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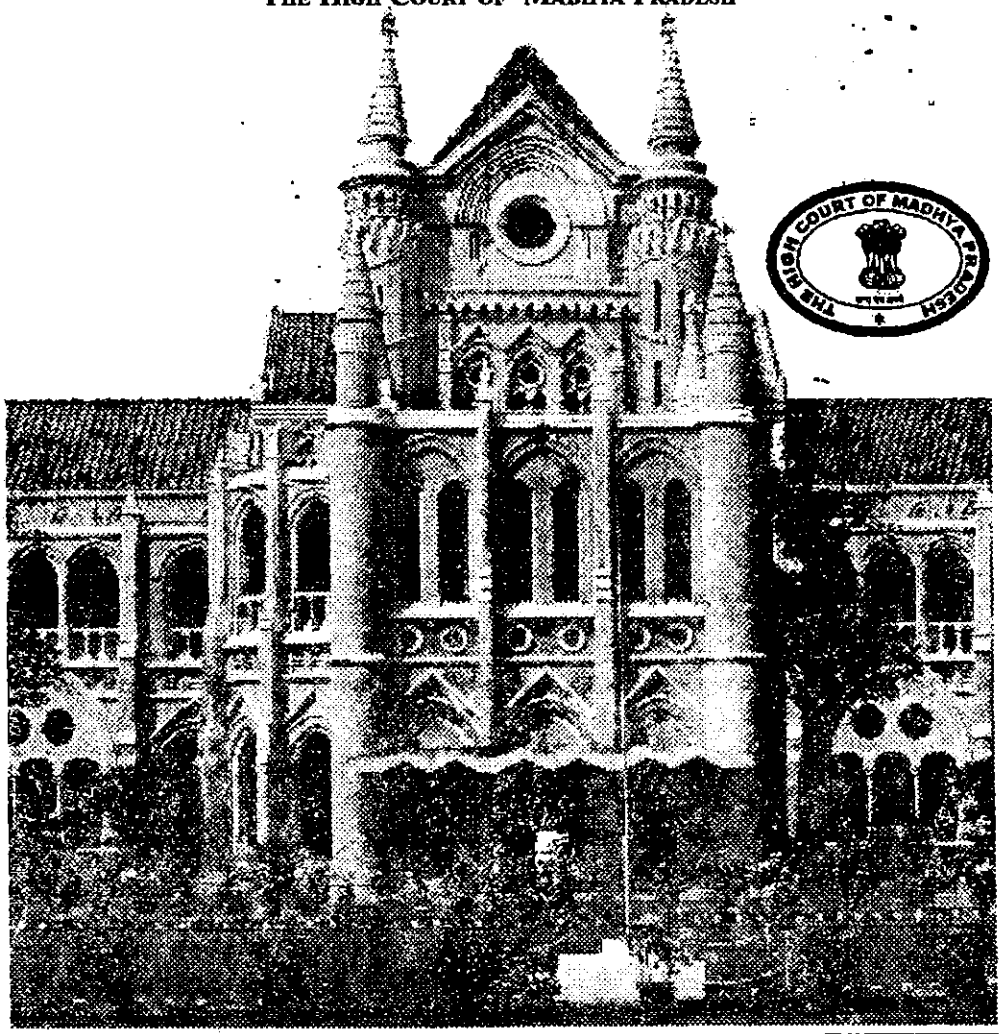

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Justice S. K. Kulshrestha

Born on 2.10.1946. Passed LL.B in 1968 and MA in English Literature in 1969. Became Member of the Bar in 1968 and joined the chamber of Shri C.R. Khanwilkar in the year 1968. Started Practising on the criminal side till appointed as Government Advocate and Public Prosecutor in High Court in 1980. Continued as Government Advocate till 1989. During this period, handled a large number of prestigious assignments on behalf of the Government as its Counsel including the Commissions appointed to inquire into various matters of public importance. Was Counsel for a very large number of Statutory and Corporate Bodies including Development Authorities, Public Service Commission, Municipal Corporations, Board of Secondary Education, Professional Examination Board, Van Vikas Nigam, Tourism Corporation and the like. In the year 1994, was appointed as Additional Advocate General and was later, designated a Senior Advocate in 1995 and continued on the said post till his elevation as Judge of the High Court on 24.1.1996.

Was Administrative Judge at Indore Bench of the High Court of M.P. till demitting the office on 2nd October, 2008.

We wish his Lordship a healthy, happy and prosperous life.

Justice Sheela Khanna

Born on 7th Oct. 1946. Passed B.A., LL.B. from Vikram University, Ujjain and LL.M. from Sagar University, Sagar. Enrolled as an advocate in the year 1969 and practised as a Lawyer for about one year. Joined judiciary as Civil Judge on 3rd Oct. 1970 was posted at Jabalpur, Indore and Gwalior in the same position (1970-1980). Became Additional Chief Judicial Magistrate, Bhopal and Indore and Chief Judicial Magistrate, Rewa (1986). Promoted as Additional District Judge and posted at Ratlam and Ujjain (1987-91). Became District Judge, Narsinghpur (October 1995 - May 1999). Worked as District Judge Gwalior (May 1999- September 2003), District Judge Indore (2004). Presently posted as Judge in the High Court of Madhya Pradesh, Bench Gwalior since October 2004.

Worked on deputation as an Attache in the Legislative Department in the Ministry of Law, Justice & Company Affairs, New Delhi in 1985. On deputation as Registrar, Bhopal Gas Leakage Tragedy Welfare Commission (1991-1992). On deputation as Secretary, M.P. Legislative Assembly (November 1993 - October 1995). On deputation as Law Officer to His Excellency. Hon. the Governor of Madhya Pradesh, at Bhopal (September 2003).

Participated as Observer in the 1st Conference of the Association of SAARC's Speakers and Parliamentarians at New Delhi (20-25 July 1993). Participated as Additional Secretary in Presiding Officers and Secretaries Conference held at Chennai (22 June-2 July 1993). Participated as Secretary in Presiding Officers and Secretaries Conference held at Bhubaneswar (29 January - 6 February 1994). Participated as Secretary in the Commonwealth Parliamentary Association conference held at Colombo (06-13 October 1995). Presided over as Society of Clerks at the table.

Also Travelled to Bangkok (Thailand), Tokyo (Japan), Hong Kong and Singapore as Secretary (MP Legislative Assembly) for a study tour organized by the Commonwealth Parliamentary Association of study Parliamentary working. Participated as Secretary (MP Legislative Assembly) in the Study tour organized by Indian Parliamentary Association to study the working of Parliamentary system of Assam and West Bengal (17-25 January 1995)

We wish her lordship a healthy happy and prosperous life.

Farewell

Hon'ble Mr. Justice A. M. Sapre bids farewell to the demitting Judge :–

Today, I rise to bid adieu to one of the most illustrious judges of our time, Hon'ble Shri Justice S.K. Kulshrestha. I had the privilege to observe his Lordship First in my capacity as a lawyer in principal seat at Jabalpur and later as a senior and respected colleague on the bench. When his lordship was elevated as a Judge of the High Court in the year 1996, what impressed all of us most was the calm and unflappable manner in which his lordship conducted himself and the proceedings of the court. His lordship was frugal with spoken word, yet communicative. His lordship is a Master of Arts in English Literature and it reflected in his judgments, effortlessly.

To recount, his lordship was born on 2nd of October 1946 on the Gandhi Jayanti-a pious day for our nation, which is remembered by every citizen of our country with pride, he entered the Bar at a tender young age of 22. He joined the office of an eminent advocate of the time, Shri C. Khanwilkar, who practiced on criminal side. His lordship practiced on writ, civil, criminal, taxation, company and Labour sides of the profession with equal ease. He rose quickly in the estimation of the Bar and the bench alike. He was appointed Additional Advocate General and later designated a senior counsel.

Finally, he was elevated to the bench in the year 1996. As a judge, he endeared himself to one and all with his self effacing nature and equanimity. He is never known to have lost his cool and was magnanimous to his subordinates. What immediately struck everyone was his learning and erudition. His Lordship was one of the most versatile judges I have ever come across. He could work without difficulty in all branches of law. 'the conciseness of his expression was unsurpassed. His judgments displayed many subtle felicities of the language. The bombastic words and convoluted sentences, running into paragraphs were unknown to him. His lordship delivered many a landmark judgment, which adorn the law journals.

His dedication to work was unmatched. His lordship continued to work with total vigour till the last day of his tenure. Knowing well that he would not be around when the new set of Rules of the High Court would come in force, yet he selflessly devoted hours in studying the draft and coming up with valuable suggestions, most of which were accepted with gratitude by the Rule Committee. I'm sure that the government of the day will make full use of his extraordinary repository of knowledge and wisdom in the years to come. Some indications to that effect are already in the air, though I would refrain from elaborating further.

I shall be failing in my duty, if I don't make here a special mention of Mrs. Kulshrestha. 'throughout the years of my acquaintance with her, she has conducted herself with aplomb and dignity. She was the proverbial woman behind a successful Judge.

'It is said in **Chapter 3 of Geeta and I quote.**

"यघदाचरति श्रेष्ठस्तदेवेतरो जनः ।
स यत्प्रमाणं कुरुते लोकस्तदनुवर्तते" ॥ (२१)

Meaning thereby: -

" Whatever a great man does is followed by others; people go by the example he sets up.

Being eminent with virtues is a rare gift, which comes from God. In one so imbued godly qualities are in evidence. Such a man is viewed a model to society. The world feels inclined to walk in his way. His responsibility is, therefore, very great. Man is to society what a limb is to the body." Unquote.

If I may be permitted to say so, the aforesaid qualities do reflect in the character of Justice S.K. Kulsherestha. 'they are thus worth emulating by every one of us.

Sir, In the end, I wish my esteemed brother to whom we all with affection call 'Shashi Bhaiya' and respected Mrs. Kulshrestha, a long, happy, healthy and prosperous life and express a sincere hope that his knowledge, wisdom and guidance would always be available to all of us.

Thank you very much.

On behalf of Central Government Shri Vinay Zelawat Asstt. Solicitor General of India, bids farewell :–

आज इस बिदाई के अवसर पर न्यायमूर्ति श्री कुलश्रेष्ठ साहब, आपके सम्बन्ध में अपनी भावनाऐं व्यक्त करना मेरे लिए एक दुष्कर कार्य सिद्ध हो रहा है। आपका मेरे जीवन पर गहरा प्रभाव रहा है। आपके बारे में मैंने क्या अनुभव किया है, इसे व्यक्त करना इतना कठिन होगा यह मैंने कभी नहीं सोचा था। शब्दों का इतना अकाल मैंने पहले कभी महसूस नहीं किया।

बिदाई के पलों में विछोह की वेदना अत्यन्त तीव्र होती है। जीवन के सफर में यह एक अटल सत्य है। लेकिन यह अवसर एक आकलन का भी होता है। यह आकलन होता है जीवन के रंगमंच पर व्यक्ति द्वारा अदा की गई भूमिका आकलन करने वालों पर लम्बे समय तक प्रभाव छोड़ने में समर्थ रहती है तो यह माना जाता है कि वह भूमिका सफल रही है। आपने भी ऐसी ही भूमिका इस न्याय मंच पर अदा की है, जो लम्बे समय तक याद की जाती रहेगी।

आज जब हम आपके कार्यकाल पर दृष्टिपात करते हैं तो हमारा मन गद्‌गद् होकर मुग्ध हो जाता है। इतने वर्षों में आपका स्थान हमारे मन में रंचमात्र से कम नहीं हुआ है। इसका अर्थ यह भी है कि हमें आपके सद्‌गुणों का मोह है। परन्तु हम उस मोह पर विजय प्राप्त नहीं कर सकते। हम आपकी तरह अपनी अस्पष्ट संवेदनाओं को छिपाकर सुख–दुःख को एक ही माप में तौलना नहीं जानते। आप हमें प्रिय हैं और हम में से कई आपको आदर्श मानते है। आपका जीवन हमेशा खुली किताब रहा हैं । हथेली की तरह बिल्कुल साफ और सपाट। आप जो भी हैं ईमानदारी के साथ हैं।

जीवन में आदर्श सहज प्रस्थापित करना कठिन है। आदर्श जीवन का पैदल रास्ता तथा उस पगडंडी का राजमार्ग तक पहुँचना और भी कठिन है। कुछ लोग सहज जीवन जीते हुए अपना आदर्श निर्मित करते हैं। आपने भी यही किया है।

आपके बारे में मैंने जब भी विचार किया तो मन मस्तिष्क में हमेंशा विशालकाय समुद्र की स्मृति हो आई। शांत संयत, संतुलन तथा स्वाभाविक हास्य आपके स्वाभाविक गुण रहे। आपने स्वयं को नैतिक मर्यादाओं में बांधा और उन मर्यादाओं का पालन भी किया। कर्तव्य, आदर्श, लोक हित और न्याय, इन समस्त आदर्शों के प्रति आपके समर्पण को देख हम आपके समक्ष नतमस्तक हैं।

महोदय, आपकी महत्ता आपकी नम्रता में रही। आपका बड़प्पन दुसरों को बड़ा समझने में रहा। निष्काम, निःस्वार्थ कर्म ही आपका कर्मयोग रहा है। आप हमेशा उस वृक्ष की तरह रहे जो फल लगने पर झुकता है। आप सदैव अपने दायित्व को निभाते समय कर्मयोगी की तरह आलिप्त एवं तटस्थ रहे। जब अपना कार्य समाज के लिए हो तथा जीवन उसको समर्पित हो तब वह कर्मयोग होता है।

आदरणीय कुलश्रेष्ठ साहब, हमने आपको विभिन्न रुपों में देखा है। अतिरिक्त महाधिवक्ता, वरिष्ठ अभिभाषक एवं एक न्यायधीश के रुप में हमने आपको कार्य करते देखा है। यह न्यायालय आपके जीवन की विकास यात्रा का प्रत्यक्ष साक्षी रहा है। न्याय के विभिन्न क्षेत्रों में आपकी गहरी समझ तथा उसकी विवेचना को हमने महसूस किया है। आपके सामने तथा आपके साथ निकटता से कार्य करने का सौभाग्य मुझे प्राप्त हुआ है। आपका स्नेह एवं अपनत्व भी मुझे हमेशा प्राप्त हुआ है। इसे मैं अपने जीवन की अमूल्य निधि मानता हूँ।

महोदय, कुछ समय पूर्व किसी ने मुझसे पूछा था कि आखिर कुलश्रेष्ठ साहब थकते क्यों नहीं है। मैंने उनसे कहा था कि कुलश्रेष्ठ साहब की मनःस्थिति थकने की नहीं है। मन का अर्थ बुद्धि नहीं है। हिन्दू संस्कृति में मन का अर्थ ईश्वर जैसा है। जो दिखता नहीं है परन्तु उसकी प्रतीती होती है। उसे इम्मार्टल फीलिंग अर्थात अमृत अनुभूति कह सकते हैं। वह शरीर की चेतना देने वाली आत्मा है।

हमने यह सुना था कि प्रत्येक व्यक्ति की सफलता उसकी प्रतिभा में छिपी होती है लेकिन आपको तो जीवन में प्रतिभा का साथ भी मिला है। आपकी सफलता ने यह साबित किया है कि हर सफल पुरुष की सफलता में एक महिला का योगदान होता है।

आज यह आपके जीवन का एक अल्प विराम है। हम जानते हैं एक नई भूमिका आपकी प्रतिक्षा में है। हम जानते हैं उस नई भूमिका में भी आप उतने ही सफल होंगे। मैं अपने स्वयं की ओर से, भारत सरकार की ओर से एवं अपने साथियों की ओर से आपके प्रति अपना आदर भाव व्यक्त करता हूँ तथा आपके, श्रीमती प्रतिभा कुलश्रेष्ठ एवं परिवार के प्रति अपनी ढेर सारी शुभकामनाएँ व्यक्त करता हूँ। आपका भावी जीवन शुभ हो एवं सुखी हो, यही कामना है।

Shri A. S. Kutumbale, Addl. Adv. General of M. P., bids farewell :–

Every inning comes to an end and so the every tenure, Its the time for which we all have gathered here for saying Bon voyage to My Lord, for starting a new inning, a totally new one.

The day has come to bid your Lordship Farewell from the Office and not from our hearts and minds. It is this day that we give our judgment on you, having received so many at your hands for past one decade.

Born on 2nd October, the auspicious Birthday of Mahatma Gandhiji in the year 1946, when the independence of India was on the horizon. Lordship has graduated in Law and later on completed his post graduation in English Literature and started practicing in Indore. Your Lordship had a long stint in the Office at Indore which I am representing today. Similarly, it was the great honour for all of us representing this Office that Lordship has been elevated in 1996 as Judge of this High Court from this very Office.

By dint of his hard work and perseverance, Lordship had made his mark in the profession as a lawyer at a very early stage. He held the Office of Public Prosecutor, Dy. Government Advocate, Government Advocate and Additional Advocate general with utmost sincerity, impeccable integrity and sheer dedication. The Region deter of being Law Officer are the attributes which are mentioned

above and these attributes were in abundance in your Lordship as Law Officer of the State Government. His Lordship had the knack of spotting the talent and he has promoted many meritorious lawyers by giving them opportunities to perform.

Your Lordship held the post of Secretary also in this esteemed Bar Association.

During the early days, I remember you had hobbies playing Chess & Table-Tennis in Bar Room and I had occasions to play Table-Tennis with and against you for hours together but now the days are gone and growing rapidly towards old age, being the last official day of the career as a Judge of this Hon'ble Court. Being my good friend, this is a personal loss to me also. I have read you as a Gentleman Judge and always helpful to the juniors.

Your Lordship's patience, profound knowledge and sharp sense of humor reflected in his court room, while sitting as a Judge. Your Lordship's congenial nature and the atmosphere of cordiality in the Court always added to the pleasure of conducting cases before you. Your Lordship's vast knowledge, experience and great analytical ability duly reflected in your judgments and we will always look forward to your guidance in future also.

Though, we will not be having you with us in the Court from now, you will always be with us in our minds and in our hearts. I extend good wishes to you as well as to Mrs. Kulshrestha on my behalf and colleagues of my office the State Government for starting a new inning and I extend good wishes and hope that you will continue as cheerful as always and spread happiness where-ever you be.

On behalf of Senior Advocates, Shri G. M. Chaphekar, Sr. Advocate, bids farewell :–

On the 2nd of October next, your Lordship will be laying down the robes of your office after 12 years of an illustrious career as a Judge of this Hon'ble Court. All the Senior Advocates of this Court, along with all other Advocates have, therefore, assembled here today, being the last working day before the unusually long Navaratri and Dussehra Holidays, to bid you farewell.

My Lord, when in 1996, you took oath of the High Office of a Judge of this Court, we entertained great expectations about your performance as a Judge, since you were picked up from the Bar to fill this High Office. Now after 12 years, when you are laying down your office, let me assure you, on behalf of all my collegues, that you have fulfilled these expectations in full measure.

I can say with full confidence and without any fear of contradiction, that by your patient hearing, courteous and impartial treatment to all the members of the Bar and Juniors and Seniors alike, and your pains taking and lucid judgments, you have given full satisfaction to the litigant public in general and to the members of the Bar in particular.

I am confident that in saying so, I am expressing the unanimous feelings of all the members of the Bar.

My Lord, I am particularly happy to record these feelings on this occasion because I had the good fortune to watch your entire judicial career from day one. I still remember you as a young lawyer, full of hopes, joining the legal profession in the year 1968, and your working in the chamber of late Shri Khanwilkar, a leading criminal lawyer of those days.

I have seen you arguing his briefs with slight nervousness but with thorough preparation and full command over the language.

Next, I have seen you working for the State Government as a Deputy Government Advocate, as a Government Advocate and then as Additional Advocate General. By your remarkable performance in these various capacities, you had easily marked yourself out, as a person destined to go higher up, and you did go higher up when you were appointed a Judge of this Court.

I have also closely watched with interest your performance as a Judge during your entire tenure, and by the grace of God, I am here even today when you are laying down the reins of your office, to record my full and heartfelt satisfaction about your performance as a Judge.

My Lord, a farewell is generally a good-bye and, therefore, naturally a sad occasion. In your retirement, we are certainly loosing a good Judge on the Bench, but at the same time we are glad that an old and respected friend is coming back to our field.

On behalf of all the Senior Advocates of this Court, I bid your farewell, and wish you a peaceful, happy and contented life after retirement.

So, farewell Justice Kulshrestha, and welcome Mr. Shashi Kulshrestha.

On behalf of Bar Council of India and M. P. State Bar Council, Shri Zafar Khan, Sr. Adv., bids farewell :–

माईलार्ड कुलश्रेष्ठ सा. की खूबियों, लियाकत और काबिलियत की जितनी भी तारीफें की जायें कम है। आप काबिलियत के साथ–साथ नफासत पसन्द और एक अच्छे और बुलन्द किरदार के मालिक हैं। उनकी नजर में इन्सानियत बड़ी चीज है। उन्होंने बड़े या छोटो में सीनियर या जुनियर्स में कभी इम्तियाज नहीं किया। खामोश मिजाज लेकिन मासूम चेहरा। कभी चेहरे पर शिकन नहीं, चेहरे पर मुस्कान हजारों मायने लिये हुए। आपने कोर्ट का माहौल हमेशा खुशनुमा बनाये रखा। दौराने केस बड़े ही खूबसूरत तहजीब के दायरे में वुकला साहिबान से मजाक भी किया तो थोड़ी देर समझ में आता था और जब आता था तो सबका दिल बाग–बाग हो जाता था और मुस्कुराये बगैर नहीं रहा जाता था। मुझे एक वक्त का किस्सा याद आ रहा है, शायद आपको याद न हो। जब मैंने एक क्रिमिनल अपील की बहस शुरु की तो हुजूर ने फरमाया कि आप कहीं के नवाब हैं। मैं समझा नहीं और जवाब दिया नहीं हुजूर महनतकश इन्सान हूँ फिर एक–दो मिनट बाद कहा आप जिसके लिये आये हैं उसका नाम तो बताइये, मैंने अपीलान्ट का नाम बताया इत्तिफाक से वह मेरा हमनाम जफर था आगे उर्फियत नवाब थी। उसका नाम बताते ही हुजूर ने फरमाया हम जफर नाम के आदमी को शरीफ भला आदमी समझते थे। उस पर से मुझे कहना पड़ा कि हुजूर जिसको आप जानते हैं वह बन्दा जफर एहमद खान है यह जफर नवाब है। बहुत ही तसल्ली से मामलों की सुनवाई करना और वकील को अपनी बात कहने का पूरा मौका देने की खूबी के साथ ईजी गोइंग कोर्ट का भी शर्फ हासिल किया। आपकी जुदाई हमारे और ज्युडिशरी के लिए एक खला छोड़ जायेगी। लेकिन आप हमसे जुदा नहीं होंगे क्योंकि आप हमारे दिल में बैठे हैं। आप हमें भूल न जाना। हमारी आपसे गुजारिश है के आप अपनी काबलियत और एक्सपीरियन्स की बारिश से हमें महरुम न करें, आपकी इनायत होगी। क्योंकि आप

उर्दू के जानकार हैं इसलिए आपकी पसंदीदा जबान में आपकी नजर यह नजराना पेश है । मैं बार काउन्सिल आफ इन्डिया और स्टेट बार काउन्सिल की तरफ से ईश्वर से कामना करता हूँ और हम सबकी तमन्ना भी है कि आपकी जिन्दगी का सफर तहजिन्दगी तक सहतयाब और खुशगवार बना रहे ।

Shri B. I. Mehta, President, Bar Association, Indore, bids farewell :–

Today, we are here to give warm farewell to Hon'ble Mr. Justice S.K. Kulshrestha. My Lord Justice Kulshrestha was born on. 02/10/1946 in a renowned family with. high traditions. After completing graduation in the year 1966, my lord did LL.B in 1968 and M.A. (English Literature) in 1969. After completing education. My Lord joined the High Court Bar Association, Indore. Thereafter My Lord joined the chambers of renowned lawyer Mr.C.R. Khanwilkar. Your Lordship practised in the High Court, Tribunals etc. Your Lordship practised in different branches of law and fields of specialization were Criminal Law and Constitutional Law.During Your Lordship's successful career. My Lord was appointed as Deputy Government Advocate and then Government Advocate in the year 1984. thereafter My Lord was appointed as Additional Advocate General in the year 1994 and designated as Senior Advocate in the year 1995.

Because of your Lordship's talent you were appointed as Judge of this Hon'ble Court on 24/01/1996. Your Lordship's hard work and decent behaviour throughout the career made you very popular amongst lawyers. Since My Lord has practised here for about 25 years before elevation, Your Lordship knew the temperament of the Advocates. By and large, My Lord is a Judge of great temperament, competence and believe in maintaining dignity, decorum and etiquettes towards all courts.

Your Lordship was also elected as Secretary of this Bar Association in the year 1994-95 and during that tenure, the members felt a radical change in the administration of Bar Association. It is a matter of pleasant coincidence that an Advocate starting his career from Indore has reached the Augustine office of Judge of this Hon'ble Court and is retiring from Indore. I may point out that for not only this Bench and Bar, Your Lordship's presence is felt on the Bench and Bar of every Court. In this great task, My Lord has delivered thousand of judgments. During Your Lordship's tenure of a Judge of this Hon'ble Court, My Lord has created an efficient administration of justice. There is one topic to which I would refer because it concerns with the great system of judiciary. Last but not the least, with all about great qualities of your Lordship, you have been described as :-

"A great Judge, a great Citizen and above all, a great human, being."

I on my behalf and on behalf of our Bar Association wish your Lordship and Smt. Kulshrestha a long, healthy and cheerful life. Jai Hind.

Farewell speech delivered by Hon'ble Shri Justice S. K. Kulshrestha :–

By the grace of Lord **'Shiva'**, day has come for me to demit my Office on 1st of October, 2008 after having associated with the field of law for over four decades. It is customary for the Bar to highlight only the qualities of a person vacating the Office and you have all been very charitable to me. If I have even 10% of the attributes you have spoken of, I shall consider myself most fortunate.

My journey in law was an abrupt change from the family tradition. Witnessing that Engineers were required to put in a lot of labour to complete their projects, I dreaded it, and, though eligible for the Science stream, I chose humanities instead, only to find later that to be a Lawyer or a Judge was not every body's pie. At the time when I ventured to enter the Bar, I had none as Lawyer or Judge in my family. Everybody thought that I had gone astray and I started sharing their view after having survived for about 7 to 8 years in the profession without the help of anyone. Of course, my Senior Late Shri C.R.Khanwilkar was very kind to me and he permitted me to handle most of his cases in the High Court which gave me some foothold in the profession.

It was at a juncture when I was fluctuating and wondering about the wisdom of my action in joining the profession, there presented an opportunity and I was appointed a Deputy Government Advocate and later a Government Advocate till 1989. My real profession started after 1989 when I again started practising as a private Counsel. This was the golden period of my life. Though, this temporary independence was impeded by my appointment as Additional Advocate General, I stood adequately compensated by having been designated Senior Advocate.

I had very many dreams of becoming a Judge but when I wanted to become, I could not and when I had lost all hopes, I did become one. People feel that it is disadvantageous to be a Judge and to sacrifice roaring practice. I am, however, of the view that those who feel that roaring practice is a better option of the two, suffer from obvious misgiving as there is no parallel to the Constitutional post of a Judge. With the perquisites attached and the handsome salary, the sacrifice is more than compensated. I have also noticed that in a large number of cases it is not because switching over to Judgeship has the result of pecuniary loss that persons refuse it, it is their reticence and diffidence that they do not want to take the plunge. It is my suggestion that should an opportunity present itself for becoming a Judge, the recipient should jump at it rather than suffer from a dilemma about the wisdom of change requiring abandonment of income.

In the field as a Judge, I have had the opportunity of handling many Rosters and I find that without the arrears weighing on the mind, lot of ground can be covered if sincere effort is made from 10.30 to 4.30 and adequate opportunity is granted to the Lawyers. This helps develop and groom the Bar. Without a good Bar a good Judiciary is inconceivable. Though I do not recall even a single instance where I reprimanded or otherwise had been harsh to a Lawyer, but if I have done so I do not regret it because it must have been for his benefit.

I assure you that I am very happy demitting my Office after an enjoyable period of about 13 years. Though I have not taken any decision with regard to my future plans except to go into retirement, much will depend upon the circumstances.

I extend my greetings to all of you and make it clear that whenever I am available at Indore you are most welcome to have tea with me at my residence if you have the time.

"JAI HIND"

Farewell

Hon'ble Mr. Subhash Samvastsar, Adm. J. Gwalior Bench bids farewell to the demitting Judge :–

Today, we have assembled here to bid farewell to Hon'ble Justice Sheela Khanna, who shall be demitting the office of the Judge of the High Court of Madhya Pradesh on 07th of October, 2008.

Justice Sheela Khanna hails from the Higher Judicial Service of the State of Madhya Pradesh and has thus a lot of experience of administration of justice at her credit. Prior to her elevation to the Bench, in her service career, she has held many offices in the State with great competence and success, on Judicial, Administrative and Advisory levels. Having been appointed as District & Sessions Judge, she was posted in various districts of Madhya Pradesh and also held the important posts like Secretary to Legislative Assembly, Law Officer to His Excellency the Governor of Madhya Pradesh, the Registrar, Bhopal Gas Tragedy. She also had a privilege to go on deputation to Legislative Department of the Central Government, New Delhi. She also participated in SAARC Meet at Delhi. She has a credit of attending Common Wealth Conferences at Colombo, Bangkok, Singapore, Tokyo, Hong kong, Nepal and at various other places.

Having contributed a lot in the administration of justice in her various judicial assignments right from 3/4/1970, including on the Bench of the High Court, she has established a very good career to her credit, till now, which cannot be forgotten in the judicial field.

Justice Khanna has made a mark as a Judge and she has distinguished herself as an eminent Judge. She will be remembered by her landmark judgments.

She will also be ever remembered for her straight forward attitude, explicit expression and strictness in public interest, both on administrative and judicial sides. Her service career right from 3/4/1970, is quite successful.

On the eve of her demitting the office of the Judge of the High Court, we all wish her every success and longevity with the best health and happiness, in all times to come.

Thank you,

Farewell Speech delivered by Hon'ble Justice Sheela Khanna :–

After completing more than 38 years of my service, I would be demitting my office on 6th of October 2008.

I do not know how this long journey of around 39 years I travelled in such a short span of time. I feel that just a few years ago I joined as a Civil Judge and after promotions and elevation to the High Court, how soon I am going to retire.

I have heard elderly peoples saying that you never know how good days pass. I think that because of smooth and happy journey throughout, without any inconveniences and difficulties, I could not feel that the journey was a long journey.

Today, I remember my respected father. When I was selected as a Civil Judge and was going to join at Jabalpur, my father said that now as a Judge you have been given a responsibility to do justice, to promote justice and to prevent injustice with honesty and without fear, force and favour. He advised me to be a hard worker as his moto was that it is work which makes a workman. My beloved mother at that time advised me that while performing your duties never get disturbed, nervous and don't feel any kind of trouble. Her moto was that one should not feel trouble unless trouble really troubles one. She guided me how to overcome with the difficulties. By the grace of God and as per advice and blessings of my parents, I tried to perform my duties keeping in view the sole object, the moto and mission to do justice and justice only.

During these 39 years of my journey, I got opportunities to work in various fields and enjoyed vivid experiences. Our country is a democratic country standing mainly on the three Pillars i.e., Judiciary, Legislative and Executive. I am fortunate enough that I got the opportunities to work and serve to all the three pillars and I mainly worked on Judicial side but was also sent on deputation as Secretary in the M.P. Legislative Assembly where I observed and experienced the legislative functioning. In 1985, I was on deputation as an attache in Legislative Department in the Ministry of Law Justice and Company Affairs in New Delhi, where I got the opportunities to observe the working of Executive also. Thus, I can say that I have seen the democracy with close eye.

I got enormous opportunities during my service tenure. I was sent by Hon'ble M.P. High Court to Bombay to observe the working of Juvenile Court when I was Civil Judge of only two years standing. Thereafter, I was posted as Senior Judge, Juvenile Court and worked for about eight years as a Senior Judge in Jabalpur and Indore. I am lucky that when I was Secretary of the Legislative Assembly of M.P. I was picked up by Shri Shivraj Patil, the than Speaker of Lok Sabha to participate in "Common Wealth Parliamentary Association Conference" held at Columbo. I also got opportunities to travel) to Bangkok (Thailand), Tokyo (Japan), Hongkong and Singapore organized by Common Wealth Parliamentary Association to study parliamentary working system. Again as Secretary of the Legislative Assembly, I participated as observer in the First Conference of Association of SAARC's Speakers and Parliamentarians at New Delhi. I got the opportunities to participate in Presiding Officers and Secretaries Conference held at Chennai and Bhubneshwar.

While on deputation as Registrar Bhopal Gas Leakage Tragedy Welfare Commission, I experienced the sufferings of gas leakage tragedy. To work on deputation as Law Officer to His Excellency, the Governor of M.P at Bhopal, was another good experience for me.

I have tried to perform my duties to the best of my abilities and capabilities and without ill-will and hatred. I am lucky that I got full support from the Bar in all the places where I was posted. As you all know that out of about 39 years of my service, I have spent the maximum period of 12 years in Gwalior and served here

as a Civil Judge, as a District Judge and as a High Court Judge. During my tenure, I got fullest support, cooperation and assistance from the Bar, due to which I could not feel any difficulty here. I am highly grateful to all of you for the good words and nice words spoken about me, ignoring my shortcomings. It is your kindness and goodness that the Bar have overlooked my shortcomings, if any, and consistently gave me full support.

I take this opportunity to express my heartfelt gratitude to all my colleagues, seniors as well as juniors for their guidance, cooperation and support from time to time.

I, sincerely, express my apologies for having said or done anything that might have hurt anyone. I would request you to kindly excuse me for my failures.

I am grateful to my friends, well wishers and family members without whom support I could not have performed my duties the way I desire.

I, sincerely, thank my Lord The Chief Justice Shri A.K. Patnaik, who in spite of his busy schedule took trouble to come here in this week and gave me an opportunity to sit with him in D.B.-I. I can never forget the affection that he has bestowed on me. Because of his preoccupations, he could not stay at the time of ovation. I would like to place on record my deep sense of gratitude towards him.

I cannot forget the love and affection bestowed on me by my past and present colleagues. It is difficult to forget the members of the District Judiciary, who gave full respect to me. I am thankful to the Registrar of this Bench and Officers of the Registry for the services rendered to me. I am thankful to my personal staff members namely Shri Dhananjay Buchake, Private Secretary, Shri Arjun Bisht, Stenographer and Shri R.K. Saxena, Reader, who performed their duties sincerely.

I am also thankful to all my brother Judges and their spouses and sister Judge, who were very kind towards me throughout.

Now, as a Judge I have completed my innings, but my journey is not complete. Now, after retirement and demitting the office I shall be starting new journey in my life to fulfill the responsibilities towards my family members and towards the society as a whole, for which I am looking forward to a better tomorrow.

I thank you all for your kind and good wishes and for warm welcome today and I believe that in future also I will get the same love and affection.

Once again, thank you very much.

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(75)

K.S. Chauhan, J

BHANWARLAL
Vs.
STATE OF M.P.

A. Prevention of Food Adulteration Rules, 1955, Rule 22B - *Quantity of sample - 220 ml. of milk sample sent to Public Analyst - Public Analayst nowhere pointed out that sample was insufficient for analysis - Cannot be said that insufficient quantity was sent for analysis.* (1978) 2 SCC 386 (ref.)

क. खाद्य अपमिश्रण निवारण नियम, 1955, नियम 22बी – नमूने की मात्रा – दूध के नमूने का 220 मि.लि. लोक विश्लेषक को भेजा गया – लोक विश्लेषक ने कहीं भी इंगित नही किया कि नमूना विश्लेषण के लिए अपर्याप्त था – यह नही कहा जा सकता कि विश्लेषण के लिए अपर्याप्त मात्रा भेजी गई। (1978) 2 SCC 386 (संदर्भित)

B. Prevention of Food Adulteration Act (37 of 1954), Section 13(2) - ***Report of Public Analyst*** - *Report of Public Analyst sent after 75 days - Applicant not availed opportunity for getting another part of sample to be analyzed by Central Food Laboratory - Nothing to show how applicant became prejudiced on that account - Applicant cannot avail any benefit for his own lapse - Revision dismissed.*

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2) – लोक विश्लेषक की रिपोर्ट – लोक विश्लेषक की रिपोर्ट 75 दिन के बाद भेजी गई – आवेदक ने केन्द्रीय खाद्य प्रयोगशाला द्वारा नमूने के दूसरे भाग का विश्लेषण कराने के अवसर का लाभ नही उठाया – यह दर्शाने के लिए कुछ भी नही कि इससे आवेदक को कैसे पूर्वाग्रह हुआ – आवेदक उसकी स्वयं की गलती का कोई लाभ नही ले सकता है – पुनरीक्षण खारिज।

Rakesh Kumar Jain, for the applicant.
A.L. Patel, G.A., for the non-applicant/State.

***Cr.R. No.631/1997 (Jabalpur), D/- 15 February, 2008.**

Short Note

(76)

Shantanu Kemkar, J

DEVKUNWAR (SMT.)
Vs.
STATE OF M.P. & ors.

Constitution, Article 226 - ***Recovery from terminal benefits*** - *Due to clerical error benefit of two increments was extended to petitioner's husband - Order for recovery from terminal benefits - Held - Benefits of increments was not extended in favour of petitioner's husband on account of any fraud or misrepresentation on his part - Recovery could not be made - Order of recovery quashed - petition allowed.*

In view of the judgment of the Supreme Court in the case of Sahibram Vs. State of Haryana [(1994) 2 SCC 52] and in case of Shyambabu Verma Vs. Union of India [(1994) 2 SCC 521] any amount paid erroneously or on the basis of wrong interpretation of rules or misconception cannot be recovered. It can only be recovered if such payment was made as a result of any fraud or misrepresentation on the part of the employee.

संविधान, अनुच्छेद 226 – सेवान्त लाभ से वसूली – लिपिकीय त्रुटि के कारण दो वेतन वृद्धियों का लाभ याची के पति को दिया गया – सेवान्त लाभ से वसूली का आदेश – अभिनिर्धारित – याची के पति को वेतन वृद्धियों का लाभ उसके द्वारा किसी कपट या दुर्व्यपदेशन के कारण नही दिया गया – वसूली नही की जा सकती – वसूली का आदेश अभिखण्डित – याचिका मंजूर।

Anand Singh, for the petitioner.
M.S. Dwivedi, P.L., for the respondents.

***W.P. No.1859/2008(S) (Indore), D/- 27 June, 2008.**

Short Note

(77)

S.C. Vyas, J

HARKAWAT & COMPANY
(M/S) & ors.
Vs.
UNION OF INDIA

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Income Tax Act, 1961, Sections 276C, 278B - *Criminal case initiated on ground that petitioner firm made payment of interest without deduction of tax at source - Tax not deposited in department - Quashment of proceeding on ground that tribunal has set-aside penalty which was levied by Assessing Officer - Held - Since assessee had deducted TDS and deposited the same in department, though late, but it has already suffered interest - Tribunal set-aside the penalty, therefore, basis of prosecution has already gone - Prosecution quashed.* (2004) 186 CTR Reports 721, 83 ITR 27, 184 ITR 467 (ref.).

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, आयकर अधिनियम, 1961, धाराएँ 276सी, 278बी – दाण्डिक मामला इस आधार पर प्रारम्भ किया गया कि याची फर्म ने मूल पर टैक्स की कटौती किये बिना ब्याज का संदाय किया – टैक्स विभाग में जमा नही किया गया – कार्यवाही का अभिखण्डन इस आधार पर कि अधिकरण ने निर्धारण अधिकारी द्वारा आरोपित शास्ति अपास्त कर दी – अभिनिर्धारित – चूंकि निर्धारिती ने टीडीएस की कटौती की और राशि विभाग में जमा की, यद्यपि विलम्ब से जमा की, किन्तु ब्याज पूर्व में ही जमा किया जा चुका था – अधिकरण ने शास्ति अपास्त कर दी, इसलिए अभियोजन का आधार पहले ही समाप्त हो चुका है – अभियोजन अभिखण्डित। (2004) 186 CTR Reports 721, 83 ITR 27, 184 ITR 467 (संदर्भित).

Shailendra Mukati, for the applicants.
R.L. Jain, for the non-applicant.

***M.Cr.C. No.1367/2007 (Indore), D/- 17 March, 2008.**

N.K. Mody, J

KALU
Vs.
BANSILAL & ors.

A. Motor Vehicles Act (59 of 1988), Section 15 - *Renewal of driving license - Accident occurred on 13.06.2000 - License of driver expired on 02.02.1999 - Application for renewal of license made more than 30 days after the date of expiry - License renewed on 23.06.2000 - Held - Driver was not possessing valid license at the time of accident - Insurance Company not liable.* 2007 ACJ 1067 (ref.)

क. मोटर यान अधिनियम (1988 का 59), धारा 15 – ड्रायविंग लायसेंस का नवीनीकरण – दुर्घटना 13.06.2000 को घटित हुई – ड्रायवर का लायसेंस 02.02.1999 को समाप्त हुआ – लायसेंस के नवीनीकरण के लिए आवेदन समाप्ति की तारीख के 30 दिन से अधिक समय बाद दिया गया – लायसेंस 23.06.2000 को नवीनीकृत हुआ – अभिनिर्धारित – ड्रायवर के पास दुर्घटना के समय वैध लायसेंस नही था – बीमा कम्पनी दायी नही। 2007 ACJ 1067 (संदर्भित)

B. Motor Vehicles Act (59 of 1988), Section 173 - *Insurance Company has already paid a sum of Rs.30,000/- to the claimant as per award - Claimant filed appeal for enhancement - High Court awarded further sum of Rs.25,000/- - Insurance Company prayed before the High Court that at the time of accident driver was not possessing valid & effective driving licence, therefore, a right of recovery be given to Insurance Company for the amount which was awarded by the tribunal and paid to claimant - Held - Since no appeal or cross-objection has been filed by Insurance Company - The prayer cannot be accepted - However, Insurance Company shall pay enhanced amount of Rs.25,000/- to claimant and shall have an option to recover the amount from owner & driver.*

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – बीमा कम्पनी ने अवार्ड के अनुसार 30,000/– रुपये की राशि दावेदार को पूर्व में ही अदा कर दी थी – दावेदार ने वृद्धि के लिए अपील पेश की – उच्च न्यायालय ने 25,000/– रुपये की अतिरिक्त राशि अधिनिर्णीत की – बीमा कम्पनी ने उच्च न्यायालय के समक्ष प्रार्थना की कि दुर्घटना के समय ड्रायवर के पास वैध और प्रभावी ड्रायविंग लायसेंस नही था, इसलिए बीमा कम्पनी को उस राशि की वसूली का अधिकार दिया जाए जो अधिकरण द्वारा अधिनिर्णीत की गई और दावेदार को अदा की गई – अभिनिर्धारित – चूंकि बीमा कम्पनी द्वारा कोई अपील या प्रत्याक्षेप पेश नही किये गये – प्रार्थना स्वीकार नही की जा सकती – तथापि, बीमा कम्पनी 25,000/– रुपये की बढ़ी हुई राशि दावेदार को अदा करेगी और उसे स्वामी तथा ड्रायवर से वसूल करने का विकल्प रहेगा।

O.P. Mandloi, for the appellant.
Satish Tomar, for the respondent No.1 & 2.
Milind Phadke, for the respondent No.3.

***M.A. No.2335/2003 (Indore), D/- 13 November, 2007.**

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(79)

Mrs. S.R. Waghmare, J

MAHESH
Vs.
STATE OF M.P.

A. Criminal Procedure Code, 1973 (2 of 1974), Section 357(3), Penal Code, 1860, Section 287 - *Order of payment of compensation - Victim suffered grievous injuries while operating thresher machine under the employment of accused - Presence of accused at spot and evidence of witnesses regarding negligence of accused - Held - Accused guilty of offence u/s 287 IPC - However - Custodial sentence reduced to period already undergone on payment of compensation.*

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 357(3), दण्ड संहिता, 1860 धारा 287 – प्रतिकर के संदाय का आदेश – अभियुक्त के नियोजन के अन्तर्गत थ्रेसर मशीन चलाते समय पीड़ित को गम्भीर क्षतियाँ आयीं – अभियुक्त की घटना स्थल पर उपस्थिति और उसकी उपेक्षा के सम्बंध में साक्षियों का साक्ष्य – अभिनिर्धारित – अभियुक्त भा.द.सं. की धारा 287 के अन्तर्गत अपराध का दोषी – तथापि, अभिरक्षा का दण्डादेश प्रतिकर का संदाय करने पर पहले ही भोगी जा चुकी अवधि तक कम किया गया।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 357(3) - *Order of payment of compensation - Accused treated victim in proper hospital and spent considerable amount - Victim himself was partly responsible for accident as he has not taken proper care - Compensation of Rs.20,000/- would meet ends of justice.* AIR 1988 SC 2127 (ref.)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 357(3) – प्रतिकर के संदाय का आदेश – अभियुक्त ने पीड़ित का उपयुक्त अस्पताल में उपचार कराया और पर्याप्त रकम खर्च की – पीड़ित स्वयं घटना के लिए भागतः उत्तरदायी था क्योंकि उसने उचित सतर्कता नही बरती – 20,000/– रुपये का प्रतिकर न्याय के लक्ष्य की पूर्ति करेगा। AIR 1988 SC 2127 (संदर्भित).

O.P. Solanki, for the applicant.

Manish Joshi, for the non-applicant/State.

***Cr.R. No.126/2005 (Indore), D/- 28 August, 2008.**

Short Note

(80)

Mrs. Sushma Shrivastava, J

MUNNALAL
Vs.
STATE OF M.P.

Prevention of Food Adulteration Act (37 of 1954), Sections 7(i), 16(1)(a)(i) - *Sentence - Applicant convicted and sentenced to rigorous imprisonment for 6 months and fine of Rs.1000/- - Held - In view of mandatory*

provision of Section 16(1) of Act, no sentence lesser than the minimum prescribed by the statute can be imposed - Revision dismissed.

The principal submission made on behalf of the applicant was with regard to the Jail sentence imposed on the applicant and it was urged that the Jail sentence was not warranted after long passage of time when the sample of milk was taken from the applicant in the year 1986. However, as held by the Apex Court in the case of *Mahendra Kumar G. Patel & anr. Vs. State of Gujrat & anr.* reported in (2004) 13 SCC 78 in view of mandatory provisions of Section 16(1) of the Act, no sentence lesser than the minimum prescribed by the statute could be awarded for the offence u/s 16(1)(a)(i) of the Act. Applicant has already been awarded minimum prescribed sentence of 6 months imprisonment and fine of Rs.1000/- which requires no further reduction.

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 7(i), 16(1)(ए)(i) – दण्डादेश – आवेदक दोषसिद्ध किया गया और 6 माह के सश्रम कारावास एवं रु. 1000/– जुर्माने से दण्डित किया गया – अभिनिर्धारित – अधिनियम की धारा 16(1) के आज्ञापक उपबंधों को दृष्टिगत रखते हुए अधिनिमिति द्वारा विहित न्यूनतम से कम दण्डादेश अधिरोपित नही किया जा सकता – पुनरीक्षण खारिज।

A.D. Deoras, for the applicant.

R.N. Yadav, Panel Lawyer, for the non-applicant/State.

***Cr.R. No.796/1998 (Jabalpur), D/- 13 March, 2008.**

Short Note

(81)

Shantanu Kemkar, J

RAKEKSH JAJU (GUPTA)

Vs.

STATE OF M.P. & ors.

Constitution, Article 226 - ***Compassionate appointment*** - *Father of petitioner died on 18.12.1985 in harness - On obtaining majority petitioner applied for compassionate appointment on 01.09.2000 - Appointment - Cancellation of appointment on ground of subsequent policy dated 22.01.2007 in which compassionate appointment can be given only in case minor attains majority within 7 years of death of employee - Held - Policy prevailing at the time of application for compassionate appointment shall be applicable and not the policy which came into existence subsequently - Order of cancellation of appointment quashed - Petition allowed.* 2002(3) MPLJ 242 (ref.)

संविधान, अनुच्छेद 226 – अनुकम्पा नियुक्ति – याची के पिता की मृत्यु 18.12.1985 को सेवा में रहते हुए हुई – वयस्कता प्राप्त करने पर 01.09.2000 को याची ने अनुकम्पा नियुक्ति के लिए आवेदन पेश किया – नियुक्ति – पश्चात्वर्ती नीति तारीख 22.01.2007, जिससे केवल अवयस्क के कर्मचारी की मृत्यु से 7 वर्ष के भीतर वयस्कता प्राप्त करने की दशा में अनुकम्पा नियुक्ति

दी जा सकती है, के आधार पर नियुक्ति निरस्त – अभिनिर्धारित – अनुकम्पा नियुक्ति के लिए आवेदन के समय प्रचलित नीति लागू होगी न कि नीति जो बाद में अस्तित्व में आयी – अनुकम्पा नियुक्ति निरस्त करने का आदेश अभिखंडित – याचिका मंजूर। 2002(3) MPLJ 242 (संदर्भित)

Surendra Patwa, for the petitioner.
Arvind Gokhale, G.A., for the respondent No.1 to 3.
V.K. Jain, for the respondent No.4.

***W.P. No.2326/2007(S) (Indore), D/- 9 July, 2008.**

Short Note
(82)

R.S. Garg & R.K. Gupta, JJ

SONE SINGH
Vs.
STATE OF M.P. & ors.

Panchayats (Appeal and Revision) Rules, M.P. 1995, Rule 5(1)(a) - ***Revision - Revision before Commissioner is maintainable against order passed by Collector in appeal.***

From a perusal of Rule 5(1)(a), it would clearly appear that the State Government, the Commissioner and the other officers/authorities mentioned in Rule 5(1)(a) would have the revisional powers and against the authority subordinate to it they can exercise such revisional powers, may call for the records for examining the correctness, validity and propriety of the order and may pass such order as the revisional authority may think fit.

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5(1)(ए) – पुनरीक्षण – आयुक्त के समक्ष कलेक्टर द्वारा अपील में पारित आदेश के विरुद्ध पुनरीक्षण पोषणीय है।

Manikant Sharma, for the appellant.
Rahul Jain, for the respondent No.1.
R.K. Verma, for the respondent No.4.

W.A. No.924/2006 (Jabalpur), D/- 14 July, 2008

Short Note
(83)

Rakesh Saksena, J

SURENDRA KAURAV & ors.
Vs.
STATE OF M.P.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) - ***Intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view - Applicants assaulted the complainant as he had lodged a police report against applicant in past - No nexus between***

commission of offence and caste of victim - Mere uttering the word 'Chamra' cannot be taken as sufficient for holding commission of offence - Order framing charge u/s 3(1)(x) set-aside - Revision allowed. 1994 (1) MPWN 154 (ref.)

It is true that at the stage of framing charge, evidence and material adduced by the prosecution cannot be critically scrutinized or analyzed with a view to probe possibility of conviction. However, it can be appreciated only with a view to find out as to whether, prima-facie, case for proceeding against the accused for an offence is made out. On careful consideration of the facts, as emerge out from the statements of the prosecurtion witnesses as it is, without adding or substracting anything in it, there appears lack of essential ingredient of requisite intent on the part of the accused persons as required for commission of an offence u/s 3(1)(x) of the Act. The incident had occurred because of lodging of report against the accused Bhagvendra in the past. There appears no nexus between commission of offence and caste of the victims. Merely uttering the word 'Chamra' cannot be taken as sufficient for holding commission of offence under the Act.

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) – अनुसूचित जाति या अनुसूचित जनजाति के सदस्य को नीचा दिखाने के आशय से किसी लोक दृष्टिगोचर स्थान में साशय अपमानित या अभित्रस्त करना – आवेदकों ने परिवादी पर हमला किया क्योंकि उसने पूर्व में आवेदक के विरुद्ध पुलिस में रिपोर्ट दर्ज करायी थी – अपराध कारित करने और पीड़ित व्यक्ति की जाति के बीच कोई सम्बन्ध नही – केवल 'चमरा' शब्द उच्चारित करना अपराध कारित होना अभिनिर्धारित करने के लिए पर्याप्त नही माना जा सकता है – धारा 3(1)(x) का आरोप विरचित करने का आदेश अपास्त – पुनरीक्षण मंजूर। 1994 (1) MPWN 154 (संदर्भित).

Amit Dubey, for the applicants.

P.C. Jain, Panel Lawyer, for the non-applicant/State.

***Cr.R. No.1310/2007 (Jabalpur), D/- 20 November, 2007.**

Short Note

(84)

Rakesh Saksena, J

SURESH
Vs.
ASHOK

Negotiable Instruments Act (26 of 1881), Section 145 - ***Evidence on affidavit - Accused cannot avail the right to examine its witness on affidavit.***

On a bare perusal of Section 145(1) of the Act, it is apparent that it is only the complainant who can give evidence of his witnesses on affidavit in any inquiry, trial or other proceedings under the Act. In the above provision it is nowhere provided that right to examine the witness on affidavit can be availed by the accused. The words in sub-section (2) of Section 145 of the Act "summon &

examine any person giving evidence on affidavit" pertain to a person whose evidence the prosecution has tendered by the affidavit.

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 145 – शपथपत्र पर साक्ष्य – अभियुक्त शपथपत्र पर उसके साक्षी का परीक्षण कराने के अधिकार का लाभ नही उठा सकता है।

Deepak Okhde, for the applicant.

Sunil Pandey, for the non-applicant

***Cr.R. No.1843/07 (Jabalpur), D/- 16 January, 2008.**

I.L.R. [2008] M. P., 2487

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha & Mr. Justice Lokeshwar Singh Panta

16 May, 2008*

SULOCHANA ... Appellant

Vs.

RAJINDER SINGH ... Respondent

A. Civil Procedure Code (5 of 1908), Section 9, Accommodation Control Act, M.P. 1961, Section 45 - *Jurisdiction of Civil Court - Provisions regarding exclusion of jurisdiction of civil court are to be strictly construed - The jurisdiction of civil court can be excluded only if the matter comes within the purview of Section 45 of the Act of Chapter-III.* (Paras 18 & 20)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9, स्थान नियंत्रण अधिनियम, म.प्र. 1961, धारा 45 – सिविल न्यायालय की अधिकारिता – सिविल न्यायालय की अधिकारिता के अपवर्जन से संबंधित उपबंधों का अर्थ कड़ाई से लगाया जाना चाहिए – सिविल न्यायालय की अधिकारिता केवल तब अपवर्जित की जा सकती है जब मामला अधिनियम के अध्याय 3 की धारा 45 के सीमा क्षेत्र में आता है।

B. Accommodation Control Act, M.P. (41 of 1961), Sections 2(b), 12(1)(a), (c), (f), 23-J, 45 - *Appellant purchased suit property in 1996 whereas respondent was inducted as tenant by seller way back in 1978 - Appellant, a widow filed a suit before civil court for eviction on the ground of arrears of rent, denial of title and bonafide requirement - Decree granted by trial court on the ground of bonafide requirement and arrears of rent and decree affirmed by District Judge - High Court set-aside decree on the ground that civil court has no jurisdiction because appellant being a widow, 'specified landlord' within the meaning of Section 23-J of Act - Appeal before Supreme Court - Held - Definitions of 'Landlord' as contained in Section 2(b) & 23-J are different - Appellant was not a landlord within meaning of Section 23-J - Any matter which stricto sensu does not come within purview of Chapter III-A would be entertainable by civil court - Judgment passed by High Court unsustainable - Appeal allowed.*

(Paras 26, 30, 37 & 43)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 2(बी), 12(1)(ए), (सी), (एफ), 23–जे, 45 – अपीलार्थी ने विवादित सम्पत्ति 1996 में क्रय की जबकि प्रत्यर्थी किरायेदार के रूप में विक्रेता द्वारा काफी पहले 1978 में अधिवासित किया गया – अपीलार्थी, एक विधवा महिला ने बकाया किराये, स्वत्वों से इंकारी और सद्भाविक आवश्यकता के आधार पर बेदखली का वाद सिविल न्यायालय के समक्ष पेश किया – विचारण न्यायालय द्वारा सद्भाविक आवश्यकता और किराये के बकाया के आधार पर डिक्री प्रदान की गई और जिला न्यायाधीश द्वारा उसकी पुष्टि की गई – उच्च न्यायालय ने डिक्री इस आधार पर अपास्त की, कि सिविल न्यायालय को अधिकारिता नहीं है क्योंकि अपीलार्थी विधवा महिला होने से अधिनियम की धारा 23–जे के अर्थ में 'विनिर्दिष्ट

*C.A. No 3636 2008

भूस्वामी' थी – उच्चतम न्यायालय के समक्ष अपील – अभिनिर्धारित – धारा 2(बी) व 23–जे में अन्तर्विष्ट 'भूस्वामी' की परिभाषाएँ भिन्न हैं – अपीलार्थी धारा 23–जे के अर्थ में भूस्वामी नही थी – कोई मामला जो कड़े अर्थ में अध्याय 3–ए के सीमा क्षेत्र में नही आता, सिविल न्यायालय द्वारा ग्रहण किये जाने योग्य होगा – उच्च न्यायालय द्वारा पारित निर्णय स्थिर रखे जाने योग्य नही – अपील मंजूर।

Cases referred :

2006(1) MPLJ 231, (2002) 6 SCC 16, (2002) 3 SCC 717, (2005) 10 SCC 51, 1990 MPACJ 88, 2002(1) LSC (2) 22, 2002(1) MPS 5, 1982 MPRCJ 62, (2002) 3 SCC 717, (1984) 1 SCC 288, (1988) 1 SCC 656, (1990) 1 SCC 324.

JUDGMENT

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

2. Whether the civil court has jurisdiction to entertain a compositesuit filed by the appellant herein for eviction of the tenant is the question involved in this appeal which arises out of a judgment and order dated 28th September, 2006 passed by a learned Single Judge of the High Court of Madhya Pradesh at Indore in Second Appeal No. 260 of 2004, whereby and whereunder while allowing the appeal filed by the respondent, the suit filed by the appellant for eviction of the respondent was dismissed.

3. The basic fact of the matter is not in dispute.

4. The premises in dispute is a shop located on the ground floor of House No.370-D, Parasi Mohalla, Neemuch Cantt, in the State of Madhya Pradesh. Appellant purchased the property in question on 23rd March, 1996 from Smt. Anntu Jenra w/o Sh. Turab Bhai. Respondent was a tenant under the predecessor-in-interest of the appellant on a monthly rent of Rs.200/- per month. By a letter dated 29th July, 1996 the appellant informed the respondent in regard to the purchase of the property by her and requested the respondent for payment of monthly rent to her. Since, despite the service of the said letter, the respondent failed and/or neglected to make payment of rent, the appellant terminated the tenancy of the respondent and requested him to vacate the tenanted premises. It was also mentioned that the shop in question was required by the appellant bona fide so as to enable her son to carry out business therein. Respondent, while denying any liability to pay any rent to the appellant, also denied her title contending that he has not been informed of the sale of the property by the original landlord in favour of the appellant.

5. Appellant thereafter filed a composite suit for eviction of the respondent on the grounds of :- (i) default in payment of rent, (ii) her bona fide requirement; and (iii) denial of her title on the part of the respondent.

6. The trial court considered the merit of the suit for passing a decree on the ground of bona fide requirement as also on arrears of rent. A decree for mesne

profits was also passed. In regard to denial of title, the trial court noticed that since the earlier landlord did not give any notice of transfer to the respondent, the title of the appellant was although denied at that time but the tenant now accepted his title.

It was furthermore held that since the court had condoned the delay for deposit/payment of rent and allowed the respondent time to pay the rent, the delay in deposit of the same cannot form the basis for grant of a decree for eviction on that count. However, as stated earlier, the court decreed the suit on the ground of bona fide requirement on the part of the landlord and directed the respondent to handover vacant possession within two months.

7. An appeal, being Regular Civil Appeal No.1A of 2004 filed by the respondent before the District Judge was dismissed by a judgment and order dated 17th February, 2004.

8. Respondent preferred a second appeal before the High Court of Madhya Pradesh, which as stated earlier, was allowed by reason of the impugned judgment and the suit filed by the appellant was dismissed on that ground alone.

9. The High Court in its judgment, relying on or on the basis *Nandlal v. Nangibai* [2006 (1) M.P.L.J. 231], held that the civil court has no jurisdiction as the suit was decreed only on the ground of bona fide requirement on the part of the appellant. *Nandlal* (supra) relied on two decisions of this Court in *Dhannalal vs. Kalawatibai and others*, [(2002) 6 SCC 16] and *Ashok Kumar Gupta vs. Vijay Kumar Agarwal*, [(2002) 3 SCC 717].

10. Mr. Sushil Kumar Jain, leaned counsel appearing on behalf of the appellant, would submit that keeping in view the pleadings of the parties as also the findings of the learned trial judge, the High Court must be held to have committed a serious error in holding that the civil court had no jurisdiction to pass a decree for eviction. It was pointed out that the respondent-tenant was inducted as a tenant in the suit premises as far as back in 1978 by the previous owner and as the appellant purchased the suit property on 23rd March, 1996 whereas she became a widow, much earlier, i.e., on 9th July, 1990 and in that view of the matter Chapter IIIA of Madhya Pradesh Accommodation Control Act, 1961 (in short, 'the Act') will not be applicable.

11. Mr. Pramit Saxena, learned counsel appearing on behalf of the respondent, on the other hand, drew our attention to the provisions of Section 45 of Act to contend that the civil court's jurisdiction is completely ousted.

12. Before adverting to the rival contentions raised, we would notice some of the provisions of the said Act.

The Act was enacted for giving protection to tenants belonging to the weaker section of society who were incapable of building their own houses. Tenant has been defined in section 2(i) to mean :-

" 'tenant' means a person by whom or on whose account or behalf the rent of any accommodation is, or, but for a contract express is, or, but for a contact express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant and also, any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act ; but shall not include any person against whom any order or decree for eviction has been made."

13. Eviction of the tenant is governed by Chapter III of the Act. Section 11-A of the Act excludes applicability to certain categories of landlords as specified in Chapter III-A of the Act and as defined in Section 23-J. Section 12, however, starts with a non obstante clause; it specifies the grounds only on the basis whereof the landlord may file a suit for eviction of tenant from any accommodation.

14. Admittedly, denial of relationship of landlord and tenant, arrears of rent and the bona fide requirement are some of the grounds on the basis whereof a suit for eviction can be filed.

15. Section 45 of the Act excludes the jurisdiction of the civil court stating :-

"45. Jurisdiction of Civil Courts barred in respect of certain matters.- (1) Save as otherwise expressly provided in this Act, no Civil Court shall entertain any suit or proceeding in so far as it relates to the fixation of standards rent in relation to any accommodation to which this Act applies or to any other matter which the Rent Controlling Authority is empowered by or under this Act to decide, and no injunction in respect of any action taken or to be taken by the Rent Controlling Authority under this Act shall be granted by any Civil Court or other authority.

(2) Nothing in sub-section (1) shall be construed as preventing a Civil Court from entertaining any suit or proceeding for the decision of any question of title to any accommodation to which this Act applies or any question as to the person or persons who are entitled to receive the rent of such accommodation."

Sub-section (6) of Section 13 of the Act, however, provides for the benefit of protection against eviction, stating :-

"13. When tenant can get benefit of protection against eviction.-

(6) If a tenant fails to deposit or pay any amount as required by this Section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit, appeal or proceeding, as the case may be."

16. Chapter III-A provides for special provisions. It is confined to eviction of tenants on grounds of bona fide requirement of different classes of landlords

specified therein. A summary procedure is provided for. Recourse thereto can be taken only by the specified landlord within the meaning of the provision of Section 23-J of the Act which means a 'landlord who is a widow or divorced wife' amongst others. Amongst others a servant of any Government including a member of defence services, would also fall within the purview of the said definition. Only a landlord who comes within the purview of the said definition is entitled to file suit on the ground of his or her bona fide requirement.

17. Section 23-H provides for deposit of rent pending proceedings for eviction or for revision.

18. The jurisdiction of the civil court can thus be excluded only if the matter comes within the purview of Section 45 of the Act of Chapter III thereof. It is beyond any cavil that the application for eviction contemplated by Chapter III-A relates to an eviction of the tenant by the landlord as defined in Section 23-J of the Act.

19. Ex facie Section 45 of the Act has no application to the facts and circumstances of this case. Section 45 is subject to the other provisions contained therein; one of them, indisputably is Section 12 which confers jurisdiction upon the civil court to entertain a suit for eviction of the tenants subject, of course, to the case falling under one or more grounds specified therein.

20. It is now well settled that the provision excluding jurisdiction of the civil court are to be strictly construed. They are not to be inferred readily. [See *Swamy Atmananda and Others v. Sri Ramakrishna Tapovanam and Others* (2005) 10 SCC 51].

21. The jurisdiction of civil court is also to be determined having regard to the averments contained in the plaint. Appellant did not proceed on the basis that she was a 'specified landlord' within the meaning of Section 23-J of the Act. Furthermore a composite suit for eviction was filed, i.e., not only on the ground of bona fide requirement but also on the ground of default of payment of rent as also denial of relationship of landlord and tenant.

22. It was explained as to why the civil court had the requisite jurisdiction.

23. Requisite averment as regards the cause of action for the said suit was made in paragraph 10 of the plaint which reads as under :-

> "(10) That, despite communicating information through notice to the defendant about having purchased the disputed shop by the plaintiff, and about bona fide and reasonable necessity of the suit/disputed shop along with possession of excess area than that of tenanted portion, along with the arrears of the rent thereof, for opening of the shop for medicines by her son Rajesh Kumar, and because of denying by the defendant to recognize the plaintiff as the owner of the disputed shop, as also because of denial by the defendant to pay the arrears of the

rent as well as handing over possession of the shop, the plaintiff has been compelled to file this suit."

24. It is also relevant to notice the prayers made in the said suit, which are :-

"13) That the plaintiff prays for the following relief against the defendant :-

a) That a decree of eviction may be passed in favour of the plaintiff and against the defendant, to vacate the municipal house No.370-D, in whose north is public road, in south is the house no.370-F; in east is the house No.370-D; and in west is joint gali and house No.370-E are located, and in which the defendant is in occupation against rent & is carrying on his business by the name & style of M/s. Rathore & Sons; and its vacant possession be peacefully awarded to the plaintiff from the defendant.

b) That, the plaintiff be awarded arrears of the rent from the defendant amounting to Rs.3000/- and decree may be passed in favour of the plaintiff and against the defendant, and from the date of institution of the suit till the date of its remittance interest at the rate of Rs.2/- per hundred per month may also be awarded by way of compensation & belated payment against use & utilization.

c) That, from the date of the institution of the suit till receipt of vacant possession of the disputed premise, compensation be awarded at the rate of Rs.200/- per month against the use and utilization of the disputed premises by the defendant.

d) That, the total expenses of the suit be awarded to the plaintiff from the defendant along with interest at the rate of Rs. 2/- per hundred per month, from the date of the insituttion of the suit till its recovery.

e) That, any other justified relief which may be considered to be eligible by the plaintiff may also be awarded from the defendant."

25. Respondent in his written statement not only denied and disputed the title of the appellant but also denied and disputed that he was in default, apart from the contention raised as regards the bona fide requirement of the appellant, inter alia stating :-

"1) That the contents of paragraph 1 of the plaint are not admitted. The ex-owner/landlord of the hosue Antu Jehara wife of Shri Turab Bhai (H.M. Fazal Hussain) resident of Bombay has not communicated any information uptill today to the defendant about transfer of proprietorship of the disputed premises; nor has appraised about this fact that presently the defendant has become tenant of the plaintiff. In the notice issued by the plaintiff, the date of purchase of the disputed premises has been shown as 29th of March, 1996 whereas in the plaint, the date of purchase has been shown as 23rd of

March, 1996, and due to this reason it is not known as to on which date the plaintiff has become the owner/landlord of the disputed premises. The plaintiff has mentioned entire contents in paragraph No.1 of the plaint as false and illusionary. The plaintiff should prove the proprietorship of the disputed premises."

26. Indisputably, the issue as regards title over a property can be decided only by a civil court and, therefore, there cannot be any doubt whatsoever hat the suit as framed was maintainable. Learned trial judge however, in regard to the issue of denial of relationship of landlord and tenant opined :-

"20) But, the defendant has revealed the reason about denial of the title of the plaintiff due to non-communication of any information by his ex landlord Antu Jehara; and it has been made clear in para 26 of his cross-examination that when he had received the notice of the plaintiff, then he was not admitting the plaintiff as its landlord. But now he admits the plaintiff to be the landlord and is also remitting the rent. Therefore, in such a circumstance, the defendant has disclosed the reason about the denial of the title of the plaintiff. Therefore, in this case, he is not found liable to be evicted on the basis of denial of title, when he is accepting the title of the plaintiff.

As regards the ground of default, the trial court held :-

"21) The plaintiff has also advanced an argument that the defendant has not deposited the rent within the prescribed period. He has not deposited the rent within a period of one (month) since receipt of the notice, then any benefit would not be accruable to the defendant by depositing the rent later on, and simply on the basis of having withdrawn and having received the rent through court, it would not be an abdication by the plaintiff to have left the ground under Section 12(A); whereas the plaintiff himself does not abdicate this right of her own self. On the aforesaid point, following ruling have been cited on behalf of the plaintiff:-

i) *Hiralal v/s. Harisingh* - 1990 M.P.A.C.J. 88 ;
ii) *R.C. Tambrakar & Others v/s. Nidhi Lekha* - 2002 (1) L.S.C. (2) 22.
iii) *Sushil Srivastava v/s. Nafis Ahamad* - 2002 (1) M.P.S. 5 ; and
iv) *Kalyansingh v/s. Ramswarup* - 1982 M.P.R.C.J. 62.

But in these citations it is also mentioned that if permission is granted by the court for depositing the rent belatedly, i.e. delay is condoned, then simply on this ground, eviction should not be allowed."

It was, therefore, not a case that no cause of action had arisen to file the suit for eviction on the ground of default or denial of title, but they were negatived having regard to the subsequent events.

27. One of issues which arose for consideration of the learned trial judge was the jurisdiction of the civil court. The learned Judge held:

> "24) During the course of the arguments, the defendant has also raised an objection to the effect that the plaintiff being a woman is widowed and on the basis of necessity, proper forum is not a civil court, but is the Rent Control Authority, and in support of this argument has cited the ruling of *Narayan Rao v/s. Parvatibai* - 1998 M.P.A.C.J. 162.
>
> 25) In the aforesaid ruling, the suit was filed for eviction simply on the ground of bona fide necessity i.e. was filed for obtaining possession, in which the point about the arrears of the rent was not found; but in the present case the plaintiff has since beginning has instituted this suit for recovery of arrears of the rent amounting to Rs.3000/- and for eviction; and this issue has been framed being disputed amongst the rival parties, and therefore, in such a situation the facts of this case and the citation being different, any relief is not available to the defendant from the aforesaid ruling, and in this respect the objection of the defendant is rejected."

28. So far as the ground of bona fide necessity on the part of the appellant is concerned, it was admittedly held in her favour.

29. The reliefs granted by the civil courts in favour of the appellant are as under :-

> "a) The defendant should hand over the vacant possession of the disputed premises of House No.370-D, Parsi Mohalla, Neemuch Cantt. to the plaintiff within two months of the date of the judgment.
>
> b) The defendant should pay rent to the plaintiff in respect of the disputed premises from 23rd of March, 1996 to 22nd of June, 1997 at the rate of Rs.200/- per month, and thereafter uptil handing over vacant possession, should pay at the rate of Rs.200/- per month against its use & utilization. In this context, the plaintiff would be entitled to recover the rent deposited by the defendant in the court."

30. It is, therefore, evident that not only a decree for eviction was passed, a decree for payment of arrears of rent, which otherwise could not have been granted by the Rent Controller, was also passed.

31. Before the first appellate court, inter alia, an application was filed for rejection of the plaint. It was rejected. The first appellate court held :-

> "43. Because the plaintiff has filed the suit apart from the necessity for the business of her son, on the grounds of denial of title and default in payment of rent; therefore such a suit falls within the jurisdiction of a civil court. Therefore, the amendment which has been proposed by the plaintiff, the same is unnecessary and is not bona fide. Due to the reason of such a situation, there is no necessity to dismiss the suit also."

