हें दिये गये आफर के सात दिन के अंदर अनुपूरक अनुबंध नहीं किया जाता है तो निगम इस नवीन खदान/खदानों को किसी भी अन्य तरह से संचालित करने हेतु स्वतंत्र होगा । अनुपूरक अनुबंध हेतु पृथक से सुरक्षा राशि आदि देय नहीं होगी । नई खदान/खदाने ठेके में शामिल किया जाना नियम के लिये बंधनकारी नहीं होगा ।

Clause 16: ठेका समाप्ति के उपरांत विशेष परिस्थितियों में आपसी सहमति से ठेका अवधि में वृद्धि करने का अधिकार निगम के प्रबंध संचालक को होगा जिसमें अनुबंधित समानुपातिक मात्रा तथा किष्त की राशि बढ़ाना अनिवार्य होगा ।

15. From the perusal of clause 15 it would clearly appear that during currency of the agreement with the contractor if the corporation obtains/secures any other mines then the said mines would be included in the group of the contractor with a stipulation that the contractor shall maintain a separate account of the sand so excavated and shall also pay additional amount on the said sand.

16. It would be necessary to note that despite availability of the additional mines within the periphery of 10 kms, Mining Corporation did not offer the said mines to the respondent, therefore, a dispute arose and ultimately the mines were offered to the respondent.

17. Clause 16 which is the bone of contention has been translated by the respondent, reads as under :-

“at the end of the contract, under special circumstances and with mutual concurrence, the Managing Director of the Corporation will have the right to extend the contract period in which proportionate increase in the contracted quantity and the amount of installment shall be imperative”.

It has been translated by the appellant as under :-

“Clause 16 on conclusion of contract the Managing Director of the Corporation shall, under special circumstances have the right to extend the contract period with mutual consent and in such case it shall be mandatory to make proportional increase in quantity and amount of installment.

Or

Clause 16 : On conclusion of the contract, under special circumstances, the right of extending the contract period by mutual consent, shall be with the Managing Director in which eventuality it would be mandatory to make proportional increase in the contractual quantity and amount of installment.”

Official translator of the High Court has translated the said clause 16 as under :-

“Clause 16 In special circumstances, after termination of contract, Managing Director of the Corporation is authorized to extend the period of contract by mutual consent, wherein enhancement of the contracted proportional quantity and amount of installment would be essential.”

A free translation of clause 16 can be “on conclusion of the contract, in the special circumstances, with the consent of the parties, the right to extend the period of lease would be with the Managing Director but in such case it would be imperative to increase the proportionate quantity and amount of installment.

18. In whatever manner clause 16 is translated, the sum and substance of clause 16 is that in the special circumstances of the matter, the Managing Director with the consent of the parties would be entitled to extend the period of lease and it would be imperative upon him to increase the proportionate quantity and the amount of installment.

19. Clause 16 according to Shri R.N. Singh, does not confer any right upon the respondent no.1 to seek any extension, firstly because that does not create any right rather a legal right in favour of the respondent and secondly, because the Managing Director was competent to extend the period with the consent of the parties.

20. On the other hand Shri Sharma learned counsel for the respondent no.1 submitted that the question that the contractor had a right to seek extension of the lease period or not was a question raised before the High Court and because of the objection raised by the present appellants the High Court could not decide the matter and the matter was directed to be referred to the Arbitrator, therefore, at this stage the appellant cannot be allowed to say that the respondent no.1 had no right to seek extension.

21. From a perusal of clause 16 it would clearly appear that the right to extend the period of the lease vests in the Managing Director of the Mining Corporation however, the discretion can be exercised by him in the special circumstances of the case. In a given case if the special circumstances exist and the Managing Director illegally refuses to exercise his discretion, then a person adversely affected can certainly under the common law come to the court seeking specific performance of the contract or may ask the arbitrator to examine the circumstances to direct the Managing Director to extend the period of agreement. The right conferred upon the Managing Director is not a right which is available to a dictator who can for no good reasons refuse to exercise the discretion and that too without assigning any reasons. The power to exercise discretion always vests in a authority so that to avoid illegality or injustice, it may pass orders to meet the requirement of the day. It is also to be noted that a fair understanding of clause 16 would make it clear that a party can always approach the Managing Director that in the special circumstances the period of the lease be extended. The special circumstances under which a party is claiming extension of the lease are within the knowledge of such party. If everything is left to the discretion of the Managing Director and it is held that a party cannot approach the Managing Director for extension, then it would lead to an illegality because the Managing Director would never know what are the special circumstances. The special circumstances may be of myriad nature. In a given set of the facts a very small lapse on the part of the Mining Corporation may provide a reason for extending the period of lease and in yet another case a lapse on the part of the Mining Corporation may not be a ground to extend the period of lease if the other party has also committed lapses.

22. A right is a generic and common word embracing whatever may be lawfully claimed. It is a just claim which may be lawfully claimed. It is a just claim and it comprehends every right known to the law. It includes both corporeal and incorporeal rights. In civil society it is defined to mean which a man is entitled to have or to do, or to receive from others within the limits prescribed by law. A right is an interest which is recognized and protected by law. Taken as in an abstract sense, it is justice, ethical correctness or consonance with the rules of law or the principles of morals. A legal right is a claim enforceable by legal means against a person, community or authority. It is well founded and could be enforceable by sanction. A legal right is a capacity residing in one man of controlling with the assistance of the State/Court, the action of others; a right that may be enforced in a civil action. The term includes rights conferred by statute as well as agreements. It is an assertable claim, enforceable before courts and administrative agencies. In a wider sense, it is an advantage or benefit conferred upon a person by rule of law.

23. Clause 16 as understood would make it clear that the right to extend the period of lease on the terms would vests in the Managing Director but the contractor would always have a right to make an application to the Managing Director for extension of period of lease on the terms as provided under clause 16 and in case the Managing Director refuses to exercise his discretion either in an illegal manner or arbitrary manner then with the help and assistance of clause 19 of the agreement, the party aggrieved can always refer the matter to the Arbitrator for his decision on the subject.

24. In the present case, the respondent no.1 even otherwise was entitled to refer the matter to the arbitrator because the High Court directed the present appellant to submit the dispute before the Managing Director who in his turn was to refer the dispute to the arbitrator in WP No. 15828/05. If the objection of the present appellant was that the High Court could not interfere in the matter, because of arbitration clause and as the subject in dispute was governed by the arbitration clause then at this stage the appellants cannot be allowed to raise the dispute.

25. It was then submitted by Shri R.N. Singh that the present matter squarely falls within the ambit of Section 34 of the Act therefore, this Court should interfere in the matter. Section 34 (2) provides as under :-

“Section 34(2) An arbitral award may be set aside by the court only if-

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

(i) a party was under some incapacity, or

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

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

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

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

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing such agreement, was not in accordance with this Part; or

(b) the court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

(3) xx xx xx

(4) xx xx xx

26. The scope of Section 34{2} has been considered by the Supreme Court in the matter of *Oil & Natural Gas Corporation Limited Vs. Saw Pipes Limited* {2003} 5 SCC 705. in the said matter in paragraph 74, the Supreme Court had observed as under :-

“74. In the result, it is held that:

{A} {1} The Court can set aside the arbitral award under Section 34{2} of the Act if the party making the application furnishes proof that:

{i} a party was under some incapacity, or

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

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

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

{2} The Court may set aside the award:

{i} {a} if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

{b} failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

{ii} if the arbitral procedure was not in accordance with:

{a} the agreement of the parties, or

{b} failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

{c} If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

{3} The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

{a} fundamental policy of Indian law; or

{b} the interest of India; or

{c} justice or morality; or

{d} if it is patently illegal.

{4} It could be challenged:

{a} as provided under Section 13{5}; and

{b} Section 16{6} of the Act.

{B}{1} The impugned award requires to be set aside mainly on the grounds:

{i} there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

{ii} in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

{iii} it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

{iv} on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

{v} liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

{vi} there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

{vii} In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 & 74 of the Contract Act and in the present case by specific terms of the contract."

27. In the matter of *M. Anasuya Devi & Another Vs. M. Manik Reddy & Others* {2003} 8 SCC 565, the Supreme Court again observed that Section 34 of the Act provides for setting aside of the award on the ground enumerated therein and none other.

28. From these two judgments, it would clearly appear that a party desirous to challenge the award, would be required to satisfy the Court that the arbitral award must be set aside for one or the more reasons enumerated under Section 34{2}{a}. The Court also has the jurisdiction to set aside the award if it comes to the conclusion that the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India.

29. It was submitted by Shri R.N. Singh, learned senior counsel for the appellants that the arbitrator had no jurisdiction to direct specific performance of the agreement by directing the appellants to extend the period of lease for a period of fifteen or seventeen months.

30. Shri Viplov Sharma, learned counsel for respondent No. 1, on the other hand, submitted that an arbitrator certainly would be entitled to issue a direction for specific performance of the contract.

31. In the matter of *Olympus Superstructures Private Limited Vs. Meena Vijay Khetan & Others* {1999} 5 SCC 651, the Supreme Court observed that merely because there is need for exercise of jurisdiction in case of specific performance, it cannot be said that only the Civil Court can exercise such a discretion. The Supreme Court approved the following observation made by the Calcutta High Court "merely because the Sections of the Specific Relief Act confer discretion on Courts to grant specific performance of a contract does not mean that parties cannot agree that the discretion will be exercised by a Forum of their choice, if the converse were true, then whenever a relief is dependent upon the exercise of discretion of a Court by statute for example the grant of interest or costs, parties could be precluded from referring the dispute to arbitration". The Supreme Court candidly observed that dispute relating to specific performance of a contract can be referred to arbitration and Section 34{2}{b}{i} is not attracted.

32. In the matter of *Rodemadan India Limited Vs. International Trade Expo Centre Limited* {2006} 11 SCC 651, the Supreme Court placed reliance upon the judgment in the matter of *Olympus Superstructures Private Limited* {supra} and observed that such a contention would not be maintainable. Under the circumstances, we hold that an arbitrator appointed under the provisions of the Act would be entitled to grant specific performance of the agreement.
33. Placing reliance upon the judgments in the matters of *Sikkim Subba Associates Vs. State of Sikkim* {2001} 5 SCC 629 and *Food Corporation Of India Vs. Chandu Construction & Another* {2007} 4 SCC 697, it is next contended by Shri R.N.Singh, learned senior counsel for the appellants that an arbitrator is not a conciliator and is to decide the disputes submitted to him according to the 'legal rights' of the parties and not according to what he may consider to be fair and reasonable. An arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. According to the submissions, he is a Tribunal selected by the parties to decide their disputes according to law and the arbitrator is bound to follow and apply the law and if he does not, he can set right by the Court provided the error apparent on the face of the award.
34. Insofar as the above referred judgments of the Supreme Court are concerned, there cannot be a dispute in regard to their application. The question, however, would be that whether the arbitrator acted as a conciliator and decided the case after ignoring the law or misapplied it in order to do what he thought was just and reasonable. The award made by the arbitrator, which is a Tribunal selected by the parties, cannot be interfered with by a Court of law under Section 34 unless the grounds for setting aside the same are available to the parties challenging the correctness, validity and propriety of the said award.
35. To challenge the award, it was contended that the arbitrator had framed the issue that whether the claimant was entitled to loss or extension of period of lease and under the circumstances, the arbitrator could not extend the lease unless he had quantified the damages. It is also submitted that the arbitrator himself was not sure and certain that what were the losses and, therefore, he was not justified in directing extension for a period of fifteen to seventeen months.
36. It is also submitted by him that in accordance with the judgments of the Supreme Court and the requirement of the law is also that an arbitrator is obliged to give the reasons and as in the present matter, the arbitrator has not supplied any reason, the award is vitiated. Strong reliance is placed upon the judgment of the Supreme Court in the matter of *MC Darmott International Inc. Vs. Burn Standard Company Limited & Others* {2006} 11 SCC 181.
37. From the records, it would clearly appear that for the illegal action on the part of the appellants, the present respondent could not excavate or collect the sand because the possession of mines to which the respondent was entitled was not given to him, the additional mines were infact exploited by a third party, which

caused immense loss to the respondent. The bid was for an amount of Rs.42,62,60,500/-. Undisputedly, the respondent had deposited a sum of Rs.10,66,62,625/- by way of security deposit.

38. It is also clear from the records that certain directions were issued by the State Government that the mines situated within the periphery of ten kilometer would be allotted to a contractor but in the case of the respondent, the new mines were allotted to third party and ultimately the High Court had to intervene in the matter and direct the Collector, Hoshangabad to cancel the allotment of mines and attach the same with the mines of the claimant.

39. From the records, it would also appear that the respondent had claimed before the arbitrator that he sustained a loss to the extent of Rs.17,23,63,381/-. The figures are not based on a simple guess work but infact find support from Annexure A-21 filed before the arbitrator, a certificate issued by the Mining Corporation on 19.4.2006. From the said letter, it clearly appears that the respondent suffered a loss to the tune of Rs.17,23,63,381/-. Once it is found that the respondent/contractor suffered loss because of the inaction or a wrong action on the part of the State Authorities and the Mining Corporation then the contractor certainly would be entitled to enforce Clause 16 of the agreement.

40. It is also to be seen from the records that identical Clause 16 of the agreement has been applied in favour of Shri Shashank Chandak Exhibit A-22, in favour of Shri Purshottam Goyal vide order dated 1.7.2005 Exhibit A-23 on the ground that fifteen mines were allotted by Panchayat in favour of the private contractors, therefore, the Corporation had to face the competition with the private contractors, in favour of M/s.B.D.Bhanot & Sons, Jabalpur vide order dated 31.3.2006 Exhibit A-24 and in favour of Shri Ajay Singh vide Exhibit A-25. These extensions have been granted by the Managing Director exercising his authority and discretion under Clause 16 of the agreement.

41. Though, Shri R.N.Singh, learned senior counsel for the appellants has submitted that the arbitrator could not apply the principle of equity or equality because in a particular case, the Managing Director may find that special circumstances do subsist but in another case, he may hold that such circumstances do not exist. On principles, we would not disagree with the submissions made by Shri R.N.Singh, learned counsel for the appellants but a perusal of the case of the respondent and the cases of those contractors, whose period of lease was extended, it would clearly appear that on identical grounds as raised by the present respondent No. 1, the lease period was extended in favour of those contractors.

42. True it is that when the discretion is to be exercised by an authority then it would be free to exercise the discretion as it likes but that does not mean that such authority can exercise the discretion in illegal, unjudicious or arbitrary manner. Arbitrariness runs contrary to the justice, principles of equity and equality. If on the given set of facts, the discretion is exercised in favour of one party then on the

same facts, an authority cannot refuse to exercise the discretion in favour of the other party.

43. Section 28 of the Act relates to Rules applicable to subsistence of dispute. Sub-section 3 of Section 28 provides that in all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. For the resolution of dispute in any commercial transaction, if the parties have not provided for the proper law/procedure, which will govern the arbitral proceedings, nor have provided for the manner in which the dispute will be resolved, the resolution thereof shall be governed by the usages of the trade, which acquires sanctity because of adoption over a long period of time by the trading community.

44. In a case like present, when a party knows that in case it suffers losses, it can apply Clause 16 because on earlier occasions, the said Clause had been applied by the Managing Director in favour of third party then the expectation of the first party cannot be held to be illegal, presumptive or imaginary. When the earlier action on the part of the Managing Director in extending the period of lease provided a foundation in favour of the respondent No. 1 then it cannot be argued by the appellants that Section 28(3) would not apply to the present case.

45. Submission of Shri R.N.Singh, learned senior counsel for the appellants that the principles on which or the facts on which the period was extended in favour of the four contractors, could not be made a foundation by the arbitrator for extending the period of lease, in our opinion, would run contrary to the principles of fair play and justice.

46. Submission of Shri R.N.Singh, learned senior counsel for the appellants further is that the arbitration award does not give any reason as to why the period is fixed between fifteen to seventeen months. According to him, fixation of this period in itself shows that the arbitrator was not sure and certain and, therefore, the award deserves to be set aside.

47. Shri Viplav Sharma, learned counsel for respondent No. 1, on the other hand, submitted that in a period of thirty-six months, if the respondent No.1 was to excavate or collect sand worth Rs.42,00,00,000/- then the monthly average of collection of sand was Rs.1.17 crores and if the respondent No. 1 had suffered losses to the tune of Rs.17,00,00,000/- and plus then at the average of Rs.1.17 crores per month, the respondent No. 1 would be entitled to extension for a period of fifteen months and to avoid any emergency or exigency, the period may be seventeen months.

48. In our opinion, the submission made by Shri Viplav Sharma, learned counsel for respondent No. 1 must be accepted. If the respondent was to excavate/collect the sand for an average of Rs.1.17 crores per month then to cover-up the losses of Rs. 17,00,00,000/- and odds, he would certainly be entitled to a period of fifteen to seventeen months.

49. At sometime, there was a confusion between the understanding of the parties that whether the respondent is entitled to excavate the sand for the money, which he has already paid and he is not required to pay any amount for the period of fifteen/seventeen months, Shri Viplav Sharma, learned counsel for respondent No. 1 fairly submitted before us that the loss of Rs.17,00,00,000/- is suffered forever but, however, the respondent would be entitled to the extension for a period between fifteen/seventeen months on payment of the amount now fixed by the Managing Director. His submission however is that if the earlier agreement was at a particular rate then there can only be a reasonable escalation/increase in the contract amount. It is also submitted by him that if sand beyond the agreed quantity is excavated by the respondent then he would also be obliged to pay the additional amount to the appellants. His further submission is that the minimum period for extension can be fifteen months and the maximum period would be seventeen months and fixing of the said period would be within the sole discretion of the Managing Director.

50. After going through the award, we are unable to hold that the arbitrator has failed to give reasons in making the award in favour of the respondent. The judgment in the matter of *MC Darmott International Inc. Vs. Burn Standard Company Limited* {supra} would not apply to the present case because the arbitrator has clearly held that non-grant of the additional area to the petitioner, exploitation of the additional area by other contractors, overloading etc had led to the losses suffered by the respondent. The arbitrator has also found that the present appellants were acting in arbitrary and high-handed manner in not applying Clause 16 in favour of the respondent though on the same grounds, extension was granted to others.

51. We are also unable to hold that the arbitrator acted as a conciliator and not as an arbitrator. In our opinion, the arbitrator did not ignore the law or misapply it in order to do what he thought was just and reasonable. Infact, the arbitrator acted as a Tribunal and decided the matter in accordance with law and according to the 'legal rights' of the parties.

52. It would also be necessary to refer to the judgment of the Supreme Court in the matter of *Bharat Coking Coal Limited Vs. Annapurna Construction* {2003} 8 SCC 154. In the said matter, the Supreme Court observed that there lies a clear distinction between 'an error within the jurisdiction' and 'error in excess of jurisdiction'. According to the Supreme Court, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of record. If there is a clear line of distinction between 'an error within the jurisdiction' and 'error in excess of jurisdiction' then

the endeavour of the Court is always to find that what error the arbitrator had committed.

53. In the present matter, we are unable to hold that the arbitrator committed any error in excess of his jurisdiction. When Clause 19 of the agreement provided that in case of any dispute between the Corporation and the Contractor, the matter could be decided either by the Managing Director or by a person nominated by him under the Arbitration & Conciliation Act, 1996 then at this stage, the appellants would not be allowed to say that the question referred to the arbitrator could not be decided by him and he committed an error in excess of the jurisdiction conferred upon him. After giving our due and anxious consideration to the legal position, the facts of the case, the findings recorded by the arbitrator and the reasons assigned by the learned Court below, we are unable to hold that the appellants are entitled to any relief.

54. During course of the arguments, it was submitted by Shri Viplav Sharma, learned counsel for respondent No. 1 that the respondent has made a security deposit of Rs. 10,00,00,000/- or more with the appellants, the appellants are enjoying the same for more than two years, neither they have returned it, nor they are paying any interest on it, therefore, the appellants be directed to pay interest on the same and adjust the said security deposit towards the extended period. It was also contended that the appellants be asked to provide proper security so that the theft or illegal mining activities are not carried out by anybody.

55. In our opinion, the question of security deposit, payment of interest on the same, its adjustment towards the extended period and control over the theft and / or illegal mining are not the questions relating to the award or the scope of the dispute. We do not think that we are entitled or authorized to issue any direction in this behalf to the appellants. However, we would only observe that the respondent No. 1 if is entitled under the law to make such application for grant of such reliefs to the appellants then he can make such application to the department. However, it would be in the discretion of the appellants/Corporation to pass appropriate orders on the said application/applications. It is made clear that in relation to the security deposit, interest over it, its adjustment towards the extended period of lease and control over the theft and/or illegal manner, this Court is not issuing any direction to the appellants but is leaving the same to their discretion with a hope that the appellants would act in accordance with law.

56. For the reasons aforesaid, the appeal deserves to and is accordingly dismissed but, however, with no orders as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2973

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

31 July, 2008*

EMPLOYEES' STATE INSURANCE CORPORATION

... Appellant

Vs.

M/S RELIABLE CARRIERS PVT. LTD.

... Respondent

Employees' State Insurance Act (34 of 1948), Sections 39, 40, 75, 82, 85-B, Employees Regulation, 1950, Regulations 31 & 31-C - Damages - Employer not deposited the contribution within prescribed period - E.S.I. Corporation imposing damages to the extent of 100% of the contribution after giving an opportunity of hearing - E.S.I. cum Labour Court reducing it to 25% - Order challenged before High Court - Held - Amount of contribution was deposited by employer after 4 to 7 years delay from the due dates of such payment - Notice was served in spite it was not replied on behalf of employer - E.S.I. Corporation's order imposing the damages was passed in consonance of Section 85-B of Act r/w Regulations 31 & 31-C - The case of employer was also not covered any of the proviso or exception - E.S.I. cum Labour Court has committed grave error in setting-aside the order passed by E.S.I. Corporation for imposing the 100% damages - Appeal allowed.

(Paras 12 to 15)

कर्मचारी राज्य बीमा अधिनियम (1948 का 34), धाराएँ 39, 40, 75, 82, 85-बी, कर्मचारी विनियमन, 1950, विनियम 31 व 31-सी - नुकसानी - नियोक्ता ने अंशदान विहित कालावधि में जमा नहीं किया - कर्मचारी राज्य बीमा निगम ने सुनवाई का अवसर देने के बाद अंशदान की 100 प्रतिशत नुकसानी अधिरोपित की - कर्मचारी राज्य बीमा सह श्रम न्यायालय ने इसे कम करते हुए 25 प्रतिशत किया - आदेश को उच्च न्यायालय के समक्ष चुनौती दी गई - अभिनिर्धारित - अंशदान की राशि नियोक्ता द्वारा निर्धारित तारीख से 4 से 7 वर्ष विलम्ब से जमा की गई - सूचनापत्र तामील करने के बावजूद नियोक्ता की ओर से उसका जवाब नहीं दिया गया - कर्मचारी राज्य बीमा निगम का नुकसानी अधिरोपित करने का आदेश अधिनियम की धारा 85-बी सहपठित विनियम 31 व 31-सी के अनुरूप पारित किया गया था - नियोक्ता का मामला किसी परन्तुक या अपवाद के अन्तर्गत भी नहीं था - कर्मचारी राज्य बीमा सह श्रम न्यायालय ने कर्मचारी राज्य बीमा निगम द्वारा 100 प्रतिशत नुकसानी अधिरोपित करने के लिए पारित आदेश को अपास्त करने में गम्भीर त्रुटि की - अपील मंजूर।

Brahmdatt Singh & Anubhav Jain, for the appellant.

None, for the respondent.

ORDER

U. C. MAHESHWARI, J. :- This appeal is directed by the appellant Corporation under Section 82 of Employees' State Insurance Act 1948 (In short the Act.) being aggrieved by the order dated 27 3 2002 passed by the ESI cum Labour

*M.A. No.1044/2002 (Jabalpur)

Court No.1, Bhopal in case No.28/ESI/94 whereby quashing the notice/order bearing No.1117 dated 16.9.1994 issued by the appellant against the respondent for recovery of damages Rs.49,607/- imposed on account of failing in depositing the contribution within the prescribed period by the respondent, such 100% amount of damages is reduced to 25% with a direction to deposit the same within one month.

2. The facts giving rise to this appeal in short are that the respondent being registered Private Ltd. Company is involved in transport business, filed an application under Section 75 of the Act in the Tribunal contending that in accordance with the order of the appellant bearing No.3295 dated 22.7.1987, directing to deposit the contribution Rs.49623/- for the period 1.2.1982 to 31.7.1984, the same was deposited on its behalf in seven different installments between 31.7.1987 to 9.4.1991 as described in para 2 of it. As per further averments due to financial crises the directed sum of the contribution was not paid lump sum and the prayer permitting it to pay the same in the installments. The same was never refused by the appellant. But on receiving the recovery order of damages issued by Tahsildar, Bhopal the respondent shocked. As such the damages were imposed 100% equal to the contribution which was already paid to the appellant. Such imposition of damages is illegal and against the rules of natural justice, thus the appellant is not entitled to recover the same. It is also pleaded that the delay in payment of the contribution has been caused due to financial crisis and not deliberately or with any mala fide intention. Before imposition of such damages the opportunity of hearing in this regard was also not extended to the respondent and without considering the financial crisis of the applicant under the garb of Section 85-B of the Act arbitrarily and illegally the order of imposition of 100% damages on contribution was passed. The same was known to the respondent on receiving the aforesaid recovery notice dated 16.9.1994 on 24.9.1994 with these averments the prayer for setting aside the order of imposition of the damages is made.

3. On the other hand the case of the appellant in short is that in spite of giving the intimation to the respondent time to time for depositing its contribution the same was not deposited in the prescribed period. It is also denied that due to poor financial condition, the respondent could not deposit its contribution within the prescribed period. In fact taking into consideration the conduct of the respondent 100% penalty on such contribution was rightly imposed in accordance with the prescribed procedure and the same is to be legally recovered. In such premises the prayer for dismissal of the petition is made.

4. In view of the pleading of the parties as many as two issues were framed by the ESI court. On extending the opportunity to the parties for adducing the evidence one Shafi Mohd Khan was examined on behalf of the respondent. On appreciation the aforesaid sum of the damages imposed by the appellant is reduced from 100% to 25% on the contribution with a direction to deposit the same within

one month. Being dissatisfied with this reduction the appellant's authority has come forward with this appeal with a prayer to restore its order by setting aside the aforesaid order of ESI court.

5. This appeal was admitted vide order dated 26.9.2007 on following substantial question of law, which is to be answered by this court:

"(i) Whether the Labour Court was justified in law while reducing the quantum of damages ignoring the provision of Section 85-B read with Section 39 and 40 of the Employees State Insurance Act? If so, its effect.

6. Shri Brahmhatt Singh and Anubhav Jain, learned counsel for the appellant by referring the various provisions of the Act as well as the Employees Regulation 1950 (In short "the Regulation") argued that the respondent being principal employer was bound to deposit its contribution within the prescribed period from its due date, if the same was not paid during such period then the respondent was liable to pay interest on such sum as prescribed under the law till the date of its actual payment. He further said that where the employer has failed to deposit the contribution payable under the Act then by virtue of Section 85-B of the Act the authority of the appellant was empowered to impose the damages as per the provision of regulation 31-C and in such provision before imposition of the damages a notice dated 22.3.1994 was given to the respondent for extending the opportunity of hearing in that regard. The same was served on dated 9.4.1994. But the same was not replied, on which taking into consideration the delay of four years in depositing the contribution the damages @ 25% per annum was imposed under the aforesaid provisions, and in compliance of it the recovery order dated 16.9.1994 by referring the aforesaid notice dated 22.3.1994 in which the description and particulars regarding due dates for depositing the contribution and the actual date on which the payment was made by the respondent are specifically mentioned. According to which it is clear that respondent failed to deposit the requisite contribution as per provision of regulation 31 and no sufficient explanation has been put forth by the respondent in this regard. Thus, by imposing the damages the recovery notice of the same was rightly issued by the appellant. In such premises there was no occasion before the ESI Court to reduce the amount of damages but contrary to it without passing any speaking order the sum of the damages has been reduced from 100% to 25%, with these submission he prayed to answer the question in its favour and setting aside the impugned order with restoring the order of the appellant imposing the damages and its recovery order by allowing this appeal.

7. The respondent was duly served and represented but no one has appeared on its behalf to respond the aforesaid argument.