32. In the second appeal, however, a purported substantial question of law was framed which reads, thus :-

> "Whether, in the facts and circumstances of the case, Civil Court had the jurisdiction to entertain a composite eviction suit filed by a landlord covered by section 23(J) on various grounds including 12 (1)(f) of the Act."

33. As noticed hereinbefore the said substantial question of law has been answered in favour of the respondent.

34. The High Court proceeded on the basis that the civil court's jurisdiction would stand ousted if the provisions contained in Sections 11, 12, 23-A, 23-J and 45 of the Act are conjointly read stating :-

> " After having herd learned counsel and going through material available on record, we do not think that learned counsel for the appellant is right in submitting that courts below had the jurisdiction to entertaining the composite suit for eviction in the facts of the present case. The point and controversy raised in this appeal stands decided by this court in Nandlal case supra. No contrary view of larger bench or Supreme Court was brought to notice. No doubt as a general rule, in all types of civil disputes, civil courts have jurisdiction unless a part of cause of action is craved out from such jurisdiction, expressly or by implication. In such a situation, it does not amount to splitting of cause of action. On a conjoint reading of relevant provisions of the Act and Code of Civil Procedure, to us it is clear that Civil Court's jurisdiction is barred in respect of composite claim for eviction on bona fide need set up by the special category landlord covered by Section 23(J) of the Act. In view of the above discussions, we have no hesitation in holding that in the facts of the case in hand, civil court acted without jurisdiction while granting an eviction decree on the grounds of bona fide need set up by the plaintiff who is indisputably covered by Section 23-J of the Act."

35. With respect, the learned Single Judge failed to notice that the definition of `landlord' as contained in Section 2(b) and Section 23-J are different. The learned Judge furthermore failed to notice the limited application of Chapter III-A of the Act. Some decisions have been noticed by the learned Single Judge, including *Ashok Kumar Gupta vs. Vijay Kumar Agarwal,* [(2002) 3 SCC 717] to which we would refer to a little later.

36. The definition of `specified landlord' as contained in Section 23-J of the Act is not as broad as the definition of the same term as contained in Section 2(b) thereof. A statute must be read, keeping in view the constitutional scheme of equality as adumbrated in Article14 of the Constitution of India. Once a special benefit has been conferred on a special category of landlord, the same must receive

strict construction. Even otherwise, it is well settled, that an exclusion provision must be construed strictly. A statute ousting jurisdiction of the civil court should also be strictly construed.

37. Appellant has purchased the premises on 23rd March, 1996 whereas the respondent was inducted as tenant of the premises way back in 1978. It is, therefore, not a case where the respondent was inducted as a tenant by the appellant. She was, thus, not a landlord within the meaning of Section 23-J of the Act. The relevant date for claiming the special benefit of Chapter III-A was the date of her becoming a widow.

38. An identical question came up for consideration in *Winifred Ross and another vs. Evi Fonseca and others*, [(1984) 1 SCC 288 wherein application of a pari materia provision contained in Section 13-A1 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 fell for consideration of this Court.

Plaintiff therein was an officer of the armed forces. This Court while lauding the object of the Act, however, held :-

> "Even the widows of such landlords may under clause (b) of Section 13-A1 can recover possession of such buildings if they satisfied the conditions mentioned therein. An analysis of clause (a) of Section 13-A1 shows that the person who wishes to claim the benefit of that section should be a landlord of the premises while he is a member of the armed forces of the Union and that he may recover possession of the premises on the ground that the premises are bona fide required by him for occupation by himself or any member of his family on the production of the required certificate either while he is still in service or after his retirement. The essential requirement is that he should have leased out the building while he was a member of the armed forces. His widow can also recover the premises of which she is or has become the landlord under clause (b) subject to fulfilment of the conditions. Having regard to the object and purposes of the Act and in particular Section 13-A1 it is difficult to hold that Section 13-A1 can be availed of by an ex-member of the armed forces to recover from a tenant possession of a building which heacquires after his retirement. Acceptance of this argument will expose the very Section 13-A1 of the Act to a successful challenge on the ground of violation of Article 14 of the Constitution for if that were so, a retired military officer who has no house of his own can purchase any building in the occupation of a tenant after his retirement, successfully evict a tenant living in it on the ground that he needs it for his use, then sell it for a fancy price and again because he has no house of his own, he can again acquire another building and deal with it in the same way. There appears to be no restriction on the number of times he can do so. It was argued that he

would not be able to get the requisite certificate under the Act more than once. A reading of Section 13-A1 of the Act shows that the certificate should show that the person concerned has been a member of the armed forces and that he does not possess any other suitable residence in the local area where he or members of his family can reside. Those conditions being satisfied the certificate cannot be refused. A liberal construction of Section 13-A1 of the Act as it is being pressed upon us would also enable unscrupulous landlords who cannot get rid of tenants to transfer their premises to ex-military men, as it has been done in this case in order to avail of the benefit of the said section with a private arrangement between them. It is also possible that a person who has retired from the armed forces may after retirement lease out a premises belonging to him in favour of a tenant and then seek his eviction at his will under Section 13-A1 of the Act."

39. *Winfred Ross* and various other decisions came up for consideration again before this Court in *Dr. D.N. Malhtora vs. Kartar Singh,* [(1988) 1 SCC 656]. Following *Winfred Ross* (supra), it was held :-

"12. On a conspectus of the decisions referred to hereinbefore more particularly the decision rendered by this Court in the case of Mrs *Winifred Ross v. Mrs Ivy Fonseca* it is well settled that in order to get the benefit of eviction of the tenant in a summary way the ex-serviceman must be a landlord qua the premises as well as the tenant at the time of his retirement from service. The ex-serviceman is not competent to make an application to the Rent Controller to get possession of his house by evicting the tenant in a summary way unless and until he satisfies the test that he is a landlord qua the premises and the tenant at the time of his retirement or discharge from service."

40. The question yet again came up for consideration before a three Judge Bench of this Court in *Bhagwat Dutt Rishi vs. Raj Kumar,* [(1990) 1 SCC 324]. The ratio laid down in *Winfred Ross* (supra) and *Dr. D.N. Malhotra* (supra) was upheld stating :-

"10. In *Malhotra case,* this Court was called upon to consider Section 13-A1 of the very Act with which we are now concerned. On the basis of the ratio in *Winifred Ross case,* this Court came to the conclusion that until the landlord satisfied the test that he was a landlord qua the premises and the tenant at the time of his retirement or discharge from service, he would not be entitled to the benefit of Section 13-A of the Act.

11. It is not disputed that the appellant retired on September 30, 1981. On the finding the appellant is right in his submission that this was not a case of transfer with an oblique motive but as the property belonged

to a Mitakshara father, upon his death the property has come to his hands. This feature which is different from the facts appearing in the two reported decisions, however, would not persuade us to give a different meaning to the definition in Section 2 (hh). In both the cases, for good reason this Court came to the conclusion that the public officer should have been a landlord of the premises in question while in service. Admittedly, the appellant was not the landlord before he superannuated."

41. We may now examine the decision whereupon reliance has been placed by the High Court, i.e., *Dhannalal* (supra). In *Dhannalal* (supra) the question which arose for consideration was as to whether a specified landlord could file a composite suit alongwith others for whose bona fide requirement the eviction of the tenant was sought for. Holding that in such a case even a suit by a co-owner alone would be maintainable, it was opined :-

"17. It follows that a widow, who is a co-owner and landlady of the premises can in her own right initiate proceedings for eviction under Section 23-A(b), as analysed hereinbefore, without joining other co-owners/co-landlords as party to the proceedings if they do not object to the initiation of proceedings by such landlady, because she is the owner of the property and requires the tenanted accommodation for the purpose of continuing or starting the business of any of her major sons. The major sons though co-owners/co-landlords may not have been joined as party to the proceedings but it would not adversely affect the maintainability of the proceedings. It would also not make any difference if they are also joined as party to the proceedings. Their presence in the proceedings is suggestive of their concurrence with the widow landlady maintaining the proceedings in her own right.".

On the aforementioned narrow context of the factual matrix involved therein, it was held:-

"19. ....The requirement pleaded is the requirement of a widow landlady for continuing or starting the business of her major sons. In proceedings for eviction of a tenant it is permissible for all the co-owner landlords to join as plaintiffs. Rather, this is normally done. Now, if they all file a claim before the civil court, an objection may possibly be raised on behalf of the defendant tenant that the widow landlady being one of the claimants for eviction she must go to the Rent Controlling Authority under Chapter III-A. If they collectively join in initiating the proceedings for eviction of the tenant before the Rent Controlling Authority under Chapter III-A the defendant tenant may object that the requirement being that of the major sons who are themselves applicant landlords the claim should have been filed before the civil court, as is the plea before us. How can such dilemma be resolved?

20. Both the learned Senior Counsel for the parties stated that there is no specific statutory provision nor a binding precedent available providing resolution to the problem posed. Procedural law cannot betray the substantive law by submitting to subordination of complexity. Courts equipped with power to interpret law are often posed with queries which may be ultimate. The judicial steps of the Judge then do stir to solve novel problems by neat innovations. When the statute does not provide the path and precedents abstain to lead, then they are the sound logic, rational reasoning, common sense and urge for public good which play as guides of those who decide. Wrong must not be left unredeemed and right not left unenforced. Forum ought to be revealed when it does not clearly exist or when it is doubted where it exists. When the law -- procedural or substantive -- does not debar any two seekers of justice from joining hands and moving together, they must have a common path. Multiplicity of proceedings should be avoided and same cause of action available to two at a time must not be forced to split and tried in two different fora as far as practicable and permissible."

The said decision, therefore, in our opinion, cannot be said to haveany application to the present case.

42. *Ashok Kumar Gupta* (supra) in fact runs counter to the contention of the respondent. Noticing Section 12, 23-A, 23-J and Section 45 of the Act it was held :

"10. The position after 16-1-1985 is that only in respect of the aforementioned categories of the landlords the Rent Controlling Authority has jurisdiction to order eviction of a tenant on grounds of bona fide requirement under Section 23-A. A conjoint reading of Sections 11-A, 12, 23-A, 23-J and Section 45 would show that in regard to the bona fide personal requirement of the landlord who does not fall within the specified categories in Section 23-J, the civil court has jurisdiction to entertain a suit and pass decree under clause (e) of sub-section (1) of Section 12 of the Act. It follows that the civil court rightly entertained counter-claim under Section 12(1)(e) of the Act so the decree passed by it is not vitiated for want of jurisdiction."

43. Thus, any matter which stricto sensu does not come within the purview of Chapter III-A would be entertainable by a civil court. This ratio of the decisions, in our opinion, was wrongly applied.

44. We have, therefore, no hesitation to hold that the decision of the High Court is unsustainable. The same is set aside accordingly. The appeal is allowed with no order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 2500

WRIT APPEAL

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

8 February, 2008*

SHIV BABU SHUKLA ... Appellant

Vs.

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

A. **Police Regulations, M.P., Regulations 238 & 240** - *Conviction in criminal offence - Appellant working as Head Constable - Convicted u/ss 498A, 304B of IPC - Sentence suspended in appeal - Appellant removed from service on the ground of conviction - Held - Regulation 238 is peremptory in nature and discretion granted is in the proviso - It is not inherent that authority has no option but to wait till conviction is affirmed in appeal - Authority was entitled to impose the punishment of removal - Appeal dismissed.* (Para 13)

क. पुलिस विनियम, म.प्र., विनियम 238 व 240 – दाण्डिक अपराध में दोषसिद्धि – अपीलार्थी प्रधान आरक्षक के रूप में कार्यरत – भा.द.सं. की धारा 498ए, 304बी के अन्तर्गत दोषसिद्ध किया गया – दण्डादेश अपील में निलंबित – अपीलार्थी को दोषसिद्धि के आधार पर सेवा से हटाया गया – अभिनिर्धारित – विनियम 238 अनिवार्य प्रकृति का है और परन्तुक में विवेकाधिकार दिया गया है – यह अन्तर्निहित नही है कि प्राधिकारी के पास दोषसिद्धि की अपील में पुष्टि होने तक इंतजार करने के अतिरिक्त कोई विकल्प नही है – प्राधिकारी हटाये जाने का दण्ड अधिरोपित करने के लिए हकदार था – अपील खारिज।

B. **Police Regulations, M.P., Regulations 238** - *Conviction in criminal offence - Appellant convicted u/ss 498A, 304B of IPC - Sentence suspended in appeal - There is no stay of judgment of conviction - Authority was entitled to impose the punishment of removal - Appeal dismissed.* (Para 14)

ख. पुलिस विनियम, म.प्र., विनियम 238 – दाण्डिक अपराध में दोषसिद्धि – अपीलार्थी भा.द.सं. की धारा 498ए, 304बी के अन्तर्गत दोषसिद्ध किया गया – अपील में दण्डादेश निलंबित – दोषसिद्धि के निर्णय पर कोई रोक नही – प्राधिकारी हटाये जाने का दण्ड अधिरोपित करने के लिए हकदार था – अपील खारिज।

Cases referred :

(1987) 1 SCC 424, 2007 AIR SCW 2458, 2008AIR SCW 390, (1995) 2 SCC 513, AIR 1995 SC 1364, 2003(1) MPHT 77.

Sanjay K. Agrawal, for the appellant.

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

O R D E R

The Order of the Court was delivered by DIPAK MISRA, J.-In this appeal prefered under Section 2(1) of the Madhya Pradesh Uchch Nyayalaya (Khand Nyaypeeth ko Appeal) Adhiniyam, 2005 the defensibility

*W.A. No.1/2008 (Jabalpur)

and justifiability of the order dated 3-12-2007 passed by the learned Single Judge in W.P. No.16086/07(s) is called in question.

2. The facts which are essential to be enumerated for the purpose of this appeal are that the appellant-petitioner (hereinafter referred to as 'the appellant'), a Head Constable of Police, was convicted for offences punishable under sections 498-A and 304-B read with Section 34 of the Indian Penal Code and under Section 3/4 of the Dowry Prohibition Act, 1961 and sentenced to suffer rigorous imprisonment for a period of 10 years and to pay a fine of Rs.500/-. Being grieved by the judgment of conviction and order of sentence he preferred Criminal Appeal No.528/07 wherein this Court by order dated 25-4-2007 had directed suspension of sentence and grant of bail.

3. During the pendency of the appeal the disciplinary authority by order dated 3-02-2007 taking note of the factum of conviction in respect of the aforesaid offences passed an order of removal from service. On being moved in an appeal the appellate authority by order dated 29-10-2007 affirmed the order of removal.

4. Being dissatisfied with and aggrieved by the aforesaid orders the appellant preferred a writ petition for issue of a writ of certiorari for quashment of the aforesaid orders. The learned Single Judge by the order-impugned referred to the provisions contained in Rule 19 of the M.P. Civil Services (Classification, Control & Appeal)) Rules, 1966 [for short 'the 1966 Rules'] and the M.P. Police Regulations (for short 'the Regulations) and eventually expressed the opinion that the authorities were justified in law in removing the appellant from service without waiting for the decision in the criminal appeal.

5. We have heard Mr. Sanjay K. Agrawal, learned counsel for the appellant and Mr. Deepak Awasthi, learned Govt. Advocate for the respondents/State.

6. Mr. Agrawal, learned counsel for the appellant submitted that the learned Single Judge has erroneously applied the provisions contained in Rule 19 of the 1966 Rules though the same is not applicable to the case of the the appellant being a head constable who is governed by the M.P. Police Regulations. It is canvassed by him that the Regulation 238 clearly postulates that till the conviction is affirmed in appeal the appellant is entitled to continue in service. Learned counsel further canvassed that once there is suspension of sentence in appeal the appellant should not have been visited with the order of removal.

7. Mr. Deepak Awasthi, learned Govt. Advocate for the respondents/State resisting the aforesaid submissions contended that the order passed by the learned Single Judge is absolutely infallible inasmuch as an employee in the police force having been convicted cannot be allowed to retained in service. It is urged by him that the gravity of the offence has been rightly taken note of by the competent authorities and, therefore, giving the stamp of approval to the same by the learned Single Judge cannot be found fault with.

8. Be it stated, at the very outset there is no dispute with regard to the post

held by the appellant, the recording of conviction by the criminal court, pendency of appeal, grant of bail and order of removal passed by the authorities. The seminal question that emanates for consideration is whether such orders could have been passed while criminal appeal is pending. In this context we may refer with profit to the 1966 Rules. Rule 14 deals with the procedure for imposing measure penalties. Rule 15 deals with action on the enquiry report. Rule 16 lays down the procedure for imposing minor penalties. Rule 17 provides for communication of orders. Rule 18 deals with joint departmental enquiry. Rule 19 deals with special procedure in certain cases. The said Rule reads as under:

> "19. Special procedure in certain cases.- Notwithstanding anything contained in Rule 14 to 18 -
>
> (i)where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, or
>
> (ii) where the Disciplinary Authority is satsified for the reasons to be recorded by it in writing that it is not reasonably practicable to hold an enquiry in the manner provided in these rules, or
>
> (iii) where the Governor is satisfied that in the interest of the secruity of the State, it is not expedient to hold any inquiry in the manner provided in these rules,
>
> the Disciplinary Authority may consider the circumstances of the case and make such orders thereon as it deems fit:
>
> Provided that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this rule."

9. On a perusal of the said rules it is vivid that when an order is passed on the base of Rule 19 of the 1966 Rules a detailed procedure prescribed for conducting a departmental inquiry under Rules 14 to 18 of the 1966 Rules is not necessary. In the case at hand, the disciplinary authority has passed the order of removal on the basis of conviction for offences punishable under Sections 498-A and 304-B read with Section 34 of the Indian Penal Code and under Section 3/4 of the Dowry Prohibition Act, 1961.

10. Submission of Mr. Sanjay K. Agrawal, learned counsel for the appellant is that Regulation 238 of the M.P. Police Regulations categorically and unequivocally provides that unless the conviction is affirmed in appeal an employee cannot be removed from service. To appreciate the submission of Mr. Agrawal it is apposite to refer to Regulations 238 and 240 of the M.P. Police Regulations. The Hindi version of the Regulations 238 and 240 reads as under:

> "238. "फौजदारी अपराध में दण्ड–जब किसी पुलिस अधिकारी को कठोर कारावास का दण्ड किसी फौजदारी अपराधी की दोषसिद्धि पर दिया जावे और दोषसिद्धि अपील से भी मान्य हो जावे या उसके विरुद्ध ऐसी कोई अपील न की जावे तो उसे पदच्युत कर दिया जावेगा :

किन्तु उपबन्ध यह है कि यदि अपराध गभीर या अपमानजनक न हो तथा कारावास इतना लम्बा न हो कि उसका अधःपतन हो जावे, तो यह महानिरीक्षक के विवेक पर होगा कि वह उसको दल में बना रहने दे ।

"240. अपील स्वीकार किये जाने पर पुनर्स्थापन–यदि दोषसिद्ध करने वाले न्यायालय के दण्ड के विरुद्ध उनकी दोष सिद्धि का आदेश अपास्त (set side) हो जाए और उसका पूर्ववर्ती पद पर पुनर्नियुक्ति किया जाना उचित प्रतीत हो तो उसकी पदच्युति के कारण की गई व्यवस्था को उलट दिया जावेगा । जहाँ तक संभव हो, इस प्रकार हुई रिक्ति में तब तक कोई सारवान् पदोन्नति या व्यवस्था–

(1) यदि अपील नहीं की गई हो तो उस दिनांक तक जिसमें अपील के लिए अनुज्ञेय कालावधि समाप्त हो, या

(2) यदि अपील की गई हो तो उच्चतर अपीलीय प्राधिकारी के आदेशों के दिनांक तक नहीं की जावेगी ।"

11. At this juncture we are obliged to reproduce English version of Regulations 238 and 240:

"238. Conviction in criminal offence.- When a police officer has been sentenced by the Trial Court to rigorous imprisonment upon conviction of a criminal offence, he shall be dismissed from the force:

Provided that if his offence was not of a serious or disgraceful nature, and the imprisonment has not been so prolonged as to be of itself degrading, it shall be in the discretion of the Inspector-General to allow his retention in the force.

xxx xxx xxx

240. If an appeal lies against the existence of the convicting court and if as a result of which an appeal preferred by the Police Officer concerned, his conviction is set aside and his reinstatement to his former post appears to be called for, the arrangement made as a result of his dismissal will have to be reversed."

If the English version is accepted there can be no iota of doubt that the order is justified in law. Even if the Hindi version is accepted to be true, correct, sound and authentic then also in our considered opinion, the result would be the same. Regulation 238 as per Hindi version as we have understood, does not confer any discretion on the competent authority after the conviction is affirmed in appeal but it does not debar the authorities to pass an order of punishment for removal. It has to be so construed as 240 of the Regulations deals with reinstatement of a police officer on dislodging of his conviction in appeal. The question of reinstatement on setting aside of conviction would not have arisen if there would have been no possibility or plausibility of removal or dismissal. Thus, Regulation 238 is peremptory in nature for imposition of punishment and the only discretion granted to the authority concerned, is in the proviso. From the language employed in Regulation

238 it is not inherent therein that the authority has no option but to wait till the conviction is affirmed in appeal. The peremptory nature or the imperative facet relates to imposition of punishment but the said peremptory aspect for the imperative command does not create a bar or impediment after the initial conviction. It does not exclusively relate to stage or state or status of the appeal. If the stage of imposition is restricted to take place only after confirmation of appeal it would lead to absurdity. If such a construction is placed on Regulations 238 and 240 then the construction would become absolutely meaningless and the same is not the purpose. The regulations have to be read purposively and in a harmonious manner. If we accept the submission of the learned counsel for the appellant it would be reading Regulation 238 in total isolation. It is well settled in law that a construction of a statute should be done in a manner which would give effect to all its provisions.

12. In *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424 the Apex Court has held as under:

> "..... If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act...."

13. Similar view has been reiterated in *Chairman, Indore Vikas Pradhikaran Vs. M/s. Pure Industrial Cock & Chem. Ltd. and Others,* 2007 AIR SCW 2458 and *Sarabjit Rick Singh Vs. Union of India,* 2008 AIR SCW 390. If the Regulation is read in the said manner, there cannot be any shadow of doubt that the authorities in the present case were entitled to impose the punishment of removal.

14. The next submission of the learned counsel for the appellant is that when there has been an order of bail the authority should not have passed an order of dismissal. It is settled in law that the Court has power to direct stay of order of conviction. The said view finds support from the decisions rendered in *Rama Narang Vs. Ramesh Narang and Others*, (1995) 2 SCC 513 and *Deputy Director of Collegiate Education (Administration), Madras Vs. S.Nagoor Meera,* AIR 1995 SC 1364. An order of stay of conviction can be passed in exceptional cases. That has been so held in *Jamna Prasad Vs. State of M.P. and Others,* (2003) 1 MPHT 77. In the case at hand, there has been suspension of sentence and enlargement on bail. There is no stay with regard to judgment of conviction. In view of the aforesaid, the submission of the learned counsel for the appellant has to pale into insignificance and has to be repelled and we so do.

15. In view of the aforesaid analysis we concur with the view taken by the learned Single Judge and accordingly dismiss the appeal. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2505

WRIT APPEAL

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

20 February, 2008*

INDIAN OIL CORPORATION LTD. & anr. ... Appellants

Vs.

GURMEET SINGH ... Respondent

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P., 2005 (14 of 2006), Section 2 - *Dealership of petrol* - *Order of cancellation of dealership on ground that High Tension Electric Line passes over the site - Advertisement does not contain such disqualification - Learned Single Judge, on finding that dealer proposed to shift line and make the site suitable, directed in case the line stands removed, the order of cancellation of dealership shall stand quashed - Pursuant to direction of learned Single Judge line shifted - Appeal against the order - Held - Policy circular No.63 contains condition for such disqualification - Policy circular being strictly confidential, knowledge of it can not be imputed to dealer - There is no suppression of fact by the dealer - The learned Single Judge ought not to have directed grant of dealership merely on account of removal of line - Since present position of policy not placed on record - Appeal partly allowed with the direction that appellant company shall, in changed circumstances, consider the suitability of respondent for allotment of dealership.* (Paras 7 & 8)

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 – पेट्रोल की डीलरशिप – डीलरशिप के रद्दकरण का आदेश इस आधार पर कि स्थल के ऊपर से उच्च वोल्टता की विद्युत लाइन गयी है – विज्ञापन में ऐसी अनर्हता अन्तर्विष्ट नही – विद्वान एकल न्यायाधीश ने, यह पाने पर कि डीलर ने लाइन हटाना और स्थल को उपयुक्त बनाना प्रस्तावित किया, निदेश दिया कि लाइन हटा देने की दशा में डीलरशिप रद्द करने का आदेश अभिखण्डित हो जायेगा – विद्वान एकल न्यायाधीश के निदेश के अनुसरण में लाइन हटायी गई – आदेश के विरुद्ध अपील – अभिनिर्धारित – पॉलिसी परिपत्र क्रमांक 63 में ऐसी अनर्हता की शर्त अन्तर्विष्ट है – पॉलिसी परिपत्र सर्वथा गोपनीय होने से, इसकी जानकारी डीलर पर अभ्यारोपित नही की जा सकती है – डीलर द्वारा कुछ नही छिपाया गया – केवल लाइन के हटाये जाने के कारण विद्वान एकल न्यायाधीश को डीलरशिप देने का निदेश नही देना चाहिए था – चूंकि पॉलिसी की वर्तमान स्थिति अभिलेख पर नही रखी गई – अपील अंशतः इस निदेश के साथ मंजूर की गई कि अपीलार्थी कम्पनी, बदली हुई परिस्थितियों में, डीलरशिप आबंटित करने के लिए प्रत्यर्थी की उपयुक्तता पर विचार करे।

Cases referred :

(2007) 4 SCC 410, (2000) 5 SCC 287.

B.L. Pavecha with *Yogesh Mittal*, for the appellants.

V.P. Saraf, for the respondent.

ORDER

The Order of the Court was delivered by **S.K. KULSHRESTHA, J.** :–Aggrieved by the order passed by the learned Single

*W.A. No.91/2006 (Indore)

Judge in W.P. No.3483/2005 dt. 27.2.2006, the Indian Oil Corporation has filed this appeal under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

2. The matter relates to the grant of Retail Outlet to eligible candidate. In this behalf an advertisement Annexure P/3 was issued on 26.2.2004 inviting applications from the eligible candidates from open category for a Retail Outlet/Dealership of Petrol at Kala Pipal. The respondent Gurmeet Singh also competed in the process and was selected for the Dealership. However, on 27.5.2005, when the site was inspected it was found that there was a High Tension (11 kilovolt) line passing through the site. This fact was reported to the committee but despite having been apprised of the said defect in the site rendering the respondent disqualified, the Company selected the respondent No.1. However, upon further inspection on 13.8.2005, by Annexure R/4, upon a complaint having been made in this behalf, the Corporation was informed that in view of the findings of investigation, the complaint was substantiated as there was an over head High Tension Line passing through the land of the respondent. It was in these premises that the appellants issued Annexure P/1 dt. 8.9.2005 informing that the merit panel of the subject location had been cancelled.

3. The respondent assailed the said order as illegal and improper before the learned Single Judge. Learned Single Judge, on finding that the respondent had proposed to shift the said High Tension Line and make the site suitable, directed that the respondent shall get the High Tension Line removed through the M.P.Electricity Board within three months and in case the line stands removed within the said period, the order of cancellation of merit panel of the subject location Annexure P/1 shall stand quashed and the dealer-ship shall be allotted to the petitioner as per Annexure R/1. It was further stated that in case the respondent fails in removing the High Tension Line within the time prescribed, the petition shall stand dismissed. It is this direction which is assailed in the present appeal.

4. Learned Senior Counsel for the appellant has invited attention to Annexure R/3, the Policy Circular No.43, containing the conditions for allotment of the Retail Outlet. Para 2.6 of the said conditions contains disqualification in case, inter-alia, over head line passes over the plot. In this context, learned Counsel has referred to the application Annexure P/4 dated 29.3.2004 in which in Column No.18, the appellant has not stated that the High Tension Line was passing over the site and on that basis the learned Counsel has referred to the decision of the Supreme Court in *Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and others* (2000) 5 Supreme Court Cases 287 to the effect that award of contract to a tenderer who at the time of submission of tender did not specify the said condition, should be set-aside. Reference has also been made to the decision in *Shiv Kant Yadav Vs. Indian Oil Corporation and others* (2007) 4 Supreme Court Cases 410 to the effect that where factual mis-statement or declaration is made, the allotment can be cancelled. It is in these

premises that the learned Senior Counsel contends that the direction of the learned Single Judge to allot Retail Outlet/Dealership to the respondent suffers from patent illegality inasmuch as the learned Single Judge has himself decided the eligibility of the respondent subject to the conditions contained in the direction passed by the Writ Court.

5. Learned Counsel Shri Saraf has submitted that insofar as the disqualification referred to by the appellant is concerned, the said document is a strictly confidential document and, therefore, not available to the general public. Even in the advertisement, no such condition was laid down nor any other document was referred to with regard to the disqualification on account of unsuitability of the site having High Tension Line over it. In this behalf the learned Counsel for the respondent has referred to the brochure of Indian Oil Corporation Limited for selection of Petrol/Diesel Retail Outlet Dealers and pointed out that the only disqualification prescribed therein is as contained in para 4.4. According to the said provision, persons convicted for any criminal offence involving moral turpitude/ economic offences; mentally unsound and totally paraylised persons and signatory to agreement of a Dealership of any Oil Company terminated on the ground of adulteration/malpractice shall be disqualified from applying for the said Dealership. Learned Counsel, in the premises of the above conditions laying down disqualification, submits that since with regard to the suitability of the site it has not been stated in the brochure that over head High Tension Line of electricity would render him disqualified, there was no occasion for him to disclose the said fact. He further submits that since he had always shown his readiness and willingness to remove the Line to over come the said hurdle, the appellants ought not have to have cancelled the selection as has been done by them vide Annexure P/1. He has further submitted that pursuant to the direction contained in the order passed by the learned Single Judge, the High Tension Line has been shifted to a distance of 162 ft. and, therefore, there is no impediment now in allotting the Dealership to the respondent in accordance with the direction of the learned Single Judge.

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

7. It is true that insofar as reliance is being placed on the Policy Circular No. 43, the said document being a classified document and strictly confidential, knowledge of the contents therein cannot be imputed to the respondent. The respondent has placed reliance on the brochure of the site which does not contain any condition with regard to the un-suitability of the site and consequently the person, if there is an over head line passing through the site. Under these circumstances, it cannot be said that the respondent had suppressed any material fact and that he would not have been selected had the said fact been disclosed. Insofar as the High Tension Line of 11 Kilovolts is concerned, the respondent No.1 has already stated that he has removed the said hurdle and got the line shifted to a distance of 162 ft. It is, therefore, clear that the respondent has exonerated himself of the disqualification, even if it is assumed that the passage

of line over the site constituted one. However, merely on account of the removal of the line to a distant place, the learned Single Judge ought not to have directed grant of Dealership as a natural consequence flowing therefrom. The present position about the policy of the Company has not been placed before the Court and, therefore, we are unable to subscribe to the view of the learned Single Judge that on removal of High Tension Line from the site in question, the respondent automatically becomes entitled to Dealership. Under the changed circumstances including the fact that the respondent has got the High Tension Line shifted to a distance of 162 ft., the Company should be granted the liberty to re-asssess the situation and to consider whether the respondent should be granted Dealership and was suitable to be appointed a Dealer as on the date the matter is considered.

8. Thus, this appeal is partly allowed. In supersession of the directions made by the learned Single Judge, it is directed that the Company shall forthwith and in any case within a month, in the changed circumstances, consider the suitability of the respondent for allotment of the Dealership in question and to take further steps as per their decision. We trust that the Company shall assess the suitability of the respondent fairly and on the objective criteria laid down for appointment of Dealers, without any prejudice or predilection.

9. With the above modification in the direction, this appeal is disposed of with no order as to costs.

Appeal disposed of.

I.L.R. [2008] M. P., 2508

WRIT APPEAL

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

4 March, 2008*

ISPAT KHADAN JANTA MAZDOOR UNION ... Appellant

Vs.

STEEL AUTHORITY OF INDIA LTD. ... Respondent

A. **Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P., 2005 (14 of 2006), Section 2(1) Proviso - *Maintainability of Writ Appeal - It has to be decided on the basis of pleadings whether impugned order passed by Single Judge is one under Article 226 or 227 of Constitution.*** (Para 5)

क. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) परन्तुक – रिट अपील की पोषणीयता – अभिवचनों के आधार पर यह विनिश्चत करना पड़ता हैं कि क्या एकल न्यायाधीश द्वारा पारित विवादित आदेश संविधान के अनुच्छेद 226 के अन्तर्गत है या 227 के।

B. **Industrial Disputes Act (14 of 1947), Section 11(1), (3), Industrial Disputes (Central) Rules, 1957, Rule 10B(6) - *Examination of witnesses on***

*W.A. No.34/2008 (Jabalpur)

affidavit - Application filed for oral examination of witnesses as they are illiterate - Application rejected by Tribunal - Held - Whoever swears affidavit must swear that contents of affidavit are true to his knowledge - Deponent must understand the facts stated in affidavit - Finding of tribunal that witnesses although illiterate, but they can understand the facts sworn by them in affidavits is fallacious - Tribunal directed to record oral evidence - Appeal allowed. (Paras 9 & 10)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 11(1), (3), औद्योगिक विवाद (केन्द्रीय) नियम, 1957, नियम 10बी(6) – साक्षियों का शपथपत्र पर परीक्षण – साक्षियों के मौखिक परीक्षण के लिए आवेदन पेश क्योंकि वे निरक्षर हैं – अधिकरण द्वारा आवेदन खारिज – अभिनिर्धारित – जो कोई शपथपत्र पर शपथ लेता है उसे यह शपथ लेनी चाहिए कि शपथपत्र की अन्तर्वस्तु उसके ज्ञान में सत्य है – शपथकर्ता को शपथपत्र में कथित तथ्यों को अवश्य समझना चाहिए – अधिकरण का निष्कर्ष, कि साक्षीगण यद्यपि निरक्षर हैं किन्तु वे उनके द्वारा शपथपत्र में किये गये तथ्यों को समझ सकते हैं, भ्रामक है – अधिकरण को मौखिक साक्ष्य अभिलिखित करने के लिए निदेशित किया गया – अपील मंजूर।

Case referred :

2008 (1) MPLJ 152.

P.S. Nair & K.C. Ghildiyal, for the appellant.

Brian D'Silva & Saurabh Sharma, for the respondent.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :– This is an appeal filed under section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Ahdiniyam, 2005 (for short the "Adhiniyam") against the order dated 12.12.2007 passed by learned Single Judge in Writ Petition No.15842/2007(S).

2. The relevant facts briefly are that a reference was made under section 10(1)(d) of the Industrial Disputes Act, 1947 (for short the "Act") by the Central Government to Central Government Industrial Tribunal-cum-Labour Court, Jabalpur (for short the "Tribunal") to decide a dispute between the appellant and the respondent. Before the Tribunal, an application was filed by the appellant-Union for oral examination of the workers, but by order dated 31.10.2007, the Presiding Officer of the Tribunal rejected the application. Aggrieved, the appellant filed writ petition No.15842/2007(S) under Articles 226 & 227 of the Constitution in this court and by the impugned order dated 12.12.2007 the learned Single Judge dismissed the writ petition summarily. Aggrieved, the appellant has filed this appeal.

3. Mr. P.S.Nair, Senior Counsel and Mr. K.C.Ghildiyal, learned counsel for the appellant, submitted that the workers who are to be examined before the Tribunal are mostly illiterate Adivasis and Harijans and they are not capable of understanding the facts stated in the affidavit and therefore they are not in a position to swear the oath required in the case of an affidavit. They submitted that it is for this reason that many of the workers who are illiterate Adivasis and Harijans preferred to be examined orally before the Tribunal and yet this has not

been permitted by the Tribunal by the order dated 31.10.2007. They referred to the provisions of section 11(3) of the Act as well as sub rule (6) of rule 10B of the Industrial Disputes (Central) Rules, 1957 (for short the "Rules") and submitted that evidence of witnesses can be recorded either in the Tribunal or on affidavit. They submitted that the Tribunal was therefore not right in rejecting the application of the appellant for examination of workers and in particular those workers who are illiterate Adivasis and Harijans.

4. Mr. Brian D' Silva and Mr. Saurabh Sharma, learned counsel for the respondent, on the other hand, submitted that sub section (1) of section 11 of the Act is clear that the Tribunal shall follow such procedure as it may think fit subject to the rules that may be made in that behalf. They submitted that even if sub rule (6) of Rule 10B of the Rules provides for recording of evidence either in the court or on affidavit, it is for the Tribunal to decide whether evidence will be recorded orally or evidence will be adduced through affidavit and the High Court in exercise of powers under Articles 226 & 227 of the Constitution does not interfere with such a decision of the Tribunal. They submitted that the learned Single Judge has taken a view in the impugned order dated 12.12.2007 that Tribunal cannot be said to be having acted illegally in rejecting the application of the appellant and as such no prejudice has been caused to the workers by the impugned order. They further submitted that the impugned order passed by the learned Single Judge, in any case, is one under Article 227 of the Constitution and the proviso to sub section (1) of section 2 of the Adhiniyam is clear that no appeal will lie against an order passed by the learned Single Judge under Article 227 of the Constitution to a Division Bench.

5. We have perused the writ petition No.15842/2007 and we find that the writ petition has been filed not only under Article 227 but also under Article 226 of the Constitution. We further find that the grounds taken in the writ petition by the appellant are such as are normally taken in a writ petition filed under Article 226 of the Constitution. Hence, from the pleadings in the writ petition, it is difficult to hold that the writ petition was not one under Article 226 of the Constitution of India but under Article 227 of the Constitution. In a judgment delivered by five-judges of this Court in *Manoj Kumar versus Board of Revenue and others* [2008(1) MPLJ 152] it has been held that it is for the Division Bench hearing the writ appeal to decide on the basis of pleadings in the writ petition as to whether the impugned order passed by the learned Single Judge is one under Article 226 or Article 227 of the Constitution. In our view, the order passed by the learned Single Judge can be treated as one under Article 226 of the Constitution and hence, an appeal under section 2(1) of the Adhiniyam against the impugned order will lie to a Division Bench. The preliminary objection raised by learned counsel for the respondent to the maintainability of the appeal thus has no merit.

6. We may now examine the merits of the appeal. Sub sections (1) and (3) of section 11 of the Act and sub rule (6) of Rule 10B of the Rules are on which the learned counsel for the parties have relied on are quoted hereinbelow:-

"11(1) Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit.

(3) Every Board, Court [Labour Court, Tribunal and National Tribunal] shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit, in respect of the following matters, namely:-

(a) enforcing the attendance of any person and examining him on oath;

(b) compelling the production of documents and material objects;

(c) issuing commissions for the examination of witnesses;

(d) in respect of such other matters as may be prescribed,

and every inquiry or investigation by a Board, Court [Labour Court, Tribunal or National Tribunal] shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860)."

"10B(6) Evidence shall be recorded either in court or on affidavit but in the case of affidavit the opposite party shall have the right to cross-examine each of the deponents filing the affidavit. As the oral examination of each witness proceeds, the Labour Court, Tribunal or National Tribunal shall make a memorandum of the substance of what is being deposed. While recording the evidence the Labour Court, Tribunal or National Tribunal shall follow the procedure laid down in rule 5 of Order XVIII of the First Schedule to the Code of Civil Procedure, 1908."

October-08 (first)

7. Sub section (1) of section 11 of the Act provides that subject to any rules that may be made, the Tribunal shall follow such procedure as it may think fit. Sub section (3) of Section 11 provides that the Tribunal shall have the power as has been vested in the Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the matters enumerated therein. In clause (a), it is provided that the Tribunal shall have the power of enforcing the attendance of any person and examining him on oath as are vested in the Civil Procedure Code, 1908. Sub rule (6) of Rule 10B of the Rules provides that evidence shall be recorded either in court or on affidavit. Hence, a discretion is vested in the Tribunal to record evidence either in the court or in affidavit, but such discretion has to be exercised in such a manner as would advance the cause of justice keeping in mind the provisions of law and the time involved in recording the evidence.

8. Order XIX, Rule 3 of the Code of Civil Procedure, 1908 states that affidavits have to be confined to such facts as deponent is able of his own knowledge to prove. Section 6 of the Oaths Act, 1969 provides the Forms of oaths and affirmations and it states that all oaths made under section 4 of the Act shall be administered according to such one of the forms given in the schedule as may be appropriate to the circumstances of the case. The form prescribed in the schedule to the Act for affidavits is extracted hereinbelow:-

Form No.4 (Affidavits):-

I do swear in the name of God that this is my name and signature
solemnly affirm
(or mark) and that the contents of this my affidavit are true.

It is thus clear that whoever swears an affidavit must swear that the facts stated in the affidavit or that the contents of the affidavit are true to his knowledge. In other words, the deponent of the affidavit must understand the facts stated in the affidavit or the contents of the affidavit and then swear that whatever is stated in the affidavit are true to his knowledge.

9. The case of the appellant before the Tribunal was that the workers who are to be examined on oath are mostly illiterate Adivasis and Harijans and they cannot understand the facts sworn in by them on oath in affidavit yet the Tribunal rejected the prayer for oral examination of the workers with the following reasons :-

"6. It is very clear from the application No.461 that this dispute is in respect of 3405 workers. All of them have been alleged to be extremely poor in health, financially poor, physically handicapped. I find myself unable to accept that all of them are physically handicapped. It has been further submitted by the learned counsel for the Union that the workers are illiterate Adivasis and Harijans, May it be correct. But it is difficult to believe that a worker will not understand the facts sworn in by him on oath in an affidavit. Till now about 55 workers have been examined on their affidavits in my presence. Only relevant questions have been permitted by me to be asked in cross- examination of the workers. Under the above circumstances, I find no force in the application of the Union for permitting the Union to examine the workers orally before this Tribunal. Consequently, application No.461 is rejected."

10. The Tribunal has not disputed that the workers who are to be examined are mostly illiterate Adivasis and Harijans. The Tribunal has held that this may be correct but it is difficult to believe that workers will not understand the facts sworn in by them on oath in affidavits. If the workers were illiterate Adivasis and Harijans, they will not be able to read the facts stated in the affidavits. The view taken by the Tribunal that it is difficult to believe that a worker even though illiterate will not understand the facts sworn in by him on oath in affidavit is thus fallacious and the order does substance injustice to the workers.

11. We accordingly set aside the order of the Tribunal and direct the Tribunal to record the oral evidence of those witnesses produced before him who are illiterate and are unable to understand the facts stated in the affidavit. The appeal is allowed. No cost.

Appeal allowed.

I.L.R. [2008] M. P., 2513

WRIT APPEAL

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

20 March, 2008*

LALJI CHOUBEY ... Appellant

Vs.

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

Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 10(5), (6) - *Delivery of Possession - Land belonging to appellant declared surplus - Notice u/s 10(5) issued to appellant which was refused - Possession of land taken over by Revenue Officer and name of State recorded in revenue record - Held - Procedure of preparing a Panchnama or memorandum by L.A.O. in presence of witnesses would constitute taking of possession - Revenue records showing party in possession of land coupled with revenue entries is sufficient compliance - Court cannot convert itself into a Revenue Court and hold that inspite of panchnama and revenue record actual physical possession of land not taken - Appeal dismissed.* (Para 9)

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 10(5), (6) – कब्जे का परिदान – अपीलार्थी की भूमि अतिशेष घोषित की गई – अपीलार्थी को धारा 10(5) के अन्तर्गत सूचनापत्र जारी किया गया जो लेने से इंकार किया गया – राजस्व अधिकारी द्वारा भूमि का कब्जा ले लिया गया और राजस्व अभिलेख में राज्य का नाम अभिलिखित किया गया – अभिनिर्धारित – भू अर्जन अधिकारी द्वारा साक्षियों की उपस्थिति में पंचनामा या ज्ञापन तैयार करने की प्रक्रिया कब्जे का लिया जाना गठित करेगी – पक्षकार को भूमि के कब्जे में दिखाने वाला राजस्व प्रविष्टियों से युक्त राजस्व अभिलेख पर्याप्त अनुपालन है – न्यायालय स्वयं राजस्व न्यायालय में परिवर्तित नही हो सकता और यह अभिनिर्धारित नही कर सकता कि पंचनामा और राजस्व अभिलेख के बावजूद भूमि का वास्तविक भौतिक कब्जा नही लिया गया – अपील खारिज।

Cases referred :

(2005) 3 SCC 632, 2004(3) MPHT 16 (NOC), 2005(4) MPLJ 10 NOC, AIR 1996 SC 3377, (1996) 3 SCC 282, (1998) 4 SCC 387.

L.N. Namdeo, for the appellant.

Vijay Shukla, Dy.A.G., for the respondents.

JUDGMENT

The Judgment of the Court was delivered by **K.K. Lahoti, J.** :–The appellant aggrieved by an order of learned Single Judge dated 1.3.2006 in W.P.No.13534/2005, has preferred this appeal under section 2(1) of the M.P.Uchha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005. Before the learned Single Judge the appellant challenged the order dated 10.10.2005 passed by the Additional Collector and competent authority Urban Land Ceiling Act, Jabalpur in revenue case no.60/B-121/88-89, by which the

*W.A. No.91/2006 (Jabalpur)

Additional Collector found that the petitioner was dispossessed by the Revenue Officer from surplus land declared under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as 'Act' for short) on 4.8.1988. The competent authority also found that due procedure for dispossessing the appellant was followed by the revenue authorities and after dispossession of appellant the land was recorded in the name of State of M.P., in place of appellant, the holder of land.

Earlier the petitioner filed a writ petition W.P.No.3763/2005, in which order Annexure A-2 dated 23.5.2005 was passed and the competent authority was directed to look into the fact whether possession of the land was really taken over or not as per law and decide this question accordingly.

2. The order passed by learned Single Judge has been assailed on following grounds :-

(i) That though in ceiling case no.208/A-90/(B-9)/81-82 the appellant's land of village Oriya and Karmeta, District Jabalpur admeasuring 105735.54 sq.m., was declared surplus, but the competent authority had not taken actual possession from the appellant.

(ii) That notice as required under section 10(5) of the Act was not served on the appellant.

(iii) That the appellant remained in possession of the land till 17.2.2000, the date on which the State Government vide notification dated 9.3.2000 adopted the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter referred to as 'Repeal Act' for short), so under section 3(2) of the 'Repeal Act', the appellant who was not dispossessed by the State Government, is entitled to retain the land.

(iv) That the learned Single Judge has not considered the report of Revenue Inspector, Maharajpur Annexure A-3, by which it was reported to the Tahsildar on 17.7.2005 that the appellant was in possession of the land and the land in question was under cultivation of appellant. Without considering this report the matter has been decided.

(v) That section 10(5) of the Act provides for issuance of notice by the competent authority for delivery of possession and in case after service of notice under section 10(5) of the Act, possession was not handed over then notice under section 10(6) of the Act was required, but in the present case no such notice was issued.

(vi) That there were two reports for taking possession dated 20.11.1988 and 8.2.1991. These reports show that infact on 20.11.1988 possession was not taken over and similarly in view of specific report Annexure A-3 filed by the appellant, it is apparent that the proceedings dated 8.2.1991 were only paper proceedings.

(vii) That the possession was not taken over under section 10(5) of the Act so the proceedings before the competent authority shall be deemed to be pending immediately before the commencement of 'Repeal Act' and the said proceedings shall stand abated.

Reliance was placed by the appellant on the judgment of Apex Court in *Kishan Lal Vs. State of M.P. and others* [(2005) 3 SCC 632], and of this Court in *Sudhir Agrawal and another Vs. State of Madhya Pradesh and others* [2004(3) MPHT 16 (NOC)], *Ram Narain and others Vs. State of M.P., and another* (2005(4) MPLJ 10 NOC) and it was submitted that this appeal be allowed, order of learned Single Judge be set aside, the appellant's petition be allowed directing abatement of proceedings against the appellant under the Act and respondents be directed not to interfere in the possession of appellant.

3. Shri Vijay Shukla, learned Deputy Advocate General raised following contentions :-

(i) That possession of the land was taken over long back in the year 1988 and in this regard the competent authority had recorded a finding in order Annexure A-1. Before taking possession the appellant was issued a due notice as required under section 10(5) of the Act, which was refused by the appellant and thereafter the possession of land was taken by the Revenue Officer.

(ii) That since 1988 the land is recorded in the name of State of M.P. The proceedings were concluded in the year 1988 itself and the appellant filed writ petition before the learned Single Judge on 25.10.2005. For a considerable long period of nearabout 17 years no steps were taken by the appellant challenging the proceedings of 1988 or for correction of the revenue record and after such long lapse of period the petition of appellant was rightly dismissed by the learned Single Judge. Reliance was placed on the Apex Court judgment in T*amil Nadu Housing Board Vs A.Viswam* (AIR 1996 SC 3377) and it was submitted that appellant was dispossessed by following the due procedure of law, a memorandum/panchnama was prepared by the authority and the appellant's name was deleted from the revenue record. All these facts show that the proceedings were duly initiated against the appellant and he was dispossessed. That the provisions of sections 3(2) of the Act are not applicable as the possession was already taken over by the State from the appellant.

(iii) That so far as the abatement of proceedings is concerned, on 12.2.2000 no such proceedings were pending before any authority, so no question arises for abatement of proceedings.

4. To appreciate the rival contention of the parties, factual position in this case may be looked into :-

(a) That the appellant was holder of urban land and his land was declared as surplus in ceiling case no.208/A-90/(B-9)/81-82 under section 10(3) of the Act. A notice under section 10(5) of the Act was sent to the appellant on 15.3.1988. This notice was refused by the appellant and the case was proceeded exparte. Thereafter the revenue authorities took the possession of the land after preparing a panchnama, the revenue records were corrected and the land in question was recorded in the name of State of M.P., in the year 1988. That the appellant had not challenged the aforesaid proceedings before any competent Court.

(b) The Central Government enacted the 'Repealing Act' and vide gazette notification dated 9.3.2000 published in the Gazette of M.P., dated 10.3.2000 the aforesaid Repealing Act was adopted by the State of M.P.

(c) The appellant on repeal of the Act filed a writ petition before this Court which was registered as W.P.No.3763/2005. The aforesaid matter came up for hearing before the High Court on 23.5.2005. Before the learned Single Judge a singular contention was made that the possession of land was not taken over as contemplated under section 10(5) of the Act, so the authorities be directed not to dispossess him because now the possession cannot be taken by virtue of 'Repeal Act'. On raising the aforesaid contention, learned Single Judge directed that the competent authority shall look into the matter whether the possession of the land was really taken over or not as per law and decide this question as per law. A period of 3 months was provided to the competent authority to decide the matter and till then the status-quo was directed to be maintained.

(d) Thereafter the competent authority/Additional Commissioner, Urban Ceiling Jabalpur enquired into the matter. He examined the record of ceiling case no.208/A-90/(B-9)/81-82 and recorded finding that the notice under section 10(5) was issued on 15.3.1988, but it was not served on the holder. On perusal of the case of Tehsildar bearing no.60/B-121/88-89 it was found that on 4.8.1988 again a notice was issued to the appellant and from the proceedings of 20.11.1988 it revealed that notice was refused by the holder, case was proceeded exparte and the possession of the land was taken over by the Revenue Officer and the record was directed to be corrected. The proceedings of taking over possession were duly signed by the Kotwar Jangle Singh and another Kotwar Komal Prasad. Thereafter the Patwari recorded the name of State Government in the revenue records. In the proceedings of taking over possession the Patwari and two witnesses Komal Prasad and

Sukhram had signed. The Tehsildar had also recorded this fact in the proceedings. After perusal of both the cases the competent authority found that the appellant was dispossessed, the land was recorded in the name of State and decided the case against the appellant.

(e) Before the learned Single Judge in W.P.No.13534/2005 the appellant reiterated the same contention about non-service of notice under section 10(5) of the Act, the proceedings for dispossessing the appellant were exparte and were not in accordance with law. The learned Single Judge by the judgment dated 1.3.2006 recorded the findings against the appellant, and dismissed the writ petition.

5. To appreciate the contention of appellant firstly the relevant provisions may be looked into which are quoted thus :-

"S.3. **Persons not entitled to hold vacant land in excess of the ceiling limit** - Except as otherwise provided in this Act, on and from the commencement of this Act, no person shall be entitled to hold any vacant land in excess of the ceiling limit in the territories to which this Act applies under sub-section (2) of section 1.

S.10. **Acquisition of vacant land in excess of ceiling limit** - (1) As soon may be after the service of the statement under section 9 on the person concerned the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that -

(i) such vacant land is so be acquired by the concerned State Government and

(ii) the claims of all persons interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their interests in such land,

to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1), the contempt authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1), shall with effect from such date as may be specified in the declaration, be deemed

to have been acquired by the State Government and upon the publication of such declaration such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(5) Where any vacant land is vested in the State Government under sub-section(3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary."

Sections 3 & 4 of Repealing Act read thus :-

3. Savings.-(1) The repeal of the principal Act shall not affect-

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where-

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land, then, such land shall not restored unless the amount paid, if any, has been refunded to the State Government.

4. Abatement of legal proceedings.-All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to Sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority.

Sections 3 and 10(3) of the Act provide that from the commencement of Act no person shall be entitled to hold any vacant land in excess of ceiling limit. Ceiling limit was provided under section 4 of the Act and in the present case as there is no controversy in this regard, it is not necessary to refer the aforesaid provision. Section 10(1) of the Act provides that after service of statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit. After publication of such notification under sub-section (1), by the competent authority the land which was declared as surplus land shall be deemed to have been acquired by the State Government and shall be deemed to have vested absolutely with the State Government free from all encumbrances with effect from the date so specified. In this case there was no dispute in respect of the fact that land was declared as surplus and was deemed to have been vested with the State, as notified in this regard. Sub-section (5) provides that after vesting of land with the State Government under sub-section (3) the competent authority may by notice in writing, order any person who may be in possession of the land to deliver the possession thereof to the State Government in this behalf within thirty days of service of notice. Sub-section (6) provides that if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land. Under section 10 of the Act, there is no provision for issuance of another notice under sub-section (6), if a notice under section 10(5) was issued and the appellant refuses to accept the notice, the competent authority was entitled to take possession of the land, so the contention of appellant that after refusal of notice under sub-section (5) another notice under sub-section (6) was required, has no force.

In *Govt. of A.P. Vs. H.E.H. The Nizam, Hyderabad* [(1996) 3 SCC 282], the Apex Court held thus:

> "..... Under Section 10(1), after service of the statement under Section 9 on the person concerned, the competent authority should cause publication of a notification in the State Gazette with particulars of the vacant land in excess of the ceiling limit, for information of the general public. After considering claims, if any, laid under sub-section (2) and disposal thereof, the competent authority shall determine the nature and extent of such claim and pass such orders as it deems fit. Thereafter the competent authority by notification under Section 10(3) published in the State Gazette may declare that the excess land published under

sub-section (1) shall be deemed to have been acquired by the State Government with effect from the date specified in the declaration and such land shall "be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified". The word 'deemed' is used to give effect to the operation of Section 3 from the date the Act was brought into force. In other words, the deemed vesting under Section 10(3) would date back to 17-2-1976 and the date specified under Section 10(3). In *Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu* (1991 Supp (2) SCC 228) this Court in para 10 had held that the word 'vest' takes varied colours from the context and situation in which the word came to be used in the statute. It is common knowledge that under the Act, the acquired lands vest in the State from the date of taking possession under Section 16 or 17(2). Under the land reforms like abolition of estate and taking over thereof, the vesting takes effect from the date of publication of the notification in the Official Gazette. In *Consolidated Coffee Ltd. v. Coffee Board* [(1980) 3 SCC 358] this Court had held that the word 'deemed' is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision is made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the legislature has made such a deeming provision. It would thus be seen that determination of the excess ceiling land pursuant to the statement filed under Section 6 becomes conclusive by publication of the notification under sub-section (3) of Section 10 and the excess lands were prohibited to be held under sub-section (3) on and from the date of the commencement of the Act. Such excess land shall vest in the State only from a date specified in the notification. The vesting under Section 10(3) takes effect from the date of publication of the notification under sub-section (3) of Section 10 in the State Gazette with effect from the date specified therein. It would thus be apparent that the State acquired absolute right, title and interest in the excess urban vacant land in the State from the date of the publication of the notification under Section 10(3) of the Ceiling Act and from 28-2-1983 that date the State Government became absolute owner of the excess vacant land free from all encumbrances"

6. In this appeal the appellant submitted that the proceedings against the appellant abated because the possession of the land was never taken from the appellant and for this purpose it shall be deemed that the proceedings were pending on 17.2.2000 when the Repeal Act came into force. The second contention of

the appellant is that when the possession was not taken from the appellant under section 10(6) of the Act now the State is precluded to take possession of the land.

7. So far as first contention of the appellant that the proceedings against the appellant abated on 17.2.2000 is concerned, no such proceedings were infact pending on 17.2.2000. Section 4 of the Repeal Act specifically provides that the proceedings under the principal Act must be pending immediately before the commencement of Repeal Act before any Court, Tribunal or other authority. However the appellant was unable to point out that before any Court, Tribunal or authority any such proceedings were pending which now may be treated as abated. In absence of any pending proceedings the contention of appellant cannot be accepted.

8. Now the second contention of appellant may be seen that the possession of the land was never taken from the appellant and the State is precluded from taking possession of the land from the appellant. In this case the competent authority after examining the record of the case had recorded a finding vide order Annexure A-1 dated 10.10.2005 that the possession of the land was duly taken on 20.11.1988, the lands were recorded in the name of the State and those entries continued till passing of the order dated 10.10.2005. Even for the sake of argument the contention of appellant is accepted then why appellant had not taken any steps for correction of record for a considerable period of 12 years since 1988. It is not the case of appellant that such entries were not in the knowledge of appellant. The vesting of land is provided under section 3 and section 10(3) of the Act and from the date of issuance of notification under the provisions land vested in the State though the possession of the land was taken exparte by the Government, after issuance of notice under section 10(5) of the Act.

9. Now another question arises that what is the procedure for taking possession. Apart from section 10 of the principal Act, in the Act no procedure is prescribed for taking possession. Under section 46 of the Act there is no provision for framing such rules prescribing the procedure for taking possession. The Apex Court in *Tamil Nadu Housing Board* (supra) considered this aspect and held that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or panchnama by the Land Acquisition Officer in the presence of witnesses winged by him and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. The Apex Court held that it is common knowledge that owner/interested person may not cooperate in taking possession of the land. In *Larsen & Toubro Ltd. Vs. State of Gujarat & others* [(1998) 4 SCC 387] the Apex Court held in para 13 that recording of panchnama in presence of witnesses signed by them as also by Circle Officer evidencing handing over of possession is a sufficient compliance. The revenue records showing the party in possession of land coupled with revenue entries is a sufficient compliance. The Apex Court held that the High Court could

not convert itself into a revenue Court and hold that inspite of panchnama and revenue record actual physical possession of the land was not taken over.

In view of the settled position of law by the Apex Court in *Tamil Nadu Housing Board & Larsen & Toubro Ltd.* (supra) the factual position in the present case may be seen. The Additional Collector vide order dated 10.10.2005 Annexure A-1 had categorically recorded a finding that the possession of land was taken over exparte and the land was recorded in the name of State and this revenue record is continuing since 1988. In these circumstances, in absence of any challenge to the aforesaid action and existence of the entries for a considerable long period of more than 11 years, the contention of appellant has been rightly turned down by the learned Single Judge that the possession of the land was not taken from him. In view of this finding, report Annexure A-3 cannot be relied on to set aside order dated 10.10.2005. The report does nowhere say that the petitioner was not dispossessed. Some act of trespass or encroachment on the part of the petitioner would not prove his legal possession or that he was not dispossessed in execution of earlier orders.

10. Section 3 of the Repeal Act meets out two exigencies, one is in respect of saving of vesting of any vacant land under sub-section (3) of Section 10, possession of which was taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority. Another situation is provided under sub-section (2) of section 3 where the land is deemed to have vested in the State Government under sub-section (3) of section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority and any amount has been paid by the State Government with respect to such land, then, such land shall not be restored unless the amount paid is refunded to the State Government. But such is not the case of petitioner and both the provisions are not applicable in the present case.

11. Though learned counsel for appellant tried to convince this Court that by necessary implication under Section 3(2), appellant's land cannot be deemed to be vested in the State Government as the possession was not taken over by the appellant but such contingency has not been specifically provided under sub-section (2) of section 3. Even for the sake of argument, the contention of appellant if taken into consideration, then as stated hereinabove, the possession of land was already taken from the appellant and in this regard due formalities were completed by the authorities in the year 1988 itself and since then land is recorded in the name of the State Government.

12. The sum total of the above discussion is that petitioner was issued notice under section 10(5) of the Act, he was dispossessed and name of the State Government was recorded in the revenue records. The proceedings were not

pending any where, therefore the petitioner would not be entitled to the benefit of the 'Repeal Act'.

In view of the aforesaid discussion, we do not find any merit in this appeal. This appeal is dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2523

WRIT APPEAL

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

8 April 2008*

MANOJ KUMAR YADAV ... Appellant

Vs.

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

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P., 1993 (1 of 1994), Sections 69(1), 70 - ***Powers of Panchayat - Panchayat cannot appoint Secretary or C.E.O. - Panchayat can appoint other officers and servants as it considers necessary for efficient discharge of its duties - Previous approval of prescribed authority is required not to a named officer or named servant but to appointment of such officers.*** (Para 6)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र., 1993 (1994 का 1), धाराएँ 69(1), 70, पंचायत की शक्तियाँ – पंचायत सचिव या मुख्य कार्यपालक अधिकारी को नियुक्त नहीं कर सकती – पंचायत अन्य अधिकारियों एवं कर्मचारियों को नियुक्त कर सकती है जिन्हें वह अपने कर्त्तव्यों के दक्षतापूर्ण निर्वहन के लिए आवश्यक मानती है – ऐसे अधिकारियों की नियुक्ति के लिए विहित प्राधिकारी का पूर्व अनुमोदन अपेक्षित है न कि किसी नामित अधिकारी या नामित कर्मचारी के लिए।

Abhishek Arjaria, for the appellant.

Kumaresh Pathak, Addl.A.G., for the respondents.

ORDER

The Order of the Court was delivered by

A.K. PATNAIK, C. J. :– This is an appeal against the order dated 5.10.2007 passed by the learned Single Judge in W.P. No. 12970/2007.

2. The facts briefly are that the appellant filed W.P. No. 12970/2007 claiming that the members of Sendri Gram Panchayat adopted a resolution dated 28.1.2007 under the supervision of Tahsildar, Niwari appointing the appellant as Panchayat Karmi of the Gram Panchayat and accordingly the appellant joined as Panchayat Karmi on 28.3.2007 and started working. But, all of a sudden the Collector Tikamgarh issued an advertisement on 30.8.2007 for recruitment of Panchayat Karmis on various Gram Panchayats including Gram Panchayat, Sendri. Being aggrieved the appellant filed W.P. No. 12970/2007 praying for quashing the

*W.A. No.1696/2007 (Jabalpur)

advertisement dated 30.8.2007 issued by the Collector, Tikamgarh and for permitting the appellant to work on the existing post of Panchayat Karmi. The learned Single Judge without issuing notice to the respondents dismissed the writ petition by the impugned order dated 5.10.2007 with the observation that there were atleast two female candidates mentioned at Serial Nos. 5 and 11 and it is clear in clause 3.4 of the Panchayat Karmi Yojna that female candidates will be given preference while making selection on the post of Panchayat Karmi and this having not been observed the resolution dated 28.3.2007 of the Gram Panchayat is in violation of Panchayat Karmi Yojna. In the impugned order dated 5.10.2007 the learned Single Judge further observed that 15 out of 20 panchas have opposed the selection of the petitioner on the ground that the mark-list submitted by the petitioner is a forged one. This is clearly mentioned in the resolution itself and thus, the resolution is in violation of the Panchayat Karmis Yojna and for this reason the Court is not inclined to interfere in the writ petition.

3. Mr. Abhishek Arjaria, learned counsel for the petitioner submitted that under Section 70 of the Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (for short 'the Act') Panchayat has the power to appoint any officers or servants other than the Panchayat Secretary. He further submitted that previous approval of the prescribed authority, namely, the Collector of the district, is required only for the posts for which the officers or other servants of the Panchayat are to be appointed for the efficient discharge of its duties and not to the named officer or named servant for a Panchayat. He submitted that when the case of the appellant clearly was that he had been appointed by the Panchayat under Section 70 (1) of the Act as a Panchayat Karmi and along with writ petition the appellant had also annexed not only the resolution of the Panchayat appointing the appellant as Panchayat Karmi but also the order dated 22.8.2007 of the Sarpanch of the Gram Panchayat in which it was stated that the Panchayat in its resolution dated 28.1.2007 appointed the appellant as Panchayat Karmi, the learned Single Judge ought not to have dismissed the writ petition in limine and instead ought to have issued notices to the respondents if he had any doubts about the truth of the case of the petitioner that he had been selected and appointed by the Panchayat in its meeting held on 21.8.2007. He referred to the provisions of the Panchayat Karmi Scheme formulated by the Govt. of Madhya Pradesh, Panchayat and Rural Development Department on 12th September 1995 to show that under the scheme, the Panchayat could appoint a Panchayat Karmi by resolution and that the Collector had no power to issue an advertisement and appoint a Panchayat Karmi.

4. Mr. Kumaresh Pathak, learned Govt. Advocate on the other hand has submitted that Section 86 of the Act provides that the State Government or the prescribed authority may, by an order in writing, direct any Panchayat to perform any duty imposed on it, by or under this Act and the Panchayat is bound to comply with such directions of the State Govt. or the prescribed authority 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. He submitted that since the Gram Panchayat in this case failed to discharge its duties under Section 70 (1) of the Act, the Collector as the Prescribed Authority has issued the advertisement in exercise of his powers under Section 86 of the Act.

5. Sections 70 and 86 of the Act, on which reliance has been placed by the learned counsel for the parties are quoted herein below:-

> "70. Other officers and servants of Panchayat – (1) Subject to the provisions of Section 69 every Panchayat may with previous approval of prescribed authority appoint such other officers and servants as it considers necessary for the efficient discharge of its duties.
>
> (2) The qualifications, method of recruitment, salaries, leave, allowance and other conditions of service including disciplinary matters of such officer and servants shall be such as may be prescribed."
>
> "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 be 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."

6. The language of sub section (1) of Section 70 is clear that subject to the provisions of Section 69 every Panchayat may with the previous approval of prescribed authority appoint such other officers and servants as it considers necessary for the efficient discharge of its duties. Section 69 deals with appointment of Secretary and Chief Executive Officers of Janpad Panchayats and Zila Panchayats. Since under sub-section (1) of Section 70 the power of Panchayat to appoint other officers and servants as it considers necessary for the efficient discharge of its duties has been made subject to the provisions of Section 69 of the Act, a Panchayat cannot appoint a Secretary or Chief Executive Officer of the Panchayat, but, it can appoint such other officers and servants as it considers necessary for the efficient discharge of its duties. A close reading of sub-section (1) of Section 70 further makes it clear that the previous approval of the prescribed authority is required not to a named officer or named servant but to the appointment

of such officers other than the Secretary and servants as the Panchayat considers necessary for the efficient discharge of duties of the Panchayats. Sub-section (1) of Section 86 of the Act quoted above empowers the State Government or the prescribed authority to direct the Panchayat to perform any duty imposed upon it by or under this Act and sub-section (2) of Section 86 provides that the Panchayat shall be 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.

7. The case of the appellant in the writ petition was that the Panchayat had performed its duties under sub-section (1) of Section 70 of the Act and appointed the appellant as a Panchayat Karmi and in support of his case the appellant had filed a copy of the resolution of the Panchayat dated 28.1.2007 and a copy of the appointment order issued by the Sarpanch pursuant to the resolution as annexures to the writ petition. Whether such a resolution in fact had been passed or not by the Panchayat on 28.1.2007 selecting the appellant as Panchayat Karmi could only be ascertained by the Court after a reply was filed by the Panchayat and other respondents and if the Court after considering the material before it comes to the conclusion that the Gram Panchayat had infact failed to perform its duty under Section 70 (1) of the Act, it could dismiss the writ petition after upholding the issue of the advertisement by the Collector for fresh selection of Panchayat Karmi. But, the learned Single Judge instead of issuing notice to the respondents has dismissed the writ petition in limine without ascertaining the truth of the case of the petitioner that he had been appointed by the Panchayat in the resolution dated 28.1.2007 of the Panchayat.

8. Regarding the observations of the learned Single Judge in the impugned order that female candidates had not been given preference in accordance with clause 3.4 of the Panchayat Karmis Scheme and hence the resolution of the Panchayat was in violation of Panchayat Karmis Yojna, it was not for the Court to suo motu decide whether the resolution adopted by the Panchayt was in violation of clause 3.4 of the Panchayat Karmis Yojna. Whether there has been such a violation or not could be decided only after replies were filed by the respondents and not at the stage of motion or admission when only the case of the appellant in the writ petition was before the Court that the appellant had been validly appointed in accordance with the resolution dated 21.8.2007 of the Panchayat and the order issued by the Sarpanch.

9. For the aforesaid reasons we set aside the impugned order dated 5.10.2007 passed by the learned Single Judge and remit the matter back to the learned Single Judge. Notice for admission be issued to the respondents and after the respondents file the return, the writ petition be heard and decided in accordance with law.

Order accordingly.

I.L.R. [2008] M. P., 2527
WRIT APPEAL

Before Mr. Justice S. Samvatsar & Mrs. Justice Indrani Datta

3 July, 2008*

STATE OF M.P. ... Appellant

Vs.

ASHOK KUMAR SHARMA & others ... Respondents

Municipalities Act, M.P. (37 of 1961), Sections 86, 87, 88 & 94, Municipal Employees Recruitment and Conditions of Service Rules, M.P. 1968, Rule 2(e), (f) - *Respondents alleging to be employees of State Government having been appointed in a cell constituted by the State Government namely M.P. State Municipal Services (Technical Cell) in exercise of powers conferred w/s 86 of Act of 1961 - Held - There is a specific rule which provides that only State Municipal Service (Executive) are excluded from the definition of "municipal service" and "municipal employee" and other categories i.e. State Municipal Service (Health) and State Municipal Service (Engineering) are included in the said definition - Respondents employees belong to category (c) i.e. State Municipal Service (Engineering), hence, they are covered by the definition of "municipal service" and "municipal employee" - Hence, so long as said definitions are not challenged, the respondents employees cannot claim that they are the employees of the State Government, even though they are getting the same salary and benefits as are available to the State Government employees - Appeal Allowed* (Para 16)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 86, 87, 88 व 94, नगरपालिका कर्मचारी भर्ती और सेवा की शर्तें नियम, म.प्र., 1968, नियम 2(ई), (एफ) – प्रत्यर्थियों ने, राज्य सरकार द्वारा 1961 के अधिनियम की धारा 86 के अन्तर्गत प्रदत्त शक्तियों के प्रयोग में गठित प्रकोष्ठ अर्थात् म.प्र. राज्य नगरपालिका सेवा (तकनीकी प्रकोष्ठ) में नियुक्त किये जाने से, राज्य सरकार के कर्मचारी होना अभिकथित किया – अभिनिर्धारित – विनिर्दिष्ट नियम है जो उपबंधित करता है कि केवल राज्य नगरपालिका सेवा (कार्यपालिक) "नगरपालिका सेवा" और "नगरपालिका कर्मचारी" की परिभाषा से अपवर्जित हैं और अन्य श्रेणीयाँ अर्थात् राज्य नगरपालिका सेवा (स्वास्थ्य) और राज्य नगरपालिका सेवा (अभियांत्रिकी) उक्त परिभाषा में सम्मिलित हैं – प्रत्यर्थी कर्मचारी श्रेणी (सी) अर्थात् राज्य नगरपालिका सेवा (अभियांत्रिकी) से सम्बद्ध हैं, इसलिए वे "नगरपालिका सेवा" और "नगरपालिका कर्मचारी" की परिभाषा के अन्तर्गत आते हैं – इसलिए जब तक उक्त परिभाषाओं को चुनौती नही दी जाती, प्रत्यर्थी कर्मचारी यह दावा नही कर सकते कि वे राज्य सरकार के कर्मचारी हैं, यद्यपि वे भी राज्य सरकार के कर्मचारियों को उपलब्ध के समान वेतन और लाभ प्राप्त कर रहे हैं – अपील मंजूर।

Cases referred :

AIR 1984 SC 161, 2002(2) MPLJ 530, 1993 MPLSR 513.

Ami Prabal, Dy.A.G., for the appellants/State.

S.P. Shrivastava, for the respondents.

*W.A. No.414/2007 (Gwalior)

JUDGMENT

The Judgment of the Court was delivered by S. SAMVATSAR, J. :–This writ appeal is filed by the appellants State of Madhya Pradesh challenging the order dated 28th July, 2006 passed by single Bench of this Court in Writ Petition No.2661/03 whereby the writ court has allowed the writ petition filed by the petitioners (respondents herein) and declared them to be the State employees.

2. Brief facts of the case are that the respondents employees have filed a writ petition before the single Bench alleging that they were appointed in a cell constituted by the State Government namely Madhya Pradesh State Services (Technical Cell) in exercise of the powers under Section 86 of the Madhya Pradesh Municipalities Act, 1961 (for short the "Act"). These employees were appointed by the Director, Urban Administration, Bhopal and Deputy Director, Urban Administration. The main object of constituting the said cell was to look after the construction work, water supply facility and other technical jobs of the municipalities. Copy of the decision for consituting the said Cell is Annexure P/1 with the record of the writ petition dated 27th May, 1976. In the said decision, it is mentioned that at number of times, there are financial difficulties with the small municipalities and they cannot engage highly paid employees for carrying on their work. Hence, the Government has decide to constitute the cell and to post engineer, sub-engineers, tracers etc in various municipalities. It was agreed to by Annexure P/2, with the record of the writ petition, that these employees shall get the same pay scale which is payable to the employees of the State Government and Public Works Department, however, these employees shall be treated as municipal employees. Vide Annexure P/3 with the record of the writ petition, the Government has decided that the engineers appointed under the said cell shall be entitled to the same allowances and other benefits and GPF will be deducted from their salary, so that they can get pension. Vide Annexure P/4 dated 3/12/1976, it was further mentioned that these engineers will get the same salary which is payable to the Government employees and they will also be entitled to the same benefits and, compulsory deductions will be made from their salary. Annexure P/5 is the circular seeking clarification about the facilities to these employees and it was clarified that these employees shall get the same facilities as are available to the Government employees. Vide Annexure P/6 dated 18/10/1985 it was again mentioned that Executive Engineers, Sub Engineers, tracers etc will get the same salary which is payable to the employees of Public Works Department. Thus, it is clear that the appointing authority of these employees are the Director, Urban Administration, Bhopal and Deputy Director, Urban Administration and they are their disciplinary authorities. The Government has right to transfer these employees from one municipality to another.

3. Considering all these aspects, the writ court has held that the total control over the respondents employees is that of the State Government, hence, the single

Bench allowed the writ petition filed by the petitioners (respondents herein) and declared that these employees to be State Government employees. The reasoning assigned by the learned writ court Bench is as under :

> With regard to functions of the petitioners, it is clear that the petitioners are working in the office of Deputy Director, Urban Administration, Gwalior Division, Gwalior. They have been appointed in the aforesaid office. The office was created in order to extend the help and supervise the construction work taken by the municipalities. The municipalities have been assigned the work of construction also in their respective areas. Earlier the work was assigned to the Public Works Department. Hence, from the above facts, it is clear that the office of Deputy Director, Urban Administration in which the petitioners are working is performing the functions of the State Government and from the facts stated above, it is clear that the State Government has total control with regard to their appointment, disciplinary action and payment of salary, creation of posts, fixation of terms and conditions of employment. In such circumstances, in my opinion, the petitioners are the employees of the State Government and they fall within the definition of "State Employees".

The aforesaid order passed by the learned writ court is under challenge in this writ appeal.

4. The contention of Shrimati Ami Prabal, the learned Deputy Advocate General, appearing for the appellants State is that even though the State Government has full control over the respondents employees, still they cannot be declared as State employees in view of various circulars and the provisions of the Act and the rules framed thereunder.

5. Shrimati Ami Prabal, learned Deputy Advocate General, appearing for the appellants State has invited attention of this Court first to Section 86 of the Act which provides that the State Government may, for the purpose of providing officers to the Council under Section 87 or 88, constitute in the prescribed manner, the following Municipal Services for the State to be called -

(a) State Municipal Service (Executive);
(b) State Municipal Service (Health) ; and
(c) State Municipal Service (Engineering).

6. Sub-section (2) of Section 86 provides that the State Government may make rules in respect of recruitment, qualification, appointment, promotion, leave scale of pay, all allowances whatever name called. Thus, from this sub-section, it is clear that the State Government has power to frame rules in respect of the above service conditions.

7. In exercise of these powers, the State Government has framed rules namely

Madhya Pradesh Municipal Employees Recruitment and Conditions of Service Rules, 1968 (herein after referred to as "1968 Rules"). Shrimati Prabal has invited attention of this Court to the said rules. The words " Municipal Employee" and "Municipal Service" are defined in clause (e) and (f) respectively of Rule 2 of the said Rules. Clause (e) defines "Municipal Employee" and as per the said definition, municipal employee means a person appointed to or borne on the cadre of the Staff other than a member of the State Municipal Service (Executive). Similarly, " Municipal Service" is defined in clause (f) of the said rule and as per the said definition, " Municipal Service" means the service or group of posts in connection with the affairs of the municipalities other than the State Municipal Service (Executive).

8. Contention of the learned counsel for the appellants is that the members of State Municipal Service (Executive) are excluded from the definition of " Municipal Employee". Thus, as per the said definition, the employees covered under category (a) of Section 86 of the Act are excluded from municipal employee and municipal service and this aspect is not considered by the learned writ court.

9. Learned counsel for the appellants pointed out that the writ court has relied upon a Full Bench decision of this Court in the case of *Suresh Chandra Sharma vs. State of M.P. and others*, 2002 (2) MPLJ 530. From perusal of the said judgment, it is clear that the Full Bench in the aforesaid case was considering the question whether the Chief Municipal Officer is a Government servant or not. Undisputedly, the Chief Municipal Officer will be covered by category (a) of Section 86 i.e. State Municipal Service (Executive) which is specifically excluded from the definition of " municipal service" as per clause (f) of Rule 2 of 1968 Rules and, therefore, the Full Bench has rightly held that the Chief Municipal Officer is a Government Servant.

10. In reply to the arguments raised by the learned counsel for the appellants, Shri S.P.Shrivastava, learned counsel for the respondents employees submitted that the entire control over these employees is that of the State Government i.e. these employees are appointed by the Director, Urban Administration, Bhopal and Deputy Director and perform the functions of the State Government. The State Government has total control with regard to appointment, disciplinary action, payment of salary, creation of posts, fixation of terms and conditions of these employees etc. and, therefore, the writ court has rightly held that the respondents employees are the State employees.

11. In support of this contention, counsel for the respondents has relied upon a judgment in the case of *Vidya Sagar Kulshreshtha vs. State of M.P. and others*, 1993 MPLSR 513. This judgment is delivered by the State Administrative Tribunal. He admitted that this judgment has no binding effect over this Court. However, he submitted that special leave petition filed by the State Government against the said judgment is dismissed by the Apex Court.

12. From perusal of the order passed by the Apex Court in the aforesaid SLP, we find that the the said SLP was dismissed without discussion of law. The order is single line order dismissing the SLP. Hence, the said judgment cannot be a precedent under Article 141 of the Constitution of India as no law is laid down by the Apex Court while dismissing the said SLP.

13. Shri S.P.Shrivstava, learned counsel for the respondents employees has referred to Section 94 of the Act which provides powers to the council to appoint staff. According to him, as the respondents employees were not appointed under Section 94 of the Act and were appointed under Section 86 of the Act, they are not the members of service.

14. Said argument raised by the learned counsel for the respondents employees is without any merit, because the question is whether the respondents are the employees of the State Government or not. Rules (e) and (f) of Rule 2 of 1968 Rules specifically exclude the State Municipal Service (Executive) who are covered by category (a) of Section 86 of the Act and not of categories (b) and (c) of Section 86 i.e. the State Municipal Service (Health) and State Municipal Service (Engineering). This itself makes it clear that the present respondents are covered by the definition of " Municipal Service" and "Municipal employee" and so long as the said rule is not challenged by the present respondents, they are not entitled to get any benefit.

15. Shri Shrivastava has also invited attention of this Court to the judgment of the Apex Court in the case of *State of Gujarat vs. Mathuradas Mohan Lal Kedia and others,* AIR 1984 SC 161 wherein the Apex Court was dealing with the provisions of Gujarat Panchayat Act and the Apex Court has held that the members of Gujarat Panchayat Service are government servants. Said judgment turns upon the construction of the provisions of Gujarat Panchayat Act.

16. In the present case, there is a specific rule which provides that only State Municipal Service (Executive) are excluded from the definition of " municipal service" and "municipal employee" and other categories i.e. State Municipal Service (Health) and State Municipal Service (Engineering) are included in the said definition. Respondents employees belong to category (c) i.e. State Municipal Service (Engineering), hence, they are covered by the definition of "municipal service" and "municipal employee". Hence, so long as said definitions are not challenged, the respondents employees cannot claim that they are the employees of the State Government, even though they are getting the same salary and benefits as are available to the State Government employees.

17. In the present case, the learned single Judge has not considered the effect of the definition of "municipal employee" and "municipal service" as defined in rule 2 (e) and (f) of 1968 Rules and has held the petitioners (respondents herein) as Government employees only because the State Government is in overall control over these employees and thus has committed grave error.

18. Resultantly, this appeal is allowed and the impugned judgment is set aside. The writ petition filed by the respondents – writ petitioners is dismissed with no order as to costs

Appeal allowed.

I.L.R. [2008] M. P., 2532

WRIT APPEAL

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

8 July, 2008*

ANIRUDDH PANDEY ... Appellant

Vs.

ADVOCATE GENERAL & ors. ... Respondents

Election Rules, 1968, Rule 31 - ***Wrong mentioning of serial number in ballot paper*** - *Petitioner contested the election for the post of member, Bar Council of M.P. - Serial number of appellant was wrongly mentioned in column 5 although it was correctly mentioned in ballot paper - Petitioner challenged the election process after more than a month of voting - Held - When name of a person is mentioned in ballot paper and everybody knows that he is contesting election, wrong mention of serial number would not amount to rejection of nomination paper - Voters are Law Graduates, therefore, misprint in column No.5 was not likely to mislead the literate voters - Appeal dismissed.* (Paras 13, 14 & 15)

निर्वाचन नियम, 1968, नियम 31 – मतपत्र में सरल क्रमांक का गलत उल्लेख – याची ने म.प्र. राज्य अधिवक्ता परिषद के सदस्य के पद हेतु चुनाव लड़ा – क्रमांक कॉलम 5 में अपीलार्थी का सरल क्रमांक गलत रूप से उल्लिखित था यद्यपि यह मतपत्र में सही रूप से उल्लिखित था – याची ने निर्वाचन प्रक्रिया को मतदान के एक माह से अधिक समय पश्चात् चुनौती दी – अभिनिर्धारित – जब एक व्यक्ति का नाम मतपत्र में उल्लिखित हो और प्रत्येक व्यक्ति यह जानता हो कि वह चुनाव लड़ रहा है, सरल क्रमांक का गलत उल्लेख नामांकन पत्र को निरस्त करने की कोटि में नही आयेगा – मतदाता विधि स्नातक हैं, इसलिए कॉलम क्र. 5 में छपाई की गलती शिक्षित मतदाताओं को भुलावे में डालने वाली नही थी – अपील खारिज।

Cases referred :

Vol. XX SCJ 162, 2001 AIR SCW 4916.

B.K. Pandit, for the appellant.

T.S. Ruprah, Addl.A.G., for the respondent No.1.

J U D G M E N T (ORAL)

The Judgment of the Court was delivered by **R.S. Garg, J.** :–Before dictating the judgment, we asked the learned counsel for the appellant that whether he wants to exploit the liberty reserved in favour of the appellant or not because the observations made by us are likely to affect his right of election petition, learned counsel for the appellant after consulting the appellant,

*W.A. No.686/2008 (Jabalpur)

who is also present in the Court, submitted that the appellant wants a judgment on the merits of the matter and is not interested in the election petition. In view of that submission, we have to consider the merits of the matter.

2. Being aggrieved by the order dated 23.6.2008 passed in Writ Petition No. 6706/2008 by the learned Single Judge dismissing the appellant/petitioner's writ petition, the appellant has filed this writ appeal under Section 2 of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005.

3. Short facts necessary for consideration of this writ appeal are that the appellant, a person registered with the Bar Council of Madhya Pradesh, is a practicing Advocate. He submitted his candidature for the elections, which were to commence on 29.4.2008. The appellant deposited a sum of Rs.10,000/- towards the fee.

4. According to the appellant, vide notification dated 2nd April, 2008, the State Bar Council of Madhya Pradesh notified for general information to all concerned that as per election programme for the office of the Member State Bar Council of Madhya Pradesh after withdrawal, the list of the contesting candidates in alphabetical order has shown in the notification. The name of the appellant was shown at Serial No. 11. The polling was to be held on 29.4.2008. A ballot paper was printed and was provided to the voters for casting their votes in preferential order.

5. The frame of the voting paper was that the Column No. 1 contained the serial number, Column No. 2 contained the names as are shown in the roll of the Bar Council, Column No. 3 provided the date of the enrollment, Column No. 4 provided the address with place of the candidates, Column No. 5 again provided for serial number and Column No. 6 provided the blank place for a mark to be put by the voter.

6. Undisputedly, in the Column No. 1, the appellant was shown at Serial No. 11 but in the Column No. 5 instead of showing at Serial No. 11, the appellant was shown as No.1. Undisputedly, there is a printing mistake in the ballot paper.

7. The appellant, who was probably to loose the election filed the writ petition on 31.5.2008 that is almost after about rather more than a month of the voting, on the ground, that wrong mention of the serial number in Column No. 5 amounted to rejection of the candidature of the appellant, therefore, the entire process of the election was vitiated.

8. Submission of the learned counsel for the appellant was that the persons, who wanted to cast their votes in favour of the appellant were confused that whether the appellant continued to be at Serial No. 1 or at 11 and, therefore, under the said confusion, they could not cast their votes in favour of the appellant. It is also submitted that mentioning of the wrong serial against the appellant in Column No. 5 had vitiated the entire process, therefore, the entire election deserves to be quashed.

9. Placing reliance upon a judgment of the Supreme Court reported in Volume XX Supreme Court Journal Page 162 *Surendra Nath Khosla & Another Versus Dalip Singh & Others*, it was submitted that if a nomination paper is illegally/ improperly rejected then the Court has to presume that result of the election had been materially affected. Reliance is also placed on the judgment of the Supreme Court in the matter of *Santosh Yadav Vs. Narender Singh* {2001 AIR Supreme Court Weekly 4916} to reinforce the submission.

10. The learned Single Judge has dismissed the petition observing interalia that Rule 31 of Election Rules, 1968 issued by the State Bar Council of Madhya Pradesh provides for an election petition, therefore, the appellant would be entitled to file an election petition. With the liberty, the learned Single Judge has disposed of the petition.

11. We have heard learned counsel for the parties and have perused the records.

12. So far as application of afore-referred two judgments of the Supreme Court is concerned, unless the Court comes to a conclusion that the matter on hands is a case relating to improper rejection of the nomination paper, the same cannot be applied. If the Court holds that the nomination paper was illegally or improperly rejected then there would be no problem in presuming that the improper rejection of the nomination paper led to change of the result or to say that the result of the election was materially affected.

13. Learned counsel for the appellant has not submitted before us that wrong mention of the serial number amounted to rejection of the nomination paper. His case is that wrong mention of the serial number should be presumed to be rejection of the nomination paper.

14. In our considered opinion, when the name of a person is mentioned in the ballot paper and everybody knows that he is contesting the election then wrong mention of the serial number would not amount to rejection of the nomination paper especially when by notification dated 2nd April, 2008, The State Bar Council of Madhya Pradesh issued the list of the contesting candidates. If the Bar Council knew and informed all concerned that the appellant is a contesting candidate and has mentioned his name in the ballot paper then by no stretch of imagination, a wild presumption can be raised that the nomination paper or the candidature of the appellant was rejected.

15. So far as the appellant's submission that the voters were confused in casting their votes is concerned, we must immediately reject the submission because present was not an election where the voters were illiterates or they did not know what is what. It is not an election where by the marks/symbols, the identity of a candidate is fixed. Present is an election where the voters are graduates so also they are law graduates and they can read and write English properly. If in the first column, the appellant is shown at Serial No. 11 then a misprint in Column No. 5, in our considered opinion, was not likely to mislead the literate voters. The appellant

cannot be allowed to make a capital out of a printing mistake. We could also understand the plea of the appellant if some voters have filed their affidavits to fortify the submission made by the appellant that because of some confusion, they could not cast their votes in favour of the appellant.

16. The ipse dixit made by the appellant is nothing but is a self-assessment that if Serial No. 11 was shown in Column No. 5, the results might have changed. In the democracy, when a person is to be elected by the agency of voters then such person must ultimately rely upon the freewill of the voters and should not have the fanciful idea. We are unable to hold that the appellant could make out any ground for any interference in the election.

17. The appeal is dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2535
WRIT APPEAL
Before Mr. Justice S. Samvatsar & Mr. Justice A.P. Shrivastava
31 July, 2008*

SANJEEV YADAV ... Appellant
Vs.
LAKSHMIBAI NATIONAL INSTITUTE OF PHYSICAL EDUCATION & ors. ... Respondents

Constitution, Article 226/227 - ***Service Law*** - *Appellants were terminated on the ground that selection committee not constituted properly - Order challenged in W.P. - W.P. dismissed - Writ Appeal filed - Held -The selection committee and the members who were within the knowledge about the defect in the selection committee have slept over the matter for about three and half years after appointments were made - Thus, the members have acquiesced themselves and have no right to challenge the appointment on the ground of selection - Appellants/ petitioners are the candidates from outside the State of Madhya Pradesh have got their appointments and altered their position by leaving other jobs available to them - Appeal allowed.* (Paras 25 & 26)

संविधान, अनुच्छेद 226/227 – सेवा विधि – अपीलार्थियों को सेवा से इस आधार पर पृथक किया गया कि चयन समिति उचित रूप से गठित नही की गई थी – आदेश को रिट याचिका में चुनौती दी गई – रिट याचिका खारिज – रिट अपील पेश – अभिनिर्धारित – चयन समिति और सदस्य, जिन्हें चयन समिति में त्रुटि के बारे में जानकारी थी, नियुक्तियाँ की जाने के पश्चात् लगभग साढ़े तीन वर्ष तक मामले में निष्क्रिय रहे – इस प्रकार सदस्यों ने स्वयं मौन सम्मति दे दी है और उन्हें चयन के आधार पर की गई नियुक्ति को चुनौती देने का कोई अधिकार नही है – अपीलार्थी/याचिकाकर्ता मध्य प्रदेश राज्य के बाहर के अभ्यर्थी हैं और उन्होंने नियुक्तियाँ प्राप्त करने के बाद उपलब्ध अन्य कार्यों को छोड़ते हुए अपनी स्थिति परिवर्तित कर ली है – अपील मंजूर।

*W.A. No.390/2006 (Gwalior)

Cases referred :

2002(2) JLJ 391, W.P. No.839/2003 decided on 30.07.2005, AIR 2002 SC 2322.

H.D. Gupta with *S.K. Gupta,* for the appellant.

Anoop Chaudhary with *Anil Sharma,* for the respondents.

JUDGMENT

The Judgment of the Court was delivered by S. SAMVATSAR, J. :–This judgment shall govern the disposal of both the writ appeals as they arise out of the common order dated 09th October, 2006 passed by single Bench of this Court in Writ Petitions No.3417/05 and 3887/05 whereby the single Bench has dismissed both the aforesaid writ petitions filed by petitioners, appellants herein challenging their termination orders.

2. Facts of the case, in brief, are that Lakshmibai College of Physical Education, Gwalior was established on 17/8/1957 by the then President of India S. Radhakrishnan with a total strength of 27 students in Bachelor of Physical Education. At that time, the said college was affiliated to Vikram University, Ujjain. In the year 1963, two years Master Degree Course in Physical Education was commenced and in the year 1964, the College was affiliated to Jiwaji University, Gwalior. In the year 1976, it was granted national status and renamed as Lakshmibai National College of Physical Education. On 2/9/1995, the Government of India, Ministry of Human Resources and Development, on the recommendations of University Grant Commission granted the status of deemed University to the said college and renamed it as "Lakshmibai National Institute of Physical Education, Gwalior" (LNIPE). Subsequently, the college was transferred to a society constituted on 24/4/2001 called as Lakshmibai National Institute of Physical Education Society and for regulating the functions of the said society, Memorandum of Association (MOA) of the society was formulated. It is also averred that the norms of University Grant Commissioner (UGC) are also binding on the said Institution.

3. The institution wanted to fill up some posts of Lecturers, hence, permission was sought to appoint lecturers by relaxing the ban on appointment. Said permission was granted to the institution. An advertisement was issued on 28/3/2000 calling for applications for filling up the posts of lecturers. However, no appointments could be made in pursuance of the said advertisement. Second advertisement (Annexure P/10) was issued on 6/12/2001. It was mentioned in the second advertisement that the candidates who had applied in pursuance of the previous advertisement were also eligible for participating in the said selection. Appellants writ petitioners and other candidates had applied for the post of lecturers. Their applications were considered and they were called for interview by the selection committee. On 17/3/2002 interviews were held and the present appellants were selected.

4. One public interest litigation (WP No.450/02) was filed by one Rajendra Tayal, who was a social worker and who was totally stranger to the institution, challenging the appointments made by the institution. Said PIL was disposed of by this Court vide order dated 19/4/2004 in following terms :-

> "Petitioner shall submit a representation to the respondent No.3 Board of Management modifying the prayer claimed by him and raising necessary grievances alongwith copy of this petition. Respondent No.3 – Board of Management shall consider the representation and after hearing the affected party shall decide the representation within a period of six months from the date of submission of the representation. However, any of the parties aggrieved with the action of respondent No.3 will have a remedy to approach the appropriate forum against the decision of the Board of Management. A copy of t he report be sent to the Registrar of this Court for compliance."

7. In pursuance of the directions issued by Division Bench in the above PIL, said Rajendra Tayal submitted a representation to the institution and higher authorities for cancellation of appointments of the. Said representation was considered by the Board of Management in its meeting dated 30th May, 2005 and the Board of Management found that the selection committee was not properly constituted. The Selection committee constituted by the Vice Chancellor was contrary to the rules of the institution and therefore, show cause notice was issued to the appellants petitioners on 31/5/2002. The appellants petitioners after service of the show cause notice requested the Board of management to supply certain documents. However, those documents were never supplied. The appellants petitioners filed their reply to the show cause notice and the Board of Management after considering their reply has found that the Selection Committee was contrary to Rule 23 of the MOA, hence, terminated the appointments of the appellants petitioners.

8. Being aggrieved by the termination of their services, appellants filed writ petitions before this Court. Those petitions are dismissed by the impugned orders, hence, these writ appeals.

9. The first contention raised by the learned counsel for the appellants is that t he 23rd meeting of the Board of management was convened on 7th January, 2005 and in that meeting, nothing wrong was found in the selection. The minutes of the Board of Management are on record at page No.198 of the paper book. The question of appointment of lecturers was considered by the Board of Management at Item No.5.19 and the Board found that Vice Chancellor Dr. K.K.Verma had acted in good faith while deciding not to chair the meeting of the Selection Committee for the reason that his daughter was one of the candidates for the said post. Further inclusion of one SC/ST member namely Professor Bangar on the Selection Committee by the then Vice Chancellor was also found in

accordance with the existing guidelines as the recruitment was for SC and ST posts also and Shri Bangar was a member of SC/ST category. The then Vice Chancellor also appeared to have acted in good faith while inducing Dr.T.C.Kundu as member on the Selection Committee as an additional member. The Board also noted that the Government's permission to fill up 12 posts of lecturers was available for the purpose and all the candidates appointed were eligible in terms of educational qualification etc. Hence, the Board decided to recommend to the competent authority. i.e. the President of the Institute for ex post facto approval to the composition of Selection Committee with effect from the date of its composition and the Institute was to apprise the Board of the decision taken by the competent authority in the matter. Thus, the matter was referred for ex post facto approval to the composition of Selection Committee. Said approval was, however, rejected and hence, the appointments were cancelled.

10. The contention of the learned counsel for the appellants is that in the 23rd meeting of the Board of Management, the appointments of the appellants were validated. It is also contended that there was no challenge to the merits of the candidates nor any bias was alleged against the members of the Selection Committee.

11. Counsel for the appellants next contended that the Memorandum of Association empowers the Vice Chancellor to constitute a committee.

12. Memorandum of Association (MOA) is on record as Annexure P/2 which is at page No.109 of the paper book. Rule 5 (a) of the Rules known as Lakshmibai National Institute of Physical Education, Gwalior appended to the MOA provides for the powers of the Board of management. Clause (iii) of Rule 5 (a) of the Rules referred to above deals with the appointment of Professors, Readers, Lecturers and other academic staff as may be necessary on the recommendations of the Selection Committee. Selection Committee is provided in Rule 12. For appointment of Lecturers, Professors, and Readers in the Institute the Selection Committee shall be consisted of (i) Vice Chancellor of the Institute as Chairman; (ii) a person nominated by the President as member; (iii) Dean of Faculty/ Head of Department/ Chairman, Board of Studies, provided he is a Professor as member; and (iv) Three outside experts nominated by the President from a panel of not less than six names recommended by the Academic Council and approved by the Board of Management.

13. Officers of the institute are provided in Rule 15. Rule 15(c) relates to Vice Chancellor. It is contended that the proviso to the said rule provides that a person appointed as Vice Chancellor shall retire from office during the tenure of his office of extension, thereof, if any, he completes the age of 65 years. If the office of Vice Chancellor becomes vacant due to death, resignation, or otherwise and in his absence due to illness or any other cause, the Dean or if there is no Dean, the senior most Professor shall perform the duties of Vice Chancellor. Relying on this

provision, it is contended by the counsel for the appellant that if for any reason like illness or for any other cause, the Vice Chancellor is not available, then the senior most Professor shall perform the duties of Vice Chancellor.

14. Contention of the learned counsel for the appellants petitioners is that Dr. K.K.Verma who was the Vice Chancellor of the Institute withdrew himself from the Chairman of the Selection Committee on account of the fact that his daughter was one of the candidates. He pointed out that Dr.Pramod Kumar Pande was the senior most Professor in the institute at that time. Thus, the action of appointing Shri Pramod Kumar Pande as Chairman of the Selection Committee cannot be said to be illegal.

15. Counsel for the appellants drew attention of this Court to clause (ii) of Rule 15 (c) of the Rules referred to above which provides that the Vice Chairman may, if he is of the opinion that immediate action is called for on any matter, exercise any power conferred upon any authority of the Institute under the Memorandum of Association and the Rules and Regulations/ Bye-laws, take such action or proceed to take such action and shall report to the concerned authority on the action taken by him on such matters and if the authority concerned as mentioned in clause (i) is of the opinion that such action ought not to have been taken, it may refer, the matter to the President whose decision thereon shall be final.

16. It is contended by the learned counsel for the appellant that Dr.T.C.Kundu was inducted as an expert in place of one of the members of the committee i.e. Mrs. Sudarshan Pathak who fell sick at the eleventh hour. Prof. R.K.Bangad and Dr.T.C.Kundu were members of the panel prepared in this behalf and therefore, there is no illegality.

17. The Writ Court, however, held that said change in the selection committee was malafide. Initially for appointment of lecturers, the Selection Committee was constituted of Dr. J.S.Narukha as Chairman. So far as Dr. J.S.Narukha is concerned, he at the relevant time, was no more holding the office and in his place Dr.K.K.Verma was appointed as Vice Chancellor. Dr. Verma withdrew from the selection committee on the ground that his daughter was appearing in the interview. Other member of the committee was Shri Shailendra Sharma who was nominated by President, LNIPE. Third member was Mrs. Sudarshan Pathak who, according to the appellants, fell sick and in her place Dr. T.C.Kundu , who was also a member of the panel was taken. Shri B.S.Rathore, Coordinator, Physical Eduction, Rajasthan University, Jaipur was the another member of the Selection Committee who participated in the selection process. The fourth member was Dr.T.C.Kundu who was also a member of the panel constituted for the Selection Committee for the selection of lecturers and who participated in the selection process as an expert of the subject. Thus, according to the appellants- petitioners, the selection committee was constituted as per the powers of the Vice Chancellor, and therefore. there was no irregularity.

18. Having heard the learned counsel for the parties, we find that the appellants petitioners were appointed in the year 2002. Public interest litigation was filed by one Rajendra Tayal which was decided in the year 2004. Thereafter, show cause notices were issued to the appellants petitioners and they have been removed from service. Thus, they continued on the post of for a period of about three and half years.

19. The writ Court has not found anything against the appellants petitioners so far as their merits are concerned. Since there is no finding about bias, therefore, selection of the appellants is set aside only on the ground that the Selection Committee was not in accordance with the rules. Even assuming for a moment that the Selection Committee was not constituted strictly in accordance with the rules, still the question is whether that itself will be a ground for terminating the services.

20. The contention of the learned counsel for the respondents is that if the selection committee is not constituted in accordance with the rules referred to above, then the entire selection process will be vitiated. For this purpose, he referred to the judgment of this Court in the case of *Salam Mani Singh (Dr.)vs. Lakshmibai National Institute of Physical Education and others*, 2002 (2) JLJ 391. In para 32 of the judgment, this Court has held that due to illegal constitution of the Selection Committee, entire selection process vitiates.

21. Another judgment on the question is in the case of *Jagdish Singh Gurjar vs. State of M.P. and others*, (WP 839/2003 decided on 30/7/2005) decided by one of us (S.Samvatsar, ,J.) in which also this Court has held that a member who was not competent to be a member of the Selection Committee if participates in the selection process, then the entire selection process vitiates.

22. From perusal of the aforesaid judgments, it appears that in all cases challenge to the selection was made by unsuccessful candidates and allegations of causing prejudices were present. In the present case, the selection process is not challenged by any of the candidates and the appointments of the appellants petitioners are cancelled by the management itself, that too, after lapse of about three and half years. No objection to the selection process was taken by any of the candidates nor the management. One Rajendra Tayal who filed the PIL was not even a staff member of the institute nor he was a connected, in any manner, to the selection process. He had filed the PIL only as a social worker.

23. It is pertinent to point out that all the members who had participated in the selection process were from the Panel prepared for that purpose. All the members were inducted by the then Vice Chancellor and there are no allegations that these persons were not qualified to be the members of the Selection process or have acted in a manner prejudicial to the interest of the Institute.

24. Counsel for the respondents pointed out that Shri R.K.Bangad was included in the panel as a member of ST/SC. His name was included in the panel only

because the entire recruitment was to be made for reserved candidates i.e. ST/ SC, and therefore, presence of a member of SC/ST category was necessary. Hence, Shri R.K.Bangad was included in the panel as per the guidelines of UGC, which are filed with this appeal. It is also contended by learned counsel for the respondents that the Committee, which was constituted was as per the norms, which are applicable to the respondent-institution.

25. The Apex Court in the case of Chandra Prakash Tiwari vs. Shakuntala Shukla and others, AIR 2002 SC 2322, has considered the question about promissory estoppal in the matter of selection process. In para 32 of the said judgment, after considering large number of judgments, the Apex Court has laid down that :

> "In conclusion, this Court recorded that the issue of estoppal by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of the learned counsel pertaining the doctrine of Estoppal by conduct. It is to be noticed at this juncture that while the doctrine of estoppal by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/ selection. It is a remedy which stands barred and it is in this perspective in Om Prakash Shukla (*Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.* - 1986 Supp. SCC 285) a Three Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a Petition challenging the said examination would not arise.

Thus, the Apex Court has laid down that challenge to the selection committee by a candidate appearing in the examination should be entertained before he has participated in the proceedings. This principle is laid down by the Apex Court on the principle that rules cannot be challenged after the game is over; one has to challenge the rules before participating in the game. This principle is laid down by the Apex Court in respect of candidates who at number of times have not processed defect in the constitution of selection committee.

26. However, in the present case, the Vice Chancellor himself had constituted the selection committee and the members who were within the knowledge about the defect in the selection committee have slept over the matter for about three and half years after appointments were made. Thus, the members have acquiesce themselves and have no right to challenge the appointment on the ground of

selection when the appellants petitioners who are the candidates from outside the State of Madhya Pradesh have got their appointments and altered their position by leaving other jobs available to them. Therefore, in the present case, this principle will apply with greater force and hence, their appointment could not have been cancelled by the Institute after a lapse of about more than three and half years on the ground that the committee which selected them was not in accordance with the rules.

27. The learned single Judge has completely lost sight of the aforesaid principle laid down by the Apex Court. From record, it appears that the impugned action was taken only because there was change in the management of the Institute in these three and half years.

28. In such circumstances, we find that the impugned order cannot be sustained in the eyes of law. Hence, we allow the writ appeals filed by the appellants, set aside the impugned orders and allow the writ petitions filed by the appellants petitioners by quashing the order of termination of their services and direct to reinstate the appellants petitioners in service forthwith with full back wages. If the appellants-petitioners remained out of job during this period, they will have to file an affidavit before the Registrar, LNIPE to that effect and after due verification of the said affidavit by the Registrar, back wages shall be payable.

Appeal allowed.

I.L.R. [2008] M. P., 2542

WRIT APPEAL

Before Mr. Justice S. Samvatsar & Mrs. Justice Indrani Datta

7 August, 2008*

MADAN LAL NARVARIYA ... Appellant

Vs.

SHRIMATI SATYA PRAKASHI PARSEDIA & ors. ... Respondents

Municipalities Act, M.P. (37 of 1961), Section 47 - ***Difference between word 'approval' and 'satisfaction' - Recalling of president - Held - The degree of application of mind in the word 'satisfaction' is greater than the word 'approval' - Normally approval is granted to an act of some other persons and not of his own - However, so far as satisfaction is concerned - Satisfaction is personal satisfaction - Said satisfaction can also be on proposal or any other material or report submitted by some other authority, still personal satisfaction is necessary - Hence, greater degree of application of mind is necessary, when the mandate of the law is that the 'satisfaction' is the satisfaction of himself - Appeal dismissed.*** (Para 21)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 47 – शब्द 'अनुमोदन' और 'समाधान' में अंतर – अध्यक्ष को वापस बुलाना – अभिनिर्धारित – शब्द 'समाधान' में

*W.A. No.98/2008 (Gwalior)

मस्तिष्क के प्रयोग की मात्रा शब्द 'अनुमोदन' से अधिक है – सामान्यतः अनुमोदन कुछ अन्य व्यक्तियों के किसी कार्य का किया जाता है न कि अपने स्वयं के कार्य का – तथापि जहाँ तक समाधान का संबंध है – समाधान व्यक्तिगत समाधान है – कथित समाधान कुछ अन्य प्राधिकारियों द्वारा प्रस्तुत प्रस्ताव या किसी अन्य सामग्री या रिपोर्ट पर भी हो सकता, फिर भी व्यक्तिगत समाधान आवश्यक है – इसलिए मस्तिष्क के प्रयोग की अधिक मात्रा आवश्यक है, जब विधि का यह आदेश हो कि 'समाधान' स्वयं का समाधान है – अपील खारिज।

Cases referred :

2005(3) MPLJ 578 (FB); 2005(2) MPHT 119 (FB), 2004(1) MPHT 312.

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

R.D. Jain with *B.B. Shukla,* for the respondent No.1.

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

K.S. Tomar with *J.S. Kaurav,* for the intevenor.

JUDGMENT

The Judgment of the Court was delivered by

S. SAMVATSAR, J. :–This judgment shall govern the disposal of both the aforesaid writ appeals as they arise out of common order dated 25th January, 2008 passed by the single Bench of this Court in Writ Petition No.5293/07 whereby the learned writ Court has allowed the writ petition filed by petitioner Shrimati Satya Prakashi Parsedia (respondent No.1 herein) and quash the order of recall.

2. Brief facts of the case are that respondent No.1 writ petitioner Shrimati Satya Prakashi Parsedia was elected as President of Municipal Council, Dabra, District Gwalior. She was declared elected as the President in the elections held on 20/11/2004. In the Municipal Council, Dabra there are as many as 24 councillors. Out of said 24 councillors, it is alleged that 20 councillors moved an application for recall on 3/11/2007 under Section 47 of the Madhya Pradesh Municipalities Act, 1961 (hereinafter, referred to as "Act"). Said proposal was accepted by the Collector and was forwarded to the State Government. The State Government referred the matter to the State Election Commission and the State Election Commission on the reference made by the State Government started taking steps for elections on the proposal of recall of the writ petitioner.

3. Writ petitioner Shrimati Satya Prakashi Parsedia filed the writ petition inter alia alleging that the procedure prescribed by sub-section (2) of Section 47 of the Act was not followed, hence, the entire action of the Collector and the State Government for recall is illegal and without jurisdiction.

4. To appreciate the argument, we have to first refer to the facts of the case. On 03/11/2007, at about 11.45 an application for recall under Section 47 of the Act was moved which was allegedly signed by 20 councillors. This application was addressed to the Collector who marked it to the Project Officer, District Urban Development Agency (DUDA). Said project officer prepared a note Annexure R/1 stating that an application under Section 47 of the Act is received

on 3/11/2007 at 11.45 by the councillors by remaining present before the Collector for recalling the President. Said President is on post since 12/1/2005, hence she completed two years ten months period. 3/4th of the councillors have moved an application for recalling the said President. This note was put up to the Project Officer. The Project Officer wrote a report on the said note that out of 24 councillors of Nagar Palika, Dabra, 20 councillors have signed the said application after remaining present before the Collector and they have made a demand for recalling the President Shrimati Satya Prakashi Parsedia. It is mentioned by the Project Officer that he has verified the signatures. He has mentioned that the said Shrimati Satya Prakashi Parsedia was elected in the year 2004 when the result of the election was published in the gazette dated 28/12/2004. The President had taken over charge on 12/1/2005. As 3/4th of the councillors have signed the application and the President is in office for more than two years, the proposal for recall should be forwarded to the State Government. Collector has made an endorsement on the said note "approved" and signed the same. Thereafter, the matter was sent to the State Government for action.

5. The contention of the learned counsel for the writ petitioner respondent herein is that for taking action under Section 47 of the Act, recording of satisfaction by the Collector is mandatory. In such a situation, it will be necessary for this Court to refer to the said provision which reads as under: -

> "47. Recalling of President. - (1) Every President of a Council shall forthwith be deemed to have vacated his office if he is recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area casting the vote in accordance with the procedure as may be prescribed:
>
> Provided that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of the total number of the elected Councilors and presented to the Collector.
>
> Provided further that no such process shall be initiated :-
>
> (i) within a period of two years from the date on which such President is elected and enters his office ;
>
> (ii) if half of the period of tenure of the President elected in a by-election has not expired :
>
> Provided also that process for recall of the President shall be initiated once in his whole term.
>
> (2) The Collector, after satisfying himself and verifying that the three fourth of the Councilors specified in sub-section (1) have the proposal of recall, shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.

(3) On receipt of the reference, the State Election Commission shall arrange for voting on the proposal of recall in such manner as may be prescribed."

6. From careful reading of Section 47, we find that sub-section (1) of Section 47 provides that every President of a Council shall forthwith be deemed to have vacated his office if he is recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area casting the vote in accordance with the procedure as may be prescribed. Proviso to this sub-section provides that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of the total number of the elected Councilors and presented to the Collector. Thus, as per this proviso, the application for recall is to be signed by 3/4th of the Councilors and is to be presented to the Collector. The procedure prescribed under this proviso is fully complied with in the present case as the application was signed by twenty out of twenty four Councilors and was presented to the Collector.

7. Second proviso to sub-section (1) of Section 47 of the Act further lays down that no such process shall be initiated within a period of two years from the date on which such President is elected and enters his office. In the present case, the President had entered the office on 12/1/2005 and the application for recall is filed on 3/11/2007 i.e. after expiry of two years and ten months. Hence, on this ground also, the application was maintainable. Proviso (ii) of second proviso to sub-section (1) of Section 47 further lays down that the application for recall shall not lie if half of the period of tenure of the President elected in a by-election has not expired. In the present case, the President was elected for five years and thus half of the tenure has already expired on the date of filing of the application for recall.

8. The third proviso to Section 47(1) further lays down that the process for recall of the President shall be initiated once in his whole term. There is nothing on record in the present case to show that before the present application for recall, any other application was moved. Hence, requirement of this proviso is also fulfilled.

9. Sub-section (2) of Section 47 of the Act provides that the Collector, after satisfying himself and verifying that the three fourth of the Councilors specified in sub-section (1) have the proposal of recall, shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.

10. Shri R.D.Jain, learned counsel for the respondent - writ petitioner contended that this requirement is not fulfilled in the present case, while Sarvashri D.K.Katare, counsel appearing for appellants in WA 98/08 and Vivek Khedkar, learned Government Advocate appearing in WA 339/08 on behalf of appellants State have submitted that as the Collector has made an endorsement "approved" on the proposal of the Project Officer, the Collector has satisfied himself and verified the facts that 3/4th of the Councilors have signed the proposal.

October-08 (first)

11. To support their contentions, learned counsel for the appellants have relied upon Full Bench decision of this Court in the case of State of Madhya Pradesh vs. Mahendra Kumar Saraf (2005 (3) MPLJ 578 wherein the Full Bench has considered the language and scope of Section 47 of the Act and held that the proviso to Section 47 of the Act does not contemplates that the proposal should be presented by the 3/4th of the Councilors in person or that for the purpose of verification of the signatories, their personal presence is necessary. It is held that the provision nowhere mandates that the verification shall be made in presence of signatories. Verification of signatures of signatories after procuring their presence may be one of the modes for such verification but it is not the only or exclusive mode, because nothing can be read in the proviso itself to this effect. Therefore, to put fetters on the discretion of the Collector in selecting the mode of verification by making the personal presence of signatories mandatory while the law is framed to give him more elbow room in the matter would be clearly against the legislative intent.

12. Another Full Bench judgment on this point is in the case of *Smt. Naravadi Bai Choudhary vs. state of M.P.*, 2005 (2) MPHT 119 in which similar view is taken and it is held that all the signatories i.e. Councilors are not required to be physically present before the Collector at the time of presentation of the proposal. The proposal, even if, is presented by one of the Councilors, it is a valid proposal.

13. The third judgment relied upon by the counsel for the parties is in the case of *Narayan Nagina vs. State of M.P. an others*, 2004 (1) MPHT 312 wherein it is laid down that sub-section (1) of Section 47 is to be read with sub-section (2) and on reading of both the sub-sections, it is apparent that the proceedings for recall shall be deemed to be initiated when the Collector has satisfied himself after verification that three fourth of the Councilors mentioned in sub-section (1) have submitted a proposal of recall. Satisfaction and verification by the Collector is mandatory under sub-section (2). Unless the Collector is satisfied after verification that three fourth of the elected Councilors have signed the proposal, it cannot be said that the proceeding for recall has been initiated. Proceeding for recall shall be deemed to be initiated after verification and satisfaction by the Collector as envisaged under sub-section (2) of Section 47 of the Act.

14. Relying on these full decisions of this Court, the contention of the learned counsel for the appellants is that the requirement of Section 47 of the Act is fully complied with in the present case.

15. So far as question of signatures are concerned, the petitioner alongwith his petition had filed affidavits of seven Councilors in support of the petitioner wherein they have stated that they have signed the proposal under the influence of the Collector. Thus, they have admitted their signatures on the application for recall and therefore, the question of verification of their signatures does not arise and there is no doubt about the genuineness of their signatures.

16. The question in the present case is whether the Collector had satisfied himself and verified the fact that 3/4th of the Councilors have signed the proposal before sending the proposal to the State Government.

17. In the present case, the Collector had endorsed the proposal of the Project Officer as "approved". The question which emerges is whether said "approval" can be said to be "satisfaction" of the Collector.

18. The question in the present case is what is the difference between the words "approval" and "satisfaction". The legislature in its wisdom has used these phrases in different statutes at different places.

19. As per Webster's New World Dictionary, the world "approval" means favourable attitude or opinion, formal consent or permission, approval for the customer to examine and decide whether to buy or return goods. The word "approve" means one's consent or sanction. The word "satisfaction" is defined in the said dictionary and means comfort, content, contentment, delight, enjoyment, fulfillment, gratification, happiness, pleasure etc.

20. "Approval" in common parlance means what has to be approved has already taken place in its nature of ratification or what has already happened or has taken place. The word 'approval' in contradistinction to the words 'previous permission', shows that the action is taken first and 'approval' is to be obtained afterwards. The word 'approval' does not equate with the word 'appeal'. The word approval does not mean anything more than either confirming, ratifying, assenting, sanctioning or consenting. While the word 'satisfaction' means the act of satisfying or the state of feeling being satisfied and the action of satisfaction contemplates adequate deliberation for acceptability of the conclusions. In other words, it means that before recording satisfaction, the concerned Authority must be convinced or persuaded to come to the conclusion.

21. In case of 'satisfaction' as well as 'approval', the application of mind is necessary. Section 47 of the Act lays down that before forwarding proposal the Collector must satisfy himself. The word "for the reasons to be recorded" are not in the act. Hence, it may be argued that objective satisfaction of the Collector is not necessary. However, still the subjective satisfaction is necessary. Thus, application of mind in both the cases is necessary. The degree of application of mind in the word 'satisfaction' is greater than the word 'approval'. Normally the approval is granted to an act of some other persons and not of his own. However, so far as satisfaction is concerned, said satisfaction is personal satisfaction. Said satisfaction can also be on the proposal or any other material or report submitted by some other authorities, still personal satisfaction is necessary. Hence, greater degree of application of mind is necessary, when the mandate of the law is that the "satisfaction" is the satisfaction of himself.

22. In the present case, the Collector has used the word "approved" and has nowhere stated that he has satisfied himself about the contents of the application.

Thus, he has not applied his mind to a degree which is required under Section 47 of the Act. It does not mean that the Collector cannot satisfy himself on the report given by some other agency. It is open to the Collector to get report from some other agency and then satisfy himself on the basis of the said report. However, this exercise is not done by the Collector in the present case. He has merely approved the proposal of the Project Officer. That itself suggests that he has not applied his mind to a greater degree which is the requirement of sub-section (2) of Section 47 of the Act. Therefore, the learned single Bench has rightly allowed the writ petition filed by respondent No. I herein. We do not find, in the present case, that the Collector has applied his mind as required under Section 47(2) of the Act before sending the proposal to the State Government.

23. In the present case, it is the effect of the satisfaction that gives rise to the jurisdiction, which is not present in the case in hand Hence, the action of the Collector in forwarding the proposal to the State Government cannot be sustained in the eyes of law. Hence, these appeals being devoid of any merit are dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2548
WRIT PETITION
Before Mr. Justice R.K. Gupta
28 March, 2008*

HEMCHANDRA PANDEY (DR.) & ors. ... Petitioner

Vs.

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

A. Civil Services (General Conditions of Service) Rules, M.P. 1961, Rule 12(2)(c) - *Determination of Seniority - Transfer on deputation to another department and subsequently absorption in that department - Past service for determining seniority can be counted only subject to equivalence of post - Nature of duties, minimum qualifications, responsibilities and powers exercised by an officer holding post, extent of territorial or other charge held, salary for post are to be considered - Merely because payscale in parent department and absorption is same itself is not determinative factor.* (Paras 17, 19, 31 & 32)

क. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र. 1961, नियम 12(2)(सी) – वरिष्ठता का अवधारण – प्रतिनियुक्ति पर दूसरे विभाग में स्थानांतरण और बाद में उस विभाग में विलयन – वरिष्ठता अवधारित करने के लिए पिछली सेवा केवल पद की तुल्यता के अध्यधीन गिनी जा सकती है – कर्तव्य की प्रकृति, न्यूनतम अर्हताऐं, दायित्व और पद को धारित करते हुए किसी अधिकारी द्वारा प्रयोग की गई शक्तियाँ, क्षेत्रीय विस्तार या धारित अन्य भार, पद के लिए वेतन विचारित किये जाने चाहिए – केवल इसलिए कि मूल विभाग और विलयन में वेतनमान समान है स्वयं अवधारक कारक नही है।

*W.P. No.2584/2003 (Jabalpur)

B. **Civil Services (General Conditions of Service) Rules, M.P. 1961, Rule 12(2)(b) & (c) (As amended w.e.f. 2nd April 1998) - *Applicability* - *Rule 12(2)(b) & (c) shall apply with retrospective effect.*** (Paras 26 & 27)

ख. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र. 1961, नियम 12(2)(बी) व (सी) (2 अप्रेल 1998 से यथासंशोधित) – प्रयोज्यता – नियम 12(2)(बी) व (सी) भूतलक्षी प्रभाव से लागू होंगे।

Cases referred :

(1987) 4 SCC 566, (1997) 3 SCC 561, (2006) 8 SCC 129, AIR 2000 SC 594, (1998) 9 SCC 298, (2001) 4 SCC 433, (1994) 2 SCC 622.

A.G. Dhande with *Sharad Verma,* for the petitioners.

Harish Agnihotri, G.A., for the respondent No.1and 2.

Sujoy Paul, for the respondent No.3.

ORDER

R.K. Gupta, J.:–The present petition has been filed by the petitioners challenging the order Annexure P-10 dated 21.3.2003 whereby the services rendered by the respondent No.3 in his parent department as Research Officer have been counted for the purposes of reckoning seniority to respondent No.3 after his absorption on the post of Assistant Director with the borrowing department.

2. The facts leading to the present petition are that the petitioner No.1 was working with the Panchayat and Social Welfare Department. He was sent on deputation with the respondents. The petitioner No.1 was given ad-hoc promotion in his parent department on 24.4.1985 as a Leprosy Welfare Officer. Subsequently, by an order dated 15.8.1986 when the new Directorate i.e. the Woman and Child Development was opened the petitioner No.1 was sent on deputation. At that time the petitioner was holding the pay scale of Rs. 2200-4000.

3. So far as the petitioner No.2 is concerned, initially he was appointed in the Tribal Welfare Department on 19.3.1979. By an order dated 15.8.1986 the petitioner No.2 was transferred on deputation to the Woman & Child Development Department. He was promoted in the parent department as Assistant Research Officer on 24.1.1994 in the pay scale of Rs.2200-4000. The petitioner No.2 was also sent on deputation in the Directorate of Woman and Child Development.

4. The petitioner No.3 was directly recruited on the post of Assistant Director in the Woman and Child Development Department w.e.f. 23.2.1995 and he was promoted on the post of Joint Director in the pay scale of Rs.12000-16500.

5. So far as the respondent No.3 is concerned, he was initially employed with the Manpower and Planning Department and he was also sent on deputation. He came on deputation with the Woman and Child Development Department on 10th September, 1997 and at this time he was also in the pay scale of Rs.2200-4000.

6. There is no dispute between the parties that all the petitioners and the respondent

No.3 have been absorbed as Assistant Director with the respondents. So far as the petitioner No.2 is concerned, his absorption was cancelled, therefore, he filed a writ petition before this Court, which was registered as W.P.No. 3863/2006 (S) (Harish Chandra Agrawal Vs. State of M.P. & others). This Court allowed the said writ petition by passing an order on 18.5.2007 whereby the order of cancelling absorption of petitioner No.2 was set aside. The order dated 18.5.2007 passed by this Court has also been upheld by a Division Bench of this Court in Writ Appeal No. 1107/2007 (*State of M.P. & Anr Vs. Harish Chandra Agrawal*) decided on 15.2.2008.

7. A chart showing the position before the absorption of the petitioners and respondent No.3 as well as position after their absorption is as under:-

	Petitioner No.1 Hemchandra Pandey		Petitioner No.2 H.C. Agrawal		Petitioner No.3 R.C.Raghuwanshi		Respondent No.3R.C. Shukla
Date	Position	Date	Position	Date	Position	Date	Position
8.2.1980	Appointed as Supervisor, Panchayat & Social Welfare Deptt. in the pay scale of Rs.246-460.	19.3.79	Appointed as Asst. Statistical Officer in Tribal Welfare Deptt. equivalent to Asst. Director	23.2.1995	Appointed as Asst. Director in Woman & Child Development Deptt (Direct Recruitee)	1980	Entered as Steno-Clerk
24.4.85	Promoted as Leprosy Welfare Officer on ad-hoc basis	15.8.86	Transferred on deputation to Woman & Child Development Deptt and absorbed on 3.11.1988		--	21.6.93	Promoted as Research Officer in parent Deptt.
4.4.98	Absorbed in Woman & Child Welfare Deptt. as Asst. Director	26.12.94	Promoted as Asst. Research Officer in Tribal Welfare Deptt (Parent Deptt)		--	10.9.97	On deputation to Woman & Child Development Deptt as Asst. Director
25.4.98	Promoted as Dy. Director	25.4.98	Promoted as Dy. Director Absorbed as Asst. Director on 24.7.98		--	Oct.2002	Promoted as Dy. Director in Woman & Child Dev. Dept.
14.12.99	Promoted as Joint Director	14.12.99	Promoted as Joint Director	23.5.98	Promoted as Joint Director	26.2.98	Absorbed as Asst. Director in Woman & Child Dev. Deptt.

8. The respondent No.3 submitted a representation whereby he submitted that after absorption his seniority be counted by taking into account the previous services rendered by him in his parent department. The said representation was accepted by the respondents and the request of respondent No.3 was acceded. Consequently, the order dated 21.3.2003 (Annexure P-10) was passed whereby the seniority was given to the respondent No.3 from 21.6.1993 i.e. the service rendered by the

respondent No.3 in his parent department w.e.f. 21.6.1993 has been taken into account for the purposes of reckoning seniority to him in the borrowing department where he is also absorbed. The respondents have also passed a consequential order, which is Annexure P-11 to the petition, whereby seniority of the petitioners has been re-fixed. The petitioners being aggrieved have filed the present petition to challenge the order Annexure P-10 and so also the consequential order Annexure P-11.

9. Before considering the rival contentions of the parties it would be appropriate to refer here to the concerning Rule for reckoning the seniority. The Rule 12 of the M.P. Civil Services (General Conditions of Service) Rules, 1961 (in short "the Rules") provided for reckoning the seniority, which reads as under:-

> **"12. Seniority.**-The seniority of the members of a service or a distinct branch or group of posts of that service shall be determined in accordance with the following principles, viz.-
>
> **(a) Direct recruits.-** (i) The seniority of a directly recruited Government servant appointed on probation shall count during his probation from the date of his appointment: viz
>
> (ii) The same order of inter se seniority shall be maintained on the confirmation of the normal period of probation. If, however, the period of any direct recruits is extended, the appointing authority shall determine whether he should be assigned the same seniority as would have been confirmed on the expiry of the normal period of probation or whether he should be assigned a lower seniority.
>
> **(b) Promoted Government servants.-** A promoted Government servant shall count his seniority from the date of his confirmation in the service to which he has been promoted and shall be placed in the gradation list immediately below the last confirmed member of that service but above all the probationers:
>
> Provided that where two or more promoted Government servants are confirmed with effect from the same date, the appointing authority shall determine their inter se seniority in the service in which they are confirmed, with due regard to the order in which they were included in the merit list, if any, prepared for determining their suitability for promotion and their relative seniority in the lower service from which they have been promoted.
>
> **(c) Officiating Government servant.** - The inter se seniority of Government servants promoted to officiate in a higher service or a higher category of posts shall, during the period of their officiation, be the same as that in their substantive service or grade irrespective of the dates on which they began to officiate in the higher service or grade:

Provided that -

(i) If they were selected for officiation from a list in which the names of Government servants considered suitable for trial in a promotion, to the Higher service or grade were arranged in order of merit, their inter se seniority shall be determined in accordance with the order of merit in such list;

(ii) The seniority of a permanent Government servant appointed to officiate in another service or post by transfer shall be determined ad hoc by the appointing authority:

Provided that the seniority proposed to be assigned to such Government servant shall be determined and intimated to him in the order of appointment:

(iii) Where a permanent government servant is reduced to a lower service, grade or category of posts, he shall rank in the gradation list of the latter service, grade or category of posts above all the others in that gradation list, unless the authority ordering such reduction by a special order indicates a different position in the gradation list for such reduced Government servant.

(iv) Where an officiating Government servant is reverted to his substantive service or post he shall revert to his position in that gradation list relating to his substantive appointment which he held before he was appointed to officiate in the other service or post."

10. Subsequently, the aforesaid Rule 12 was substituted and was made effective from 2nd April, 1998. The relevant portion of the amended Rule 12 (2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961 is reproduced as under:-

"(2) **Seniority of Transferees.**-(a) The relative seniority of persons appointed by transfer from one department of another department of the State Government shall be determined in accordance with the order of their selection for such transfer.

(b) Where a person is appointed by transfer in accordance with the provisions in the Recruitment Rules, providing for such transfer in the event of non availability of suitable candidates by direct recruitment or promotion, such transferee shall be grouped with direct recruits or promotees, as the case may be, and he shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion.

(c) In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "transfer on deputation/transfer") his seniority in the grade in which he is absorbed will normally be counted from the date of absorption) the

same or equivalent grade on regular basis, in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority, from the date he has been holding the post on deputation or the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department whichever is later.

Explanation - The fixation of seniority of a transferee in accordance with the above rule will not however affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words it will be operative only in filling up of vacancies in higher grade taking place after such promotion."

11. On the basis of the aforesaid facts, learned counsel for the petitioners submitted that the order impugned Annexure P-10 has been passed arbitrarily and the respondent No.3 could not have been given ante-dated seniority i.e. from the date when he was not even absorbed. It is contended that the matter of grant of seniority was governed by the amended Rule 12(2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961. It is also submitted that in the present case the order impugned Annexure P-10 has been passed treating it to be a special case in favour of the respondent No.3 only and what was the special circumstance of the case, no record has been made available to this Court and thus, under these circumstances, the order Annexure P-10 is arbitrary. Learned counsel for the petitioner further contended that without there being equation of post the benefit as such should not have been granted in favour of the respondent No.3 only by counting his past services which he has rendered in the parent department.

12. Learned counsel appearing on behalf of the respondent No.3 in reply to the aforesaid submissions put forth by the learned counsel for the petitioners submitted that the matter with regard to grant of seniority is not governed by the Rules, which were amended w.e.f. 2.4.1998. He submitted that the matter for grant of seniority is governed by the general law of the service jurisprudence and the past services rendered by the respondent No.3 in the parent department have rightly been taken into account. He also submitted that even assuming that in the order Annexure P-10 in para-2 it is stated that the order for counting past services which has been made in favour of the respondent No.3 shall not be counted in case of any other officer in future, yet the petitioners can submit a representation and similar benefits can be claimed by the petitioners also. He further submitted that once the respondent No.3 was in the pay scale of Rs.2200-4000 on the date when he was sent on deputation and was also absorbed in the same pay scale then under the service jurisprudence the past services of the respondent No.3 cannot be ignored.

13. To substantiate his contention, learned counsel for the respondent No.3 placed heavy reliance on the judgment passed by the Apex Court in *K. Madhavan*

and another Vs. Union of India and others, 1987 (4) SCC 566 and referred to para-21 of the said judgment, which is reproduced as under:-

> "We may examine the question from a different point of view. There is not much difference between deputation and transfer. Indeed, when a deputationist is permanently absorbed in the CBI, he is under the rules appointed on transfer. In other words, deputation may be regarded as a transfer from one government department to another. It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to the same or an equivalent post in another government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he has been transferred. It has been observed by this Court that it is a just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected and presented by taking the same into account in determining their ranking in the new service cadre. See *R.S. Makashi v. I.M. Menon, Wing Commander J. Kumar v. Union of India."*

On the basis of the aforesaid, learned counsel for the petitioners submitted that once a person has been appointed on transfer from one department to another department and subsequently is absorbed permanently then there is not much difference between deputation and transfer. It is contended by him that the deputation may be regarded as transfer from one department to another department and he submitted that it will be against all rules of service jurisprudence if the past services are not counted for seniority.

14. Learned counsel for the petitioners submitted that a true meaning of the judgment passed by the Apex Court in *K. Madhawan* (supra) would be that for the purposes of counting the past services what is material is the transfer on the equivalent post in another government department. It is submitted by him that the services rendered in the parent department on the equivalent post i.e. when both the posts are equivalent, would only be considered for counting seniority in terms of the decision rendered by Apex Court in *K. Madhawan* (supra).

15. The contentions of the rival parties with regard to the applicability of the judgment rendered by the Apex Court in K. Madhawan (supra) are considered. In the present case, at the first instance, it is to be seen that the State Government has not submitted any record for the satisfaction of this Court that at any point of time any mind was applied by the authority before passing the order Annexure P-10 that the post of Research Officer, which was occupied by the respondent No.3 in his parent department before absorption was the equivalent post on which the respondent No.3 has been absorbed in the borrowing department. Though the

order Annexure P-10 states that the services rendered by the respondent No.3 on the equivalent grade before absorption shall be taken into account for the purposes of reckoning seniority on the absorbed post. For the purposes of ascertaining the equivalent grade as per the general service jurisprudence for applying the principles in *K. Madhawan* (supra) one has to see whether there is any application of mind by any authority that both the posts of respondent No.3 were the equivalent post. Merely because the pay scale of petitioners as well as of respondent No.3 were the same before their sending on deputation and the petitioners and respondent No.3 were absorbed in the same pay scale whether it would mean that both the posts were equivalent.

16. In this reference, the judgment passed by the Apex Court in *M. Hara Bhupal Vs. Union of India and others*, 1997 (3) SCC 561 is relevant and in para 2 of the said judgment the Apex Court has considered the question with regard to equivalence of post and ultimately the Apex Court came to the conclusion that the pay scale by itself is not determinative factor for the purposes of equivalence of the posts. What is material is the class or position in a class according to the value. The paragraph 2 from the said judgment is profitably reproduced as under:-

> "2. .....Thus we have no hesitation in holding that these are two distinct posts. The eligibility criteria for absorption vide Rule 5 of both the sets of Rules lays down two essential conditions, namely, that on the date on which the two sets of Rules were brought into force the incumbent should have been holding the same post and would be eligible to be absorbed in the same grade. In the context although the scale of pay of the post of Private Secretary and Section Officer may be the same and both may be in the feeder cadre for further promotion yet the words same grade occurring in Rule 5 of the respective Recruitment Rules must mean the same post to which the particular Recruitment Rules would apply. Interchangeability in the two posts cannot be read in the Rules. In other words a Section Officer could be eligible to be absorbed only as Section Officer and a Private Secretary only as Private Secretary subject to the condition of holding the post on the date of commencement of the respective Rules.
>
> It is submitted by the applicant that notwithstanding that he was holding the post of Private Secretary he should be deemed to be in equivalent grade or in analogous post and on that basis he could be absorbed even as Section Officer so that he would not lose the benefit of past service for seniority. The applicant seeks to rely on the decision of the Supreme Court in *Hari Nandan Sharan Bhatnagar v. S.N. Dixit*. It was held in that case that the dictionary meaning of 'grade' is rank, position in scale, a class or position in a class according to the value. The term however was explained in *A.K. Subraman v. Union of* India as

having various shades of meaning in the service jurisprudence, sometimes used to denote a pay scale and sometimes a cadre. It is relevant to note that under the Stenographers' Service Recruitment Rules, 1989, 58 posts of Private Secretary were specified and under the Miscellaneous Posts Recruitment Rules, 1989, 91 posts of Court Officer/Section Officer were specified subject to variation depending on workload. In that sense posts of Private Secretary and Court Officer/ Section Officer would fall in two separate cadres. The word 'cadre' means permanent establishment of regiment forming nucleus for expansion at need and it does not mean post but strength of the establishment (See *D.G. of Health Services v. Bikash Chatterjee*.) We are therefore unable to reach any element of interchangeability in the two posts for the purpose of absorption in the post of Section Officer as analogous to absorption in the post of Private Secretary for reckoning seniority. The argument of the applicant therefore cannot be accepted."

On the basis of the aforesaid law, under the service jurisprudence without deciding the equivalence of post held by a person came on transfer and a deputationist cannot be treated to be the holder of the equivalent post for the purposes of conferring seniority by counting his past services which he has rendered in the parent department. The question for grant of seniority is considered in *Indu Shekhar Singh and others Vs. State of U.P. and others*, 2006 (8) SCC 129 wherein ultimately the Apex Court came to the conclusion that grant of seniority is not a fundamental right but is only a civil right.

17. Thus, it is not necessary that in every case where a person is absorbed by way of his transfer from one department to another department then his past services are to be counted necessarily. The past services have to be counted only subject to equivalence of post and before conferring seniority there has to be an application of mind with reference to the equivalence of post.

18. The question with regard to equivalence of post has also received consideration by the Apex Court in *S.I. Rooplal and another Vs. Lt. Governor through Chief Secretary, Delhi and others*, AIR 2000 SC 594 and in para-17 of the said judgment the Apex Court reiterated the principle of counting the past services rendered by a transferee who is absorbed and ultimately held that the past services which an incumbent has rendered before his absorption have to be counted. The Apex Court considered the question with regard to factors which may determine the equation of two post and ultimately in para-17 of the judgment the following law has been laid down:-

"In law, it is necessary that if the previous service of a transferred official is to be counted for seniority in the transferred post then the two posts should be equivalent. One of the objections raised by the respondents in this case as well as in the earlier case of Antony Mathew

is that the post of a Sub-Inspector in the BSF is not equivalent to the post of a Sub-Inspector (Executive) in Delhi Police. This argument is solely based on the fact that the pay-scales of the two posts are not equal. Though the original Bench of the tribunal rejected this argument of the respondent, which was confirmed at the stage of SLP by this Court, this argument found favour with the subsequent Bench of the same tribunal whose order is in appeal before us in these cases. Hence, we will proceed to deal with this argument now. Equivalency of two posts is not judged by the sole fact of equal pay. While determining the equation of two posts many factors other than 'Pay' will have to be taken into consideration, like the nature of duties, responsibilities, minimum qualification etc. It is so held by this Court as far back as in the year 1968 in the case of *Union of India v. P. K. Roy* (1968) 2 SCR 186 : (AIR 1968 SC 850). In the said judgment, this Court accepted the factors laid down by the Committee of Chief Secretaries which was constituted for settling the disputes regarding equation of posts arising out of the States Reorganisation Act, 1956. These four factors are (i) the nature and duties of a post; (ii) the responsibilities and powers exercised by the officer holding a post; the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for recruitment to the post; and (iv) the salary of the post. It is seen that the salary of a post for the purpose of finding out the equivalency of posts is the last of the criterion. If the earlier three criteria mentioned above are fulfilled then the fact that the salaries of the two posts are different, would not in any way make the post 'not equivalent'. In the instant case, it is not the case of the respondents that the first three criteria mentioned hereinabove are in any manner different between the two posts concerned. Therefore, it should be held that the view taken by the tribunal in the impugned order that the two posts of Sub-Inspector in the BSF and the Sub-Inspector (Executive) in Delhi Police are not equivalent merely on the ground that the two posts did not carry the same pay-scale, is necessarily to be rejected. We are further supported in this view of ours by another judgment of this Court in the case of *Vice-Chancellor, L. N. Mithila University v. Dayanand Jha* (1986) 3 SCC 7: (AIR 1986 SC 1200) wherein at para 8 of the judgment, this Court held : "Learned counsel for the respondent is therefore right in contending that equivalence of the pay-scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. We are inclined to agree with him that the real criterion to adopt is whether they could be regarded of equal status and responsibility ****. The true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts."

19. On the basis of the aforesaid, merely because the pay has been equal of an incumbent in the parent department and absorption in the same pay scale that by itself is not the determinative factor the purposes of equivalence of post and what further has to be considered is the nature of duties, the minimum qualification, responsibilities and powers exercised by an officer holding a post; the extent of territorial or other charge held or responsibilities discharged and the salary for the post. Ultimately the Apex Court held that the salary of a post for the purposes of finding out the equivalence of post is the last of the criteria and not the only criteria.

20. Thus, from the aforesaid analysis of the judgments rendered by the Apex Court in *M. Hara Bhupal* (supra) and *S.L. Rooplal* (supra) it is clear that the service jurisprudence is not allergic to count the past services of a transferee who is permanently absorbed in a department but the past services of such an incumbent are to be counted if he had been holding the equivalent post before his absorption in the department.

21. This being the law settled by the Apex Court, the "State" was under a duty to apply its mind to the equivalence of post and if there had been application of mind then that material should have been placed on record for the satisfaction of the Court. In this reference, it will be necessary to look into the other material filed by the petitioners along with their rejoinder in reply to the return filed by respondents. The same was fled on 10.5.2006 through I.A. No. 3635/2006. Along with the rejoinder certain copies of the note-sheets have been filed as Annexure P/13 which go to show as to how the matter has been processed for grant of seniority in favour of the respondent No.3. In none of the documents it is shown that the respondents have applied their mind to the equivalence of post but the note-sheets reflect that the case of the respondent No.3 be treated as a special case for conferring him seniority by counting his past services. Nothing is shown in the said note-sheet as to why the case of the respondent No.3 be treated as a special case for the purposes of conferring the benefit of seniority to him. While counting the past services of the respondent No.3, it is not apparent from the said note-sheet that at any point of time there had been any application of mind with reference to the equivalence of the two posts.

22. This leads to another question for consideration that when the law has been settled by the Apex Court that previous services of an incumbent who is transferred from one department to another department then after absorption the previous services on equivalent post have to be counted. The petitioners also before their absorption and deputation were holding the pay scale of Rs.2200-4000, then the law which has universal application as settled by the Apex Court should also have been applied for the petitioners and if ultimately the respondents come to the conclusion that the petitioners were not holding the equivalent post in their parent department and are not entitled to count their seniority on the equivalent post on

which they have been absorbed then the matter would have been entirely different. But, in the present case from the record submitted by the petitioners the case of the respondent No.3 alone was considered treating it to be a special case. This also leads to think that there had been some special favour to the respondent No.3 and the same standard or the norms were not applied with reference to the petitioners. The above discussion will be with reference to the respondent No.3 vis-à-vis petitioners No.1 and 2 and the case of the petitioner No.3 is on a different footing. He was directly recruited on the post of Assistant Director and was selected by the Public Service Commission and held the post of Assistant Director w.e.f. 23.2.1995 i.e. the post on which the petitioners and the respondent No.3 were initially absorbed.