8. Having heard the counsel after perusing the record and the impugned order, I am of the view that ESI court has committed grave error in setting aside the

order passed by the authority of the appellant imposing the damages on the respondent; under the provision of Section 39 r/w 85-B of the Act r/w its Regulation 31-C because of the following reasons;

9. As per provision of Section 39 and 40 of the Act the employer is bound to deposit its contribution within the prescribed period and as directed by the Regulation 31, if the employer is failed to deposit such contribution within such period then he shall be liable to pay the simple interest @ 12% p. a. as per regulation 31-A. Besides the aforesaid on failing the employer in depositing the contribution or any other amount then by virtue of Section 85-B of the Act r/w regulation 31-C he shall be liable to pay the damages @ prescribed under the aforesaid regulation 31-C

10. Before proceeding further I would like to reproduce the provision of Section 39 and 85-B of the Act as ready reference. The same are read as under:

39. Contribution:

(1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.

1[(2) The contributions shall be paid at such rates as may be prescribed by the Central Government:

Provided that the rates so prescribed shall not be more than the rates, which were in force immediately before the commencement of the Employees' State Insurance (Amendment) Act, 1989.]

2[(3) The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.]

(4) The contributions payable in respect of each 3[wage period] shall ordinarily fall due on the last day of the 3[wage period], and where an employee is employed for part of the 3[wage period], or is employed under two or more employers during the same 3[wage period], the contributions shall fall due on such days as may be specified in the regulations.

4[(5) (a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve percent. per annum or at such higher rate as may be specified in the regulations till the date of its actual payment.

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank. (b) Any

interest recoverable under clause (a) may be recovered as an arrear of land revenue or under section 45C. to section 451. Explanation. In this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934)].

85-B. Power to recover damages (1) where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer such damages not exceeding the amount of arrears as it may think fit to impose;

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard.

(2) Any damages recoverable under Sub-section (1) may be recovered as an arrear of land revenue.

11. The regulations 31 and 31-C enacted u/s 97 of the Act are read as under:

31. Time for payment of contribution.

An employer who is liable to pay contributions in respect of any employee shall pay those contributions within 21 days of the last day of the calendar month in which contribution falls due.

Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure.

31-A.

31-B.

31-C. Damages or contributions or any other amount due, but not paid in time.

An employer who fails to pay contributions within the periods specified under Regulation 31, or any other amount payable under the Act, shall be liable to pay damages as under :

	Period of delay	Rate of damages in % per annum of the amount due
i)	Up to two months	5%
ii)	two months and above but less than 4 months	10%
iii)	four months, and above but less than six months	15%
iv)	six months and above	25%

Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a

rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may

(a) in case of a change of management including transfer of undertaking (s) to worker(s) co-operative or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable;

(b) in other cases, depending on its merits, waive up to 50 percent damages levied or leviable.

(c) In exception hard cases, waive either totally or partially the damages levied or leviable."

12. In view of the aforesaid on examining the case at hand, it is apparent that before imposition of the damages for extending the opportunity of hearing a show cause notice dated 22.3.1994 was issued by the authority of the appellant to the respondent, on the back side of such notice the due dates for payment of contribution and the actual date of the payment were mentioned. According to such statement the requisite amount of contributions was deposited by the respondent after four to seven years delay from the due dates of such payment. As per acknowledgement receipt available on record Such notice was served on 9.4.1994, inspite it the same was not replied on behalf of the respondent. Thus, considering the circumstance by virtue of the aforesaid provisions the authority of the appellant imposed the damages Rs.49,607 vide order dated 25.5.1984 against the respondents, such damages was imposed in respect of the non-depositing the contribution between the period 2/82 to 7/84. In such premises it could not be said that such damages was imposed contrary to any provision or without extending the opportunity of hearing to the respondent. On the contrary it is apparent that aforesaid order imposing the damages was passed in consonance of above mentioned Section 85-B of the Act r/w Regulations 31 and 31-C enacted under Section 97 of the Act.

13. The Tribunal ought to have taken into consideration the aforesaid show cause notice dated 22.3.1994 and particulars mentioned on it's back side regarding due date of the payment of contribution and actual dates of such deposit but on perusing the impugned order I have not found the facts showing that averments of such notice are taken into consideration by the ESI cum Labour Court. In last paragraph of the impugned order without any foundation it is stated that damages have been imposed without extending any opportunity of hearing to the respondent and also without taking into consideration the poor financial condition of the respondent Company The same are apparently contrary to the aforesaid available record and the aforesaid provision of Section 85-B of the Act r/w regulation 31 and 31-C. In fact the case of the respondent was also not covered under any of the proviso or exception of aforesaid provisions. So apparently the Tribunal has committed grave error in setting aside the order passed by the appellant's authority

for imposing the 100% damages. In such premises it is established that the impugned order is passed not only without taking into consideration the record but also without application of mind in other words it could not be termed to be speaking order. In such premises the same is not sustainable under the law.

14. As per provision of Section 85-B of the Act if the employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, and his case is not covered by any proviso or exception of the provisions then the Corporation may recover from the employer, such damages not exceeding the amount of arrears as it think fit to impose. But the same shall be recovered after giving the reasonable opportunity of being heard to the employer.

15. As per provision of the Regulation 31-C if the employer fails to pay the contribution under regulation 31 or any other amount payable under the Act shall be liable to the damages as mentioned in such regulation. According to Regulation 31-C if period of delay up to two months then 5% p.a. damages shall be payable and if such delay is more than two months but less than four months then damages shall be payable @ 10% p.a, if such delay is more than four months and less than six months then same shall be @ 15% p.a. and if such delay is more than six months then employer shall be liable to pay the damages @ 25% p. a. on the contribution and such other sum. In such premises it appears that taking into consideration the delay of four years in depositing the contribution the appellant has not committed any error in imposing the damages @ 25% p.a. Thus the order of the appellant could not be interfered by the E.S.I. Court. In such premises such court has committed error and perversity in allowing the appeal and reducing the sum of damages mentioned in the recovery order from 100% to 25%. Hence, the order of ESI Court is not sustainable and deserves to be set aside. Accordingly the substantial question of law is answered in favour of the appellant and against the respondent.

16. Therefore, by allowing this appeal the impugned Order is hereby set aside and the order of appellant authority for imposing the damages and in pursuance of it issued recovery notice dated 16.9.1994, served on 29.4.1994 are hereby restored and respondent is directed to deposit such sum within thirty days otherwise the same shall be recovered as per prescribed procedure of law. In the facts and circumstances of the case, there shall be no order as to the costs.

17. Appeal is allowed as indicated above.

Appeal allowed.

I.L.R. [2008] M. P., 2980

APPELLATE CRIMINAL

Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saxena

3 March, 2008*

TOK SINGH & ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 300 Exception 4 - *Murder or Culpable Homicide not amounting to murder* - Appellant No.4 had scuffled with deceased and appellant No.2 picked up a spade and dealt repeated blows from its blunt side on the head of deceased - Lacerated wounds with depressed fractures of skull bone and laceration of brain found - Lower jaw was also broken at three places - Held - For bringing in operation the Exception 4 of Section 300, it has to be established that act was committed without premeditation in a sudden fight in heat of passion upon a sudden quarrel without offender taking undue advantage and having not acted in cruel or unusual manner - Appellant No.2 has caused death of deceased with intention of causing death - Conviction of appellant No.2 u/s 302 upheld.

(Paras 17 & 18)

दण्ड संहिता (1860 का 45), धारा 300 अपवाद 4 - हत्या या हत्या की कोटि में न आने वाला सदोष मानव वध - अपीलार्थी क्र. 4 ने मृतक के साथ हाथापाई की और अपीलार्थी क्र. 2 ने फावड़ा उठाया और उसकी मोथरी तरफ से मृतक के सिर पर कई प्रहार किये - सिर की हड्डी के दबे हुए अस्थि भंग के साथ चिरे-फटे घाव और मस्तिष्क चिरा पाया गया - निचला जबड़ा भी तीन स्थानों पर टूटा हुआ था - अभिनिर्धारित - धारा 300 के अपवाद 4 को प्रवर्तन में लाने के लिए यह स्थापित करना पड़ता है कि कार्य बिना किसी पूर्वचिन्तन के अचानक झगड़ने पर आवेश की तीव्रता में अचानक लड़ाई में किया गया अपराधी के अनुचित लाभ लिये बिना और क्रूर या असामान्य तरीके से कार्य नहीं करते हुए - अपीलार्थी क्र. 2 ने मृत्यु कारित करने के आशय से मृतक की मृत्यु कारित की - धारा 302 के अन्तर्गत अपीलार्थी क्र. 2 की दोषसिद्धि पुष्ट की गई।

Case referred :

(1982) 1 SCC 486.

Mohd. Saleem, for the appellants.

Pankaj Dixit, Panel Lawyer, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :- Appellant Charan Singh has been convicted under Section 302 of Indian Penal Code and appellants Tok Singh, Sher Singh and Amar Singh have been convicted under Section 302 read with Section 34 of Indian Penal Code. All of them have been sentenced to imprisonment for life for causing the

murder of Rai Singh. Appellant Amar Singh has been convicted under Section 307 of Indian Penal Code and appellants Tok Singh, Sher Singh and Charan Singh have been convicted under Section 307 read with Section 34 of Indian Penal Code and have been sentenced to rigorous imprisonment for seven years each for causing hurt to Hem Singh. The substantive jail sentences have been ordered to run concurrently.

2. The facts of the prosecution case, in brief, are that a day before 24.11.1996 Ahru had stolen some Soya bean crop from the field of Hem Singh. Ahru was relative of appellants Charan Singh and Amar Singh. Kamla Bai, wife of Hem Singh had rebuked Ahru for his committing theft of the crop. Felt aggrieved, appellants Charan Singh, Amar Singh and their relative Tok Singh got annoyed. On 24.11.1996, at about 11.00 a.m. when Rai Singh (deceased) and Hem Singh went to their threshing-floor, they found appellants present there. As soon as they reached there, appellant Amar Singh rushed and caught hold of Rai Singh. At that moment Tok Singh and Sher Singh assaulted Hem Singh by fists and kicks and felled him. Immediately thereafter, Charan Singh picked up a spade which was lying there and dealt several blows from the backside of it on the head of Rai Singh, as a result of which, Rai Singh fell down and died. Thereafter, appellant Amar Singh took the spade from Charan Singh and dealt 2-3 blows from the back side on the head of Hem Singh. Bajru Bega (PW-3), who was present in the vicinity, raised alarm, then all the four appellants ran away from the spot leaving the spade there. Hem Singh went to his house and narrated the occurrence to Buddha Singh (PW-1). Buddha Singh went to Police Station Karanjiya, district Mandla and lodged report (Ex. P/1). A marg report (Ex. P/2) was also recorded.

3. Sub Inspector Rajendra Mohan Dubey (PW-13) went to the spot and carried out inquest proceedings. He seized the blood stained earth and spade from the spot vide seizure memo Ex. P/14. He sent the dead body of Rai Singh to Primary Health Centre, Karanjiya, for postmortem examination, where Dr. Pradeep Sinha (PW-12) carried out the postmortem examination. According to his report (Ex. P/16), Rai Singh had sustained one lacerated wound 2x1/2x1/2 cms. on left lower part of face, lacerated wound 2x1x1 cms. on left upper part of face and temporal region and another lacerated wound 2x1x1 cms. on right upper part of forehead. There had been depressed fractures in the skull of left temporal region and right upper part of forehead. The brain had a lacerated wound on left temporal region and lower jaw was broken at three places. All the injuries were caused by hard and blunt object. Cause of death was the injury to brain and intracranial region with haemorrhage. Nature of death was homicidal. On examining Hem Singh, Dr. Pradeep Sinha (PW-12) found one lacerated wound 2x1x1/2 cms. on post-central part of scalp. The injury was caused by hard and blunt object and was simple in nature. Injury report is Ex. P/17.

4. After investigation, the police filed a charge-sheet against the appellants on

the allegations that they committed murder of Rai Singh and attempted to cause the death of Hem Singh.

5. Trial Court, mainly relying on the evidence of Hem Singh (PW-2), Bajru (PW-3), Buddha Singh (PW-1) and medical evidence of Dr. Pradeep Sinha (PW-12), convicted and sentenced the appellants, as aforesaid.

6. Shri Mohd. Saleem, learned counsel for the appellants, without disputing the occurrence, submitted that appellants Tok Singh, Sher Singh and Amar Singh were not liable to be convicted with the aid of Section 34 of the Indian Penal Code for the act of appellant Charan Singh. He submitted that the conviction of Charan Singh for the offence under Section 302 of Indian Penal Code was also not justified and at the most, he could be held liable under Section 304-II of the Indian Penal Code. He also assailed the conviction of appellants under Section 307 read with section 34 of Indian Penal Code on the ground that the injury found on the body of Hem Singh was not dangerous or sufficient to cause his death.

7. Learned counsel for the State tried to justify the finding of conviction recorded by the trial Court.

8. It has not been disputed, in our opinion rightly, that the presence of Hem Singh (PW-2) at the spot is established. Hem Singh (PW-2) testified that when he and Rai Singh went to the threshing-floor, all the four appellants abruptly pounced on Rai Singh. They scuffled and felled him. Appellant Charan Singh then dealt blows from the back side of spade on his head. When he tried to rescue him, they felled him and at that time appellant Amar Singh snatched the spade from the hand of Charan Singh and dealt a blow on his head. When Bajru (PW-3) raised hue and cry, all the appellants-accused, leaving spade there, ran away towards forest. According to him, along with Bajru he went to the house of his brother Buddha Singh (PW-1) and narrated incident to him.

9. Learned counsel for the appellant pointed out that Hem Singh has improved upon his case diary statement (Ex. D/1) wherein he did not say that all the four appellants had pounced over Rai Singh and felled him. Hem Singh was confronted with his aforesaid statement (Ex. D/1) wherein he did not say that when Charan Singh had dealt blows of spade on the head of Rai Singh, other appellants had held his hands.

10. On perusal of the relevant portion of case diary statement of Hem Singh (PW-2), it is revealed that when appellant Amar Singh had caught hold of Rai Singh and Hem Singh wanted to intervene, appellants Tok Singh and Sher Singh assaulted him by fists and kicks and, in the meantime, suddenly, Charan Singh picked up a spade lying at the spot and dealt its blows on the head of Rai Singh. Similarly, the earlier version of Hem Singh was that suddenly appellant Amar Singh had taken spade from the hand of Charan Singh and assaulted on his head.

11. On perusal of the evidence of Bajru (PW-3), we find the same situation. In

chief examination of his testimony, he said that all the four appellants had caught hold of Rai Singh and Charan Singh had dealt a blow by blunt side of spade and during the quarrel Amar Singh had taken the spade from the hand of Charan Singh and assaulted Hem Singh by its blunt side on his head and that on raising his hue and cry, all the appellants ran away. During cross-examination, this witness was also contradicted by his case diary statement (Ex. D/2) wherein he did not say that all the four appellants-accused had caught hold of Rai Singh.

12. The evidence of Hem Singh (PW-2) finds corroboration from the testimony of Buddha Singh (PW-1); to whom he had narrated the incident.

13. On careful examination of the evidence of these witnesses, we are satisfied that all the four appellants had participated in the incident in which Rai Singh suffered injuries at the hands of appellant Charan Singh and Hem Singh suffered simple injury at the hands of appellant Amar Singh.

14. Now the crucial question before us is whether all the appellants are liable for causing death of Rai Singh and for attempting to cause death of Hem Singh with the aid of Section 34 of Indian Penal Code and whether the conviction of the appellants under Section 302 read with Section 34 of the Indian Penal Code is justified.

15. On appraisal of the evidence of eyewitnesses Hem Singh (PW-2) and Bajru (PW-3), it appears that they have improved upon their earlier version given by them under Section 161 of the Code of Criminal Procedure in attributing the act of holding Rai Singh by all the four appellants while the assault was made by appellant Charan Singh. It is not established beyond doubt that appellants Tok Singh, Sher Singh and Amar Singh continued to hold Rai Singh till the assault on him was over. All that appears in the evidence is that appellant Amar Singh had scuffled with Rai Singh and, in the meanwhile, appellant Charan Singh had picked up a spade, which was lying at the spot and had assaulted by its back side on his head, as a result of which he died. Thus, from the mere fact that appellant Amar Singh caught hold of the deceased and scuffled with him while Charan Singh picked up a spade and assaulted him, it cannot be inferred beyond reasonable doubt that he formed common intention with Charan Singh to murder the deceased. Similarly, other appellants Tok Singh and Sher Singh also cannot be held liable for the murder of the deceased vicariously with the aid of Section 34 of the Indian Penal Code. On the same principle, appellants Tok Singh, Sher Singh and Charan Singh cannot be convicted for the offence under Section 307 read with Section 34 of the Indian Penal Code for causing injury to Hem Singh (PW-2). It has clearly come in the evidence of eyewitnesses that suddenly appellant Amar Singh had snatched the spade from the hands of Charan Singh and assaulted by its blunt side on the head of Hem Singh. At the most, appellants Tok Singh, Sher Singh and Amar Singh were liable for an offence under Section 325 read with Section 34, Penal Code. We are fortified in concluding so from the ratio of *Shambhu Kuer*

Versus *State of Bihar*-(1982) 1 SCC 486, wherein the Apex Court held that from the mere fact that the appellant caught hold of the deceased and scuffled with him, while co-accused took out a knife and commenced the assault, it cannot be inferred beyond reasonable doubt that he shared the intention of co-accused to murder the deceased. At the most, he was vicariously liable for an offence under Section 326 read with Section 34, Penal Code.

16. Learned counsel for the appellants submitted that since the assault by the blunt side of the spade was made in a sudden fight, the act of appellant Charan Singh was covered under the 4th Exception of Section 302 of the Indian Penal Code and he was only liable to be convicted under Section 304-II of the Indian Penal Code.

17. For bringing in operation the Exception 4 to Section 300 of Indian Penal Code, it has to be established that the act was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel without the offender taking undue advantage and having not acted in a cruel or unusual manner. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. In such circumstances, the cause for committing the offence of homicide is not clearly traceable to unilateral provocation i.e. whole blame cannot be placed on one side. In the instant case, the established facts are that when deceased had reached his threshing-floor, appellant Amar Singh had scuffled with him and immediately thereafter appellant Charan Singh had picked up a spade and dealt repeated blows from its blunt side on the head of deceased. There is absolutely no confusion that there had been bilateral quarrel between the deceased and the appellants. Dr. Pradeep Sinha (PW-12) had found three lacerated wounds on the skull of Rai Singh, which had resulted into depressed fractures of skull bones and laceration of brain. His lower jaw was also broken at three places. Aforesaid injuries had resulted into the death of Rai Singh.

18. In the above circumstances, we are of the considered view that appellant Charan Singh had caused the death of Rai Singh with the intention of causing his death. His conviction under Section 302 of the Indian Penal Code is therefore affirmed.

19. Since the injury caused by appellant Amar Singh to Hem Singh (PW-2) was found to be simple in nature, his conviction under Section 307 of the Indian Penal Code is set aside, instead he is convicted under Section 323 of the Indian Penal Code.

20. In the result, the appeal is partly allowed. Conviction and sentence of appellant Tok Singh, Sher Singh and Amar Singh under Section 302 read with Section 34 of Indian Penal Code is set aside, instead they are convicted under Section 325 read with Section 34 of Indian Penal Code and sentenced to rigorous

imprisonment for five years. Conviction and sentence of appellants Tok Singh, Sher Singh and Charan Singh under Section 307 read with 34 of Indian Penal Code is set aside. They are acquitted of that charge. Conviction and sentence of appellant Amar Singh under Section 307 of Indian Penal Code is set aside, instead he is convicted under Section 323 of Indian Penal Code and sentenced to rigorous imprisonment for one year. All the aforesaid sentences of the appellants shall run concurrently. Conviction and sentence of life imprisonment of appellant Charan Singh under Section 302 of Indian Penal Code is affirmed.

21. Appeal is partly allowed.

Appeal partly allowed.

I.L.R. [2008] M. P., 2985
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
28 March, 2008*

KULDEEP SAHU & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 374(2), Narcotics Drugs and Psychotropic Substances Act, 1985, Section 8 r/w 20(b)(iii)(b) - Appellant No.1 was convicted for the charge that on search of his house 12 Kg Ganja was found - Whereas appellant No.2 was convicted on the allegation that at the time of search he was present and weights, measures and Rs.743/- were seized from him - Appellants challenged their conviction before High Court - Held - No evidence is produced that appellant No.2 was also selling Ganja with appellant No.1 - Merely his presence is not sufficient to prove that he was dealing in Ganja - There is no evidence to connect complicity of appellant No.2 with this offence - Defence story of appellant No.2 that he suggested police officer not to use third degree methods against appellant No.1 on account of which he has been implicated in this case - Cannot be said to be unreasonable - Conviction of appellant No.2 set-aside - Appeal partly allowed. (Paras 11 to 13)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 374(2), स्वापक औषधि और मनःप्रमावी पदार्थ अधिनियम, 1985, धारा 8 सहपठित 20(बी)(iii)(बी) - अपीलार्थी क्र. 1 इस आरोप के लिए दोषसिद्ध किया गया कि उसके घर की तलाशी पर 12 किग्रा गांजा पाया गया - जबकि अपीलार्थी क्र. 2 को इस आरोप पर दोषसिद्ध किया गया कि तलाशी के समय वह उपस्थित था और तराजू, बांट और 743/- रुपये उससे अभिग्रहीत किये गये - अपीलार्थियों ने उनकी दोषसिद्धि को उच्च न्यायालय के समक्ष चुनौती दी - अभिनिर्धारित - कोई साक्ष्य पेश नहीं की गई कि अपीलार्थी क्र. 2 भी अपीलार्थी क्र. 1 के साथ गांजा बेच रहा था - केवल उसकी उपस्थिति यह साबित करने के लिए पर्याप्त नहीं है कि वह गांजे का संव्यवहार कर रहा था - इस अपराध से

अपीलार्थी क्र. 2 की सह-अपराधिता जोड़ने के लिए कोई साक्ष्य नहीं है – अपीलार्थी क्र. 2 की प्रतिरक्षा की कहानी कि उसने पुलिस अधिकारी को अपीलार्थी क्र. 1 के विरुद्ध थर्ड डिग्री पद्धति का प्रयोग करने का सुझाव दिया जिसके कारण उसे इस मामले में आलिप्त किया गया – अयुक्तियुक्त नहीं कही जा सकती – अपीलार्थी क्र. 2 की दोषसिद्धि अपास्त – अपील अंशतः मंजूर।

P.S. Das, for the appellants.

R.N. Yadav, Panal Lawyer, for the respondent/State.

J U D G M E N T

K.S. CHAUHAN, J. :- This criminal appeal under Section 374(2) has been filed being aggrieved by the judgment, finding and sentence passed by Special Judge (N.D.P.S.), Mandla in Sessions Trial No.09/2004 passed on 25.09.2006, whereby the appellants have been convicted under Section 8/20(b)(ii)(b) of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act') and sentenced thereto R.I. for 4 years each with fine of Rs.1,000/- in default R.I. for 6 months.

2. The prosecution case in short is that on 08.11.2004 at 2:00 p.m. R.M.Dubey, S.H.O./S.I., Police Station Nainpur received information that Kuldeep Sahu has stored ganja for sale in his house situated in ward no.10, Nainpur. Panchnama Ex.P/1 was prepared in presence of the witnesses. After obtaining the search warrant he proceeded to the house of Kuldeep Sahu along with staff and two independent witnesses. Kuldeep Sahu came out of his house on his asking. Search was given to him and after complying with the provisions of Section 50 of the Act, the house of Kuldeep Sahu was searched. 12 kilograms ganja was found in 3 different containers kept there. Out of which 2 samples of 50 grams each were drawn. Ganja and samples were seized from Kuldeep Sahu vide Ex.P/9. Weights, measures and Rs.743/- were seized from Gajraj vide seizure memo Ex.P/13. Panchnama of the proceeding was prepared. The accused persons were arrested. They were brought to police station Nainpur along with contraband articles. F.I.R. was registered. Ganja was deposited in Malkhana. Sample was sent for chemical examination to F.S.L., Sagar from where the report received. After completing the usual investigation, charge sheet was filed in the Court of Special Judge (N.D.P.S.), Mandla.

3. Appellants stood charged under Section 8/20(b)(ii)(b) of the Act to the effect that on 08.11.2004 at 5.10 p.m. at the house of Kuldeep Sahu they were found having stored 12 kilograms ganja for sale. Appellants abjured the guilt and claimed to be tried. Prosecution examined as many as 10 witnesses and defence did not examine any witness. After relying on the prosecution evidence, trial Court convicted the appellants under Section 8/20(b)(ii)(b) of the Act and sentenced thereunder as stated in para no. 1 of the judgment. Being aggrieved by the impugned judgment, the instant appeal has been filed on the grounds mentioned in the memo of appeal.

4. Shri P.S.Das, learned counsel for the appellants submitted that the finding of conviction with respect to appellant Kuldeep Sahu is not challenged. He has already suffered jail sentence of more than 3 years out of 4 years awarded by the trial Court, therefore, he be released on the period already undergone. Learned counsel further submitted that he is seriously challenging the conviction made with respect to appellant Gajraj Singh because no ganja was recovered from him and he has been illegally convicted. The finding of guilt is erroneous hence deserves to be set aside and he is entitled for acquittal.

5. On the other hand, Shri R.N.Yadav, learned P.L. appearing on behalf of the respondent/State has supported the judgment, finding and sentence passed by the trial Court mainly contending that weights, measures and Rs.743/- were seized from appellant Gajraj Singh. He has rightly been convicted and sentenced, therefore, it does not call for any interference.

6. The main point for consideration in this appeal is that whether the trial court has committed any illegality in convicting and sentencing the appellants under Section 8/20(b)(ii)(b) of the Act?

7. R.M.Dubey (PW-10) received information regarding storing of ganja by Kuldeep Sahu in his house, therefore, he obtained the search warrant and proceeded at his house with the staff and the witnesses. After giving the search of him and his staff he searched the house wherein ganja of 12 kilograms was found in 3 different containers out of which 2 samples of 50 grams each were drawn from it and the ganja was seized from Kuldeep Sahu vide seizure memo Ex.P/9. He prepared different Panchnamas.

8. Hari Singh Thakur (PW-1) and Akram Quereshi (PW-3) were the independent witnesses. They have admitted their signature on the documents from Ex.P/1 to Ex.P/15. However, Akram Quereshi (PW-3) has not supported the prosecution case and Hari Singh Thakur has supported the prosecution case and has given the evidence that the ganja was seized from the possession of Kuldeep Sahu. The other members of raid party M.L.Jhadekar (PW-4), Avnish Shrivastava (PW-5) and Deepak Bairagi (PW-6) have also supported the proceedings done by R.M.Dubey (PW-10). The seized samples were sent to F.S.L., Sagar from where the report Ex.P/31 received which clearly indicates that in sample A-1 and A-2 there was ganja.

9. These witnesses have been subjected to very lengthy and piercing cross examination and tried to shake their veracity but their evidence is intact on the material point that 12 kilograms ganja was seized from the possession of appellant Kuldeep Sahu. Therefore, the offence against him is proved beyond reasonable doubt and the trial Court has rightly found him guilty.

10. It is borne out from the evidence that the information regarding storing of ganja was only with respect to Kuldeep Sahu and not with respect to Gajraj Singh.

It is also borne out from the evidence that Gajraj Singh was not having any contraband article when he is said to have come out from the house of Kuldeep Sahu with him.

11. It is strange enough that R.M.Dubey (PW-10) gave the search of himself and his staff to Gajraj Singh also vide Ex.P/4. The question is that when there was no information regarding storing of ganja by this appellant and there was no search warrant against him then what was the sanctity to give him the search. It clearly indicates that the Police Inspector tried to make the case against him.

12. It is also borne out from the evidence that no ganja was seized from Gajraj Singh but he has been implicated only on the basis of seizure of weights, measures and Rs.743/- from him. Thus, the single act of Kuldeep Sahu has been bifurcated into two by seizing ganja from him and weights, measures and rupees from Gajraj Singh. There is no evidence to connect the complicity of Gajraj Singh with this offence. No evidence is adduced that Gajraj Singh was also selling the ganja with Kuldeep Sahu. Merely, his presence is not sufficient to prove that he was dealing in ganja. The defence of this appellant that he suggested police officer not to use third degree methods against Kuldeep Sahu. On account of which, he has been implicated in this case, can't be said to be unreasonable in the facts and circumstances of this case.