23. The fixation of inter se seniority of a deputationist who is permanently absorbed vis-à-vis a person already working in the department by way of direct recruitment is considered in the light of the amended Rule 12(2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961, which came into force w.e.f. 2.4.1998. It prescribes that where a person is appointed by transfer in accordance with the provisions in the Recruitment Rules, providing for such transfer in the event of non availability of suitable candidates by direct recruitment or promotion, such transferee shall be grouped with direct recruits or promotees, as the case may be, and he shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion. The analogous Rule has received consideration in a judgment passed by the Apex Court in *Union of India and another Vs. Onkar Chand and others,* 1998 (9) SCC 298 and paragraphs 10 and 11 from the same are reproduced as under:-

> "10. The indisputable facts, which we have given above, will show that Onkar Chand was a deputationist. When he was permanently absorbed as JIO-I w.e.f. 31-12-1977 he was factually working as JIO-I. Though, he was promoted to officiate in the rank of ACIO-II in the deputation quota by an order dated 11-10-1977, he joined that post on 2-1-1978. A perusal of the promotion list (vide Ex. R-II at p. 124) will show that separate lists were prepared for departmental candidates, permanently absorbed candidates and deputationists. It is also worthy to note that the inter se seniority among the different categories were also fixed in the list. It is not in dispute that the deputationists have got certain percentage of quota for promotion. The said Onkar Chand was promoted to officiate in the rank of ACIO-II only against the deputationist quota is not in dispute. At this juncture, it is necessary to quote the relevant clause in the office memorandum dated 22-12-1959 regarding the fixation of seniority of persons appointed by transfer in accordance with the Recruitment Rules. Clause 7(iii) reads as follows:
>
> "Where a person is appointed by transfer in accordance with provision

in the Recruitment Rules providing for such transfer in the event of non-availability of a suitable candidate by direct recruitment or promotion such transferees shall be grouped with direct recruits or promotees, as the case may be, for the purpose of para 6 above. He shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion." (emphasis supplied)

11. Therefore, when the said Onkar Chand was permanently absorbed (by transfer) in the cadre of JIO-I w.e.f. 31-12-1977 he must take his seniority below the persons in the department already in the cadre of JIO-I on that date. One more relevant factor will be that a person in the cadre of JIO-I has to put in a minimum years of service before aspiring for promotion as ACIO-II. The appellants, taking the date of permanent absorption of the said Onkar Chand as JIO-I w.e.f. 31-12-1977, fixed the seniority in that cadre and so considered his turn for regular promotion as ACIO-II came only in the year 1984 as his junior departmental JIOs were promoted on the basis of 1984 DPC."

24. The grant of seniority to the respondent No.3 w.e.f. 21.6.1993 adversely affected the civil right of seniority of the petitioner No.3 who is a person directly appointed in the department and was appointed prior to the absorption of the respondent No.3 because the petitioner No.3 was appointed on 23.2.1995 and the respondent No.3 is given seniority w.e.f. 21.6.1993. How such an arrangement of a special case would be permissible in the light of Rule 12(2)(b) by treating the case of the respondent No.3 as a special case, would be contrary to the Rule 12(2)(b) of the Rules.

25. Learned counsel for the respondents submitted that by the impugned order Annexure P-10 dated 21.3.2003 the respondent No.3 has been given seniority w.e.f. 21.6.1993 and the amended Rule 12(2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961 has come into operation w.e.f. 2nd April, 1998, therefore, under the circumstances the new Rules have no application in any manner. Learned counsel appearing for the petitioners submitted that the new Rule shall have application in the present case.

26. The submission so put forth by the parties with regard to applicability of the amended Rule 12(2) of the Rules is considered. At the first instance, it has to be seen whether the new Rule will have the retrospectivity or not? The prospectivity and retrospectivity of the Rule will depend upon the nature of the Rule in which it has been worded. A reading down of the Rule 12(2) particularly the Clause (b) and (c) which may apply in the present case itself indicates that Rule 12(2)(b) and (c) shall apply with retrospective effect because under Rule 12(2)(b) and (c) if the seniority is to be conferred to a person who is appointed by transfer and such transferee is to be grouped with the direct recruits or promotees, as the case may be, then he shall be ranked below all direct recruits or promotees, as the case may

be, selected on the same occasion. This is with reference to the Rule 12(2)(b). Thus, grant of seniority of a person ranked below to the direct recruits or promotees after his absorption may depend upon the date before the Rules have come into operation. If the order is passed on or after 2nd April, 1998 when new Rules have come into operation then the effect would be the grant of ante-dated seniority under the new Rules.

27. Similarly, reading down of Rule 12(2)(c) also indicates that when a person who has come on transfer/deputation and is permanently absorbed in the equivalent grade on regular service then seniority would be fixed by counting his past services which he has rendered in the equivalent post. The Rule 12(2)(c) also indicates the grant of seniority with retrospective effect, if the order is passed on or after 2nd April, 1998. The Apex Court in the case of *S.I. Rooplal* (supra) in para-24 has also taken note of the word "whichever is later" in the similar provision which is also used in Rule 12(2)(c) and held that the aforesaid provision is ultra vires to the Constitution. The paragraph 24 from the said judgment is reproduced as under:-

> "It is clear from the ratio laid down in the above case that any Rule, Regulation or Executive Instruction which has the effect of taking away the service rendered by a deputationist in an equivalent cadre in the parent department while counting his seniority in the deputed post would be violative of Arts. 14 and 16 of the Constitution. Hence, liable to be struck down. Since the impugned Memorandum in its entirety does not take away the above right of the deputationists and by striking down the offending part of the Memorandum, as has been prayed in the writ petition, the rights of the appellants could be preserved, we agree with the prayer of the petitioners/appellants and the offending words in the Memorandum "whichever is later" are held to be violative of Arts. 14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned Memorandum. Consequently, the right of the petitioners/appellants to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF, while computing their seniority in the cadre of Sub Inspector (Executive) in the Delhi Police, is restored."

The judgment passed by the Apex Court in *S.I. Rooplal* (supra) further received consideration in the case of *Indu Shekhar* (supra) wherein the words "whichever is later" came up for consideration and the Apex Court in para-46 of its judgment in *Indu Shekhar* (supra) observed as under:

> "For the said reasons only the executive instruction was held to be ultra vires Articles 14 and 16 of the Constitution of India. It was further held that by reason of the memorandum impugned therein the right of the deputationists could not have been taken away and in that view of the matter, the offending part of the memorandum was struck down, as

prayed in the writ petition. The rights of the appellants were held to have been preserved and the words "whichever is later" were held to be ultra vires Articles 14 and 16 of the Constitution of India."

Therefore, in view of the judgments passed by Apex Court the words "whichever is later" as used in Rule 12(2)(c) become meaningless.

28. In this reference, I may profitably refer to the judgment passed by the Apex Court in *P. Mohan Reddy Vs. E.A.A. Charles and others*, 2001 (4) SCC 433 wherein the Apex Court has considered the question in respect of retrospective application of the Rules conferring seniority and came to a conclusion that reading down of the Rule and its effect is the decisive factor for applying the same for giving the retrospective effect and accordingly the same is to be given effect to for the purposes of fixing seniority, if it is permissible with retrospective effect under the Rules. The relevant paragraphs 16 & 17 from the said judgment are reproduced as under:-

16. It would be appropriate to notice a three Judge Bench decision of this Court in S.S. Bola. It is this judgment on which the High Court heavily relied upon. In that case the question of seniority between direct recruits and promotees had been decided by the Supreme Court adopting a particular principle and the seniority list had been drawn up. But the Haryana Legislature enacted an Act governing the conditions of service of the employees and that Act had been given retrospective effect and the legislative intervention became necessary as the entire seniority position became topsy-turvy to such an extent that a direct recruit Assistant Executive Engineer, who was not even borne on the cadre when a promotee had been appointed as a Deputy Engineer became senior to the said promotee. It is because of the retrospectivity of the Act the seniority was required to be re-drawn up in accordance with the Act, the validity of the Act having been upheld. The principle decided in S. S. Bola's case, by this Court will have no application to the present case since, admittedly, the amended provisions which came into force in September, 1992, is not retrospective in nature. The High Court, therefore, was not justified in drawing its conclusion on the basis of the aforesaid judgment in Bola's case. At this juncture, we may notice yet another judgment of this Court in *P. S. Mahal v. Union of India.* It is in this case the Supreme Court by its judgment dated 11th December, 1974 had indicated that in the absence of any Statutory Rules governing the inter se seniority of the Executive Engineers promoted from two sources, the seniority inter se should be determined on a General Principle indicated in the Memorandum dated 22nd June, 1949 on the basis of length of continuous officiation in the grade. The Rule making Authority then came forward with a set of Recruitment Rules in exercise

of power under proviso to Article 309 and gave it retrospective effect from a date prior to the judgment of the Supreme Court, referred to earlier. When the seniority list was re-determined on the basis of the Statutory Recruitment Rules this Court held, that since by the earlier judgment it has been held that the inter se seniority of Executive Engineers promoted from the grades of Assistant Engineers up to 11-12-1974 would be governed by the Rule of length of continuous officiation, that direction and decision cannot be set at not by the subsequent Recruitment Rules coming into force and giving the same retrospective effect. The Court, therefore, directed that in respect of the appointees prior to the promulgation of the recruitment rules the seniority has to be determined on the basis of the decision in *A.K. Subraman v. Union of India.*

17. A conspectus of the aforesaid decisions of this Court would indicate that even though an employee cannot claim to have a vested right to have a particular position in any grade, but all the same he has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was borne in the Cadre. The question of re-determination of the seniority in the cadre on the basis of any amended criteria or rules would arise only when the amendment in question is given a retrospective effect. If the retrospectivity of the Rule is assailed by any person then the court would be entitled to examine the same and decide the matter in accordance with the law. If the retrospectivity of the Rule is ultimately struck down, necessarily the question of re-drawing of the seniority list under the amended provisions would not arise, but if however, the retrospectivity is upheld by a Court then the seniority could be redrawn in accordance with the amended provisions of the employees who are still in the cadre and not those who have already got promotion to some other cadre by that date. Further a particular Rule of seniority having been considered by Court and some directions in relation thereto having been given, that direction has to be followed in the matter of drawing up of the seniority list until and unless a valid Rule by the rule-making authority comes into existence and requires otherwise, as was done in Bola case. It may be further stated that if any rule or administrative instruction mandates drawing up of seniority list or determination of inter se seniority within any specified period then the same must be adhered to unless any valid reason is indicated for non-compliance with the same."

29. As I have already held above that a reading down of the Rule itself indicates the retrospectivity for conferring seniority then keeping in view the nature of the Rule and the language applied therein the submission so put forth by the learned counsel for the respondent No.3 cannot be accepted merely because the seniority

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is given to the respondent No.3 from 21.6.1993 by passing an order on 21.3.2003 (Annexure P-10) i.e. when the Rule 12(2) of the Rules was already in force w.e.f. 2nd April, 1998.

30. In view of the above, when the Rule 12(2)(b)(c) directs that a transferee who is permanently absorbed in the department on the equivalent post, he will be ranked below the persons already existing in the category and the petitioner No.3 was already working in the cadre on the date of absorption of the respondent No.3, as he was directly recruited on the post of Assistant Director on 23.2.1995 and the respondent No.3 was absorbed on 26.2.1998 as Assistant Director and he is granted seniority w.e.f. 21.6.1993 then such an eventuality would also be contrary to Rule 12(2)(b)(c) and the action of the State Government as such will also be prejudicial to the interest of the petitioner No.3.

31. The Rule for fixation of seniority should stand to the test of Articles 14 and 16 of the Constitution. Granting seniority to the respondent No.3 from the date he was not even borne in the cadre, over such persons who were already working in the cadre i.e. the petitioner No.3, would only mean that the respondent No.3 was treated to be a special class and has been given a special treatment without deciding and giving the objective consideration which were relevant and have already been considered above. In this reference, the Apex Court in the case of *Indu Shekhar* (supra) also referred to and relied upon the decision rendered by it in the case of *Ram Janam Singh Vs. State of U.P. and others,* 1994 (2) SCC 622. The paragraph 28 from the judgment passed by the Apex Court in *Indu Shekhar* (supra) is reproduced as under:-

> "28. In *Ram Janam Singh v. State of U.P.* this Court held: (SCC p. 627 para-10):
>
> "It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 and 16 of the Constitution. Of course, if the circumstances so require a group of persons can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment in matters of seniority has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution. Normally, such classification should be by statutory rule or rules framed under Article 309 of the Constitution. The far-reaching implication of such rules need not be impressed because they purport to affect the seniority of persons who are already in service. For promotional posts, generally the rule regarding merit and ability or seniority-cum-merit is followed in most of the services. As such the seniority of an employee in the later case is material and

relevant to further his career which can be affected by factors, which can be held to be reasonable and rational."

32. For the reasons stated hereinabove, I am inclined to allow the present petition and set aside the order dated 21.3.2003 (Annexure P-10) and so also the consequential order dated 28.4.2003 (Annexure P-11) and further direct the respondents-State Government to take a fresh decision with regard to equivalence of post of the petitioners vis-à-vis the respondent No.3 in terms of the Rule 12(2) of the Rules which was amended w.e.f. 2nd April, 1998 by ignoring the words "whichever is later" as provided in Rule 12(2)(c) of the Rules and then to determine the inter se seniority of the petitioners vis-à-vis the respondent No.3. The necessary order shall be passed by the respondents-State within a period of two months from the date the petitioners furnish the certified copy of this order.

In the result, the present petition stands allowed. No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2565

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice Rajendra Menon

17 April, 2008*

S.N.S. (MINERALS) LTD., MAIHAR (M/S.) & ors. ... Petitioners

Vs.

UNION OF INDIA & ors. ... Respondents

A. Mines and Minerals (Regulation and Development) Act (67 of 1957), Section 18, Mineral Conservation and Development Rules, 1988, Rule 23-F - *Validity of Rule 23-F - Validity of Rule 23-F challenged - Mining lease holder has to take rehabilitation and reclamation process to bring back mining area as far as possible to its original shape - Section 18 of the Act gives power to Central Government to make rules for the protection of environment by preventing or controlling any pollution which may be caused by prospecting or mining operations - Rule 23-F is a measure introduced for protection of environment - Rule 23-F is intra vires of Section 18 of the Act.* (Paras 7 to 10)

क. खान और खनिज (विनियमन और विकास) अधिनियम (1957 का 67), धारा 18, खनिज संरक्षण और विकास नियम, 1988, नियम 23–एफ – नियम 23–एफ की विधिमान्यता – नियम 23–एफ की विधिमान्यता को चुनौती दी गई – खनन पट्टा धारक को खनन क्षेत्र को जहाँ तक संभव हो उसके मूल आकार में वापस लाने के लिए पुनरुद्धार और उद्धार की प्रक्रिया ग्रहण करनी पड़ती है – अधिनियम की धारा 18 केन्द्रीय सरकार को, किसी प्रदूषण को, जो खनिज खोज या खनन संक्रियाओं के द्वारा कारित किया जाए, निवारित या नियंत्रित करने एवं पर्यावरण के संरक्षण के लिए नियम बनाने की शक्ति प्रदान करती है – नियम 23–एफ पर्यावरण के संरक्षण के लिए लाया गया एक उपाय है – नियम 23–एफ अधिनियम की धारा 18 के शक्त्याधीन है।

*W.P. No.1679/2004 (Jabalpur)

B. **Mineral Conservation and Development Rules, 1988; Rule 23-F - *Financial Assurance - Financial assurance is different from royalty and security - Cannot be termed unreasonable or arbitrary.*** (Para 11)

ख. खनिज संरक्षण और विकास नियम, 1988, नियम 23–एफ – वित्तीय आश्वासन – वित्तीय आश्वासन रॉयल्टी और प्रतिभूति से भिन्न है – अयुक्तियुक्त या मनमाना नही माना जा सकता।

A.G. Dhande with *Dharmendra Soni,* for the petitioners.
Shekhar Sharma, for the respondent No.1, 3 & 4.
Alok Pathak, G.A., for the respondent No.2.

ORDER

The Order of the Court was delivered by RAJENDRA MENON, J. :– As challenge in both these petitions are made to Rule 23-F of the Mineral Conservation and Development Rules, 1988 (hereinafter referred to as 'Rules of 1988') incorporated vide Notification dated 10.4.2003, these petitions are disposed of by this common order. For the sake of convenience, facts in the record of Writ Petition No.1679/2004 are referred to.

2. Petitioners in both these petitions are carrying on mining activities on the basis of lease granted to them under the Mineral Concession Rules, 1960. Vide Notification dated 10.4.2003 (Annexure P/2) published in the Gazette of India, the Central Government made certain amendments to the Rules of 1988. The aforesaid amendment were made in exercise of the powers conferred on the Central Government under section 18 of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as 'Act of 1957'). Being aggrieved by the amendment incorporated in the Rules of 1988 vide the Mineral Conservation and Development (Amendment) Rules, 2003, as contemplated under Rule 23-F pertaining to submission of financial assurance, petitioners have filed this petition. It is the case of the petitioners that the amendment is contrary to the powers conferred on the Central Government under Section 18 of the Act of 1957. It is the case of the petitioners that Section 18 does not permit framing of the Rules in the manner as done and, therefore, the Rules in question framed being in excess to the powers conferred under section 18, is liable to be declared as ultra vires.

3. It was emphasized by learned Senior Counsel appearing for the petitioners that in pursuance to the agreement entered into under the Mineral Concession Rules, 1960 in statutory Form K, a separate provision has been made for deposit of an amount of Rs.10,000/- as security with the State Government. This amount having been paid as security can be utilized by the Government for violation of any provisions of the mining lease and when security is already paid in pursuance to the agreement, there is no necessity for insisting upon any further assurance or security from the lease holder. Interalia contending that the demand of financial

assurance contemplated in Rule 23-F is not warranted in the light of the fact that security is already submitted in accordance to the Mineral Concession Rules and further as royalty and other payments are made in accordance with the statutory provision, it is not at all necessary for seeking any further amount by way of financial assurance. It is stated by learned Senior Counsel for the petitioners that in accordance to the statutory provisions, closure plan has to be executed and approved by the Indian Bureau of Mines, who are conducting inspection of the mining area once or twice in a year and various measures have been provided for taking penal action in case of deviation from the closure plan. It was emphasized that when the measures for protection of environment is already taken in the agreement executed in Form K, appended to the Mineral Concession Rules, when security and royalty are being paid in accordance to the statutory provision and as per the closure plan when the measures for environment protection by planting of trees and reclamation of land is already being undertaken, there is no necessity for incorporating a further provision for seeking financial assurance for the purpose of protecting the environment and rehabilitation. Interalia contending that the provision of Rule 23-F is ultra vires to the provisions of Section 18 of the Act of 1957, and is liable to be quashed for the grounds stated hereinabove, learned Senior Counsel appearing for the petitioners pray for grant of relief prayed for.

4. Shri Shekhar Sharma, learned counsel representing respondents 1, 3 and 4, and Shri Alok Pathak, learned Government Advocate for the State, refuted the aforesaid contention and pointed out that as the financial assurance contemplated in the amended provision is for the purpose of conservation and protection of environment, it is well within the powers conferred on the Central Government under section 18 of the Act of 1957. That apart, it is argued by them that the amount is not being claimed as a fee, tax or any other amount for the purpose of execution of the agreement, but it is only in the form of surety furnished by the lease holder to indemnify the competent authority against reclamation and rehabilitation cost. It is the case of the respondents that payment of security and royalty is different from the financial assurance sought for and in doing so, it is argued that the Central Government has not acted in excess of its power nor is the proposed assurance sought by the amendment illegal or contrary to any statutory rule or provision warranting interference into the matter.

5. We have learned counsel for the parties at length.

6. Section 18 of the Act of 1957 imposes a duty on the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India, so also for the protection of environment by preventing or controlling any pollution which may be caused by prospecting or mining operation. This rule enables the Central Government by Notification in the official Gazette to make Rules as it may think fit for enforcement of the aforesaid provision and in particular for the purposes of doing the acts indicated in sub-

section (2)(a) to (q). Financial assurance is defined under Rule 3 (jjj) of the Rules of 1988, and the same reads as under:

> "(jjj) 'financial assurance' means the sureties furnished by the lease holder to the competent authority so as to indemnify the authorities against the reclamation and rehabilitation cost.

The amendment incorporated by the Notification in question impugned in this petition i.e.. Rule 23-F contemplates a provision to the effect that every lease holder has to furnish a financial assurance and the amount of financial assurance is Rs.25,000/- for A category mines, Rs.15,000/- for B category mines per hectare of the mining lease area, which is put to use for mining and allied activities. A minimum amount of financial assurance to be furnished in any of the forms referred to in Clause (2) is fixed at Rs. 2 Lacs for A category mines and Rs. 1 Lac for B category mines. A provision is made for payment of enhanced amount towards financial assurance in case of increase of mining area and allied activities. Further provision is made for reduction of the amount of financial assurance in case the lease holder undertakes reclamation and rehabilitation measures as part of the progressive closure of mine. The amount spent by the lease holder in this regard is reckoned to be the sum of financial assurance already spent by the lease holder and to that extent a reduction in the amount to be furnished, as financial assurance is permissible. Sub-rule (2) of Rule 23-F contemplates the procedure to be followed and prescribes the form in which the financial assurance is to be submitted. Four methods are contemplated for submission of financial assurance. They are: (a) by means of a Letter of Credit from any Scheduled Bank; (b) Performance or surety bond; (c) Trust fund build up through annual contribution from the revenue generated by mine and based on expected amount sum required for abandonment of mine; and (d) any other form of security or any other guarantees acceptable to the competent authority. Various other provisions are contemplated under sub-rule (3) to (7) of Rule 23-F, pertaining to the manner in which financial assurance is to be submitted; the authority to whom it is to be submitted; the time when it is to be submitted; so also the manner of releasing the financial assurance; and, the procedure for recovery of financial assistance.

7. The main ground of challenge to the aforesaid provision is mainly on the ground that under section 18 of the Act of 1957, the Central Government cannot make a provision for claiming and insisting upon submission of any such financial assurance. A perusal of the amended provision and the scheme proposed by the aforesaid amendment to the Rules by the Notification in question indicates that financial assurance is nothing but a surety furnished by the lease holder to the competent authority so as to indemnify the authority against the reclamation and rehabilitation cost. This is the purpose for seeking financial assurance as is clear from the definition of financial assurance, as defined in sub-rule (3)(jjj). The amount of financial assurance indicated for A category and B category mine as

contemplated under Rule 23-F is to be submitted in the various form prescribed in sub-rule (2). The second proviso to Rule 23-F(1) contemplates a provision for proportionate reduction in the financial assurance to be submitted to the extent of reclamation and rehabilitation measure already undertaken by the lease holder as part of progressive closure measure of the mine. It is, therefore, clear from a complete reading of the amended provision that the amendment is incorporated for the purpose of indemnifying the competent authority in case reclamation and rehabilitation cost is incurred by the authority after mining operations are concluded. Under the statutory provision, a lease holder on closure of mine is required to take steps for reclamation and rehabilitation in respect of the mine or part thereof, after cessation of mining operation, and in this regard statutory provisions are envisaged by means of submitting a mine closure plan and a progressive mine closure plan. These provisions are incorporated in Rule 23-A and 23-B, by amendment in the Rules of 1988. It is, therefore, clear that it is the duty of the lease holder to undertake the rehabilitation and reclamation process after cessation of mining activities and the Rule in question i.e.. Rule 23-F is only a measure incorporated to ensure adherence to the aforesaid provision for rehabilitation and reclamation and in absence thereof to seek indemnification of the cost incurred by the competent authority for failure on the part of the lease holder.

8. The question is as to whether incorporation of the provision seeking furnishing of surety in various form as contemplated under sub-rule (2) of Rule 23-F is beyond the powers vested in the Central Government under section 18 of the Act of 1957.

9. As already indicated hereinabove section 18 imposes statutory duty on the Central Government to take all steps as may be necessary for conservation and systematic development of minerals in India and to ensure protection of environment by preventing or controlling any pollution that may be caused by prospective or mining operation. After mining operation or prospecting operations are concluded the mining area has to be brought back to its original shape as far as possible and for the said purpose rehabilitation and reclamation process are to be undertaken. This comes within the purview of protection of environment by preventing or controlling pollution, as envisaged under section 18 of the Act of 1957, that being so, any measure taken by the Central Government in preserving the environmental balance and for preventing or controlling pollution by incorporating measures for ensuring reclamation and rehabilitation would come within the ambit of Section 18 of the Act of 1957, and the contention of learned Senior Counsel for the petitioners to the effect that the Central Government is not empowered to incorporate any measures seeking financial assurance by way of surety or security for carrying out rehabilitation and reclamation activity is unsustainable. The provisions of Section 18 of the Act of 1957 is very wide and it includes within its fold any measure that may be introduced for reclamation and rehabilitation after mining operations or prospective operations are concluded and

the said measure would clearly come within the ambit of the aforesaid section, that being so, we are of the considered view that the power conferred on the Central Government to take various steps as indicated in Section 18 and the power to formulate Rules as contemplated in sub-section (2) of Section 18 would include measures to be taken by the Central Government for the purpose of ensuring reclamation and rehabilitation of the mining area after mining operation ceases.

10. The amendment incorporated by the Amending Rule of 2003 for submission of financial assurance is, therefore, well within the legislative competency of the Central Government and in enacting the Rule for the said purpose it cannot be stated that the Central Government has acted in excess of the powers conferred on it.

11. The arguments advanced with regard to feasibility in seeking financial assurance when royalty and security is already paid is concerned, the same is wholly misconceived. Payment of royalty and payment of Rs.10,000/- as security under the Mineral Concession Rules for the purposes of execution of the agreement is entirely different. Security of Rs.10,000/- is deposited in view of the provisions of Rule 32 of the Mineral Concession Rules, 1960 and is for the purpose of due observance of the terms and conditions of the lease. The purpose of obtaining financial assurance as contemplated under Rule 23-F by the amendment in question is nothing but a surety furnished for indemnifying the competent authority in case the said authority is required to incur any cost for the purposes of reclamation and rehabilitation. The purpose and import of seeking financial assurance is entirely different from the purpose of claiming security deposit or payment of royalty and, therefore, on this ground interference cannot be made by this Court. That apart, once it is found by this court that the Rule in question seeking financial assurance is in accordance to the powers conferred on the Central Government, further interference on the ground of financial burden or feasibility in insisting upon the submission of financial assurance cannot be gone into by this Court, until and unless it is found to be wholly arbitrary or unsustainable. Respondents have given reasonable justification and as financial assurance insisted upon is nothing but a surety submitted for indemnification of the competent authority in the event of failure on the part of the petitioners to undertake reclamation and rehabilitation after closure of mining operations, the same cannot be termed as unreasonable or arbitrary warranting interference by this Court.

12. Shri M.L. Jaiswal, learned Senior Counsel, had submitted that the procedure contemplated under sub-rule (2) of Rule 23-F, for submitting bank guarantee, is very harsh and impracticable and it may cause great hardship to the petitioners.

13. On the ground of hardship interference cannot be made by this Court. It is for the Government concerned to lay down procedure and the form in which security or surety is to be submitted and in case some forms for the said purpose are indicated, no Mandamus can be issued directing the Central Government or

the State Government or the competent authority to seek submission of security or surety in the particular form. The discretion available to the competent authority in this regard cannot be curtailed by this Court by issuing any direction as prayed for in this regard.

14. Accordingly, in the facts and circumstances of the case, finding no illegality in the amendment incorporated and the action initiated for seeking submission of financial assurance, both the petitions are dismissed without any order so as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 2571
WRIT PETITION
Before Mr. Justice S.K. Seth
24 April, 2008*

PARESH SPINNERS LTD. ... Petitioner
Vs.
STATE BANK OF INDIA & ors. ... Respondents

A. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Section 2(c) - *Various debts owed to respondent No.1 are assigned to respondent No.3 which is a private bank - Held - Respondent No.3 is a banking company within the meaning of Section 2(c) - No prior notice is required before assignment of N.P.A. - No prohibition that one bank could not assign its debts together with underlying securities to another bank under guidelines of RBI dated 13.07.2005 - Respondent No.3 competent to take action - Petition dismissed.* (Para 14)

क. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम (2002 का 54), धारा 2(सी) – प्रत्यर्थी क्र. 1 को देय विविध ऋण प्रत्यर्थी क्र. 3 को समनुदिष्ट किये गये जो एक निजी बैंक है – अभिनिर्धारित – प्रत्यर्थी क्र. 3 धारा 2(सी) के अर्थ के अन्तर्गत एक बैंकिंग कम्पनी है – एन.पी.ए. के समनुदेशन के पूर्व कोई सूचनापत्र अपेक्षित नही – कोई निषेध नही कि भारतीय रिजर्व बैंक की गाइडलाइन तारीख 13.07.2005 के अन्तर्गत एक बैंक दूसरी बैंक को पूर्वाधिकार प्रतिभूतियों के साथ अपने ऋण समनुदेशित नही कर सकती – प्रत्यर्थी क्र. 3 कार्यवाही करने के लिए सक्षम – याचिका खारिज।

B. Constitution, Article 226 - *Writ of Mandamus* - *No writ of mandamus could be issued for enforcement of pure contractual right.* (Para 15)

ख. संविधान, अनुच्छेद 226 – परमादेश की रिट – पूर्ण संविदात्मक अधिकार के प्रवर्तन के लिए परमादेश की रिट जारी नही की जा सकती।

Cases referred :

AIR 2008 Delhi 65, AIR 2003 SC 4325, 2007 (13) JT 102, 2006 (12) SCALE 585.

*W.P. No.2435/2006 (Indore)

ORDER

S.K. SETH, J. :–Petitioner is aggrieved by the assignment of its loan, debts and charges and other collateral securities by respondent No. 1 in favour of respondent No. 3, as advised by the respondent No. 1 to petitioner vide communication dated 15.4.2006,Annexure P-1. In the present petition, petitioner is claiming following relief from this Court:-

> "1. The Hon'ble Court may please to issue an appropriate writ quashing the deed of assignment dated 23.3.06 executed between Respondent No.1-bank and Respondent No.3 for the assignment of outstanding balance of the petitioner company as per Annexure P/1.
>
> 2. The Hon'ble Court may please to issue an appropriate writ directing the Respondent No.1-bank to honour its offer of settlement made to the petitioner company vide letter dated 29.12.05 under Reserve Bank guidelines and also directing the Respondent No.1-bank to accept the improved offer made by the petitioner company vide letter dated 18.4.06.
>
> 3. The Hon'ble Court may please to issue an appropriate writ directing the Respondent No.3 not to intervene in the affairs of the petitioner company nor to take any coercive measures for recovery of the dues under deed of assignment but to direct the Respondent No.3 to accept the offer of OTS under RBI guidelines as made by petitioner company and to discharge them.
>
> 4. The Hon'ble Court may please to pass an appropriate writ directing the Respondent No.2 to ensure due compliance of its guidelines issued for one time settlement of the dues of SME as per Annexure P/2 being applicable to non discretionary on all the eligible borrowers.
>
> 5. Any other order, writ or direction as may be deemed fit in the circumstances of the case, may please be issued."

2. Petitioner is a registered Company. It set-up an industrial unit by obtaining various loans/fund or non-fund based facilities as detailed in Annexure P-1 from the State Bank of India-respondent No.1. The facilities were secured by pledge/ mortgage/ hypothecation of assets, including guarantees executed in favour of the respondent No.1 Bank. The outstanding loan amount together with underlying securities was assigned by the respondent No. 1 to respondent 3. This, according to petitioner is impermissible in terms of the Reserve Bank of India guidelines dated September 3, 2005. Petitioner expressed its readiness and willingness vide Annexure P-4 to deposit the minimum amount under the OTS by proposing 25% down payment within one month and remaining amount in 12 monthly installments. Later on, vide Annexure P-5, petitioner proposed to settle the outstanding dues of Rs. 1,40,09,542/- by making payment in three month. According to petitioner,

respondent No. 1 without affording opportunity of hearing; illegally assigned the NPA with securities to respondent No. 3 which is neither a **Reconstruction** nor a **Securitisation Company** as defined in Section 2 (v) and (za) of the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002** (hereinafter referred to as 'the Act' for short). That being the legal position, the respondent No. 1 could not assign outstanding loans and charges over the assets of Petitioner Company in favour of respondent No.3.

3. The next contention of learned counsel for petitioner was that the guidelines issued by the Reserve Bank of India on September 3rd, 2005 are binding on respondent No.1 and as such respondent No. 1 was bound to accept the one time settlement offered by the petitioner. Lastly, it was submitted that outstanding dues of the petitioner Company being actionable claim, assignment thereof is only permissible upon execution of an instrument in writing as per Section 130 of the Transfer of Property Act, to acquire unsecured rights and remedies of transferor. In view of this, according to learned counsel for the petitioner, respondent No. 3 could not acquire secured rights and remedies of respondent No. 1 by virtue of assignment.

4. Per contra, learned counsel appearing for the respondent No. 3 and respondent No. 1 supported the action and raised preliminary objection that what ever was argued by learned counsel for petitioner is not set out in the petition and there are no pleadings to that effect. Learned counsel for respondent No. 3 raised further objection with regard to the maintainability of writ petition against respondent No. 3 (a private Bank), which is not a **State** or **Instrumentally** of State within the meaning of Article 12 of the Constitution of India. Further, it was submitted that assuming that the submissions made at the Bar on behalf of petitioner can be examined without pleadings, still petitioner has no case on merit. According to them, what were assigned to the respondent No. 3 are the various debts owed to respondent 1 together with security papers, which is permissible under the law as per guidelines of RBI dated July 13, 2005, which has a binding and statutory force so far as respondent No. 1 and 3 are concerned. In other words respondent No. 3 has stepped into the shoes of respondent No.1.

5. It was further contended that petitioner merely made an offer to settle the out standing dues and neither the respondent No. 1 nor respondent No. 3 is bound to accept the offer and therefore in absence of a statutory right, no writ of mandamus could be issued by the Court against a private incorporate body to enforce matters relating to contract. Lastly they submitted, equity is not in favour of the petitioner in as much as; although it is in the business of spinning cotton yarn, in fact it had been spinning yarns (pun intended) to respondent No. 1 and 3 and in this context they pointed out various order-sheets recorded in the present case to show how respondents No. 1 and 3 including the Court was taken for a ride to avoid payment. It was also contended that respondent no. 3 being a Bank,

can in fact proceed against petitioner under the provisions of Act and in this view of the matter reference to provisions of Transfer of Property, Act regarding settling of debts between secured and unsecured creditors is wholly alien.

6. Shri Munshi, learned counsel for petitioner made reference to various decisions without pointing out any specific paragraph, and in support of what proposition of law. These decisions are :-

AIR 1962 SC 1837-*Vallukunnel v. Reserve Bank of India.*

AIR 1998 SC 3000 *Canara Bank v. P.R.N. Upadhayaya.*

AIR 2000 SC 1536- *Allahabad Bank ve. Canara bank and another.*

AIR 2003 Kerala 299-*Mohammed Usman T.P. and others v. Registrar Co-operative Societies, Trivandrum and others.*

Lastly, reliance was also placed on a decision of the Supreme Court in the matter of *Zenith Steel Tubes & Industries Ltd. and ano. V. Sicom Limited* reported in 2007 (13) JT 102 in support of his contention that pure legal questions could be argued even if there is no pleading to that effect in the writ petition.

7. On the other hand, learned counsel for the respondent No. 3 who led the arguments has placed reliance on the following decisions.

AIR 2008 Delhi 65-*Haryana Steel & Alloys Ltd. V. IFCI Ltd. and another*

AIR 2003 SC 4325- *Federal Bank Ltd. Sagar Thomas and other.*

8. Before dealing with rival submissions and case law cited, it would be pertinent to state that although a ground has been raised that petitioner company is a sick industrial unit under the provisions of the SICA Act, no submission was made when learned counsel for the petitioner argued the matter before the Court, hence this Court is not dealing with the said ground which was not argued.

9. Now to various decisions cited by the learned counsel for petitioner, as quoted above. Even after a careful reading of the cases cited, it is not clear at all how these cases advance the case of petitioner. In *Vellukunnel supra* (AIR 1962 SC 1837), the Constitutional Bench of five Judges was considering the constitutional validity of Section 38 (1) (3)(b)(iii) of the Banking Companies Act, 1949 on the ground it were void being in breach of Arts. 14 and 19 of the Constitution and ultra vires being in conflict with Art. 301. By a majority of 3 judges, speaking through Hidayatullah J (as his Lordship then was) Supreme Court upheld the validity of the impugned legislation on each count. Section 38 (1) (3)(b)(iii) of the Banking Companies Act, 1949 vested exclusive power in the Reserve Bank of India to judge whether the affairs of a banking company are not being so conducted as to be prejudicial to the interests of the depositors. Majority held that the said provision was not arbitrary, unreasonable or ultra vires of Art 14, Art 19 and Art 301 of the Constitution of India.

10. Next decision is *Canara Bank* (AIR 1998 SC 3000). It is also not applicable to the facts of the case in hand. It was a case of term loan advanced by the Bank to the respondent for construction of a Strong Room in the premises which was ultimately let out to the Bank. Landlord executed a Demand Promissory Note undertaking to pay interest at the rate of 5% above the RBI rate of interest with minimum rate of interest @14 p.a. compounded quarterly. Subsequently a complaint was filed before Banking Ombudsman assailing the action of Bank in charging higher rate of interest. Banking Ombudsman allowed the complaint and directed the Bank to recast loan amounts in the light of RBI's circulars and not to charge interest at the quarterly rests. It is against the directions of the Banking Ombudsman matter was taken to the Supreme Court which set aside the directions of the Banking Ombudsman. It is beyond comprehension how the said decision is useful while deciding the present writ petition.

11. *Allahabad Bank's case* (AIR 2000 SC 1536) supra, says the Debt Recovery Tribunal has the exclusive jurisdiction to decide an application for recovery of debt from the Financial Institution and the Company Court under Section 442,446,537 of the Companies Act can not stay the proceedings initiated and pending before the Tribunal constituted under RDB Act, 1993. That is also the case not here.

12. Now coming to the decision of Kerala High Court in *Muhammed Usman* supra (AIR 2003 Kerala 299), after a careful reading, we fail to see how the said decision would come to the rescue of the petitioner in present factual scenario.

13. The last citation, i.e. *Zenith Steel Tubes* (2007 (13) JT 102) supra, it was cited to buttress the argument that a legal point could be raised even without pleading. A reading of the said decision clearly goes to show that some Interlocutory Application was filed in the Supreme Court to place on record additional grounds as set out in the application. Despite objection from the other side, Supreme Court allowed the application and allowed the appellant therein to raise the plea of limitation. Learned counsel for the respondent No. 1 and 3 were right in submitting that first there has to be foundation which could be elaborated. In absence of any basic pleading, arguments should be ignored as even otherwise they have no merit and substance.

14. In the present case, it is no body's case that respondent No. 3 is not a banking company within the meaning of Clause (c) of Section 2 of the Act. In this view of the matter, all contentions, though not pleaded, fall flat on this ground. There is no prohibition that one Bank could not assign its debts together with underlying securities to another Bank. The respondent No. 3, therefore, stepped into the shoes of respondent No. 1 by virtue of assignment and as such is competent to take action against the petitioner under the provisions of the Act.

15. This aspect of the matter has been exhaustively dealt with by the Division Bench of Delhi High Court in the case of *Harayana Steels & Alloys Ltd Vs I.F.C.I.* supra. We are in respectful agreement with the decision of Delhi High

Court reported in AIR 2008 Delhi 65. Learned counsel for respondent No. 3 also brought to notice of the copy of S.L.P. [(Civil) No. 3352/2007] preferred against the said decision, which was also dismissed on 2.3.2007 in view of the earlier judgment of the Supreme Court in *M/s. Transcore vs. Union of India* reported in 2006 (12) SCALE 585. So far as the scope and extent of power of judicial review in such type of cases is concerned, it has been succinctly brought out in Haryana Steel & Alloys and therefore it does not call for any repetition. Suffice it to say that in a contractual matter like assignment of NPA, pursuant to the RBI's guidelines it is not open for the borrower to challenge assignment debts with underlying securities and no writ of mandamus could be issued for enforcement of pure contractual right. No prior notice is required before assignment of NPA nor does the petitioner have any right to enforce OTS. Decision of the Delhi High Court is answer to each and every contention raised by learned counsel for the petitioner. No writ proceedings would lie against respondent No. 3 in view of the in *Federal Bank Ltd. vs. Sagar Thomas and others* reported in AIR 2003 SC 4325. Thus, we do not find any merit in writ petition from any angle.

16. That there is yet another reason which disentitles petitioner to any relief as equity is not in favor of petitioner. At the time of filing of the present writ petition, petitioner had admitted that dues to the tune of 1,40,09,542 were outstanding as on 31.3.2004. On 12.11.2007, while considering I.A. No. 9640/2007, this Court taking into account the admitted liability, directed petitioner to deposit on or before 28.2.2008 Rs. 1,50,00,000/- with respondent No. 3 failing which the interim protection given to the petitioner was liable to be withdrawn. It was also made clear that the aforesaid deposit would not affect rights of the parties. From reading of this interim order, it seems that it was a consent order, still, petitioner preferred an Intra Court Appeal (W.A.No. 117/2008) against the said interim order. Said W.A. was partially allowed in the sense that instead of Rs. 1,50,00,000/- petitioner was directed to deposit a sum of Rs. 1,40,00,000/- within three weeks then the interim protection would continue. Instead of complying with the interim orders of this Court, petitioner filed a civil suit. When an objection was taken to the maintainability of the suit in view of Section 34 of the Act and Section 17 and 18 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, learned trial Judge sustained objections and dismissed the suit vide order dated 4.4.2008, certified copy whereof was produced for the perusal of the Court and it was returned after retaining photo-copy thereof. Thus, it is clear that Petitioner Company was not serious at any point of time to settle outstanding dues which led to loan a/c being declared as NPA and assignment of said NPA to respondent No.3.

17. In the light of above discussion, we find and reiterate that on account of assignment of out-standing loans with underlying securities, respondent No. 3 interest, was secured interest, within the meaning of the Act, and as such there is no merit and substance in the writ petition, which is accordingly dismissed with costs of Rs. 7500/- to be paid by the petitioner to the respondent No.3 within a

month, otherwise costs would be realized as Arrears of Land Revenue by the Competent Authority as per law.

Petition dismissed with costs.

I.L.R. [2008] M. P., 2577
WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Sanjay Yadav
29 April, 2008*

Y.D. SHUKLA & ors. ... Petitioners
Vs.
HIGH COURT OF JUDICATURE OF M.P. AT JABALPUR & anr. ... Respondents

Uchchatar Nyayik Sewa (Bharti Tatha Sewa Sharten) Niyam, 1994, Rule 5(1) Second Proviso, Constitution, Articles 14, 16, 233, 235 - *Recruitment to post of District Judge (Entry Level)* - *Rule 5(1) Second Proviso provides that recruitment to posts of District Judges (Entry Level) shall be made on the basis of vacancies available till attainment of required percentage - Held - Proviso prevents High Court and Governor to fill up all vacancies arising from year to year is contrary to provisions of Articles 233 & 235 - Right to equality and equal opportunity in matters of public employment guaranteed under Articles 14 & 16 is affected - Proviso in question is ultra vires Articles 14, 16, 233 and 235 of Constitution.* (Paras 19 to 22)

उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, 1994, नियम 5(1) द्वितीय परन्तुक, संविधान, अनुच्छेद 14, 16, 233, 235 – जिला न्यायाधीश (प्रवेश स्तर) के पद पर भर्ती – नियम 5(1) द्वितीय परन्तुक उपबंधित करता है कि जिला न्यायाधीशों (प्रवेश स्तर) के पद की भर्ती अपेक्षित प्रतिशतता की प्राप्ति तक उपलब्ध रिक्तियों के आधार पर की जाएगी – अभिनिर्धारित – परन्तुक उच्च न्यायालय एवं राज्यपाल को वर्षानुवर्ष उद्भूत सभी रिक्तियों को भरने से रोकता है, अनुच्छेद 233 व 235 के उपबंधों के प्रतिकूल है – अनुच्छेद 14 व 16 के अन्तर्गत प्रत्याभूत समानता का अधिकार और सरकारी नौकरी के मामलों में समान अवसर प्रभावित होता है – प्रश्नगत परन्तुक संविधान के अनुच्छेद 14, 16, 233 एवं 235 के अधिकारातीत है।

Cases referred :

(2002) 4 SCC 247, AIR 1993 SC 477, (2006) 9 SCC 507, AIR 1991 SC 382, (1999) 5 SCC 624, AIR 2001 SC 2102, (2008) 3 SCC 529.

Rajendra Tiwari with *Girish Shrivastava, Amitabh Gupta* and *Nikhil Tiwari*, for the petitioners.

V.S. Shroti with *A.P. Shroti*, for the respondent No.1.

Vivek Awasthi, G.A., for the respondent No.2.

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*W.P. No.6511/2007(S) (Jabalpur)

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :– The petitioners, who are all judicial officers belonging to the M.P. Lower Judicial Service, have filed this writ petition with a prayer to declare the Second Proviso under Rule 5 (1) of the M.P. Uchchatar Nyayik Sewa (Bharti Tatha Sewa Sharten) Niyam, 1994, as amended by notification dated 8th June, 2005 as ultra vires the Constitution of India.

2. The relevant facts briefly are that in the year 1994, the M.P. Uchchatar Nyayik Sewa (Bharti Tatha Seva Sharten) Niyam, 1994 (for short 'the 1994 Rules') were framed by the Governor of Madhya Pradesh in consultation with the High Court of Madhya Pradesh under Art. 233 read with the proviso to Art. 309 of the Constitution of India. Rule 5 (1) of the 1994 Rules provided for appointment to the posts of District Judge in Senior Time Scale by direct recruitment from the Bar and by promotion by selection on the basis of merit-cum-seniority from amongst officers belonging to the M.P. Lower Judicial Service. The First Proviso to Rule 5 (1) of the 1994 Rules, however, stated that the number of vacancies to be filled up or reserved to be filled up by direct recruitment shall be determined by the High Court from time to time, but shall not exceed 10% of the total permanent strength and direct recruitment shall, as far as possible, be made biennially. The Second Proviso to Rule 5 (1) further provided that post for direct recruitment where suitable persons are not available for appointment, shall not be carried forward. In accordance with Rule 5 (1) of the 1994 Rules, Judicial Officers belonging to M.P. Lower Judicial Service were being considered for promotion by selection on the basis of merit-cum-seniority to the posts of District Judge in Senior Time Scale as and when vacancies arose.

3. In the year 1999, Justice Shetty Commission (for short 'the Shetty Commission') submitted its report. The recommendations in the Shetty Commission's report were considered by the Supreme Court in *All India Judges Association and others vs. Union of India and others,* (2002) 4 S.C.C. 247 and the Supreme Court inter-alia directed in its order dated 21st March, 2002 that recruitment to the Higher Judicial Service i.e. in the cadre of District Judges will be 50% by promotion from amongst Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing of suitability test, 25% by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service and 25% by direct recruitment from amongst eligible Advocates on the basis of written and viva-voce test conducted by the High Court and appropriate rules shall be framed by the High Court as early as possible.

4. Pursuant to the said direction of the Supreme Court in **All India Judges Association case**, the Governor of Madhya Pradesh, in consultation with the High Court of M.P., amended the 1994 Rules by notification dated 8th June, 2005 and substituted Rule 5 (1) of the 1994 Rules as follows:

"5. Method of Appointment - (1) Appointment to the posts in category (a) of sub-rule (1) of Rule 3 shall be made as follows:

(a) 50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of merit-cumseniority and passing suitability test;

(b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than 5 years qualifying service;

Provided that notwithstanding that a person has passed such competitive examination, his suitability for promotion shall be considered by the High Court on the basis of his past performance and reputation;

Provided further that recruitment to the posts shall be made on the basis of the vacancies available till the attainment of the required percentage.

(c) 25 percent of the posts shall be filled by the direct recruitment from amongst the eligible advocates on the basis of the written test and viva voce conducted by the High Court."

In the aforesaid substituted rule, therefore, while the ratio of 50% by promotion on the basis of meritcum-seniority, 25% by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) and 25% by direct recruitment from amongst eligible Advocates on the basis of written test and viva-voce conducted by the High Court, as directed by the Supreme Court, has been provided for appointment to the posts of District Judge (Entry Level), a Proviso has been introduced in Rule 5 (1) (a) and (b) that recruitment to the posts shall be made on the basis of vacancies available till the attainment of the required percentage. It is this Proviso which has been challenged in this writ petition by the petitioners as ultra vires Arts. 14, 16 and 233 of the Constitution.

5. Mr. Rajendra Tiwari, learned senior counsel for the petitioners submitted that on account of the impugned Proviso, presently no promotion from amongst Civil Judges (Senior Division) on the basis of meritcum-seniority and passing of suitability test is being made and only promotions strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) and direct recruitment from amongst the eligible Advocates on the basis of written test and viva-voce are being made to fill up the vacancies in the posts of District Judge (Entry Level). He submitted that the quota of 50% by promotion from amongst Civil Judges (Senior Division), 25% by promotion by limited competitive examination of Civil Judges (Senior Division) and 25% by direct recruitment from amongst the eligible Advocates on the basis of written test and viva-voce should be applied to the vacancies of District Judge (Entry Level) available to be filled up every year and if this is done, Civil Judges (Senior Division) can be considered on the basis of merit-cum-seniority for promotion to 50% of the vacancies every year. He

submitted that if the quota of 50%, 25% and 25% for promotion on the basis of merit-cum-seniority, promotion on the basis of limited competitive examination and direct recruitment are applied to the total number of posts or the cadre strength of District Judges (Entry Level), then the right of the petitioners to equality and equal opportunity in the matter of public employment guaranteed under Arts. 14 and 16 of the Constitution would be affected. In support of his submission, *Mr. Tiwari cited the decision in Indra Sawhney vs. Union of India and others*, AIR 1993 S.C. 477, in which the Supreme Court has held that for the purpose of applying the rule of 50% reservation in favour of the Scheduled Castes, Scheduled Tribes and Other Backward Classes, a year should be taken as a unit and not the entire cadre strength or service as the unit.

6. Mr. Tiwari next submitted that Art. 233 of the Constitution mandates that appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court. He further submitted that under Art. 235 of the Constitution, the control over district courts and courts subordinate thereto including the posting and promotion of persons belonging to the judicial service of the State and holding any post inferior to the post of district judge is vested in the High Court and it is in exercise of such control that the High Court promotes and posts sufficient number of judicial officers as District Judges to ensure that the administration of justice goes on smoothly. He argued that in case, in any particular year, sufficient number of Civil Judges (Senior Division) are not available for promotion strictly on the basis of merit through limited competitive examination or sufficient number of eligible Advocates are not available for direct recruitment on the basis of written test and viva-voce conducted by the High Court so as to maintain the required percentage of recruitment to the posts as provided in Rule 5 (1), the High Court will not be able to fill up all the posts of District Judges (Entry Level) in exercise of its powers under Arts.233 (1) and 235 of the Constitution. He submitted that in *Malik Mazhar Sultan and another vs. U.P. Public Service Commission and others*, (2006) 9 S.C.C. 507, the Supreme Court has observed in paragraph 23 of the judgment at page 513 of the S.C.C. that it is absolutely necessary to evolve a mechanism to speedily determine and fill vacancies of judges at all levels and timely steps are required to be taken for determination of vacancies, issue of advertisements, conducting of examinations, interviews, declaration of the final results and issue of orders of appointments and for these and other steps, it is necessary to provide for fixed time schedule so that the system works automatically and there is no delay in filling up of vacancies. He submitted that the impugned Proviso, in so far as it prevents the High Court from filling up the available vacancies in any particular year runs contrary to the directions of the Supreme Court in *Malik Mazhar Sultan vs. UP PSC* (supra).

7. Mr. V.S. Shroti, learned senior counsel appearing for the High Court, on the other hand, submitted that from the language in paragraphs 27 and 28 of the

judgment of the Supreme Court in *All India Judges Association case* (supra), it is clear that the percentages for promotion on the basis of merit-cumseniority, promotions strictly on the basis of limited competitive examination and direct recruitment are to be maintained vis-à-vis the total posts of the Higher Judicial Service or the cadre of District Judges. He submitted that in view of the clear language of the Supreme Court and the directions in paragraphs 27 and 28 of the judgment in the *All India Judges Association case* (supra), the percentages for promotion on meritcum-seniority, promotion on the basis of merit through limited competitive examination and direct recruitment have to be by reference to the total posts or the service or the cadre, and not by reference to the vacancies in a particular year. He submitted that the right of the petitioners under Arts. 14 and 16 of the Constitution to equality of opportunity in the matters of employment is not in any way affected by the impugned Proviso.

8. Mr. Shroti cited the decision in *Orissa Judicial Services Association Cuttack and another vs. State of Orissa and others,* AIR 1991 S.C. 382 in which the Supreme Court upheld the validity of Rule 7 of the Orissa Judicial Service Rules, 1963, which provided that when a vacancy occurs in the Senior Branch of a service, Government shall decide in consultation with the High Court whether it may be filled up by direct recruitment or promotion. He submitted that in the aforesaid decision, the Supreme Court has held that under clauses (1) and (2) of Art. 233 of the Constitution, recruitment to the posts of District Judge could be made by promotion from subordinate judicial service as well as by direct recruitment from amongst members of the Bar and Rule 7 of the Orissa Judicial Service Rules, 1963 made in exercise of powers under Art. 309 read with Art. 233 of the Constitution of India could not be challenged merely on the ground that it may, to certain extent, adversely affect the chances of promotion of officers belonging to the junior branch of judicial service.

9. Mr. Shroti also cited the decision in *S. Prakash and another vs. K.M. Kurian and others,* (1999) 5 S.C.C. 624, in which the Supreme Court upheld Note (3) in the impugned Rules which provided that whenever a ratio or percentage is fixed for different methods of recruitment to the posts, the number of vacancies to be filled up by candidates from each method is to be decided by applying a fixed ratio or percentage to the cadre strength of the posts to which the recruitment is made and not to the vacancies existing at that time.

10. Mr. Shroti next cited the decision in *Delhi Judicial Service Association vs. Delhi High Court,* AIR 2001 S.C. 2102 in which the Supreme Court interpreting Rule 7 (b) of the Delhi Higher Judicial Service Rules, 1970, as amended in 1987, which provided that recruitment after the initial recruitment shall be made by direct recruitment from the Bar provided that not more than 1/3rd of the posts in the service shall be held by direct recruits has held that the embargo provides that direct recruitment will not exceed 1/3rd of the total number of posts in the service and not qua number of vacancies at any given point of time

11. Mr. Shroti also cited the decision in *Prasad Kurien and others vs. K.J. Augustin and others*, (2008) 3 S.C.C. 529 in which the Supreme Court while interpreting the Kerala Excise and Prohibition Subordinate Service Rules, 1974 and the Kerala State and Subordinate Service Rules, 1958 has held that proportion between direct recruitment and promotion on transfer is to be maintained by looking to the cadre or service strength and not looking to the vacancies which are sought to be advertised.

12. Mr. Shroti submitted that the cadre strength of District Judges (Entry Level) in the year 2006-2007 was 163 posts. Hence 50% of the cadre strength of 163 posts works out to 82 posts whereas as many as 87 Civil Judges (Senior Division), who had been promoted on the basis of merit-cum-seniority were in position. The result is that the Civil Judges (Senior Division) who have been promoted on the basis of merit-cumseniority have exceeded their quota of 50% provided in Rule 5 (1) of the 1994 Rules, as amended by the notification dated 8th June, 2005 and for this reason no promotion from amongst Civil Judges (Senior Division) on the basis of merit-cum-seniority can take place in accordance with clause (a) of Rule 5 (1) of the amended Rules until the required percentages are attained as provided in the impugned Proviso.

13. Relevant portion of para 27 and the entire para 28 of the order of the Supreme Court in the *All India Judges Association case* (supra), on which Mr. Shroti has relied upon, are extracted herein below:

> "27. ..... we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned: **50 percent of the total post in the higher judicial services** must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case law. The remaining **25 per cent of the posts in the service** shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a civil judge (senior division) should be not less than five years. The High Courts will have to frame a rule in this regard.
>
> **28. As a result of the aforesaid, to recapitulate, we direct that recruitment to the higher judicial service i.e. the cadre of district judges will be:**
>
> [1] (a) 50 per cent by promotion from amongst the civil judges (senior division) on the basis of principle of merit-cum-seniority and passing a suitability test;
>
> (b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of civil judges (senior division) having not less than five years qualifying service; and

(c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.

[2] Appropriate rules shall be framed as above by the High Courts as early as possible." (emphasis provided)

14. It will be clear from the underlined words in para 27 of the order of the Supreme Court in *All India Judges Association case* (supra), quoted above, that 50% of the total posts in the Higher Judicial Service was to be filled up by promotion on the basis of principle of merit-cum-seniority and 25% of the posts were to be filled up by promotion strictly on the basis of merit through limited departmental examination between Civil Judges (Senior Division) who have not less than five years of service. Hence, the percentage of 50% and 25% were to be worked out not on the basis of vacancies but on the basis of total number of posts. Again, on a reading of underlined words in para 28 of the order of the Supreme Court in the *All India Judges Association case,* quoted above, we find that the direction of the Supreme Court regarding percentages for promotion from amongst Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority, 25% by promotion strictly on the basis of merit through limited competitive examination from Civil Judges (Senior Division) and 25% by direct recruitment through eligible Advocates, was with reference to the Higher Judicial Service, the cadre of District Judges or the posts. Contrary to the aforesaid express directions of the Supreme Court in *All India Judges Association case,* the High Court could not have provided in the amended rules that the percentages fixed for promotions on the basis of merit-cum-seniority, promotions directly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) and direct recruitment have to be worked out with reference to the number of vacancies in a particular year and not the total posts of the cadre or service.

15. But on reading of both paras 27 and 28 of the order of the Supreme Court in the case of *All India Judges Association* (supra), we do not find that there is any direction of the Supreme Court that till the percentages of 50%, 25% and 25% for promotion on the basis of merit-cum-seniority, promotion on the basis of merit through limited competitive examination and direct recruitment are attained, there should be no promotion from amongst Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority. The impugned Proviso that recruitment to the posts shall be made on the basis of vacancies available till the attainment of required percentage is therefore not introduced in the Rules pursuant to any specific direction of the Supreme Court in the aforesaid paragraphs 27 and 28 of the order of the Supreme Court in *All India Judges Association, case* (supra).

16. The question to be decided in this case is whether in the absence of any express direction of the Supreme Court that until the required percentages as mentioned in paragraphs 27 and 28 of the order in the *All India Judges Association*

case (supra) are attained, promotion from Civil Judges (Senior Division) on the basis of principle of merit-cumseniority could be Constitutionally prevented by the insertion of the impugned Proviso in the 1994 Rules by the amendment to the 1994 Rules by notification dated 8th June, 2005.

17. Articles 233 and 235 of the Constitution are quoted herein below:

> **"233. Appointment of district judges.**
>
> (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.
>
> **235. Control over subordinate courts.**
>
> The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

It will be clear from language of Articles 233 and 235 of the Constitution that powers are vested in the Governor of the State and the High Court to make appointment of persons to be District Judges by promotion or by direct recruitment. It will be also clear from Art. 235 of the Constitution, quoted above that control over District Courts and Courts subordinate thereto including the posting and promotion of persons belonging to the judicial service and holding any post inferior to the post of District Judge shall be vested in the High Court. The Governor of the State as well as the High Court will also have to ensure that posts of District Judges in the State are filled up by direct recruitment or promotion so that administration of justice in the State does not suffer in any way and that the people of the State get timely justice from the District Courts.

18. In fact, in *Malik Mazhar Sultan vs. UP PSC* (supra), the Supreme Court has observed:

> "23. It is absolutely necessary to evolve a mechanism to speedily determine and fill vacancies of judges at all levels. For this purpose, timely steps are required to be taken for determination of vacancies,

issue of advertisement, conducting examinations, interviews, declaration of the final results and issue of orders of appointments. For all these and other steps, if any, it is necessary to provide for fixed time schedule so that the system works automatically and there is no delay in filling up of vacancies. The dates for taking these steps can be provided for on the pattern similar to filling of vacancies in some other services or filling of seats for admission in medical colleges. The schedule appended to the regulations governing medical admissions sets out a time schedule for every step to be strictly adhered to every year. The exception can be provided for where sufficient number of vacancies do not occur in a given year. The adherence to strict time schedule can ensure timely filling of vacancies. All the State Governments, the Union Territories and/or the High Courts are directed to provide for time schedule for the aforesaid purposes so that every year vacancies that may occur are timely filled. All the State Governments, the Union Territories and the High Courts are directed to file within three months details of the time schedule so fixed and date from which the time schedule so fixed would be operational.

19. Contrary to the aforesaid provisions in Arts. 233 and 235 of the Constitution as well as the directions of the Supreme Court in *Malik Mazhar Sultan vs. UP PSC* (supra), the impugned Proviso prevents the High Court and the Governor to fill up all vacancies arising from year to year till the attainment of percentages mentioned in Rule 5 (1) (a), (b) and (c) of the 1994 Rules as amended. In other words, in a given year, vacancies of the posts of District Judges (Entry Level) cannot be filled up by promotion of Civil Judges on the basis of merit-cum-seniority if suitable candidates for promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) or through direct recruitment from amongst eligible Advocates on the basis of written test and viva-voce conducted by the High Court are not available

20. The contention of Mr. Shroti, however, is that 50% of the posts of District Judges (Entry Level) numbering to as many as 82 have already been filled up by Civil Judges (Senior Division) on the basis of merit-cum-seniority and at present there is an excess number of persons promoted on the basis of merit-cumseniority and, therefore, no promotion to the post of District Judges (Entry Level) on the basis of meritcum-seniority of Civil Judges (Senior Division) can take place so long as excess exists and it is for this reason that the impugned Proviso has been inserted.It is not imperative that required percentages mentioned in Clauses (a), (b) and (c) of Rule 5 (1) of the 1994 Rules have to be immediately attained and the percentages can be attained gradually so that vacancies do not remain unfilled and the chance of promotion of Civil Judges (Senior Division) on the basis of merit-cum-seniority is not completely choked.

21. The consequence of the impugned Proviso would be that for some more years from now, promotion from amongst Civil Judges (Senior Division) on the basis of merit-cum-seniority will not be made and Civil Judges (Senior Division) can only be appointed as District Judges (Entry Level) through limited competitive examination of Civil Judges (Senior Division). Experience during the last two years has shown that not all Civil Judges (Senior Division) can compete in such limited competitive examination which comprises of a written test. Having given up the regular college education long back and not used to writing examinations for several years, Civil Judges (Senior Division) may not be able to successfully compete with other Civil Judges (Senior Division) in a limited competitive written examination for promotion to the posts of District Judges (Entry Level) although they may be otherwise suitable and meritorious for such promotion to the post of District Judge (Entry Level) on the basis of their performance as Civil Judges (Senior Division). Thus, the right of such Civil Judges (Senior Division) to be considered for promotion to the post of District Judges (Entry Level) to equality and equal opportunity in the matters of public employment guaranteed under Arts. 14 and 16 of the Constitution is affected by the impugned Proviso. In the decisions cited by Mr. Shroti, provision similar to the impugned Proviso that recruitment to the posts shall be made on the basis of vacancies available till the attainment of required percentages was not under consideration before the Supreme Court. The impugned Proviso altogether prevents the consideration of Civil Judges (Senior Division) on the basis of merit-cum-seniority for promotion to the posts of District Judges (Entry Level) till the attainment of the required percentages in Rule 5 (1) of the 1994 Rules, as amended.

22. For the aforesaid reasons, we declare the impugned Proviso to Rule 5 (1) of the 1994 Rules, providing that recruitment to the posts shall be made on the basis of vacancies available till attainment of required percentage as ultra vires Arts. 14, 16, 233 and 235 of the Constitution, but we make it clear that this judgment will not affect promotions and recruitments, which have already been made.

The writ petition is allowed. The interim order passed by this Court on 22.11.2007 is vacated. Considering the facts and circumstances of the case, parties shall bear their respective costs.

Petition allowed.

I.L.R. [2008] M. P., 2587

WRIT PETITION

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

13 May, 2008*

LALITABAI ... Petitioner

Vs.

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

Constitution, Article 226, National Security Act, 1980, Section 3(2) - ***Order of preventive detention - Grounds - Offences do not relate to any activity prejudicial to public order - Ground relating to shooting at public place causing terror in public - Ground alleged inconsistent with F.I.R. - Representation against detention rejected after 17 days without explanation of delay - Subjective satisfaction requisites for passing detention order stands vitiated - Held - Detention order quashed - Petition allowed.*** (Paras 10, 11 & 12)

संविधान, अनुच्छेद 226, राष्ट्रीय सुरक्षा अधिनियम, 1980, धारा 3(2) – निवारक निरोध का आदेश – आधार – अपराध लोक व्यवस्था के प्रतिकूल किसी क्रियाकलाप से सम्बन्ध नही रखते हैं – आधार लोक स्थल पर लोक में भय उत्पन्न करते हुए गोली चलाने से संबंधित – कथित आधार एफ.आई.आर. से असंगत है – निरोध के विरुद्ध अभ्यावेदन 17 दिनों बाद विलम्ब के स्पष्टीकरण के बिना खारिज किया गया – निरोध का आदेश पारित करने के लिए आवश्यक वैयक्तिक समाधान दूषित हुआ – अभिनिर्धारित – निरोध का आदेश अभिखण्डित – याचिका मंजूर।

S.R. Saraf, for the petitioner.

Girish Desai, Dy.A.G., for the respondents.

ORDER

The Order of the Court was delivered by **S.K. KULSHRESTHA, J.** :– The wife of the detenu Radheshyam Rathore @ Jhot s/o Badrilal Rathore has filed this petition for habeas corpus assailing the preventive detention of her husband vide order dated 01.01.2008 (Annexure P/1 & P/1-A) passed by the District Magistrate, Indore in exercise of the power conferred by the Sub-Section (2) of the Section 3 of the National Security Act, 1980 (here-in-after referred to as the Act). Along with the order of detention, grounds of detention dated 1st January, 2008 were also furnished in which it was stated that the detenu has pursued the course of crime and on account of 40 serious offences committed by him, witnesses were unwilling to unfold the truth before the Court and terrorized by his activities, they were compounding the offences. It was also stated that preventive action taken against him proved ineffective and although he was detained on 30.06.2004 under the provisions of the Act, after he was released from jail, he resumed his criminal activities. In order to show the criminal propensities of the detenu, in schedule, as many as 11 serious offences have been enumerated.

*W.P. No.2490/2008 (Indore)

2. Learned counsel for the petitioner has submitted that even if each offence mentioned in the schedule to the grounds of detention, is taken at its face value, the offences relate merely to "law and order" and not "public order", with the result, the detenu could not have been detained under the provisions of Section 3(2) of the Act and the requisite subjective satisfaction of the detaining authority, stands vitiated. In relation to ground No.11 of the schedule, learned counsel has submitted that although in the first information report, it is mentioned that the detenu along with others recklessly fired at the complainant, recital to the effect that the said act terrorized the public of the locality and they started running helter-skelter and the shop keepers closed down their shops, is not evidenced by the accompanying first information report of the Crime No.532/07. Learned counsel has further submitted that delay in deciding the representation has also not been explained; with the result, the detention is rendered illegal.

3. Learned counsel for the State has pointed out that right from the year 2004, after the release of the detenu from the earlier detention, the detenu is engaged in criminal activities, which clearly indicate his propensities and determination to lead a life of crime. He has further submitted that the other incidents apart, incident dated 23.12.2007 clearly indicated that his recklessly firing at the complainant had created panic in the mind of the public who started running helter-skelter and shop keepers started pulling down their shutters. It was, therefore, clearly a case of activities prejudicial to the "public order". Learned State counsel has also pointed out that if there is cogent material on which the subjective satisfaction of the detaining authority is based, it cannot be interferred with merely because the inference of the counsel for the detenu is not in tune with that of the Detaining Authority.

4. We have heard the learned counsel for the parties and perused the record.

5. In the reply filed by the respondents, the respondents have referred to the statutory compliance about which the petitioner has not made any grievance. However, the petitioner's case is that on the basis of the grounds of detention, no prudent person could have come to the conclusion that the activities were prejudicial to the "public order".

6. In the schedule to the grounds of detention, the District Magistrate has stated that on 25.10.2004, the detenu acted in a manner which give rise to the registration of an offence under Sections 323, 294 and 506 read with Section 34 of the Indian Penal Code. It is stated that on 13.11.2004, likewise, he committed an offence punishable under Sections 341, 294, 506 and 34 of the IPC. Reference has also been made to the offence dated 28.11.2004 under Sections 341, 323, 294 and 34 of the IPC. On 31.12.2004, it is alleged that the detenu committed an offence under Sections 341, 323, 294, 506 and 34 of the IPC.

7. In 2005, only one offence under Section 34-B of the Excise Act has been alleged against the detenu. It is clear that thereafter for a considerable period, no

offence was committed by detenu except on 08.02.2006 when he committed offence under Sections 327, 323, 294, 506 and 34.

8. The offence committed in the year 2004, 2005 and 2006 and that too after long gaps, apart from being remote, cannot be considered to be serious enough to be a danger to the "public order". The said offences can, however, be taken into consideration as furnishing an index of the criminal propensities of the detenu. It is also alleged that detenu committed an offence on 08.02.2007 and case was registered under Sections 294, 307 and 34. Again on 22.10.2007, it is alleged that he had committed offence under Sections 294, 451, 506 and 34 of the IPC.

9. The offences, which have proximity for the purposes of deriving subjective satisfaction for detention under the provisions of the Act, have been catalogued at serial No.9, 10 and 11. If we examine the contents of the offence dated 06.05.2007, though it is stated that he attempted at the life of Nitin, the offence was not registered under Section 307 of the IPC, but only under Section 324 thereof along with other trivial offences. Offence at serial No.10 also alleges that the detenu attempted at the life of the complainant but surprisingly, the case was registered only under Sections 341, 294, 324 and 34 of the IPC.

10. From the narration of the facts of the case, as recorded in the schedule from serial No.1 to 10, it cannot be said that they furnish material for coming to the satisfaction that it was necessary to detain the detenu. While it is true that the subjective satisfaction has to be of the detaining authority, which does not normally call for any interference, the said subjective satisfaction can be derived only on some objective criteria. In the objective criteria, the offences mentioned from serial No.1 to No.10 do not relate to any activity prejudicial to the "public order", but "law and order" alone.

11. The real ground strenuously debated by both the parties is at serial No.11 of the schedule to the grounds of detention. According to this ground, the detenu on 23.12.2007, along with his two companions, started shooting at complainant Anil recklessly; with the result, Anil fell down from his motorcycle, badly injured and bleeding through his injuries. It has been added that on account of the said act of the detenu, terror reigned and public started running helter-skelter. It has also been recorded that the shop keepers pulled down their shutters out of fear and the said act created a situation prejudicial to the "public order". Since the above ground is only germane to the subjective satisfaction, learned counsel for the petitioner has referred to the first information report pertaining to crime No.532 dated 23.12.2007 to show that instead of borrowing from the record, the detaining authority has borrowed from his imagination. The said first information report states that the detenu and two others shot at the complainant recklessly; with the result, he lost his balance and stopped the motorcycle. In the report or otherwise, there is no mention that members of the public started running away apprehensive of some untoward incident and the shop keepers closed down their shops. It is,

therefore, clear that even if we assume that the material disclosed by the ground No.11 would have laid foundation for subjective satisfaction, the fact that the ground is inconsistent with the first information report and the record clearly manifests that satisfaction has been derived on the basis of the recital which are not contained in the first information report or any other contemporaneous documents. Indeed, the learned District Magistrate has been misled by the recital in ground No.11 with respect to the incident dated 23.12.2007 insofar as it refers to the panic in the mind of the public and the shop keepers having closed down their shops. Apparently, therefore, the subjective satisfaction requisites for passing an order under Section 3 (2) of the Act stands vitiated, having been based on extraneous consideration.

12. We may also point out that the detenu had sent a representation against his detention on 21.01.2008 (Annexure P/3), which was received on 24.01.2008. According to the respondents, comments were called from the detaining authority which were received on 13.02.2008 and thereafter the representation was rejected by order dated 01.03.2008. The respondents have not explained the period of 17 days from 13.02.2008 to 01.03.2008. We may emphasise that under Article 22 (5) of the Constitution of India, the detenu has been conferred the right to be afforded earliest opportunity of making a representation against the order. This right is rendered otiose if the detaining authority or the authority competent to consider the representation causes delay in processing the same without any valid reason. The detaining authority and the authority vested with the power of considering the representation is under a legal obligation to show that the representation was not delayed and it was processed in the normal course expeditiously without any loss of time. The detention, therefore, is also vitiated on the ground that the representation of the detenu was not expeditiously processed and the order was passed on 01.03.2008, after a long delay from the receipt of the comments of the detaining authority.

13. It is thus, luculent that the subjective satisfaction of the detaining authority is vitiated for his having taken into consideration extraneous material and, in addition, detention is vitiated on account of the unexplained delay in considering the representation of the detenu. Under these circumstances, the order of detention is rendered illegal.

14. Accordingly, the detention order dated 01.01.2008 passed by the District Magistrate, Indore (Annexure P/1 and P/1-A) is quashed and it is directed that the detenu be forthwith released from the custody, if not required in connection with any other matter.

Order accordingly.

I.L.R. [2008] M. P., 2591

WRIT PETITION

Before Mr. Justice S.K. Seth

24 June, 2008*

NANDKISHORE NAROLIA & ors. ... Petitioners

Vs.

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

Constitution, Article 14, 16 & 226, Rajya Prashasnik Adhikaran (Lambit Evam Nirakrat Avedano Ka Antaran) Adhyadesh, M.P. 2003, Administrative Tribunals Act, 1985, Section 21 - *Appointment without any advertisement or calling names from Employment Exchange - Challenged before M.P. Administrative Tribunal - Application transferred to High Court upon abolition of Tribunal - Plea of limitation u/s 21 of Act of 1985 - Held - After transfer to High Court, cases are registered and decided treating to be writ petition under Article 226/227 - Section 21 of the Act of 1985 can not curtail jurisdiction under Article 226/227 - Appointments without advertisement and calling names from Employment Exchange - Violative of Article 14 & 16 - Hence quashed - However, appointees worked for 10 years and crossed upper age limit prescribed for public employment - Allowed to participate in fresh recruitment process and their application form shall not be rejected on the ground of age limit - Petition allowed.* (Paras 4, 7 & 10)

संविधान, अनुच्छेद 14, 16 व 226, राज्य प्रशासनिक अधिकरण (लंबित एवं निराकृत आवेदनों का अंतरण) अध्यादेश, म.प्र. 2003, प्रशासनिक अधिकरण अधिनियम, 1985, धारा 21 – किसी विज्ञापन या रोजगार कार्यालय से नाम माँगे बिना नियुक्ति – म.प्र. प्रशासनिक अधिकरण के समक्ष चुनौती दी गई – अधिकरण के समापन पर आवेदन उच्च न्यायालय को अंतरित किया गया – 1985 के अधिनियम की धारा 21 के अन्तर्गत परिसीमा का अभिवचन – अभिनिर्धारित – उच्च न्यायालय को अंतरण के पश्चात् मामले अनुच्छेद 226/227 के अन्तर्गत रिट याचिका के रूप में दर्ज और विनिश्चित किये गये – 1985 के अधिनियम की धारा 21 अनुच्छेद 226/227 की अधिकारिता को कम नही कर सकती है – नियुक्तियाँ किसी विज्ञापन और रोजगार कार्यालय से नाम माँगे बिना की गईं – अनुच्छेद 14 व 16 का उल्लंघन है – इसलिए अभिखंडित की गईं – तथापि, नियुक्त व्यक्तियों ने 10 वर्ष कार्य किया और लोक नियोजन के लिए विहित उच्च आयु सीमा पार कर ली – नई नियुक्ति प्रक्रिया में भाग लेने के लिए अनुमत किया और उनके आवेदनपत्र आयु सीमा के आधार पर निरस्त नही किये जाऐं – याचिका मंजूर।

Cases referred :

AIR 1990 SC 10, 1995 Supp (3) SCC 231, (1992) 19 ATC 292, 2004 AIR SCW 5332, JT 2005 (11) SC 56, (2008) 1 SCC (L&S) 348.

ORDER

S.K. Seth, J. :–Being aggrieved by selection and appointment of Respondent Nos. 3 to 6 on the post of Laboratory Attendant, initially the petitioners invoked

*W.P. No.6800/2003 (O.A. No.65/2000) (Indore)

the jurisdiction of the M.P. Administrative Tribunal by filing an application u/s. 19 of the Administrative Tribunals Act, 1985. Upon abolition of the Tribunal, under the provisions of Madhya Pradesh Rajya Prashasnik Adhikaran (Lambit Evam Nirakrat Avedano Ka Antaran) Adhyadesh, 2003, the matter has been transferred to this Court i.e. how it has come up for hearing.

2. Facts for resolving the controversy lie in a narrow compass. It is not in dispute that Respondent No.2 selected and appointed Respondent Nos. 3 to 6 on the post of Laboratory Attendant in the Government College. It is also not in dispute that before making the appointment, no advertisement was issued inviting applications from eligible candidates nor the names of registered unemployed eligible persons were solicited from the Employment Exchange.

3. The allegation of the petitioners is that Respondent No. 3 to 6 are close relatives of persons already working in the Government College. It is also alleged that one of the selected candidate is close relative of Principal of the College who headed the Selection Committee. These allegations are denied and we don't propose to enter into this controversy in view of the order which we propose to pass.

4. As has been pointed out hereinabove, it is an undisputed fact that the appointment of Respondent No. 3 to 6 were made without any advertisement or calling the names from Employment Exchange. Thus, in the considered opinion of this Court, the selection and appointment of Respondent No. 3 to 6 is in clear violation of Article 14 and Article 16 of the Constitution of India which enjoin right of equality in all respects including matter of public employment to the citizens of India. Obviously, in absence of any advertisement or notification of vacancies to the Employment Exchange, the fundamental rights of petitioners enshrined under Article 14 and 16 have been violated and on this ground alone, the selection and appointment of Respondent No. 3 to 6 cannot be sustained in law.

5. Shri Sethi, learned senior counsel appearing for Respondent No. 3 to 6 submitted that the originally the petition was preferred before the M.P. Administrative Tribunal and as such, it would be governed by the provisions of the Administrative Tribunals Act, 1985. His objection is that the petition was barred by limitation as prescribed u/s. 21 of the Act, therefore, it could not be entertained. In support of this contention, he placed reliance on decisions of Supreme Court reported in AIR 1990 SC. 10 : *S.S. Rathore V/s. State of M.P.;* and 1995 Supp. (3) SCC 231 : *Secretary to Govt. of India & others V/s. Shivram Mahadu Gaikwad.*

6. Prima facie, the contention of Shri Sethi appears to be attractive and appealing, but on a deeper probe, this Court is of the opinion that contention has no force. The petition was filed in the Tribunal and no doubt, it was not admitted, but nonetheless a show-cause notice against admission was issued by the Tribunal as is evident from perusal of the order-sheets of the case. During the pendency of show-cause proceedings, M.P. Administrative Tribunal was abolished and by virtue

of provisions of Madhya Pradesh Rajya Prashasnik Adhikaran (Lambit Evam Nirakrat Avedano Ka Antaran) Adhyadesh, 2003, the pending cases stood transferred to this Court for adjudication. It is pertinent to point out that even before establishment and constitution of Tribunal, all service disputes were adjudicated upon by this Court on a petition under Article 226/227 of the Constitution of India, therefore, after the transfer of Original Applications to the High Court under provisions of 2003 *Adhyadesh* (Supra), all such cases were registered as Writ Petition and have been disposed of treating them to be Writ Petition under Article 226/227 of the Constitution of India. Against the order of Single Judge, the party aggrieved had remedy of Letters' Patent Appeal (LPA), and thereafter, Writ Appeal (WA) under the **Madhya Pradesh Uchha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005.** This goes to show that for all practical purposes, Original Applications transferred from the Tribunal to this Court were registered and decided as Writ Petition under Article 226 of the Constitution of India. There is another aspect of the matter. The writ jurisdiction of this Court is not governed by the provisions of the Administrative Tribunals Act, 1985, therefore, Section 21 of 1985 Act cannot curtail the jurisdiction of this Court conferred by Article 226/227 of the Constitution of India. In view of this, in the considered opinion of this Court, the plea of limitation raised by Shri Sethi would not come in the way of the petitioners. To exercise jurisdiction under Article 226 of the Constitution of India, no period of limitation is prescribed under the law but a self imposed constraint not to entertain a petition on account of delay and latches has been evolved. There is another facet of the case which clearly shows that there has been violation of Article 14 and 16 of the Constitution of India in the matter of public employment and, therefore, such technical plea of limitation should not come in the way or doing justice or protecting the fundamental right of the citizens. To accept the contention of Shri Sethi, it would be too parochial approach and would lead to defeat the justice on the wheels of statistics. It is the foremost duty of this Court to uphold the fundamental right. Thus, in this backdrop, we find that the appointments made in favour of Respondent No. 3 to 6 are illegal, bad in law and are in violation of Article 14 & 16 of the Constitution of India and as such, they are unsustainable.

7. In view of the aforesaid conclusion, this Court is left with no option, but to quash the appointment orders of Respondent No. 3 to 6 and to further direct the respondents to hold fresh selection for the post of Laboratory Attendant. This be done at the earliest, within a period of four months from the date of communication of certified copy of the order.

8. At this stage, Shri Sethi, learned senior counsel appearing for Respondent No. 3 to 6, submitted that in view of the aforesaid direction, the necessary consequence would be that Respondent No. 3 to 6 would be thrown out of the job and having worked on the post for about 10 years, they have obviously crossed the upper age-limit prescribed for public employment. He submitted that in order

to protect the interest of Respondent No. 3 to 6, they may be allowed to continue in service till the fresh selection takes place and they may be allowed to participate in the selection process condoning the age-limit. In support of this contention, Shri Sethi relied on a decision of Supreme Court in the case reported in (1992) 19 ATC. 292 : *H.C. Puttaswamy & others V/s. The Hon'ble Chief Justice of Karnataka High Court, Bangalore & others;* and a decision reported in 2004 AIR SCW 5332 : *Pankaj Gupta & others V/s. State of Jammu and Kashmir & others.*

9. Per contra, Shri Patne, learned counsel appearing for the petitioners, cited the decision of Supreme Court reported in J.T. 2005 (11) SC. 56 : *Binod Kumar Gupta & others V/s. Ram Ashray Mahoto & others;* and a decision reported in (2008) 1 SCC. (L&S) 348 : *Nagendra Chandra & others V/s. State of Jharkhand & others.*

10. After having given considerable thought to the problem placed before this Court, we deem it proper in the light of law laid down by the Supreme Court in the above decisions and for the smooth functioning of the College, the Respondent No. 3 to 6 may be allowed to continue in service till fresh selection and appointment is made in accordance with law by the Respondent No. 1 and 2 after issuing advertisement or calling the applications from the Employment Exchange so as to enable eligible persons to participate in the recruitment process. So far as petitioners and Respondent No. 3 to 6 are concerned, if they wish to participate in the recruitment process, in that eventuality, Respondent No. 1 and 2 shall not reject their application forms on the ground of age-limit and allow them to participate in the recruitment process provided, they possess requisite qualification and are eligible in all respect for appointment on the post of Laboratory Attendant.

11. In view of the foregoing discussion, this writ petition is allowed. It is once again reiterated that Respondent No. 1 and 2 shall ensure that entire exercise is completed as early as possible, but not later than four months from the date of communication of certified copy of this order. No costs.

Petition allowed.

I.L.R. [2008] M. P., 2594
WRIT PETITION
Before Mr. Justice R.S. Jha
3 July, 2008*

S.C. TANTIA ... Petitioner
Vs.
STATE OF M.P. ... Respondent

Fundamental Rules, M.P., Rule 56(3) - *Compulsory Retirement* - *Petitioner working as Executive Engineer - His service record was very good and his integrity*

*W.P. No.24495/2003 (Jabalpur)

was not doubtful - But, he was compulsorily retired on the ground of pendency of D.E. and a criminal case against him - Held - Compulsory retirement is resorted to only for removing officers who have outlived their utility or have become dead wood or their continuance in service is not in public interest - Pendency of D.E. and a criminal case cannot be made a basis of compulsory retirement as it would amount to penalty - Order of compulsory retirement quashed - He would be deemed to have been in service till age of his superannuation - Also entitled for full back wages, revised pension and all consequential benefits - Petition allowed.

(Paras 13 to 15)

मूलभूत नियम, म.प्र., नियम 56(3) – अनिवार्य सेवानिवृत्ति – याची कार्यपालन यंत्री के रूप में कार्यरत – उसका सेवा अभिलेख बहुत अच्छा था और उसकी सत्यनिष्ठा संदेहपूर्ण नही थी – किन्तु उसे उसके विरुद्ध विभागीय जाँच और एक आपराधिक मामला लम्बित होने के आधार पर अनिवार्य रूप से सेवानिवृत्त किया गया – अभिनिर्धारित – अनिवार्य सेवानिवृत्ति का आश्रय केवल उन अधिकारियों को हटाने के लिए लिया जाता है जिनकी उपयोगिता अधिक समय तक सेवा में बने रहने में नही है या अनुपयोगी हो गये हैं या उनका सेवा में बने रहना लोक हित में नही है – विभागीय जाँच और आपराधिक मामले का लम्बित होना अनिवार्य सेवानिवृत्ति का आधार नही बनाया जा सकता क्योंकि यह शास्ति के समान होगा – अनिवार्य सेवानिवृत्ति का आदेश अभिखण्डित – वह उसकी अधिवार्षिकी की आयु तक सेवा में होना समझा जाएगा – पिछले पूर्ण वेतन, पुनरीक्षित पेंशन और समस्त पारिणामिक लाभों के लिए भी हकदार – याचिका मंजूर।

Cases referred :

AIR 1954 SC 369, AIR 1960 SC 1305, AIR 1967 SC 1260, (1992) 2 SCC 299 (2001) 3 SCC 314, (1995) 1 SCC 336, (1999) 1 SCC 529, (1999) 1 SCC 529, 2002 (4) MPLJ 343.

Hemant Shrivastava, for the petitioner.

Ashok Agrawal, G.A., for the respondent/State.

ORDER

R.S. JHA, J. :–The petitioner, being aggrieved by order dated 6-1-2000, by which he has been compulsorily retired from service while working as a Superintending Engineer in the Water Resources Department has filed this petition before this Court.

2. The facts of the case, in brief, leading to the filing of the present petition are that the petitioner was initially appointed as an Assistant Engineer and was thereafter promoted as Executive Engineer on 12-6-1979. He was again promoted on 9-7-1993 as a Superintending Engineer. On 22-12-1997, after a Lokayukta enquiry, a charge sheet was filed against the petitioner and several others before the competent Criminal Court pursuant to which he was suspended vide order dated 31-1-1998. Subsequently, a departmental enquiry was initiated against the petitioner on 9-8-1999 in respect of certain charges relating alleged lapses in the performance of his duties. While the aforesaid criminal case as well as the departmental enquiry was pending, the petitioner's case was considered by a

Screening Committee constituted for the purposes of scrutinizing all case for compulsory retirement under F.R.56(3) of M.P. Fundamental Rules and en masse orders of compulsory retirement were issued which were challenged before the M.P.State Administrative Tribunal by several persons successfully and the cases were directed to be rescrutinised by a Review Screening Committee. The petitioner's case was also rescrutinised and by the impugned order dated 6-1-2000 the petitioner was compulsorily retired from service.

3. The case of the petitioner before this Court is that the petitioner had an excellent service record and was never served with any adverse entries. He has further submitted that the allegation on the basis of which the charge sheet was filed against him before the Criminal Court was apparently misconceived as the petitioner was not responsible for making any payments or deductions from the amounts to be paid to contractors which was in fact the duty of his subordinates. It is further submitted that apart from the charge sheet filed against the petitioner before the Criminal Court, a departmental enquiry was also initiated against the petitioner for the purpose of depriving him of his right to consideration for further promotion to the post of Chief Engineer for which he had become due in the year 1998. On instructions from the petitioner, the learned counsel for the petitioner submitted that during pendency of the present petition the petitioner has been exonerated in the departmental enquiry vide order dated 12-4-2002 and has been acquitted by the Criminal Court vide judgment dated 25-3-2006. In the circumstances, it is submitted by the learned counsel for the petitioner that the impugned order of compulsory retirement was not based on any material on record and clearly indicated total non-application of mind on the part of the Screening Committee as well as the respondent-authorities and, therefore, as the order of compulsory retirement of the petitioner, not being in public interest, was beyond the scope of F.R.56(3) and deserves to be set aside.

4. Per contra, the learned counsel appearing for the State/ respondent, submits that the State Government had constituted a Screening Committee to scrutinize the cases of all engineers working in the Water Resources Department for the purposes of compulsory retirements and the Screening Committee had laid down certain bench marks for the purposes of weeding out dead wood as well as corrupt officers from the department. It is submitted that the Screening Committee, on scrutinizing the case of the petitioner and taking into consideration the fact that departmental proceedings and a criminal case were pending against the petitioner, came to the conclusion that the petitioner was not fit to be retained in service and that his compulsory retirement from service was in public interest. In the circumstances, it is submitted that no fault can be found with the impugned order dated 6-1-2000 compulsorily retiring the petitioner and the petition being misconceived deserves to be dismissed.

5 I have heard learned counsel for the parties at length. The proceedings of

the Review Screening Committee as well as the service record of the petitioner was produced before the Court by the learned Government Advocate during hearing which has been minutely scrutinized by this Court as well as the learned counsels appearing for the parties. From a perusal of the Screening Committee Minutes, which summarized the service record of the petitioner and is reproduced herein, it is apparent that the petitioner had been awarded excellent grades and that his service record up to 1997-98 is very good :-

Confidential Valuation Sheet of last 15 years of Supdt. Engineers of Water Resources Department

Name of officer : Shri S.C. Tantia
Date of Birth : 12-3-43.
Date of First Appointment : 29-6-65.

Years		Report
1983-84	:	K+K (क+क)
1984-85	:	K (क)
1985-86	:	K (क)
1986-87	:	K+K (क+क)
1987-88	:	+K (+क)
1988-89	:	K+K (क+क)
1989-90	:	K (क)
1990-91	:	K (क)
1991-92	:	+K (+क)
1992-93	:	K (क)
1993-94	:	K (क)
1994-95	:	K (क)
1995-96	:	K (क)
1996-97	:	K (क)
1997-98	:	K (क)

It is also apparent from a perusal of the minutes of the Screening Committee that the petitioner's case was recommended for compulsory retirement not on the basis of a scrutiny of his service record, which was very good but only on the basis of the pendency of the departmental enquiry and the criminal case against him.

6. In view of the aforesaid undisputed facts, the only question that remains for adjudication is as to whether the petitioner could have been compulsorily retired from service only in view of the pendency of a departmental enquiry and a criminal case against him and whether pendency of departmental enquiry and criminal case against an employee would justify his compulsory retirement in public interest or would render him dead wood for the purposes of government service.

7. The law relating to compulsory retirement which is based simply on the basis of a scrutiny of the service record and which is well settled is that compulsory retirement is not a punishment as it does not result in any adverse consequences

and the petitioner is entitled to and is given pension and all other retirement benefits as has been held by the Supreme Court in the cases of *Shyamlal v. State of Uttar Pradesh and another,* AIR 1954 SC 369, *Dalip Singh v. State of Punjab,* AIR 1960 SC 1305 and *The State of Uttar Pradesh v. Madan Mohan Nagar,* AIR 1967 SC 1260. The parameters and guidelines on the basis of which such cases have to be scrutinized and adjudged have also been laid down by the Supreme Court in paragraph 34 in the case of *Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another,* (1992) 2 SCC 299 and in paragraph 11 in the case of *State of Gujrat v. Umedbhai M.Patel,* (2001) 3 SCC 314. It is also a settled law that compulsory retirement is resorted to only for the purposes of removing officers who have out lived their utility, have become dead wood or their continuance in service is not in public interest and, therefore, the authority while exercising its jurisdiction to compulsory retire an employee must carefully scrutinize his entire service record and must thereafter record a conclusion on that basis. In other words, the record of the employee must indicate that his performance was deteriorating with the passage of time or that his continuance in service was not in public interest.

8. In the present case, from a perusal of the record of the petitioner it is evident that the petitioner has been awarded 'very good' and 'excellent' grades and that his service record was very good. It is also apparent that there were no entries in his service record relating to his integrity and, therefore, prima facie, the impugned order of compulsory retirement finds no support from the service record of the petitioner.

9. The question as to whether an employee could be compulsorily retired only on the basis of the fact that the departmental proceedings were pending against him or in a case where criminal proceedings were pending against him came up for consideration before this Court in the cases of *Shyamlal v. State of Uttar Pradesh and another*, AIR, 1954 SC 309, *State of U.P. and another v. Abhai Kishore Masta* (1995) 1 SCC 336 and *State of Gujrat and another v. Suryakant Chunnilal Shah,* (1999) 1 SCC 529. In the case of *Abhai Kishore Masta* (supra) the Supreme Court quashed orders of compulsory retirement passed only on account of disciplinary proceedings and held in paragraphs 7 and 8 as follows :-

> "7. So far as the order of compulsory retirement under Fundamental Rule 56(j) is concerned, we are of the opinion that the principle enunciated by the High Court in J.N.Bajpai v. State of U.P., 1 (1990) 8 Lucknow Civil Decisions 149 and followed in the judgment under appeal is unsustainable in law. It cannot be said as a matter of law nor can it be stated as an invariable rule, that any and every order of compulsory retirement made under Fundamental Rule 56(j) (or other provision corresponding thereto) during the pendency of disciplinary proceedings is necessarily penal. It may be or it may not be. It is a matter to be decided on a verification of the relevant record or the material on which the order is based.

8. In the *State of U.P. v. Madan Mohan Nagar,* AIR 1967 SC 1260 it has been held by ka Constitution Bench that the test to be applied in such matters is "does the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsorily ?" It was observed that if the charge or imputation against the officer is made the condition of the exercise of the power it must be held to be by way of punishment otherwise not. In other words if it is found that the authority has adopted an easier course of retiring the employee under Rule 56(j) instead of proceeding with any concluding the enquiry or where it is found that the main reason for compulsorily retiring the employee is the pendency of the disciplinary proceeding or the leveling of the charges, as the case may be, it would be a case for holding it to be penal. But there may also be a case where the order of compulsory retirement is not really or mainly based upon the charges or the pendency of disciplinary enquiry As a matter of fact, in many cases, it may happen that the authority competent to retire compulsorily under Rule 56(j) and authority competent to impose the punishment in the disciplinary enquiry are different. It may also be that the charges communicated or the pendency of the disciplinary enquiry is only one of the several circumstances taken into consideration. In such cases it cannot be said that merely because the order of compulsory retirement is made after the charges are communicated or during the pendency of disciplinary enquiry, it is penal in nature.

10. As is apparent from a perusal of the aforesaid judgments of the Supreme Court, the mere and sole fact of pendency of a departmental proceeding against an employee cannot be made a basis of issuance of an order of compulsory retirement as that would in substance amount to imposing a penalty on the petitioner and would also be construed as an attempt on the part of the authorities to circumvent the due procedure prescribed by the Rules for holding a departmental enquiry.

11. In the case of *State of Gujrat and another v. Suryakant Chunnilal Shah,* (1999) 1 SCC 529, the Supreme Court set aside an order of compulsory retirement which was based merely on the fact that two criminal cases were pending against the employee though his service record was good as there was no mention about his doubtful integrity in his service record in spite of the pendency of the criminal cases and while doing so, held as under :-

> "27. The whole exercise described above would, therefore, indicate that although there was no material on the basis of which a reasonable opinion could be formed that the respondent had outlived his utility as a government servant or that he had lost his efficiency and had become a dead wood, he was compulsorily retired merely because of his

involvement in two criminal cases pertaining to the grant of permits in favour of fake and bogus institutions. The involvement of a person in a criminal case does not mean that he is guilty. He is still to be tried in a court of law and the truth has to be found out ultimately by the court where the prosecution is ultimately conducted. But before that stage is reached, it would be highly improper to deprive a person of his livelihood merely on the basis of his involvement. We may, however, hasten to add that mere involvement in a criminal case would constitute relevant material for compulsory retirement or not would depend upon the circumstances of each case and the nature of offence allegedly committed by the employee.

28. There being no material before the Review Committee, inasmuch as there were no adverse remarked in the character roll entries, the integrity was not doubted at any time, the character roll entries subsequent to the respondent's promotion to the post of Assistant Food Controller (Class II) were not available, it could not come to the conclusion that the respondent was a man of doubtful integrity nor could have anyone else come to the conclusion that the respondent was a fit person to be retired compulsorily from service. The order, in the circumstances of the cased, was punitive having been passed for the collateral purpose of his immediate removal, rather than in public interest. The Division Bench, in our opinion, was justified in setting aside the order passed by the Single Judge and directing reinstatement of the respondent."

12. From a perusal of the aforesaid judgments of the Supreme Court, it is clear that in cases where the service record of an employee is good but he is compulsorily retired only on account of pendency of departmental proceedings and criminal cases against him, the order of compulsory retirement would not be an innocuous order in public interest but would in substance acquire the character of being a punitive order passed for collateral purposes with a view to immediately remove the employee by circumventing the procedure prescribed by law. The same view has been taken by a Division Bench judgment of this Court in the case of State of *M.P. v. Laxmi Chand Awadhiya,* 2002 (4) MPLJ 343 wherein this Court quashed the order of compulsory retirement which was passed only on the basis of pendency of departmental enquiries and criminal proceedings through the service record of the employee was good.

13. In the present case as the service record of the petitioner is very good and he has been compulsorily retired only on account of pendency of a departmental enquiry and a criminal case against him which, even otherwise, have undisputedly ended in his exoneration and acquittal, respectively, during the pendency of the present petition, the impugned order of compulsory retirement, not being justified

on the basis of the service record, amounts to perverse and illegal exercise of power under F.R.56(3) and is punitive and, therefore, the impugned order dated 6-1-2000 deserves to be and is hereby quashed in view of the law laid down by the Supreme Court in the aforementioned judgments.

14. In the present case as is seen from a perusal of the record, the petitioner was initially compulsorily retired without proper application of mind and, therefore, the order was quashed and the matter was remitted back for re-examination of his case and all other similar cases by a review screening committee. Thereafter, the respondents have again compulsorily retired the petitioner by the impugned order without applying their mind to the service record of the petitioner which on the face of it, does not warrant his compulsory retirement as has been held by me in the preceding paragraph and, therefore, the petitioner has been prevented from performing his duties and kept out of service for no fault of his and as a result of which he has been deprived of his legitimate salary and other benefits which he would have enjoyed had the impugned order not been passed repeatedly by the respondent-authorities without applying their mind in spite of orders by the Court.

15. In view of the aforesaid peculiar circumstances existing in the present case, I am of the considered view that as a consequence of quashing of the impugned order of compulsory retirement the petitioner would be deemed to have been in service till the age of his superannuation and would also be entitled to and is hereby granted full back wages for the period during which he was kept out of service, revised pension and all other consequential benefits.

16. With the aforesaid observation the petition filed by the petitioner stands allowed. The impugned order of compulsory retirement dated 6-1-2000 is hereby quashed. In the peculiar facts and circumstances of the case there shall be no order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2601
WRIT PETITION
Before Mr. Justice S.K. Gangele
11 July, 2008*

GANESH PRASAD MADAN ... Petitioner
Vs.
STATE TRANSPORT APPELLATE TRIBUNAL & ors. ... Respondents

A. Motor Vehicles Act (4 of 1939), Sections 68-B, 57(2)(3), Motor Vehicles Act, 1988, Section 80 - *Permit - While granting new permit as per the provision of Act of 1988 after receiving application prior publication of notice and further notice to the operator who have been plying their vehicles on the route is necessary or not - Held - Not necessary - Petition allowed.* (Para 12)

*W.P. No.2074/2008 (Gwaliior)

क. मोटर यान अधिनियम (1939 का 4), धाराएँ 68–बी, 57(2)(3), मोटर यान अधिनियम, 1988, धारा 80 – अनुज्ञापत्र – नवीन अनुज्ञापत्र देते समय 1988 के अधिनियम के उपबंध के अनुसार आवेदन प्राप्त करने के पश्चात् सूचनापत्र का पूर्व प्रकाशन और संचालक, जो उनके वाहन उस मार्ग पर चला रहे हों, को सूचनापत्र आवश्यक है या नही – अभिनिर्धारित – आवश्यक नही – याचिका मंजूर।

B. Powers of the Courts - *It is well settled principle of law that court by way of direction cannot introduce a new clause which has been deleted by the legislature - It would mean enacting a new law which is beyond the powers of the court.* (Para 12)

ख. न्यायालयों की शक्तियाँ – विधि का यह सुस्थापित सिद्धांत है कि न्यायालय निदेश के माध्यम से नवीन खण्ड पुरःस्थापित (introduce) नही कर सकता जो विधायिका द्वारा हटा दिया गया है – इसका अर्थ होगा, नवीन विधि अधिनियमित करना न्यायालय की शक्ति से परे है।

Cases referred :

AIR 1992 SC 443, AIR 1968 SC 410, AIR 1995 All 330, (2004) 6 SCC 186, AIR 1991 AP 11 (FB).

Arvind Dudawat, for the petitioner.

R.D. Sharma, for the respondent No.3.

ORDER

S.K. GANGELE, J. :–Petitioner has filed this petition challenging the order Annexure P/1 dated 24.04.2008 passed in revision No. 581/2007.

2. The petitioner is a bus operator. He is owner of a vehicle bearing registration No. M.P.-04/HB- 9041 which is a passenger bus. The State Government vide gazette notification dated 11.02.1991 published a scheme No. 82 under sub section 3 of section 68-B of the Motor Vehicles Act, 1939(herein after referred to as Act of 1939). By the aforesaid scheme private operators have been permitted to ply their vehicles on certain routes including Bhopal & Obedullaganj.

3. The petitioner applied for grant of regular permit for feeder service in accordance with the aforesaid scheme from obedullaganj to Jawahar Chowk, Bhopal. The application of the petitioner was rejected by the Regional Transport Authority vide order dated 02.01.2007. Thereafter, the petitioner filed an appeal against the aforesaid order which was registered as Appeal No. 51/2007. The Appellate Court allowed the appeal and remanded the case back to the authority for consideration of grant of permit. Thereafter, vide order dated 21.05.2007, the petitioner has been granted permit for the route mentioned above. The permit has been issued for the period 06.08.2007 upto 05.08.2012.

4. Against the aforesaid order of grant of permit, the respondent No. 3 filed a petition before this High Court which was registered as W.P.No. 136/2007 and the same was decided by this Court vide order dated 01.10.2007. The High Court directed the respondent No. 3 to file a revision before the State Transport Appellate

Tribunal. Consequently, the respondent No. 3 filed a revision before the Tribunal and vide impugned order, the Tribunal allowed the revision of the respondent No. 3 and set aside grant of permit to the petitioner. Further, it has remanded the matter back to the authority. The main reason for setting aside the grant of permit by the Tribunal is that the authority who granted permit had neither given notice to the existing operators of that route nor the aforesaid notice had been published prior to grant of permit to the petitioner.

5. It is a fact that the respondent No. 3 did not file any objection before the authority at the time of grant of permit in favour of the petitioner. The reason mentioned by respondent No. 3 for the aforesaid is that she had no notice or information about grant of permit because no such notice had been published.

6 Learned counsel for the petitioner submitted that the impugned order passed by the Tribunal is against the law and against the provisions of Motor Vehicles Act, 1988 (hereinafter referred to as Act of 1988). Learned counsel further contended that publication of the notice or prior notice to the existing operators of the aforesaid route is not necessary for grant of new permit as per the provisions of Act of 1988. In support of his contentions, learned counsel relied on the Judgment of Hon'ble the Supreme Court in *Mithilesh Garg, etc. etc., Vs. Union of India and Others etc. etc.* reported in AIR 1992 S.C. 443.

7. Contrary to this, learned counsel for the respondent No. 3 submitted that the petitioner was not entitled for grant of permit under the scheme because his vehicle was more than three years old. It has further been stated that the right of the respondent No. 3 has been affected badly because the petitioner has been given three minutes before timing to the respondent No. 3. Hence, as per rule of natural justice the respondent No. 3 is entitled notice and opportunity of hearing. In support of his contentions learned counsel relied on the following Judgments :

a) AIR 1968 Supreme Court 410 *(Lakshmi Narain Agarwal Vs. The State Transport Authority, U.P. & Another.)*

b) AIR 1995 ALLAHABAD 330 *(Smt. Munni Devi and Others Vs. Regional Transport Authority & Another)*

c) (2004) 6 Supreme Court Cases 186 *(Collector of Central Excise, Calcutta Vs. Alnoori Tobacco Products and Another)*

8. From the facts of the case, it is clear that the question for determination before this Court in the present case is whether while granting new permit as per the provisions of Act of 1988 after receiving application prior publication of notice and further notice to the operators who have been plying their vehicles on the route is necessary or not? It is fact that the respondent No. 3 did not submit any objection at the time of grant of permit to the petitioner. Respondent No. 3 stated before the Tribunal that she had no knowledge about grant of permit to the petitioner. It is also a fact that respondent No. 3 has also been granted permit of

the route and the petitioner has been granted permit before timing of the respondent No. 3. As per the provisions of the Act of 1988, there is no right in favour of the existing transport operators to file objections in case of grant of new permit. Although there was a provision to this effect in the earlier Act of 1939. The relevant provision in old Motor Vehicles Act, 1939 was in section 57 (2) (3) after amendment in the new Motor Vehicle Act, 1988 there is no such provision in section 80 of the Act of 1988.

9. Hon'ble the Supreme Court in *Mithilesh Garg, etc. etc., Vs. Union of India and Others etc. etc.* reported in AIR 1992 Supreme Court 443 has considered in detail the aims and object of reviewing the Act of 1939 and summarized the history as under :

> 3. A Working Group was, therefore, constituted in January, 1984 to review all the provisions of the Motor Vehicles Act, 1939 and to submit draft proposals for a comprehensive legislation to replace the existing Act. This Working Group took into account the suggestion and recommendations earlier made by various bodies and institutions like Central Institute of Road Transport Automotive Research Association of India, and other transport organizations including the manufacturers and the general public. Besides, obtaining comments of State Governments on the recommendations of the Working Group, these were discussed in a specially convened meeting of Transport Ministers of all States and Union Territories. Some of the more important modifications so suggested related for taking care of-
>
> (a)& (b) .....
>
> (c) the greater flow of passenger and freight with the least impediments so that islands of isolation are not created leading to regional or local imbalances;
>
> (d) .....
>
> (e) simplification of procedure and policy liberalization for private sector operations in the road transport field; and
>
> (f) .....
>
> The proposed legislation has been prepared in the light of the above background. Some of the more important provisions of the Bill provide for the following matters, namely:-
>
> (a) to (f) .....
>
> (g) liberalized schemes for grant of stage carriage permits on non-nationalized routes, all-India tourist permits and also national permits for goods carriages .....
>
> (h) to (l) .....

4. Chapter V of the Act - substitute for Chapter IV of the old Act - consisting of Sections 66 to 96, provides for 'control of transport vehicles'. Sections 71, 72 and 80, to the relevant extent, are reproduced as under:

"71. Procedure of Regional Transport Authority in considering application for stage carriage permit.- (1) A Regional Transport Authority shall, while considering an application for a stage carriage permit, have regard to the objects of this Act:

Provided that such permit for a route of fifty kilometers or less shall be granted only to an individual or a State transport undertaking.

(2) A Regional Transport Authority shall refuse to grant a stage carriage permit if it appears from any timetable furnished that the provisions of this Act relating to the speed at which vehicles may be driven are likely to be contravened:

Provided that before such refusal an opportunity shall be given to the applicant to amend the time-table so as to conform to the said provisions.

(3) (a) The State Government shall, if so directed by the Central Government having regard to the number of vehicles, road conditions and other relevant matters, by notification in the Official Gazette, direct a State Transport Authority and a Regional Transport Authority to limit the number of stage carriages generally or of any specified type, as may be fixed and specified in the notification, operating on city routes in towns with a population of not less than five lakhs..... .....

(4) A Regional Transport Authority shall not grant more than five stage carriage permits to any individual or more than ten stage carriage permits to any company (not being a State transport undertaking).

(5) In computing the number of permits to. be granted under sub-section (4), the permits held by an applicant in the name of any other persons and the permits held by any company of which such applicant is a director shall also be taken into account.

72. Grant of stage carriage permits-(1) Subject to the provisions of Section 71, a Regional Transport Authority may, on an application made to it under Section 70, grant a stage carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit:

Provided that no such permit shall be granted in respect of any route or area not specified in the application.

80. Procedure in applying for and granting permits,- (1) An application for a permit of any kind may be made at any time.

(2) A Regional Transport Authority shall not ordinarily refuse to grant an application for permit of any kind made at any time under this Act:

Provided that the Regional Transport Authority may summarily refuse the application if the grant of any permit in accordance with the application would have the effect of increasing the number of stage carriages as fixed and specified in a notification in the Official Gazette under clause (a) of sub-section (3) of Section 71 or of contract carriages as fixed and specified in a notification in the Official Gazette under clause (a) of sub-- section (3) of Section 74:

Provided further that where a Regional Transport Authority refuses an application for the grant of a permit of any kind under this Act it shall give to the applicant in writing its reasons for the refusal of the same and an opportunity of being heard in the matter."

5. A comparative reading of the provisions of the Act and the old Act makes it clear that the procedure for grant of permits under the Act has been liberalized to such an extent that an intended operator can get a permit for asking irrespective of the number of operators already in the field. Under Section 57 read with Section 47(1) of the old Act an application for a stage carriage permit was to be published and kept for inspection in the office of the Regional Transport Authority so that the existing operators could file representations / objections against the said application. The application, along with objections, was required to be decided in a quasi-judicial manner. Section 47(3) of the old Act further permitted the imposition of limit on the grant of permits in any region, area or on a particular route. It is thus obvious that the main features of Chapter IV "control of transport vehicles" under old Act were as under:

1. The applications for grant of permits were published and were made available in the office of the Regional Transport Authority so that the existing operators could file representations;

2. The applications for grant of permits along with the representations were to be decided in quasi judicial manner; and

3. The Regional Transport Authority was to decide the applications for grant of permits keeping in view the criteria laid down in Section 47(1) and also keeping in view the limit fixed under Section 47(3) of the Act. An application for grant of permit beyond the limited number fixed under Section 47(3) was to be rejected summarily.

6. The Parliament in its wisdom has completely effaced the above features. The scheme envisaged under Sections 47 and 57 of the old Act has been completely done away with by the Act. The right of existing operators to file objections and the provision to impose limit on the

number of permits have been taken away. There is no similar provision to that of Section 47 and Section 57 under the Act. The Statement of Objects and Reasons of the Act shows that the purpose of bringing, in the Act was to liberalize the grant of permits. Section71(1) of the Act provides that while considering an application for a stage carriage permit the Regional Transport Authority shall have regard to the objects of the Act. Section80(2), which is the harbinger of Liberalization, provides that a Regional Transport Authority shall not ordinarily refuse to grant an application for permit of any kind made at any time under the Act. There is no provision under the Act like that of Section 47(3) of the old Act and as such no limit for the grant of permits can be fixed under the Act. There is, however, a provision under Section 71(3) (a) of the Act under which a limit can be fixed for the grant of permits in respect of the routes which are within a town having population of more than five lakhs."

10. It is clear from the aforesaid provisions as quoted by Hon'ble the Supreme Court that in amended Motor Vehicles Act of 1988, the Parliament in its wisdom has completely done away the right of the existing operators to file objections. The Hon'ble Supreme Court further held in the above Judgment that by the aforesaid amendment the right of the existing transport operators to carry out profession under Article 19 (1) (f) & (g) has not been affected.

11. A full Bench of Andhra Pradesh High Court in *The Secretary, Regional Transport Authority, Guntur and Another, etc. Vs. E.Rama Rao and Others etc.* reported in AIR 1991 Andhara Pradesh page 11 has considered the point of prior publication and giving notice to the existing operators in the event of grant of new permit as per the provisions of Act of 1988 and held as under :

"The provisions of S. 71 and S. 80 in the new Act as compared with Ss. 47 and 57 of the old Act clearly define the limits of the restrictions to be imposed in public interest under Art. 19(6) and therefore, the R.T.A. while exercising powers under the new Act, has necessarily to bear in mind those restrictions and cannot impose any other restrictions in the context of Art. 19(6), that were statutorily imposed earlier by Ss 47 and 57 of the old Act. The Statement of Objects and Reasons of the New Act clearly states that the Act proposes to liberalize the grant of permits. In such a situation, it is, not open to the High Court to imply and read into the new Act, the same provisions which have been deliberately and expressly omitted. The new applicants for grant of stage carriage permits are obviously exercising their fundamental right under Art. 19 (1) (g) to carry on their occupation, trade or business. Such a fundamental right can, no doubt be restricted by an existing law or a new law, by the imposition of reasonable restrictions in the interest

of the general public under Art. 19(6). It is for Parliament from time to time to define the limits upto which the said fundamental right under Art. 19(1)(g) can be reasonably restricted. Under the old Motor Vehicles Act, 1939 the restrictions included one which enabled an existing operator to represent and also to be heard in opposition. That restriction has now been deliberately removed and thereby the fundamental right of the applicant is not now as restricted as, it was before the new Act. Further an existing operator cannot be said to suffer any legal injury if a new rival operator is proposed to be introduced. These being the factors governing the situation the Parliament intended to negative any right to the existing operators either to submit their representations or to a right to a hearing under S. 71(1) or S. 80(2) of the new Act. It is therefore not open to the Court to imply principles of natural justice and add further restrictions than what Parliament considered sufficient, according to its new legislative policy."

12. It is clear from the aforesaid principle of law laid down by the Hon'ble Supreme Court and Full Bench of Andhara Pradesh High Court that as per the provisions of Motor Vehicles Act, 1988 prior publication of notice and giving opportunity of hearing to the existing operators at the time of grant of new permit is not necessary. It is a fact that the application filed by the petitioner was affixed on the notice board of the Regional Transport Authority. In such circumstances, the direction issued by the Tribunal vide impugned order for publication and giving notice to the existing transport operators in the event of grant of new permit is contrary to law. It is also contrary to the intention and object of the Parliament because similar provision which was in Act of 1939 has been deleted in the new Act of 1988. It is a well settled principle of law that Court by way of direction cannot introduce a new clause which has been deleted by the Legislature. It would mean enacting new law which is beyond the powers of the Court. No other point has been considered by the Tribunal in remanding the case back to the authority, hence, the points raised by the learned counsel for the respondent No. 3 with regard to age of the vehicle and timings cannot be considered in this writ petition. The respondent No. 3 is at liberty to file appropriate proceedings with regard to aforesaid objection in accordance with law.

13. Consequently, petition of the petitioner is allowed. The impugned order Annexure P/1 dated 24.04.2008 is hereby quashed.

14. No order as to cost.

Petition allowed.

I.L.R. [2008] M. P., 2609

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

16 July, 2008*

VISHNU VAKIL ... Petitioner

Vs.

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

Constitution, Article 226, Civil Services (Pension) Rules, M.P. 1976, Rule 9 - *Service Law - Recovery by way of issuance of R.R.C. after retirement of employee - Allegation that while employee was posted as store keeper some articles were found missing and employee accepted the shortage of articles - Allegation not proved as department failed to produce any document - No adjudication of recovery by way of departmental or judicial proceeding - Held - Issuance of R.R.C. for recovery without departmental or judicial proceeding, not sustainable - R.R.C. quashed - Petition allowed.* (Paras 7, 8 & 9)

संविधान, अनुच्छेद 226, सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9 – सेवा विधि – कर्मचारी की सेवानिवृत्ति के पश्चात् आर.आर.सी. द्वारा वसूली – आरोप कि जब कर्मचारी स्टोर कीपर के रूप में पदस्थ था कुछ वस्तुएँ कम पायी गईं और कर्मचारी ने वस्तुओं की कमी स्वीकार की – आरोप साबित नही हुआ क्योंकि विभाग कोई दस्तावेज पेश करने में असफल रहा – विभागीय या न्यायिक कार्यवाही में वसूली का कोई न्याय–निर्णय नही – अभिनिर्धारित – विभागीय या न्यायिक कार्यवाही के बिना वसूली हेतु आर.आर.सी. का जारी किया जाना स्थिर रखे जाने योग्य नही – आर.आर.सी. अभिखण्डित – याचिका मंजूर।

Case referred :

2002 RN 419.

D.M. Kulkarni, for the petitioner.

M.S. Dwivedi, Panel Lawyer, for the respondents.

ORDER

SHANTANU KEMKAR, J. :–The petitioner a retired Upper Division Clerk from the Public Works Department of the State of Madhya Pradesh, has filed this petition seeking quashment of Revenue Recovery Certificate (for short 'RRC') dated 27.09.2001 (Annexure P/l) issued against him by 4th respondent Tahsildar, Burhanpur for the recovery of Rs. 65,580/-

2. Briefly stated, on attaining the age of superannuation on 30.09.91, the petitioner was retired from the Public Works Department. The Executive Engineer deducted a sum of Rs.68,575.20 Paise from the petitioner's G.P.F. account. Feeling aggrieved the petitioner had filed O.A. No. 684/93 before the Madhya Pradesh State Administrative 'tribunal Bench at Indore (for short" the tribunal"). The said O.A. was allowed by the tribunal vide dated 8.4.94 and the recovery was set

*W.P. No.6479/2006 (Indore)

aside observing further that allowing of the O.A. and setting aside the order of recovery will not be a bar for the recovery according to the law and procedure.

3. Thereafter, Tahsildar, Burhanpur issued the aforesaid RRC (Annexure P/1). Aggrieved, the petitioner approached to the tribunal in OA No. 1286/01. On abolition of the tribunal, the O.A. was transferred to this Court and was renumbered as WP No. 9148/03. The said WP No. 9148/03 was dismissed as withdrawn vide order dated 16.02.2006 passed by this Court with a liberty to the petitioner to file a fresh petition making appropriate pleadings to challenge the RRC. According to the said liberty, the present petition has been filed.

4. The case of the petitioner is that it is after more than 10 years of his retirement, the RRC for the recovery of amount of Rs,65,580/- has been issued against him. According to him, no recovery could be effected invoking provisions of Land Revenue Code, 1959 (for short 'the Code'). He submits that the only mode prescribed for recovery under the service rules in such circumstances is under rule 9 of the Madhya Pradesh Civil Services (Pension Rule), 1976 (for short, 'the pension rules'). His further case is that before issuance of RRC the respondents have failed to follow the principles of natural justice in as much as no opportunity of hearing was ever given to the petitioner.

5. The respondents filed the reply and have stated that while the petitioner was posted as store keeper some articles were found missing, therefore, the recovery was ordered. According to the respondents, the petitioner accepted the shortage in the articles of the stores and, therefore, the recovery has rightly been ordered by way of RRC.

6. Having heard learned counsel for the parties in my view the petition deserves to be allowed. The petitioner was retired from service in the year 1991. Thereafter, the recovery made from GPF account of the petitioner was set aside by the tribunal on 8.4.94. No action for the alleged recovery was taken for such a long period, now vide RRC dated 27.09.01 (Annexure P/1) the respondents have taken action for the recovery of the amount by invoking Section 146 of the Code. The amount sought to be recovered from the petitioner is not the arrears of the land revenue and as such the same is not recoverable by invoking the provisions of Code. There is no adjudication by way of any departmental or judicial proceedings about the liability or ascertainment of quantum of the alleged shortage in the stores department.

7. The plea taken by the respondents that the petitioner had accepted the shortage and therefore recovery by way of RRC is justified also has not been substantiated by the respondents by producing any document in support, therefore, the averment of the respondents in this regard has no base. The respondents did not invoke rule 9 of the pension rules nor filed a civil suit for the said recovery from the petitioner. Having not done so, the respondent cannot invoke the provisions of the Code and issue RRC against the petitioner for the recovery of the said amount.

8. A learned Single Judge of this Court in the case of *Kuldeep Gupta v/s State of M.P. and others.* (2002 RN 419) had occasion to deal with similar facts and it has been held in the case of *Kuldeep Gupta* (supra) that recovery of amount of defalcation being not the amount of the land revenue cannot be recovered under the provisions of the Code. It has also been held that the amount due from an employee against excess payment made by him in the discharge of his duties can not be recovered as arrears of the land revenue.

9. Having regards to the aforesaid, the impugned action of issuance of RRC in the year 2001 by the respondents for the alleged recovery of the period prior to 30.09.1991 without there being any departmental enquiry or judicial proceedings, cannot be sustained. The amount sought to be recovered is not recoverable under the provisions of the Code.

10. Accordingly, the petition is allowed. The impugned RRC (Annexure P/1) is quashed. No orders as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2611
WRIT PETITION
Before Mr. Justice S.K. Gangele
28 July, 2008*

CHITRAREKHA (SMT.) ... Petitioner
Vs.
VIRENDRA KUMAR SHARMA & anr. ... Respondents

Civil Procedure Code (5 of 1908), Section 34, Constitution, Article 227 - ***Interest*** - *Trial court awarded interest at rate of 18% p.a. from the date of institution of suit till realisation without recording a finding that the loan transaction was a commercial transaction - Held - Trial court has no jurisdiction to award interest at the rate of 18% p.a. after judgment and decree upto realisation of amount - Upto that extent decree passed by trial court is a nullity - Objection can be raised at the stage of execution and also proceeding under Article 227 of the Constitution - If decree is nullity upto that extent cannot be executed - Petition allowed.* (Para 12)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 34, संविधान, अनुच्छेद 227 – ब्याज – विचारण न्यायालय ने यह निष्कर्ष अभिलिखित किये बिना कि ऋण संव्यवहार वाणिज्यिक संव्यवहार था, वाद संस्थित किये जाने की तारीख से वसूली तक 18 प्रतिशत प्रतिवर्ष की दर से ब्याज अधिनिर्णीत किया – अभिनिर्धारित – विचारण न्यायालय को निर्णय व डिक्री के पश्चात् राशि की वसूली तक 18 प्रतिशत प्रतिवर्ष की दर से ब्याज अधिनिर्णीत करने की अधिकारिता नही है – उस सीमा तक विचारण न्यायालय द्वारा पारित डिक्री अकृत है – आपत्ति निष्पादन के प्रक्रम पर और संविधान के अनुच्छेद 227 के अन्तर्गत कार्यवाही में भी उठायी जा सकती है – यदि डिक्री अकृत है तो उस सीमा तक निष्पादित नही कराई जा सकती – याचिका मंजूर।

*W.P. No.5917/2006 (Gwalior)

Cases referred :

AIR 1994 P&H 98, AIR 1954 SC 340, AIR 1970 SC 1475, Division Bench of Bombay High Court.

T.C. Singhal, for the petitioner.
Rajendra Jain, for the respondent No.1.
P.C. Chandil, as amicus curiae.

O R D E R.

S.K. GANGELE, J. :–Heard on I.A. No. 10288/08 for taking certain documents on record.

The application is allowed.

2. Because the petitioner has challenged the order passed in execution proceedings hence with the consent of parties the case is disposed of finally.

3. Plaintiff - respondent No. 1, Virendra Kumar Sharma, filed a civil suit against the petitioner - defendant No.1 for recovery of an amount of Rupees Two Lakhs with interest at the rate of 18 % per annum. He pleaded that the defendants had taken a loan for their personal use on 01.11.1999. In consequence thereof a promissory note was executed. Defendants also agreed to pay interest at the rate of 18 % per annum on the loan amount. However, inspite of that the defendants did not pay the aforesaid amount. Defendants denied the execution of promissory note and taking loan. They pleaded that plaintiff authored a forged document. The trial Court after recording the finding that defendants had taken a loan of Rupees Two Lakhs passed a decree of an amount of Rupees Two Lakhs with interest at the rate of 18 % per annum from the date of institution of the suit i.e. 08.08.2002. Plaintiff filed an execution proceedings for execution of the aforesaid decree. During execution proceedings the petitioner - defendant No.1 deposited an amount of Rs.40,000/- on 24.03.2006 and Rs.2,36,000/- on 01.07.2006 calculating the interest at the rate of 6 % per annum. The Executing Court did not satisfy with the amount and issued notification for auction of the property of the petitioner on the ground that petitioner did not deposit the amount as per the rate of interest of 18 % per annum

4. Learned counsel for the petitioner and Amicus Curiae, Mr. P.C. Chandil, appointed by the Court have submitted that the trial Court committed an error of law and jurisdiction in awarding interest at the rate of 18 % per annum. As per the provisions of Section 34 of the Code of Civil Procedure the Court had no jurisdiction to award interest more than 6 % per annum and to that extent judgment and decree are nullity and the Executing Court has power to refuse execution of the decree upto that extent. Contrary to this, learned counsel for respondent No.1 has submitted that a decree has been passed. The petitioner did not file any appeal against the judgment and decree, hence it became final and the trial Court has no power to go beyond the decree.

5. Undisputed facts of the case are that the trial Court passed a decree in favour of the plaintiff of Rupees Two Lakh with interest at the rate of 18 % per annum from the date of filing of the suit i.e. 08.08.2002, The decree has been passed in Civil Suit No. 3-B/2002 by Third Additional District Judge, Gwalior, copy of the judgment has been filed by the petitioner alongwith an application for taking documents on record. It is clear from the judgment of the trial Court, as stated above in this order that the case of the plaintiff before the trial Court was that defendants had taken loan for their own personal purpose and business of Rupees Two Lakhs and executed a promissory note of Rupees Two Lakhs with a condition to pay interest at the rate of 18 % per annum.

6. The plaintiff, Virendra Kumar Sharma, in his deposition clearly stated that defendants had taken a loan of Rupees Two Lakhs. He stated that there was need for the money. Same facts have been stated by Mr. K .C. Jain, (PW-2), plaintiff's witness. The trial Court in para 12 of its judgment has recorded a finding that the defendants had taken a loan of Rs. Two Lakhs on 01.11.1999 and executed a promissory note. It was a condition in th promissory note to pay interest at the rate of 18 % per annum but defendants did not pay the loan. There is no finding of the trial Court that the loan was taken for business purpose. Contrary to this, the pleadings of the plaintiff was that the loan was taken by the defendants for their personal and business purpose. The Plaintiff did not discharge the burden of proof that the loan was for business purpose neither there is a finding to this effect by the trial Court that defendant had taken a loan for business purpose.

7. Section 34 of the Code of Civil Procedure gives power to the Court for awarding interest at the rate as has been fixed in this section, which reads as under :-

> "34. Interest .- (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, (with further interest at such rate not exceeding six per cent. pr annum, as the Court deems reasonable on such principal sum), from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:
>
> (Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I .- In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

Explanation II .- For the purpose of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.)

(2) Where such a decree is silent with respect to the payment of further interest (on such principal sum) from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lies."

8. It is clear from the aforesaid section that the Court has no jurisdiction to award further interest at the rate not exceeding 6 % per annum on principal sum, if the loan is not for business purpose. However, as per the proviso of section 34 CPC the Court can award further interest more than six per cent per annum or at the agreed rate at the contractual rate or at the rate fixed by the nationalised banks for commercial transactions if the transaction is commercial one.

9. In awarding interest at the rate of 18 % per annum as has been awarded by the trial Court from the date of institution of the suit upto the date of decree and thereafter future it was obligatory on the part of the Court to record a finding that the transaction was a commercial one because the trial Court has no jurisdiction to award interest after pronouncement of decree more than 6 % per annum if the transaction is not a commercial one. In the present case, there is no finding recorded by the trial Court that the transaction is a commercial one.

10. A Division Bench of High Court of *Punjab and Haryana Jagdish Chander v. Punjab National Bank,* AIR 1994 Punjab & Haryana 98 has held as under, with regard to power of the Court in awarding interest if transaction is not a commercial transaction :-

"4. In view of the authoritative pronouncement it is no more open to exception that under Section 34 of the Code future interest exceeding 6 per cent per annum can be granted if liability adjudged has arisen out of commercial transaction and in no event it shall exceed the contractual rate of interest, and if the contractual rate of interest is not established the Court can grant interest at a rate allowed by the nationalised bank in relation to commercial transactions. The Court seized of the suit has to come to a conclusion that the money was advanced in a commercial transaction and once it so holds the case will be squarely covered under Ist proviso to S. 34 of the Code. If the liability sought to be imposed does not arise out of a commercial transaction where the loan was advanced to an agriculturist for purpose of mechanising cart or somewhat identical purposes, it cannot be said that the loan was connected with commercial transaction. In *Krishan Lal v. State Bank of Patiala,*

1990 (I) 97 Pun. LR 132 while interpreting the proviso read with Explanation II of S. 34 of the Code observed thus :-

"The proviso, read with Explanation (II) ;of S. 34 as reproduced above, would not apply to the facts of the case in hand. The loan of Rs.5000/- for the purchase of a mechanised cart, cannot be remotely connected with a commercial transaction, connected with the industry, trade or business of the party incurring liability. As ruled in *Siri Chand's case* (1988 (I) 93 Pun. LR 473) (supra), it is the jurisdiction of the Court to pass an order for grant of future interest at the time of passing the decree and if such an order is passed which is beyond the jurisdiction of the Court, same could be nullity and objection to that effect can be taken in execution proceedings. To the extent, as stated above, the decree of the Civil Court cannot be executed against the judgment-debtor (petitioner)."

A Division Bench of Bombay High Court has held, as under, with regard to commercial transaction :-

"There is a clear distinction between the profession on one hand and industry, trade and business on the other. While dealing with the 'commercial transaction" for the purpose of Section 34, CPC the Legislature has not used the word 'profession' along with the words, 'industry', 'trade', or 'business'. The commercial transaction which are strictly connected with the industry, trade, or business alone are included for the purpose of S.34, CPC as provided in Expln.2. Though the "commercial transaction" is inclusive of 'Industry, trade and business", but it is exclusive of "profession". The fact that the Legislature has not included the word "profession" along with the words "industry, trade and business" to specify the "commercial transaction" cannot be ignored. The proviso to S.34, C.P.C. will, therefore not govern the cases where the loan is advanced for the 'profession' or for "professional transaction". The construction of hospital cannot be said to be profit-oriented, unless there is evidence to hold it so. The construction of a hospital can be service-oriented and not necessarily profit-oriented. The loan advanced by Bank for construction of hospital is therefore not a commercial transaction. Awarding future interest at the rate of 6 % P.A. cannot be said to be in contravention of the provisions of S. 34, C.P.C."

11. Hence, as per the provisions of section 34 of the Code of Civil Procedure and the law laid down by the various High Courts stated above the decree passed by the trial Court awarding interest at the rate of 18 % per annum upto the date of realisation of the amount is without jurisdiction.

Hon'ble the Supreme Court in *Kiran Singh and others v. Chaman Paswan and others*, AIR 1954 SC 340 (Para 6) has held as under with regard to the decree and judgment passed by the Court without jurisdiction :-

"(6) The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of section 11 of the Suits valuation Act is on that position. It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, & that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at thje very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was 'coram non judice', and that its judgment and decree would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position."

The Hon'ble Supreme Court in *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and others,* AIR 1970 SC 1475 (Para 7) has held as under :-

"7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and ;requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In *Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarti,* 60 Ind App 71 = (AIR 1933 PC 61) the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction."

12. Hence, in my opinion, the trial Court had no jurisdiction to award interest at the rate of 18 % per annum after the judgment and decree upto the realisation of

the amount. Up to that extent the decree passed by the trial Court is a nullity and this objection can be entertained in the execution proceedings and also proceedings under Article 227 of the Constitution because if a decree is a nullity upto that extent the decree cannot be executed. Hence, the Executing Court has committed an error of jurisdiction in issuing the auction proceedings with regard to attachment of house of the petitioner. It is an admitted fact that the petitioner has already deposited an amount of Rs.2,76,000/- and that is prima facie sufficient with regard to realisation of the loan amount.

13. Consequently, petition of the petitioner is allowed. Impugned order, Annexure P-1 dated 01.11.2006 is hereby quashed. The Executing Court may proceed as per observations made by this Court above.

14. This Court appreciates the Assistance provided by learned Amicus Curiae.

15. No order as to cost.

Petition allowed.

I.L.R. [2008] M. P., 2617
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
22 November, 2007*

SAUDARABAI (SMT.) ... Appellant
Vs.
SHRI RAM RATAN ... Respondent

Guardians and Wards Act (8 of 1890), Sections 7, 25, Hindu Minority and Guardianship Act, 1956, Section 6(b) - *Custody of minor illegitimate child - In case of illegitimate boy or an illegitimate unmarried girl - The mother, and thereafter, the father is natural guardian - Boy living with mother and getting education - Mother willing to keep son - Son also feels comfortable with mother - Held - In case of guardianship of minor child, the paramount consideration is welfare of the child - Son will reside with mother the natural guardian - Appeal allowed.* (Paras 7 & 8)

संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएँ 7, 25, हिन्दू अप्राप्तवयता और संरक्षकता अधिनियम, 1956, धारा 6(बी) – अप्राप्तवय जारज बालक की अभिरक्षा – जारज बालक या जारज अविवाहित बालिका के मामले में – माता, और उसके बाद, पिता प्राकृतिक संरक्षक है – बालक माता के साथ रह रहा और शिक्षा प्राप्त कर रहा – माता पुत्र को रखने की इच्छुक – पुत्र भी माता के साथ सुविधाजनक महसूस करता है – अभिनिर्धारित – अप्राप्तवय संतान की संरक्षकता के मामले में सर्वोपरि ध्यान संतान का कल्याण है – पुत्र प्राकृतिक संरक्षक माता के साथ रहेगा – अपील मंजूर।

Heeralal Jain, for the appellant.
P.S. Pawar, for the respondent.

*F.A. No.409/2006 (Indore)

JUDGMENT

N.K. MODY, J. :–Being aggrieved by the order dated 25/03/2006, passed by IInd Additional District Judge, Indore, in Guardian Case No.46/2005, whereby the application filed by the respondent under the provisions of Hindu Minority and Guardianship Act, 1956 (which shall be referred hereinafter as Act) for the custody of minor child Dinesh was allowed and the appellant was directed to give the custody to the respondent, the present appeal has been filed.

2. Short facts of the case are that the respondent filed an application before the learned Court below alleging that the respondent was married with one Ashabai, but she was suffering with some mental disease and is under treatment and is being looked after by her father. It was alleged that thereafter the appellant came in contact with the respondent and out of the friendly relation between the respondent and the appellant, appellant gave birth to a daughter, who expired. Thereafter, appellant gave birth to a son Dinesh, who is aged 10 years approximately. It was alleged that appellant is living separately and appellant is not taking proper care of her son Dinesh. It was further alleged that respondent is a teacher and respondent is in a position to take better care of Dinesh. It was prayed that the appellant be directed to handover the custody of Dinesh to respondent.

3. The application was opposed by the appellant on various grounds. After holding summarily inquiry by the impugned order learned Court below directed appellant to handover the custody of Dinesh to the respondent, against which present appeal has been filed.

4. Learned counsel for the appellant submits that the order passed by the Court below is illegal and deserves to be set aside. Learned counsel submits that as per the case of the respondent Dinesh is illegitimate son of the appellant and in case where the son is illegitimate, the proper guardian under the law is the mother and not the father. Learned counsel further submits that respondent is not in a position to maintain the expenses of Dinesh, as respondent himself has stated in the case relating to maintenance that respondent is having a large family and is unable to maintain.

5. Learned counsel for respondent submits that respondent is a teacher and is posted in a village of Tehsil Depalpur. Learned counsel submits that the respondent is financially in sound position and can take care of son Dinesh. Dinesh is present in the Court, who is aged 10 years and states that he is studying in Class IVth in Shashkiya Madhyamik Vidhyalaya Gunawad, Tehsil Badnagar, District Ujjain. Dinesh further states that he wants to live with his mother, who is appellant herein.

6. From perusal of the order it is evident that learned Court below has held that as per Section 6(a) of the Act, in case of a boy or unmarried girl the father and after him the mother are the natural guardian.

7. From perusal of the application filed by the respondent before learned Court below and also the statement given by the respondent before the Court below it is evident that it is Ashabai, who is wedded wife of respondent and not the appellant. Respondent himself has stated that out of friendly relationship between the parties Dinesh born. In the facts and circumstances of the case the status of Dinesh is of a illegitimate son. In such a situation it is sub Section (b) of Section 6 of the Act which is applicable according to which in a case of illegitimate boy or illegitimate unmarried girl the mother is the natural Guardian and thereafter the father.

8. Since Dinesh is illegitimate boy and is in custody of mother / appellant, who is present in the Court and shows her willingness to kept her son Dinesh and Dinesh also feels comfortable with her mother and is also getting education, therefore, this Court is of the opinion that Dinesh is in the custody of his natural guardian. While deciding the application filed under the provisions of Guardianship Act, while question of guardianship of minor child is required to be decided, paramount consideration is welfare of the child. Position of law is also in favour of appellant.

9. In view of this in the opinion of this Court learned Court below committed error in allowing the application filed by the respondent. Thus, the appeal filed by the appellant stands allowed. Order impugned herein passed by the learned Court below stands set aside holding that Dinesh shall reside under the Guardianship of mother, who is appellant. No order as to costs.

10. With the aforesaid observations appeal stands disposed of. No order as to costs.

Appeal disposed of.

I.L.R. [2008] M. P., 2619
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
16 January, 2008*

MANAK CHAND JAIN ... Appellant
Vs.
PUKHRAJ BAI (SMT.) & anr. ... Respondents

A. **Evidence Act (1 of 1872), Section 102** - *Mother & sister of deceased filed suit to recover debt due to deceased against debtor/defendant -Defendant came with the case that no transaction between the parties and cheque was issued in security for debt given to one Narayan - Defendant failed to discharge burden to prove that there was no liability - Held - Trial court rightly granted decree - Appeal dismissed.* (Para 11)

क. साक्ष्य अधिनियम (1872 का 1), धारा 102 – मृतक की माँ और बहन ने मृतक को शोध्य ऋण की वसूली के लिए ऋणी/प्रतिवादी के विरुद्ध वाद पेश किया – प्रतिवादी का मामला

*F.A. No.285/2007 (Indore)

यह है कि पक्षकारों के मध्य कोई संव्यवहार नही और चेक किसी नारायण को दिये गये ऋण की प्रतिभूति के लिए जारी किया गया था – प्रतिवादी यह साबित करने के भार को उन्मोचित करने में असफल रहा कि कोई दायित्व नही था – अभिनिर्धारित – विचारण न्यायालय ने डिक्री ठीक प्रकार से प्रदान की – अपील खारिज।

B. Succession Act (39 of 1925), Sections 213, 214 - *Proof of representative title - Provisions do not bar institution of suit - Decree will be considered provisional and will come into effect on obtaining and producing probate of will or succession certificate - Plaintiffs are claiming as legal representatives of deceased and decree has been passed - It is directed that decree will not be given effect till plaintiffs obtain and produce the succession certificate.* (Para 11)

ख. उत्तराधिकार अधिनियम (1925 का 39), धाराएँ 213, 214 – प्रतिनिधिक स्वत्व का सबूत – उपबंध वाद संस्थित करने पर रोक नही लगाते – डिक्री प्राविधिक मानी जाएगी और वसीयत का प्रोबेट या उत्तराधिकार प्रमाणपत्र प्राप्त कर पेश करने पर प्रभाव में आयेगी – वादियों ने मृतक के विधिक प्रतिनिधियों के रूप में दावा किया और डिक्री पारित की गई – यह निदेशित किया गया कि वादियों के उत्तराधिकार प्रमाणपत्र प्राप्त कर लेने और पेश कर देने तक डिक्री को प्रभाव नही दिया जाएगा।

C. Negotiable Instruments Act (26 of 1881), Section 80 - *No provision in agreement for payment of interest - When no rate of interest is specified in the instrument, interest on due amount shall be calculated @ 18% - However, plaintiffs claimed interest @ 6% - Interest rightly awarded.* (Para 11)

ग. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 80 – अनुबन्ध में ब्याज के संदाय के लिए कोई उपबंध नही – जब लिखत में ब्याज की कोई दर विनिर्दिष्ट नही की गई हो, शोध्य राशि पर ब्याज की गणना 18 प्रतिशत की दर से की जाएगी – तथापि, वादियों ने ब्याज 6 प्रतिशत की दर से माँगा – ब्याज उचित रूप से दिलाया गया।

Cases referred :

AIR 1960 Kerala 84, AIR 1978 All 268, 2004(4) MPLJ 77, (2006) 10 SCC 442.

A.K. Sethi with *Harish Joshi*, for the appellant.

Dilip Kshirsagar, for the respondents.

JUDGMENT

N. K. Mody, J. :–Being aggrieved by the judgment and decree dated 13/03/2007, passed by IIIrd Additional District Judge, Indore, in Civil Suit No.4-B/2006, whereby suit filed by the respondents was decreed and the appellant was directed to pay a sum of Rs.1,02,501/- along with interest on Rs.75,000/- @ 6% p.a. w.e.f. 19/11/2002, the present appeal has been filed.

2. Short facts of the case are that the respondents filed a suit for realization of amount of Rs.1,02,501/- on 18/11/2002 alleging that RameshChandra was

the son of respondent No.1 and brother of respondent No.2. Appellant was having good relations with deceased Ramesh Chandra Jain. It was alleged that appellant was in need of money and a sum of Rs.75,000/- was lent by deceased Ramesh Chandra Jain to the appellant and appellant gave a post dated cheque to deceased Ramesh. It was alleged that the cheque which was given by the appellant to the respondents was bearing cheque No.1992240 of Dena Bank, Jail Road, Indore, which was payable on 20/11/1999. It was alleged that the cheque was issued by the respondents as proprietor of M/s. M.C.J. Fuel Corporation. Further case of respondents was that deceased Ramesh in his life time presented the cheque for collection through M.P. State Cooperative Bank, Indore, but the same was returned by Dena Bank with a memo dated 19/05/2000, wherein it was mentioned that it "exceeds arrangement". Further case of respondents was that after the return of the cheque a demand was made by the deceased Ramesh in his life time and after his death by the respondents. Lastly, the demand was made vide notice dated 10/06/2002, which was duly served on the appellant, but wrong reply was given, hence the suit was filed.

3. The suit was contested by the appellant by filing written statement, wherein plaint allegations were denied. It was denied that any amount was taken by the appellant from deceased Ramesh Chandra. It was also alleged that appellant was having no relation with the deceased Ramesh. Deceased Ramesh was having relations with one Narayan. Narayan has taken loan from deceased Ramesh Chandra. Appellant was having good relations with Narayan and because of good relation with Narayan and the money was given by Ramesh to Narayan appellant gave a cheque of Rs.75,000/- to the deceased Ramesh. It was also alleged that Narayan has paid the amount which has taken by him from Ramesh. Thereafter, the appellant demanded for return of cheque, but appellant was informed by deceased Ramesh that cheque has been misplaced. It was prayed that the suit be dismissed. After framing of issues and recording of evidence learned Trial Court decreed the suit, against which present appeal has been filed.

4. Mr. A.K. Sethi, learned counsel for the appellant submits that learned Trial Court committed error in decreeing the suit. It is submitted that Ramesh died on 21/12/2001 and thereafter some of the legal representatives of deceased has filed the suit. Learned counsel submits that the suit itself was not maintainable in view of Section 214 of the Indian Succession Act, which reads as under :

> **214. Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons. (1) No Court shall -**
>
> (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effect of the deceased person or to any part thereof.
>
> (b) proceed, upon an application of a person claiming to be so entitled,

to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming of-

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under Section 31 or Section 32 of the Administrator General's Act. 1913 (3 of 1913), and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein.

5. Learned counsel for the appellant placed reliance on a decision of Kerala High Court in the matter of *Raman Namboodiri Vs. chaldean Syrian Bank Ltd.*. reported in AIR 1960. Kerala, 84, wherein the Divisional Bench, of Kerala High Court has held that person cannot claim to recover debt due to deceased without production of succession certificate.

6. Reliance was also placed on a decision in the matter of *Bhaiya Ji Vs. Jageshwar Dayal Bajpai,* reported in AIR 1978, Allahabad, 268, wherein it was held that :

"The purpose of. S..214 is to make clear that no debt to a deceased person can be recovered through the court except by a holder of one of the documents mentioned in the Section, the only exception being either whether the claim is made on survivorship, or whether it is in respect of rent, revenue or profits payable in respect of land used for agricultural purposes S.214 does not make, any distinction between Hindus, and non Hindus. It treats everybody alike. The only necessary thing is that there should be a relationship of debtor and creditor between the person from whom money is claimed and the deceased at the time of the latter's death. However S.214 does not debar the filing of the suit. It merely debars a court from passing a decree. If a suit has been filed the court is forbidden from passing a decree on the basis of a debt against the debtor of the deceased."

7. Learned counsel further submits that since there was no agreement for payment of interest, therefore, learned Court below committed error in awarding interest. For this contention reliance was placed on a decision in the matter of *Banshilal Kharakwar Vs. Narbada Prasad Chourasia,* reported in 2004(4) MPLJ, 77, wherein it was held that in absence of agreement for payment of interest between parties, interest cannot be granted.