13. Since no contraband article was seized from Gajraj Singh and no complicity has been proved to connect him with this offence, therefore, the finding of guilt against him is erroneous which deserves to be set aside.

14. On the foregoing discussions, this appeal deserves to be partly allowed.

15. Since appellant Kuldeep Sahu has suffered the jail sentence of near about 3 years and 4 months out of 4 years awarded by the trial Court, thus he has suffered the substantial part of sentence, therefore, the sentence already suffered by him is sufficient to meet the ends of justice.

16. The finding of guilt with respect to appellant Gajraj Singh is erroneous, therefore, the same deserves to be set aside and he is entitled for acquittal.

17. Consequently, the appeal is partly allowed. The conviction of appellant Kuldeep Sahu under Section 8/20(b)(ii)(b) of the Act is hereby maintained. The sentence is reduced to the period already undergone. He is in jail. He be released forthwith, if not required in any other case.

18. The conviction with respect to appellant Gajraj Singh under Section 8/20(b)(ii)(b) of the Act is hereby set aside. He is acquitted of the charge levelled against him. He is on bail. His bail bonds are discharged. He be set at liberty.

Appeal partly allowed.

I.L.R. [2008] M. P., 2989
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
 1 April, 2008*

MAHENDRA SINGH

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 9, Penal Code, 1860, Sections 395 & 397 - Test identification parade - Dacoity - Identification parade after more than 2 month of incident - No evidence lead by prosecution that after arrest till holding of identification parade, investigating agency observed requisite precautions to hide identity of accused - Witnesses did not disclose personality, description and special feature of accused in F.I.R. - Held - Evidence of solitary witness can not be relied upon for fixing the identity of accused - Appellants acquitted - Appeal allowed. (Paras 9 & 11)

क. साक्ष्य अधिनियम (1872 का 1), धारा 9, दण्ड संहिता, 1860, धाराएँ 395 व 397 - शनाख्त परेड - डकैती - शनाख्त परेड घटना के दो माह पश्चात् - अभियोजन द्वारा कोई साक्ष्य पेश नहीं की गई कि गिरफ्तारी के पश्चात् शनाख्त परेड करने तक अनुसंधानकर्ता ने अभियुक्त की पहचान छुपाने के लिए आवश्यक सावधानियों का पालन किया - साक्षियों ने एफ.आई.आर. में अभियुक्त का व्यक्तित्व, वर्णन और विशिष्ट लक्षण प्रकट नहीं किये - अभिनिर्धारित - अभियुक्त की पहचान तय करने के लिए एकमात्र साक्षी की साक्ष्य पर विश्वास नहीं किया जा सकता - अपीलार्थी दोषमुक्त - अपील मंजूर।

B. Evidence Act (1 of 1872), Section 9, Penal Code, 1860, Sections 395 & 397 - Test identification of articles - Dacoity - Recovery of articles from appellants - Cash without any specific mark of identification seized from appellants - No evidence adduced that other seized articles purchased from looted cash - Held - Prosecution failed to prove its case beyond all reasonable doubts against appellants - Appellants acquitted - Appeal allowed. (Para 12)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 9, दण्ड संहिता, 1860, धाराएँ 395 व 397 - वस्तुओं की शनाख्त - डकैती - अपीलार्थियों से वस्तुओं की बरामदगी - पहचान के किसी विनिर्दिष्ट चिन्ह के बिना नगदी अपीलार्थियों से अभिग्रहीत की गई - कोई साक्ष्य पेश नहीं कि अन्य अभिग्रहीत वस्तुएँ लूटी गई नगदी से क्रय की गई - अभिनिर्धारित - अभियोजन अपीलार्थियों के विरुद्ध मामला सभी युक्तियुक्त संदेह से परे साबित करने में असफल हुआ - अपीलार्थियों को दोषमुक्त किया गया - अपील मंजूर।

C. Criminal Procedure Code, 1973. (2 of 1974), Section 452 - Disposal of property - Appellant denied seizure of property from himself - He failed to lead any evidence to establish entitlement to have possession of property - Held - For return of property the appellant has to claim property

and establish that he is the person entitled for possession - Appellant not entitled for property - Cash amount directed to be returned to the society instead of complainant who was employee of that society - Judgment of trial court amended. (Paras 14 & 15)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 452 - सम्पत्ति का व्ययन - अपीलार्थी ने उससे सम्पत्ति अभिग्रहीत की जाना अस्वीकार किया - वह सम्पत्ति का कब्जा रखने की हकदारी स्थापित करने के लिए कोई साक्ष्य प्रस्तुत करने में असफल रहा - अभिनिर्धारित - सम्पत्ति की वापसी के लिए अपीलार्थी को सम्पत्ति का दावा करना चाहिए और यह स्थापित करना चाहिए कि वही कब्जे के लिए हकदार व्यक्ति है - अपीलार्थी सम्पत्ति के लिए हकदार नहीं - नगद राशि परिवादी, जो सोसायटी का कर्मचारी है, के स्थान पर सोसायटी को वापस किये जाने का निदेश दिया गया - विचारण न्यायालय का निर्णय संशोधित किया गया।

Case referred :

2007 (1) SCC (Cri) 528.

A.S. Rathore, for the appellant.

Manish Joshi, Panel Lawyer, for the respondent/State.

J U D G M E N T (O R A L)

S.L. KOCHAR, J. :- Since all the aforesaid three appeals arise out of one and the same judgment, therefore, they are being decided by this common judgment.

2. The appellants in Cri.A.No. 810/06 and Cri.A.No. 1096/06 have preferred these appeals against the judgment dated 21.07.06 passed by the learned IX Addl. Sessions Judge, Indore in S.T.No. 161/05, thereby convicting them under sections 395 and 397 of the Indian Penal Code and sentencing them each to undergo R.I. for ten years and fine of Rs.10,000/-, in default of payment of fine to suffer additional R.I. for one year while the appellant Vishal in Cri.A.No. 987/06 preferred this appeal against the aforesaid judgment and order for return of property i.e. Hero Honda Motor Bike and the amount seized from the appellant Vishal.

3. The prosecution case in nut-shell as put forth before the trial Court is that the complainant Shaitansingh (PW-2) was serving as Head Cashier in TAKNIKI KARMACHARI SAHAKARI SAKH SANSTHA WARE HOUSE ROAD, INDORE. In November, 2003, this society entered into an agreement with the MPEB for running Electricity Bill Collection Counter in Indore Town. According to this contract, this society was collecting the amount of electric bills by running counter on different areas and in the evening after collection of money from all the counters being shifted to the office of the society. On 25.10.04, Ramsamaz Yadav, Director of the society instead of sending M.L. Verma for collecting money who used to go regularly ordered him to sit on the counter and send the complainant PW-2 Shaitansingh for collecting the money. Shaitansingh went in a Maruti Van bearing Registration No. MP/09/7040 along with driver PW-1 Mayaram in the evening at 5.30 PM. After collecting total amount of Rs. 5,32,992/- along with cheques of Rs. 2,02,559/- he was returning from Manoramaganj via

Tilak Nagar to Bakhtawarram Nagar. They were intercepted by two motor cycle riders on which two persons each were sitting. They stopped the van and while saying as to how the driver was driving the van, one miscreant gave fist blow on the head and another on the face of complainant Shaitansingh. Blood from the lips of Shaitansingh started oozing. The other two miscreants also gave 2/3 slaps to the driver Mayaram. At this juncture, two persons also reached on motor cycle and forcibly took away the bag made of thick cotton cloth containing cash amount. On this bag by blue ink English letters TKSSSM in capital were written. In the bag, amount of Rs. 5,32, 992/- and the cheques collected from three Zones were kept. The complainant lodged the report Ex.P/2 at the Police Station :Palasiya, Indore and the incident was also informed to the vice president Ramsukh Yadav of the aforesaid society. Police reached on the spot and prepared the spot map. The complainant/injured was sent for medical examination.

4. During the course of investigation, on secret information from informant dated 27.12.2004, the acquitted co-accused person Vishal Jain, Deepak, Manoj and Satish were arrested. On the basis of disclosure statements of these accused persons cash amount, mobile phone, Hero Honda motor cycle and its documents, one motor cycle bearing registration CD DON/JZ/3051 were seized. On 30.12.2004, on the basis of suspicion police of Police Station Chhoti Gwal Toli Indore arrested the appellants Mahendra and Sandeep and from their possession cash amount, one motor cycle, deposit receipt in the name of Latabai, Kinetic Honda, one bag of chilly powder, A Yamaha motor cycle, and one knife were seized and these accused persons were transferred after formal arrest to Palasiya Police Station. On disclosure statement of appellant Mahendra, a television set, one sofa set, motor pump and one cotton bag, form of MPEB, counter foils of receipt of bills were seized. The accused persons were put for identification in jail, in which the eye witness Mayaram Yadav (PW-1) did not identify any of the accused whereas PW-2 Shaitansingh identified only the appellants Sandip and Mahendra vide identification memo Ex.P/4. The identification parade was held by PW-25 Naib Tehsildar Shri C.M. Khan on 19.03.505. On completion of investigation, six accused persons were charge-sheeted for commission of the offences punishable under sections 395, 397 and 412 of the Indian Penal Code.

5. Accused persons refuted the charges. Their defence was that of denial. They did not examine any witness in defence. Learned trial Court, after examining the prosecution witnesses, recording of the statement of the accused persons as per provision under section 313 of the Code of Criminal Procedure and hearing both the parties, acquitted accused Vishal, Deepak, Manoj and Satish but convicted and sentenced the appellants Mahendra and Sandeep as mentioned herein-above. The learned trial Court has also passed the order of disposal of property as per provision under section 452 Cr.P.C. returning the seized motor cycle CD Don / JZ/3051 to the appellant Vishal which was already given on his Supurdginama

during pendency of the trial and Fixed Deposit receipt account No. 00816 to Lata w/o Bharat Kumayu holding that the motor cycle and FD were not purchased and made from the amount of dacoity.

6. Having heard learned counsel for the parties and after perusing the entire record carefully, it is spelled out that out of two eye witnesses of the incident, PW-1 Mayaram driver of the van did not identify any of the miscreants. In T.I. Parade memo his signature is appearing at portion marked A to A in Ex.P/1 and also did not identify any body in the Court. The conviction of the appellants is based on solitary statement of the complainant PW-2 Shaitansingh Raghuvanshi who had left the services of MPEB two years prior to his retirement and seizure of articles at the instance of the appellants by PW-30 R.K. Puri, Station House Officer, PW-29 C.K. Yadav ASI and PW-27 ASI L.S. Shriwas. The independent witnesses of memorandum-statement recorded under section 27 of the Indian Evidence Act and seizure of the property in pursuance thereof have turned hostile. It is also clear from the prosecution case that the looted property was the cash amount, cheques and these properties were kept in a bag on which in black ink Capital English letters TKSSSM were written. The cheques were not seized from any of the accused persons.

7. Now the core question for consideration before this Court is that whether the solitary testimony of PW-2 Shaitan Singh is sufficient to place implicit reliance or not. Shaitan singh was not knowing the appellants and seen them for the first time at the place of incident in the night at 7.00 PM,. He did not mention the personality, description and special features of the appellants in his report Ex./P/2, but stated in Court that he identified the appellants because he had seen their faces and height. He was contradicted with his statement recorded by the police as well as the report Ex.P/2 and he failed to explain the omission to this effect in the FIR Ex.P/2 in his statement para 25. He also admitted in para 11 that in the report, he did not mention the description of personality, features, height and age of the miscreants.

8. At the time of identification also he did not disclose before the Naib Tehsildar PW-25 Shri C.M. Khan as to how, on what basis and for what purpose he identified the appellants. The Identification Memo Ex.P/4 is also completely silent on this aspect. In para 14 he admitted that he expressed his inability to identify because of darkness. In para 21, he has admitted that at the time of lodging of the report, he was not knowing the exact amount of cheque and the Police first reached on the spot and after returning from the spot at 8.00 PM he was interrogated in the Police Station and the report was written. He has also stated specifically that after preparation of the spot map and spot inspection, the First Information Report was written and exact cheque amount was told to him by the President of the Society. This version is contradicted by the time of the First Information Report i.e. 7.30 PM. The map Ex.P/3 bears his signature at portion

marked A to A as mentioned in his statement para 6, but from the document Ex.P/3, it appears that the Court failed to mark his signature as portion A to A. The time of preparation of map Ex.P/8 is 8.00 PM which is clear from the document. This circumstance shows that immediately after the incident, the First Information Report was not recorded. The First Information was recorded after consultation and discussion with the officials of the society, complainant and police personnel. Shaitan singh has also specifically and voluntarily stated in para 26 that because of darkness he could not see properly and fully the miscreants and in para 27 of his deposition, he deposed that in the month of December, 2004 he received telephonic message from the Police Station that the accused persons were arrested and he was called at the Police Station. He reached there and the police shown him and told that the accused persons had committed the offence. In view of this positive admission of showing of the appellants in the Police Station, the evidence of Test Identification Parade loses its all sanctity. Learned trial Court has failed to consider this aspect of the matter in its proper perspective and held in para 16 that Shaitan singh has not stated that he had identified the accused persons in jail who were shown to him in the Police Station.

9. In view of positive admission in para 27 that this witness was called at the Police Station and the accused persons who committed the crime were shown to him, it clearly establishes that the appellants were shown. The Test Identification Parade was held on 19.03.05 whereas the appellants were arrested on 21.12.2004 i. e. After a lapse of 2 months and 18 days. No evidence is led by the prosecution to the effect that after arrest till holding of the Test Identification Parade, the Investigating Agency observed requisite precautions to hide the identity of the appellants. The appellants must have been produced after 24 hours of their arrest before the concerned Magistrate. The order-sheet of the learned Committal Court dated 31.12.2004 is perused by this Court in which it is nowhere mentioned that the appellants Mahendra Singh and Sandeep were produced BAPRDAH (by covering their faces by mask or cloth) and the learned Magistrate granted three days' police remand and the appellants were returned back in the custody of ASI Shri S.K. Yadav (PW-29) whereas when the acquitted co-accused persons, four in number, were arrested and produced before the Committal Court on 28.12.2004, they were produced BAPARDAH so that no body could identify and see them. The witnesses PW-1 Mayaaram and PW-2 Shaitan singh failed to identify these accused persons in the Test Identification Parade. This raises a reasonable presumption in favour of the appellants that if they were produced BAPARDAH, there was every possibility of failure of the witnesses to identify them in the Test Identification Parade. After arrest and while taking them to the Court as well as during the course of police remand, there was ample opportunity available to the witnesses to see them so that they may be identified properly in test identification parade.

10. If the accused persons were not known to the victim by names as well as by faces, then it is incumbent for the investigating agency to hold test identification parade through independent agency at the earliest point of time after their arrest to ascertain that right person/persons were arrested and investigation was proceeding on correct line. The Supreme Court in the case of *Amit Singh Vs. State of Maharashtra* [2007 (1) SCC Cr. 528] exhaustively considered this aspect and value of test identification parade relevant U/S. 9 of the Evidence Act after taking into account almost all the earlier judgments operating in this field rendered by the Supreme Court and held in para 13 and 14 as under:-

“13. As was observed by this Court in *Matru v. State of U.P.* Identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See *Santokh Singh v. Izhar Hussain.*). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code of Criminal Procedure, 1973 (in short “the Code”) and the Evidence Act, 1872 (in short “the Evidence Act”). It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

14. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act.

As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whole testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (see: *Kanta Prashad v. Delhi Admn.*, *Vaikuntam Chandrappa v. State of A.P.*, *Budhsen v. State of U.P.* And *Rameshwar Singh v. State of J & K.*) (Emphasis supplied)

11. Having regard to the aforesaid dicta of the Supreme Court, in the facts and circumstances of the present case, evidence of solitary witness PW.2 Shaitan Singh cannot be relied upon for fixing the identity of the appellants especially when the delay in holding test identification parade has not been explained by the prosecution by giving cogent and reliable reasons.

12. The next set of evidence relied upon by the trial Court against the appellants is the recovery of articles, but in the considered opinion of this Court, recovery of articles from the possession or houses or at the instance of the appellants would not be sufficient to bring home their guilt, because the looted property was cash amount and the same were not bearing any specific mark of identification. Therefore, the question of holding test identification parade would not arise and the statements of the accused persons before the police witnesses namely PW.27 L.S. Shrivastava, PW.29 ASI SK Yadav and PW.30 SHO R.K. Puri that the seized motor cycles, mobile phones, furniture etc. were purchased by them by looted cash amount from possession of the complainant, would not be admissible in evidence, being hit by the provisions of Sec.25 of the Indian Evidence Act that "any confession made to a police officer shall be proved as against a person accused of any offence".

13. The prosecution has failed to prove by adducing cogent and reliable evidence that the seized property (Articles) were purchase by the looted cash amount from the possession of the complainant. So far as seizure of bag from appellant Mahendra Singh is concerned, in which papers of proforma/forms of MPEB and counter slips of cash receipts were also found, is not believable. The accused would not keep for about more than four months these articles with him which could be used as a piece of evidence against him.

14. In Criminal Appeal No.987/2006 learned counsel for the appellants has challenged the impugned judgment regarding disposal of Hero Honda Passion Motor Cycle, Engine No.98931 and Chassis No.33483 by auction and the amount of the same directed to be given to the complainant Shaitan Singh along with cash amount of Rs.35,000/-. It is crystal clear that the appellant Vishal has not accepted seizure of Hero Honda Passion Motor Cycle and cash amount from his possession and house. In accused statement recorded U/S.313 of the Cr.P.C. he has not accepted the seizure of these articles at his instance and he has also not claimed these properties to be returned to him before the trial Court. The appellant has not led any evidence to establish his entitlement to have possession of these Articles. He has not filed any documents of Registration and Insurance in regard to Passion Hero Honda Motor Cycle. One invoice was seized by the police but in the said invoice only name of Vishal Jain is mentioned but his father's name and address is not mentioned. For return of the property the appellant has to claim the property and also to establish that he is the person entitled to have possession thereof, which is the main ingredient of Sec.452 of the Cr.P.C for disposal of property of the case at the time of conclusion of trial. When and accused is given benefit of doubt and acquitted, it cannot be said that he was necessarily in lawful possession of the property which was the subject matter of the case. The appellant has not led any evidence to establish his lawful possession and entitlement by claiming and adducing evidence to this effect. On the contrary, he has denied the seizure of Passion Hero Honda Motor cycle and cash amount from his possession.

15. In the opinion of this Court, on due consideration, that the learned trial Court ought to have directed return of complete cash amount of this case to the TAKNIKI KARMACHARI SAHAKARI SAKH SANSTHA MARYADIT, Ware House Road, Indore through its President or Secretary or Managing Director because the cash amount was of this Society and not of the complainant Shaitan Singh who was merely an employee of the Society. This Court in exercise of powers U/S.386(3) read with Sec.397/401 of the Cr.P.C and suo-motu powers of revision amended the impugned judgment in place of returning the property to the complainant Shaitan Singh orders to return the same to the Society.

16. In the wake of foregoing discussion, this Court is of the firm view that the prosecution has failed to prove its case beyond all reasonable doubt against the

appellants. Therefore, Cr.Appeals No.810/2006 and Cr.Appeal No.1096/2006 deserve to be and are hereby allowed. The appellants in these appeals are in jail. The learned trial Court is directed to release them forthwith if not required in any other criminal case. Cr.Appeal No.987/2006 is liable to be dismissed and is hereby dismissed.

17. Let a copy of this judgment be kept in the records of Cr.Appeal Nos. 987/96 and 1096/06 each and the original judgment be retained in the record of Cri. Appeal No. 810/2006. A copy of the judgment be also sent to the trial Court along with its record for immediate compliance.

Appeal allowed.

**I.L.R. [2008] M. P., 2997
APPELLATE CRIMINAL**

Before Mr. Justice S.K. Kulshrestha & Mrs. Justice Manjusha P. Namjoshi
10 April, 2008*

ASHOK & ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 302 - Murder - Appellants assaulted deceased with deadly weapons - Evidence of eye witness corroborated by report of F.S.L. - In doctors report appellants were not shown as assailants - Held - Primary duty of doctor is to treat a patient and not to find out by whom the injury was caused - Non-disclosure of names to doctor is of no consequence - Conviction and sentence, affirm - Appeal dismissed.

(Paras 26, 27, 30)

क. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - अपीलार्थियों ने मृतक पर घातक आयुध से हमला किया - प्रत्यक्षदर्शी साक्षी के साक्ष्य की न्यायालयिक विज्ञान प्रयोगशाला की रिपोर्ट द्वारा पुष्टि की गई - चिकित्सक की रिपोर्ट में अपीलार्थियों को हमलावर के रूप में नहीं दर्शाया गया - अभिनिर्धारित - चिकित्सक का प्राथमिक कार्य मरीज का इलाज करना है न कि यह पता लगाना कि क्षतियाँ किसके द्वारा कारित की गई - चिकित्सकों को नाम प्रकट न करने का कोई परिणाम नहीं है - दोषसिद्धि और दण्डादेश की पुष्टि - अपील खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 154, Police Regulations, Regulation 744 - F.I.R. dictated by I.O. to another Sub-Inspector and scribe not examined in court - Held - F.I.R. shall be reduced to writing by officer-in-charge of police station to whom the report was made or can be recorded under his direction - There is no requirement to examine scribe - Case of prosecution not vitiated on account of flaw in F.I.R. or procedure adopted for recording F.I.R. - Regulation 744 is not applicable in the matters relating to the recording of F.I.R.

(Paras 16)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154, पुलिस विनियम, विनियम 744 – एफ.आई.आर. अनुसंधान अधिकारी द्वारा अन्य उपनिरीक्षक को लिखवाई गई और लेखक का न्यायालय में परीक्षण नहीं कराया – अभिनिर्धारित – एफ.आई.आर. पुलिस थाने के भारसाधक अधिकारी द्वारा, जिसको रिपोर्ट की गई है, लेखबद्ध की जाएगी या उसके निदेश के अन्तर्गत लेखबद्ध की जा सकती है – लेखक का परीक्षण कराने की कोई आवश्यकता नहीं है – अभियोजन का मामला एफ.आई.आर. में त्रुटि या एफ.आई.आर. लेखबद्ध करने के लिए अपनाई गई प्रक्रिया के कारण दूषित नहीं होता – एफ.आई.आर. लेखबद्ध करने से सम्बन्धित मामलों में विनियम 744 लागू नहीं होता।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 161, Police Regulations, Regulation 744 - Criticism levelled with regard to Section 161 statements having not recorded by I.O. as per provision of Regulation 744 - Held - The reference or allusion made to the diary in the regulation is not to the statements recorded but to the entries made with regard thereto.

(Para 19)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161, पुलिस विनियम, विनियम 744 – अनुसंधान अधिकारी द्वारा 161 के कथन विनियम 744 के अनुसार लेखबद्ध न करने के सम्बन्ध में आलोचना – अभिनिर्धारित – विनियम में डायरी की ओर संदर्भ या संकेत कथनों के लेखबद्ध करने से नहीं है, बल्कि डायरी में की गई प्रविष्टियों से है।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 161, Police Regulations, Regulation 744 - 161 statements do not form an integral part of the case diary, although the I.O. is required to record substance of the statement of the witnesses examined u/s 161 of the Code.

(Para 19)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161, पुलिस विनियम, विनियम 744 – धारा 161 के कथन केस डायरी का अभिन्न अंग नहीं हैं, यद्यपि अनुसंधान अधिकारी से अपेक्षित है कि साक्षियों की संहिता की धारा 161 के अन्तर्गत की गई परीक्षा का सार लेखबद्ध करे।

Case referred :

AIR 2004 SC 1058.

S.K. Vyas with Amit Vyas, for the appellants.

Girish Desai, Dy.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by S.K. KULSHRESTHA, J. :- The convicted appellants have assailed the judgment dated 19.02.1999 of the learned 1st Additional Sessions Judge, Mohw (District Indore) in Session Trial No.78/1996 whereby while acquitting co-accused Kanhaiyalal, the appellants have each been convicted under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and fine of Rs.2,000/-. In default of payment of fine, the judgment directs the defaulter to suffer six months rigorous imprisonment.

2. The appellants were indicted for the offence punishable under Section 302 and, in the alternative, 302/34 of the Indian Penal Code. According to the case of the prosecution, a quarrel took place between accused Suresh and PW-2 Baldev in village Umeriyagaon about the person who should drive the Icher vehicle. During the course of the quarrel, PW-7 Tej Singh Chouhan arrived and tried to intercede, but Suresh gave a slap to Tej Singh Chouhan, with the result, PW-2 Baldev started abusing Suresh. PW-3 Gopibai arrived and took away Baldev and the quarrel subsided. After a short while, Hukum s/o Rameshwar came back from the duty and witnessed that the accused persons armed with various weapons passed by his house shouting that they will be done to death. On hearing the said intimidation, deceased Hukum and Baldev came out of the house and followed the accused to prevent them from the assaulting Tej Singh and few paces behind, Meenabai, Gopibai and Shivkanya followed them. When Hukum reached the tamarind tree, three persons and the co-accused attacked. Accused Ashok with a Falia, Suresh with a sword and Rajkumar with a knife assaulted the deceased who fell down as a result of their attack. The accused persons, thereafter, fled away.

3. On account of the seriousness of the injuries sustained by Hukum, Kamal and Chander took him to Indore for treatment. Tej Singh also accompanied him while Baldev Singh, Raghunath and Meenabai proceeded to the Police Station, Kishanganj where Meenabai lodged report Ex.P/1. On the basis of the report, an offence punishable under Section 302/34 of the Indian Penal Code was registered.

4. The injuries of deceased Hukum were examined by PW-6 Dr. Nirmal Chand, who gave his report Ex.P/4. In this report, PW-6 Dr. Nirmal Chand recorded that puple of the patient were dialated, pulse was not palpable and blood was coming out from the neck and chest. On this basis, the doctor opined that he was brought dead.

5. In further investigation, spot map Ex.P/2 was prepared and samples of blood stained and control soil were taken vide panchnama Ex.P/3. On learning about the death of Hukum Singh, case of sudden death was registered vide Ex.P/5 and inquest was held of which panchnama Ex.P/6 was prepared. Under requisition Ex.P/23, the dead body of Hukum was sent to M.Y. Hospital for postmortem examination. The autopsy was conducted by PW-11 Dr. Prakash Chand Jain who gave autopsy report Ex.P/24. According to the testimony of the said doctor and the autopsy report Ex.P/24, the deceased had the following external injuries: -

(1) Incised wound 8 x 2 x 4 cm just below left part of neck and below mandible lower angle runs obliquely, transverse and downward.

(2) Incised wound 5 cm x muscle deep 2 cm x 0.5 cm width transverse oblique direction present on post part of neck and its post end is 8 cm below occipital protuberance and its out end is 7 cm below and post to left ear pinna.

(3) Lacerated wound 2 cm x 1 cm x bone deep present on parieto temporal area (left) and 5 cm above and slightly post to left ear pinna. Sagittal oblique in direction.

(4) Contused abrasion 2 cm x 1 cm on right frontal area 2 cm below the right eye brow.

6. As per the opinion of the autopsy surgeon, the death occurred on account of shock and haemorrhage as a result of injuries to the body as described. The death was homicidal in nature.

7. On learning about the death of Hukum Singh, the case was altered to one under Section 302 of the Indian Penal Code and further investigation was made. The statements of the witnesses were recorded and the accused persons were arrested on 04.10.1995. On being interrogated, they made disclosure vide memo Ex.P/7 to Ex.P/9 and on the basis of the information furnished, knife was seized at the instance of accused Raj Kumar, a Falia from Ashok and a sword from Suresh. Bushirt was also seized from Ashok and all seized articles were sent to Forensic Science Laboratory, Indore from where report Ex.P/20 was received. The articles were forwarded to the Serologist and report Ex.P/21 was received to the effect that bushirt seized from appellant Ashok was having stains of human blood. After completion of the investigation, the accused persons were prosecuted.

8. On being indicted for the said offences, the accused stated that strangers had committed murder of Hukum but on account of enmity, they had been falsely implicated. DW-1 Radheshyam, DW-2 Isaq Ali and DW-3 Arun Choudhary were examined in defence.