8. It is also submitted that since no transaction has taken place between the parties, therefore, suit could not have been decreed. Learned counsel for the appellant further submits that there is nothing on record to show that Ramesh Chandra is no more, as death certificate has not been filed. It is also submitted

that suit is barred by limitation. It is submitted that initially the suit was filed as an indigent person. Vide order dated 03/04/2004, learned Court below held that respondents are not entitle to get the benefit to prosecute the appeal as an indigent person and was directed to pay the Court fee. It is submitted that Court fee was deposited on 06/05/2006 and respondents prayed for extension of time under Section 149 of C.P.C. It is submitted that since the suit was not properly presented along with the requisite Court fee, therefore, the suit was barred by law under the provisions of Limitation Act. Learned counsel further submits that the alleged cheque was dated 20/11/1999, while the same was returned with the memo of Dena Bank Exhibit P-2 on 19/05/2000. It is submitted that since the suit was filed on 06/05/2006, when the requisite court fee was paid, therefore, the suit itself is not maintainable.

9. Mr. Dilip Kshirsagar, learned counsel for respondents submit that suit was not filed by the respondents as indigent person, but since the respondent No.1 is woman, therefore, exemption from payment of Court fee was claimed under Section 35-B of the Court Fees Act. It is submitted that the prayer was refused. The Court fee was deposited by the respondents within the time given by the learned Court below. It is submitted that it is true that it took time in depositing the amount of Court fee but the time was extended by the Court below from time to time, therefore, it cannot be said that suit is barred by law of limitation. So far as the transaction is concerned learned counsel submits that respondents have examined respondent No.1 as P.W.-1 and respondent No.2 as P.W.-2 and also one independent witness in whose presence the transaction of money took place. It is submitted that after due appreciation of the evidence the learned Trial Court has decreed the suit, which requires no interference. Learned counsel further submits that since the document which was in possession of respondents was a cheque, which is a negotiable instrument, therefore, there is a presumption under Section 118 of the Negotiable Instruments Act in favour of respondents. So far as succession certificate is concerned, learned counsel submits that filing of the suit is not barred under Section 214 of the Indian Succession Act. It is also submitted that even passing of the decree is also not barred. The only thing which is not permissible is the decree holder cannot execute the decree till succession certificate is obtained. Learned counsel placed reliance on a decision in the matter of *Binapani Kar Chowdhury Vs. Sri Satyabrata Basu,* reported in 2006(10) SCC 442, wherein it was held that Section 213 bars executor or legatee under a Will from establishing any right under the Will unless probate or letters of administration is obtained, while it does not bar institution of a suit for declaration of title and possession of property by the executor or legatee claiming under a Will but it bars passing of a decree or a final order in such suit until and unless probate or letters of administration is obtained by the executor or legatee. In the said case it was also observed that with a view to do complete justice between the parties, it is appropriate to direct the Trial Court where the suit is pending, to proceed to hear arguments and deliver judgment in the suit. Nothing further will

be required, if the suit is to be dismissed. But if the suit is to be decree, the trial Court should make it clear that the judgment and decree will come into effect only on the first obtaining and producing the probate of the Will, und till then the decree should be considered only as provisional and not to be given effect. Learned counsel submits that the learned Trial court has also directed that respondents cannot execute the decree without obtaining the succession certificate.

10. Learned counsel for the appellant submits that the law laid down by the Hon'ble Apex Court in the matter of *Binapani Kar* (Supra) is not at all applicable in the present case. It is submitted that in that case deceased person in his life time filed the suit, while in the present case the facts are altogether different. Ramesh in whose favour.the alleged cheque has been issued died before filing of the suit, therefore, no advantage can be given to the respondents by this authority.

11. From perusal of the record it is evident that the respondents who are the mother and the sister of the deceased Ramesh were possessing the negotiable instrument i.e. cheque, which was issued by the appellant in favour of deceased Ramesh Chandra. Appellants came with the case that the transaction took place between one Narayan and Ramesh and in lieu of that, cheque was given by the appellant. The burden was on the appellant to prove that there was no transaction between the parties and the cheque was issued in security and also the amount which was taken by Narayan was duly paid to deceased Ramesh Chandra. Not only this, there is no evidence on record in that regard. After the death of Ramesh a demand notice was issued by the respondents and in reply also it was not denied by the appellant the cheque was given by him to the deceased Ramesh. In the facts and circumstances of the case it appears that learned Trial Court has rightly granted the decree against the appellants and in favour of respondents. So far as award of interest is concerned the learned Trial court has awarded the interest @ 6% p.a. It is true that there is nothing on record to show that there was any agreement for payment of interest. However, since it was a negotiable instrument which was being possessed by the respondents and as per Section 80 of the Negotiable Instruments Act when no rate of interest is specified in the instrument, interest on the amount due thereon shall be calculated at the rate of 18% p.a. However, in the present case the respondents has claimed interest only @ 6% which appears to be reasonable. Since deceased Ramesh has died and the suit has been filed by the respondents who are claiming themselves to be legal representatives of the deceased and the suit has been decreed, therefore, in the interest of justice between the parties it is directed that the decree shall be treated as provisional and will not be given effect till respondents obtained and produce the succession certificate.

12. With the aforesaid observations appeal stands disposed of. No order as to costs.

Appeal disposed of.

I.L.R. [2008] M. P., 2625

APPELLATE CIVIL

Before Mr. Justice S.K. Kulshrestha & Mrs. Justice S.R. Waghmare

22 January, 2008*

JEPIKA PAINTS (M/s)& anr. ... Appellants

Vs.

UNION OF INDIA & ors. ... Respondents

A. Central Excise and Salt Act (1 of 1944), Section 5A(1) - Small Scale Exemption - General Exemption No.1 (Notification No.1/93-C.E., dated 28.02.1993 as amended) Clause 4 - *Exemption to manufacturer for first clearances of duty and concessional duty on subsequent clearances - Appellant's small scale industry unit was assigned trade name on the basis of agreement dated 11.01.1994 - Commissioner, Central Excise, after decision of tribunal, acted upon the provision of agreement and granted exemption for period 19.04.1996 to 29.02.2000 - Appellants have also claimed exemption for period 19.04.1995 to 18.04.1996 - Plea of department that assignment was not registered - Held - Assignment need not to be registered - Department once acted upon the agreement of assignment of trade name for period subsequent to 18.04.1996, can not take contrary stand - Tribunal erred in holding that appellants were not entitled to be considered for exemption for period 19.04.1995 to 18.04.1996 - Direction to the tribunal that consider the case of appellant in the light of provisions made in exemption notification and discussion contained in the order.*

(Paras 13, 14 & 15)

(क) केंद्रीय उत्पाद–शुल्क और नमक अधिनियम (1944 का 1), धारा 5ए(1) – लघु छूट – सामान्य छूट क्र. 1 (अधिसूचना क्र. 1/93–सी.ई., तारीख 28.02.1993 यथा संशोधित), खण्ड 4 – प्रथम निकासी के लिए विनिर्माता को शुल्क की छूट और पश्चात्वर्ती निकासी पर रियायती शुल्क – अपीलार्थी की लघु उद्योग इकाई को तारीख 11.01.1994 के अनुबंध के आधार पर व्यापार नाम समनुदेशित किया गया – आयुक्त, केंद्रीय उत्पाद–शुल्क ने अधिकरण के विनिश्चय के पश्चात् अनुबंध के उपबंधों पर कार्यवाही की और तारीख 19.04.1996 से 29.02.2000 तक की कालावधि के लिए छूट प्रदान की – अपीलार्थियों ने तारीख 19.04.1995 से 18.04.1996 तक की कालावधि के लिए भी छूट का दावा किया – विभाग का अभिवचन कि समनुदेशन पंजीकृत नही किया गया – अभिनिर्धारित – समनुदेशन पंजीकृत होना आवश्यक नही – विभाग ने जब एक बार 18.04.1996 के बाद की अवधि के लिए अनुबन्ध पर कार्यवाही की तो तत्प्रतिकूल आधार नही ले सकता – अधिकरण ने यह अभिनिर्धारित करने में त्रुटि कारित की कि अपीलार्थी 19.04.1995 से 18.04.1996 तक की कालावधि के लिए छूट के लिए विचारित किये जाने के हकदार नही थें – अधिकरण को निदेश दिया कि छूट अधिसूचना में दिये गये उपबंध और आदेश में किये गये विवेचन के आलोक में अपीलार्थी के मामले पर विचार करें।

B. Central Excise and Salt Act (1 of 1944), Section 5A(1) - Small Scale Exemption - General Exemption No.1 (Notification No.1/93-C.E., dated

*M.A. No.1635/2005 (Indore)

28.02.1993 as amended) Clause 4 - *In the notification itself, Explanation-IX mentions that brand name or trade name shall mean a brand name or trade name whether registered or not - Thus, reference to brand name or trade name in clause 4 of the notification is not to the registered brand name or trade name.* (Para 14)

ख. केंद्रीय उत्पाद–शुल्क और नमक अधिनियम (1944 का 1), धारा 5ए(1) – लघु छूट – सामान्य छूट क्र. 1 (अधिसूचना क्र. 1/93–सी.ई., तारीख 28.02.1993 यथा संशोधित), खण्ड 4 – अधिसूचना के स्पष्टीकरण 9 में उल्लिखित ब्रांड नेम या ट्रेड नेम का अर्थ है ब्रांड नेम या ट्रेड नेम चाहे वह रजिस्टर्ड हो या नही – इस प्रकार अधिसूचना के खण्ड 4 में संदर्भित ब्रांड नेम या ट्रेड नेम रजिस्टर्ड ब्रांड नेम या ट्रेड नेम नही है।

Case referred :

2003 (157) ELT 4 (SC).

G.M. Chafekar with *S. Kohli*, for the appellants.
V.K. Zelawat, A.S.G., for the respondents.

ORDER

The Order of the Court was delivered by **S.K. KULSHRESTHA, J.** :– This appeal has been filed by the assessee appellants under the provisions of Section 35 (g) of the Central Excise Act, 1944.

The appeal has been admitted on the questions formulated in order dated 22.9.2005 which read as follows:-

> 1) "Whether in view of the clause 4 of the notification No.1/93-C.E, dated 28.2.1993 exemption to a manufacturer for the first clearances of the duty and concessional duty on subsequent clearances as provided in the notification can be disallowed if the specified goods bear a brand name or trade name of another person although the proprietor of the brand name or trade name has assigned the same to the manufacturer ?"
>
> ii) "Whether it was permissible for the C.E.S.T.A.T. to consider a new ground raised by the revenue which was neither taken in the show cause notice nor in the adjudication order and before the Commissioner (Appeals) ?"
>
> iii) "Whether the impugned order of the Tribunal is vitiated on account of the fact that despite there being execution of the sale deed in favour of the assessee, the Tribunal has proceeded on the hypothesis that sale deed had not been executed ?"

2. It is not disputed that M/s Jepika Paints, Indore is a small scale industry entitled to exemption within the parameters fixed by the Notification dated 28.2.1993 and Shri Bharat Bhushan Gupta is the Proprietor of the said manufacturing unit.

3. The Unit is engaged in the manufacture of Oil Bound Distemper, Synthetic Enamel Paints etc. which the Firm is selling in the name of Jepika. It is averred

that this brand name was registered in the name of M/s Jepika Chemicals Industries Pvt. Ltd., Jepika House, Daulatganj, Gwalior of which appellant No.2, father of Shri Bharat Bhushan Gupta, was a Director. The use of the brand name was permitted by the father of appellant No.2 to the S.S.I. :Unit appellant No.1. It is alleged that insofar as the Gwalior Unit is concerned, it is not manufacturing or selling the product which is being sold by the appellants.

4. The Notification Ann.A/4 dated 28.2.1993 was issued to provide exemption to first clearances of the specified goods up to the value of Rs. 30,00,000/- and concessional duty on subsequent clearances in the case of manufacturer having clearances not exceeding Rs. two crores in the preceding financial year. There is no dispute that the appellant No.1 fulfilled this condition and was granted eligibility in this behalf. The real contest of the parties, however, is on the construction of Clause-4 of the Notification whereof the relevant provision reads as under:-

> 4. The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) of another person:
>
> provided that nothing contained in this paragraph shall be applicable to the specified goods which are component parts of any machinery or equipment or appliances and cleared from a factory for use as original equipment in the manufacture of the said machinery or equipment or appliances, and -
>
> (i) in a case where the clearances of such specified goods are with the first clearances upto an aggregate value not exceeding rupees thirty lakhs in a financial year, the manufacturer of the specified goods gives a declaration that the specified goods shall be used as mentioned above.
>
> (ii) in any other case, the procedure set out in Chapter X of the said Rules is followed.

5. Learned Counsel for the Revenue submits that since Clause-4 prohibits sale of the specified goods bearing a brand name or trade name of another person, the sales effected by the appellant S.S.I. Unit for the period commencing from 19.4.1995 to 29.2.2000 were not entitled to exemption from duty. The contention of the learned Senior Counsel for the appellants is that since the brand name was assigned by the Gwalior Unit to the appellant No.1, the appellant No.1 became entitled to its use and to sell the product under the said name "Jepika". He has further contended that when the matter was remanded to the Commissioner Central Excise by the CESTAT, the Commissioner Central Excise has acted upon the provisions contained in the agreement and granted exemption in respect of the period commencing from 19.4.1996 to 29.2.2000 and the case of the appellants has been omitted from consideration for the period 19.4.1995 to 19.4.1996 as the Tribunal did not remand the case for the said period.

6. We may record to complete the narration of facts, that the Department filed an appeal before the Tribunal which was decided by order dated 30.12.2004 and the Tribunal observed that the benefit of small scale exemption notification is not available to M/s Jepika Paints upto 18.4.1996 and remanded the matter to the Adjudicating Authority for consideration of the period commencing from 19.4.1996 for decision afresh. The question of imposing penalty was also left open to be decided by the Adjudicating Authority.

7. It is in view of the above order of the Tribunal that the present appeal has been filed against refusal of the Tribunal to accept the case for exemption of the appellants for the period 19.4.1995 to 19.4.1996.

8. Learned Counsel for the appellants has submitted that although assignments under the erstwhile Trade and Merchandise Marks Act, 1958 require registration, the Supreme Court in *Collector of Central Excise Ahmedabad Versus Vikshara Trading & Invest. P. Ltd.* 2003 (157) E.L.T.4 (S.C.) has observed that when as a matter of fact it is held that there was an assignment of trade mark in favour of the party and that fact was not in serious dispute, the mere fact that the agreement was not registered could not alter the position. It was stated that it was permissible in law to have same brand name for different classes of goods owned by different persons.

Paragraph 3 of the said report reads as under:-

> 3. The contention putforth before the Tribunal as well as before us is that no document has been shown that the subsequent assignment in favour of M/s. Vikshara Trading & Invest. P. Ltd. was registered as contemplated under the Trade and Merchandise Marks Act, 1958. This aspect was taken note of by the Tribunal that the trade mark need not necessarily be in respect of all goods unless registration has been so acquired and it is therefore, permissible in law to have same brand name for different classes of goods owned by different person, and in that background found in favour of the respondent and held that the Notification No. 223/ 87-C.E., dated 22.9.1987 was applicable. When as a matter of fact it is held that there was an assignment in favour of the first respondent and that fact was not in serious dispute the mere fact that the assignment was not registered could not alter the position. Therefore, we decline to interfere with the order made by the Tribunal and to that extent the appeal is dismissed in respect of respondent No.1.

9. Learned Senior Counsel for the appellants further invited attention to the decision in *Reckitt & Colman of India Ltd. Vs. Collector of Central Excise* 1996 (88) E.L.T. 641 (S.C.) in support of his contention that without there being a case of the Revenue the Tribunal erred in segregating the period from 19.4.1995 to 19.4.1996 in considering the availability of exemption under the Notification.

10. The short question that arises for determination in this case is as to whether

in the wake of the decision of the Commissioner of Appeals for the period subsequent to 19.4.1996 on the basis of the claim made by the appellants that they had been duly assigned the trade mark and were, therefore, entitled to its exclusive use insofar as their product was concerned, the exemption could have been declined for the period anterior thereto i.e. 19.4.1995 to 19.4.1996 although the agreement on the basis whereof the exemption was executed as back as on 11.1.1994.

11. Before we proceed to consider the above question, we may briefly refer to the contention raised by the learned Counsel for the Revenue. Learned Counsel has urged that under the erstwhile Trade and Merchandise Marks Act, 1958 Section 2 (a) defines assignment of trade mark to mean "an assignment in writing by act of the parties concerned." Section 37 of the said Act lays down assignability and transmissibility of registered trade mark.

> **37. Assignability and transmissibility of registered trade marks.-** Notwithstanding anything in any other law to the contrary, a registered trade mark shall, subject to the provisions of this Chapter, be assignable and transmissible, whether with or without the goodwill of the business concerned and in respect either of all the goods in respect of which the trade mark is registered or of some only of those goods.

12. According to this provision the registered trade mark is assignable and transmissible, whether with or without the sale of the business concerned and in respect of either or all the goods in respect of which trade mark is registered or of some of these goods. It has not been disputed before us that the goods manufactured by the appellants to whom the trade mark has been assigned are not the same as the merchandise of the Proprietor. Attention was also invited by learned Solicitor General to Section 44 with regard to necessity of registration of such assignments.

Section 44 of the Trade and Merchandise Marks Act, 1958 makes provision as under:-

> **44. Registration of assignments and transmissions.-** (1) where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods in respect of which the assignment or transmission has effect and shall cause particulars of the assignment or transmission to be entered on the register :
>
> Provided that where the validity of an assignment or transmission is in dispute between the parties, the Registrar may refuse to register the assignment or transmission until the rights of the parties have been determined by a competent Court.

(2) Except for the purpose of an application before the Registrar under sub-section (1) or an appeal from an order thereon, or an application under section 56 or an appeal from an order thereon, a document or instrument in respect of which no entry has been made in the register in accordance with sub-section (1), shall not be admitted in evidence by the Registrar or any Court in proof of title to the trade mark by assignment or transmission unless the Registrar or the Court, as the case may be, otherwise directs.

13. It is in the context of this requirement that the learned Senior Counsel for the appellants had referred to the decision in *Collector of C. Ex. Ahmedabad Versus Vikshara Trading & Invest. P. Ltd.* (supra). This requirement having not been found necessary by the Supreme Court in the above decision and the Revenue having acted upon the agreement in question for the period subsequent to 19.4.1996, we are of the considered view that the Department cannot take the stance contrary to its own action and conclusion.

14. Another contention which was raised by the learned Assistant Solicitor General is that in the statement recorded by the Excise Department, the Proprietor of the firm did not point out that the said mark was assigned to them by the Proprietor. In the Notification itself, explanation -IX mentions that brand name or trade shall mean a brand name or trade name whether registered or not. Thus, reference to brand name or trade name in Clause-4 of the Notification is not to the registered trade name or brand name. Under these circumstances, and in view of the specific provisions contained in the exemption notification, we are of the considered view that the Tribunal erred in holding that the appellants were not entitled to be considered for grant of registration for exemption for period commencing from 19.4.1995 and ending on 18.4.1996.

15. In view of the discussion above, the question formulated are answered in favour of the appellants only to the extent that the Tribunal shall now consider the case of the appellants with regard to the period commencing from 19.4.1995 to 19.4.1996 in the light of the provisions made in the exemption notification and the discussion contained hereinabove.

16. With the above direction to the Tribunal, this appeal is disposed of with no order as to costs.

Appeal disposed of.

I.L.R. [2008] M. P., 2631
APPELLATE CIVIL
Before Mr. Justice A.K. Gohil
5 February, 2008*

SITARAM ... Appellant
Vs.
RADHESHYAM ... Respondent

A. **Civil Procedure Code (5 of 1908), Section 100, Order 1 Rule 3B (M.P. Amendment Act No. 29 of 1984)** - *Any right over agriculture land - State is necessary party - Can be added at any stage - Any suit between two parties relating to any right over agricultural land even without any relief against the State - The State of M.P. necessary party - But a plaintiff cannot be non-suited on that ground - State can be added as party at any stage on which the objection is taken.* (Para 10)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, आदेश 1 नियम 3बी (1984 का म.प्र. संशोधन अधिनियम क्र. 29) – कृषि भूमि पर किसी अधिकार का दावा – राज्य आवश्यक पक्षकार है – किसी भी प्रक्रम पर जोड़ा जा सकता है – दो पक्षकारों के मध्य राज्य के विरुद्ध किसी अनुतोष के बिना कृषि भूमि पर किसी अधिकार के सम्बन्ध में कोई वाद – राज्य आवश्यक पक्षकार – किन्तु वादी का वाद इस आधार पर समाप्त नही किया जा सकता – राज्य को पक्षकार के रूप में किसी भी प्रक्रम पर जोड़ा जा सकता है जिस समय ऐसी आपत्ति ली गई हो।

B. **Specific Relief Act (47 of 1963), Section 38** - *Suit for injunction - Land recorded in the name of temple and name of Pujari is recorded as 'Ehatmam' - Pujari is having very limited right - He is not having any ownership right in the property of temple - Pujari and his brothers were not entitled to partition the property mutually and their possession cannot be treated as exclusive over the temple land - Temple is also necessary party - Plaintiff was not entitled to file even suit for injunction - Suit rightly dismissed.* (Para 14)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 38 – व्यादेश के लिए वाद – भूमि मंदिर के नाम से अंकित और पुजारी का नाम 'एहतमाम' के रूप में अंकित – पुजारी को बहुत सीमित अधिकार हैं – वह मंदिर की सम्पत्ति में कोई स्वामित्व का अधिकार नही रखता – पुजारी और उसके भाई सम्पत्ति को परस्पर विभाजित करने के हकदार नही थे और मंदिर सम्पत्ति पर उनका कब्जा अनन्य नही माना जा सकता – मंदिर भी आवश्यक पक्षकार है – वादी व्यादेश का वाद भी पेश करने का हकदार नही था – वाद उचित रूप से खारिज किया गया।

Cases referred :
1986 MPLJ 539, 1994 MPLJ 192, AIR 1970 SC 439.

S.S. Garg, for the appellant.
None, for the respondent.

*S.A. No.131/1995 (Indore)

JUDGMENT

A.K. GOHIL, J. :–This is second appeal filed under Section 100 of the Code of Civil Procedure by the appellant/defendant against the judgment and decree dated 3.1.1995 passed by Additional District Judge to the Court of District Judge, Dhar in regular Civil Appeal No.22A/86, whereby dismissed the appeal of the appellant and affirmed the decree dated 23.7.1986 granted by trial Court, i.e., Civil Judge Class-1, Kuchhi in Civil Suit No.315A/84.

2. This second appeal was admitted on the following questions of law :-

"Whether in the present matter State of MP was a necessary party?"

3. The brief facts of the case are that the appellant/defendant and respondent/ plaintiff are the real brothers. Respondent Radheshyam filed a suit for injunction stating therein that the agricultural land bearing survey nos. 209, 347, 348, 350, 360 and 361, having total area of 6.993 hect. situated at village Lohari Tehsil Kuchhi, was partitioned between both the brothers in the year of 1974 and the aforesaid land came into the share of plaintiff. After the partition the plaintiff is having possession over the entire land and doing agricultural operations thereon. It was further stated that the character of the appellant/defendant was not good and he has destroyed and transferred the properties, i.e., one house and agricultural land, which was given to him in partition and now he is not having any means of livelihood, therefore, he has started interfering in the property, which is in possession of the plaintiff. A prayer was made to grant a decree for permanent injunction in favour of the respondent/plaintiff. In the written statement it was admitted that the partition took place in 1974 but it was pleaded that half of the suit land was given in the share to the appellant/defendant and the defendant is also having possession over half of the land, therefore, the suit is bad in law and no decree for injunction can be granted on the land which is in possession of the appellant. The issues were framed, evidence of the parties was recorded and trial Court decreed the suit, against which First Appeal was filed and the same was also dismissed.

4. I have noticed one important fact that none of the parties have stated in their pleadings about actual position in the revenue record that the aforesaid disputed lands are actually recorded in the revenue record in the name of Gopal Mandir and Collector is the Manager of the aforesaid temple and the status of both the appellant and respondent is of Pujari. This fact was mentioned in the order dated 2.2.1985 by which application for injunction was decided and thereafter in the order dated 1.5.1985 passed in appeal. This fact was also mentioned in the judgment and decree granted by trial Court on 23.7.1986. Plaintiff filed two documents Exts. P/4 and P/5. Ex. P/4 is the certified copy of khasra entries of the year 1983-84, in which all the lands bearing khasra no.209, 347, 348, 350, 360 and 361 are recorded in the name of Gopal Mandir Lohari as a Bhumiswami and the names of appellant and respondent have been mentioned as Pujari of the temple and name

of the Collector has been mentioned as the Manager. In Ex.P/5, which is the khasra entry pertaining to the year 1980-81 to 1983-84, all the lan ds have been mentioned in the name of Gopal Mandir. From these two documents it is clear that the aforesaid lands are not the private properties as has been pleaded by the plaintiff in the suit and if the land is recorded in the name of Gopal Mandir then certainly there cannot be any partition between two brothers, unless the State Government or the Gopal Mandir is made party in the suit. In the impugned judgments both the Courts below have taken note of this fact that the lands are recorded in the name of Gopal Mandir as Bhumiswami, name of the parties have been mentioned as Pujari and this fact has also been mentioned that the Collector is the Manager of the aforesaid land, even then has not considered this aspect of the matter that if decree is granted without adding the State or idol as party, decree shall not be binding on them and shall be nullity to that extent.

5. Now the germane question would be when the two brothers filed a suit without making State or idol as party and one party obtained a decree for injunction without proof of ownership of the property or without claiming any right therein or possession in the property, whether relief of injunction can be granted in a suit or not. If the plaintiff is not in the exclusive ownership or possession over the property, certainly he cannot pray for injunction and if decree is granted then it would not be binding on temple property. In such circumstances if decree is obtained without adding the State and idol as party, it would be treated as granted in collusion. If in the revenue record the suit land is recorded in the name of Gopal Mandir, it cannot be held that either the plaintiff or the defendant is either owner or having possession thereof. Plaintiff himself has admitted in the plaint that in revenue record his status has been mentioned as of Pujari, therefore cannot either seek any partition or cannot obtain even a decree for injunction without adding the State and idol i.e. Gopal Mandir as a party in the suit.

6. In this case, Madhya Pradesh Amendment under Order I Rule 3-B CPC is very material, which has come into force w.e.f. 14.8.1984, which is reproduced as under:-

> "3B. Conditions for entertainment of suits.-- (1) No suit or proceeding for,--
>
> (a) declaration of title or any right over any agricultural land, with or without any other relief; or
>
> (b) specific performance of any contract for transfer of any agricultural land with or without any other relief,
>
> shall be entertained by any Court, unless the plaintiff or applicant, as the case may be, knowing or having reason to believe that a return under section 9 of the Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (No.20 of 1960) in relation to land aforesaid has been or is required to be filed by him or by any other person before competent

authority appointed under the Act, has impleaded the State of Madhya Pradesh as one of the defendants or non-applicants, as the case may be, to such suit or proceeding.

(2) No Court shall proceed with pending suit or proceeding referred to in sub-rule (1) unless, as soon as may be, the State Government is so impleaded as a defendant or non-applicant.

Explanation – The expression "suit or proceeding" used in this sub-rule shall include appeal, reference or revision, but shall not include any proceeding for or connected with execution of any decree or final order passed in such suit or proceeding."

By M.P.Act No.29 of 1984 the State of M.P. has made the amendment in the Code of Civil Procedure and has incorporated the aforesaid rule 3B in Order I, according to which, no suit or proceeding for declaration of title about any right over any agricultural land, with or without any other relief shall be entertained by any Court and no Court shall proceed with pending suit or proceeding referred to in sub-rule (1) unless the State Government is so impleaded as a defendant or non-applicant. As per the "explanation" added to this provision, the suit or proceeding used in sub-rule shall include appeal, reference or revision, therefore, it is clear that if any suit was pending even between two parties relating to any right over agricultural land even without any relief against the State Government, it was necessary for the parties to join the State as a party in the suit.

7. In this case, though the suit was filed on 16.7.84 and the amendment came in force on 14.8.1984 but immediately after the amendment the plaintiff ought to have added the State as a party. According to me, in the language of Rule 3B suit for injunction relating to any right over any agricultural land is also covered in such suit and therefore not only the State but Gopal Mandir is also necessary party. This is also very clear from the khasra entries produced on record, Ex.P/4 and Ex.P/5, in which the land is recorded in the name of Gopal Mandir through its Manager Collector. In view of the aforesaid documents if any party was interested to claim any right over the agricultural land, the same can not be done without joining the idol or Gopal Mandir as party, it was obligatory on the part of the party to join the State of Madhya Pradesh as well as Gopal Mandir through Collector, who was Manager as party.

8. In case of *Mahila Basiran Bai v. Fatimabai and others*, reported in 1986 MPLJ 539, the object of the aforesaid amendment was considered and it was held as under:-

"The sole object of the State amendment is to protect interest of the State in a particular class of cases. Whether the State has any interest in any case at any stage of the lis has to be decided by any Court before which any proceeding is pending when the State Amendment Act to be discharged by not only the trial Court but also by the Appellate

Court, of course, excluding the executing Court as is made very clear by the explanation appended to the new provision. Without discharging this duty it did not behove the appellate Court to pass any barren and omnibus order, shifting its responsibility to the trial Court."

9. But in case of *Brijrajsingh Vs. Bitto Devi (Smt.)* reported in 1994 MPLJ 192 Division Bench of this Court has held that non- compliance of amended provision of Rule 3-B of CPC does not create jurisdictional incompetence in court in hearing suit or appeal. Defect can be rectified by joining the State as party to the proceedings at that very stage at which the defect is detected or pointed out to the Court. Therefore, it is clear that suit can not be dismissed on the ground that State was not made as party and State can be added as party at any stage of the suit. But certainly a party can be non suited on the ground that the necessary party was not made party in the suit and court may ascertain the nature of dispute and who is the real owner and in such circumstances may refuse to grant even decree for injunction. In any case it is the duty of the court to see that jurisdiction of the court is not misused and the relief sought is not collusive in nature.

10. Thus, considering the facts and circumstances of the case it is held that though the State of Madhya Pradesh was a necessary party but a person cannot be non-suited on that ground and State can be added as party at any stage on which the objection is taken.

11. In the revenue record when land is recorded in the name of temple and name of Pujari is recorded as "Ehatmam" then it can not be held that pujari is either the owner of the land or having possession thereon with its own rights.

12. In case of *Kalanka Devi Sansthan vs. M.R.T., Nagpur and others,* reported in AIR 1970 SC 439, the Hon'ble Supreme Court has held about the rights of the Pujari of a temple that **"It is well known that when property is given absolutely for the worship of an idol it vests in the idol itself as a juristic person. The idol is capable of holding property in the same way as a natural person".** Pujari is having very limited right. He is not having any ownership right in the property of the temple. Therefore, it is clear that the appellant and respondent were not entitled to partition the property mutually and also cannot bring a suit for injunction against the other person without making State or temple as party and such partition decree may also be treated as a collusive. Therefore, considering the aforesaid legal position it is clear that both the Courts below have committed error of law in not joining the temple as party, as under the facts and circumstances of the case the temple is necessary party and without adding the temple as party in the suit, the suit itself was not maintainable.

13. In view of the aforesaid discussion that the suit was not maintainable without adding the temple or idol as party and under the proviso of Section 100 CPC this Court can frame additional substantial question of law, therefore, exercising the aforesaid power following substantial question of law is framed :-

"Whether the findings recorded by the Courts below are perverse and when the land is recorded in the name of temple or idol, whether the suit for injunction filed by plaintiff was maintainable ?"

14. After hearing the learned counsel for the parties on the aforesaid question and as held supra in the case of *Kalanka Devi Sansthan* that the rights of Pujari are limited in the temple property, it is clear that the appellant and respondent those who are the brothers were not entitled to partition the property mutually and their possession cannot be treated as exclusive over the temple land, therefore, plaintiff was not entitled to file even suit for injunction. Thus, without adding the temple as party the suit for injunction was not maintainable and was liable to be dismissed.

15. Consequently, this appeal is allowed and it is held that the possession of the plaintiff was not exclusive possession over the temple property, therefore, plaintiff was not entitled to bring the suit for injunction in his own name. Thus, the judgment and decree passed by both the Courts below are set aside and suit of the plaintiff is dismissed. Under the facts and circumstances of the case, parties are directed to bear their own costs.

Appeal allowed

I.L.R. [2008] M. P., 2636
APPELLATE CIVIL
Before Mr. Justice A.K. Gohil
7 February, 2008*

GIRDHARILAL ... Appellant
Vs.
BALCHAND ... Respondent

Civil Procedure Code (5 of 1908), Section 100 - *Suit for mandatory and permanent injunction that there exists a 'Gali' between two houses and defendant be restrained from closing it as the easementary rights of the plaintiff were adversely affected - The trial court dismissed the suit and lower appellate court dismissed the appeal - Second appeal filed - Held - Admittedly, plaintiff has neither proved that he is the owner of the aforesaid 'Gali', nor has proved or established his easementary right over the same - To prove the latter it is necessary to establish that it was exercised on some one else's property and not as an incident of his own ownership of that property - Appeal dismissed.*

(Paras 4 & 5)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – आज्ञापक और स्थायी व्यादेश के लिए दावा कि दोनों घरों के बीच में गली स्थित है और प्रतिवादी को इसे बंद करने से निषेधित किया जावे क्योंकि वादी के सुखाधिकार प्रतिकूल रूप से प्रभावित हुए – विचारण न्यायालय ने वाद खारिज किया और निचले अपीलीय न्यायालय ने अपील खारिज की – द्वितीय अपील पेश की – अभिनिर्धारित –

*S.A. No.135/1991 (Indore)

स्वीकृत रूप से वादी ने न तो यह साबित किया कि वह पूर्वोक्त गली का स्वामी है और न उस पर अपने सुखाधिकार को साबित या स्थापित किया – पश्चात्वर्ती को साबित करने के लिए यह स्थापित करना आवश्यक है कि वह किसी अन्य की सम्पत्ति पर न कि प्रसंगति के रूप में उसके स्वयं के स्वामित्व की सम्पत्ति पर, उपयोग किया गया – अपील खारिज।

Case referred :

AIR 1971 SC 1878.

A.K. Shrivastava, for the appellant.
Nitin Phadke, for the respondent.

JUDGMENT

A.K. Gohil, J. :–This Second Appeal filed under Section 100 of the Code of Civil Procedure was admitted on the following substantial question of law:-

> "Whether the learned lower appellate Court, having found that there is a lane in between the two disputed houses, erred in law in ignoring the evidence of material witnesses to arrive at a finding that easement as well as encroachment was not proved ?

2. Brief facts of the case are that the plaintiff/appellant filed a suit for mandatory injunction as well as for permanent injunction saying therein that there is one passage exists between the houses of the plaintiff/appellant and the defendant/ respondent towards the north side and the defendant has closed it by raising construction of 'Otla' thereon. Therefore, decree for mandatory/permanent injunction he granted against the respondent and he be directed to remove the Otla and also be restrained from closing the aforesaid 'gali' and restraining the plaintiff to use it, as it is a part of his easementary right, which he is using for the last 20 years.

3. Trial court found that the plaintiff has failed to prove his easementary right over the aforesaid 'gali' and found that no case is made out for infringement of his easementary right and dismissed the suit. This finding is affirmed by the lower appellate court in appeal. It was submitted that though the lower appellate court has found the existence of such a passage between the two houses, but was of the view that the appellant has failed to prove his easementary right over the same and dismissed the appeal.

4. In case of *Chapsibhai Vs. Purshottam* AIR 1971 SC 1878, the Apex court has held that -

> "a party to a suit can plead inconsistent pleas in the alternative such as the right of ownership and a right of easement. But, where he has pleaded ownership and has failed, he can not subsequently turn around and claim that right as an easement by prescription. To prove the latter, it is necessary to establish that it was exercised on some one else's property and not as an incident of his own ownership of that property.

For that purpose, his consciousness that he was exercising that right on the property is a necessary ingredient in proof of the establishment of that right as an easement."

5. Admittedly, the plaintiff/appellant has neither proved that he was the owner of the aforesaid 'gali', nor has proved or established that his right is easementary right over the same. Thus, in my considered opinion, both the courts below have not committed any illegality in dismissing the suit as well as the appeal. Question is answered accordingly and this appeal is dismissed with no costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2638
APPELLATE CIVIL
Before Mr. Justice A.K. Gohil
8 February, 2008*

BABU ... Appellant
Vs.
STATE OF M.P. & anr. ... Respondents

Land Revenue Code, M.P. (20 of 1959) (As amended w.e.f. 15.12.1995), Sections 170B, 257(L-1) - ***Exclusive jurisdiction of Revenue Authorities - Plaintiff purchased agriculture land by registered sale deed - Proceeding u/s 170B of Code was registered against him - Suit for declaration & injunction that he is Bhumiswami and respondent be restrained to dispossess him filed on 12.06.1995 - Suit dismissed on ground that jurisdiction of civil court is barred u/s 257 of Code - Held - Insertion of sub-clause (L-1) in Section 257 w.e.f. 15.12.1995 - Clearly indicates that prior to insertion there was no express bar on jurisdiction of civil court in matter covered u/s 170B - Suit was filed prior to 15.12.1995, therefore, jurisdiction of civil court was not barred - Judgment & decree of courts below set-aside - Case remanded - Appeal allowed.*** (Paras 6, 7 & 8)

भू राजस्व संहिता, म.प्र. (1959 का 20) (15.12.1995 से यथासंशोधित), धाराएँ 170बी, 257(एल–1) – राजस्व प्राधिकारियों की अनन्य अधिकारिता – वादी ने रजिस्टर्ड विक्रयपत्र द्वारा कृषि भूमि क्रय की – उसके विरुद्ध संहिता की धारा 170बी के अन्तर्गत कार्यवाही दर्ज – घोषणा और व्यादेश के लिए वाद कि वह भूमिस्वामी है और प्रत्यर्थी को उसे बेदखल करने से रोका जावे, 12.06.1995 को पेश किया – वाद इस आधार पर खारिज किया गया कि संहिता की धारा 257 के अन्तर्गत सिविल न्यायालय की अधिकारिता वर्जित है – अभिनिर्धारित – धारा 257 में उपखण्ड (एल–1) का अन्तःस्थापन 15.12.1995 से प्रभावी – स्पष्ट रूप से बताता है कि अन्तःस्थापन के पूर्व धारा 170बी के अन्तर्गत आने वाले मामले में सिविल न्यायालय की अधिकारिता पर कोई अभिव्यक्त रोक नही थी – वाद 15.12.1995 के पूर्व पेश किया गया, इसलिए सिविल न्यायालय की अधिकारिता वर्जित नही थी – अधीनस्थ न्यायालयों के निर्णय व डिक्री अपास्त – मामला प्रतिप्रेषित – अपील मंजूर।

*S.A. No.281/1997 (Indore)

Case referred :

1976 JLJ 323.

T.N. Singh with *Hemlata Gupta,* for the appellant.
Lokesh Bhatnagar, G.A. for the respondents.

JUDGMENT

A.K. Gohil, J. :–Plaintiff/appellant has filed this second appeal under Section 100 CPC against the judgment and decree passed on 10.4.97 in Regular Civil Appeal No.5A/96 by the First Additional District Judge, Barwani (West. Nimar), affirming the judgment and decree passed on 20.2.96 in Civil suit No. 13-A/95 by Civil Judge Class-II Anjad, W.N. This Second Appeal was admitted on the following substantial questions of law:-

> **"Whether under the facts and in the circumstances of the case the Courts below erred in law in holding that the Civil Court jurisdiction is barred under Section 257 of the M.P.Land Revenue Code ?"**

2. Brief facts of the case are that the appellant purchased agricultural land at village Chhapri bearing Survey No.318 admeasuring 8.27 acre from one Umariya Bhilala, by registered sale-deed on 25.4.73. It is submitted that the appellant is 'Adivasi' belonging to aboriginal tribe and the seller Umariya Bhilala was also of the same tribe. Thereafter on 12.5.95, a case under Section 170-B of the M.P.Land Revenue Code was registered against the appellant as well as one Nabia S/o Ganpat who is in possession as a benami. It was stated in the notice that the aforesaid transaction of purchase of land by the appellant on 25.4.73 is nothing but a fraud and is covered under the provision of Section 170-B and the original owner, who was the member of aboriginal tribe, is entitled for possession of such land. After receiving notice the plaintiff filed the suit on 12.6.95 praying for a relief seeking declaration that he is the Bhumiswami and respondent be restrained to dispossess him. Suit was contested, issues were framed, question of jurisdiction of Civil Court was also raised and trial Court vide order dated 20.2.96 dismissed the suit simply on the ground that the jurisdiction of the Civil court under Section 257 of the Code is barred. Thereafter the lower appellate Court also upheld the aforesaid finding of the trial Court in appeal and dismissed the appeal filed by the appellant, against which this Second Appeal has been filed which was admitted on the aforesaid substantial question of law.

3. I have heard the learned counsel for the parties and perused the record. It was seriously argued and objected by the learned counsel for the appellant that the judgment and decree passed by both the Courts below are bad in law and the findings recorded by the trial court on the question of jurisdiction of the Civil Court are also bad in law. It was argued that on the day when the suit was filed, i.e. on 12.6.95, the civil Court was having jurisdiction to entertain the suit and the

jurisdiction of the Civil Court was not exclusively barred and both the courts below have committed illegality in dismissing the suit as well as appeal.

4. After hearing the learned counsel for the parties, I have perused the provisions of Section 257 of the Code. Section (L-l) any matter covered under Section 170-B was inserted by M.P.Amendment Act No.38 of 1995 w.e.f. 15.12.1995. Therefore, it is clear that prior to 15.12.1995 the jurisdiction of the Civil court in cases falling under Section 170-B of the Code was not exclusively barred and Section (L-l) was incorporated and came into operation with effect from 15.12.1995. There is no dispute in this case that on 12.6.1995 on the day when suit was filed, the aforesaid amended Section (L-l) was not in operation and was not inserted and brought on the books of statute. Therefore, the question for consideration in this case is as to whether on 12.6.1995, when the jurisdiction under Section 257 of the Code was not barred, the suit was maintainable ?

5. It is settled principle of law that the exclusion of jurisdiction of Civil Courts is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. The same principle is accepted by the Division Bench in the case of *State of Madhya Pradesh Vs. Sundarlal Jaiswal,* reported in 1976 JLJ 323=1976 RN=175=1976 MPLJ 254=AIR 1976 MP 175, placing reliance on Full Bench decision reported in 1978 JLJ 89. It was further held that as a necessary corollary of this principle, provisions excluding jurisdiction of civil Courts and provisions conferring jurisdiction on authorities and tribunals other than civil courts are to be strictly construed.

6. Section 257 of the Code confers exclusive jurisdiction to the revenue Courts in respect of certain matters as enumerated in the Section and in some of the matter in which the jurisdiction of the civil Court has not been expressly barred then the civil Court will have jurisdiction to entertain the suits. It is more particularly clear from the insertion of sub-clause (L-l) in Section 257 w.e.f. 15.12.95 that any matter covered under Section 170-B of the Code no civil Court shall exercise jurisdiction thereon. This also clearly indicates that prior to 15.12.1995 there was no expressed bar on the jurisdiction of the Civil Court and therefore it is clear that on 12.6.1995 the jurisdiction of the civil court was not expressly barred. Thus, as a necessary corollary it has to be held that prior to 15.12.1995 for considering the cases falling under Section 170-B of the Code, which was introduced by MP Act No. 15 of 1980 w.e.f. 24.10.1980, the jurisdiction of the civil Court was not excluded. If there was no clear provision in Section 257 to debar the jurisdiction of the civil Court prior to 15.12.95 then certainly it has to be held that the suit was maintainable and civil Court was competent to entertain the suit.

7. Section 257 of the Code provides that except as otherwise provided in this Code, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board, or any Revenue Officer is by

this Code, empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the matters mentioned in this section. Even the language of sub-section (3) of Section 170-B of the Code does not say in clear terms that the jurisdiction of the civil Court is either explicitly expressed or clearly implied as barred.

8. In view of the aforesaid facts and circumstances of the case it is clear that for the cases falling under Section 170-B the jurisdiction of the civil Court is barred w.e.f. 15.12.1995 and prior to that the jurisdiction of the civil Court was not barred. Therefore, in my opinion, both the Courts below have not properly examined the provisions of Section 257 of the Code and have not considered this aspect of the matter that on the day when the suit was filed, whether jurisdiction of the civil Court was expressly barred or not.

9. Consequently, question is answered accordingly. This appeal is allowed. Judgments and decree of both the Courts below are set aside and the case is remanded back to the trial Court to decide the suit on merits after hearing the parties in accordance with law. The parties shall appear before the trial Court on **28.3.2008** and thereafter the trial Court shall decide the suit as expeditiously as possible. Office is also directed to remit back the record of the trial Court so that it may reach on or before **28th March,2008.**

10 Parties; to hear their own costs.

Appeal allowed.

I.L.R. [2008] M. P., 2641

APPELLATE CIVIL

Before Mr. Justice S. Samvatsar & Mr. Justice A.P. Shrivastava

26 August, 2008*

SHAKUNTALA DEVI SINGHAL ... Appellant

Vs.

GOVERDHAN DAS & ors. ... Respondents

A. **Hindu Succession Act (30 of 1956), Section 23, Hindu Succession (Amendment) Act, 2005** - *Right of female in succession - Bar to file a partition suit - Held - A perusal of the Amendment Act, 2005, it is clear that intention of the legislature is to bring female and male heirs on equal footing - By omitting Section 23 of the Act, 1956 no new right is created in favour of female, but only a bar of filing a suit is lifted - The female had a share in the property even before coming into force of Hindu Succession (Amendment) Act, 2005, but only restriction of their right shall bar for filing a suit for partition in the property which is kept by the family members, and the said bar is lifted - In view of this fact the said bar will operate retrospective and benefit of the said omission can be extended to the present appellant - Appeal allowed.* (Para 15)

*F.A. No.445/2005 (Gwalior)

क. हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 23, हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 – उत्तराधिकार में स्त्री का अधिकार – विभाजन का वाद पेश करने पर रोक – अभिनिर्धारित – संशोधन अधिनियम, 2005 के परिशीलन से यह स्पष्ट है कि विधायिका का आशय स्त्री और पुरुष वारिसों को समान स्थिति पर लाना है – 1956 के अधिनियम की धारा 23 के लोप करने के द्वारा स्त्री के पक्ष में कोई नया अधिकार सृष्ट नही किया गया है, बल्कि केवल वाद पेश करने की रोक को उठाया गया है – हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 के अस्तित्व में आने के पूर्व भी स्त्री सम्पत्ति में हिस्सा रखती थी, किन्तु उसके अधिकार की रोक केवल सम्पत्ति में विभाजन के लिए वाद पेश करने पर रोक लगाएगी, जो परिवार के सदस्यों द्वारा रखी गई है, और यह रोक उठाई गई है – इस तथ्य की दृष्टि गोचरता में कथित रोक भूतलक्षी रूप से प्रवर्तित होगी और कथित लोप का लाभ वर्तमान अपीलार्थी को दिया जा सकता है – अपील मंजूर।

B. Succession Act (39 of 1925), Section 63 - *Execution of unprivileged Wills - Proof of Will - It is necessary that witnesses must have seen the testator signing the will in his presence.* (Para 7)

ख. उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – विशेषाधिकार रहित वसीयतों का निष्पादन – वसीयत का सबूत – यह आवश्यक है कि साक्षियों को वसीयतकर्ता को उसकी उपस्थिति में वसीयत हस्ताक्षरित करते हुए अवश्य देखना चाहिए था।

Cases referred :

2007(54) AIC 808 (Madras), 2006(39) AIC 533 (Kerela), 2008(64) AIC 664 (Calcutta), 2008(64) AIC 668, 2007 AIHC 1133, (2000) 2 SCC 536, 1995 MPLJ 402, 2007(1) MPLJ 435, 2007(1) MPLJ 467.

K.M. Mishra, for the appellant.

Deepak Khot, for the respondent No.1.

N.K. Jain with *A.K. Jain*, for the respondent No.2.

K.L. Mangal, Navnidhi Padhariya and *Shiv Om Agarwal*, for the respondent No.3.

JUDGMENT

The Judgment of the Court was delivered by **S. Samvatsar, J.** :–This appeal is preferred by the plaintiff being aggrieved by the judgment and decree dated 27/1/2004 passed by the 10th Additional District Judge (Fast Track Court) Gwalior, whereby the suit filed by the present plaintiff is dismissed.

2. The facts in a nut shell are that the plaintiff has filed the present suit alleging that she is daughter of late Shri Jagannath Prasad who died on 22/9/1969. As per the plaint allegation, Jagannath Prasad was the owner of two houses situated at Deedwanaoli, Lashkar Gwalior as described in the plaint map.

3. As per the plaint allegations, Jagannath Prasad survives by Goverdhan Das (Defendant No.1), Narayan Das, who is now dead and his heirs are the defendants No.2 and 6, Smt. Chhanno, who is also now dead and surviving by Smt. Vimla Devi & Smt Munni Devi (Defendants No.3 & 4) and Savitri Bai, who is dead and

survived by Smt. Leela Devi and plaintiff. The appellant/ plaintiff filed the suit for partition alleging that she has one-sixth share in the property. The defendants filed their separate written statements. Goverdhan Das and Narayan Das filed the written statement alleging that Jagannath Prasad before his death had executed a will dated 16/6/1968 in their favour, and hence the plaintiff has no right to file the suit. They have also raised a plea that the property in question being a dwelling house, hence present appellant has no right to claim partition.

4. The learned trial Court framed as many as 11 issues on the basis of pleadings of the parties, and after recording the evidence and appreciating the same has held that the alleged will executed by Jagannath Prasad is not proved. Hence, Goverdhan Das and Narayan Das have filed their cross objection in the present appeal.

5. The first question, which is under consideration is whether the will is proved or not. From perusal of the will, it is clear that the will is signed on the presence of two attesting witnesses, the copy of the will is Ex.D-1, which bears signature of two attesting witnesses i.e. Prakash Chand and Ratanlal.

6. To prove the alleged will, the defendants have examined only one attesting witness Ratanlal as DW-2. In his statement, he stated that the property in question was owned by Jagannath Prasad, who had constructed the house about 65-70 years back. He carries on business of repairing watches on a platform of the house owned by Jagannath Prasad. On 16/6/1968 at about 12:00 Jagannath Prasad called him and a will was executed in his presence in favour of Goverdhan Das and Narayan Das. This witness has further stated that the will was read over to him. He states that thereafter he and other witness Prakash Chand had signed in the will at place B to B and C to C respectively. In para 11 of his cross examination, he states that he does not know who were present at the time of execution of will. He states that when the will was executed Mama and Pappu were present. He further states that after signing the will, he went away and no one has signed in his presence. Thus, he states that when he signed the will, no one was present.

7. Section 63 of the Indian Succession Act, 1925 provides a mode of proving a will, which reads as under:-

> **"63. Execution of unprivileged Wills.--** Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of

whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary".

As per Section 63-C of the Act, 1925 the Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator. Thus, for proving the will as per the provisions of Section 63 of the Act, 1925 it is necessary that the witnesses must have seen the testator signing the will in his presence.

8. In the present case, as per the statement of Ratanlal (DW-2), he has not seen the testator signing the will, hence the Court below has rightly held that the will is not proved in accordance with Section 63 of the Act, 1925. Moreover, there are contradictions in the statement of DW-1 and DW-2. The other attesting witness Prakash Chand is not examined by the defendants. In view of this fact, the learned Court below has held that the alleged will is not proved, and therefore, held that all the heirs of Jagannath Prasad have one-sixth share in the property

9. Now the question is about bar of Section 23 of the Hindu Succession Act, 1956, which provides that where a Hindu intestate has left surviving him or her both male and female heirs specified in class-I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein. In the present case, admittedly the plaintiff is a female heir of deceased Jagannath Prasad. The learned Court below has held that in view of this provision, plaintiff has no right to file the suit.

10. However, from perusal of the evidence, it appears that the house in question is not dwelling-house. Suresh Chand Jain (PW-1) in para 4 of his statement has admitted that in the first house there are three shops while the other house contains three shops. The said shops are on rent and the tenants are carrying their business in the said houses. So, the said houses cannot be said to be dwelling house wholly occupied by the members of family of the deceased Jagannath Prasad. Therefore, bar of Section 23 of the Act, 1956 does not arise, and therefore, the learned Court below has committed an error in dismissing the suit on this ground.

11. Moreover, by promulgation of the Hindu Succession (Amendment) Act, 2005, now the question is what is effect of the said amendment. Whether that amendment

will operate in the present case as retrospective and will affect the rights of the parties.

12. The Madras High Court in the case of *G.Sekar Vs. Geetha & others,* 2007(54) AIC 808 (Mad), the Kerala High Court in the case of *Narayan Vs. Meenakshi,* 2006 (39) AIC 533 (Kerala), the Calcutta High Court in the case of *Smt. Puspa Mukherjee and another Vs. Smt. Smritikana Mukherjee & others,* 2008 (64) AIC 664 (Cal), and in the case of *Kalipada Kirtan Vs. Bijoy Bag and others,* 2008 (64) AIC 668, and the Karnataka High Court in the case of *Rathnakar Rao Sindhe Vs. Smt. Leela Ashwath,* 2007 AIHC 1133 has laid down that the deletion of Section 23 of the Hindu Succession Act is retrospective effect.

13. Relying on these judgments, learned counsel for the appellant submitted that as now there is no bar against a female heir of filing suit, the present suit can be decreed and set aside the impugned judgment and decree. He has also relied on judgment of the Apex Court in the case of *Kolhapur Canesugar Works Ltd. & another Vs. Union of India & others,* (2000) 2 SCC 536, in which the Apex Court in para 37 has considered the meaning of omission and held as under:-

> "37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6 (1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision".

In the present case, Section 23 of the Act, 1956 is omitted without replacing the same by any other provision, and therefore, the same shall be treated as it never existed in the statute, and hence will be applicable in the present case.

14. In reply to this argument, Shri N.K.Jain, learned senior counsel for the respondents has submitted that the deletion of Section 23 of the Act is not a retrospective, but will be prospective effect. In support of his arguments, he has relied on judgments of the Apex Court in the case of *R. Rajagopal Reddy Vs.*

Padmini Chandrasekharan, 1995 MPLJ 402, *Sheela Devi & others Vs. Lal Chand*, 2007 (1) MPLJ 435, and in the case of *Anar Devi and others Vs. Parmeshwari Devi & others*, 2007 (1) MPLJ 467.

15. From perusal of these judgments, it is clear that in those cases the Apex Court has held that whether a provision is prospective or retrospective is to be decided on the basis of language, aims and objects for which the said amendment is carried out in the Act. From perusal of the Amendment Act, 2005, it is clear that a change is brought in the law amongst the Hindu and gives equal rights to the Hindu Joint Family both male and female. Thus, from the object and reasons, it is clear that intention of the legislature is to bring female and male heirs on equal footing. By omitting Section 23 of the Act, 1956 no new right is created in favour of female, but only a bar of filing a suit is lifted. The female had a share in the property even before coming into force of Hindu Succession (Amendment) Act, 2005, but only restriction of their right shall bar for filing a suit for partition in the property which is kept by the family members, and the said bar is lifted. In view of this fact the said bar will operate retrospective and benefit of the said omission can be extended to the present appellant. In such circumstances, the appeal deserves to be allowed.

16. In the ultimate result, the appeal is allowed and cross objection stands dismissed. The impugned judgment and decree is hereby set aside and pass a preliminary decree of partition by holding that heirs of deceased Jagannath Prasad have one-sixth share in the property. Now the Court shall appoint a Commissioner for partition the property by way of one-sixth share each of the heirs of the deceased Jagannath Prasad.

Appeal allowed.

I.L.R. [2008] M. P., 2646
APPELLATE CIVIL
Before Mr. Justice S.K. Gangele
5 September, 2008*

BABULAL BIRLA (DEAD) THROUGH L.RS.
SMT. KRISHNA DEVI & ors. ... Appellants
Vs.
RAM PRAKASH SHARMA ... Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a), (c) & (f), Civil Procedure Code, 1908, Order 1 Rule 10, Order 30 - *Non-joinder of necessary party - Maintainability of suit - Suit premises rented to partnership firm and the firm or its partners not impleaded as a party - Effect - Held - A decree of eviction of the premises cannot be granted in favour of the plaintiff*

*S.A. No.285/2005 (Gwalior)

because the tenancy is in favour of a partnership firm, which means in favour of all the partners of the firm - Hence, the suit is not maintainable - Appeal allowed. (Para 28)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए), (सी) एवं (एफ), सिविल प्रक्रिया संहिता, 1908, आदेश 1 नियम 10, आदेश 30 – आवश्यक पक्षकार का असंयोजन – वाद की पोषणीयता – वादग्रस्त परिसर भागीदारी फर्म को किराये पर दिया गया और फर्म या उसके भागीदारों को पक्षकार नही बनाया – प्रभाव – अभिनिर्धारित – परिसर से निष्कासन की डिक्री वादी के पक्ष में प्रदान नही की जा सकती क्योंकि किरायेदारी भागीदारी फर्म के हक में है, जिसका अर्थ है फर्म के सभी भागीदारों के हक में – इसलिए वाद पोषणीय नही है – अपील मंजूर।

Cases referred :

AIR 1999 SC 3335, (1992) 4 SCC 254, (2007) 5 SCC 392, (2007) 5 SCC 745, AIR (38) 1951 Nagpur 448, AIR 1965 SC 1718, 1996 AIHC 2297, AIR 1971 MP 109, AIR 1958 MP 209, (2001) 3 SCC 179, (2004) 12 SCC 368.

R.D. Jain with *S.K. Jain,* for the appellants.

K.N. Gupta with *Anupam Shrivastava,* for the respondent.

ORDER

S.K. Gangele, J. :–Defendants have filed this appeal against the judgment and decree dated 10.01.2005 passed by VIII Additional District Judge, Gwalior in Civil Appeal No. 40-A/2004 affirming the judgment and decree dated 30.4.2004 passed by IX Civil Judge, Class I, Gwalior in Civil Suit No. 62-A/2002.

2. The appeal has been admitted vide order dated 08.09.2005 for hearing on the following substantial questions of law :-

(1) Whether the suit filed by the plaintiff for ejectment against the defendants is not maintainable in view of the fact that partnership firm to whom accommodation was let is not joined as party ?

(2) Whether the Courts below have erred in passing the decree under Section 12 (1) (f) of the M.P. Accommodation Control Act, when plaintiff has failed to prove his need to the suit accommodation objectively ?

(3) Whether the findings of the Courts below about the bonafide need of the plaintiff is vitiated for non-consideration of the facts i.e. age of the plaintiff, his past experience, failure to file a suit within six years of his retirement etc. are material consideration for determining his bonafide need ?"

3. During the pendency of the second appeal the respondent filed a cross-objection which has also been admitted on 19.10.2005 for hearing on the following substantial question of law :-

"Whether the first appellate court has erred in refusing to pass a decree on the ground of Section 12 (1) (a) when the rent is not deposited in

accordance with Section 13 (1) and the delay is not condoned by the first appellate Court ?"

4. Facts of the case are - Plaintiff, Ram Prakash Sharma filed a suit for eviction and recovery of rent against defendant, Babulal Birla. Plaintiff pleaded that he is the owner of a shop situated at Patankar Bazar, Lashkar, Gwalior. The shop was let out by his father, late Shri Matadeen Sharma on 23.06.47 on a written rent-deed. Father of the plaintiff died on 26.06.71. After death of the father defendant, Babulal Birla became tenant of the plaintiff and the tenancy is oral. It had been agreed between the parties to pay monthly rent of Rs. 125/- per month. The defendant did not pay rent. The shop is needed for bonafide need of the plaintiff because the plaintiff wants to start business of Restaurant. He had sufficient fund for the aforesaid purpose. The defendant in the written statement admitted the fact that the shop was rented out on 23.06.47. It has further been pleaded by the defendant that he had been paying rent regularly. The defendant denied the bonafide need of the plaintiff and stated that wife of the plaintiff had been working as Teacher at Gajra Raja Girls School, Gorkhi, Gwalior. His son, Arvind Sharma was in Air Force and younger son, after obtaining B.E., Degree, was also posted at Maruti Udyog Ltd, Gudgaon. The written statement was amended further and the defendant stated that in the year 1994 the plaintiff got possession of two times larger space in comparison to the suit shop, which is adjacent to the shop in dispute. The defendant also raised a plea that on 01.04.1976 that Partnership firm of defendant came into existence and an information had been given to this effect to the plaintiff. The plaintiff agreed to transfer the tenancy of the shop in favour of the partnership firm and also received rent from the Partnership firm, named as 'Firm Birla Machinery Company' and issued rent-receipts in favour of the partnership firm. Inspite of this the partnership firm has not been impleaded as a party neither partners of the firm have been impleaded as parties, hence the suit is not maintainable on the ground of non-joinder of necessary parties. In view of special pleadings and amendment in the written statement, which was allowed by the Court, the plaintiff also amended the plaint. He pleaded that no notice of existence of partnership firm had been given to him. The defendant illegally handed over possession of the suit premises to the partnership firm. There is a sub-letting on the part of the defendant and on this ground also the plaintiff is entitled to received decree of eviction.

5. During pendency of the suit an application under Order 1 Rule 10 CPC has been filed before the Court on 13.02.2001 by Birla Machinery Co. through Radheshyam, Birla and Harish Birla, as partners. They pleaded that partnership came into existence on 01.04.76. There is a registered deed of partnership. The plaintiff treated partnership firm as tenant, hence the partnership firm and its partners, Radheshyam Birla and Harish Biral are the necessary parties. Hence, they be added as defendants. Plaintiff objected the application and pleaded that defendant, Babulal Birla had been given the premises on rent, hence the partners

and partnership firm are not the necessary parties. The aforesaid application has been rejected by the trial Court vide order dated 08.03.2001 by holding that documents filed by the defendants can be filed during trial and the decree of eviction can be passed without adding the aforesaid partners as parties to the suit. A review application was filed against the aforesaid order. That has also been rejected vide order dated 17.08.2001.

6. The plaintiff in his deposition stated that he is the owner of the suit shop. The shop was rented out by his father on 23.06.47 to the defendant, Babulal Birla on a written tenancy at the rate of Rs. 60/- per month, the agreement has been filed as Ex. P-3. The tenancy has been continued after death of his father. The shop was needed bonafide to the plaintiff for starting of business of hotel/restaurant. He admitted in his cross-examination that he received possession of an area of 1150 sq.ft. , which is adjacent to the shop and the area of shop is 460 sq.ft., however, that area is not sufficient to start business of plaintiff. He further admitted that he signed documents Exs. D-1 and D-2, rent receipts on behalf of 'Birla Machinery Company'. He further admitted that there is a board on the shop of Birla Machinery Company and both sons of the defendants had been doing business at the shop. He further admitted that he received rent from Babulal and some times from his sons. On behalf of the plaintiff two other witnesses, Naresh Kumar (PW 2) and Satya Narayan (PW 3) have been examined. P.W. 2 Naresh Kumar in his statement stated that Birla Machinery Company had been doing business of machines in the shop. Plaintiff had experience of hotel and restaurant. The shop is sufficient for business of hotel and restaurant. Another witness of the plaintiff Satya Narayan (PW 3) in his statement stated that Ram Prakash had been doing the business in the shop. The shop is sufficient for the business of restaurant. He admitted in his cross-examination that the plaintiff got possession of a portion from another tenant.

7. The defendant in his statement stated that the shop was rented out by the father of the plaintiff to him on 23.6.47. The plaintiff demanded 'Pagree' from him. The plaintiff also got possession of 1150 sq. ft. plot, which is adjacent to the shop. He had been doing business in the shop in the name of 'Birla Machinery Company'. The rent receipts, Exs. D-1 and D-2 are also from the plaintiff in the name of 'Birla Machinery Company'. In the year 1976 there a partnership firm has been created in the name of 'Birla Machinery Company' and other partners of the firm are his sons, Radheshyam and Harish. On 13.7.96 the plaintiff had given a letter to Andhra Bank, Gwalior mentioning the fact that the tenant of the shop is 'Birla Machinery Company, a Partnership Firm, copy of the letter and certificates from the Bank have been filed as Exs. D-37 and D-38 and registration of Partnership Firm has been filed as Ex. D-39. The defendant denied the need of the plaintiff. In his cross-examination he stated that his two sons had been doing the business in the shop.

8. On behalf of defendants Mr. Radheshyam Birla and Mr. Harish Birla have

been examined as D.W. 2 and D.W. 3. Another witness, Saroj Bindal has also been examined. Son of the defendant, Radheshyam Birla has stated that he had been doing business in the shop in the name of Partnership firm since 1976. His brother and father are the partners of the firm. The registration of the firm is Ex. D-39. The plaintiff received rent from the firm and also informed Andhra Bank that the firm is the tenant. He further stated that there was no bonafide need of the plaintiff and the plaintiff got possession of near about 1200 sq.ft. Same facts have been stated by Mr. Harish Birla, who is the son of the defendant and who has been examined as D.W. 3. He admitted that there are restaurants and Sweets shops adjacent to the suit shop. Another witness Saroj Bindal stated that plaintiff had no experience of restaurant business and he also received possession of the premises of an area of 1150 sq.ft., which is adjacent to the shop. Mr. Vijay Sengar, who has been examined as witness on behalf of defendant denied the fact that had experience of restaurant business.

9. Apart from oral evidence plaintiff produced rent note, Ex. P-3, copy of the map of the suit shop and death-certificate of his father, Ex. P-4. The defendants produced receipts of rent of Rs. 1500/- dated 31.03.1994 and 31.3.1990, Ex. D-1 and D-2, Photographs of the place and letter Ex. D-37 written by the defendant to the Bank and certificate issued by the Bank as Ex. D-38, copy of registration of the firm as Ex. P-39 and partnership deed.

10. On the basis of the peladings, documents and evidence on record the trial Court has held that the plaintiff is entitled a decree of eviction on the ground of bonafide need under Sections 12 (1) (f), 12 (1) (a) and also 12 (1) (c) of M.P. Accommodation Control Act and decreed the suit.

11. The defendants filed and appeal. During pendency of the appeal Babulal Birla died and his legal representatives have been brought on record. The lower Appellate Court affirmed the decree of eviction passed by the trial Court on the grounds under sections 12 (1) (a) and 12 (1) (f) of the M.P. Accommodation Control Act. Thereafter, appellants filed the present appeal and the respondents filed cross-objections against the rejection of the claim of the plaintiff under section 12 (1) (c) of the Act for arrears of rent. The appeal has been admitted and cross-objections have also been admitted for hearing on the substantial questions of law mentioned above.

12. Learned Senior Counsel for the appellants has submitted that the plaint filed by the plaintiff is not maintainable for non-joinder of necessary parties because the suit accommodation had been subsequently let out to the Partnership fim and it has not been joined as a defendant inspite of application. Hence, the suit has to be dismissed. The learned counsel further submitted that there is no bonafide need to the plaintiff and the findings to this effect are vitiated looking to the age of the plaintiff and the fact that plaintiff got possession of another land of 1200 sq. ft. and he has not started any business over the land. In support of his contentions the learned counsel relied upon following judgments :-

(1) *Deena Nath v. Pooran Lal,* (2001) 5 SDCC 705,

(2) *Ramesh v. A. Balreddy,* 1990 (II) MPWN 71 (SC),

(3) *Chhotelal Ratanlal and another v. Rajmal Milapchand and others,* AIR (38) 1951 Nagpur 448,

(4) *Mattulal v. Radhelal* 1975, JLJ 1 (SC),

(5) *Kishan Chand v. Jagdish Pershad and others,* (2003) 9 SCC 151,

(6) *J.J. Lal Pvt.Ltd. and others v. M.R. Murali and another,* (2002) 3 SCC 98,

(7) *Indrasen Jain v. Rameshwardas,* AIR 2005 SC 578,

(8) *Nagubai Ammal and others v. B. Shama Rao and others,* AIR 1956 SC 593

(9) *Bhairab Chandra Nanden v. Ranadhir Chandra Dutta,* AIR 1988 SC 396

13. Contrary to this, learned Senior Counsel for the respondents - plaintiff submitted that the suit shop has never been let out to partnership firm. As per the agreement the tenancy was between the plaintiff and the defendant. No issue has been from to this effect before the trial Court neither both the Courts below have recorded any finding on the aforesaid issue. Hence it cannot be raised for the first time in the second appeal. Learned Senior Counsel further submitted that both the courts below have appreciated the evidence on record and found need of the plaintiff bonafide and the findings of both the Courts below to this effect are as per law. He further submitted that the cross-objection filed by the respondent is also liable to be allowed because there is a delay in depositing arrears of rent. In support of his contentions, learned counsel relied upon the following judgments :-

(1) *Kanji Manji v. The Trustees of the Port of Bombay,* AIR 1963 SC 468,

(2) *Sheodhari Rai and others v. Suraj Prasad Singh and others,* AIR 1954 SC 758,

(3) *N.M. Ponniah Nadar v. Smt. Kamalakshmi Ammal,* AIR 1989 SC 467,

(4) *Tarabai Jivanlal Parekh v. Lala Padamchand,* AIR 1950 Bombay 89,

(5) *Keshorao v. Madhoprasad,* 1960 MPLJ SN 116,

(6) *Unreported judgment in Rajendra Prasad v. Smt. Shanti Garg and others,* Second Appeal No. 542/07, Decided on 29.10.2007 at Gwalior Bench.

14. As mentioned above in this judgment, initially the plaintiff filed a suit for eviction on the ground of recovery of arrears of rent and bonafide need. The

defendant denied the need of the plaintiff and also denied the factum of arrears of rent. Subsequently, the defendant amended the written statement and pleaded that on 02.04.1976 a partnership firm was created and it has been doing business in the shop in dispute. The plaintiff informed about the partnership firm and he also consented to transfer the tenancy in favour of the partnership firm. He received rent from the Partnership firm. The partnership firm is a registered firm and it had been doing the business in the shop in the name of 'Birla Machinery Company'. In spite of that the partnership firm and its partners have not been impleaded as parties in the suit, hence the plaint is liable to be rejected on the ground of non-joinder of necessary parties. After the aforesaid amendment in the written statement the plaintiff also amended the plaint and denied that the shop had been let out to the partnership firm. An application was also filed before the trial Court on behalf of partnership firm through all the partners, namely, Radheshyam Birla and Harish Birla for making them as parties under Order 1 Rule 10 CPC. The plaintiff opposed the aforesaid application and stated that the accommodation has never been let out to the partnership firm. That application has been rejected by the Court vide order dated 08.03.2001. Thereafter, a review application was filed and that application was also rejected by the Court by order dated 17.08.2001.

15. Initially, the shop was let out to the defendant vide agreement, Ex. P-3. It was executed between Babulal Birla, the defendant and Matadeen Sharma, father of the plaintiff, on 23.06.1947. The agreement was valid upto 23rd June 1948 and as per the agreement shop was rented out on a monthly rent of Rs. 60/- per month. Subsequently, Mr. Matadeen Sharma died on 26.06.1971. Since the date of agreement the shop is in possession of the defendant. The plaintiff in his plaint pleaded that initially the shop was rented out by the father of the plaintiff on the basis of a written agreement, Ex. P-3, and after death of his father, who died on 26.06.1971, the defendant, Babulal Birla became the tenant of the plaintiff and the tenancy is oral. The rent of the shop was also fixed as Rupees 125/- per month. The defendant specifically pleaded that the shop was subsequently rented out in favour of a firm, namely, 'Birla Machinery Company'. The firm was registered with the Registrar on 06.08.1976. Registration Certificate has been filed as Ex. P-39. The partnership deed was executed on 1st April 1986 between the partners, Babulal Birla, Radheshyam Birla and Harish Birla. The plaintiff received rent of Rs.1500/- from 'Birla Machinery Company'. Receipt of rent has been filed as Ex. D-1 which is dated 31.3.1994. Another rent receipt has been filed as Ex. D-2. It is also in the name of 'Birla Machinery Company'. It is dated 31.03.1990. It is for the rent of Rs. 1500/-. As per the aforesaid documents Mr. Ram Prakash Sharma received rent of the shop from 31st March 1990 upto October and as per Ex. D-1 Mr. Ram Prakash Sharma received rent of the shop from 1st April 1993 to 31st Marh 1994. Plaintiff admitted his signature on receipts, Ex. D-1 and Ex. D-2 in para 21 of his cross-examination. He further admitted that there is a sign-board on the shop of 'Birla Machinery Company'. Apart from this, the plaintiff submitted

a rent-letter to the Manager, Andhra Bank, Gwalior informing the bank that Birla Machinery Company was the tenant of the plaintiff. Photocopy of the rent-letter has been filed as Ex. D-37, in which following paragraph has been mentioned by the plaintiff :-

> "With reference to the advances already granted and advances to be granted in future by your Bank to Birla Machinery Company against goods stored in my godown no -- situated at Patankar Bazar, Gwalior, I hereby agree and confirm that I have no lien on goods already pledged and to be pledged to your Bank in future and that I have no objection and shall have no objection whatsoever hereafter to your Bank having access to the goods whenever necessary for the purpose of inspection or otherwise and also to your Bank's putting its name boards locks etc. on the godown or godowns containing the goods in token of your Bank's lien over them."

The Bank further submitted a certificate, which has been filed as Ex. D-38. In the aforesaid certificate, it has been mentioned that a rent letter was received by the Bank with regard to Birla Machinery Company, Patankar Bazar, Gwalior, a registered partnership Firm from the land lord and that rent letter has not been cancelled. The certificate is dated 19.04.2003.

16. From the aforesaid documentary evidence, it is clear that the plaintiff received rent from Birla Machinery Company as per Exs. D-1 and D-2 and the plaintiff also submitted a rent-letter to the Bank, Ex. P-37 mentioning that Birla Machinery Company, Patankar Bazar, Gwalior, a registered Partnership firm was the tenant of the plaintiff and the rent-letter has never been cancelled as per the certificate issued by the Bank Ex. D-39. The defendant himself stated in the year 1976 the defendant informed to the plaintiff about the creation of partnership firm and thereafter his both sons have become partners of the firm. Both the sons of the defendant have also deposited the same facts in their evidence as DW 2 and DW 3.

17. From the above facts and documents, Exs. D-1 and D-2 and specially the letter Ex. D-37 it is clear that the plaintiff accepted the Birla Machinery Company, a registered Partnership Firm as his tenant because the plaintiff received rent to this effect and submitted a rent-letter to the Bank initially, there was only a written agreement between the defendant and father of the plaintiff, Annexure P-3 and it was for a period of one year i.e. upto 23rd June 1948. The plaintiff himself pleaded that after death of his father there was an oral tenancy. Section 111 of the Transfer of Property Act prescribes surrender of lease, which is as under :

> "111. **Determination of lease** - A lease of immoveable property determines -
>
> (a) by efflux of the time limited thereby.

(b) where such time is limited conditionally on the happening of some event - by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event - by the happening of such event;

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

(e) by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter (***); or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; (or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event); and in (any of these cases) the lessor or his transferee (gives notice in writing to the lessee of) his intention to determine the lease;

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

18. Hon'ble the Supreme Court in *T.K. Lathika v. Seth Karasandas Jamnadas*, AIR 1999 SC 3335, has held as under with regard to doctrine of implied surrender :-

"12. The principle which governs the doctrine of implied surrender of a lease is that when certain relationship existed between two parties in respect of a subject matter and a new relationship has come into existence regarding the same subject matter, the two sets cannot co-exist, being inconsistent and incompatible between each other, i.e. if the latter can come into effect only on termination of the former, then it would be deemed to have been terminated in order to enable the latter to operate. A mere alteration or improvement or even impairment of the former relationship would not *ipso facto* amount to implied surrender. It has to be ascertained on the terms of the new relationship vis-a-vis the erst-while demise and then judge whether there was termination of the old jural relationship by implication."

The Hon'ble Supreme Court in *P.M.C. Kunchiraman Nair v. C.R. Naganatha Iyer and others*, (1992) 4 SCC 254, has held as under with regard to the same principle :-

"In English law, delivery of possession by the tenant to a landlord and his acceptance of possession effects a surrender by operation of law. It is also called implied surrender in contradistinction to express surrender which must be either by deed or in writing. Directing the occupier to acknowledge the landlord as his landlord i.e., to attorn to the landlord, is a sufficient delivery of possession by the tenant to the landlord. Receipt of rent from a person in possession may be evidence of the landlord's acceptance of him as tenant, whether he is a stranger, or whether he was already in possession as subtenant. Illustration under clause (f) or S. 111 of the T.P. Act is not exhaustive of the cases in which there may be an implied surrender of the lease. Just as under the English law, there can be an implied surrender under the law of transfer of property in India, if the lessor grants a new lease to a third person with the assent of the lessee under the existing lease who delivers the possession to such person or where the lessee directs his subtenant to pay the rent directly to a lessor."

Hon'ble the Supreme Court in *Tarachand v. Sagarbai alias Chaiyalibai,* (2005) 5 SCC 392, has held as under with regard to implied surrender :-

"25. Although technically a tenant may continue to occupy the premises, once the nature of possession changes resulting in change in his status, which he accepts the same may amount to virtual taking of possession. In any event, virtual taking of possession is no a *sine quo non* for implied surrender as the same can be created by a new relationship also. In *Nemichand v. Onkar Lal* (1991 (3) SCC 464 this aspect of the matter has not been considered."

19. As per the above quoted judgments of Hon'ble the Supreme Court it is clear that delivery of possession is not a *sine quo non* for implied surrender and from the facts of the case there can be an implied surrender and a new relationship can also be created.

20. From the facts mentioned above, it is clear from the Exs. D-1, D-2, D-37 and D-38 rent-letter and certificate issued by the petitioner that plaintiff accepted the tenancy of partnership firm - 'Birla Machinery Company, and there is an implied surrender of tenancy in favour of Birla Machinery Company and new relationship has been created between the plaintiff and Birla Machinery Company.

21. Hon'ble Supreme Court in *B. Arvind Kumar v. Govt. of India and others,* (2007) 5 SCC 745, has held as under with regard to essential ingredients of a lease :-

"9. Section 105 of the Transfer of Property Act, 1882 defines lease as follows :-

"105. Lease defined - A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or

of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined - The transferror is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

Thus the essential ingredients of a lease are : (a) there should be a transfer of a right, to enjoy an immovable property; (b) such transfer may be for a certain term or in perpetuity; (c) the transfer should be in consideration of a premium or rent; (d) the transfer should be a bilateral transaction, the transferee accepting the terms of transfer."

22. In view of the above judgment it is clear that a tenancy had been created between, the plaintiff and Birla Machinery Company, a Partnership Firm, a Firm which had three partners i.e. Babulal Birla, Radheshyam Birla and Harish Birla. The partnership firm filed an application for joinder of necessary parties. That has been resisted by the plaintiff. Hence, the partnership firm and its partners were the necessary parties in the suit of eviction because the tenancy was between the plaintiff and Birla Machinery Company, a partnership firm. In accordance with the provisions of Order 30 of the Code of Civil Procedure the partners can be sued in the name of the firm. In the present case the plaintiff has not sued the firm and neither all the partners. Contrary to this, the firm and its partners filed an application for joining them as defendants. That has been resisted by the plaintiff.

23. The Division Bench of Nagpur High Court in *Chhotelal Ratanlal and another v. Rajmal Millapchand and others*, AIR (38) 1951 Nagpur 448, has held as under :-

"Where a sum of money is due to a partnership firm, such a sum can be recovered either in a suit brought by all the partners of the firm or in a suit filed in accordance with O.30, R.1, in the name of the firm. Suit by one partner alone in his name is not maintainable."

The Division Bench of Nagpur High Court further held as under with regard to that all the partners of a firm or firm has not been added as parties then the suit is not maintainable :-

The principle is that in actions of contract, it is the right of the defendant, if he takes the objection in proper time to insist upon all persons with whom he contracted being joined as plaintiffs and if after objection has been raised the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to and the Court find that the objection is well founded, the suit must be dismissed : See *'Ramsebuk v. Ramlal Koondoo'* 6 Cal 815. More than

once it has been held that one of the several partners carrying on business in the name of a firm cannot sue in his own name the cause of action which has arisen in favour of the firm : See *'Dular Chand v. Balram Das'* 1 All 453. *'Ralliram Shewaram v. Firm of Bhudhuram'* AIR (12) 1925 Sind 181 and *'Behari Lal v. Ram Chand'* A.I.R. (29) Oudh 335."

The Hon'ble Supreme Court in *Her Highness Maharani Mandalsa Devi and others v. M. Ramnarain Private Ltd. and others,* AIR 1965 SC 1718 has held as under with regard to suit against a partnership firm :-

"A suit by or in the name of a firm is really a suit by or in the name of all its partners. The decree passed in the suit, though in form against the firm, is in effect a decree against all the partners. Beyond doubt, in a normal case, where all the partners of a firm are capable of being sued and of being adjudged judgment-debtors, a suit may be filed and a decree may be obtained against a firm under O.30 of the Code of Civil Procedure, and such a decree may be executed against the property of the partnership and against all the partners by following the procedure of O.21 R. 50 of the Code of Civil Procedure."

The learned Single Judge of Karnataka High Court in *Sri. Jayantilal Sampathraj Jain v. Shri D. Noor Mohammed,* 1996 AIHC 2297, has held as under :-

"Where an eviction petition under S. 21 of the Karnataka Rent Control Act (1961) was filed against the partnership firm, the tenant firm can be sued in its own name, without the partners being impleaded, in view of R. 1 of O.30 Civil P.C., since Rule 35 of the Karnataka Rent Control Rules (1961) expressly provides that in deciding any question relating to procedure not specifically provided for by these Rules, the Court shall as far as possible be guided by the provisions contained in the Code of Civil Procedure, 1908. Thus, the provisions of Order 30 of the CPC in its entirety are applicable to a proceeding under section 21 of the Karnataka Rent Control Act (1961). AIR 1984 SC 1570, Expl. & Disting."

A Division Bench of this Court in *Smt. Vraj Kuwar Bai and others v. Kunjbiharilal Krishnachandra and others,* AIR 1971 MP 109 has held as under :-

11. Under Order 30 of the Code of Civil Procedure, a suit can be filed against a firm without joining all or any of the individual partners by name as defendant and a valid and binding decree can be passed which will be executable against the firm property. The necessity of joining individual partners is only for the purposes of binding a particular partner personally, but for binding the partnership property it is not at all necessary to implead any partner by name. Under Order 21, Rule 50

of the Code of Civil Procedure, where a decree has been passed against a firm, execution may be granted against any property of the partnership; but it can be granted against the person or personal property of the partners only if they are parties to the suit or permission is obtained to execute the decree against individual partners."

24. From the above principle of law laid down it is clear that the partnership firm can be sued in the name of partnership firm or against all the partners. However, in the present case, although the tenancy was transferred in favour of the partnership firm, as held earlier, the plantiff has not sued the partnership firm neither all the partners. Only Babulal Birla has been sued. In such circumstances, the suit was not maintainable due to non-joinder of necessary parties.

25. Although no issue has been by the trial Court in this regard, but in the present case, the plaintiff went into the trial of the suit with ful knowledge and the defendant at the initial stage objected with regard to maintainability of the suit, the plaintiff denied the claim of the defendant to this effect. Thereafter in evidence the defendant specifically pleaded that the tenancy has subsequently been transferred to Birla Machinery Company, a partnership firm. The plaintiff in his evidence denied the aforesaid fact. Even though the plaintiff opposed the application of amendment filed on behalf of the partners of the partnership firm and resisted the prayer of the partners to be joined as defendants. In such circumstances, plaintiff went on trial with the knowledge of the aforesaid issue and led evidence on this aspect. There is no prejudice to the plaintiff due to the aforesaid issue.

26. The Hon'ble Supreme Court in *Nagubai Ammal and others v. B. Shama Rao and others,* AIR 1956 SC 593 has held as under with regard to non-framing of specific issue :-

"(10) 1, We see no substance in the contention that the plea of lis pendents is not open to the plaintiff on the ground that ithad not been raised in the pleadings. It is true that neitehr the plaint nor the reply statement of the plaintiff contains any averment that the sale is affected by the rule of lis pendens. Nor is there any issue specifically directed to that question. It is argued for the respondent that the allegations in para 4 of the plaint and in para 5 of the reply statement that Dr. Nanjuda Rao being a transferee subsequent to the mortgage could claim no right "inconsistent with or superior to those of the mortgagee and the auction-purchaser" are sufficiently wide to embrace this question, and reference was made to issue No. 3 which is general in character.

Even if the plaintiff meant by the above allegations to raise the plea of lis pendens, he has not expressed himself with sufficient clearness for the defendants to know his mind, and if the matter and rested there, there would be much to be said in favour of the appellant's contention. But it does not rest there.

(11) The question of lis pendens was raised by the plaintiff at the very commencement of the trial on 8.3.1947 when he went into the witness-box and filed in his examination-in-chief Exhibit J series, relating to the maintenance suits, the decree passed therein and the proceedings in execution thereof, including the purchase by Devamma. This evidence is relevant only with reference to the plea of lis pendens, and it is significant that no objection was raised by the defendants to its reception. Nay, more.

On 13.3.1947 they cross-examined the plaintiff on the collusive character of the proceedings in Exhibit J series, and filed documents in proof of it. The trial went on thereafter for nearly three months, the defendants adduced their evidence, and the hearing was concluded on 2.6.1947. In the argument before the District Judge, far from objecting to the plea of lis pendens being permitted to be raised, the defendants argued the question on its merits, and sought a decision on the evidence that the proceedings were collusive in character, with a view to avoid the operation of S. 52, T.P. Act.

We are satisfied that the defandants went to trial with full knowledge that the question of lis pendens was in issue, had ample opportunity to adduce their evidence thereon, and fully availed themselves of the same, and that, in the circumstances, the absence of a specific pleading on the question was a mere irregularity, which, resulted in no prejudice to them.

(12) It was argued for the appellants that as no plea of lis pendens was taken in the pleadings, the evidence bearing on that question could not be properly looked into, and that no decision could be given based on Exhibit J series that the sale dated 30.1.1920 was affected by lis; and reliance was placed on the observations, of *Lord Dunedin in Siddik Mahomed Shah v. Mt. Saran,* 1930 P.C. 57 (1) (AIR V 17) (A), that "no amount of evidence can be looked into upon a plea which was never put forward.

The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto."

A Division Bench of this Court in *Ishak Ali v. Mst. Unnasbi Porthahin and others,* AIR 1958 MP 209 has held as under :-

"No doubt, the plea of adverse possession was not made in so many words, but all the facts necessary thereto were pleaded by the defendant. The plaintiffs had full knowledge and notice of the case and the absence of a plea or issue had hardly affected the merits. The parties went to trial with the full realisation of want the case was and the plaintiffs, who had a burden initially on them, know full well that they had been kept out of possession for 32 years by the defendants :

Held that in these circumstances, it was incumbent upon them to have shown how the suit brought by them was within time. Case law relied on."

Hon'ble the Supreme Court further in *Santosh Hazari v. Purushottam Tiwari (Deceased) by Lrs.*, (2001) 3 SCC 179, has held as under :-

"14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

The Hon'ble Supreme Court in *Achintya Kumar Saha v. Nanee Printers and others*, (2004) 12 SCC 368, has held as under :-

In cases where courts are required to consider the nature of transactions and the status of parties thereto, one cannot go by mere nomenclatures such as, licence, licensee, licensor, licence fee, etc. in order to ascertain the substance of the transaction, the Court has to ascertain the purpose and the substance of the agreement. In such cases, intention of the parties is the deciding factor. In order to ascertain the intention, the Court has to examine the surrounding circumstances including the conduct of the parties. In the present case, the High Court was; right in examining the terms of agreement coupled with the circumstances

surrounding the agreement in question like exclusive possession of the premises being given to Respondents 1 and 2 for monetary consideration for eleven years with a clause of renewal of the licence for further eleven years, payment of municipal taxes by Respondents 1 and 2, the rent receipts issued by M, the premises being let out for business purposes in a residential locality and conduct of the plaintiff-appellant in not examining Respondent No.4 who was held to have consented to the agreement in question. All the above circumstances taken together show that Respondents 1 and 2 were not trespassers. They show that the agreement was a tenancy in disguise of a licence. (Para 7).

The main issue around which the entire case revolves is : whether the agreement was a licence or a tenancy. This issue was there before the trial Court and the agreement was held to be a licence. It was there also before the lower appellate court but it was not adjudicated upon. When the core issue is not adjudicated upon, it results in a substantial question of law under Section 100 CPC. Although the core issue of tenancy arose before the first appellate court, the same was not adjudicated upon and in the circumstances the High Court was right in invoking Section 103 CPC."

27. From the above principle laid down by Hon'ble the Supreme Court and the Division Bench of this Court as quoted above, it is clear that if parties went on trial with full knowledge of facts and led evidence then non-framing of issue is not fatal and that point can be considered by the Court. From the facts of the case, it is clear that joining of firm, which is a tenant of the plaintiff, goes to the root of the matter and it is necessary point to decide the case. Plaintiff went to the trial with full knowledge of the aforesaid fact, hence the arguments advanced by the learned counsel for the respondent-plaintiff that the aforesaid point cannot be considered for the first time in the appeal cannot be accepted.

28. The question of non-joinder of necessary parties is a question of law and fact. It is based on the jurisdiction of the Court because if necessary parties have not been added as defendants then a decree cannot be executed against them. In the present case, as held earlier, that the tenancy was transferred to a partnership firm named as 'Birla Machinery Company', hence either Birla Machinery Company or its all the partners are necessary parties. The plaintiff has not added Birla Machinery Company as defendant neither all the partners as defendants. In such circumstances, a decree of eviction cannot be granted in favour of the plaintiff of the premises because the tenancy is in favour of a partnership firm - which means in favour of all the partners of the firm, hence the suit filed by the plaintiff is not maintainable. I answer the substantial question of law No. 1 in affirmative in favour of the appellants. Hence, the plaint has to be rejected. In view of the above findings, there is no necessity to answer other substantial questions of law and also the substantial question of law with regard to cross-objection.

29. Consequently, the appeal filed by the appellants is hereby allowed. The suit filed by the plaintiff is hereby dismissed. It is hereby clarified that the plaintiff is free to file fresh suit adding the proper parties. No order as to costs.

Appeal allowed.

I.L.R. [2008] M. P., 2662

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice Prakash Shrivastava

18 January, 2008*

RAMSA ... Appellant

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302, 304 Part I - ***Murder or Culpable Homicide not amounting to murder*** - *Deceased sitting along with her husband - Sundarlal was accompanied by his son Ramsa (appellant), Pintoo and Ramdas came there - Sundarlal hurled abuses and all of them assaulted deceased by means of axe - Appellant Ramsa has been convicted u/s 302 IPC whereas other accused persons were acquitted - Held - No evidence that accused and complainant party were on inimical terms - Incident took place in a spur of moment - Act of appellant falls under Exception 4 of Section 300 - Appellant acquitted u/s 302 and convicted u/s 304 Part I - Sentenced to 8 years rigorous imprisonment - Appeal allowed in part.* (Para 16)

दण्ड संहिता (1860 का 45), धारा 302, 304 भाग I – हत्या या हत्या की कोटि में न आने वाला सदोष मानव वध – मृतक अपने पति के साथ बैठी थी – सुन्दरलाल अपने पुत्र रामसा (अपीलार्थी), पिंटू और रामदास के साथ वहाँ आया – सुन्दरलाल ने जोर से गालियाँ दीं और उन सभी ने मृतक पर कुल्हाड़ी से हमला किया – अपीलार्थी रामसा को भा.द.सं. की धारा 302 के अन्तर्गत दोषसिद्ध किया गया जबकि अन्य अभियुक्तों को दोषमुक्त किया गया – अभिनिर्धारित – कोई साक्ष्य नही कि अभियुक्त और परिवादी पक्ष में बैरपूर्ण संबंध थे – घटना क्षणभर में घटित – अपीलार्थी का कृत्य धारा 300 के अपवाद 4 के अन्तर्गत आता है – अपीलार्थी धारा 302 के अन्तर्गत दोषमुक्त और धारा 304 भाग I के अन्तर्गत दोषसिद्ध – 8 वर्ष के सश्रम कारावास का दण्डादेश दिया – अपील अंशतः मंजूर।

Case referred :

(2006) 7 SCC 391.

Ahadullah Usmani, for the appellant.

R.S. Patel, Addl.A.G., for the respondent.

JUDGMENT

The Judgment of the Court was delivered by A.K. SHRIVASTAVA, J. :–Feeling aggrieved by the judgment of conviction and order

*Cr.A. No.36/2007 (Jabalpur)

of sentence dated 8.12.2006 passed by learned Sessions Judge, Betul in Sessions Trial No.34/2006 convicting the appellant under Section 302 IPC and sentencing him to suffer life imprisonment, this appeal has been preferred under Section 374(2) Cr.P.C. of 1973.

2. In brief the case of prosecution is that on 18.8.2005 which was the festival day of Raksha Bandhan, Balaram was in his house. In the evening Bhoori Bai (hereinafter referred to as 'the deceased') who is the wife of Balaram was also sitting nearby him. At that juincture, Sunderlal came and hurled the abuses. He was accompanied by his son Ramsa (appellant), Pintu and Ramdas. It is said that Ramsa was carrying an axe and all of them assaulted the deceased as a result of which she fell down in the courtyard. On hearing hue and cry Motiram who is the son of Balaram and the deceased came there and on seeing Motiram all the accused persons fled from the place of occurrence. Motiram noticed that a stick was lying nearby the dead body of the deceased and she sustained injuries on her head, abdomen and back. Thereafter, Kesho also arrived at the spot and saw the dead body of the deceased lying in the courtyard.

3. A telephonic information was given to Station Officer Incharge of the concerned Police Station on 18.8.2005 in regard to the commission of the offence as a result of which Station Officer Incharge Madan Singh Choudhary proceeded to the village. After arrival in the village, the investigating agency seized the dead body and prepared its Panchanama ; sent it for postmortem; seized ordinary and blood stained earth from the place of occurrence; seized a broken lathi from the place of occurrence; recorded the statement of the witnesses; and arrested the accused persons.

4. After completion of the investigation, a charge sheet was submitted in the committal court which on its turn committed the case to the Court of Session where accused persons were tried.

5. The learned trial Judge on the basis of the allegations made against the accused persons in the charge sheet framed charge punishable under Section 302 IPC and in the alternative 302/34 of IPC. Needless to emphasize all the accused persons abjured their guilt and pleaded complete innocence.

6. In order to prove the charges, the prosecution examined as many as 9 witnesses and placed Ex.P/1 to P/33 the documents on record. The defence of accused persons is of false implication and in support of their defence they examined one Ganaji (DW-1).

7. The learned trial Judge after appreciating and marshalling the evidence came to hold that except appellant Ramsa, other accused persons did not commit any offence and eventually acquitted them by the impugned judgment. However, according to the learned trial Judge since there is evidence against the present appellant Ramsa, he has been convicted under Section 302 of IPC.

8. Shri Usmani, learned counsel for the appellant submits that in the present case four persons were cited as eye witnesses they are Balaram (PW-1), Kesho (PW-2), Motiram (PW-3) and Sanu (PW-4). However, the learned trial court after scrutiny of the evidence came to hold that Kesho (PW-2), Motiram (PW-3) and Sanu (PW-4) are not the eye witnesses and thus the conviction has been based solely on the testimony of eye witness Balaram (PW-1). According to learned counsel if the statement of Balaram (PW-1) is considered in proper perspective, it is difficult to hold that the appellant committed the offence punishable under Section 302 of IPC.

9. An alternative submission has also been putforth by learned counsel that if the case of prosecution in regard to inflicting of injury by axe is found to be proved in toto, since only one fatal blow was given by the appellant Ramsa, the case would not come under the ambit and sweep of Section 302 of IPC since it is not borne out from the record that there was any previous enmity between the parties. According to learned counsel, the incident had occurred all of sudden and, therefore, the case would not travel beyond the ambit and sweep of Section 304 part-I of IPC.

10. On the other hand Shri R.S.Patel, Additional Advocate General argued in support of the impugned judgment.

11. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be allowed in part.

12. In the present case, four persons were cited as eye witnesses by the prosecution, they are Balaram (PW-1), Kesho (PW-2), Motiram (PW-3) and Sanu (PW-4). Out of these four eye witnesses, three eye witnesses, namely, Kesho (PW-2), Motiram (PW-3) and Sanu (PW-4) were disbelieved by the trial court and it has been held that they have not seen the incident. The learned trial Judge has based the conviction only on the statement of Balaram (PW-1). Thus, we have to give our emphasis on the statement of this witness.

13. On going through the statement of PW-1, Balaram, we find that Sunderlal came at his house and was hurling the abuses and thereafter the other accused persons as well as present appellant armed with an axe came there. It has been stated that appellant dealt an axe blow on the person of the deceased as a result of which she died. It has further been stated that the police party arrived in the village and he lodged Dehati Nalish (Ex.P/1) which has been proved by him in his evidence. On going through Dehati Nalish (Ex.P-1) we find that some altercation took place between the complainant side and Sunder who was one of the accused and who has been acquitted by the trial court. Thereafter appellant dealt a blow of axe on the person of the deceased, as a result of which she died. This witness was cross-examined at length but nothing has been carved out from his testimony in order to disbelieve him. Learned counsel for the appellant by inviting our attention to Dehati Nalish (Ex.P/1) as well as the police case diary statement of this witness

(Ex.D/1) has argued that there are some omissions and contradictions, but, on going through those discrepancies, omissions and contradictions we find that they are minor in nature. Learned counsel for the appellant could not point out that how and in what manner the testimony of Balaram (PW-1) should be disbelieved on material point of inflicting injury by axe to the deceased by appellant. On the other hand, we find that his evidence is clear, cogent and trustworthy and therefore the learned trial Judge did not err in placing reliance on the testimony of this witness. Thus, on the basis of the evidence of Balaram (PW-1) it is proved that appellant caused injury by axe on the person of the deceased, as a result of which she died.

14. The testimony of eye witness Balaram is further corroborated by the evidence of Dr.Priti (PW-8) and her postmortem report (Ex.P/27) in which following injuries were found on the person of the deceased :

> "(i) Injury over left side of scapular region of 5 cm x 3 cm x 1" depth, Nature fresh injury.
>
> (ii) Head Injury over occipital region - of size - 1 ½"x 1 ½" x 1" bony depth. It is a fresh injury."

15. We have gone through the evidence of Dr.Priti (PW-8) who has stated that the deceased has received head injury on occipital region having size 1 ½"x 1 ½" x 1" bony depth. However, the lady doctor did not opine whether the injury is incise or lacerated wound. After the arrest of the appellant and seizure of axe which was used as weapon in the commission of offence from him, was sent to the doctor and in the inquest report the lady doctor opined that the injury sustained to the deceased on her head could come by the axe. According to the doctor, the deceased had died on account of head injury and the said injury was sufficient in ordinary course to cause death. On scanning the testimony of Dr.Priti (PW-8), we do not find that what is the nature of injury which was received by the deceased on left shoulder on scapular region whether it was simple or grievous in nature. But, there is overwhelming evidence in order to hold that it was appellant who caused injury on the person of the deceased, as a result of which she died. We have also given our anxious and bestowed consideration to the reasoning assigned by learned trial Judge holding the appellant to be responsible for causing injury to the deceased, as a result of which she died and we do not find illegality in it. Thus we hereby extend our stamp of approval to the reasoning assigned by learned trial Judge.

16. We shall now advert ourselves to the alternative submission made by learned counsel for the appellant. The contention of learned counsel is that there is nothing on record and there is no evidence that the complainant party and the appellant and acquitted co-accused persons were in inimical terms. On the contrary it has been stated by PW-1, Balaram in para 16 that there was no dispute with the accused earlier to the incident. After X-raying the testimony of PW-1, Balaram

we find that all of a sudden altercation took place between the complainant party and acquitted co-accused Sundar as a result of which appellant came and dealt axe blow on the person of the deceased. Thus, according to us the case would rest under exception 4 to Section 300 as it is borne out from the evidence of Balaram (PW-1) who is the sole eye witness that without pre-meditation in the heat of passion, as acquitted co-accused Sunder was hurling abuses to the deceased, the incident occurred and therefore, according to us, the case would rest under the ambit and sweep of Section 304 part I of IPC as the incident had occurred all of a sudden in a spur of moment. In this context we may profitably rely the decision of Supreme Court *Pappu vs. State of M.P.* (2006) 7 SCC 391.

17. Resultantly, this appeal succeeds in part. The conviction of appellant under Section 302 of IPC is hereby set aside and he is convicted under Section 304 part-I of IPC and sentenced to eight years R.I.

Appeal succeeds in part.

I.L.R. [2008] M. P., 2666
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice Rakesh Saksena
22 January, 2008*

BIHARI ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 106 - ***Murder - Circumstantial Evidence - Burden of Proof - It is established that just before death of deceased, there had been quarrel between her and her husband/ appellant inside their house and appellant had rushed to pick up an axe - Incised wounds found on the body of deceased - Held - Appellant and deceased were last seen together inside their house and soon thereafter wife was found dead due to serious injuries - Burden was on appellant to offer reasonable explanation as to how his wife met with homicidal death inside his dwelling house - Appellant did not offer any explanation - Appellant rightly convicted u/s 302 IPC - Appeal dismissed.*** (Para 15)

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 106 – हत्या – परिस्थितिजन्य साक्ष्य – सबूत का भार – यह स्थापित किया गया कि मृतक की मृत्यु के ठीक पहले उसके और उसके पति/अपीलार्थी के मध्य उनके घर के अन्दर झगड़ा हुआ था और अपीलार्थी कुल्हाड़ी उठाने के लिए दौड़ा था – मृतक के शरीर पर छिन्न घाव पाये गये – अभिनिर्धारित – अपीलार्थी और मृतक अंतिमतः एक साथ उनके घर के अन्दर देखे गये और उसके तुरन्त बाद पत्नी गम्भीर क्षतियों के कारण मृत पायी गयी – तर्कसंगत स्पष्टीकरण देने का भार अपीलार्थी पर था कि कैसे उसकी पत्नी उसके निवास गृह के अन्दर मानव वध से मृत्यु को प्राप्त हुई – अपीलार्थी

*Cr.A. No.2387/1998 (Jabalpur)

ने कोई स्पष्टीकरण प्रस्तुत नही किया – अपीलार्थी भा.द.सं. की धारा 302 के अन्तर्गत सही रूप से दोषसिद्ध किया गया – अपील खारिज।

Case referred :

(2006) 10 SCC 681.

S.K. Gangrade, for the appellant.

R.S. Patel, Addl.A.G., for the respondent.

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Appellant has filed this appeal against the judgment dated 18.08.1998 passed by the Third Additional Sessions Judge, Chhatarpur, in Sessions Trial No.156/1997, convicting him under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life.

1. In short, the prosecution case is that on 01.05.1997, complainant Dhaniram lodged a report at Police Outpost, Dhuwara that at about 7 O'clock in the evening, when he was going after attending a feast in village Dhuwara, her niece Parwati met him weeping at the stand. On being asked the reason for weeping, she informed that her father (accused) assaulted her mother and threw her down from the "Attari". She was lying in the courtyard. When he reached at the house, he found his brother's wife Lakhanbai lying dead there. There were wounds on her head and neck. On the aforesaid report, Police registered an offence under Section 302 of the Indian Penal Code against the appellant and at the same time, also registered a "Marg".

2. PW-13 Virendra Chaturvedi, Sub Inspector, reached at the place of occurrence. He sent the dead body of Lakhanbai for post mortem examination to P.H.C., Bada Malhara. PW-10 Dr.P.K.Agrawal, Assistant Surgeon, performed the post mortem examination of the dead body and found following injuries on it: -

(i) Incised wound, size 12 x 2.5 cm and deep up to the cranial cavity cutting the bone and brain matter.

(ii) Incised wound transversely present on the nape of the neck, on the left side region, at the level of second cervical vertebra, size 8 x 2 cm and deep up to the cervical vertebra.

(iii) Incised wound transversely present on the left side of neck, at the level of second cervical vertebra, size 8 x 2 cm and deep up to the soft tissue.

All injuries were ante-mortem in nature and were caused by some sharp cutting heavy weapon.

3. In the opinion of doctor, the cause of death of the deceased was coma and shock due to the injuries over the scalp and neck region.

4. After requisite investigation, Police filed the charge sheet before the Court

of Magistrate, The case was then committed to the Court of Sessions for trial. Trial Judge framed the charge against the appellant under Section 302 of the Indian Penal Code. Appellant abjured his guilt and pleaded false implication. No specific defence was put forth by him.

5. Trial Judge relying mainly on the evidence of PW-11 Sukhwati and medical evidence convicted the appellant under Section 302 of the Indian Penal Code.

6. Learned counsel for the appellant submits that the evidence of PW-11 Sukhwati who is child witness of about 10-11 years of age, is not reliable. She has exaggerated that she had witnessed the incident. He submits that the prosecution has failed to establish that the appellant was present in the house at or before the time of death of his wife.

7. On the other hand, learned counsel for the State submits that there is enough evidence on record to establish that at the time of incident the deceased was in the house with her husband (appellant). The evidence of PW-11 Sukhwati alone is sufficient to hold that the appellant had killed his wife. He submits that the appellant offered no explanation as to how his wife met with homicidal death inside his house.

8. It is not disputed that the deceased died a homicidal death inside the house of appellant who was her husband and that the injuries found on her body were sufficient in ordinary course of nature to cause her death.

9. PW-9 Parwati, daughter of appellant, who was examined by the prosecution as an eye-witness of the occurrence, did not support the prosecution case during the trial. According to her, she had gone to take her meals in another house, and when she came back to her house, she found her mother lying dead. Blood was oozing out from her neck. This witness was declared hostile by the prosecution. Similarly, PW-8 Dhaniram, brother of accused, who had lodged the First Information Report of the incident, also did not support the prosecution case and even disowned the lodging of First Information Report. However, in paragraph No.9 of his statement, he said that he and appellant had gone to the Police Outpost for lodging the report and that Police had made appellant to sit at the Police Chowki. This witness was duly confronted with the First Information Report (Exhibit P/6) and Marg report (Exhibit P/7) wherein he admitted his signatures. Thus it can reasonably be inferred that the witnesses Parwati and Dhaniram did not state the truth, as they happened to be the daughter and real brother of the appellant, respectively.

10. On perusal of the statement of PW-11 Sukhwati, it is seen that Lakhanbai (deceased) was her elder sister. She and Lakhanbai had gone to village Dhuwara with the appellant, where he lived. On the same day, there occurred a quarrel between Lakhanbai and the appellant. Appellant slapped Lakhanbai and then brought an axe from "Attari" and assaulted her by it and pushed her down from "Attari". According to her, accused again inflicted a blow to her. She, out of fear ran away from the house. In the cross-examination, however, it was revealed that

infact she did not witness the actual assault by the axe. In her Police statement (Exhibit D/1), she only mentioned about the altercation between Lakhanbai and the appellant and that the appellant pushed her down from "Attari". It was also mentioned that when accused rushed for getting an axe, she ran out from the house. On a careful scrutiny of the testimony of this witness, we find a ring of truth in it. Her testimony cannot be discarded on the ground of her being the sister of the deceased. From her evidence, it has been amply established that just before the death of Lakhanbai there had been a quarrel between her and the appellant inside their house and the appellant had rushed to pick up an axe. Thus, the appellant and deceased were last seen together inside their house and soon thereafter, the deceased was found dead due to serious injuries found on her body.

11. Evidence of PW-11 Sukhwati finds support from the evidence of PW-14 Bare Lal who is uncle of Lakhanbai. He categorically stated that Lakhanbai was at his house in the village Ramtoriya. On the day of incident, accused had come to his house to fetch Lakhanbai. He had sent Lakhanbai and her sister Sukhwati along with the appellant. He was later on informed by Sukhwati that the appellant had killed Lakhanbai.

12. From the evidence of PW-1 Jagdish Singh, PW-6 Kashi Prasad Pateriya, PW-7 Bal Kishan, PW-12 Mahesh and PW-13 Virendra Chaturvedi (Police Sub Inspector); it has been established that the dead body of the deceased was found inside the house of accused.

13. In the above circumstances, the burden was on the appellant to offer a reasonable explanation as to how his wife met with homicidal death inside his dwelling house.

14. In case of *Trimukh Maroti Kirkan Vs. State of Maharashtra,* (2006) 10 SCC 681, the Apex Court observed, "In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See *State of T.N. v. Rajendran* (SCC para 6); *State of U.P. v. Dr.Ravindra Prakash Mittal* (SCC para 39 : AIR para 40); *State of Maharashtra v. Suresh* (SCC para 27); *Ganesh Lal v. State of Rajasthan* (SCC para 15) and *Gulab Chand v. State of M.P.* (SCC para 4).]. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates

that he is responsible for commission of the crime. In *Nika Ram v. State of H.P.* it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife."

15. On examining the factual aspects of the present case in the light of the above legal propositions, we find that the appellant did not offer any explanation about the homicidal death of his wife inside his dwelling house. His presence soon before the occurrence with his wife has been established beyond doubt. It has also been established that there had been a quarrel between them and he had slapped and pushed his wife. Appellant in his statement under Section 313 of the Code of Criminal Procedure, did not offer any explanation as to how the deceased received injuries which were found on her body. The circumstances enumerated above unerringly point out to the guilt of the appellant and of no one else.

16. In view of the above circumstances, we are of the considered opinion that the Trial Court was perfectly right in convicting the appellant/accused under Section 302 of the Indian Penal Code and sentencing him thereunder. We, therefore, do not find any merit in this appeal, it is hereby dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2670
APPELLATE CRIMINAL

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

1 February, 2008*

STATE OF M.P. ... Appellant

Vs.

RAJESH ... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 378(3), Penal Code, 1860, Section 304B - *Dowry Death - Wife of accused committed suicide within 7 years of marriage - There is no evidence about the amount having been demanded - In reply of notice sent on behalf of wife, ill treatment by husband not mentioned - Acquittal - Held - Dowry demand and cruelty on failure to conceive not proved - Prosecution failed to discharge burden - Conclusions drawn by trial court from*

*Cr.A. No.1527/1998 (Indore)

evidence brought on record are reasonable & proper. - Appeal against acquittal dismissed. (Paras 13 & 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(3), दण्ड संहिता, 1860, धारा 304बी – दहेज मृत्यु – अभियुक्त की पत्नी ने विवाह के 7 वर्ष के भीतर आत्महत्या की – रकम की माँग की जाने के बारे में कोई साक्ष्य नही – पत्नी की ओर से भेजे गये सूचनापत्र के जवाब में पति द्वारा बुरा बर्ताव किया जाना उल्लिखित नही – दोषमुक्ति – अभिनिर्धारित – दहेज की माँग और गर्भधारण करने में असफलता पर क्रूरता साबित नही – अभियोजन भार उन्मुक्त करने में असफल रहा – अभिलेख पर आयी साक्ष्य से विचारण न्यायालय द्वारा निकाले गये निष्कर्ष तर्कसंगत एवं उचित – दोषमुक्ति के विरुद्ध अपील खारिज।

Girish Desai, Dy.A.G., for the appellant/State.
None, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by **S.K. KULSHRESTHA, J.** :–The State has filed this appeal against the judgment dated 30.9.1998 of the learned Second Additional Sessions Judge, Alirajpur in Sessions Trial No. 431/1992 by which the respondent, husband of the deceased Nirmalabai, has been acquitted of the charge under Section 304-B of the IPC.

2. It was alleged by the prosecution that on the night intervening 4th and 5th June, 1991, Nirmalabai had committed suicide within a span of seven years from the date of her marriage with the accused, on account of the persistent demand of dowry by the accused and harassment and cruelty in pursuance of the said demand. The marriage between the accused and the deceased was solemnized on 15th May, 1985 and thereafter she had gone to the matrimonial home where she lived with her husband and Rukmabai, her mother-in-law. Though a long period of four years elapsed, Nirmalabai did not conceive and it was stated that Rajesh and his mother, used to ill treat the deceased in pursuance of their demand of dowry. As a result of the in human behaviour of the accused, Nirmalabai had to shift to her parents house where she spent a period of a year and a half. However, on the assurance of the accused to treat her with respect, Nirmalabai moved back to the matrimonial home but she was again treated cruelly and subjected to harassment. It was in these compelling circumstances, according to the prosecution, that she committed suicide. The accused then rushed to the Police Station and informed the Police about the death of Nirmalabai on the basis whereof a case of unnatural death was registered under the provisions of Section 174 of the Cr.P.C.

3. During investigation it was found that Nirmalabai had committed suicide by hanging herself in the kitchen of which the ceiling height was only 7 ft. Her knee was also touching the ground. The Police, therefore suspected a case of homicide. The inquest was held, the Doctor conducted Autopsy, the notices exchanged between the parties were seized and after further investigation, the accused was indicted for an offence punishable under Section 302, 201 and 304-B of the IPC.

4. On charges being framed the accused abjured his guilt and stated that he had been falsely implicated at the instance of the Police though he was completely innocent. On trial the learned Additional Sessions Judge, on the appreciation of the evidence brought on record acquitted the respondent and hence this appeal has been filed by the State under Section 378 of the Cr.P.C. after obtaining due leave under Section 378(3) thereof.

5. We have heard the learned Dy. Advocate General for the appellant/State.

6. None has appeared for the respondent accused.

7. The prosecution examined 12 witnesses. P.W.1 Mansharam father of the deceased and P.W.2 Mangtibai mother of the deceased were examined to prove the demand of dowry by the accused and consequent harassment and cruelty. P.W.-3 Saligram brother-in-law of P.W.1 deposed only about man handling without referring to any demand emanating from the side of the accused. P.W.4 Anand Rao is brother of P.W.1 Mansharam and P.W.-5 Praveen Goswami is the witness who lived across the house of the deceased. This witness has categorically stated that he never heard the accused and the deceased quarreling and deceased was frustrated as she had not conceived despite passage of four years since marriage. P.W.6 Dr. A.S.Tomar has referred to the findings in post mortem and the ligature mark found on the neck of the deceased, on the basis whereof he has opined that it was a case of suicide. P.W.-7 Kishorilal earlier alleged that the accused used to beat his wife, has not supported the prosecution and has been declared hostile, P.W.10 Anoop Kumar Sharma Advocate has referred to the exchange of notices Ex.P/12 and P/13 while P.W.12 Dharmendra Singh Choudhary carried out investigation.

8. The learned Additional Sessions Judge has considered the testimony of these witnesses in his judgment in paragraphs 13,14 and 15. While he has held that the death occurred within seven years of their marriage, the case of the prosecution that there was a demand of Rs. 10,000/- by way of dowry and on failure chastisement and cruelty was apprehended, was not proved in view of the reply Ex.P/13 sent on behalf of Nirmalabai. The father of the deceased (P.W.-1) has also stated that he had been called by a telegram on the false pretext of his daughter being not well and on reaching he found that the daughter was hail and hearty and she had complained that her husband was demanding a sum of Rs. 10,000/-. If the testimony of P.W.1 is scanned properly and examined in proper perspective, it reveals that the accused wanted to open a shop and for that purpose he had asked for a sum of Rs. 10,000/-. There is not a whisper about the amount having been demanded by way of dowry.

9. P.W.1 Mansharam has also been disbelieved on the ground that his statement that he had lodged the report Ex.P.1 on the next day but in his cross-examination he has admitted that it has not been mentioned that the accused and his mother were ill treating the deceased.

10. P.W.2 Mangtibai, mother of the deceased, deposed before the Court that the accused was demanding Rs. 10,000/- and was quarreling with deceased but there is a conspicuous omission in her statement under Section 161 (Ex.D/2).

11. Insofar as P.W.-3 Saligram and P.W.4- Anand Rao are concerned, though they had stated that the accused demanded Rs. 10,000/-, there is omission of this fact in their statements Ex.D/3 and D/4. Under these circumstances, the Trial Court has disbelieved these witnesses.

12. Due notice has been taken by the Trial Court of the reply sent on behalf of Nirmalabai marked as Ex.P/13. In the reply Ex.P/13, there is no mention of any ill treatment meted to her by her husband or any demand having been made.

13. In view of the fact that the testimony of P.W.-1 Mansharam, P.W.-2 Mangtibai, P.W.-3 Saligram, P.W.-4 Anand Rao has not been found satisfactory and far short of the degree of proof required in a criminal case, the learned Additional Sessions Judge has acquitted the accused. The findings are based on appreciation of evidence which is in no way perverse but, on the contrary, in accordance with the matter on record. We have already observed that demand of dowry has not been established by the prosecution and it has also not been established that the accused was treating the deceased Nirmalabai, his wife, cruelly or harassing. The only reason that appeals to the mind, therefore, is that on the ground that she had not conceived despite elapse of four years since her marriage, she had committed suicide. Even if it is believed that the causative factor was not her having not conceived, since it is for the prosecution to prove that the causative factor was the act of the accused, the prosecution has not succeeded in discharging this burden.

14. It is well settled that if in an appeal against acquittal, the view expressed by the Trial Court which has had the opportunity of examining the demeanour of the witnesses is reasonable, the same should be accepted. We find that the conclusions drawn by the Trial Court from the evidence brought on record are reasonable and proper and there is no room for any inconsistent view. In this view of the matter, we find no merit in this appeal against acquittal.

15. The appeal is dismissed.

Appeal dismissed.

October-08 (first)

I.L.R. [2008] M. P., 2674

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar

5 February, 2008*

CHATRA & ors. ... Appellants

Vs.

STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Sections 366, 376 - *On 10.04.1990 prosecutrix while returning home was caught and was confined in house - In the night she was ravished by appellant Chatra - Next day brother of prosecutrix alongwith two witnesses reached there - Prosecutrix and appellant Chatra were taken to village - FIR was lodged on 12.04.1990 - Appellant Chatra was arrested on 19.04.1990 - Held - Medical report of appellant Chatra dated 12.04.1990, in which 7 injuries were found, suppressed by prosecution - Manipulation found in appellant's medical report dated 19.04.1990 - No explanation why appellant was not arrested on 12.04.1990 - Material witnesses were deliberately withheld by prosecution - Deficiencies and serious infirmities in prosecution case - Defence story probable that appellant was assaulted on account of dispute over repayment of the amount, and when he lodged the report, a false case has been concocted or prosecutrix was a consenting party found in the company of appellant and both were beaten by brother and relative of prosecutrix - Thereafter, she was forced to lodge the report - Conviction & sentence set-aside - Appeal allowed.* (Paras 10, 11, 12 & 14)

क. दण्ड संहिता (1860 का 45), धाराएँ 366, 376 – 10.04.1990 को अभियोक्त्री जब घर लौट रही थी, उसे पकड़ा और घर में परिरुद्ध रखा – रात में अपीलार्थी चतरा द्वारा उसके साथ बलात्कार किया गया – अगले दिन अभियोक्त्री का भाई दो साक्षियों के साथ वहाँ पहुँचा – अभियोक्त्री और अपीलार्थी चतरा को गाँव ले जाया गया – एफ.आई.आर. 12.04.1990 को दर्ज कराई गई – अपीलार्थी चतरा को 19.04.1990 को गिरफ्तार किया गया – अभिनिर्धारित – अपीलार्थी चतरा की मेडीकल रिपोर्ट तारीख 12.04.1990, जिसमें 7 क्षतियाँ पाई गईं, अभियोजन द्वारा दबाई गई – अपीलार्थी की तारीख 19.04.1990 की मेडीकल रिपोर्ट में हेरफेर पाया गया – कोई स्पष्टीकरण नही कि 12.04.1990 को अपीलार्थी को क्यों गिरफ्तार नही किया – अभियोजन द्वारा सारवान साक्षियों का जानबूझकर परीक्षण नही कराया – अभियोजन के मामले में कमियाँ और गम्भीर दुर्बलता – प्रतिरक्षा की कथा संभाव्य कि राशि के पुर्नभुगतान पर से विवाद के कारण अपीलार्थी पर हमला किया, और जब उसने रिपोर्ट दर्ज करायी, एक मिथ्या मामला गढ़ा गया या अभियोक्त्री एक सहमत पक्षकार थी अपीलार्थी के साथ पायी गई और दोनों को अभियोक्त्री के भाई और रिश्तेदार द्वारा पीटा गया – तत्पश्चात् उस पर रिपोर्ट दर्ज कराने के लिए दवाब डाला गया – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर।

B. Evidence Act (1 of 1872), Section 114(g) - *Adverse inference - Non-examination of I.O.* - *First information report was lodged in the presence of*

*Cr.A. No.596/1994 (Indore)

appellant Chatra and a case u/s 366, 392, 376 r/w 34 IPC was registered - Appellant was available and the F.I.R. was disclosing a cognizable and non-bailable offence against him - Appellant was not arrested then and there - This circumstance could be explained by I.O./S.H.O. - But, was not examined by prosecution - Appellant was deprived of his right of cross-examination on this important aspect - Court constrained to draw adverse inference against the prosecution. (Paras 10 & 11)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114(जी) – विपरीत अनुमान – अनुसंधान अधिकारी का परीक्षण न कराना – प्रथम सूचना रिपोर्ट अपीलार्थी चतरा की उपस्थिति में दर्ज कराई गई और भा.द.सं. की धारा 366, 392, 376 सहपठित 34 के अन्तर्गत मामला दर्ज किया गया – अपीलार्थी उपलब्ध था और एफ.आई.आर. उसके विरुद्ध संज्ञेय और गैर जमानती अपराध प्रकट कर रही थी – अपीलार्थी को वहाँ उसी समय गिरफ्तार नही किया गया – यह परिस्थिति अनुसंधान अधिकारी/थाना प्रभारी द्वारा स्पष्ट की जा सकती थी – किन्तु अभियोजन द्वारा उनका परीक्षण नही कराया गया – अपीलार्थी इस महत्वपूर्ण पहलू पर प्रतिपरीक्षण करने के अपने अधिकार से वंचित हो गया – न्यायालय अभियोजन के विरुद्ध विपरीत अनुमान निकालने के लिए बाध्य था।

C. Evidence Act (1 of 1872), Section 114(g) - ***Adverse inference - Non-examination of material witness - Prosecutrix and appellant Chatra found sitting on a cot in his house - Chhotu, relative of prosecutrix along with brother of prosecutrix entered into the house and they have beaten prosecutrix & appellant both - Chhotu and brother of prosecutrix both were facing prosecution which was instituted on the basis of report lodged by appellant - Chhotu was a material witness - On examination of the witness, unfavourable evidence to the prosecution would have come on record - Therefore, deliberately withheld by the prosecution - Adverse inference should be drawn.***

ग. साक्ष्य अधिनियम (1872 का 1), धारा 114(जी) – विपरीत अनुमान – सारवान साक्षी का परीक्षण न कराना – अभियोक्त्री और अपीलार्थी चतरा उसके घर में खाट पर बैठे थे – अभियोक्त्री के रिश्तेदार छोटू ने अभियोक्त्री के भाई के साथ घर में प्रवेश किया और उन्होंने अभियोक्त्री और अपीलार्थी को पीटा – छोटू और अभियोक्त्री का भाई अपीलार्थी द्वारा दर्ज कराई रिपोर्ट के आधार पर संस्थित अभियोजन का सामना कर रहे थे – छोटू एक सारवान साक्षी था – साक्षी के परीक्षण पर अभियोजन के प्रतिकूल साक्ष्य अभिलेख पर आती – इसलिए अभियोजन द्वारा जानबूझकर बयान नही कराये गये – विपरीत अनुमान निकाला जाना चाहिए।

Sanjay Sharma, for the appellants.

C.R. Karnik, Dy.G.A., for the respondent/State.

J U D G M E N T (ORAL)

S.L. Kochar, J. :–The appellants above named have preferred this appeal against the judgment dated 25.08.94 rendered by the learned Additional Sessions Judge, Garoth District Mandsaur in S.T. No. 76/91 thereby convicting all the appellants under section 366 of the Indian Penal Code and appellant No. 1 Chatra also under section 376 of the Indian Penal Code and sentencing them each to

undergo R.I. for three years with fine of Rs. 100/-, in default of payment of fine to suffer S.I. for one month under section 366 of the Indian Penal Code and further the appellant No. 1 Chatra to undergo R.I. for seven years and to pay a fine of Rs. 100/-, in default of payment of fine to suffer additional S.I. for one month under section 376 of the Indian Penal Code. Both the substantive jail sentences of the appellant No. 1 are directed to run concurrently.

2. The prosecution case in nut-shell as unfolded before the trial Court is that on 10.04.90 in the noon prosecutrix PW-8 while residing in the house of her father, had gone to the forest for collecting dung-cake. At that time, she was caught by the appellants and on refusal by her to go with them, she was beaten and was abducted. She was taken in a forest rivulet and her silver ornaments were taken out forcibly. She was confined in the house of appellant Chatra. In the night the prosecutrix was being ravished by appellant Chatra, she cut his nose by a razor blade. On the next day, brother of prosecutrix named Ranglal PW-2 along with Tarachand (PW-3) reached at the hutment of appellant Chatra to whom, the prosecutrix disclosed about the incident. The prosecutrix PW-8 and appellant No. 1 Chatra were taken to the village by Ranglal and his companions. On 12.04.90, at about 4.15 PM, First Information Report Ex. P/15 was lodged by the prosecutrix, recorded by Station House Officer Shri Gopal Suryavanshi of police station Gandhi, District-Mandsour. The police registered the offences punishable under Sections 366, 392 and 376 read with Section 34 of the IPC against the appellants. The prosecutrix was medically examined by PW-9 Dr. Mrs A.P. Buddhisagar. Her medical report is Ex.P/14. Doctor also prepared the slides of vaginal swab of the prosecutrix and also sealed her Petticoat, blouse and half Saree, which were worn by the prosecutrix. All the articles were sent to the police station. Prosecutrix was also referred for ossification test for determination of her age. Investigating Officer/ Station House Officer prepared the spot maps, Ex. P/2 & P/3 at the instance of the prosecutrix, in presence of PW-4 Gheensalal. The stained and controlled earth as also the piece of stone were also seized through seizure Ex. P/4 from the spot. Ex. P/5, the third spot map was also prepared by the Investigating Officer vide Ex. P/5 in presence of PW-5 Heera. The appellant No.1 Chatara was arrested on 19.4.1990 at 6.40 PM, his arrest memo is Ex.P/6. Appellant Rughnath was arrested on 14.4.1990 at 8:00 PM, his arrest memo is Ex. P/7. The appellant No.1 Chatara was sent for medical examination on 19.4.1990 and was medically examined by PW-7 Dr. M.S. Bhandari. His medical report is Ex. P/10. The medical reports of appellant Rughnath, Ananda and Rama @ Ramlal are Ex. P/11, P/12 & P/13 who were examined by PW-7 Dr. M.S. Bhandari on 15.5.1990. On completion of investigation, the appellants were charge sheeted for commission of the aforesaid offences.

3. The appellants refuted the charges. The defence of appellant Chatra was that Ranglal, brother of the prosecutrix had cut his nose for which a prosecution was pending against Ranglal and appellant Chatra was serving under the father of

the prosecutrix for grazing his cattle. The defence of appellant Rughnath was that he was also working under the father of the prosecutrix named Moti and took an advance from him. And on not returning the said amount, he was beaten and as a counter blast, a false case has been concocted by the complainant party. The appellants did not examine any witness in their defence, but filed the certified copy of the medical report of appellant No. 1 Chatra in defence whereas the prosecution has examined in total nine witnesses and exhibited 15 documents to prove its case. Learned trial Court, finding the appellants guilty, convicted and sentenced them as referred herein-above.

4. Having heard learned counsel for the parties and after perusing the entire record, this Court is of the view that the prosecution has miserably failed to prove its case beyond reasonable doubt and the appellants deserve to be acquitted.

5. PW-1 Jadavbai, mother of the prosecutrix has deposed that the prosecutrix was married with Mewaji resident of village Banakheda, but her GAUNA ceremony had not taken place and she was residing with her. Prosecutrix used to go to the forest for collecting dung-cakes. On the date of incident also she had gone for that purpose at 11.00 AM, but did not return back till 5.00 PM whereas ordinarily she was returning back at about 4.00 PM. Therefore, her husband (Moti) went in search of her and returned back in the night at 8.00 PM. On the same day, she sent her brother in search of the prosecutrix towards village Rawatbhata who also returned back without any clue. On next day, her husband and son Ranglal (PW-2) went in search of the prosecutrix and returned back on third day of her missing with appellant Chatra, witness Tarachand and Chhotu. The nose of the appellant No. 1 Chatra was cut and the prosecutrix disclosed about the incident as well as looting of her Hasli and Kadi. In cross-examination, she has deposed that prior to this incident, the prosecutrix had never gone to village Rawatbhata from the house. According to this witness when prosecutrix, appellant No. 1 Chatra, witness Ranglal and her husband returned in the village, the villagers assembled and because of quarrel between the appellant Chatra and her son Ranglal, the villagers had left the place. In cross-examination, she has given contradictory statement about sending of the prosecutrix to her in-law' house. She deposed that after marriage, she was sent to her matrimonial house and she remained there for one month and on her return she lived with them and her second marriage (Natra form of marriage) was performed according to her caste custom. After return to village, the appellant No. 1 Chatra, her son PW-2 Ranglal, witness Chhotu, Tarachand and prosecutrix within five minutes, they proceeded for Police Station and during these five minutes, a quarrel between Chatra and Ranglal took place which was pacified. She has also stated that though police had reached to village, but she was not interrogated and the police reached in the village in the noon at 12.00 O'Clock on the date of lodging of the report. She has denied the defence suggestion that Rughnath was serving under her husband and had taken an advance which was not repaid by him on demand

and because of which Ranglal, Chhotu and Tarachand had beaten the appellant No. 1 Chatra and got lodged a false report by the prosecutrix in order to save themselves.

6. PW-2 Ranglal, brother of the prosecutrix has deposed that when they had gone in search of the prosecutrix, his companions Chhotu and Tarachand (PW-3) had seen lamp light coming from the house situated at the out-skirt of village and they reached there. They over heard the talks going on between a man and woman. Tarachand called the persons who were inside the house and also asked to open the door, but from inside the house prosecutrix told in a loud voice that she was inside the house and the appellant Chatra was not allowing her to open the door. On this, he threatened that they would assault him in case the door was not opened. Thereafter with great difficulty the door was opened and they found the appellant Chatra and prosecutrix inside the house. In a torch light they saw that blood was trinkling from the nose of appellant Chatra and the prosecutrix disclosed them about the incident. They returned back to village along with appellant Chatra and his father, maternal uncle, prosecutrix and took Chatra, the appellant to Gandhi Sagar Police Station for lodging the report. In cross-examination, the say of this witness is that after opening the door, first he entered the room and the prosecutrix came out of the house. Chatra was standing there inside the house and prosecutrix disclosed about the incident to him. He was confronted with his case-diary statement Ex. D/1 with regard to omission of the fact of disclosing of the incident to him by the prosecutrix, but he failed to give any plausible reason. This witness also denied the defence suggestion that they had beaten the appellant No. 1 Chatra and also cut his nose and to save themselves got a false report lodged against them by the prosecutrix. This witness admitted his prosecution along with other accused persons for cutting the nose of appellant No. 1 Chatra. He also denied about assaulting Chatra by lathi, but admitted giving 2/3 slaps and kick blows to Chatra.

7. PW-3 Tarachand has stated that PW-2 Rangalal approached him for going in search of his sister who was missing and he himself, Ranglal (PW-2) and Chhotu went towards village Dhawad in her search. They over heard some kind of sound of talks coming from the hut ment situated outside the village. He called Ranglal and thereafter opened the door by pushing it. Prosecutrix and appellant Chatra came out of the hut. He saw in the torch-light injury on the nose of Chatra and the prosecutrix disclosed them about the incident. The prosecutrix also told them about taking away of her silver ornaments as well as commission of rape on her by appellant Chatra and Rugnath. In cross-examination he admitted that when he reached near the hut, he over heard the talks going between Chatra and the prosecutrix and Ranglal pushed the door with force and because of which the door was opened and they saw that the prosecutrix and Chatra were sitting on a cot. First of all, Ranglal entered inside the hut and beaten Chatra. Prosecutrix was beaten by Chhotu (cited as a witness, but not examined). PW-2 Ranglal,

brother of the prosecutrix also beaten her. Thereafter, both were brought on bicycle to village Bakchach. When the prosecutrix was being beaten, he objected to it. He further admitted that prior to this incident, two to three times the prosecutrix had run away from her house and was traced after two to four days and he did not disclose to police that the prosecutrix told him about commission of rape on her by Chatrra and Rama. This fact he deposed for the first time in Court and he had no talks with the prosecutrix. After returning to village, he went to the forest with his goats and had no talks with any villager. He also admitted that on the basis of the report lodged by the appellant Chatra, he, Ranglal and Chhotu were facing prosecution. The statement of this witness Tarachand (PW-3) is at variance with the statement of Ranglal (PW-2) as mentioned herein-above regarding opening of the door and admission of this witness who has not been declared hostile by the prosecution that they found the appellant Chatra and the prosecutrix sitting on a cot, thereafter, both were beaten by Ranglal (PW-2) and Chhotu and the prosecutrix also had run away from her house twice or thrice. This shows the fact that the story in this regard is concocted and PW-2 Ranglal, brother of the prosecutrix did not disclose correct facts.

8. The prosecutrix was medically examined by PW-9 Dr Buddhisagar on 13.04.90 and she did not find any stain of semen on her clothes. All secondary sex characters of the prosecutrix were fully developed and there was a bruise on scapula region/back portion of the prosecutrix and her hymen was absent and that she was habitual to sexual intercourse. She was referred for ossification test, but the prosecution did not examine the Radiologist.

9. PW-8, the prosecutrix, has deposed that she was forcibly taken by the appellants from the jungle and was confined in a house situated outside the village Dhawad. Her ornaments were tgaken away by the appellants Rughnath, Ananda and Rama. They went away from the house and in the night between 2.00 and 2.30 A appellant Chatra committed bad act (forcible sexual intercourse) on her against her consent and will. The further say of this witness is that she was ravished twice in the night and when Chatra did not stop, she cut his nose by a blade which she was having in her blouse. In the night between 4.00 and 5.00 AM, Chhotu, Ranglal (PW-2) and Tarachand (PW-3) reached over there in her search. After cutting of nose, appellant No. 1 Chatrra went out of the room and hidden himself some where. He also bolted the door from outside. She was crying and only thereafter Ranglal and Tarachand by opening the door from outside, entered the room. She disclosed about the commission of rape on her by Chatra, cutting of his nose by her and looting of her ornaments by the appellants. She admitted that Ranglal is her real brother and Tarachand and Chhotu are cousins. All these brothers caught Chatra and took them to village Bakchach. (In the deposition of this witness and other witnesses at so many place, it appears that there is typing mistake and the name of Ranglal is typed as Rughnath). Thereafter, her brother Ranglal went in search of appellants Rughnath, Ananda and Rama.

When up till noon i. e. at about 2.00 O'Clock he did not return back, they proceeded between 4.00 and 5.00 PM with her father to lodge the report and she lodged the re;port Ex. P/15 at Gandhi Sagar Police Station. She denied the defence suggestion that Chatra was serving under her father and he was falsely implicated because of dispute on leaving of service by him. On assessment of the statement of the prosecutrix, it is crystal clear that she has given altogether a different story about reaching of Chhotu, witnesses Ranglal and Tarachand inside the hut.

10. In view of contradictory statements of these witnesses on this vital issue, it would be very difficult to accept their version, in the light of statements that the prosecutrix was found sitting on the cot with appellant Chatra and both were beaten by them and thereafter brought to the village on a bicycle. There is an alarming feature available in the instant case. All the witnesses have stated in o ne voice that the appellant No. 1 Chatra was caught on the spot (inside or near the hut) and was brought to the village, thereafter he was taken to the Police Station. This fact is also mentioned in the First Information Report Ex.P/15, but the arrest memo of appellant No. 1 Chatra (Ex.P/6, a document admitted by the defence) as per provision under section 294 of the Code of Criminal Procedure) is disclosing the fact that the appellant Chatra was arrested on 19.04.90 in the evening at 6.04 PM. If the First Information Report was lodged, as stated by the prosecutrix vide Ex. P/15 on 12.04.90 and Chatra was also taken to the Police Station in whose presence the First Information Report was lodged, why he (Chatra) was not arrested then and there when he was available and the First Information Report was disclosing a cognizable and non-bailable offence against him. This circumstance was to be explained by the prosecution through Investigating Officer/Station House Officer Gopal Suryavanshi who was not examined by the ;prosecution though several opportunities were given to produce him for his examination being an Investigating Officer. Because of non-examination of this witness, the appellant was also deprived of his right of cross-examination on this important aspect as well as on so many other material particulars. In the considered view of this Court, learned trial Court should have drawn adverse inference against the prosecution for non-examination of Investigating Officer and witness Chhotu as per provision under section 114 (g) of the Indian Evidence Act, which reads as under:-

> **"114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to be common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.**
>
> **(g) That evidence which could be and is not produced, would , if produced, be unfavourable to the person who withholds it."**

11. On examination of both the witnesses by the prosecution, so many unfavourable evidence to the prosecution would have come on record and both

these witnesses were deliberately withheld. This Court, therefore, is constrained to draw adverse inference against the prosecution for non-examination of witness Chhotu as well as Investigating Officer.

12. The appellant Chatra was sent for medical examination by the Station House Officer/Investigating Officer on 19.04.90. His medical report is Ex. P/10 proved by PW-7 Dr M.S. Bhandari and in this medical re;port as also in the statement of PW-7 Dr Bhandari, no injury was found on the person of Chatra. If Chatra was taken to the Police Station and available to the Investigating Officer, in injured condition, why he was not sent immediately on 12.04.90 for medical examination in the instant case. The defence has filed certified copy of the medical report of appellant No. 1 Chatra who was medically examined on 12.04.90 and according to this re;port, the doctor found in all seven external injuries on his person, out of which, injury No. 1 was on nose i. e. cutting of part of nose which was not available and this injury was caused by a sharp object. The remaining six injuries were the contusions on different/different parts of body and on the same day i.e. 12.04.90 he was referred for X-ray examination and treatment to the District Hospital.

13. The First Information Report was lodged on 12.04.90 at 4.15 PM and thereafter, it appears that Chatra was sent for medical examination immediately and was medically examined by the doctor on 12.04.90 at 4.55 PM. He was taken to the hospital by Constable Ramvilas Singh who was also not examined by the prosecution. The prosecution has also not filed this medical report of Chatra along with the charge-sheet, filed against him and other appellants. This medical report shows that Chatra himself must have reached independently to the Police Station and lodged the report. Thereafter, the report was lodged by the prosecutrix and a case was concocted against the appellants, otherwise there was no reason for not arresting appellant No. 1 Chatra immediately when he was available and was also sent for medical examination. The prosecution has also not explained the fact that after his medical examination on 12.04.90 where he remained up till 19.04.90. On the overleaf of medical injury report of Chatra, there is requisition for medical examination written by the Station House Officer. In this requisition, he has described seven injuries found on the person of Chatra and Investigating/ Station House Officer had also made a query that if stains of semen are found on his underwear, the same should be sealed by the doctor. A bare perusal of the medical report of appellant Chatra and medical requisition form shows that this query is added by the scribe of this document i. e. Investigating Officer/Station House officer later on in the gap left between clause 7 and the request for medical examination, in smaller words. But, there is no query made by the Investigating Officer about giving opinion with regard to his potency for performing sexual act for which he was sent for medical examination on 19.04.90.

14. It is pertinent to mention here that from the side of the defence, documents were filed on 18.08.94 as is clear from the Court order-sheet, but in the entire

judgment, the learned trial Court did not care to discuss the fact of filing of the certified coy of the medical report of appellant No. 1 Chatra by the defence, which ought to have been done. In view of all these deficiencies and serious infirmities in the prosecution case, it can legitimately be inferred, as suggested by the defence, that first the appellant Chatra was assaulted on account of dispute over repayment of the amount and when he lodged the report at the Police Station, a false case has been concocted by the complainant party against him or prosecutrix was a consenting party who was found peacefully in the company of the appellant in his hut and both were beaten by the brother and relatives of the prosecutrix thereafter, she was forced to lodge the report. Learned trial Court has not believed the prosecution story regarding robbing of silver ornaments from the person of the prosecutrix.

15. For the foregoing legal and factual discussion, this appeal succeeds and is hereby allowed. The conviction and sentences of the appellants are set aside. The appellants are on bail. Their bail and surety bonds are discharged.

16. Let a copy of this judgment be sent to the trial Court along with its record in due course.

Appeal allowed.

I.L.R. [2008] M. P., 2682
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
27 March, 2008*

NATHU ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 9, Penal Code, 1860, Section 307 - *Identification* - *Complainant and all the three eye witnesses admitted that accused was not known to them before the incident - Accused was shown to them in police station - I.O.'s explanation that accused person were arrested in the presence of complainant and witnesses because of which test identification parade was not held - This statement is not corroborated by any eye witness - Therefore, dock identification of the accused is not sufficient to establish identity of the accused.* (Para 9)

क. साक्ष्य अधिनियम (1872 का 1), धारा 9, दण्ड संहिता, 1860, धारा 307 – शिनाख्तगी – परिवादी और सभी तीनों प्रत्यक्षदर्शी साक्षियों ने स्वीकार किया कि अभियुक्त को घटना के पहले से वे नही जानते थे – उन्हें पुलिस थाने में अभियुक्त को दिखा दिया था – अनुसंधान अधिकारी का स्पष्टीकरण कि अभियुक्तों को परिवादी और साक्षियों की उपस्थिति में गिरफ्तार किया इसलिए टेस्ट शिनाख्त परेड नही करवाई – इस कथन की पुष्टि किसी प्रत्यक्षदर्शी साक्षी ने नही की – इसलिए कठघरे में अभियुक्त की शिनाख्तगी, अभियुक्त की पहचान स्थापित करने के लिए पर्याप्त नही है।

*Cr.A. No.285/2008 (Indore)

B. **Criminal Procedure Code, 1973 (2 of 1974), Section 154** - *F.I.R. - Contradictory statement of complainant and constable with regard to lodging of F.I.R. and time of recording thereof - It appears that there was concoction of time of recording of F.I.R. - F.I.R. not reliable.* (Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – एफ.आई.आर. – एफ.आई.आर. दर्ज कराने और उसके अभिलिखित करने के समय के सम्बन्ध में परिवादी और आरक्षक के विरोधाभाषी कथन – ऐसा प्रतीत होता है कि एफ.आई.आर. दर्ज कराने का समय गढ़ा गया – एफ.आई.आर. विश्वसनीय नही।

C. **Evidence Act (1 of 1872), Section 3** - *Tutored witnesses - When tutoring or reading over the police statement is admitted by witnesses - Denial of giving statement on the basis of tutoring, is of no consequence - Trial court wrongly discarded admission of tutoring.* (Para 7)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – सिखाये–पढ़ाये साक्षी – जब साक्षियों द्वारा सिखाया–पढ़ाया जाना या पुलिस कथन पढ़ा जाना स्वीकार किया जाता है – सिखाये–पढ़ाये जाने के आधार पर कथन देने से इंकारी का कोई परिणाम नही है – विचारण न्यायालय ने सिखाये–पढ़ाये जाने की स्वीकृति गलत ढंग से अमान्य की।

Cases referred :

AIR 1972 SC 283, AIR 1973 SC 839, AIR 1980 SC 1382, 1984 JLJ 521, 1991(1) JLJ 232.

Ashok Shukla, Assisted by *R. K. Trivedi*, for the appellant.
Manish Joshi, Panel Lawyer, for the respondent/State.

J U D G M E N T (ORAL)

S.L. Kochar, J. :–The appellant has preferred this appeal against his conviction under section 307 of the Indian Penal Code and sentence of R.I. for five years and fine of Rs.2,000/-, in default of payment of fine to suffer additional R.I. for six months, passed by the learned Fourth Addl. Sessions Judge, Dhar in S.T. No. 43/2004 by judgment dated 23.02.2008.