9. Learned counsel for the appellants submits that the entire case of the prosecution is based on appreciation of the evidence. The learned counsel has severely criticized the manner in which the first information report was recorded and has stated that if it were true that PW-9 Dilip Bhandari, Investigating Officer had dictated the report and it was recorded by another Sub Inspector, it was necessary under Regulation 744 of the Police Regulations to record this fact in the first information report itself. He has further urged that having not examined the scribe of the first information report, the first information report does not constitute any legal evidence. He has also expressed his doubt about the sanctity of the first information report on the ground that though Dilip Bhandari asserts that the report of the incident was sent to the Magistrate having jurisdiction on 02.10.1995, the fact that it had reached the Court on 4.10.1995, creates a doubt of the said report being in existence on 02.10.1995 and gives rise to an inference that it has been antedated. Learned counsel has further stated that the case of the prosecution is doubtful for the reason that Tej Singh (PW-7) had though accompanied the deceased to the hospital where he was examined by Dr. Nirmal Chand (PW-6) who gave report Ex.P/4, it was not disclosed to the doctor that the

appellants were the assailants and on the contrary, it was stated that unknown persons had assaulted the deceased. He has further stated that PW-7 Tej Singh having already been furnished names of the assailants, would not have stated that the assailants were unknown. He has also criticized the manner in which the offence was investigated and the delay and lethargy on the part of the investigating officer in taking requisite steps in the matter.

10. Learned counsel for the State has, per contra, submitted that the requirement of the first information report does not lay down that it is to be written by the person to whom the matter is reported and it is sufficient if it has been recorded under his dictation. He has also submitted that the statements under Section 161 of the Criminal Procedure Code also do not require the statement of witnesses be reduced in writing by the person who has been informed about the incident.

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

12. In so far as the homicidal death of Hukum Singh is concerned, the appellants have not disputed the same. Even otherwise from the testimony of PW-1 Meenabai, PW-2 Baldev Singh, PW-3 Gopibai, PW-4 Bharat Singh Chouhan, PW-6 Dr. Nirmal Chand and PW-11 Dr. Prakash Chand Jain and the PM report Ex.P/24 coupled with the inquest report, clearly establish that Hukum Singh met a homicidal death. The moot question for our consideration is as to whether the appellants were responsible for causing the said death and if so, nature of the offences committed by them.

13. The prosecution examined eleven witnesses to prove its case while the defence examined three witnesses. Out of the eleven witnesses examined by the prosecution, PW-1 Meenabai, PW-2 Baldev, PW-3 Gopibai and PW-4 Bharat Singh Chouhan have been examined as eye witnesses. Learned counsel for the appellants has doubted the truthfulness of the statements of these witnesses on the ground that they are partisan and though independent witnesses must have been available, the investigating officer did not produce them in the case or recorded their statement. It is well settled that the testimony of a witness cannot be discarded merely on the ground that he is partisan and all that, that is necessary is that the evidence of such witness should be minutely scrutinized.

14. PW-1 Meenabai has deposed that while she was going to fetch water from a hand-pump, she saw that her brother-in-law Baldev and accused Suresh were quarreling. At that moment, her uncle-in-law Tej Singh, Sarpanch, arrived and tried to intervene. Accused Suresh resented his intrusion and gave a slap to Tej Singh. At that time, her mother-in-law Gopibai was coming from the side of the well and both of them then went to the place and brought back Baldev after persuading the parties to refrain from quarreling further. At this juncture, her brother-in-law Hukum Singh came to the house from his duty and her mother-in-law brought water for him. The three accused along with the co-accused passed by the house stating that they would finish Tej Singh. Sensing some untoward

incident, her brother-in-law Hukum Singh left the house and followed the accused to ensure that quarrel does not ensue. They also followed Hukum Singh. When the accused persons had reached the house of Kamal, they suddenly returned. The accused persons, stating that he belonged to the same family, started assaulting Hukum Singh and killed him and fled away from the place of incident. Tej Singh and Kamal took the deceased for treatment while she proceeded along with Baldev, Gopibai and Rugnath to the Police Station where she lodged first information report Ex.P/1.

15. Learned counsel for the appellants has submitted that the first information report cannot be taken to be a reliable document as it was not recorded by PW-9 Dilip Bhandari, as admitted by him, but by a Sub Inspector to whom he had dictated the text and thereafter has subscribed his signatures. Learned counsel has submitted that as per the Police Regulation 744, if a person to whom the report is made, is unable to record it, he has to assign reasons in the first information report itself. This question has also been put to the investigating officer PW-9 by the defence but he has shown ignorance about the provisions of Regulation 744 of the Police Regulation. Before proceeding to consider the impact of Regulation 744, it would be necessary to elicit the requirement of recording FIR as per Section 154 of the Criminal Procedure Code. Section 154 of the Criminal Procedure Code reads as under: -

“154. Information in cognizable cases. - (1) Every information relating to the commission of a cognizable offence, if given orally to an officer incharge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer incharge of a police station in relation to that offence.”

16. It is manifest from the provision herein above reproduced that the information can be reduced to writing by the officer to whom it is furnished or under his

direction. Even if we do not believe the cause assigned by the investigating officer that his hand was trembling on account of hyper-tension, since Section 154 of the Criminal Procedure Code permits that the first information report can be recorded under the direction of the officer-in-charge of the Police Station to whom the report was made, we have to see as to what is the impact of Regulation 744 of the Police Regulation.

17. Regulation 744 reads as follows: -

"744. Statement under Section 161, Criminal Procedure Code. - When an investigating officer decides to record a statement under Section 161, Criminal Procedure Code, the record should be made at the time the witness is examined. The diary itself should be written privately, usually at end of the day's work, and not in the presence of witnesses as though its compilation were a public function. The diary must be written up day by day and not at leisure after the investigation is completed. The investigating officer will ordinarily write the case-diary in his own hand-writing and will sign and date it, after recording the hour at which the investigation is closed each day. Should he, for any reason, be unable to write himself, he may use a literate head constable or constable as his amanuensis but in such case it must be distinctly stated why the investigating officer could not himself write the diary, which should be signed both by the investigating officer and the writer. The names of informers need not be entered in the diary and no court can compel an investigating officer to disclose the name of an informer. When, therefore, action is taken on information, the source of which the investigating officer does not wish to disclose, he will preface the report in the diary of that action with the remark "From information received I did so and so"."

18. Perusal of the provision as herein above extracted, shows that Regulation 744 is not applicable in matters relating to the recording of the first information report. It is also clear that when the first information report is recorded under the direction of the SHO to whom the report is made, it is not necessary to examine the scribe as, according to the case of the prosecution, it was recorded under the direction of the SHO PW-9, Dilip Bhandari who has testified to it. The purpose of first information report is the same as of any document on the basis whereof, under Section 145 of the Evidence Act, he can be contradicted. It has also been stated that FIR can be used for corroboration as well. Under these circumstances, we are of the opinion that Regulation 744 had no application in matter relating to recording of the FIR nor there is any requirement for examining scribe thereof when the Station House Officer has testified to it.

19. Criticism has also been levelled with regard to 161 statements having not been recorded by the investigating officer PW -9 Dilip Bhandari. It is in this arena

that the learned counsel pressed into service provision of Regulation 744. We may straightway point out that so far as regulations with regard to the investigation are concerned, they are directory and cannot override the provisions of Criminal Procedure Code or any other law, though they can definitely supplement the same. Regulation 744 is an enabling one as it provides an opportunity to the person unable to write, to seek assistance of another. Regulation clearly provides that the investigation officer for any reason unable to write himself, may use a literate head constable but in such case, it must be distinctly stated why the investigating officer could not himself write the diary, which should be signed by both the investigating officer and the writer. The reference or allusion made to the diary in the regulation is not to the statements recorded but to the entries made with regard thereto. Under these circumstances, we are of the considered view that the investigation did not suffer from any serious flaw as shown, to vitiate the entire investigation. Reference has also been made to the Regulation 635 with regard to the details required to be entered as prescribed by Section 44 of the Police Act, 1861. Learned counsel has stated that though it is required to mention in the general diary, the names of the complainant or the informant, names of the witnesses examined and the other requirements enumerated thereto, investigating officer has admitted that he did not enter the names of the witnesses examined by him immediately upon his return to the police station. The above requirement is also procedural as examination of the witnesses by Police under Section 161 of the Criminal Procedure Code permits the investigating officer or other police officer to examine a person orally and he may reduce into writing any statement made to him in the course of examination under the said section. Sub Section (3) requires that a separate and true record of the statement of each such person shall be made. It is, therefore, clear that insofar as the statements under Section 161 of the Criminal Procedure Code are concerned, they do not form part of the case diary but are maintained separately for being filed in accordance with Section 173 of the Criminal Procedure Code along with the charge sheet. Attention has also been invited to Section 172 of the Cr.P.C. that every police officer making an investigation is required to enter his proceedings in investigation in a diary from day to day setting forth the time at which the information reached him and the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation. We cannot confuse the case diary with the general diary. The case diary is sacrosanct in the manner and the accused is not permitted access to it unless it is used for refreshing memory. Since the accused had the access to 161 statements and not to case diary, it clearly shows that 161 statements do not form an integral part of the case diary, although the investigating officer is required to record substance of the statement of the witnesses examined under Section 161 of the Criminal Procedure Code.

20. From the above discussion, we are of the view that the case of the

prosecution is not vitiated on account of any flaw in the first information report or procedure adopted for recording statements under Section 161 of the Criminal Procedure Code.

21. A doubt has also been raised with regard to the first information report having been lodged at a time it purports to have been. Learned counsel has submitted that although the first information report was stated to have been recorded on 02.10.1995, it reached the Magistrate having jurisdiction on 04.10.1995. PW-9 Dilip Bhandari when asked about the delay has merely stated that as per the dispatch register, the same had been sent on 02.10.1995. If by reference to the dispatch register, witness deposes that it was sent on 02.10.1995, the accused could have been examined the said register to ascertain whether the statement was true. He has further submitted that in paragraph 31, he has admitted that on 02.10.1995, report about the investigation had not been mentioned till 03.10.1995, which casts a serious doubt about the investigation. We find that though the investigating officer meticulously followed the law and the procedure prescribed, non-mention of the steps taken in investigation in the roz-namcha promptly does not adversely affect the case of the prosecution.

22. As pointed out herein above, there are four eye witnesses and the evidence of PW-1 Meenabai has already been referred to. PW-2 Baldev Singh has also corroborated the version of Meenabai. He has referred to the earlier quarrel in which Tej Singh had been slapped and stated that thereafter the accused persons assaulted the deceased with the sword and Falia and knife. When he heard that the accused were challenging by stating that they will finish the family of Sarpanch, they followed to ensure that no untoward incident takes place. Hukum Singh returned and started leading the party, following the accused person, although they attacked Hukum Singh and killed. Learned counsel has pointed out that Baldev has stated that although four accused assaulted him with swords, it appears that the statement of this witness in paragraph 2 has not been appreciated in correct perspective. In paragraph 2, he has clearly stated that accused persons were wielding sword, Falia and knife and the acquitted accused with Lathth (staff). Under these circumstances, the statement that "all of them attacked with swords" appears to have been made in some confusion. It has also been pointed out that the evidence of this witness cannot be believed as he has criminal propensities and is facing prosecutions. The witness has, however, clarified that it was only a case of verbal quarrel for which he has been prosecuted.

23. PW-3 Gopibai is the sister-in-law of Tej Singh. She has described the incident in which Tej Singh was slapped and subsequently accused persons having arrived with weapons and intimidating the family with the above arms. He has also confirmed that they followed the accused persons but as they reached near the house of Ganesh, Suresh assaulted Hukum Singh with a sword, Ashok with a Falia and Raj Kumar with a knife. Thereafter accused persons ran away. She has stated that the accused had attacked the deceased conjointly.

24. Bharat Singh Chouhan (PW-4) is another eye witness though his name has not been mentioned in the first information report, as rightly pointed out by the learned senior counsel for the appellants. Bharat Singh has corroborated the testimony of the other witnesses and has stated that after the incident Tej Singh left for Indore but in the evening they learnt that Hukum Singh had succumbed to the injuries. His statement was recorded on the same evening.

25. Learned counsel has referred to the testimony of PW-6 Dr. Nirmal Chand and the report Ex.P/4 given by him. In the report Ex.P/4, while recording the history that it was a case of assault with Farsa at about 01.30 p.m. on that date in village Umeriya by some persons. Since name of Tej Singh is mentioned as the person who accompanied the dead body, learned counsel has inferred that Tej Singh has given this information though he knew, as per the statement of this witness, that the accused persons had belaboured him. PW-6 Dr. Nirmal Chand in his testimony has deposed that he was working as Medical Officer in Choithram Hospital & Research Centre, Indore when Hukum Singh s/o Rameshwar was brought by his uncle Tej Singh. He had stated that some people had assaulted the deceased with Farsa. He, therefore, gave a report Ex.P/4 and informed the Police.

26. Tej Singh has been examined as PW-7. Tej Singh has deposed to the earlier part of the incident in which Suresh had given him a slap and quarrel had ensued in which others had interceded. There was turmoil in the village and some people had informed him that the accused persons were approaching with arms. When he saw where the crowd had gathered and he reached the place, he found that Hukum Singh was lying in a pool of blood. Gopibai told him that Ashok with Falia, Suresh with sword and Raj Kumar with a knife had caused injuries to Hukum Singh. Hukum Singh was taken in a Maruti Car to Indore where he was declared dead and his body was sent to M.Y. Hospital. Learned counsel has submitted that Tej Singh is unreliable for reasons more than one. It has been conceded by him that names of the assailants had been communicated to him but still he did not mention the names to PW-6 Dr. Nirmal Chand. In his cross examination, he has denied having informed the doctor that some people had assaulted the deceased with Farsa. We may at once notice, that Tej Singh was not the only person who had accompanied the deceased but there were many more. Merely because his name was recorded as the person who accompanied the dead body, it cannot be inferred that the history was furnished by him. PW-6 Dr. Nirmal Chand has though stated that Tej Singh had given the said information, it is only on the basis of the medical report that he had said so. There is no evidence to the effect that Tej Singh was known to Dr. Nirmal Chand and, therefore, Dr. Nirmal Chand had no reason for remembering the facts of the said case right up to the date of his examination in chief. Tej Singh has also not been shown to Dr. Nirmal Chand to ascertain whether Tej Singh had given the said information. On the basis of such vague assertion on the part of Dr. Nirmal Chand, it cannot be inferred that the information recorded in Ex.P/4 had been given by Tej Singh.

27. Learned counsel for the respondent/State has referred to the decision of the Supreme Court in *Bhargavan and others versus State of Kerala* (AIR 2004 SC 1058) to the effect that non-disclosure of the names to the doctor is of no consequence. It has been further observed that the primary duty of the doctor is to treat a patient and not to find out by whom the injury was caused. It is, therefore, clear that the evidence of the eye witnesses namely PW-1 Meenabai, PW-2 Baldev, PW-3 Gopibai and PW-4 Bharat Singh Chouhan is in no way adversely affected on account of the recital in the injury certificate Ex.P/4 or on account of the testimony of PW-6 Dr. Nirmal Chand.

28. Learned senior counsel for the appellants has further submitted that since PW-7 Tej Singh has a criminal record, he is not a reliable witness. Tej Singh has admitted that in the past, he had been prosecuted for an offence punishable under Section 307 of the Indian Penal Code. He has also admitted that while he was Sarpanch, he had been prosecuted for misappropriation. He was also prosecuted with regard to the theft of electric motor.

29. The role of PW-7 Tej Singh was limited to taking the deceased to the hospital and with regard to the earlier quarrel in which he had been given a slap by Suresh. It is not a case where Tej Singh has been examined as an eye witness. Had it been a case where Tej Singh wanted to help the prosecution, there was no impediment in his proceeding to do so. Therefore, we are of the view that the evidence of Tej Singh that he had not made any such statement to PW-6 Dr. Nirmal Chand to whom Tej Singh was a stranger, deserves to be accepted.

30. PW-8 Dashrath Singh is a witness to the disclosure of the weapons but he has not supported the prosecution case. PW-10 R.K. Singh has conducted inquest. The report of the Forensic Science Laboratory and the Serologist Ex.P/20 and Ex.P/21 indicate that there were blood stains on the shirt of accused Ashok. In view of the overwhelming evidence of the eye witnesses, this piece of evidence namely the report of the Serologist in respect of the shirt of the accused Ashok, that the same contained human blood, further corroborates the eye witness.

31. In view of the foregoing discussions, we are of the considered view that this appeal sans merit. Accordingly, the appeal is dismissed. The appellant shall surrender to their bail bonds to serve out the jail sentence.

32. Simultaneously, warrants be issued against the appellants for their production before the trial Court for being sent to jail for serving out their sentence.

Appeal dismissed.

I.L.R. [2008] M. P., 3008
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
 23 June, 2008*

BHERU

Vs.

STATE OF M.P.

... Appellant

... Respondent

Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Sections 8, 20 - Cannabis plants seized from field - Land record and map of field produced - Appellant denied ownership and possession of field - Held - Prosecution is required to prove that the appellant was in exclusive possession of the field where cannabis plants were seized and he was having conscious possession of contraband article - Neither name of Patwari who issued the record disclosed nor signature & handwriting proved - Land record and map not proved in accordance with provision of S. 67 of Evidence Act - Independent witness also did not support prosecution case - Prosecution failed to prove case beyond reasonable doubt - Conviction and sentence set-aside - Appeal allowed. (Paras 4 & 5)

स्वापक औषधि और मनःप्रमावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8, 20 - गांजे के पौधे खेत से अभिग्रहीत - खेत का भू अभिलेख और नक्शा पेश - अपीलार्थी ने खेत के स्वामित्व और कब्जे से इंकार किया - अभिनिर्धारित - अभियोजन को यह साबित करना अपेक्षित है कि अपीलार्थी खेत के एकमात्र कब्जे में था जहाँ से गांजे के पौधे अभिग्रहीत किये गए और वह निषिद्ध वस्तु का सचेतन कब्जा रखता था - न तो अभिलेख जारी करने वाले पटवारी का नाम प्रकट किया गया और न ही हस्ताक्षर और हस्तलेख साबित किये - भू अभिलेख और नक्शा साक्ष्य अधिनियम की धारा 67 के उपबंध के अनुसार साबित नहीं किये - स्वतंत्र साक्षी ने भी अभियोजन के मामले का समर्थन नहीं किया - अभियोजन मामला युक्तियुक्त संदेह से परे साबित करने में असफल - दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर।

Vivek Singh, for the appellant.

R.S. Chouhan, for the respondent/State.

JUDGMENT (ORAL)

S.L. KOCHAR, J. :-The appellant has preferred this appeal against the impugned judgement dated 22/03/95 passed in S.T.No.138/94 by learned Session Judge, Ratlam, whereby convicted the appellant for the offence punishable under Section 8/20 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (for short 'the Act'), sentenced to R.I for one year and fine of Rs. 3,000/-, in default of payment of fine additional imprisonment for three months.

2. According to prosecution case, on 13.8.94 PW-5, Station House Officer, Shri Shivram Dandotiya received information from informant that in village

Babdikheda in the field of appellant between the crop of cotton and maize cannabis plant were also grown. Memorandum Ex.P/2 was prepared regarding informer information and copy of the same was sent to the senior police officer. The Station House Officer reached in the field of the appellant and apprised him about the informer report. PW-5 Shivram Dandotiya effected the seizure of cannabis plant, total 2090. Out of this plants some plants were seized separately as a sample and same were sent to the laboratory. According to laboratory report Ex.P/1 plants were of cannabis. On due investigation, appellant was charge sheeted for commission of offence under Section 8/20 of the Act.

3. Appellant denied the charges and pleaded false implication.

4. Having heard the learned counsel for the parties and after perusing the entire record, it emerged that no independent witness has supported the prosecution case regarding seizure of cannabis plants from the field exclusively in possession of the appellant for the purposes of establishing the charge of growing or cultivating cannabis. The prosecution is required to prove that the appellant was in exclusive possession of the field from where the cannabis plants were seized and he was having conscious possession of contraband article. In the instant case, on this issue only witness is PW-5 Investigating Officer Shivram Dandotiya, who has proved a copy of the land record Ex.P/16 and map of the field Ex.P/17, but he has nowhere stated that these documents were issued by which Government officer in discharge of official duty and whose handwriting and signatures are present on these documents. These documents have not been proved in accordance with the provision of Section 67 of the Evidence Act, which reads as under :-

67.- Proof of signature and handwriting of person alleged to have signed or written document produced.-- If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

5. In paragraph-13, the Investigating Officer has stated only this much that he obtained the trace map and copy of land record from the Patwari vide Ex.P/16 and P/17. He has not even disclosed the name of Patwari and nowhere stated that both documents were prepared in the handwriting by the concerned Patwari and also signed by the said Patwari. It is crystal clear from the statement of PW-5 Shivram Dandotiya that documents Ex.P/16 and P/17 have not been proved in accordance with the provisions of Section 67 of the Evidence Act (supra). The prosecution case also affected on the ground of non-examination of Patwari, who was the main witness for proving the documents regarding ownership as well as possession of the field from where cannabis plants were seized. Appellant has specifically denied the ownership as well as possession of the field and seizure of the plants.

6. In view of the above-mentioned discussion, in the opinion of this Court, prosecution has miserably failed to prove the case beyond reasonable doubt, therefore, this appeal is allowed, conviction and sentence of the appellant are hereby set aside. Appellant is on bail, his bail and surety bonds stand discharged.

Appeal allowed.

I.L.R. [2008] M. P., 3010
APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava

1 July, 2008*

RAMSIYA

Vs.

STATE OF M.P.

... Appellant

... Respondent

A. Evidence Act (1 of 1872), Section 3 - Reliability of hostile witness
- *The evidence of a hostile witness cannot be treated as effaced or washed off from the record altogether, but the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof.*
(Para 17)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - पक्षद्रोही साक्षी की विश्वसनीयता - पक्षद्रोही साक्षी का साक्ष्य अभिलेख से पूरी तरह मिट गया या विलुप्त हो गया ऐसा नहीं माना जा सकता, बल्कि वह उस सीमा तक स्वीकार किया जा सकता है जितना सावधानीपूर्वक जाँच करने पर ऐसे साक्षी का बयान विश्वसनीय पाया जाए।

B. Penal Code (45 of 1860), Section 302 - Eye-witness, who is a son of deceased, was present and witnessed the occurrence of deadly assault on his parents by appellant - Corroborated from F.I.R. lodged by him and also corroborated from testimony of witnesses to whom the incident is narrated soon after the incident - No reason why he would twice depose against appellant - It does not appeal to reason that he would falsely implicate the appellant who is real uncle - Witness cannot be disbelieved merely on ground that he has been declared hostile by the prosecution - Conviction and sentence u/s 302 affirmed - Appeal dismissed.
(Paras 18 & 19)

ख. दण्ड संहिता (1860 का 45), धारा 302 - प्रत्यक्षदर्शी साक्षी, जो मृतक का पुत्र है, घटनास्थल पर उपस्थित था और अपीलार्थी द्वारा उसके माता-पिता पर घातक हमला करने की घटना का साक्षी था - उसके द्वारा दर्ज कराई गई एफ.आई.आर. से सम्पुष्टि हुई और साक्षियों के अभिसाक्ष्य से भी पुष्टि हुई जिन्हें घटना के तत्काल बाद घटना बतायी गई - इसका कोई कारण नहीं कि वह दो बार अपीलार्थी के विरुद्ध बयान देवे - यह कारण भी मानने योग्य नहीं है कि अपीलार्थी जो कि सगा चाचा है उसे वह मामले में झूठा फसायेगा - साक्षी पर केवल इस आधार पर अविश्वास नहीं किया जा सकता है कि उसे अभियोजन ने पक्षद्रोही घोषित किया - धारा 302 के अन्तर्गत दोषसिद्धि और दण्डादेश की पुष्टि - अपील खारिज।

C. Evidence Act (1 of 1872), Section 157 - *The evidence of such witnesses to whom the incident is narrated soon after the incident, is admissible as corroborative evidence u/s 157 of the Act.* (Para 18)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 157 - ऐसे साक्षियों का साक्ष्य, जिन्हें घटना के तत्काल बाद घटना बतायी गई हो, अधिनियम की धारा 157 के अन्तर्गत सम्पुष्टिकारक साक्ष्य के रूप में ग्राह्य है।

Case referred :

AIR 1991 SC 1853, (1985) 4 SCC 212.

B.K. Khare, for the appellant.

R.S. Patel, Addl.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **SMT. SUSHMA SHRIVASTAVA, J. :-** Appellant has challenged his conviction and order of sentence passed by Sessions Judge, Chhatarpur, in S.T. No. 255/98 decided on 26.7.99.

2. Appellant has been convicted under Section 302 of IPC and sentenced to imprisonment for life with fine of Rs. 2,000/- on two counts for committing murder of Hiraya and Rajrani @ Radharani by the impugned judgment. Both the sentences were to run concurrently.

3. According to prosecution, on 6.10.98 at about 3 O'clock in the noon at Mahamai field, village Odi, when deceased Hiraya, his wife Rajrani and son Ramlakhan were cutting the grass near the medh of their field after ploughing it, appellant Ramsiya, the real brother of deceased Hiraya, came there with lathi and abused Hiraya complaining why he ploughed the medh of his field. Deceased Hiraya denied to have ploughed medh of appellant's field, which led to an altercation between deceased Hiraya and the appellant. Thereupon, appellant wielded lathi blow on the scalp of Hiraya and other repeated lathi blows on his body. As a result, Hiraya fell down and sustained injuries with profused bleeding. His wife Rajrani @ Radharani & son Ramlakhan rushed to rescue him, but appellant gave lathi blows to Rajrani as well. She also fell down and sustained various injuries. Appellant also tried to assault Ramlakhan, the son of Hiraya, but he somehow managed to escape, reached the village and narrated the incident to Rajaram Patel, Baldev Patel, Shobhalal & others. By the time they came to the place of occurrence, both Hiraya and his wife Rajrani had succumbed to their injuries.

4. The FIR of the incident was lodged by Ramlakhan, the son of deceased at Police Station Sarvai, on the basis of which an offence was registered against the appellant and was investigated. Merg intimation was also recorded at his instance and merg inquest reports were prepared. The dead bodies of deceased Hiraya and Rajrani @ Radharani were sent for postmortem examination. Spot map was prepared. Blood stained and plain earth were seized from the spot. The lathi

used in the commission of offence was also seized at the instance of appellant. After due investigation, appellant was prosecuted under Section 302 of IPC and was put to trial.

5. Appellant abjured the guilt and pleaded false implication.

6. The learned Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellant guilty for committing murder of his brother Hiraya and his wife Rajrani @ Radharani and convicted and sentenced him as aforesaid by the impugned judgment. Being aggrieved by the order his of conviction and sentence, appellant has preferred this appeal.

7. Learned counsel for the appellant submitted that the learned trial judge erroneously convicted the appellant on the basis of unreliable, inconsistent and sole testimony of Ramlakhan (P.W-3) and failed to appreciate that the aforesaid witness was not present on the scene of occurrence.

8. We have perused the entire evidence on record.

9. It is clearly borne out from the medical evidence of Dr. S.D. Mishra (P.W-1) that both the deceased persons, namely, Hiraya and his wife Rajrani @ Radharani (hereinafter to be referred as deceased by their respective names) met homicidal death. Dr. S.D. Mishra (P.W-1), who conducted the autopsy on the dead body of deceased Hiraya, found following antemortem injuries on his body:-

(i) Lacerated wound 4cm x 3cm x bony deep at right parietal region of scalp, obliquely situated. Underlying the wound right parietal bone fractured and right parietal lobe of brain with its meninges teared. Clotted blood inside the brain present.

(ii) Lacerated wound 5cm x 3cm x bony deep at right side of occipital region of scalp. Underlying the wound occipital bone fractured and occipital lobe of brain with its meninges teared. Clotted blood inside the brain present.

(iii) Lacerated wound 4cm x 2cm x bony deep at right maxillary region of face. Under the wound right maxillary bone fractured. Clotted blood present at the wound.

(iv) Lacerated wound 3cm x 2cm x 1cm at right cheek. Blood clot present at wounds.

(v) Lacerated wound:- 3 m x 2cm x 1cm at right ear pinna.

10. According to Dr. S.D. Mishra (P.W-1), the aforesaid injuries were caused by hard and blunt object and were sufficient in the ordinary course of nature to cause death and deceased Hiraya died due to coma as a result of injury to the brain.

11. The postmortem on the dead body of deceased Rajrani @ Radharani was also conducted by Dr. S.D. Mishra (P.W-1) and the following antemortem injuries were found on her body -

1. "Lacerated wounds 10cm x 3cm x bony deep at left occipito-parietal region of scalp. Underlying the wound both occipital and parietal bone left side fractured and brain left parietal lobe and occipital lobe with its meninges has been teared. Clotted blood present at the wound. Obliquely situated.
2. Lacerated wound 9cm x 3cm x bony deep at left parietal region of scalp. Under the wound of left parietal bone has been fractured. Left parietal lobe of brain with its meninges under the wound has been teared and coming out from the wounds. Clotted blood present at wounds. It is situated below the injury no.1 and obliquely placed.
3. Lacerated wounds 2cm x 2cm x 1 cm at right side of nose. Blood clot present.
12. In the opinion of Dr. S.D. Mishra (P.W.-1), the aforesaid injuries of deceased Rajrani @ Radharani were caused by hard and blunt object and were sufficient in the ordinary course of nature to cause death and deceased Rajrani died due to coma as a result of injury to brain.
13. There are no reasons to disagree with the aforesaid medical evidence. In view of the aforesaid medical evidence, it is upheld that death of both Hiraya and his wife Rajrani was homicidal in nature.
14. The next question that arises is whether appellant intentionally caused the death of both Hiraya and his wife Rajrani ?
15. The conviction of the appellant is founded mainly on the testimony of Ramlakhan (P.W.-3), the son of deceased Hiraya & Rajrani, who was also cutting the grass in the field alongwith his parents at the time of occurrence. P.W.-3 Ramlakhan categorically deposed in his evidence that appellant came with a lathi and wielded lathi blows to his father and mother leading to their death; when appellant tried to assault Ramlakhan (P.W.-3) he ran away from the spot and narrated the incident to Dau Patel & others and lodged the FIR. (Ex.P-6).
16. Although, P.W.-3 Ramlakhan was swayed in his cross-examination and deposed that he was informed of the incident by Dau and a suggestion was made from the defence side by recalling him for further cross-examination that he was not present at the place of occurrence and he had gone to village Mahoi, but when he was declared hostile and cross-examined by Public Prosecutor, Ramlakhan (P.W.-3) again clearly admitted that appellant had raised an objection as to why his father had ploughed his medh, entered into an altercation and thereafter appellant had assaulted his father Hiraya & his mother Rajrani. He also admitted that he had reported the matter to the Police.
17. Upon close scrutiny of the evidence of P.W.-3 Ramlakhan, it appears that he made a shift from his statement only at the suggestion of the defence, otherwise he remained firm in his testimony that appellant assaulted his parents in his presence.

This fact is also fortified by the contents of the FIR (Ex.P-6) admittedly lodged by him. In view of clear and categorical admission made by P.W-3 Ramlakhan in his evidence that appellant assaulted his mother and father before him, his presence on the scene of occurrence cannot be doubted. It is also well settled, as reiterated by the Apex Court in the case of *Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh* reported in AIR 1991 Supreme Court Pg. 1853, that the evidence of a hostile witnesses cannot be treated as effaced or washed off from the record altogether, but the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof.

18. The fact, that P.W-3 Ramlakhan was present and witnessed the occurrence of deadly assault on his parents by the appellant, is not only corroborated from the FIR (Ex.P-6) lodged by him, but also corroborated from the testimony of Dau @ Saligram (P.W-4) and Rajaram (P.W-5) to whom P.W-3 Ramlakhan had narrated the incident. The evidence of such witnesses to whom the incident is narrated soon after the incident, is admissible as corroborative evidence under Section 157 of the Evidence Act. It would be profitable to refer to a decision of the Apex Court reported in 1985(4) Supreme Court Cases page 212 *Smt. Chander Kala Vs. Ramkishan & Another* para 9 in this behalf.

19. Moreover, there are no reasons why son of the deceased would twice depose against the appellant that he had assaulted his mother and father in his presence. It does not appeal to reason that P.W-3 Ramlakhan would falsely implicate the appellant, who is his real uncle, merely because of alleged land dispute and would save the real assailant of his father and mother.

20. In view of the aforesaid facts, the statement made by P.W-3 Ramlakhan that the incident took place in his presence when he was cutting the grass along with his parents at the field and the appellant assaulted both his mother and father by lathi is found to be acceptable and trustworthy.

21. The citation referred to by learned counsel for the appellant, as reported in AIR 1996 Supreme Court page 3471 (*Alil Mollah Vs. State of West Bengal*), being distinguishable on facts is of no avail to the appellant in the instant case.

22. The plea taken by the appellant that somebody else killed the deceased persons at the instance of village Patel out of enmity in order of grab the land of the appellant and his brother (deceased), is also not found established from the record.

23. It was thus rightly held by the trial court on the basis of testimony of Ramlakhan (P.W.-3) coupled with other corroborative evidence that appellant caused the death of Hiraya and his wife Rajrani by assaulting them with lathi. It is also clearly borne out from the medical evidence that injuries caused on the vital parts of the body of deceased persons were sufficient in the ordinary course of nature to cause death. Thus, it was also quite evident that the appellant intentionally caused the death of both Hiraya and his wife Rajrani @ Radharani.

24. In the wake of aforesaid, we are of the considered opinion that the appellant has been rightly convicted by the trial court under Section 302 of IPC for committing murder of Hiraya & Rajrani.

25. The conviction of the appellant under Section 302 of IPC as recorded by the trial court for committing murder of Hiraya and Rajrani and the life sentence with fine of Rs.2,000/- awarded to him on two counts do not warrant any interference in appeal.

26. Appeal being bereft of any merit is dismissed.

27. The conviction of the appellant and the sentences passed on him under Section 302 of IPC are affirmed.

Appeal dismissed.

I.L.R. [2008] M. P., 3015

APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava

3 July, 2008*

RAJU @ RAJENDRA SINGH

Vs.

STATE OF M.P.

... Appellant

... Respondent

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - *Dying declaration - Appellant alleged to have poured kerosene oil over his wife and set her ablaze - Executive magistrate recorded her dying declaration after doctor testified that she is fully conscious and fit to give dying declaration - Held - Dying declaration can form the sole basis of conviction if found to be true and voluntary - Appeal dismissed.* (Paras 11 & 14)

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 32 - मृत्युकालिक कथन - अपीलार्थी ने कथित रूप से अपनी पत्नी पर मिट्टी को तेल डाला और उसको आग लगा दी - कार्यपालिक मजिस्ट्रेट ने चिकित्सक के यह प्रमाणित करने के बाद कि वह मृत्युकालिक कथन देने के लिए पूर्णतः सचेतन और स्वस्थ है, उसका मृत्युकालिक कथन अभिलिखित किया - अभिनिर्धारित - मृत्युकालिक कथन दोषसिद्धि का एकमात्र आधार बनाया जा सकता है यदि सत्य और स्वैच्छिक होना पाया जाए - अपील खारिज।

Cases referred :

(2005) 9 SCC 113, AIR 1991 SC 1853.

B.K. Choudhary, for the appellant.

S.K. Rai, G.A., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by SMT. SUSHMA SHRIVASTAVA, J. :- Appellant has challenged his conviction and order

of sentence passed by Xth Additional Sessions Judge, Bhopal in S.T. No. 146/98, decided on 22.10.99.

2. Appellant has been convicted under Section 302 of IPC for committing murder of his wife Gangotri Bai by setting her ablaze and sentenced to imprisonment for life with fine of Rs. 1,000/-, in default imprisonment for three months, by the impugned judgment.

3. According to prosecution, deceased Gangotri Bai was the second wife of the appellant and was residing with him at Jahangirabad, Bhopal alongwith her three children from her first husband. On 7.3.98 at about 8'O'clock at night, appellant quarrelled with his wife Gangotri Bai at his house and also gave beating to her. Thereafter at midnight appellant poured kerosene oil over his wife Gangotri Bai and set her ablaze. Upon hue and cry, appellants' three step children got up and witnessed the incident. Gangotri Bai came out of her house in burnt condition and shouted for help. Her neighbour, Sayra Bano tried to extinguish fire by pouring water over her. Gangotri Bai was then rushed to Hamidiya Hospital and was admitted in the Burn ward and the Police was informed.

4. The FIR of the incident in the form of Dehati Nalishi was recorded in the hospital at the instance of Gangotri Bai, on the basis of which an offence was registered against the appellant and was investigated. Her dying declaration was also recorded by Executive Magistrate at Hamidiya Hospital. Gangotri Bai, however, succumbed to her burn injuries on 9.3.98. Intimation of her death was given to Police Station, Jahangirabad. Merg intimation was recorded and merg inquest report was prepared. The dead body of deceased Gangotri Bai was sent for postmortem examination. After due investigation, appellant was prosecuted under Section 302 of IPC and was put to trial.

5. Appellant abjured the guilt and pleaded innocence and false implication.

6. After trial and upon appreciation of the evidence adduced in the case, learned Trial Judge found the appellant guilty for committing murder of his wife Gangotri Bai by pouring kerosene oil over her and setting her ablaze and convicted him under Section 302 of IPC and sentenced as aforesaid by the impugned judgment. Hence, this appeal.

7. We have heard the counsel for the parties and perused the evidence on record.

8. It was no longer disputed that deceased Gangotri Bai died of burn injuries. It is also reflected from the testimony of Dr. Dhananjay Sharma (P.W-8) that on 7.3.98 Gangotri Bai (hereinafter to be referred as 'deceased') was brought to Hamidiya Hospital with burn injuries over her face, chest, stomach and smell of kerosene was also present over her body. Dr. D.K. Satpathi (P.W-9), who conducted the autopsy on the dead body of deceased Gangotri Bai, also found second to third degree burns over her face, neck, chest, abdomen and other parts

of the body. In the opinion of Dr. D.K. Satpathi (P.W-9), deceased Gangotri died due to cardio respiratory arrest as a result of burn and its complications. The detailed postmortem report (Ex.P-11) is also placed on record.

9. Learned counsel for the appellant, however, submitted that the trial court gravely erred in convicting the appellant by placing implicit reliance on the dying declaration of the deceased and the testimony of three step children of the appellant.

10. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant and submitted that the guilt of the appellant was established by the dying declaration of the deceased as well as bulk of ocular evidence on record.

11. The dying declaration (Ex.P-16) was recorded and proved by Executive Magistrate Maksood Ahmed (P.W.13). Maksood Ahmed (P.W.13) categorically deposed in his evidence that he had recorded the dying declaration of deceased Gangotri Bai, the wife of Raju @ Rajendra on 7.3.98 at new burn ward, Hamidiya Hospital, at 1.05 'O'clock in the noon after obtaining a certificate from the doctor that Gangotri Bai was fit to give her statement and also obtained her thumb impression on her dying declaration (Ex.P-16). According to Executive Magistrate Maksood Ahmed (P.W-13), Gangotri Bai had stated before him that her husband had poured kerosene oil over her and lit fire by matchstick.

12. Dr. Satish Pillai (P.W.-19) also testified that before recording of the dying declaration of the deceased by Executive Magistrate, he had examined the deceased and found that she was fit to give statement and he also made an endorsement to this effect on the dying declaration (Ex.P-16) and also affixed his signatures. He further testified that dying declaration (Ex.P-16) was recorded in his presence and declarant remained fully conscious during her statement and he had also appended a note to the same effect at the foot of the dying declaration (Ex.P-16).

13. There are no reasons to disbelieve the evidence of Executive Magistrate Maksood Ahmed (P.W.-13) and Dr. Satish Pillai (P.W.-19) that deceased Gangotri Bai gave her dying declaration as per Ex.P-16 and she remained fully conscious during her statement. There are no reasons to suspect that Executive Magistrate Maksood Ahmed (P.W-13) would himself manipulate the dying declaration (Ex.P-16) or it was not the statement of deceased.

14. There is nothing on record to indicate that dying declaration (Ex.P-16) was the result of any tutoring or prompting or product of imagination. Thus, there are no reasons to doubt or suspect that dying declaration (Ex.P-16) is not a true or voluntary statement made by the deceased. The dying declaration (Ex.P-16) is a detailed document and recorded in question and answer form and it clearly and unequivocally indicated that the appellant quarrelled with the deceased at night and burnt her alive by sprinkling kerosene oil over her. Needless to emphasize,

as also reiterated by the Apex Court in the case of *Muttu Kutty and another Vs. State by Inspector of Police, Tamilnadu* reported in 2005(9) SCC page 113 that dying declaration can form the sole basis of conviction if it is found to be true and voluntary.

15. Besides, there is also ocular evidence of the incident as given by the three step children of the appellant, namely, Anju (P.W.-14), Manju (P.W.-15) and Sanjay (P.W.-18), who have clearly deposed that appellant poured kerosene oil over the body of the deceased and lit fire by matchstick. The evidence of the aforesaid three witnesses is found to be natural, cogent and trustworthy.

16. There is also evidence of oral dying declaration coming forth through the deposition of Sayra Bano (P.W-2), who was the neighbour of the deceased and poured water on seeing her in burnt condition. P.W-2 Sayra Bano deposed in her evidence that deceased had told her just after the incident that her husband had poured kerosene oil over her and lit fire by matchstick. Although, Sayra Bano (P.W.-2) was declared hostile by the prosecution and revealed the fact of oral dying declaration of the deceased during her cross-examination by the Public Prosecutor, yet the same is found to be reliable upon close scrutiny of her evidence. It is well settled, as reiterated by the Apex Court in the case of *Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh* reported in AIR 1991 Supreme Court Pg. 1853, that the evidence of a hostile witnesses cannot be treated as effaced or washed off from the record altogether, but the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof.

17. In the wake of aforesaid, we are of the opinion, that the trial court did not err in relying upon the dying declaration (Ex.P-16) of the deceased and the other ocular and corroborative evidence on record and rightly held the appellant guilty for intentionally causing the death of his wife Gangotri Bai by pouring kerosene oil over her and setting her ablaze.

18. Thus, the conviction of appellant, as recorded by the trial court under Section 302 of IPC and life sentence awarded to him with fine of Rs. 1,000/- do not warrant any interference in appeal.

19. Appeal fails and is dismissed. The conviction of the appellant and sentence passed on him under Section 302 of IPC are affirmed.

Appeal dismissed.

I.L.R. [2008] M. P., 3019
APPELLATE CRIMINAL
Before Mr. Justice S.A. Naqvi
 5 August, 2008*

CHHOTA @ CHHOTELAL

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 376(2)(f) - Appellant alleged to have committed offence of rape on a minor girl aged 8 years - Prosecutrix and her mother supporting prosecution case in their examination-in-chief - Their statements are corroborated by medical evidence & F.I.R. - Trial court convicted appellant u/s 376(2)(f) of IPC - Conviction & sentence challenged - Held - Prosecutrix and her mother took somersault in cross-examination and contradicted their statements of examination-in-chief with the explanation that on insistence of police they stated against the appellant in examination-in-chief - Father and brother of prosecutrix turned hostile - Appellant was in police custody previous to the date of incident - Factum of non-sustaining injury on genitile organ of appellant also weakens prosecution case - Evidence of prosecutrix and her mother cannot be relied beyond doubt - Conviction and sentence not tenable - Appellant acquitted. (Para 16)

क. दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) :- अपीलार्थी ने कथित रूप से 8 वर्ष की अवयस्क बालिका के साथ बलात्संग का अपराध किया - अभियोक्त्री और उसकी माँ ने उनके मुख्य परीक्षण में अभियोजन के मामले का समर्थन किया - उनके कथनों की चिकित्सकीय साक्ष्य और एफ.आई. आर. से पुष्टि हुई - विचारण न्यायालय ने अपीलार्थी को भा.द.सं. की धारा 376(2)(एफ) के अन्तर्गत दोषसिद्ध किया - दोषसिद्धि और दण्डादेश को चुनौती दी गई - अभिनिर्धारित - अभियोक्त्री और उसकी माँ ने प्रतिपरीक्षण में बयान पलट दिये और उनके मुख्य परीक्षण में दिये बयान के सम्बन्ध में स्पष्टीकरण दिया कि मुख्य परीक्षा में पुलिस के आग्रह पर अपीलार्थी के विरुद्ध बयान दिया था - अभियोक्त्री के पिता और भाई पक्षद्रोही हो गये - अपीलार्थी घटना तारीख के पहले ही पुलिस की अभिरक्षा में था - अपीलार्थी के प्रजनन अंग पर कोई क्षति न होने के तथ्य से अभियोजन का मामला कमजोर हुआ - अभियोक्त्री और उसकी माता के साक्ष्य को शंका से परे विश्वसनीय नहीं माना जा सकता - दोषसिद्धि और दण्डादेश स्थिर रखने योग्य नहीं - अपीलार्थी दोषमुक्त किया गया।

B. Evidence Act (1 of 1872), Section 3 - Benefit to the accused - It is clear that on the basis of evidence two views of the story appears to be probable hence, one view that was contended by the accused and favourable to the accused be accepted. (Para 17)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 - अभियुक्त को लाभ - यह स्पष्ट है कि साक्ष्य के आधार पर कहानी के दो दृष्टिकोण संभाव्य प्रतीत होते हैं इसलिए एक दृष्टिकोण जो अभियुक्त द्वारा प्रतिवादित किया गया और अभियुक्त के लिए अनुकूल था स्वीकार किया गया।

Cases referred :

(2007) SCC 1 (Cri) 732, AIR 2004 SC 4961.

S.C. Datt with Neeraj Nahar, for the appellant.

Arun Nema, Panel Lawyer, for the respondent/State.

J U D G M E N T

S.A. NAQVI, J. :—Assailed is to the judgment dated 18.06.2004 passed by Third Additional Sessions Judge, Damoh in S.T. no.88/2002, whereby the appellant Chhota @ Chhotelal has been convicted under section 376 (2)(f) of the IPC and sentenced to suffer 10 years R.I. fine of Rs.5000/- in default 1 year R.I.

2. It is pertinent to note that vide judgment dated 21.4.2006 the impugned judgment passed by the learned trial Court has been affirmed by this Court and appeal has been dismissed. S.L.P. was filed by the respondent/State vide Criminal Appeal No.463/2007 has been admitted for final hearing by the Apex Court. The case was remanded back by the Apex Court vide order date 30th March 2007. In this manner this appeal again came up for final hearing.

3. Facts of the case in brief are that on 10.3.2002 at about 8.00 a.m., the appellant Chhota @ Chhotelal committed rape with prosecutrix (PW 5), aged 8 years. She narrated the incident to her mother Savitri Bai (PW 1). Savitri Bai lodged F.I.R Ex.P/1. Prosecutrix was examined by Dr. Alka Nikhar (PW 10). She opined as per Ex.P/10 that forcibly sexual intercourse has been committed over prosecutrix. Slide from vaginal smear of prosecutrix was prepared and sealed by the Doctor. Underwear of the prosecutrix was also sealed by the Doctor. Both these articles were handed over to police. Same day the appellant was apprehended and he was examined by Dr. S.K. Jain (PW 12) who found him competent to perform intercourse. Underwear of the appellant seized, sealed and handed over to the police. seized articles were Sealed. Spot map was got prepared. Witnesses were examined u/s 161 Cr.P.C. Seized articles were sent for chemical analysis to FSL Sagar. After completion of investigation the appellant was charge sheeted. The case was committed to the Court of Sessions.

4. Learned trial Court framed charge u/s 376(1) of the IPC against the appellant. The appellant abjured the guilt and pleaded innocence and false implication. The defence of the appellant is that before the date of the incident i.e.10.3.2002 he was already in police custody. He was an employee of Railway he expressed to file complaint against the police consequently, he was falsely implicated.

5. Prosecution examined 14 witnesses. No witness has been examined in defence. After hearing learned counsel for both the parties, perusing evidence and material on record learned trial Court convicted the appellant u/s 376(1) (f) of the IPC and sentenced him as aforementioned. Being aggrieved by the impugned judgment the appellant has preferred the appeal. Per contra, learned public

prosecutor supported the impugned judgment and submitted that the learned trial Court did not err in convicting the appellant and sentencing him hereinabove mentioned.

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

7. Learned senior counsel for the appellant urged that learned trial Court committed error in relying upon the testimony of the prosecution witnesses, discarding cross-examination of prosecutrix (PW 5), Savitri Bai (PW 1) and evidence of Benugopal, giving much importance to the fact that Savitri Bai was cross-examined after about 10 months of her examination-in-chief, to rely child witness without due corroboration is hazardous there is no reliable evidence that the appellant committed rape with prosecutrix ignoring the evidence of the prosecution witnesses that the appellant was in police custody prior to the alleged incident and convicting the appellant hereinabove mentioned. Per contra, learned Public Prosecutor supported the impugned judgment and argued that learned trial Court did not commit any error in convicting the appellant and sentencing him as aforementioned.

8. The age of the prosecutrix (PW 5) is not disputed. Admittedly, on the date of the incident, i.e. 10.3.2002 prosecutrix was 9 years of age. During the course of arguments also learned senior counsel admitted that the age of the prosecutrix was 9 years at the time of the incident. So I do not think to burden the judgment to appreciate the prosecution evidence in respect of the age of the prosecutrix. Learned trial Court rightly held that at the time of the incident age of the prosecutrix was about 9 years.

9. Prosecutrix (PW 5) deposed that she was playing in court yard of Sunder with her younger brother. Sunder was also playing with them. The appellant came there and caught hold her (prosecutrix) took her in his house. He removed clothes of the prosecutrix and committed rape with her. Blood came out of private part of the prosecutrix. She went to her house and narrated the incident to her mother Savitri Bai (PW 1). Savitri Bai deposed that on 10.3.2000 at about 8 a.m. prosecutrix came weeping to her. She told that she was playing in colony, appellant Chhota @ Chhotelal came there and took her to his house and committed rape with her blood was coming out of private part of the prosecutrix. She lodged F.I.R Ex.P/1 in police station Hindoriya district Damoh. Prosecutrix was medically examined. Benugopal (PW 6) father of the prosecutrix turned hostile and he has not supported the prosecution case and evidence of the prosecutrix and Savitri Bai. Ram Milan (PW3) also turned hostile. He is also not supporting the prosecution on material points. He is deposing contrary to his previous statement Ex.P/3. Statement of Ram Milan is not reliable. Hemantrao (PW 7) also turned hostile. He simply deposed that prosecutrix and Sunder were playing alongwith him in court yard of Sunder but he denied any sexual violence upon prosecutrix. He is

also deposing against his previous statement Ex.P/6. Hemantrao is real brother of prosecutrix. His statement is not reliable.

10. Dr. Alka Nikhar (PW 10) on 10.3.2002 examined prosecutrix (PW 5). She deposed that there was lacerated wound/tear present in posterior forecheat extending anteriorly upto hymen and posterior just above perinal body size 1cm x 1 cm x ½ cm . Fresh bleeding present with clots in vulva . She prepared slide from vaginal smear of the prosecutrix and sealed it. She also sealed underwear of the prosecutrix and handed over it to police. Dr. Alka Nikhar opined that forceful sexual intercourse was committed with the prosecutrix. In cross-examination Dr. Alka Nikhar admitted that if girl would fall on pointed wood then there will be injury on vagina but she definitely opined that injury caused to prosecutrix caused only by forceful intercourse.

11. Dr. S.K. Jain (PW 12) on 12.3.2000 examined the appellant Chhote @ Chhotelal. He deposed that secondary sexual characters of the appellant were well developed. He found three abrasions

- (1) Abrasion irregular around left knee size 6 cm x 2 cm,
- (2.) Abrasion irregular anterior over right knee 4 cm x 1 cm, and
- (3) Abrasion over right shoulder 3 cm x 2 cm.

He was complaining pain over both buttock, back and both lower limbs. Injuries were caused by hard, blunt and rough object within 72 hrs. Dr. jain opined that the appellant was competent to perform sexual intercourse.

12. Ramsunder (PW 11) also turned hostile. He is not corroborating the prosecution case on material points. He is deposing contrary to his previous statement Ex.P/11. Statement of Ram Sunder is not reliable. Jamna Bai (PW 2) deposed date of birth of the prosecutrix (PW 5) to be 22.4.1993. Sandeep Vishwas (PW 4) prepared spot map Ex.P/4. K.S.Raikwar (PW 8) writer of FIR Ex.P/1. Mahendra Singh (PW 9) handed over sealed packet received from Doctor and it was seized as per seizure memo Ex.P/9, which contained underwear and semen slide of the appellant. Somdatt (PW13) on 10.3.2002 took prosecutrix for medical examination. Doctor handed over slide and underwear of the prosecutrix to this witness which was seized from him as per seizure memo Ex.P/13. G.P.Dwivedi (PW 14) conducted investigation. He also prepared spot map Ex.P/14, recorded evidence of the witnesses u/s 161 Cr.P.C. And seized incriminating articles from Mahendra Singh and Somdatt.

13. Prosecutrix (P W 5) in cross-examination categorically stated that she was playing in the court yard and during the course of play she sustained injury on private part by wood. She also specifically stated where wood struck. There was bleeding from that part. She also admitted that she told her mother that she sustained injury by wood. Her mother Savitri Bai (PW 1) went to Hindoriya and she (Prosecutrix) went to her house. She specifically admitted that police personal

tutored her and accordingly, she deposed in examination-in-chief. Prosecutrix also admitted she does not know meaning of rape (Balatkar) but in examination-in-chief she deposed that she told her mother that Chhotelal committed rape (Balatkar) with her. Prosecutrix took somersault in her cross-examination. Savitri Bai also deposed that prosecutrix told her that while playing she sustained injury on her private part by wood. Savitri Bai also admitted that police told her that story of rape be told against the appellant. She also admitted that at the instance of police, she deposed in examination-in-chief that appellant committed rape with her daughter. Learned Public Prosecutor vehemently argued that learned trial Court rightly held that after about 10 months of examination-in-chief of Savitri Bai was cross-examined and she was won over by the appellant hence, she negatived the prosecution story in cross-examination. Learned trial Court giving more than one reason to rely upon the testimony of Savitri Bai and prosecutrix (PW 5) and convicted the appellant. Contrary to that learned Senior Counsel for the appellant submitted that learned trial Court committed grave error in ignoring the cross-examination of Savitri Bai and prosecutrix (PW 5), learned trial Court should have seen the whole statements of these witnesses and would have come to the conclusion that prosecution has failed to prove the guilt against the appellant.

14. Prosecutrix (PW 5) was aged 10 years when she was examined in the Court. She was able to understand questions and she could reply the question very well. Prosecutrix was not declared hostile and her statement is binding on prosecution. It is well settled principle of law that to act upon on the evidence of the child witness is hazardous without corroboration if there appears no infirmity in the statement of child witness and it is corroborated by firm and reliable witness then only the evidence of child witness can be relied upon. It is true, that examination-in-chief of Savitri Bai (PW 1) was recorded on 11.10.2002 and she was cross-examined on 10.9.2003. In cross-examination she totally denied the prosecution story and completely go by to what has been stated in examination-in-chief. In the similar situation in *Vikramjit Singh alias Vocky v. State of Punjab* ((2007) SCC 1 (Cri.) 732) the Apex Court held as under:

“22. Furthermore, as noticed hereinbefore, the prosecution witnesses have turned hostile. It may be an act of dishonesty on their part as contended by Ms. Kochar but by reason thereof only we can not hold the appellant guilty of commission of a heinous offence. In view of their statement in the cross-examination giving a complete go by to what had been stated in the examination-in-chief, it is not possible to rely even upon a part of their statement.”

15. In the case of *Vikramjit Singh* (Supra) all the material witnesses supported the prosecution case in their examination-in-chief but in their cross-examination, did not support the prosecution case at all. Examination-in-chief Amarjit Kaur (PW 4) was recorded on 15.4.2003 her cross-examination was deferred and it

resumed after a period of five months i.e. On 16.9.2003 even then the Apex Court opined that in view of the statement of their cross-examination giving a complete go by to what has been stated in the examination-in-chief, it is not possible to rely even the part of their statements. Consequently, in view of the Apex Court's observation any part of the statement of prosecutrix (PW 5) and Savitri Bai (PW 1) can not be relied upon because they completely go by to what has been stated in the examination-in-chief. Consequently, I am of the view that the learned trial Court committed error in relying upon the testimony of the prosecutrix (PW 5) and Savitri Bai (PW 1) though their statements are corroborated by medical evidence and FIR Ex.P/1. Even father and real brother of the prosecutrix did not corroborate the testimony of the prosecutrix. Prosecutrix specifically deposed that the appellant has not done anything with her. If it is taken to be proven that sexual violence has been committed over the prosecutrix there is duty cast on the prosecution to prove beyond doubt that the appellant has committed rape with the prosecutrix but as per prosecutrix's statement in cross-examination para 6 that appellant Chhota @ Chhotelal has not committed anything (rape) with her. She specifically admitted that she was tutored by police to depose against the appellant for commission of rape with her. Hence she deposed against him in examination-in-chief. Savitri Bai (PW 1) also deposed that at the instance of police inspector she deposed against appellant in examination-in-chief. She deposed that she is speaking truth in cross-examination. Savitri Bai (PW 1) also deposed that the appellant has not committed rape with the prosecutrix. Tutoring of the prosecutrix by police is also proved by the fact that prosecutrix deposed in examination-in-chief that appellant committed rape (Balatkar) with her but even on the date of her examination in Court i.e. on 10.9.2003 she does not know the meaning of rape (Balatkar).

16. Prosecutrix (PW 5) and Savitri Bai (PW 1) deposed that when they went to police on the date of the incident the appellant Chhote alias Chhotelal was already under custody of the police. This fact got strength from the fact that appellant sustained six injuries over his person and he was complaining pain on both buttock, head, back and both lower limbs. On any stretch of imagination it can not be held that during commission of rape with a 9 years old girl the appellant sustained six injuries over his left knee, right knee, forehead, shoulder and pain on both buttock, head, back and both lower limbs. These injuries possibly caused by beating to the appellant by any person. The appellant was examined on 12.3.2000 as per Doctor S.K.Jain (PW 12) and injuries were caused within 72 hrs but on Ex.P/12 MLC report and application for examination the date is mentioned as 12.3.2002 and date of incident also mentioned 10.3.2002 but Dr. S.K. Jain (PW 12) examined the appellant on 12.3.2000. There is every possibility that the appellant was apprehended before the incident and he was taken to police station and beaten there otherwise no question arises to sustain such injury on the person of the appellant. As per Dr. S.K. Jain (PW 12), only injuries mentioned in MLC report

Ex.P/12 were found on the person of the appellant Chhote alias Chhotelal. No injury was found on genital organ of the appellant. As per prosecution, the appellant committed rape with a virgin girl aged 9 years old who sustained injury on her private part with bleeding consequently possibility of sustaining laceration or abrasion over genital organ of the appellant can not be ruled out, though the factum of non-sustaining injury on genital organ of the appellant also weakens the prosecution case and supports the evidence of prosecutrix (PW 5) and Savitri Bai (PW 1) which she stated in cross-examination. Father of the prosecutrix Benugopal (PW 6) also deposed that his wife Savitri Bai (PW 1) told him that prosecutrix sustained injury by wood though Benugopal has been declared hostile but looking to the evidence of the prosecutrix (PW 5) and Savitri Bai (PW 1) this part of the statement can not be brushed aside. In *Orsu Venkat Rao v. State of Andhra Pradesh* (AIR 2004 SC 4961), the Apex Court held that revelation of incident made by the child witnesses only next day evening when they were examined, though child witnesses however deposing to have given statement to policemen earlier indicates that first statement of children was suppressed. Hence, conviction can not be based on the evidence of the child witness. In the present case, prosecutrix and her mother Savitri Bai (PW 1) supported the prosecution case in examination-in-chief and they took somersault in cross-examination and contradicted their statement of examination-in-chief with explanation that on insistence of police they stated against the appellant in examination-in-chief. Even though the appellant was in police custody previous to the date of the incident. Consequently, evidence of the prosecutrix and Savitri Bai (PW 1) in respect of commission of rape with prosecutrix can not be relied beyond doubt.

17. On going through the evidence of prosecutrix (PW 5) and Savitri Bai (PW 1) in toto, it is clear that on the basis of their evidence two views of the story appear to be probable hence, one view that was contended by the accused and favourable to the accused be accepted. I am of the considered view that learned trial Court weighing the evidence err in relying upon testimony of prosecution and Savitri Bai (P.W. 1) and convicted the appellant.

18. As per the aforesaid discussion, I am of the view that the impugned judgment of the trial Court does not based on sound reasoning and principle of law laid down by the Apex Court. Learned trial Court has committed error in relying upon testimony of the prosecutrix (PW 5) and Savitri Bai (PW 1) and convicted the appellant u/s 376 (2)(f) of the IPC and sentencing him as aforementioned. Consequently, impugned judgment of conviction and order of sentence is not tenable.

19. Appeal has merit, deserves to be and is hereby allowed. Impugned judgment dated 18.6.2004 and order of sentence is hereby set aside. Appellant is in jail if he is not required in any other criminal case, he be released forthwith.

Appeal allowed.

I.L.R. [2008] M. P., 3026

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice S.A. Naqvi

27 August, 2008*

GANESH @ GANESHA @ GANESH PRASAD & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 302, Arms Act, 1959, Sections 25 & 27 - Allegation that appellants chased deceased and appellant Ganesh fired on deceased and committed his murder - Trial court convicted appellants u/s 302 r/w Section 34 I.P.C. and Sections 25 & 27 Arms Act - Appeal filed - Held - Evidence of eye witnesses do not inspire confidence and their presence on spot at the time of incident and the fact that they saw the appellant Ganesh fired on deceased is doubtful - Prosecution has not examined material witnesses which leads to the presumption against prosecution - No explanation by prosecution that why the weapons & empty cartridge were sent after 10 days to FSL - No evidence the weapons which were seized from possession of the appellants, the same were sent for analysis - Appeal allowed - Appellants acquitted.

(Paras 12 to 17)

क. दण्ड संहिता (1860 का 45), धारा 302, आयुध अधिनियम, 1959, धाराएँ 25 व 27 - आरोप है कि अपीलार्थियों ने मृतक का पीछा किया और अपीलार्थी गनेश ने मृतक पर गोली चलाई और उसकी हत्या की - विचारण न्यायालय ने अपीलार्थियों को भा.द.सं. की धारा 302 सहपठित धारा 34 और आयुध अधिनियम की धारा 25 व 27 के अन्तर्गत दोषसिद्ध किया - अपील पेश की गई - अभिनिर्धारित - प्रत्यक्षदर्शी साक्षियों का साक्ष्य विश्वास प्रेरित नहीं करता है और उनकी घटना के समय घटना स्थल पर उपस्थिति और यह तथ्य कि उन्होंने अपीलार्थी गनेश को मृतक पर गोली चलाते देखा, शंकास्पद है - अभियोजन ने सारवान साक्षियों का परीक्षण नहीं कराया जिससे अभियोजन के विरुद्ध उपधारणा की जाएगी - अभियोजन द्वारा कोई स्पष्टीकरण नहीं कि आयुध और खाली कारतूस न्यायालयिक विज्ञान प्रयोगशाला को 10 दिन बाद क्यों भेजे गये - कोई साक्ष्य नहीं कि आयुध, जो अपीलार्थियों के कब्जे से अभिग्रहीत किये गये, वही विश्लेषण के लिए भेजे गये - अपील मंजूर - अपीलार्थियों को दोषमुक्त किया गया।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - F.I.R. - F.I.R. is not substantial piece of evidence - It can be used only for corroboration and proving the contradiction, omission and improvements in the statement of prosecution witnesses - Only on the basis of F.I.R. conviction cannot be upheld.

(Para 17)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 - एफ.आई.आर. - एफ.आई.आर. साक्ष्य का सारवान अंश नहीं है - यह केवल सम्पुष्टि करने और अभियोजन साक्षियों के कथन में विरोधाभास, लोप और सुधारों को साबित करने के लिए प्रयुक्त की जा सकती है - केवल एफ.आई.आर. के आधार पर दोषसिद्धि पुष्ट नहीं की जा सकती।

Case referred :

2004(4) MPLJ 543.

Namrata Kesharwani, for the appellants.

R.S. Patel, Addl.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by S.A. NAQVI, J. :- Challenge is to the judgment dated 27-12-97 passed by the First Additional Sessions Judge, Chhatarpur in Sessions Trial No. 95/96 whereby the appellants Ganesh @ Ganesha @ Ganesh Prasad and Kallu @ Hiralal have been convicted under Section 302 read with section 34 I.P.C and under Section 25 and 27 of the Arms Act and sentenced to undergo life imprisonment and three years rigorous imprisonment on each count respectively.

2. The prosecution case in short is that on 24-2-96 at about 2:30 p.m, Babu (PW-1) was going to the field Awadhiyaha. Ahead of Babu, wife of Bharose was also going, at this point of time, they heard sound of fire of katta and they saw that Bharose is running and the appellants were chasing him. At this juncture, appellant Ganesh fired upon Bharose as a result of which, he fell down. Bandra Chamar, Sundar Yadav, Bhura Yadav, Halki Bai wife of Mangi reached on the spot. The incident was narrated by Bharose to all these persons. On account of old enmity between Bharose and the appellants, Bharose done away by the appellants. Bharose succumbed to the injuries.

3. FIR Exhibit P-1 was lodged by Babu (PW-1). The inquest memo of dead body of Bharose Exhibit P-3 was prepared. Spot map Exhibit P-4 was prepared. Blood stained soil, control soil, lathi, pallet, one 12 bore shell, one brass bucket, one bed-sheet, one towel and one pair of shoes have been seized as per seizure memo Exhibit P-13 from the spot. The post-mortem of the deceased was conducted by Dr. R.C. Malare (PW-8) and he found following injuries on his person:-

"1. Abrasion:- 5 x 3 cms right knee joint caused by rough object;

2. Abrasion:- 4 x 2cm x left knee joint caused by rough object.

Gun shot wound ante-mortem in nature:

1. Wound of entrance- 2 x 2 cm oval shaped right side scapular region (just below) at level of 7th & 8th vertebra. Margin inverted. Blood comes out. Margin of wound slight black & some clotted blood also present.

2. Wound of Exit - 3 x 3 cm oval shaped. Margin erected blood comes out & clotted blood also present. Wound present. Middle of right chest."

4. Dr. R.C. Malare (PW-8) opined that the death of the deceased Bharose was caused due to shock of gun shot injuries on the right side of chest and excessive

hemorrhage and lacerated wound on right lung within 12-13 hours since time of post-mortem. Appellants were arrested. As per Exhibit P-7, the appellant Ganesh disclosed that he has kept one 12 bore katta and cartridge in a box in his house and is ready to get it recovered, as per memorandum Exhibit P-7. At the instance of the appellant Ganesh, one 12 bore katta and live cartridge have been seized as per seizure memo Exhibit P-8. The appellant Kallu @ Hiralal disclosed as per Exhibit P-11, that he has kept one 12 bore katta and one cartridge in his house and is ready to get it recovered. On 13-3-96, at the instance of the appellant Kallu @ Hiralal as per Exhibit P-12, one 12 bore katta and live cartridge have been seized. The cloth of the deceased Bharose, two pallets were seized in sealed packet as per seizure memo Exhibit P-6. Seized articles were sent to FSL, Sagar for analysis. After completion of investigation, the appellants were charge-sheeted. Case was committed to the court of sessions for trial.

5. Learned Trial Court framed charges under Section 302 read with Section 34 I.P.C and 25 and 27 of the Arms Act. The appellants abjured the guilt and pleaded innocence and false implication. The prosecution examined 11 witnesses, two witnesses have been examined in defence. After hearing learned counsel for the parties, perusing evidence and material on record, learned Trial court convicted both the appellant under Section 302 read with section 34 I.P.C and 25 and 27 of the Arms Act and sentenced them hereinabove mentioned. Being aggrieved by the impugned judgment, the appellants have preferred the appeal.

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

7. Learned counsel for the appellants Ku. Namrata Kesharwani, vehemently argued that learned Trial court committed error in relying upon the testimony of prosecution witnesses. Babu (PW-1) and Halki Bai @ Gorabai (PW-6) are not eye-witnesses, all the prosecution witnesses reached on the spot after the incident and they have not seen that the appellant Ganesh fired on the deceased Bharose and even they have not seen the appellant Kallu @ Hiralal armed with katta. The appellant Kallu was not present on the spot, he was in the primary school, Chanda and he appeared in practical examination. The shells (empty cartridge) found on the spot were not fired by alleged seized 12 bore katta's from the appellants. The shells and kattas i.e., articles which were received and examined by ballistic expert are not proved to be the same, allegedly recovered at the instance of the appellants. The witnesses are highly interested and learned Trial court erred in convicting the appellants and sentencing them. Per contra, learned Public Prosecutor, supported the impugned judgment and contended that learned Trial court did not err in convicting the appellants and sentencing them adequately.

8. Babu (PW-1), Bhura (PW-3), Halki Bai (PW-5), Halki Bai @ Gorabai (PW-6) deposed that Bharose was lying on the ground in injured condition and he was having a bullet injury over his back of the chest and he succumbed to the injuries.

Inquest memo of the dead body of the deceased Bharose Exhibit P-3 reveals that Bharose deceased received gun shot injury. Dr. R.C. Malare (PW-8) on 25-2-96 conducted autopsy of Bharose and found gun shot injury on his person as per post-mortem report exhibit P-10 which is enumerated in foregoing paras. It is established by the evidence of this witness that Bharose sustained gun shot injury over his right scapular region just below the level of 7th and 8th vertebra and exit wound in the middle of the right chest. The cause of the death of Bharose was shock due to gun shot injury in right side of chest and excessive hemorrhage and lacerated wound on right lung. Certainly, the death of Bharose is homicidal in nature. This fact has not been challenged by the learned counsel for the appellants during the course of arguments. The evidence of these witnesses in this respect is reliable hence, it is proved beyond reasonable doubt that Bharose died due to gun shot injury and his death was homicidal in nature. The finding arrived at by learned Trial court in this respect is affirmed.

9. Babu (PW-1) deposed that at about 2:30 p.m, he was going to his field, he saw Halki Bai @ Gorabai (PW-6), wife of deceased Bharose was going to give him food. He heard a noise of fire, he saw that appellants Ganesh and Kallu were chasing Bharose armed with 12 bore katta. Deceased Bharose was coming running towards them. At this juncture, the appellant Ganesh fired at Bharose. The bullet struck on the back of Bharose and he fell down. Babu and Halki Bai @ Gorabai (PW-6) tried to rescue Bharose but the appellants intimidated them to fire on them. The appellants fled away from the spot then only Babu and Halki Bai @ Gorabai (PW-6) reached near him. Halki Bai (PW-5) also reached the spot. Bundra Chamar, Sunder, Bhura (PW-3) also reached there. Babu lodged FIR Exhibit P-1. Halki Bai (PW-6) corroborated the testimony of Babu (PW-1), she deposed that in the noon of fateful day, she and Babu were going to their field, she heard sound of fire and they proceeded ahead. They saw that the appellants Ganesha and Kallu were chasing Bharose. The appellant Ganesha fired on Bharose who fell on the ground. They tried to rescue Bharose but the appellants intimidated them to fire on them. The appellants fled from the spot, then they reached near Bharose, she also further stated that Sunder Ahir, Bunder Chamar, Bhura Ahir, wife of Mangi, wife of Bhagwa and wife of Halka reached on the spot. Bharose told them that Ganesha had fired on him. Babu and Halki Bai @ Gorabai (PW-6) deposed that there was enmity between the appellants and the deceased over a piece of land. Babu is real brother of the deceased and Halki Bai @ Gorabai (PW-6) is wife of deceased hence, their testimony requires close scrutiny. Kamta Singh (PW-2), is writer of FIR Exhibit P-1. He also seized two sealed packets of clothes of the deceased and pallets as per seizure memo Exhibit P-6. Ramavtar (PW-9) turned hostile, he is witness of memorandum of appellant Kallu Exhibit P-11 and seizure of 12 bore katta and life cartridge as per seizure memo Exhibit P-12. Though, he has admitted the signatures on both these documents but he denied the factum of discovery and recovery of weapon and cartridge from the possession

of appellant, Kallu. Ramesh Kumar (PW-11) proved the sanction Exhibit P-11 accorded by the District Magistrate, Chhatarpur to prosecute the appellants under the provisions of Arms Act.

10. P.L. Luharia (PW-10), deposed that on 4-3-96, he interrogated the appellant Ganesha who disclosed that he has kept katta and cartridge in a box and he is ready to get it recovered. He also deposed that at the instance of the appellant Ganesha, he recovered 12 bore katta and live cartridge as per seizure memo Exhibit P-8 and Memo of Ganesha is Exhibit P-7. P.L. Luharia (PW-10), deposed that on 13-3-96, on interrogation of appellant Kallu, he disclosed that he has kept katta and cartridge in his house and he is ready to get it recovered as per seizure memo Exhibit P-11. He seized one katta and live cartridge at the instance of kallu as per seizure memo Exhibit P-12. Raju (PW-4) also corroborated the testimony of P.L. Luharia and deposed that on the information and at the instance of appellant Ganesha one katta and cartridge were seized. In para-4 of his cross-examination, Raju admitted that he was called by daroga (Police Inspector) who told him that he has seized one katta from the appellant Ganesh and he has arrested him, then daroga got his signatures on papers. He also specifically admitted that he has signed on the papers in primary school. Raju contradicted his own statement of examination-in-chief in respect of discovery and recovery of weapon and cartridge at the instance of appellant Ganesha in cross-examination. Raju has not been declared hostile and prosecution is bound by his statement. Consequently, statement of Raju in respect of the factum of memorandum of the appellant Ganesha and seizure of weapon and cartridge at his instance is not reliable. The same position is in respect of memorandum Exhibit P-11 and seizure of weapon and cartridge Exhibit P-12 in respect of appellant Kallu because Ramavtar (PW-9) is not corroborating this fact. On going through the evidence of P.L. Luharia, we are of the view that his statement cannot be relied upon without corroboration by independent evidence beyond doubt. Hence, seizure of 12 bore katta and live cartridge at the instance of the appellants is not proved beyond reasonable doubt and learned Trial court committed error in holding that one 12 bore katta and live cartridge have been seized from the possession of each of the appellant hence, we set aside the finding of learned Trial court in this respect.

11. P.L. Luharia (PW-10) deposed that seized articles were sent to FSL, Sagar for chemical analysis. Report of senior scientist officer and Assistant Chemical Analyst FSL, Sagar Exhibit P-17 is on record. It is proved by this report that alleged seized katta from the possession of the appellants were in running condition and they were fired successfully. It is also proved by this report that the shell (empty cartridge) which were seized from the spot were not fired from the alleged seized katta's which were allegedly seized from the possession of the appellants. From the document of prosecution itself, it is proved that the seized shell were not fired by the seized 12 bore kattas and they were fired by the smooth bore weapon.

There is no evidence on record that the alleged seized katta's are of smooth bore weapon. These facts weakens the prosecution story and adversely effects the evidence of prosecution witnesses.

12. There is no evidence on record to prove that the seized 12 bore katta and cartridges were kept in Malkhana of police station in sealed condition. The alleged katta and cartridge were seized on 4-3-96 from the appellant Ganesh and on 13-3-96 from the appellant Kallu. Though, this fact have not been proved beyond doubt, these articles were sent to FSL, Sagar, along with letter Exhibit P-15 dt. 21-3-96 and sealed packets were received on 27-3-96. There is no evidence on record that from the date of seizure till 21-3-96 seized weapons were kept in police station Malkhana in sealed and safe condition and the same articles were sent to FSL, Sagar for chemical analysis. Malkhana-in-charge, has not been examined by the prosecution to substantiate these facts which casts doubt to the effect that whether the same weapons and cartridges were sent to FSL, Sagar for analysis or not. In *Vijay Singh Vs. State of M.P.* 2004(4) MPLJ 543, it has held by the division bench of this court as under :-

"22. Shri Gupta, learned senior counsel by inviting out attention to Ex. P-7 which is a seizure memo of the broken plastic dot of a bullet and Ex. P-9 which is a seizure memo of 12 bore single barrel gun and seizure of empty cartridge seized from the chamber of the said gun and the licence of the gun, has argued that only single empty cartridge was recovered and that too from the barrel of the gun while case of the prosecution is that more than single fire took place in the incident as it is clearly established from the testimony of Autopsy Surgeon. The prosecution did not care to find out the second empty cartridge which would indicate that the story of prosecution is doubtful. Our attention has also been drawn to Ex. P-17 which is a letter addressed to Director, Forensic Science Laboratory, Sagar sent by S.P. Morena by which certain articles were sent to him for examination. A packet, containing the empty cartridge was sent but the same cartridge was sent in a sealed parcel has not been mentioned in the letter which would mean that it was not sent in the sealed parcel.

23. The learned counsel has also invited our attention that the incident took place on 17-12-1988 and the empty cartridge and the fire bullets were seized on the same date but they were sent on 27-12-1988 to the Forensic Science Laboratory which reached to its office on 30th December, 1988. The contention of learned counsel is that the prosecution did not bother to give any explanation that where during this period of ten days these articles were kept. There is total lack of evidence in this regard that these articles were sealed because in the letter addressed to Forensic Science laboratory dated 27-12-1988 there

is no indication that the fired bullet as well as the empty cartridge were sent in a sealed parcel. There is no iota of evidence in order to indicate that during the period 17-12-1988 to 27-12-1988 in whose power and possession these articles remained. It be seen that if the prosecution wants to connect the accused/appellant in the crime with the aid of these articles, according to us, it was incumbent on the prosecution to prove that the sealed articles remained intact since the time they were taken into custody by the prosecution agency to the time they were received by the chemical examiner/ballistic expert. We have given our bestowed consideration in this aspect of the matter and according to our considered view, to connect the appellant with these articles with the alleged crime there should be positive evidence of the prosecution and prosecution must produce each person in whose custody the parcel remained during this period. Since there is no evidence in this regard and this important link is missing, for this additional reason also, we are constrained to hold that the recovery part of the investigation in regard to seizure of empty cartridge and bullet does not connect the appellant with the alleged offence. We may not hesitate to mention at the cost of repetition and this fact cannot be marginalised and blinked away that there is no evidence in order to show that the empty cartridge and the fired bullet were ever sealed. This was quite essential for the simple reason that the prosecution should produce cogent evidence that the articles which were seized and sealed were the same articles which were received and examined by the ballistic expert. Not only this, the prosecution was obliged to place cogent evidence on record that the seals of the parcel containing the empty cartridge and bullet were not tampered with till the articles are sent to the ballistic expert. If the evidence is of such sealing is not placed and produced in court, according to us, the court cannot place its reliability on the seizure of these articles as well as the court cannot connect the appellant with the alleged crime with the aid of this type of seizure.

23-A. We would be failing in our duty if we don not place reliance on two decisions of the Apex Court *Santa Singh Vs. State of Punjab* AIR 1956 SC 526 and *Mohd. Aman and another Vs. State of Rajasthan*, AIR 1997 SC 2960 wherein sufficient light has been thrown by the Apex Court in regard to the period of custody of empty cartridge with the police. The Supreme Court has held that inordinate delay in sending the empty cartridge for examination by ballistic expert raises serious doubt and gave rise to suggestion on the part of the accused that empty cartridge which was ultimately sent to the expert relates to a cartridge that was fired by the police station and is not recovered at the spot. In the case of *Mohd. Aman* (supra) there was delay of only 5

days and in those circumstances it was held by the Apex Court that when without any justifiable reason the delay had occurred it would weaken the case of prosecution. In the present case the delay is of 10 days on the part of investigating agency to send the empty cartridge and the fired bullet. In this context, it would also be fruitful to rely another decision of Supreme Court in the case of *Mahmood Vs. State of Uttar Pradesh*, AIR 1976 SC 69 wherein the Apex court has held that after sealing the parcel the seal should not remain with investigating agency. The latest pronouncement of the Apex Court on the point is *State of Madhya Pradesh Vs. Ghudan*, JT 2003 (Suppl. 2) SC 481. Though in this case there was a delay of six months but the principle is the same. Since there is no explanation by the prosecution that why the empty cartridge and fired bullet were kept for 10 days, as well as there is no evidence that where and in what condition they were kept, it would be highly unsafe to hold that these articles which were alleged to have been seized are the same articles which were sent to the ballistic expert for obtaining his opinion. We may also place reliance on the case of *Modan Singh Vs. State of Rajasthan*, AIR 1978 SC 1511 in this regard. "

Hence, looking to the facts and totality of circumstances and the scenario emerged, it is doubtful whether the alleged seized weapons and cartridges were sent to FSL, Sagar for analysis, which weakens the prosecution case. If for the sake of argument, it is taken to be proved that one 12 bore katta and live cartridge has been seized from the possession of each of appellant, but it has not been proved beyond doubt that the same weapons and cartridges were sent for analysis, hence, the seizure of weapons from the appellants does not help in any way to the prosecution/respondents.

13. Halki Bai @ Gora Bai (PW-6) deposed that her husband deceased Bharose used to go early in the morning in the field, sometimes he used to take food in the house otherwise, she used to go to give food to him. She specifically admitted that when her husband takes food at home then she did not go to the field in the noon. She specifically deposed that on the fateful day her husband deceased did not come to take food at home, that is why she was going to give him food. Her jettth Babu (PW-1) also told her that he will accompany her. Babu also categorically stated that Halki Bai @ Gora Bai (PW-6) was going to give food to the deceased and he was with her. As per evidence of Babu and Halki Bai @ Gora Bai (PW-6) they were going to give food to the deceased Bharose because that day he has not taken either breakfast or food at home. But the fact of not taking breakfast or food by the deceased Bharose has been belied by the medical evidence. Dr. R.C. Malare, specifically deposed that there was undigested food present in stomach and digested food was present in small intestine. This fact is corroborated by the post-mortem report Exhibit P-10. Autopsy of deceased Bharose was conducted on 25-2-96 at 9:30 a.m, that is to say, next day of incident, Bharose died on 24-2-96

and that day undigested food was present in his stomach and digested food in his small intestine. Bharose died at about 2:30 p.m on 24-2-96 which means, he took meal or breakfast some hours before of his death on 24-2-96 which reveals that before going to the field deceased Bharose has taken breakfast or meal on the date of incident. Post-mortem report and evidence of Dr. R.C. Malare belies the evidence of Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) to the effect that deceased Bharose has not taken meals, that is why they were going to field to give him food. Evidence of Halki Bai @ Gora Bai (PW-6) cannot be accepted beyond reasonable doubt in this respect. Babu (PW-1) also deposed that on the date of incident before going to the field deceased has not taken meal. We are of the considered view that the evidence of Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) that they were going to give food to the deceased because he has not taken food at home in the morning does not inspire confidence. Halki Bai @ Gora Bai (PW-6) specifically deposed that if the deceased would have taken food before going to the field she never goes to field to give him food, which means on 24-2-96, there was no occasion of going to the field of Babu (PW-1) and Halki Bai @ Gora Bai (PW-6). Consequently, presence of Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) becomes doubtful at the scene of occurrence at the time of incident.

14. Halki Bai @ Gora Bai (PW-6) in paragraph-7 of her cross-examination specifically deposed that he asked her husband that who has fired on him then he told that Ganesha has fired on him. She also admitted that her jeth Babu (PW-1) also asked the deceased that who has fired on him. She also deposed that her husband told the other persons that Ganesha has fired upon him. If Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) would have been eye-witnesses and if they have seen that Ganesha has fired on the deceased, then there was no occasion to ask by them to the deceased that who has fired on him. This fact shows and creates doubt on the testimony of Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) that they are eye-witnesses and they have seen the incident and in their presence the appellant Ganesha fired on the deceased. There is sufficient evidence on record that due to irrigating the field there was enmity between the appellants and Babu and the deceased. There is every possibility that due to enmity Babu and Halki Bai @ Gora Bai (PW-6) are roping the appellants in the offence.

15. Since beginning the defence of the appellant Kallu @ Harilal is that at the time of incident he was not present at the place of incident and at that time he was appearing in practical examination. Jagye Prasad (DW-1) on 24-2-96 was Assistant Teacher in Govt. Boys School, Chandla. Appellant Kallu @ Harilal was student of 12 standard at the relevant time. Jagye Prasad on 24-2-96 took attendance of the students. He specifically deposed that Kallu @ Harilal was present in the class and he appeared in practical examination. He also deposed that the time of practical examination was 7:30 to 10:30 a.m. After practical exams there was viva. the roll no. of appellant Kallu @ Hiralal was 20802688 which was

entered in list of students who appeared in practical exams. In the list of students, the name of appellant Kallu @ Hiralal appears at serial no.4 which shows that on 24-2-96, he appeared in practical exams. Jagye Prasad took attendance on that date twice. Evidence of Jagye Prasad is corroborated by Exhibit D-1C, Exhibit D-2C, Exhibit D-3C and Exhibit D-4C. Learned Trial court disbelieved the evidence of Jagye Prasad on the ground that at one time he deposed that the time of practical exams was 12:00 noon and subsequently, he deposed that the time of practical exam was 10:30a.m, and there was every possibility that the appellant Kallu @ Hiralal would have reached the spot after appearing in the practical exams. We did not agree with the reasonings of learned Trial court in this respect, because there is no evidence on record that previous to the incident there was any quarrel between the deceased and the appellant or any incident with them which leads to the murder of the deceased Bharose. There is no evidence and circumstances on record to hold that the appellants before the incident conspired to murder deceased Bharose and they were having knowledge that Bharose will be at field or on way to the house at the relevant time. It is pertinent to note that the time of practical examination was 7:30 to 10:30 thereafter, there was a viva of students, though, the name of the appellant Kallu @ Hiralal appears at serial no.4 in the list of students, but it is known fact and it is matter of common knowledge that after practical exams and viva students remains in the school to know what was the score of other students hence, there is every possibility that after appearing in viva, the appellant Kallu @ Hiralal would have remained present in the school. Looking to the number of students who appeared in practical exams on 24-2-96 and in the facts and circumstances of the case, it would not be possible for the appellant Kallu @ Hiralal to reach the spot at 2:30 p.m. The distance of spot is 7 kilometers away from Chanda village. Looking to the distance of spot from Chanda village also strengthen the presumption that it was not possible that the appellant Kallu @ Hiralal would have reached on spot, at about 2:30 p.m. We are of the view that learned Trial court committed error in disbelieving the evidence of Jagye Prasad. Jagye Prasad is an independent witness and credibility of defence witness should also be scrutinised at par to prosecution witnesses. We are of the considered view that evidence of Jagye Prasad (DW-1) is reliable. Hence, the presence of appellant Kallu @ Hiralal is doubtful on the spot at the time of incident. Be it true, then evidence of Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) is belied that the appellant Kallu @ Hiralal was present on the spot and he was also chasing the deceased Bharose. The evidence of Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) is very much doubtful on material points.

16. Bhura (PW-3) specifically deposed that when he reached on the spot, the deceased Bharose was alive but he did not depose anything about the incident. He is not corroborating the fact that Bharose or any other person told him that Ganesha has fired on him. Mst. Halki Bai @ Gora Bai (PW-6) and Babu (PW-1) categorically stating that just after incident along with Sunder Ahir, Bandra Chamar,

Wife of Mangi, Wife of Bhagwa and Bhura also reached on spot but Bhura is not corroborating the fact that the deceased Bharose told him that the appellant Ganesha has fired on him as stated by Babu(PW-1) and Halki Bai @Gora Bai (PW-6). Halki Bai (PW-5) also deposed that she was going to field, on way to the field, she saw that the deceased Bharose was lying on the spot. Bandra Chamar, Sunder, Bhura and three women were near Bharose, thereafter she went to the field. Halki Bai (PW-5) specifically deposed that she did not go near to Bharose and she did not listen Bharose telling anything. Halki Bai (PW-5) also contradicting the fact as stated by Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) that Bharose told that the appellant Ganesha has fired on him. Strangely, Babu and Halki Bai @ Gora Bai (PW-6) did not narrate the incident to Bhura (PW-3) and Halki Bai (PW-5) for the reasons best known to them. Prosecution has not examined Bandra Chamar, Sunder, wife of Halka, Wife of Bhagwa and wife of Mangi which leads to the presumption that if they would have been examined by the prosecution, they would have gone against prosecution. Sunder is examined as (DW-2), he deposed that after hearing the sound of fire, he went on the spot, he saw that the deceased Bharose was lying on the field. The appellants were not on the spot, he went to village and informed about the incident to Babu (PW-1) and Ram Milan thereafter, Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) reached on the spot. Babu (PW-1) and Halki Bai @ Gora Bai (PW-6) also admitted the presence of Sunder on the spot. As per discussion in foregoing paras, presence of Babu and Halki Bai @ Gora Bai (PW-6) is doubtful on spot at the time of incident hence, looking to the evidence of Bhura (PW-3) and Halki Bai (PW-5), evidence of Sunder appears to be reliable and there is every possibility that Babu and Halki Bai @ Gora Bai (PW-6) would have reached on spot after the incident.

17. To sum up and as per discussion, we are of the considered view that the evidence of Babu (PW-1) and Mst. Halki Bai @ Gora Bai (PW-6) do not inspire confidence and their presence on spot at the time of incident and the fact that they saw the appellant Ganesha and Kallu @ Hiralal chasing the deceased and the appellant Ganesha fired on the deceased Bharose is doubtful. FIR Exhibit P-1 is not substantial piece of evidence. It can be used only for corroboration and proving the contradiction, omission and improvements in the statement of prosecution witnesses. Only on the basis of FIR conviction cannot be upheld. Consequently, we are of the view that prosecution has failed to prove beyond reasonable doubt that on 24-2-96, the appellants Ganesha and Kallu @ Hiralal chased Bharose and the appellant Ganesha fired on Bharose and committed his murder. Learned Trial Court committed error in relying upon the testimony of prosecution witnesses and convicting the appellants under Section 302 read with section 34 I.P.C and under Section 25 and 27 of the Arms Act. Consequently, the finding of conviction of appellants under aforementioned charges is hereby set aside and the appellants deserves to be acquitted

18. Consequently, the appeal has merit and deserves to be and is hereby allowed. The impugned judgment of conviction of appellants and order of sentence under Section 302 read with Section 34 I.P.C and under Section 25 and 27 of the Arms Act is hereby set aside and the appellants are acquitted of charges levelled against them. The appellant Kallu is on bail. His bail bond stands discharged. The appellant Ganesh @ Ganesha @ Ganesh Prasad is in jail. If he is not required in any other criminal case, he be released forthwith.

Appeal allowed.

I.L.R. [2008] M. P., 3037

CIVIL REVISION

Before Mr. Justice A.K. Shrivastava

4 March, 2008*

GOURI BAHU (SMT.) THROUGH L.R.

SMT. SHASHI DEVI

Vs.

GOPALDAS

... Applicant

... Non-applicant

Civil Procedure Code (5 of 1908), Section 2(11) - Legal Representative - Probate - Decree of eviction passed in favour of Smt. Gouri Bahu who died during pendency of appeal - Applicant claiming herself to be legal representative on the basis of will - Executing court accepting the objection hold that applicant would be free to execute decree after obtaining the probate certificate - Held - Property is situated within State of M.P. - Obtaining of probate not necessary - Applicant has a right to execute decree as property has been devolved on the applicant - Revision allowed. (Paras 13 & 14)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 2(11) - विधिक प्रतिनिधि - प्रोबेट - बेदखली की डिक्री श्रीमती गौरी बहू के पक्ष में पारित की गई जिसकी अपील के लम्बित रहने के दौरान मृत्यु हो गई - आवेदक ने वसीयत के आधार पर स्वयं को विधिक प्रतिनिधि होने का दावा किया - विचारण न्यायालय ने आपत्ति स्वीकार करते हुए अभिनिर्धारित किया कि आवेदक प्रोबेट प्रमाण पत्र प्राप्त करने के पश्चात् डिक्री का निष्पादन कराने के लिए स्वतंत्र होगी - अभिनिर्धारित - सम्पत्ति म.प्र. राज्य के भीतर स्थित है - प्रोबेट प्राप्त करना आवश्यक नहीं - आवेदक को डिक्री निष्पादित कराने का अधिकार है क्योंकि सम्पत्ति आवेदक पर न्यागत हो गई है - पुनरीक्षण मंजूर।

Cases referred :

2007 (I) MPWN 14, 1976 J LJ SN 93, AIR 1956 Nag 209, AIR 1962 SC 232, (1993) 2 SCC 507, 1993(II) MPWN 99:

G.C. Bhatia, for the applicant.

Yogendra Gautam, for the respondent.

ORDER

A.K. SHRIVASTAVA, J. :- This revision application under Section 115 of the

Code of Civil Procedure, 1908 (in short 'the Code') has been filed by the present applicant Smt. Shashi Devi against the order dated 2/8/2004 passed by learned Executing Court directing her to obtain probate certificate in order to execute the decree of eviction passed in favour of decree holder Gouri Bahu.

2. The facts leading to the revision application lie in narrow compass. Smt. Gouri Bahu filed civil suit No.20-A/98 for eviction on the ground envisaged under Section 12(1)(a) of the M.P. Accommodation Control Act, 1961 against the respondent-Gopaldas on the relationship of landlord and tenant. The suit was decreed by learned 2nd Civil Judge Class-II, Katni on 31/10/2000.

3. An appeal which was filed by respondent/tenant against his landlord Goura Bahu was dismissed as abated, since Goura Bahu died.

4. The present applicant Smt. Shashi Devi presenting herself to be the legatee of Gouri Bahu, filed execution application on the ground that Gouri Bahu executed a will in her favour on 23/6/2001. It has also been stated in the application that Gouri Bahu died on 27/6/2001 and because a will has been executed in her favour, she be permitted to get the decree executed passed in favour of Gouri Bahu.

5. An objection was raised on behalf of respondent that since Shashi Devi has not obtained probate certificate, therefore, she is not entitled to execute the decree. The executing Court while accepting the objection raised by respondent closed the execution proceedings by holding that Shashi Devi would be free to execute the decree after obtaining the probate certificate.

6. In this manner, present revision application has been filed.

7. The contention of learned counsel for the applicant is that the parties belonged to State of Madhya Pradesh and the property is also in Madhya Pradesh, since the same is in district Katni. Thus, by placing reliance on the decision of this Court *Mayank V. Public in General and others*, 2007 (1) MPWN 14, it has been argued that there is no necessity to obtain probate certificate. He has also placed reliance on another decision of this Court *Kundanbai V. Hazarabi*, 1976 J.L.J. S.N.93 in this regard.

8. On the other hand, Shri Yogendra Gautami, learned counsel for the respondent, has argued in support of the impugned order.

9. Having heard learned counsel for the parties, I am of the view that this revision application deserves to be allowed.

10. Admittedly, the suit property is in the State of Madhya Pradesh. The Division Bench of this Court in *Damodar Lal Sunderlal V. Gopinath Sunderlal and another*, AIR 1956 Nagpur 209, has categorically held that by notification No.7988 dated 19/7/1904, the District Judges were authorized to receive applications for probate and letters of administration even in the case of Hindu wills not falling under Section 57 of the Hindu Succession Act. It was further observed that obtaining the probate certificate is not obligatory when the property is situated in

the State of Madhya Pradesh and obtaining probate certificate was optional. In this decision it has also been held that the said notification dated 19/7/1904 is deemed to continue in force as one under sub-Section (2) of Section 264 of the Act. Thus, I am of the view that obtaining the probate certificate by applicant is only optional and not mandatory.

11. On visualizing and considering the ambit and scope of Section 2(11) of the Code where the term "legal representative" has been defined, I am of the view that it would also cover present applicant in whose favour will has been executed by decree holder Gouri Bahu and if it is held that she would not come under the ambit and sweep of "legal representative", it would amount to throttling the purpose to define the term "legal representative" and the intention of the Legislature who has widened the scope of definition of 'legal representative' would also be frustrated. The Supreme Court in the case of *Andhra Bank Ltd. V. Srinivasan and others*, AIR 1962 SC 232, has categorically held in para-18 that a legatee who represents the estate of the deceased would be a legal representative in terms of Section 2(11) of the Code. It would be appropriate to quote para-18 of the decision which reads thus :

"(18) Mr. Sastri concedes that a universal legatee would be a legal representative and he does not challenge that the person who intermeddles even with a part of the estate of the deceased is also a legal representative; but his argument is that a legatee who obtains only a part of the estate of the deceased under a will cannot be said to represent his estate and is therefore not a legal representative under S.2(11). We are not impressed by this argument. The whole object of widening the scope of the expression "legal representative" which the present definition is intended to achieve would be frustrated if it is held that legatees of different portions of the estate of a deceased do not fall within its purview. Logically it is difficult to understand how such a contention is consistent with the admitted position that persons who intermeddles with a part of the estate are legal representatives. Besides, if such a construction is accepted it would be so easy for the estate of a deceased to escape its legitimate liability to pay the debts of a deceased debtor only if the debtor takes the precaution of making several legacies to different persons by his will. Besides, as a matter of construction, if different intermeddlers can represent the estate different legatees can likewise represent it. In regard to the intermeddlers they are said to represent the estate even though they are in possession of parcels of the estate of the deceased and so there should be no difficulty in holding that the cause "a person who in law represents the estate of a deceased person" must include different legatees under the will. There is no justification for holding that the "Estate" in the context must mean the

whole of the estate. Therefore, we are satisfied that the plain construction of S.2(11) is against Mr Sastri's argument, apart from the fact that considerations of logic and commonsense are equally against it."

(Emphasis supplied)

12. I may further add that the term "legal representative" can be equated with term "personal representative". To me, the term "legal representative" is having a wider connotation and would include not only the legal heirs of the deceased but also intermeddlers of the estate of the deceased and also a person who, in law, represents the estate of the deceased and the definition should not restrict and confine to heirs alone. Thus, a legatee under the will would also come under the ambit and sweep of "legal representative" as defined under Section 2(1) of the Code (See *Chiranjilal Shrilal Goenka V. Jasjit Singh and others*, (1993) 2 SCC 507).

13. On going through the definition of "legal representative" as defined under Section 2(11) of the Code, I am of the view that since the present applicant Smt. Shashi Devi is having the will of deceased decree holder Gouri Bahu in her favour, the estate of Gouri Bahu is represented through Smt. Shashi Devi. To me, Smt. Shashi Devi is the person who is representing the estate of the deceased decree holder Gouri Bahu. It is not disputed that the will has not been probated. But, at the same time, it can be held that the property has been devolved on the present applicant under the will and, therefore, according to me, right to execute the decree could be claimed in respect of the suit property by applicant-Smt. Shashi Devi who represents the estate of the deceased. In this context, I may profitably rely the decision of the Division Bench of this Court *Shakuntla (Mst) V. Shatrughan*, 1993(2) MPWN 99.

14. In the case of *Kundanbai* (supra), Single Bench of this court has also taken the same view that if the property is situated in the Madhya Pradesh, obtaining of probate is not necessary.

15. In this view of the matter, I am of the view that the order of the executing Court holding that the probate certificate is necessary and directing the applicant to obtain probate certificate in order to get the decree passed in favour of deceased decree holder Gouri Bai executed, deserves and is hereby set aside. The applicant Shashi Devi is permitted to execute the decree.

16. The revision application is hereby allowed. The executing Court is hereby directed to proceed further with the execution. Looking to the facts and circumstances, the parties are directed to bear their own costs.

Revision allowed.

I.L.R. [2008] M. P., 3041

CIVIL REVISION

Before Mr. Justice S.K. Seth

29 August, 2008*

SHEIKH IKAR

Vs.

... Applicant

SHEIKH SHAMIM AHMAD & ors.

... Non-applicants

Civil Procedure Code (5 of 1908), Order 7 Rule 11, Mohammedan Law - Inheritance - Suit for declaration, partition and separate possession - Dismissed on the ground that in Mohammedan Law sons of predeceased son are not entitled to claim property of their grandfather - Appellate court reversed the finding and remanded the case - Held - Suit involved mixed questions of law and fact - Property was agriculture holdings and what would be the position of devolution of agriculture holdings of a person governed by Mohammedan Law has to be decided on merits - Appellate court committed no error in remanding case - Revision dismissed. (Para 4)

सिविल प्रक्रिया संहिता (1908 का 5). आदेश 7 नियम 11, मुस्लिम विधि - उत्तराधिकार - घोषणा, विभाजन और पृथक कब्जे के लिए वाद - इस आधार पर खारिज किया गया कि मुस्लिम विधि में पूर्वमृत पुत्र के पुत्र अपने दादा की सम्पत्ति में दावा करने के हकदार नहीं हैं - अपीलीय न्यायालय ने निष्कर्ष को उलट दिया और मामला प्रतिप्रेषित किया - अभिनिर्धारित - मामले में विधि और तथ्य के मिश्रित प्रश्न अन्तर्गस्त हैं - सम्पत्ति कृषि खाता था और मुस्लिम विधि से शासित होने वाले किसी व्यक्ति के कृषि खाते के न्यागमन की स्थिति क्या होगी. यह गुणदोषों पर विनिश्चित किया जाना है - अपील न्यायालय ने मामला प्रतिप्रेषित करने में कोई त्रुटि नहीं की - पुनरीक्षण खारिज।

B.I. Mehta, for the applicant.

ORDER

S.K. SETH, J. :-He is heard.

This revision is by defendant in civil suit No.10A/2005. It is directed against the judgment dated 21.02.2008 passed by Additional District Judge, Barwah district West Nimar in C.R.A.No.54A/2005. By the order impugned, the lower appellate Court has set aside the order dated 15.10.2005 passed by Civil Judge, Class-II, Sanawad in civil suit No.10A/2005.

2. Respondents No.1 to 3 herein have filed a suit for declaration, partition and separate possession in respect of the properties of late Sheikh Nannu, who died intestate. The plaint allegation is that respondents No.1 to 3 are sons of Sheikh Nisar, who happened to be one of the sons of Sheikh Nannu. The applicant in this revision is the real brother of Sheikh Nisar. After institution of the suit, applicant filed an application under Order 7 Rule 11 CPC praying for dismissal of the suit on

the ground that under Mahomedan law, sons of a pre-deceased son are not legal heirs of the property of their grand-father. Learned trial Judge accepted the application and dismissed the suit. Against which an appeal was preferred and by the order impugned, it was allowed and the order passed by the trial Judge was set aside and the case was remanded back to the trial Court for a decision on merit. The present revision is directed against the order passed by the appellate Court.

3. Shri Mehta, learned counsel appearing for the applicant vehemently argued that the legal position under the Mahomedan law is clear and as such the suit filed by non-applicants No. 1 to 3 was not maintainable. Thus, according to him, lower appellate Court committed a grave error of law in allowing the appeal and setting aside the order passed by the trial Court.

4. After having heard Shri Mehta and going through the order impugned, we do not find that the Court below committed any jurisdictional error nor the order impugned suffers from any irregularity or illegality. The suit instituted by non-applicants raised mixed questions of law and fact inasmuch as the immoveable property of late Sheikh Nannu was agricultural holdings and what would be the position of devolution of the agricultural holdings of a person governed by the Mahomedan law has to be decided on merits.

5. In view of the aforesaid, we find no merit and substance in this revision notwithstanding the fact that it is also barred by limitation. Accordingly, the revision fails and is hereby dismissed.

Revision dismissed.

I.L.R. [2008] M. P., 3042

CRIMINAL REVISION

Before Mr. Justice Rakesh Saxena

15 January, 2008*

BABBI @ JITENDRA & ors.

... Applicants

Vs.

STATE OF M.P.

... Non-applicant

Penal Code (45 of 1860), Section 306 - Abatement to commit suicide - Applicant No. 1 grabbed money of deceased - Deceased was assaulted by applicants when he demanded his money back - Held - No material to show that applicants in any manner instigated, incited or provoked deceased to commit suicide - Nothing to indicate any intention on their part that deceased should commit suicide - Order framing charge u/s 306 set-aside - Revision allowed. (Paras 12 & 13)

दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या का दुष्प्रेरण - आवेदक क्र. 1 ने मृतक की धनराशि छीनी - जब मृतक ने अपनी धनराशि वापस माँगी तो आवेदकों द्वारा उस पर

हमला किया गया – अभिनिर्धारित – यह दर्शाने के लिए कोई सामग्री नहीं कि आवेदकों ने मृतक को आत्महत्या करने के लिए किसी तरीके से उकसाया, उद्दीप्त या प्रकोपित किया – उनकी ओर से किसी आशय को उपदर्शित करने के लिए कुछ नहीं कि मृतक को आत्महत्या करनी चाहिए – धारा 306 के अन्तर्गत आरोप विरचित करने का आदेश अपास्त – पुनरीक्षण मंजूर।

Manish Datt, for the applicants.

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

ORDER

RAKESH SAKSENA, J. –Petitioners have filed this revision against the order dated 20.11.2006, passed by Second Additional Sessions Judge, Chhindwara, in Sessions Trial No. 36/2006, framing the charge under Section 306 of Indian Penal Code against them.

2. Learned counsel for the petitioners submits that prima-facie on the facts and evidence as adduced by the prosecution in the case, no offence under Section 306 of Indian Penal Code is made out against the petitioners, as there is absolutely no evidence to infer that petitioners in any manner instigated, aided or provoked the deceased to commit suicide. Merely because the petitioners had grabbed the money of deceased and had assaulted him, it cannot be said that they abetted the deceased to commit suicide. Since no ingredient of abetment is borne out from the facts of the prosecution case, learned trial Court committed error in framing charge under Section 306 of Indian Penal Code against the petitioners.

3. Learned counsel for the State, on the other hand, submits that the deceased had committed suicide because his money had been held up by the accused Babbi and when he demanded his money back, he was assaulted, due to which, he committed suicide by drowning in the well. Since the deceased committed suicide due to the conduct of the petitioners, the trial Court did not commit any error in framing charge under Section 306 of Indian Penal Code.

4. In short, the facts of the case are that accused Babbi @ Jitendra Vishwakarma and the deceased Godan had taken a joint loan of Rs. 10,000/- from the State Bank. Deceased had sold a portion of his house and some crop for Rs. 40,000/-. All of this had been kept by accused Babbi. When deceased demanded the said money, it was not given back to him. It is said that in the night of 10.4.2005 when deceased went to the house of Babbi Vishwakarma for demanding money, he did not pay it to him and instead Babbi, Madanlal, Shailendra, Umesh and Satish assaulted him. This incident was witnessed by his son Sonu.

5. On perusal of the statement of Sonu, Shivpati Bai ((wife), Hemraj (cousin), Ram Bharose, Bhagwati and Yashoda, it is seen that all of the aforesaid witnesses stated before the police that Babbi Vishwakarma had borrowed a loan for Rs. 10,000/- on the land of deceased. That amount was kept by Babbi. Deceased had sold a portion of his house for Rs. 40,000/- and had also collected some money by selling his crop and all that money was kept with Babbi. Babbi had assured the

deceased that he would get opened a shop of grocery for his son, but Babbi did not return the said money and when deceased demanded the same, he abused and assaulted him. In the night of 10.4.2005 when deceased had gone to the house of Babbi, all the accused persons abused and assaulted him. Deceased, after informing to his family members that he was going to lodge the report, went somewhere and never returned back. On 13.4.2005, his dead body was found in a well.

6. On report being lodged with the police, a case under Section 306 of Indian Penal Code was registered against the petitioners.

7. On postmortem examination of the dead body, the death of deceased was found due to asphyxia due to drowning.

8. The question in the present case is as to whether considering and accepting the entire material available on record as absolutely correct and true, a prima-facie case for alleged commission of an offence punishable under Section 306 of the Indian Penal Code is made out against the accused/petitioners.

9. For making out an offence under Section 306 of Indian Penal Code, one essential and requisite ingredient is 'abetment' by the accused to deceased to commit suicide. Section 306 of India Penal Code reads as under:-

"306. Abetment of suicide.-If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

10. As per definition given in Section 107 of the Indian Penal Code abetment is constituted by:-

- (i) Instigating a person to commit an offence; or
- ii) engaging in a conspiracy to commit it; or
- iii) intentionally aiding a person to commit it."

11. A person is said to 'instigate' another to an act, when he actively suggests or stimulates him to the act by means of language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement. The word 'instigate' means to goad or urge forward or to provoke, incite, urge or encourage to do an act.

12. On examining the facts of the present case as it is, it appears that none of the accused goaded or urged forward, provoked, incited or urged or encouraged the deceased to commit suicide. They merely refused to return or refund the money of deceased allegedly kept by them. They never intended that deceased should commit suicide.

13. Since there is absolutely no material on record to indicate that petitioners in any manner instigated, incited or provoked the deceased to commit suicide, or to

indicate any intention on their part that deceased should commit suicide, it cannot be held that petitioners in any manner abetted deceased to commit suicide. In the absence of essential ingredient of abetment, no charge for the offence under Section 306 of Indian Penal Code can be framed against the accused persons.

14. In view of the above discussion, I am of the view that the learned trial Judge committed error in framing charge under Section 306 of Indian Penal Code against the petitioners.

15. Accordingly, this revision is allowed. The impugned order of framing charge against the petitioners under Section 306 of Indian Penal Code is set aside. The charge under Section 306 of Indian Penal Code is quashed.

Revision allowed.

I.L.R. [2008] M. P., 3045

INCOME TAX APPEAL

Before Mr. Justice S.K. Kulshrestha & Mrs. Justice S.R. Waghmare

18 January, 2008*

COMMISSIONER OF INCOME TAX

... Appellant

Vs.

KRISHI UPAJ MANDI SAMITI

... Respondent

Income Tax Act (43 of 1961), Sections 11, 12A, 12AA, 260A - Whether a Krishi Upaj Mandi is entitled for registration u/s 12A & 12AA and exemption u/s 11 - The object of establishment of Krishi Upaj Mandi is to protect the interest of farmers and ensure that they are not exploited - Fees charged has nexus with service rendered - Mandi does not have any commercial activity - Mandi charges 2% from farmers and out of that 1.2% is directly transferred to State - Held - Mandies entitled for registration and exemption - Order of Income Tax Appellate Tribunal upheld - Appeal dismissed. (Paras 4, 6, 7 & 8)

आयकर अधिनियम (1961 का 43), धाराएँ 11, 12क, 12कक, 260क - क्या कोई कृषि उपज मण्डी धारा 12क एवं 12कक के अन्तर्गत पंजीयन और धारा 11 के अन्तर्गत छूट की हकदार है - कृषि उपज मण्डी को स्थापित करने का उद्देश्य किसानों के हितों का संरक्षण करना और यह सुनिश्चित करना है कि उनका शोषण न हो - आरोपित शुल्क का सम्बन्ध दी गई सेवा के साथ है - मण्डी की कोई वाणिज्यिक गतिविधि नहीं है - मण्डी किसानों से 2 प्रतिशत वसूल करती है और उसमें से 1.2 प्रतिशत सीधे राज्य को अंतरित करती है - अभिनिर्धारित - मण्डियाँ पंजीयन और छूट की हकदार - आयकर अपीलीय अधिकरण के आदेश की पुष्टि की गई - अपील खारिज।

Cases referred :

MA (IT No.12/07) reported in ILR (2008) MP 1735, (2008) 297 ITR 1(SC), 267 ITR 461, 224 ITR 757, 247 ITR 18.

R.L. Jain with Veena Mandlik, for the appellant.

None, for the respondent.

ORDER

The Order of the Court was delivered by S.K. KULSHRESTHA, J. :-These appeals have been filed under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as the Act) against the various orders passed by the Income Tax Appellate Tribunal with regard to the direction to the Income Tax Authorities to grant registration to the Krishi Upaj Mandi under the provisions of Section 12-A and 12-AA of the Act.

These appeals have been admitted on the following questions of law:-

1)" Whether ITA was justified in setting aside of the order passed by the Commissioner which has refused to grant registration to the assessee (Krishi Upaj Mandi Samiti) who had applied by them under Section 12A of the IT Act, 1961 for registration as provided in Section 12A *ibid*.?

2)" Whether the respondent/assessee Mandi is entitled to claim registration under Section 12A of the Act, and if so, whether it satisfies requirement both on facts and at law for obtaining registration as provided under Section 12A and 12AA. of the said Act ?

3) "Whether the finding recorded by the Tribunal while reversing the order passed by the Commissioner and thereby allowing the application made by the respondent-assessee for obtaining registration under Section the aforesaid section namely 12A and 12AA is legally and factually sustainable?

4) " Whether Tribunal was justified in granting registration and that too retrospectively by allowing the application made by the respondent? "

2. Since the appeals raise common questions of law, they are being disposed of by this common order. However, for convenience the facts have been taken from the record of ITA No.217/2007 (*CIT Vs. Krishi Upaj Mandi Samiti, Bhanpura*).

3. A consolidated order was passed by the ITAT on 23.12.2006 by which the order of the CIT was set-aside and allowing the appeals of the Krishi Upaj Mandis, it was directed that the Commissioner of Income Tax shall take necessary steps to grant registration to all the assesseees from the date of their creation. Aggrieved by the orders passed by the ITAT, the Revenue has preferred these appeals which have been admitted on the questions hereinabove reproduced. While not disputing that the controversy has already been decided by this Court, by Gwalior Bench, in Miscellaneous Appeal (I.T.) No.12/2007 and this Court has held that the market Committees will fulfill the requirements of Section 11 to get exemption and, therefore, they are entitled to registration under Section 12-A and 12-AA of the Act, the learned Counsel has placed reliance on the judgment of the Apex Court reported in (2008) 297 ITR 1 (SC) *U.P. Forest Corporation and another Vs Deputy Commissioner of Income-Tax*. Learned Counsel has pointed out, by reference to the said decision that in all such matters, a conjoint reading of Section

11, 12 and 12-A of the Act manifests that registration under Section 12-A is a condition precedent for availing the benefit under Section 11 and 12 of the Act. Reliance has also been placed on the decision of the Allahabad High Court in *Krishi Utpadan Mandi Samiti Vs Union of India and another* 267 ITR 461 in which the Allahabad High Court has expressed the view that Krishi Utpadan Mandi Samiti are not one of the entities mentioned in Section 10 (20) of the Act and, therefore, they were not entitled to exemption under Section 10 (20) of the Act. Reference has also been made to the judgment of the Patna High Court in *Bihar State Forest Development Corporation V. Commissioner of Income-Tax* 224 ITR 757 holding that a State Forest Development Corporation is a Government Company and not entitled to registration under the provisions aforesaid. Attention has also been invited to the decision of the Kerala High Court in *Self Employers Service Society Vs. CIT* 247 ITR 18 regarding registration of the society under Section 12-AA of the Act.

4. At the outset, we may point out that in the decision of U.P. Forest Corporation and another, the Apex Court was considering the status of the Corporation vis-a-vis its entitlement to exemption under the provisions of the Act. Their Lordships have also taken into consideration the preamble of the Act "An Act to provide for the establishment of a Corporation for better preservation, supervision and development of forest and better exploitation of forest produce within the State and have matters connected therewith". In the case in hand, the questions referred to above deal with the cases of Krishi Upaj Mandi. The preamble of the M. P. Krishi Upaj Mandi Adhiniyam, 1972 under which the Krishi Upaj Mandi is established refers to providing for better regulation of buying and selling of agricultural produce and the establishment and proper administration of markets of agricultural produce in the State of M.P. unlike in the case of Forest Corporation which also deals with the Forest produce, its sale etc., Though the learned counsel suggested that these Mandis charge tax and, therefore, they are not covered within the umbrella of Sec. 12-A and 12-AA of the Act, a survey of the provisions of the Act indicates that market committee charges fee, for various purposes which have the necessary nexus with the service rendered and thus, quid pro quo. Merely because it is charging fee does not militate against the altruistic purpose, for which these Mandis are established.

5. Before referring to the judgment of this Court in relation to the questions raised in these appeals, we may also point out that Allahabad High Court in *Krishi Utpadan Mandi Samiti* (supra) was considering the status of the Upaj Mandi under the Explanation to Section 10(20) of the Act. In the present case, question of the Krishi Upaj Mandi being a local authority is not involved and the decision of the Allahabad High Court will, therefore, have no application.

6. In view of the reliance of the learned counsel for the appellant on the decision of the Supreme Court, the core question arises whether the judgment of this Court in *CIT Vs. Krishi Upaj Mandi Samiti Morena*, M.A.(I.T.) 12/2007, delivered on 8.1.2008, concludes the issue with regard to the questions raised in the present

appeals. We have already referred to the object for which Krishi Upaj Mandis have been established. Krishi Upaj Mandi does not have any commercial activity but has been constituted under the provisions of the said Act to protect the interest of the farmers and ensure that they are not exploited. It is not shown that the fee charged by the Krishi Upaj Mandi is applied for any purpose to the advantage of the Krishi Upaj Mandi. Under these circumstances, when the object of the Krishi Upaj Mandi is benevolent, it cannot be said that it is not entitled to Registration u/S. 12-A and 12-AA of the Act.

7. In the said decision it has been observed that sub-section (2) of Sec. 11 provides that for getting the exemption it is necessary that the income must be applied for Charitable or religious purpose in India to the extent of 85% of the income derived during that year from the property. In the case of the Krishi Upaj Mandi, the Commissioner expressed the view that the Committee charges 2% from the Farm Houses who come to Mandi for sale of the produce as a Mandi Fee and out of 2%, 1.2% is directly transferred to the State Government. It was in this view of the matter that the Commissioner observed that the Mandi was not applying 80% of the Income for Charitable purposes. In this context this Court observed that the sole requirement of the Act was not that the entire income should be applied for charitable purposes. Thus, relying on the provisions of Sub-Section (4) of Sec. 11 and the provisions of Sec. 12-A and 12-AA of the Act, it was observed that the Tribunal rightly allowed the appeals filed by Krishi Upaj Mandi Samiti and rightly set aside the order passed by the CIT.

8. We may reiterate that the decision of the Supreme Court is in regard to the entitlement of the U.P. Forest Corporation to registration under the provisions of Sec. 12-AA while the decision rendered by this Court at Gwalior Bench relates to the entitlement of the Krishi Upaj Mandi to registration u/S. 12-AA. This Court has already found that these Krishi Upaj Mandis are entitled to the exemption as they fulfill the requirement of Sec. 11 of the Act and thus, they are entitled to registration u/Ss. 12-A and 12-AA of the Act. This observation is in keeping with the opinion expressed by the apex Court in *U.P. Forest corporation* (supra) to the effect that for claiming benefit u/S. 11(1)(a), registration u/S. 12-A is a condition precedent. Since this Court has come to the conclusion that the Krishi Upaj Mandi fulfills the requirement of Sec. 12-A and 12-AA, and due applications were made to the Commissioner for Registration, the inconsistencies pointed out by the learned Senior Counsel appear illusory and fallacious. We are, therefore, of the considered view that the decision of this Court in similar cases referred to above, clinches the issue and the questions formulated deserve to be answered against the Revenue.

9. In the result, these appeals are dismissed but with no order as to costs. A copy of this order be maintained in each connected appeal.

Appeal dismissed.

I.L.R. [2008] M. P., 3049

MISCELLANEOUS CIVIL CASE

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice R.S. Jha

4 July, 2008*

GURMIT SINGH

... Applicant

Vs.

THE ZONAL MANAGER, PUNJAB & SINDH BANK,
BHOPAL & anr.

... Non-applicants

Constitution, Article 226 - Subsistence allowance can be claimed on the basis of deemed suspension - As a result of departmental proceedings applicant dismissed from service by order dated 29.02.1996 - Departmental appeal also dismissed - High Court in writ petition quashed the order of dismissal and applicant was directed to be reinstated in service - Order of High Court was assailed in writ appeal - Appellate court set-aside all the orders and remitted the matter back to Disciplinary Authority with certain directions - Fresh order of dismissal passed on 16.04.2007 - Applicant claimed subsistence allowance from the date of his first dismissal i.e. 29.02.1996 till the date of his second dismissal i.e. 16.04.2007 - Held - Finding and order of Disciplinary Authority was set-aside and was directed to re-decide issue after affording adequate opportunity to applicant - Position of applicant as it existed prior to his dismissal from service as charged officer under suspension was restored - Applicant should be deemed to be under suspension till the date of subsequent order of dismissal - Applicant entitled for subsistence allowance - Application allowed. (Paras 9 & 10)

संविधान, अनुच्छेद 226 - जीवन-निर्वाह भत्ते का दावा माने गये निलम्बन के आधार पर किया जा सकता है - विभागीय कार्यवाही के परिणामस्वरूप आवेदक को आदेश तारीख 29.02.1996 द्वारा सेवा से पदच्युत किया गया - विभागीय अपील भी खारिज की गई - उच्च न्यायालय ने रिट याचिका में पदच्युति का आदेश अभिखण्डित किया और आवेदक को सेवा में पुनर्नियुक्त किये जाने के निदेश दिये - उच्च न्यायालय के आदेश को रिट अपील में चुनौती दी गई - अपीलीय न्यायालय ने सभी आदेश अपास्त किये और मामला कुछ निदेशों के साथ अनुशासनिक प्राधिकारी को वापस भेज दिया - पदच्युति का नवीन आदेश 16.04.2007 को पारित किया गया - आवेदक ने उसकी प्रथम पदच्युति की तारीख अर्थात् 29.02.1996 से द्वितीय पदच्युति की तारीख अर्थात् 16.04.2007 तक जीवन-निर्वाह भत्ते का दावा किया - अभिनिर्धारित - अनुशासनिक प्राधिकारी का निष्कर्ष और आदेश अपास्त किया गया और आवेदक को सुनवाई का पर्याप्त अवसर देने के बाद विवाद पुनः विनिश्चित करने का निदेश दिया - आवेदक की स्थिति जैसी उसकी सेवा से पदच्युति के पूर्व निलम्बन के अन्तर्गत आरोपित अधिकारी के रूप में थी पुनः स्थापित की गई - आवेदक को सेवा समाप्ति के पश्चात्तर्वर्ती आदेश की तारीख तक निलम्बन के अधीन माना जाना चाहिए - आवेदक जीवन-निर्वाह भत्ते का हकदार - आवेदन मंजूर।

Cases referred :

(2006) 4 SCC 153, (1996) 10 SCC 702, (1996) 9 SCC 322, (1992) 4 SCC 711, (1993) 4 SCC 727.

Sanjay Sanyal, for the applicant.

Ajay Mishra with Ankit Saxena, for the non-applicant.

ORDER

The Order of the Court was delivered by R.S. JHA, J. :-The applicant, who was the original petitioner in W.P.No. 2515 of 1997 and respondent in W.A.No. 901 of 2006, has filed this application for review of order dated 25-1-2007 passed in W.A.No. 901/2006 and has prayed for a direction to the non-applicant/appellants to pay subsistence allowance to the applicant for the period commencing 1-3-1996 till the disciplinary proceedings are finally concluded by the non-applicants.

2. The facts in brief necessary for the adjudication of the present application are that on 25-6-1990 the applicant was placed under suspension vide order dated 23-6-1990 pursuant to a report lodged by the non-applicant No.1 dated 26-5-1990 with the State Bureau of Economic Offences, Bhopal. Subsistence allowance was also ordered to be paid to the applicant as per clauses of the bipartite settlement and norms prevalent in the non-applicant/bank. The Economic Offences Bureau vide its letter dated 9-1-1991 informed the non-applicant that no offence was found to have been committed in the investigation conducted by it in spite of which the non-applicants lodged a fresh F.I.R. against the applicant on 5-2-1991. The non-applicants also informed the applicant vide their letter dated 13-5-1991 that he would be entitled to subsistence allowance equal to full pay with effect from 25-6-1991 as per the bipartite settlement. On 22-2-1993 during the pendency of the criminal case a charge sheet was issued to the applicant and a departmental proceeding was initiated against him which ultimately resulted in imposition of a punishment of dismissal of the applicant from service vide order dated 29-2-1996. The appeal filed by the applicant was dismissed by the appellate authority vide order dated 6-2-1997 and, therefore, the applicant filed a writ petition before this Court assailing his dismissal from service which was registered as W.P.No. 2515 of 1997 and was ultimately allowed vide order dated 21-6-2005 and the impugned orders of the appellate authority, dated 6-2-1997 and of the disciplinary authority, dated 29-2-1996 were quashed and the applicant was directed to be reinstated in service.

3. As the non-applicant failed to comply with the orders passed by this Court in W.P.No. 2515/97, the applicant was constrained to file an application for review which was also disposed of vide order dated 26-9-2005 passed in M.C.C.No. 1422 of 2005 with a direction to the non-applicants to comply with the order passed in the writ petition regarding reinstatement within two months. The non-applicants thereafter filed a Special Leave Petition (Civil) No. 19790/2005 and the Supreme Court, vide interim order dated 3-10-2005 granted ad-interim stay of the orders passed by this Court in W.P.No. 2515/97 dated 21-6-2005. however, as intra Court appeal in the State of M.P. was revived, the Special Leave Petition was disposed

of permitting the non-applicants to file an intra Court appeal and the interim protection granted to them was extended for a further period of two months.

4. Being aggrieved by the order of the learned single Judge the non-applicants filed Writ Appeal No. 901 of 2006 which was ultimately disposed of vide order dated 25-1-2007 after setting aside the order dated 21-6-2005 passed by the learned single Judge in W.P.No. 2515/2007, quashing the order dated 29-2-1996 of the disciplinary authority as well as the order dated 6-2-1997 of the appellate authority with a direction to the disciplinary authority in the following terms :-

"For the aforesaid reasons, we set aside the impugned order dated 21-6-2005 of the learned Single Judge in W.P.No. 2515/97 and quash the order dated 29-2-1996 of the Disciplinary Authority and the order dated 6-2-97 of the appellate authority and remit the matter to the Disciplinary Authority to record a finding on the charges against the respondent after excluding the opinion of the handwriting expert and after affording an opportunity to the respondent to make further representation against the findings of the Inquiry Officer in the enquiry. Since the respondent has remained out of service since 1996, this exercise will be completed by the Disciplinary Authority within a period of three months from the date of receipt of the certified copy of this order from the respondent. The appeal is accordingly disposed of."

5. As the matter was remitted back to the disciplinary authority, the applicant filed an application dated 17/24-2-2007 before the non-applicants claiming payment of subsistence allowance as per the provisions of the bipartite settlement but no orders thereon were passed by the non-applicants and subsistence allowance was not paid to him, therefore, he has filed the present application before this Court for review/directions to the non-applicants for payment of subsistence allowance to him.

6. It is pertinent to note that during the pendency of the present application the non-applicants have again completed the enquiry and have issued an order dated 16-4-2007 dismissing the applicant from service against which it is stated by the learned counsel for the applicant that he has filed an appeal before the appellate authority. In the circumstances, the sole question before this Court in the present application is as to whether the applicant is entitled to subsistence allowance from the date of his first dismissal from service i.e. 29-2-1996 till the date of his second dismissal from service pursuant to directions issued by this Court dated 16-4-2007.

7. The applicant, in support of his contention, submits that once the initial order of dismissal from service dated 29-2-1996 was quashed by this Court in W.P.No. 2151/97 which was further affirmed by this Court in W.A.No. 901/2006, the applicant should be deemed to be under suspension and is entitled to payment of subsistence allowance as per the bipartite settlement.

8. Per contra, learned counsel appearing for the non-applicants, submits that the applicant is not entitled to any subsistence allowance as quashment of the

order of dismissal does not mean that the applicant would revert back to the status of a suspended employee in all circumstances and in support of the aforesaid contention has relied upon the judgment of the Supreme Court in *Managing Director, ECIL, Hyderabad v. B. Karunakar and others*, (1993) 4 SCC 727.

9. To appreciate the rival submissions in the proper perspective it is relevant to take into consideration certain facts, namely, that the first order of dismissal of the applicant dated 29-2-1996 was quashed by this Court in W.P.No. 2515/97 and the applicant was directed to be reinstated, however, in the writ appeal filed by the non-applicants while that part of the direction relating to reinstatement passed by the learned single Judge was set aside, the order of the learned single Judge as far as it related to quashing of order of dismissal was affirmed with a direction to the disciplinary authority to reopen the departmental enquiry and record a fresh finding on the charges against the applicant after excluding the opinion of the handwriting expert and after affording an opportunity to him to make further representation against the findings of the enquiry officer in the enquiry. In other words, the finding and the order of the disciplinary authority was set aside and the disciplinary authority was directed to re-decide the issue after affording adequate opportunity to the applicant and, therefore, the position of the applicant as it existed prior to his dismissal from service as a charged officer under suspension was restored.

10. In the aforesaid facts and circumstances, we are of the considered opinion that the contention of the learned counsel for the applicant deserves to be accepted and the applicant should be deemed to be under suspension till the date of issuance of the subsequent order of termination dated 16-4-2007 and consequently, he is entitled to payment of subsistence allowance for the period commencing from 1-3-1996 to 16-4-2007.

11. We find support for the view taken by us from the judgment of the Supreme Court in the case of *Ranjit Singh v. Union of India and others*, (2006) 4 SCC 153 wherein in similar circumstances when an order of dismissal was set aside and the matter was remitted back to the disciplinary authority for fresh consideration, the delinquent employee was directed to be deemed to be under suspension till the disposal of the matter by the disciplinary authority in the following terms in paragraph 24 of the judgment :-

".....We make it clear that although we are setting aside the order of disciplinary authority and consequently all other orders, we direct that the appellant shall be deemed to be under suspension till an appropriate order is passed by the disciplinary authority."

Similar directions were issued by the Supreme Court in the case of *State of U.P. and another v. T.P. Lal Shrivastava*, (1996) 10 SCC 702 where on the matter being remitted back to the disciplinary authority for proper adjudication by setting

aside the order of dismissal the employee was directed to be deemed under suspension, Yet again in the case of *State of Punjab and others v. Dr. Harbhajan Singh Greasy*, (1996) 9 SCC 322 the Supreme Court observed in paragraph 3 of the judgment that the law was now well settled that in cases where an enquiry is found to be faulty the matter should be remitted back to the disciplinary authority to follow the procedure from the stage at which the fault was pointed out instead of directing reinstatement and pending such enquiry the delinquent must be deemed to be under suspension, in the following terms :-

".....It is now a well settled law that when the enquiry was found to be faulty, it could not be proper to direct reinstatement with consequential benefits. Matter requires to be remitted to the disciplinary authority to follow the procedure from the stage at which the fault was pointed out and to take action in accordance to law. Pending enquiry, the delinquent must be deemed to be under suspension. The consequential benefits would depend upon the result of the enquiry and order passed thereon. The High Court had committed illegality in omitting to give the said direction."

We may also profitably draw support from the fact that the provisions of Rules 10(3) and (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, which have statutorily incorporated provisions for treating a delinquent employee under deemed suspension in cases where an order of dismissal is set aside or declared or rendered void by a Court or Tribunal, have been given the stamp of approval by the Supreme Court in the case of *Nelson Motis v. Union of India and another*, (1992) 4 SCC 711.

12. The reliance placed by the learned counsel for the non-applicants on paragraphs 30 (v) and 31 of the judgment of the Supreme Court in the case of *Managing Director, ECIL, Hyderabad v. B. Karunakar and others*, (1993) 4 SCC 727 (supra) is, in our considered opinion, misplaced and misconceived as the observations relied upon by the learned counsel for the non-applicants made in that judgment relate to the discretion vested in the authority regarding grant of consequential benefits pursuant to setting aside of the order of termination and to decide as to the manner in which the period between the order of dismissal and the subsequent order of reinstatement on remand should be treated i.e. regarding grant of full or reduced back wages and counting of the intervening period for the purposes of seniority, pension etc. and, therefore, has no applicability to the issue involved in the present case as the issue in the present case relates to the entitlement of suspension allowance and not back wages.

13. The parties have also strenuously opposed each other regarding the quantum of subsistence allowance to be paid to the applicant, however, as is evident from Annexure P-14, filed by the applicant, which is a letter issued by the Regional Manager of the non-applicant/Bank to the Manager of the Manarajpur Branch of Punjab and Sindh Bank filed along with the reply to the application for modification,

that Chapter XXXI of the bipartite settlement dated 8-9-1983 as well as paragraph 557 of the Shastri Award read with paragraph 17.14 of the Desai Award are applicable to the case of the applicant for grant of subsistence allowance during the period of suspension. Clause 1 of Chapter XXXI (at some places referred to as Chapter 5) of the bipartite settlement reads as under :-

"1. Subsistence allowance during the period of suspension should be granted on the following scale :

A. Where the enquiry is departmental by the bank :

(1) Where the investigation is not entrusted to, or taken up by an outside agency (i.e., Police/C.B.I.) :

(a) for the first three months of suspension one-third of the pay and allowances which the workman would have got but for the suspension;

(b) for the period of suspension, if any, thereafter, one-half of the pay and allowances which the workman would have got but for the suspension provided that after one year of suspension full pay and allowances will be payable if the enquiry is not delayed for reasons attributable to the concerned workman or any of his representatives.

(2) Where the investigation is done by an outside agency (i.e., Police/C.B.I.), and such investigation is followed by a departmental enquiry by the bank and not by prosecution :

(a) for the first three months of the suspension one third of the pay and allowances which the workman would have got but for the suspension;

(b) for the period of suspension, if any, thereafter, one half of the pay and allowances which the workman would have got but for the suspension;

Provided that full pay and allowances will be payable after six months from the date of receipt of report of the investigating agency that it has come to the conclusion not to prosecute the employee or one year after the date of suspension, whichever is later;

And provided further that the enquiry is not delayed for reasons attributable to the concerned workman or any of his representatives.

B. Where the enquiry is held by an outside agency including a trial in a criminal Court (irrespective of whether the enquiry/trial is preceded by an investigation by an outside agency i.e. Police/C.B.I.) or not :

(a) for the first six months of the suspension one-third of the pay and allowances which the workman would have got but for the suspension;

(b) for the period of suspension, if any, thereafter, one-half of the pay and allowances which the workman would have got but for the suspension, until the enquiry is over.

(Paragraph 557 Sastry Award, paragraph 17.14 Desai Award and paragraph 5 Bipartite Settlement 8.9.1983)" -

14. In the instant case though initially the matter was handed over to the Economic Offences Bureau for investigation, the Bureau recorded a conclusion not to prosecute the applicant vide its letter dated 9-1-1991. The non-applicant again lodged a fresh F.I.R. with the police on 5-2-1991 which ultimately culminated in his acquittal on 30-10-2001. However, the non-applicant/Bank without waiting the decision of the Criminal Court initiated departmental proceedings by issuance of the charge sheet dated 22-2-1993 which resulted in the dismissal of the applicant and is in fact, the subject-matter of the present case and, therefore, the case of the applicant falls under clause 1-A(2) of the aforementioned Rules relating to payment of subsistence allowance as the departmental enquiry was conducted by the non-applicant-bank itself and as per the proviso appended to clause 1-A(2) the applicant is entitled to full pay and allowances as subsistence allowance after six months from the date of the receipt of the report of the investigating agency that it has come to the conclusion not to prosecute the employee which, in the instance case, was communicated by Economic Offences Bureau to the non-applicant vide letter dated 9-1-1991.

15. In view of the aforesaid facts and circumstances we are of the considered opinion that the applicant is entitled to full pay and allowance as subsistence allowance for the period commencing from 1-3-1996 till 16-4-2007 after deducting the amount already paid to the applicant, if any, by way of subsistence allowance including the amount paid to him pursuant to the interim orders passed by this Court in the present MCC. The outstanding amount is directed to be paid to the applicant within a period of two months from today. The application is accordingly allowed.

16. In the peculiar facts and circumstances of the case there shall be no order as to costs.

Application allowed.

I.L.R. [2008] M. P., 3055
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Sinho
30 July 2008*

KEWAL KUMAR JAGGI

... Applicant

Vs.

VINOD KUMAR SAHU

... Non-applicant

Negotiable Instruments Act (26 of 1881), Section 138 - Complaint
can be signed and filed by Counsel on the basis of memo of appearance.

(Para 12)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 — परिवाद मेमो ऑफ एपीअरेंस के आधार पर अधिवक्ता द्वारा हस्ताक्षरित और पेश किया जा सकता है ।

Cases referred :

2002 Cr.L.J. 2621, AIR 2006 SC 269, 2007 (4) MPHT 480.

J.K. Verma, for the applicant.

Surendra Verma, for the non-applicant.

ORDER

S.C. SINHO, J. :- This order shall govern the disposal of aforesaid two M.Cr.C. under Section 482 of Cr.P.C. because the same legal point (complaint under Section 138 of Negotiable Instrument Act was signed by non-applicant advocate on basis of memo of appearance duly signed by non-applicants) is involved in both the cases. Learned J.M.F.C. Jabalpur in R.T. No.29/2003 and 193/2002, dismissed the objection raised by applicant on the ground of maintainability.

2. These complaints under Section 138 of Negotiable Instrument Act 1881 (hereinafter referred as to "Act 1881") was filed by respondents with the signature of his Advocate Shri Surendra Verma. Applicants filed an application for quashing the complaint on the ground these complaints has been filed without the signature of the complainant and they are signed by their Advocate on the basis of memo of appearance. As the learned Magistrate in impugned order dated 12.12.2005 has held that he has already taken cognizance therefore he cannot go behind orders. Feeling aggrieved these petitions under Section 482 of Cr.P.C. are filed before this court.

3. The only disputed question before me is that what will be the fate of such complaint which has been signed and presented by a complainant Advocate instead of complainant.

4. Learned counsel for the applicant Shri J.K. Verma argued that these complaints were filed before JMFC with the signature of respondents/complainants advocate and while these complaints were filed even complainant in person was not present before the court and they appeared before Court for the first time when their statements under Section 200 was recorded. These complaints are hopelessly time bar as well as not signed by the complainants hence the impugned order regarding taking cognizance under Section 204 passed by Court below be quashed.

5. Shri Surendra Verma, learned counsel for the respondents/complainants drawn my attention that there is no particular formate of a complaint. A complaint presented to the Magistrate containing allegation that an offence has been committed and ending with a prayer that culprit be suitably dealt with is a complaint. He further argued that complaint can be made orally as provided in definition of complaint in Cr. P.C. 1973 Section 2(d). However, learned Advocate of Respondents requested that he is willing to cure the defect if any.

6. Both the Advocates were heard at length.

7. In view of the above arguments it will be proper to reproduce Section 2 (d) of Cr.P.C. 1973, about definition of complaint.

“Complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

8. He was duly engaged in both the cases and memo of appearance was signed by non-applicant.

9. However, further Section 142(a) of the Act, 1881 reads as under:

S. 142 (a): no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque.

10. Thus it is clear that the complaint under Section 138 of the Act 1881 should be in writing. Further it is settled position that power of attorney of payee or a holder in due course can file complaint (Relied on *S. P. Sampathy Vs. Manju Gupta*, 2002 Cri. L. J. 2621) If a power of attorney holder can file a complaint on behalf of complainant so can counsel can also act on behalf of his client. If this capacity is not recognized, it will cause inconvenience and loss to the parties as well as delay the progress of proceedings in Court. It is nowhere held that complaint shall be filed with signature of the complainant. According to Section 142, the complaint should be in writing and legislature did not emphasize that such complaint should be also signed by the complainant. But it does not mean that the complaint can be filed without signatures or there is no necessity of putting the signatures of complainant or his advocate but not much stretch is provided on signatures.

11. Further it is held by the Apex Court in the case of *Uday Shanakar Triyar Vs. Ram Kalewar Prasad Singh and Anr.* AIR 2006 SC 269.

17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :-

i. Where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.

ii. Where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it.

iii. Where the non-compliance or violation is proved to be deliberate or mischievous:

iv. where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v. in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellants.

12. It is clear that no prejudice has been caused to the applicants because the complaints under Section 138 of Act 1881 were signed by complainants Advocate instead of complainant. Further this Court in *Smt. Shashi Shrivastava Vs. Jagdish Singh Kushwaha*, 2007 (4) M.P.H.T. 480 where the complaint under Section 138 of Act 1881 was filed without any signature even then this Court permitted complainant to cure the defect with a remedy to put his signature for curing the defect within 15 days and further directed that this remedy will not become barred by time merely on this technical ground based on mistake. Whereas non-applicant cases are on better footing. Learned Advocate of complainant has filed these complaints on the basis of Vakalatnama or memo of appearance duly signed by non-applicants will not make any difference till it is challenge by the non-applicants.

13. On going through the relevant portion of memo of appearance duly signed by non-applicant is as under :

"I/we have been duly engaged, instructed and authorised by non-applicants". The four words, "duly engaged, instructed and authorized" are very important. Every word in the memo of appearance has to be given due weightage and it makes clear that non-applicant has made a clear and loud declaration about engagement and authorization of Shri Surendra Verma on their behalf.

Authorise means-To empower; to give a right or authority to act, to endow with authority or effective legal power, warrant, or right, to permit a thing to be done in the future, it has a mandatory effect or meaning, implying a direction to act.

12. It is well settled that the inherent power is exercised for the limited purpose very sparingly where there is an apparent miscarriage of justice.

13. Consequently, the M.Cr.C. No.285/06 and M.Cr.C. No.442/06, devoid of any merit and are dismissed.

Petition dismissed.