2. Briefly stated, the prosecution case as unfolded before the trial Court is that the complainant Mahesh (PW-2) had gone to his field situated in village Dol on 220.09.03 in the morning at 9.00 AM. Near the field of Mahesh some sheep were grazing. He told the owner of the sheep that he was also having sheep and he should take away his sheep . On this score, there was exchange of abuse between the appellant and the complainant Mahesh. The masters of the sheep were staying by the side of canal of Karan river, from where a man came there and fired a gun which hit below the right shoulder of the complainant and three pallets pierced. The incident was witnessed by Parmanand PW-4, Suresh (PW-3) and Mukesh PW-5). According to the prosecution story, the person who fired was wearing white Dhoti and Bandi. He was having fair complexion, stout and five and a half feet in height. The complainant went along with Hirdaram and

Mukesh and lodged the report Ex.P/3-A of the incident on 20.09.003 at 2.30 PM. The distance of police station from the place of occurrence was 8 K.Ms. In the First Information Report the complainant also mentioned that he could be in a position to identify the accused. The complainant and other witnesses reached in the village and disclosed about the incident to Hirdsaram and Mahesh son of Hukumchand. The First In formation re;port was recorded by ASI Choudhary. Along with the appellant, Dhannabhai was also arrested. Injured Mahesh was sent for medical examination who was examined by PW-1 Dr Surekha Jain. His MLC report is Ex.P/1-A. Spot map Ex.P/8 was prepared by the Investigating Officer. After arrest of the accused persons, from the possession of appellant, one twelve bore gun and three used and one live cartridges together with licence were seized through seizure memo Ex.P/7. The seized artricles were sent for examination to the Forensic Science Laboratory, Sagar. After due investigation, accused persons were charge-sheeted for commission of offence punishable under section 307 of the Indian Penal Code and 25/27 of the Arms Act.

3. Accused persons denied the charges and pleaded innocence. According to them they were falsely implicated. In defence, they did not examine any witness.. Learned trial Court, after recording the statements of the prosecution witnesses and hearing both the parties, while acquitting co-accused Dhannabhai, convicted and sentenced the appellant as indicated herein-above.

4. Having heard learned counsel for the parties and after perusing the entire record carefully, this Court finds that the conviction of the appellant is not sustainable.

5. It is undisputed that the injured Mahesh as well as eye witnesses PW-4 Parmanand, PW-3 Suresh and PW-5 Mukesh were not knowing the appellant from before the date of incident and they had seen the appellant for the first time on the date of incident, but no Test Identification Parade was held by the Investigating Agency during the course of investigation. PW-2 victim Mahesh at the first instance in examination-in-chief has stated that he was not knowing the appellant and thereafter again stated that he was knowing the appellant. In cross-examination para 12, he stated that he did not disclose before the Police in the :Police Station that he was not knowing the accused persons. In para 13, he has stated that on the date of incident, it was raining for the whole day and four to five persons were grazing their sheep. In para 15 he has specifically stated that he was not knowing the appellant and the appellant was shown to him by the police in the Police Station. Thereafter, he saw the appellant in Court. In para 16, he stated that he mentioned in his report as well as in the statement that the appellant was having black complexion and five and a half feet tall whereas in the First Information Report it is mentioned that the miscreant was having fair complexion and his height was about five and a half feet. The appellant is six feet in height and dark in complexion. In para 17, he has stated that after sustaining

gun shot injury, he fell down in the mud, but his clothes did not smear with mud and accused shot only one fire. According to this witness all the three eye witnesses were standing at a distance of 200 feet.

6. On visualization of the statement of the complainant/injured PW-2 Mahesh, this Court is of the view that dock identification of the appellant in the facts and circumstances of the present case is not sufficient to establish identity of the appellant especially when the appellant was not known to the witness from before the incident and appellant was shown to all the eye witnesses and complainant in the Police Station. When the accused is unknown, it is obligatory on the part of the police to hold Test Identification Parade during the course of investigation to establish the identity. The Supreme Court, in the case of *Hasib V/s State of Bihar* (AIR 1972 SC 283), in such situation, observed as under:-

> "As observed by this Court in *Vaikuntam Chandrappa V. State of Andhra Pradesh*, AIR 1960 SC 1340 the substantive evidence is the statement of a witness in Court and the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. If there is no substantive evidence about the appellant having been one of the dacoits when PW-10 saw them on January, 28, 1963 then the T.I. Parade as against him cannot be of any assistance to the prosecution.
>
> But otherwise too the identification proceedings in the present case do not inspire confidence. It appears that several test identifications parades were held for identifying the accused persons. So far as the present appellant is concerned PW-10 appears to have identified him on February 14, 1963 though the appellant had been arrested as early as January, 1963 at about 4.15 a.m. Now identification parades are ordinarily held at the instance of the Investigating Officer for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the persons who are alleged to have been concerned in the offence. Such tests or parades belong to the investigation stage and they serve to provide the investigating authority with material to assure themselves if the investigation is proceeding on right lines. It is accordingly desirable that such test parades are held at the earliest possible opportunity. Early opportunity to identify also tends to minimise the chances of the memory of the identifying witnesses fading away by reason of long lapse of time. But much more vital factor in determining the value of such identification parades is the effectiveness of the precautions taken by those responsible for holding them against the identifying witnesses having

an opportunity of seeing the persons to be identified by them before they are paraded with other persons and also against the identifying witnesses being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused concerned."

In the case of *Mohanlal V/s State of Maharashtra* (AIR 1982 SC 839, paras 20 and 25) the Supreme Court ruled that :-

"When the victim was not knowing the accused prior to occurrence and test identification parade was not held and accused was shown to victim by police before trial. Under these circumstances, identification of the accused in Court by the victim is valueless and cannot be relied upon."

[Also see: *V.C.Shukla V/s Delbhi Administration* (AIR 1980 SC 1382)].

7. PW-2 Mahesh has also stated in para 19 that he came to the Court two or three times for giving statement and the Court Mohorrir had tutored him and also asked him to give the statement as tutored. In view of this positive admission with regard to tutoring , it would be hazardous to place reliance on the testimony of this witness. (See: *Ramvilas and others V/s State of M.P.* (1984 JLJ Page 521 para 15) and *Nagendrasingh and others V/s State of M.P.* (1991(1) JLJ 232, para 10). Learned trial Court did not give importance to the admission of this witness regarding tutoring on the ground that after admission this witness has stated that he had not given statement on the basis of tutoring. In the considered opinion of this Court when tutoring or reading over the police statement is admitted by the witness then in the case, his denial of giving statement on the basis of tutoring, is of no consequence.

8. The eye witnesses PW-3 Suresh, Parmanand (PW-4) and Mukesh (PW-5) have also specifically admitted that they were not knowing the appellant ;prior to the date of incident and the appellant was shown to them in the Police Station on the basis of which they identified the appellant in the Court. It is also worth mentioning here that according to witness Mahesh, all these three eye witnesses were standing at the distance of 200 feet and the rains had continued. Therefore, in the view of this Court, it could be difficult for these witnesses to have identified the assailant when he was fleeing away. In para 13, PW-5 Mukesh has also stated that when fire was done, the back portion of Mahesh was facing towards the person firing the gun and they had seen from a quite long distance.

9. Learned trial Court has failed to give importance to the positive admission of the victim as well as all the three eye witnesses regarding not knowing the appellant by name and face from before the date of incident and the appellant was shown to them in the Police Station. Learned trial Court considered the statement of PW-7 Investigating Officer Basant Naik that the accused persons were arrested in presence of the complainant and the witnesses, because of which,

Test Identification Parade was not held. This statement of the Investigating Officer is not corroborated by all the eye witnesses. They have no-where stated that the accused persons were arrested by the police in their presence, but they have specifically stated that the police had shown the accused persons in the Police Station. (See: para 15,16, 14 and 14 of the statements of PW-2 Mahesh, PW-3 Suresh, PW-4 Parmanand and PW-5 Mukesh respectively).

10. PW-8 Constable Budhnath has proved the First Information Report Ex. P/3-A, because its scribe ASI Choudhary could not come to Court, because of sickness. This witness in para 6 stated voluntarily that the First Information Report was recorded in the morning at 9.00 AM which is just contrary to the statement of PW-2 Mahesh as well as the First Information Report Ex.P/3-A wherein time of lodging and recording of the FIR is mentioned as 2.30 PM. PW-2 Mahesh stated that he went to the Police Station on motor cycle and also stated going to P.S. on foot. Looking to all these contradictory statement of the complainant with regard to lodging of the First Information Report and time of recording thereof as stated by Constable PW-8 Budhnath, it appears that there was concoction of time of recording of the First Information Report.

11. Ex-consequenti, for the foregoing discussion, this Court is of the view that the prosecution has miserably failed to establish its case against the appellant beyond all reasonable doubt. Therefore, this appeal deserves to be and is hereby allowed. The conviction and sentence of the appellant are set aside. The learned trial Court is directed to set the appellant at liberty forthwith, if not required in any other criminal case. Registry is directed to send a copy of this judgment to the trial Court along with its record for immediate compliance.

Appeal allowed.

I.L.R. [2008] M. P., 2687

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar

8 April, 2008*

MUJAFFAR HUSSAIN MANSOORI ... Appellant

Vs.

DEVENDRA TRIVEDI ... Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Section 386 - *Court shall decide the appeal on mertis, cannot dismiss for default - Appeal against acquittal filed by complainant - On two dates respondent (accused) and his counsel were not present - Even after intimating the date by issuance of special post card, respondent and his counsel not present - High Court heard appeal on merit in absence of respondent as well as his counsel.* (Para 2)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 386 – न्यायालय अपील

*Cr.A. No.1292/2001 (Indore)

का विनिश्चय गुणदोषों पर करेगा, व्यतिक्रम के लिए खारिज नही कर सकता – परिवादी द्वारा दोषमुक्ति के विरुद्ध अपील पेश की गई – दो तिथियों पर प्रत्यर्थी (अभियुक्त) और उसके वकील उपस्थित नही हुए – तिथि की सूचना विशेष पोस्टकार्ड द्वारा देने के बाद भी प्रत्यर्थी और उसके वकील उपस्थित नही हुए – उच्च न्यायालय ने प्रत्यर्थी और साथ ही उसके वकील की अनुपस्थिति में अपील की गुणदोषों पर सुनवाई की।

B. Negotiable Instruments Act (26 of 1881), Section 138, Evidence Act, 1872, Section 114 Illustration (f), General Clauses Act, 1897, Section 27 - *Dishonour of Cheque - Notice by registered post on correct address - Postman tried to deliver on several dates - Notice returned with remark addressee not available - Presumption about service not rebutted - Held - Notice duly served. - Order of conviction passed by trial court upheld - Appeal allowed.* (Para 8)

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138, साक्ष्य अधिनियम, 1872, धारा 114 दृष्टांत (एफ), साधारण खण्ड अधिनियम, 1897, धारा 27 – चेक का अनादरण – रजिस्टर्ड डाक द्वारा सूचनापत्र सही पते पर – डाकिये ने विभिन्न तारीखों पर परिदान करने का प्रयत्न किया – सूचनापत्र पाने वाला उपलब्ध नही की टीप के साथ वापस प्राप्त हुआ – तामील के बारे में उपधारणा खण्डित नही – अभिनिर्धारित – सूचनापत्र सम्यक रूप से तामील हुआ – विचारण न्यायालय द्वारा पारित दोषसिद्धि का आदेश पुष्ट किया गया – अपील मंजूर।

C. Negotiable Instruments Act (26 of 1881), Section 139 - *Presumption in favour of holder of cheque, unless the contrary is proved that holder of cheuqe received cheque for discharge, in whole or in part, of any debt or liability.* (Para 9)

ग. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 139 – चेक धारण करने वाले के पक्ष में उपधारणा, जब तक इसके विरुद्ध साबित नही किया जाता कि चेक को धारण करने वाले ने किसी ऋण या दायित्व से पूर्णतः या भागतः उन्मुक्ति के लिए चेक प्राप्त किया।

Cases referred :

(1996) 9 SCC 372, AIR 1996 SC 2439, Judgment Today 2008(1) SC 172, (2007) 6 SCC 555.

Vijay Sharma, for the appellant.

None, for the respondent.

J U D G M E N T (ORAL)

S.L. Kochar, J. :–The appellant/complainant has filed this appeal after grant of leave to file appeal against the impugned judgement of acquittal of respondent herein passed by learned III A.S.J, Indore in Criminal Appeal No. 56/01 dated 01/09/2001 arising out of judgement of conviction of respondent Devendra Trivedi, passed by learned Judicial Magistrate First Class, Indore (Ku. Sunita Barlo) in Criminal Case No. 1099/00, convicting the respondent under Section 138 of the Negotiable Instrument Act (for short "the Act") sentenced to R.I for six months and fine of Rs. 3,000/- (Three Thousand)and compensation amount of Rs. 12,000/- (Twelve Thousand) was ordered to be given to the appellant.

2. This is the appeal of the year 2001. Respondent is represented by his advocate but on 14/02/2008 appeal was listed for final hearing and the advocates of both the parties were not present, therefore adjourned for two weeks. It was again listed on 25/03/2008 and on this date counsel for the appellant Vijay Sharma was present and counsel for the respondent was not present, therefore, this Court ordered for issuance of Special Post Card. (SPC) intimating the respondent, who is on bail for final hearing of this appeal on 08/04/2008. In spite of this neither the counsel for the respondent nor the respondent is present today in first half of the day and also in second half. In view of Supreme Court judgements rendered in cases of *Kishan Singh V/s State of M.P* (1996 (IX) SCC 372), *Bani Singh & Others V/s State of U.P* (AIR 1996 SC 2439) and *Dharampal & Others V/s State of U.P* [judgement today 2008 (I) SC 172], this court heard this appeal on merit in absence of the respondent as well as his Advocate. In case of *Bani Singh* (supra) in paragraph-16 Supreme Court has observed as under : -

> **Para 16.-** Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the Court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher Court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted.

3. The appellant filed a criminal complaint before the learned Judicial Magistrate First Class, Indore on 30/03/1999. His case was that he and respondent were friends. On 30/12/1998, respondent came to his house and borrowed cash amount of Rs. 12,000/- for fulfilling the need of his family. Respondent issued post dated cheque No. 987721 dated 15/01/1999 towards the repayment of loan amount. On 14/01/1999 respondent approached the appellant and requested him for producing the cheque for encashment on 25/01/1999 in place of 15/1/1999. The appellant submitted the cheque for encashment in Nagrik Sahkari Bank, 12, Subhash Marg, Indore, but same was not honoured and returned back on 30/01/1999 to the appellant with remark of stop payment. The appellant sent a notice through his advocate dated 13/02/1999 demanding the cheque amount, but same was returned back by the respondent deliberately knowing well about the notice and appellant received the envelope on 27/02/99 with a remark that addressee was not available in time.

4. The learned Trial Court after recording the statement of P.J. Malviya, Dy Manager, State Bank of Indore, Branch - Cloth Market, Indore and himself, under

Section 200 of the Cr.P.C, passed the order dated 7/7/99 for registration of complaint against the respondent under Section 138 of the Act. The respondent appeared on 6/9/99 and furnished the bail and surety bond. The appellant examined himself, witness CW-2 Inamulha and CW-3 Jugal Kishore Tamrakar, whereas respondent did not examine any witness in defence. Learned Trial Court, after hearing both the parties, convicted the respondent as mentioned herein-above. Against the judgement of conviction, he went up in appeal and learned Lower Appellate Court allowed the appeal, setting aside the judgement of conviction passed by the Trial Court.

5. Learned counsel for the appellant has submitted that Lower Appellate Court erred in relying the version of the respondent regarding issuance of letter Ex.D/1 to his Bank for stop payment and there was no evidence led by the appellant about service of the notice on respondent.

6. Having heard the learned counsel for the appellant and after perusing the entire record, this Court is of the view that learned Lower Appellate Court has committed grave error of law in placing reliance on letter Ex.D/1 containing recital that the cheque was to be given by the respondent to Dongrelal Rathi, but because of pendency of case in the Court cheque was issued in the name of the appellant i.e. Mujaffar Hussain for payment of property tax and charges of water and electricity and it was issued in the wrong name, therefore, he directed the bank not to honour the cheque. Witness CW-3 Jugal Kishore Tamrakar, Assistant Manager, has nowhere accepted in cross-examination about receiving of letter Ex.D/1. He has successfully stated that he could not say whether letter Ex.D/1 was received or produced before his bank or not and he was also not able to identify the signature regarding acknowledgement of receipt of original letter, copy of which was Ex.D/1 filed by the respondent. The appellant in cross-examination in para-8 denied the defence suggestion that respondent issued the said cheque towards the payment of price of land (plot) and for depositing the payment in Municipal Corporation. He has also stated specifically that he was not required to deposit the money in Municipal Corporation and he was not knowing Dongre Lal Rathi.

7. The appellant Mujaffar Hussain has stated specifically that on 30/12/1998, respondent who was his friend came to his house and requested for the loan of Rs. 12,000/-. Appellant gave cash amount of Rs. 12,000/- for 15 days and respondent gave him postdated cheque Annx.P/1 dated 15/01/1999. After 15 days, respondent again approached the appellant and requested for production of the cheque after 10 days for encashment. The appellant accepted his request and submitted the cheque in the bank on 25/01/1999. The cheque was dishonoured and returned back with letter Annx.P/2 because, the respondent stopped the payment. After return of cheque, appellant sent registered notice acknowledgment due, copy whereof is Annx. P/3-C and registered envelope is Ex.P/4. Envelope was open, containing notice Ex.P/5 and Ex.P/6 is the postal receipt regarding sending of notice by registered post Ex.P/7 is the acknowledgment due. Envelope of registered notice is clearly containing recital that respondent was not available at the time of

delivery, therefore, same was returned back. The concerned postman tried to deliver the notice on several dates i.e. on 13/02/99 to 25/02/99. The notice was sent on the following addressee of the respondent :-

"Shri Devendra Trivedi,
s/o Shri Satendra Nath Trivedi,
r/o 26/1, Chhipa Bakhal, Indore (MP).

Same is the address of respondent mentioned in the complaint. The learned Lower Appellate Court has held in paragraph-18 of impugned judgement that the appellant has failed to establish that notice was duly served upon the respondent and the learned Magistrate should have not drawn inference regarding service of notice. In the considered view of this Court, the learned Lower Appellate Court has failed to consider the provision under Section 27 of the General Clauses Act and Section 114 (III) (f) of the Evidence Act regarding presumption of service of notice, if same was sent by registered post on correct address of the drawer of the cheque. In judgement of three judges bench of the Supreme Court in case of C.C. Allvi Haji V/s Palapetty Muhammad & another [(2007) 6 Supreme Court Cases 555], justice D.K.Jain speaking for the bench has considered the provisions of Section 138 of the Act regarding sending of notice as well as provision under Section 27 of the General Clauses Act and Section 114 of the Evidence Act exhaustively and has observed in paragraph-15 and 16 as under : -

> 15.-Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the court to draw presumption or inference either under Section 27 of the GC Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasize that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the court is required to be prima facie satisfied that a case under the said Section is made out and the afore-noted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

16.- As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of section 138. In Vinod Shivappa this Court observed : (SCC p.462, para 13)

"One can also conceive of cases where a well-intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause © of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfill their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their *modus operandi* to cheat unsuspecting persons."

8. In the case at hand as mentioned herein-above, notice was sent on correct address of the respondent. It was also within time as per provision under Section 138 Proviso (b) and appellant in his statement has specifically stated that respondent got returned the notice and did not pay the amount. In cross-examination even suggestion was not given to the appellant that he had not sent any notice to the respondent and respondent had no knowledge of sending of notice to him and he was always available on a given address, but postman never approached him for service of notice. In the light of clear factual position in the instant case, presumption has been rightly drawn by the learned Magistrate regarding service of notice to respondent.

9. The respondent has utterly failed to establish that cheque was given to the appellant towards the agreement of land purchased or payment to taxes of Municipal Corporation by adducing cogent and reliable evidence. Under Section 139 of the Act, there is presumption in favour of holder of cheque " that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

10. Consequently on the basis of foregoing discussions, this appeal is allowed, impugned judgement and finding of the learned Lower Appellate Court dated 01/09/2001 in Criminal Appeal No. 56/2001 are hereby set aside and judgement and order passed by the learned Judicial Magistrate First Class, Indore dated 12/02/2001 in Criminal Case No. 1099/00 are hereby restored.

Office is directed to send SPC to the respondent Devendra Trivedi to appear before the learned Trial Court on 23th June, 2008 and the learned Trial Court is directed to send him jail for serving out the jail sentence. On failure of the respondent Devendra Trivedi to appear before the learned Trial Court on a given date, the learned Trial Court is directed to take suitable action against him as well as his surety, under intimation to this Court.

Appeal allowed.

I.L.R. [2008] M. P., 2693

APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava

8 May, 2008*

SANJAY VISHWAKARMA. ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Section 302 - *Murder - Circumstantial Evidence - Deceased, wife of appellant died in the house - Cause of death was asphyxia caused by strangulation - Ligature mark and abrasions found on the neck of deceased - Son of deceased clearly stated that appellant was in house and had beaten deceased with kicks and fists - Held - Appellant was in house and was in room and gave beating to deceased - Body was removed from first floor - Blood stains were found on pillow - No report was lodged by appellant or any of his family members - Appellant wanted to screen offence - Appellant guilty of committing murder - Appeal dismissed.* (Para 8)

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अपीलार्थी की पत्नी (मृतक) की मृत्यु घर में हुई – मृत्यु दम घुटने से कारित हुई थी – मृतक के गले पर गला घोंटने के निशान और खरोंचें पायी गईं – मृतक के पुत्र ने स्पष्ट रूप से कथन किया कि अपीलार्थी घर के अन्दर था और उसने मृतक को लात और घूसों से मारा था – अभिनिर्धारित – अपीलार्थी घर के अन्दर कमरे में था और मृतक को मारा था – मृतक का शरीर प्रथम तल से हटाया गया – तकिये पर खून के धब्बे पाये गये – अपीलार्थी या उसके परिवार के किसी भी सदस्य ने कोई रिपोर्ट दर्ज नही करवाई – अपीलार्थी अपराध को छिपाना चाहता था – अपीलार्थी हत्या कारित करने का दोषी – अपील खारिज।

B. Evidence Act (1 of 1872), Section 106 - *Burden of Proof - Circumstantial Evidence - When death has taken place in the house, it is necessary for husband to explain the circumstances how the death took place.* (Para 9)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 106 – सबूत का भार – परिस्थितिजन्य साक्ष्य – जब मृत्यु घर में हुई, पति के लिए यह आवश्यक है कि परिस्थितियाँ स्पष्ट करे कि कैसे मृत्यु कारित हुई।

Cases referred :

1992) 3 SCC 300, AIR 1994 SC 1597, AIR 1998 SC 942, JT 2006 SC 50,

*Cr.A. No.1845/1999 (Jabalpur)

1974 (3) SCR 833, (2000) 8 SCC 382, (1999) 8 SCC 679, AIR 1992 SC 2045, (2000) 1 SCC 471, (2002) 1 SCC 731, (1995) 3 SCC 574, (1973) 1 SCR 428, (1992) 3 SCC 106.

S.C. Datt with *Siddharth Datt,* for the appellant.
R.S. Patel, Addl.A.G., for the respondent / State.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the accused appellant aggrieved by conviction and sentence recorded by the 1st ASJ, Satna in S.T. No.45/97 u/s 302 and 201 of IPC for causing murder of his wife Madhu Vishwakarma.

2. Briefly stated the prosecution case is that marriage of accused Sanjay Vishwakarma was performed with Madhu in the year 1985, accused used to drink liquor and beat the deceased. He used to spent whatever money he was earning in drinking. Accused often used to threaten the deceased to kill her. This fact was informed to in laws by Madhu number of times. On 9.10.96 accused committed murder of his wife. There was ligature marks found around the neck of deceased. The in laws suspected that Madhu was done away with as such brother of Madhu, Manoj Kumar Vishwakarma (PW.1) lodged a Marg intimation at Police Station, Kotwali at about 12.15 PM. Marg intimation (P.1) was recorded at Crime No.80/96. Inquest (P.2) was prepared, postmortem was performed by a team of four doctors. Doctors opined that death was due to asphyxia, case was referred to Medico Legal Expert, Bhopal. Ligature marks and abrasions on the neck of deceased were found to be ante mortem. Sons of deceased informed that accused had beaten the deceased on the date of incident also in the night due to that she was unable to speak. When preparation was being made for cremation of the body, a report was lodged by brother of deceased. As per the opinion of Medico Legal Institute, Bhopal, death was caused due to asphyxia because of strangulation as there were ligature marks on the neck, death was homicidal in nature. The death was caused in the room situated at Ist floor and body was placed ,in order to remove the evidence, on the ground floor. Blood stained pillow from the cot of deceased was seized as per seizure memo (P/3), presence of human blood was found by FSL, Sagar. No poison was found in the viscera. Accused was charged for commission of offence under Sections 302 and 201 of IPC.

3. Accused abjured the guilt and contended that he has been falsely implicated in the offence. He was in his shop and was informed by Gulab Tiwari at about 3.30 AM that his wife was not well, he called Dr.Safi who declared that his wife has died. Rajesh Namdeo was in the house on the day of incident. His mother was sleeping along with both the children in the room on the ground floor. Rajesh Namdeo came in the night at about 1 O'clock to sleep in the house, at about 2 O'clock in the night on hearing his mother's hue and cry, he found that deceased

was lying near the staircase in the ground floor. Thereafter his mother summoned the accused through Gulab Tiwari. Thereafter in laws were informed. Deceased used to consume Supari and Tobacco, deceased must have inhaled Tobacco/Supari, that was the cause of death due to asphyxia, he was not responsible for committing murder of his wife.

4. Shri S.C.Datt, learned Senior Counsel appearing with Shri Siddharth Datt, for appellant has submitted that in the postmortem report no definite opinion was given by team of four doctors that death was due to strangulation. Thus, it could not be said that death was due to asphyxia caused by strangulation. No poison was found in the viscera, thus, it has not been established that death was homicidal in nature. Learned counsel has further submitted that statement of son of accused Sandeep (PW.11) cannot be said to be sufficient so as to fasten the guilt. There was yet another person Rajesh (PW.5) in the house, the accused was not in the house, he was summoned from the shop by his mother, doctor was also informed by the accused which fact points out to his innocence. Consequently, accused should have been acquitted by the Court below, the commission of offence has not been established beyond periphery of doubt.

5. Shri R.S.Patel, learned Addl.AG appearing for State has supported the conviction. He has submitted that presence of accused in the house is established by statement of his son Sandeep (PW.11). On the neck of deceased ligature marks and abrasions were found,accused gave beating to the deceased is also the statement made by Sandeep (PW.11). Asphyxia was caused due to strangulation. The accused has removed the body from the first floor and put it on the ground floor in order to remove the evidence of commission of offence. From the first floor, from the bed blood stained pillow was seized on which human blood was found. In case accused was not responsible, he ought to have explained how the death of wife was caused. He has failed to explain the circumstances appearing against him. Consequently, the conviction recorded by the Court below calls for no interference in the appeal.

6. In the instant case, we find that death was clearly homicidal in nature. It is apparent from postmortem report that there were ante mortem ligature marks and abrasions on the neck of deceased. Death was caused due to asphyxia is the opinion recorded in the postmortem report as there were ligature marks around the neck of deceased. When abrasions were also found as noticed in the postmortem report itself, it passes comprehension how the panel of four doctors inspite of opining that death was caused due to asphyxia could not opine that it was due to strangulation. Dr.B.L.Gupta (PW.12) who was member of the team which performed autopsy has stated in para 18 that all the signs of strangulation were found on the dead body. Report of Junior Forensic Specialist of Medico Legal Institute, dated 18th March,97 of Gandhi Medical College, Bhopal indicates that deceased has died as a result of asphyxia caused by strangulation which is

homicidal in nature. He has given the opinion on the basis of various facts. The deceased was having multiple abrasions over the neck and ligature marks and symptoms of asphyxia. The ligature marks were due to strangulation. Further reason mentioned by the expert was that deceased was never seen in hanging condition by any one. The neck muscles were congested (Ecchymosis) which is one of the important finding of strangulation rather than of hanging. There was presence of multiple abrasions on neck indicating sign of struggle. He has further mentioned patchy haemorrhages is a positive finding of slow asphyxia means strangulation rather than hanging in this particular case. Observation of saliva trickling mark over cheek transversely was against the gravity of hanging. There was absence of ligature material. Thus, it is apparent that asphyxia was caused due to strangulation. It was not a case of hanging. If it was a case of hanging, it was for the accused to explain the circumstances as per Section 106 of Evidence Act which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

7. We find on record statement of son of deceased Sandeep (PW.11). He has clearly stated that in the night his father was in the house and had beaten deceased Madhu with kicks and fists. When he went to save the mother, he was pushed and threatened by his father, mother was unable to speak, thereafter his father sent him to the house of Anis. Saurav was also present when his father, i.e., accused was beating the deceased. There is absolutely nothing to doubt the version of Sandeep (PW.11) son of accused and deceased. Though he is a child witness, but appears to be truthful and not a tutored one. He had no enmity with the accused. He could not be said to be an interested witness.

Rajesh Kumar (PW.5) who was also in the house has stated that at about 2.30-3-3.30 O'clock in the night mother of accused came to him and stated that Madhu was unable to speak. Accused Sanjay and his mother took him to the room on the first floor. He found that Madhu was lying dead on the cot. Thus, from the statement of Rajesh Kumar also presence of accused Sanjay when Madhu was done away with stands established. Ramkali (DW.4), mother of deceased, has stated that deceased used to be beaten by the accused, she had seen the marks of beating on the body of deceased prior to 7-8 days of her death also. Accused used to often beat the deceased.

8. It is apparent that accused was in the house at the time of commission of offence and was in the room and gave beating to deceased as stated by Sandeep (PW.11) and his presence is also stated by Rajesh Kumar (PW.5). He was responsible to strangulate the deceased to death. Body was removed from the first floor, blood was coming out from the mouth as stated by Ramkishore (PW.3). No report was lodged by the accused or any of his family members, they wanted to screen the offence. It was only when parents of deceased and brother came, they suspected foul play as there were ligature marks and abrasions on the neck of deceased, at that time report was lodged at the police station. The conduct of

the accused also indicates that he tried to screen the offence by not informing the police. Death was obviously homicidal in nature. Spot inspection report indicates that blood stains on the pillow were found from the bed of deceased. The circumstances unerringly point out that deceased was subjected to physical violence by the accused. Photographs of deceased also speaks as to presence of ligature marks and the abrasions on the neck. From the evidence adduced by the prosecution as well as by the conduct of the accused, it is apparent that he was culprit and commission of offence by him has been established beyond periphery of doubt.

9. When death has taken place in the house, it is necessary for the husband to explain the circumstances how the death took place as observed by the Apex Court in *State of U.P. vs. Dr. Ravindra Prakash Mittal* (1992) 3 SCC 300 and in *Shri Kishan vs. State of Haryana* AIR 1994 SC 1597. In the instant case, there was no possibility of any outsider having committed the offence, that also is a circumstance which militates against the accused as observed by the Apex Court in *Sheikh Abdul Hamid and another vs. State of Madhya Pradesh* AIR 1998 SC 942. When the offence takes place in the house, the duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. In view of Section 106 of Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed as observed by the Apex Court in *Trimukh Maroti Kirkan vs. State of Maharashtra* JT 2006 () SC 50 , *Collector of Customs, Madras and others vs. D. Bhoormull* 1974(3) SCR 833 and *State of West Bengal vs. Mir Mohammad Omar and others* (2000) 8 SCC 382. In *State of Tamil Nadu vs. Rajendran* (1999) 8 SCC 679, *State of U.P. vs. Dr. Ravindra Prakash Mittal* AIR 1992 SC 2045, *State of Maharashtra vs. Suresh* (2000) 1 SCC 471, *Ganesh Lal vs. State of Rajasthan* (2002) 1 SCC 731 and *Gulab Chand vs. State of M.P.* (1995) 3 SCC 574 the Apex Court has also observed that in a case based on circumstantial evidence where no eye-witness account is available, the principle is that when an incriminating circumstance is put to the accused and the accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. When relations were strained, the accused husband must offer explanation as held in *Nika Ram vs. State of Himachal Pradesh* 1973 (1) SCR 428. Explanation should be given by accused in statement recorded under Section 313 Cr.P.C. as held in *Ganeshlal vs. State of Maharashtra* (1992) 3 SCC 106.

10. In the instant case, when we test the evidence in the light of aforesaid decisions it is clear that accused has failed to offer any cogent explanation. Explanation offered by the accused that he was not in the house is found to be incorrect. Statement of mother of accused that accused was not in the house is just to save his son from punishment of offence under Section 302 IPC.

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11. Consequently, we find the appeal to be devoid of merit, same deserves dismissal, the appeal is hereby dismissed. The conviction and sentence imposed upon the appellant by the Court below under Section 302 and 201 IPC is hereby upheld.

Appeal dismissed.

I.L.R. [2008] M. P., 2698
APPELLATE CRIMINAL
Before Mr. Justice Abhay Gohil & Mr. Justice S.S. Dwivedi
12 May, 2008*

KARAN SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302 - *Murder - Dying Declaration - Reliability - Appellant convicted only on the basis of dying declaration - Held - When there is doubtful evidence whether the maker of dying declaration i.e. deceased was fully conscious or not - Court can consider the medical evidence and if the court is not satisfied that the deceased was in fit mental condition or there are contradictions in the opinion of the doctor vis-à-vis opinion of the eye witnesses - In such circumstances in a particular case that requires corroboration and if there is no corroborative evidence, the same can be discarded - If the evidence is reliable and trustworthy the conviction can be based thereon - Appeal allowed - Appellant acquitted.* (Para 8)

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृत्युकालिक कथन – विश्वसनीयता – अपीलार्थी केवल मृत्युकालिक कथन के आधार पर दोषसिद्ध किया गया – अभिनिर्धारित – जब यह साक्ष्य शंकास्पद हो कि मृत्युकालिक कथन करने वाला अर्थात् मृतक पूर्णतः सचेत था या नही – न्यायालय चिकित्सकीय साक्ष्य पर विचार कर सकता है और यदि न्यायालय संतुष्ट नही है कि मृतक स्वस्थ मानसिक स्थिति में था या प्रत्यक्षदर्शी साक्षियों की राय और चिकित्सक की राय में विरोधाभाष है – इन परिस्थितियों में किसी विशिष्ट मामले में सम्पुष्टिकारक साक्ष्य अपेक्षित है और यदि कोई सम्पोषक साक्ष्य नही है, यह अमान्य की जा सकती है – यदि साक्ष्य विश्वसनीय है तो दोषसिद्धि उस पर आधारित की जा सकती है – अपील मंजूर – अपीलार्थी दोषमुक्त।

Cases referred :

(1992) 2 SCC 474, (2008) 2 SCC 516.

Sudha Shrivastava, for the appellant.
Brijesh Sharma, P.P., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by **Abhay Gohil, J.** :–The appellant has filed this jail appeal under section 374 of Cr.P.C challenging his conviction under section 302 of IPC and sentence of life

*Cr.A. No.294/2005 (Jail Appeal) (Gwalior)

imprisonment with fine of Rs.250/- vide judgment dated 7-4-2005 in ST No.257/04 passed by the trial court.

2. As per prosecution story, Dehati Nalishi was lodged by one Londu S/o. Devlal. As per this Dehati Nalishi, the deceased Guddibai alias Ganeshi was his daughter and on 28-4-04 the appellant/accused alongwith his family members had come to his house and was staying at the house of his father-in-law. On 10-5-04 at about 11 am in the morning, the deceased Guddibai was sitting in a hut, at that time, appellant came with axe, gave axe blow on the neck of the deceased and after assaulting her, ran away from the spot. On the basis of aforesaid Dehati Nalishi, crime was registered under section 307 of IPC and injured Ganeshi was referred for medical examination where her dying declaration Ex.P/4 was recorded. After her death, postmortem of the dead body was performed and after investigation, charge sheet was filed.

3. No doubt, the deceased is wife of the appellant, but during trial, Kalawatibai (PW-1) mother of the deceased, Londuram (PW-2) father of the deceased, Gopal (PW-3), Chironji (PW-4), Lakhan (PW-5), Munnalal (PW-6), Amarlal (PW-10), Lachchho (PW-12) and Bindra (PW-13) have not supported the prosecution and they all were declared hostile. They are either the relatives of the deceased or the villagers. Relying on dying declaration (Ex.P/4) which was recorded by Dr. Padmesh Upadhyay (PW-8), learned trial court found the offence proved against the appellant, convicted and sentenced him as aforesaid, against which the appellant has preferred this appeal from jail.

4. We have heard Ku. Sudha Shrivastava, learned counsel appointed by the Legal Aid Officer of the High Court for the appellant and Shri Brijesh Sharma, learned Public Prosecutor for the respondent/State. Learned counsel for the appellant submitted that dying declaration Ex.P/4 is not admissible in evidence. In fact, it is not dying declaration, it is in the shape of opinion recorded by the doctor and such a dying declaration can not form the basis of conviction. In reply, Shri Brijesh Sharma, learned public prosecutor supported the judgment and relied on the evidence of Dr. Padmesh Upadhyay (PW-8).

5. Having heard learned counsel for the parties, we have considered the document Ex.P/4 which is a dying declaration. Admittedly, incident took place at about 11 O'clock in the morning and dying declaration was recorded at 3.50 pm i.e. after 4 hours. Dr. Padmesh Upadhyay (PW-8) has stated that the deceased received incised wound on the neck which was 2 cm wide and injury was dangerous to life. Her condition was quite critical. Blood pressure was 106/70 and she was vomiting, her lower part of the body suffered with paralytic attack. Though, she was speaking, but he has admitted in the cross-examination that in Ex.P/4 he has not mentioned whether she was fully conscious and she was in fit condition to give statement. Doctor has stated that her voice was quite low and staggering. In the cross-examination he has admitted that she had stated that her husband was

mad for last one month. She had also informed him that after sustaining an axe blow, she immediately became unconscious, but when she was being shifted in the jeep, she came to know that jeep was of A.S.I. Khan and her father, mother and brother were present. But, this statement was contradicted by Dr. S.C. Agrawal (PW-7), who performed the autopsy. Dr. S.C. Agrawal (PW-7) has stated in his statement that because of the injuries over the neck and spinal cord which was cut, she must have died immediately after receiving the axe blow. Doctor has stated that she might be in a position to speak something for a while but not for a long time, contrary to this, her statement was recorded after four hours.

6. Thus, in view of the aforesaid medical evidence, it is clear that she must have not survived for four hours as the dying declaration was recorded after 3 ½ hours of the incident. From the aforesaid evidence of PW-7, doctor who performed autopsy, it is clear that she might not be in a position to speak anything when her dying declaration was recorded which has raised a serious doubt in the prosecution evidence.

7. We have carefully perused the document Ex.P/4. It is clear that in Ex.P/4 the doctor has not mentioned any certificate that the deceased was in a fit mental condition to give statement or she was fully conscious. Doctor has also not made endorsement on the dying declaration Ex.P/4 that while recording her dying declaration she remained fully conscious and, therefore, in the absence of medical certificate, the reliance can not be placed on a dying declaration. Doctor himself has raised doubt about her fit mental status and consciousness looking to the manner in which the doctor has recorded the dying declaration, the same cannot be accepted. He has not directly asked any question from Ganeshi (the deceased). It appears that he was asking questions from the parents of Ganeshi and whatever they were answering, he was writing. The trial court has recorded a finding that there was no evidence on record of this effect that the appellant was insane person. We have also not considered this aspect of the matter. We have only considered whether dying declaration is reliable and sufficient to maintain conviction. We are of the view that simply on the basis of dying declaration which even bears no endorsement of the doctor about the fit mental condition, the same cannot be accepted as reliable dying declaration. In this case one more circumstance is that the dying declaration was recorded in the presence of the mother, father and brother of the deceased, their thumb impressions were also obtained thereon, but none of them has supported the prosecution in the court, therefore, this possibility cannot be ruled out that they may be instrumental in getting the dying declaration recorded during investigation from the doctor. Thus, on the basis of aforesaid dying declaration, the conviction of the appellant cannot be affirmed and it cannot be held that the evidence of dying declaration is of a conclusive nature. We are aware of this legal position that conviction can be based on the evidence of dying declaration alone but in that case, the evidence of dying declaration must be reliable, trustworthy and truthful in nature.

8 The legal position is very clear regarding conviction solely on the evidence

of declaration. In the case of *Paniben Vs. State of Gujarat* (1992) 2 SCC 474, their Lordships of the Supreme Court considered the law relating to dying declaration and also the circumstances under which such declaration can form sole basis of conviction. The Apex Court has held that a dying declaration is entitled to great weight. Once the court is satisfied that the declaration is true and voluntary, it could base conviction without corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence and not a rule of law. See also *Vikas Vs. State of Maharashtra* (2008) 2 SCC 516.

While accepting the evidence of dying declaration, the court is required to scrutinize the dying declaration carefully and has to ensure that the dying declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state of mind to make the declaration. Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks upon the medical opinion. It there is a doubtful evidence about the fit mental condition and when there is also doubtful evidence whether the maker of the dying declaration i.e. the deceased was fully conscious or not, the court can consider the medical evidence. And if the court is not satisfied that the deceased was in fit mental condition or there are contradictions in the opinion of the doctor vis a vis opinion of the eye witnesses, and if the evidence does not satisfy the test laid down, the court may discard the same and may record its conclusion that it does not inspire confidence about its correctness and in such circumstances in a particular case that requires corroboration and if there is no corroborative evidence, the same can be discarded but if the evidence is reliable and trustworthy the conviction can be based thereon.

9. We have also noticed one more material fact that the evidence of memorandum under section 27 of the Evidence Act and thereafter the seizure of axe is not found proved by any independent evidence. From the evidence of Munna-PW-9 the trial court has not found that aforesaid axe was seized after receiving the information from the accused, the court has also not found proved that it was the appellant, who committed murder of his wife by giving axe blow on her neck.

10. Thus, considering the totality of the factual matrix, legal position and circumstances of the case, we are of the view that the conviction cannot be affirmed only on the basis of evidence of dying declaration which in our considered opinion is not reliable and trustworthy. Accordingly, this appeal is allowed. The conviction of the appellant is hereby set-aside. He is acquitted from the charge by extending the benefit of doubt. He is in jail. He be released forth-with, if not required in any other case.

Appeal allowed.

I.L.R. [2008] M. P., 2702
APPELLATE CRIMINAL
Before Mr. Justice Abhay Gohil & Mr. Justice Abhay M. Naik
16 May, 2008*

PRAMOD KUMAR ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 300, Exception 4, Sections 302, 304 Part I - ***Murder or Culpable Homicide not amounting to murder*** - *For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel without premeditation - It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner - There was no enmity between the parties - There occurred a sudden fight, the appellant stabbed the deceased thrice repeatedly on vital parts - Deceased has not exercised any force against the appellant - Appellant applied the knife for causing the bodily injuries on the person of deceased which were likely to cause death - The case of appellant falls within u/s 304 Part I and not u/s 302.* (Paras 14 & 15)

दण्ड संहिता (1860 का 45), धारा 300, अपवाद 4, धाराएँ 302, 304 भाग 1 – हत्या या हत्या की कोटि में न आने वाला सदोष मानव वध – अपवाद 4 लागू करने के लिए यह दर्शाना पर्याप्त नही है कि अचानक झगड़ा पूर्व चिन्तन के बिना हुआ था – यह भी दर्शाना चाहिए कि अपराधी ने अनुचित लाभ नही लिया या क्रूर या असामान्य तरीके से कार्य किया – पक्षकारों के मध्य कोई शत्रुता नही थी – अचानक लड़ाई हुई, अपीलार्थी ने मृतक के मर्मस्थलों पर लगातार तीन प्रहार किये – मृतक ने अपीलार्थी के विरुद्ध किसी बल का प्रयोग नही किया – अपीलार्थी ने चाकू से मृतक के शरीर पर शारीरिक क्षतियाँ कारित कीं जो मृत्यु कारित करने के लिए संभाव्य थीं – अपीलार्थी का मामला धारा 304 भाग 1 के अन्तर्गत आता है न कि धारा 302 के अन्तर्गत।

Case referred :
2008 Cr.L.J 690.

V.K. Saxena with *M.K. Jain,* for the appellant.
M.P.S. Bhadauria, G.A., for the respondent.

JUDGMENT

The Judgment of the Court was delivered by ABHAY M. NAIK, J. :–Story of prosecution is that on 3.11.1986 complainant Hukumchand accompanied by wife Sheela Devi visited the house of his sister situated at Kharifatak road, Vidisha for performing 'Teeka' on the occasion of 'Bhaidooj'. His sister Keshar Bai and her husband Mishrilal were residing as tenant in the property belonging to Chandra Kumar Jain, father of the accused. They reached in the house of Mishrilal at about 10:30 P.M. When Rajesh and Dilip (both sons of Mishrilal) came back from their business of 'Chat'. They used to run their business of 'Chat' on Thela. While coming back, they collected up one fused

*Cr.A. No.60/2000 (Gwalior)

mercury tube light from road which was broken by Pradeep who also gave beatings to Rajesh. This was informed on coming back to home to Mishrilal. Mishrilal told them that he will apprise Chandra Kumar of the incident, who will further persuade his sons to behave properly. Chandra Kumar was residing with his family on the lower floor. Mishrilal came downstairs and apprised Chandrakumar of the incident and asked him to make his sons understand to behave properly. Suddenly Pradeep, Praveen, Pramod and Vinod appeared on the site and started abusing. They were asked to refrain from abusing. They shouted 'Maro Salon Ko'. Ballu alias Vinod has brought a knife from inside and handed it over to Pramod, who inflicted injuries on right side of the chest, left side of stomach and near the nose. Complainant Hukum Chand tried to protect him, but Pramod also inflicted injuries on him by knife on left hand and wrist. Mishrilal's sister, namely, Khumaniya Bai also made an effort to protect Dilip, but she was also injured by Pramod by the knife. Dilip Kumar became serious, so he was taken to Vidisha Hospital on handcart, whereas, complainant Hukumchand went to the Police Station Vidisha and lodged FIR. Dr. R.C. Sharma (PW/8) examined Dilip Kumar and found following injuries on the body of Dilip Kumar as per the report (Ex. P/8) :

(1) Stab wound - 1 1/4" x 3/4" transverse in 7th (left) Intercostal space in Nipple line, going towards peritoneal cavity, omentum coming out of the wound, depth of the wound could not be assessed. Fresh bleeding present.

(2) Stab wound - 4" x 1 1/2" vertical on medial end of clavicle, Muscle & Fascia cut in the depth of the wound, going towards chest wall, medial end of clavicle seen exposed in the wound. Profuse bleeding present.

(3) Incised wound 2" long on cheek. It is brought in the end of Peri circulatory failure.

Dilip Kumar succumbed to injuries and, ultimately, died on 5.11.1986 at 2:30 P.M. Postmortem was performed and following were the findings as per the postmortem report.

"The body lying serpine on P.M. Table C head straight. Rigor mortis present. There are three injuries seen on the body which are Antemortem -

(i) One stitched and dressed wound of length of 10 cms over the right side of the chest in upper part vertical in position extending upto the medial end of the right clavicle.

(ii) One stitched and dressed wound of length of 25 cms arrow-head in shape over abdominal paramedian in position on left side extending towards the left hypochondine region.

(iii) One stitched & dressed wound of length 2.5 cms over right cheek 2 cms away from the angle of mouth.

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In the opinion of Dr. H.K. Verma (PW/9) the mode of death is syncope and the cause of death is excessive haemorrhage and shock due to injury to vital organ, the right lung. The time elapsed from death to post mortem is within 24 hours.

2. After due investigation challan was submitted against Pramod Kumar, Ballu alias Vinod Kumar, Pradeep Kumar and Praveen Kumar. A private complaint was also submitted by the complainant Mishrilal against Chandra Kumar Jain. It will not be out of place to mention here that Pradeep Kumar and Praveen Kumar were discharged by this Court in Cr. Revision No. 307/96 vide order dated 15.2.1996 and Ballu alias Vinod Kumar is acquitted vide the impugned judgment by the learned Sessions Judge in S.T.No. 186/97.

3. Pramod Kumar has been convicted under Section 302 Indian Penal Code, and has been sentenced to imprisonment for life for having committed mudrer of Dilip Kumar. A fine of Rs. 1000/- has also been imposed. Pramod Kumar has also been convicted and sentenced to two years rigorous imprisonment under Section 324 of Indian Penal Code and fine of Rs. 500/- for causing simple injuries to Hukumchand.

4. Aggrieved by the conviction of Pramod Kumar Cr. Appeal No. 60/2000 has been preferred. Similarly, Cr. Appeal No. 36/2001 has been preferred by the State of Madhya Pradesh against acquittal of Ballu alias Vinod Kumar after obtaining necessary leave. Both the appeals have been heard analogously, but are being decided by separate judgments.

5. Shri V.K. Saxena, Senior Advocate and Shri M.P.S. Bhadoriya, Govt. Advocate made their submissions in support of respective contentions which have been considered in the light of the material on record.

6. Shri V.K. Saxena, learned Sr. counsel contended that the learned Sessions Judge has not properly appreciated the evidence. It is not proved beyond doubt that Pramod Kumar has inflicted injuries on the body of Dilip Kumar by knife. There are major discrepancies in the evidence which have been ignored by the learned Sessions Judge. The discrepancies, if taken into consideration in correct perspective, would make the story of prosecution untrue and Pramod Kumar deserve to be acquitted. In the alternative, it is contended that the case of Pramod umar falls within the ambit of Section 304 Part-II of Indian Penal Code and sentence of life imprisonment is awarded in excess of jurisdiction besides being highly disproportionate.

7. It may be seen that the prosecution has examined number of eye witnesses, namely, Mishrilal (father of deceased PW/1), Hukumchand (PW/3), Hukumchand Ahirwar (PW/4), Rajesh Jain (PW/5), Sheela Devi (PW/6), Keshar Bai (PW/7) and Khumaniya Bai (PW/11).

8. Dr. R.S. Sharma, who examined Dilip Kumar on 4.11.1996 has been examined as PW/8, who found the injuries as described hereinabove. He categorically stated

that the injuries found on the body of Dilip Kumar could have been inflicted by the knife seized from the appellant. This doctor had also examined Dilip Kumar before recording of the dying declaration and had given fitness certificate which is revealed in Annx. P/11. Postmortem was conducted by Dr. H.K. Verma, who, too, has been examined as PW/9. He has clearly opened that the death was caused due to the injuries received in the right side of chest which caused excessive bleeding and shock. He has further specifically stated in paragraph 2 of his statement that injuries inflicted on the body of the deceased were sufficient in the ordinary course of nature to cause death. In paragraph 3, he has ruled out that injuries were received by the deceased by knife due to scuffling. On the contrary, he expressly stated that such injuries could be received only if the knife is applied with intention to cause the injuries.

9. Although, Shri Saxena, learned Senior counsel for the appellant contended that the evidence was not properly appreciated, he however, was unable to demonstrate any major discrepancy in the evidence which may vitiate the impugned judgment. In the light of the entire material on record, I find that witnesses have given the minute details with regard to date, time and place of the occurrence and have given further full details of the manner in which knife was used by the accused. The ocular evidence is corroborated by the medical evidence. No enmity on the part of witnesses of prosecution was proved against the accused persons. Medical evidence has also established that injuries on the person of deceased were result of the knife seized from the appellant. Thus, the evidence is unimpeachable and learned First Additional Sessions Judge, Vidisha, has analysed the evidence in paragraph 13 to paragraph 54 of its judgment and has further found in paragraph 55 the appellant guilty of causing injuries intentionally on vital parts of the body of Dilip Kumar which resulted into death. Appellant's learned Senior counsel Shri V.K. Saxena did not specify any specific piece of evidence or incorrect appreciation . This being so, I do not find it necessary to reproduce the evidence and further confirm the finding of conviction recorded against the appellant for causing deah of deceased Dilip Kumar, since there is no infirmity.

10. Next contention of Shri Saxena, learned Senior counsel, seems to be quite forceful that the appellant has been wrongly convicted under Section 302 of Indian Penal Code. However, he is equally not correct in saying in ground 4 of memo of appeal that the case of the appellant would fall under Sections 324 & 326 of Indian Penal Code. Section 324 of Indian Penal Code applies when hurt is caused by the accused voluntarily by means of any instrument for shooting, stabbing or cutting or any instrument which if used as a weapon of offence is likely to cause death. In the present case, Dilip Kumar, the deceased, was injured in the late night of 3rd November, 1986, which caused his death. It was not a case of hurt or grievous hurt, therefore, neither Section 326 nor Section 324 of the Indian Penal Code would be applicable.

11. Now it is to be seen that whether the appellant has caused culpable homicidal amounting to murder or culpable homicide not amounting to murder. Culpable homicile murder falls under Section 300 of Indian Penal Code unless it falls within the case of exception as provided in Section 300 itself.

12. Recently, the Apex Court has an occasion in the case of *Gali Venkataiah Vs. State of Andhra Pradesh* (2008 Cri. L.J. 690) to examine the scope of exception to Section 300 of Indian Penal Code. We may profitably quote paragraph 15 & 16 as under :-

> "15. For bringing in operation of Exception 4 to Section 300, IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.
>
> 16. The Fourth Exception to Section 300, IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for, in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated. Yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. 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. For, if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused. (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within

Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300, IPC is not defined in IPC. It takes two to make a fight. Heat of passion required that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel of unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

13. Undisputably, in the present case, there was no enmity between the parties of a degree which would have given rise to an idea of causing murder of Dilip Kumar. Appellant had not gone to the house of the deceased or complainant. On the contrary, the family members of Mishrilal Jain including the deceased came downstairs, to the house of appellant's father to make deliberations in respect of the quarrel which is stated to have been picked up by sons of the Chandra Kumar. When the landlord was being persuaded about the behaviour of his sons, all the four sons appeared on the spot, there book place heated exchanges causing provocation to the accused who used the knife and inflicted various injuries which, ultimately, caused the death. It is not the case of the prosecution that the appellant entertained an idea right from the beginning to cause death of Dilip Kumar, the deceased. Thus, there was no pre-planned or premeditation and Pramod Kumar is found to have inflicted injuries by knife on account of sudden provocation caused due to the deceased visiting his house and making complaint to his father. In view of this, the case of the appellant did not fall within the definition of culpable homicidal amounting to murder.

14. In the case of *Gali Venkataiah* (supra), the Supreme Court was dealing with a case of single knife blow on chest of the deceased and it awarded sentence under Part-I of Section 304 of Indian Penal Code since it was a case of sudden fight without pre-meditation.

15. In the present case though there occurred a sudden fight, the appellant stabbed the deceased thrice repeatedly on vital parts. The deceased was unarmed young body of 17 years of age. He is not proved to have exercised any force against the appellant. Appellant, thus, applied the knife for causing the bodily injuries on the person of Dilip Kumar which were likely to cause death. Considering this factual background and in totality of circumstances, this Court is of the view that the

case of the appellant falls within Part-1 of Section 304 of Indian Penal Code and the appellant is liable to be punished with custodial sentence of five years which would Meet the ends of justice.

16. Accordingly, this appeal is allowed in part, conviction of appellant is altered from Section 302 to Section 304 Part II IPC and the sentence of life imprisonment is reduced to the sentence of five years R.I. and the fine amount is enhanced from Rs. 1,000/- to Rs. 50,000/-. In default of payment of fine amount the appellant shall undergo further jail sentence of one year. On depositing this amount a compensation of Rs. 50,000/- be paid to the mother of the deceased. The conviction of appellant under Section 324 IPC for causing injury to injured Hukum Chand is affirmed. His jail sentence and fine amount is also affirmed. Both the sentences shall run together. Appellant is on bail. His bail bonds are forfeited. He is directed to surrender before the trial Court to undergo remaining jail sentence. The trial Court shall have liberty to execute the judgment.

Appeal allowed in part.

I.L.R. [2008] M. P., 2708
APPELLATE CRIMINAL
Before Mr. Justice S.A. Naqvi
24 July, 2008*

MOHAMMAD ASLAM ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Sections 363, 366, 376 - *Kidnapping and Rape - Determination of age - Parents and prosecutrix stating that she is below 16 years of age - Date of birth recorded in school register on the information of father shows that prosecutrix was below 16 years of age - Held - Evidence of parents and school register proves that prosecutrix was 15 years and 8 months old on the date of incident.* (Para 7)

क. दण्ड संहिता (1860 का 45), धाराएँ 363, 366, 376 – व्यपहरण और बलात्संग – आयु का अवधारण – अभिभावक और अभियोक्त्री ने कथन किया कि उसकी उम्र 16 वर्ष से कम है – पिता द्वारा दी गई जानकारी पर स्कूल रजिस्टर में अभिलिखित जन्मतिथि दर्शाती है कि अभियोक्त्री की उम्र 16 वर्ष से कम थी – अभिनिर्धारित – अभिभावक की साक्ष्य और स्कूल रजिस्टर साबित करते हैं कि घटना की तारीख पर अभियोत्री 15 वर्ष 8 माह की थी।

B. Penal Code (45 of 1860), Sections 363, 366, 376 - *Kidnapping and Rape - Prosecutrix who was washing cloths was dragged by appellant and thereafter taken to Sarni by cycle and truck - Prosecutrix was shifted in a rented house - Appellant committed sexual intercourse daily with her - Prosecutrix recovered from possession of appellant on the report of father of prosecutrix -*

*Cr.A. No.670/1994 (Jabalpur)

Held - Consent of prosecutrix is immaterial as she is below 16 years of age - Violation, intention and conduct of women do not determine the offence - They only foretell upon the intent with which accused had kidnapped her - Appellant by active persuasion enticed prosecutrix below 16 years of age to come from one place to another with intent to have sex illegitimately - Appellant rightly convicted by trial court - Appeal dismissed. (Paras 13 & 14)

ख. दण्ड संहिता (1860 का 45), धाराएँ 363, 366, 376 – व्यपहरण और बलात्संग – अपीलार्थी द्वारा अभियोक्त्री जो कपड़े धो रही थी, को घसीटा गया और उसके बाद साईकिल और ट्रक द्वारा सारनी ले जाया गया – अभियोक्त्री को एक किराये के मकान में रखा – अपीलार्थी ने उसके साथ प्रतिदिन मैथुन किया – अभियोक्त्री के पिता की रिपोर्ट पर अभियोक्त्री अपीलार्थी के कब्जे से बरामद की गई – अभिनिर्धारित – अभियोक्त्री की सहमति तात्विक नही है क्योंकि उसकी उम्र 16 वर्ष से कम है – उल्लंघन, आशय और महिला का आचरण अपराध अवधारित नही करते हैं – वे केवल बताते हैं कि अभियुक्त ने किस आशय से उसका व्यपहरण किया – अपीलार्थी ने 16 वर्ष से कम उम्र की अभियोक्त्री से अवैध रूप से शारीरिक संबंध बनाने के आशय से उसे सक्रिय अनुनय द्वारा एक स्थान से दूसरे स्थान पर जाने के लिए फुसलाया – अपीलार्थी को विचारण न्यायालय द्वारा उचित रूप से दोषसिद्ध किया गया – अपील खारिज।

Case referred :

(2006) 9 SCC 713.

A. Usmani, for the appellant.

Ku. Vijay Bhatnagar, Panel Lawyer, for the respondent/State.

JUDGMENT

S.A. Naqvi, J. :–The appellant Mohd. Aslam has preferred the appeal being aggrieved by the impugned judgment dated 25-6-94 passed by the First Additional Sessions Judge, Chhindwara in Sessions Trial No. 88/93 whereby the appellant has been convicted under Section 376, 363 and 366 of I.P.C and sentenced to undergo seven years R.I and fine of Rs. 500/- in default 2 months R.I, 2 months R.I and fine of Rs. 200/- in default 1 month R.I and 3 years R.I and fine of Rs. 200/- in default 1 month R.I respectively.

2. The case of the prosecution in short is that prosecutrix (PW-9) resides with her father Nandlal (PW-1) and mother, Kamalwati (PW-4). On 6-2-93, Nandlal and Kamalwati were out of village, Singori in respect of their business of oil, prosecutrix and her sister Anusia (PW-7) were at home. On 6-2-93, prosecutrix and her sister Suia @ Anusia went to wash the clothes on the well of Davendra Singh Seth which was situated on Rajola road. Anusia was fetching water from the well and prosecutrix was washing the clothes. The appellant accused Aslam reached on spot and took the prosecutrix on bicycle towards Badegoan thereafter he took the prosecutrix on bicycle to Shivpuri and then by truck to Sarni. They reached Sarni at about 11'O'clock in the night and they stayed in the Aslam's house. On 7-2-93, Aslam took a house on rent at Sarni and shifted along with the prosecutrix in the rented house. Everyday the appellant committed sexual intercourse with the prosecutrix. Prosecutrix asked the appellant to leave her to

parents house, but he did not take her to parents house. The appellant took the prosecutrix to Betul to perform court marriage, but it was not materialised. Anusia came to the house and told his brother-in-law, Prakash (PW-8) that Aslam has taken prosecutrix on bicycle. Prakash informed the parents of prosecutrix in this respect, they searched prosecutrix and lodged report Exhibit P-15C in police chowki Singori. Thereafter the prosecutrix was recovered from the possession of the appellant and she was brought in police Chowki, Singori. Panchnama Exhibit P-12 was prepared, one under-wear and salwar of prosecutrix were seized as per seizure memo Exhibit P-9. Prosecutrix was medically examined by Dr. Smt. P.Chhada (PW-3). She could not give any definite opinion in respect of commission of sexual intercourse with prosecutrix as per Exhibit P-5. She prepared two slides from the vaginal smear of prosecutrix, sealed them and handed over to police. Sealed slides were seized as per seizure memo Exhibit P-7, spot map Exhibit P-8 was prepared, one school certificate Exhibit P-11 of prosecutrix was seized as per seizure memo Exhibit P-10. One Dakhil Khariz Registrer of Primary Girls School, Singore was seized as per seizure Exhibit P-14. The appellant was arrested, he was examined by Dr. R.K. Sharma, he found the appellant competent to perform sexual intercourse as per report Exhibit P-3, he prepared slide from the semen of the appellant and slide was handed over to police, sealed semen slide was seized as per seizure memo Exhibit P-6. After completion of investigation, the appellant was charge-sheeted, case was committed to court of sessions for trial.

3. Learned Trial Court framed charges under Section 363, 366 and 376 of I.P.C. The appellant abjured the guilt and pleaded innocence and false implication. His defence is that on 6-2-93, he was on his photo-frame shop.

4. Prosecution examined 15 witnesses, no witness has been examined in defence. After hearing learned counsel for the parties, perusing evidence and material on record, learned Trial court convicted the appellant under Section 363, 366 and 376 I.P.C and sentenced him as hereinabove mentioned. Being aggrieved by the impugned judgment, the appellant has preferred the appeal.

5. I have heard learned counsel for the parties, perused the impugned judgment, evidence and material on record.

6. Learned counsel for appellant Shri A. Usmani, vehemently argued that the age of the prosecutrix is above 18 years, she eloped with the appellant voluntarily. Prosecutrix is a consenting party. The appellant has not committed any offence and learned Trial Court committed error in convicting the appellant. Learned panel lawyer supported the impugned judgment and contended that learned Trial court did not commit any illegality or perversity in convicting the appellant and sentencing him as hereinabove mentioned.

7. Prosecutrix (PW-9) in paragraph-4 of the cross-examination deposed that her age was 15 years at the time of seizure of her clothes. Nandlal (PW-1), father of the prosecutrix deposed that age of the prosecutrix was below 16 years.

Kamalwati (PW-4), mother of the prosecutrix deposed that the age of the prosecutrix was 15 years at the time of the incident. Nandlal deposed that he admitted the prosecutrix in school, at that time, he was knowing the age and date of birth of the prosecutrix. Nathulal Banwari (PW-13), was head master of Girls School, Singori, he deposed that as per the school record, date of birth of prosecutrix is 25-6-77, due to absence, the name of the prosecutrix was struck down from the register Exhibit P-13 and it is clear from the evidence of Nathulal Banwari that an entry in Exhibit P-13 pertains to prosecutrix. Exhibit P-13, is copy of Original Dakhil Khariz Register and the date of birth of prosecutrix is mentioned 25-6-77 in the register. The evidence of Nathulal Banwari is reliable. If his evidence is read with Dakhil Khariz register and evidence of Nandlal (PW-1) and Kamalwati (PW-4) and prosecutrix (PW-9), it is crystal clear that the date of birth was written in school on the information of Nandlal and he was having knowledge of the date of birth of prosecutrix. Evidence of Nandlal, Kamalwati, prosecutrix and Nathulal Banwari and Exhibit P-13 A proves that the date of birth of prosecutrix was 25-6-77 and on the date of incident i.e, 6-2-93, her age was about 15 years 8 months hence, it is proved beyond reasonable doubt that on the date of incident the age of the prosecutrix was below 16 years.

8. Dr. R.K. Sharma (PW-2) on 26-2-93 medically examined the appellant Mohd. Aslam, he deposed that the appellant was competent to perform sexual intercourse. His report is corroborated by Exhibit P-3. Evidence of R.K. Sharma is not challenged in the course of arguments and in his cross-examination. Hence, it is proved that the appellant was competent to perform sexual intercourse. As per medical evidence, no injury on the person of appellant or private part of the appellant was found. Dr. Smt. P.Chhada medically examined the prosecutrix, she did not find any injury on the person or private part of the prosecutrix. She could not give any definite opinion in respect of commission of sexual intercourse with the prosecutrix, that is to say, that there is no medical evidence on record in respect of commission of recent sexual intercourse with the prosecutrix.

9. Prosecutrix (PW-9) deposed that on the fateful day, she along with her sister Anusia (PW-7) went to well of Davendra Singh Seth to wash clothes. Well is situated at Rajola road. Anusia was fetching water from the well. Appellant came on the spot and dragged her towards Badegoan, thereafter he took her to Badegoan on bicycle, from Badegoan, he took her to Shivpuri. From Shivpuri, he took her to Sarni in a truck, they reached Sarni at night and stayed in the house of the appellant. The appellant committed sexual intercourse with her. Prosecutrix deposed that the appellant used to commit sexual intercourse daily with her in day and night. He kept her in a rented house. Ultimately, police recovered her from the possession of the appellant and apprehended the appellant. She was kept in police station Sarni and next day she was taken to Singori. Anusia @ Sia also corroborated the testimony of prosecutrix, she deposed that when prosecutrix was washing the clothes and she was fetching water from the well, the appellant

October-05 (First)

came and caught hold of the prosecutrix and took her away, she left her bucket on the well and went to her house and informed about the incident to her sister Shanti and brother-in-law, Prakash (PW-8). Prakash also deposed that Anusia came from the well and told her that Aslam has taken the prosecutrix on bicycle. He along with Nandlal, father-in-law searched prosecutrix but could not find her. Prosecutrix was recovered from the possession of the appellant, she told him that the appellant took her on cycle to Badegoan and Shivpuri ant in truck to Sarni, she also told him that appellant committed rape with her. Kamalwati (PW-4), deposed that she and her husband Nandlal (PW-1) came back from Pandarai. Anusia told them that appellant, Aslam caught hold of the prosecutrix and dragged her towards Badegoan. She was unsuccessfully searched, thereafter prosecutrix was recovered from the possession of the appellant, prosecutrix told her that appellant had taken her to Sarni and committed rape with her. Nandlal also corroborated the testimony of these witnesses. He lodged written complaint Exhibit P-1. Bhaiyalal(PW-14), received Exhibit P-1 and entered the same in Roznamchasana no. 224 as Exhibit P-15.

10. Newalal Vishwakarma (PW-6) prepared the spot map Exhibit P-8. It is clear that the well is situated near the road. It is shown that the appellant was standing near the well shown at No.6. The well is three furlongs away from the house of Nandlal. Chetram(PW-10), deposed that the under-wear and salwar was seized from the prosecutrix as per seizure memo Exhibit P-9. The seizure of salwar and under-wear from prosecutrix is proved by Sambhu Prasad Ahirwar (PW-15). Sambhu Prasad Ahirwar also seized the slides of prosecutrix prepared from her vaginal smear as per seizure memo Exhibit P-7. Bharatlal (PW-5) also corroborated the seizure of slides as per seizure memo Exhibit P-7. Sambhu Prasad Ahirwar (PW-15) and Bharatlal (PW-5) proved that in the sealed slide prepared from the semen of the appellant has been seized as per seizure memo Exhibit P-6. Sambhu Prasad Ahirwar (PW-15), seized school certificate as per seizure memo Exhibit P-10 in the presence of Bhuwanlal Sahu (PW-11), the relevant certificate is Exhibit P-11. Sambhu Prasad Ahirwar (PW-15), also seized one Dakhil Khariz Register as per Exhibit P-14 from Nathulal Banwari (PW-3). The relevant copy of register is Exhibit P-13 which has been discussed in the previous paras of the witnesses. Damodar (PW-12), turned hostile, he is not supporting the seizure Exhibit P-10. Seizure of aforementioned articles have not been challenged during the course of the arguments.

11. I have gone through the evidence of prosecutrix (PW-9), Nandlal (W-1), Kamalwati (PW-4), Anusia @ Sia (PW-7) and Prakash (PW-8), I am of the view that there is no material contradiction, omission or improvement in their statements. They remain firm and consistent in cross-examination. There is no exaggeration in their statement. There is no evidence on record to show that these witnesses are falsely implicating the appellant in a offence like kidnapping and rape. There is no previous enmity between the appellant and these witnesses. Their statements are corroborated by report Exhibit P-1 and roznamchasana entery Exhibit P-15.

Evidences of these witnesses is reliable and learned Trial Court did not commit any illegality or perversity in relying upon the testimony of these witnesses. Learned Trial Court rightly held that on 6-2-93, prosecutrix (PW-9) and her sister Anusia @ Sia (PW-7) went to wash clothes on the well and the appellant Mohd. Aslam came there and took prosecutrix from the well. She was taken to Sarni via Badegoan and Shivpuri and he committed sexual intercourse with prosecutrix.

12. Learned counsel for the appellant vehemently argued that the medical evidence belies the commission of sexual intercourse with the prosecutrix (PW-9), hence, it cannot be held that the appellant has committed sexual intercourse with the prosecutrix. Learned counsel for the appellant relying upon *Yerumalla Latchaiah Vs. State of A.P* (2006) 9 SCC 713 contended that according to the evidence of doctor Smt. P.Chadda who examined the prosecutrix immediately after the occurrence, there was no sign of rape. Thus, evidence of prosecutrix is belied by the medical evidence and it should be held that the accused/appellant is entitled to acquittal. In the case of *Yerumalla Lachaiah* (supra), the age of the prosecutrix was eight years. On examination of prosecutrix Dr. K. Scheritha stated in her evidence that no injury was found on any part of the body, much less on private part. Hymen was found intact and the doctor specifically stated that there was no sign of rape at all. It has been stated that the vaginal smears were collected and examined under the microscope but no sperm detected. But the facts of the present case is different from aforementioned citation. The age of the prosecutrix is 15 years plus. As per Dr. Smt. P.Chadda, hymen was absent and two fingers were entering in the vagina of the prosecutrix. She opined that no definite opinion can be given in respect of recent intercourse with the prosecutrix. Hence, citation relied upon by the learned counsel for the appellant does not help the appellant's case. It is settled principle of law that if evidence of prosecutrix is corroborated by other evidence and it does not suffer from any infirmity and evidence is cogent and consistent then conviction can be based on the testimony of prosecutrix and her evidence can be relied upon. As it has been observed that there is no enmity between the prosecutrix and her family with the appellant and there is no reason to implicate the appellant in false case. Hence, the evidence of prosecutrix and other witnesses is reliable.

13. Learned counsel for the appellant submitted that there is sufficient evidence and circumstances on record to hold that the prosecutrix was a consenting party and she eloped with the appellant with her consent and appellant committed sexual intercourse with her consent. It is also urged that on way to Sarni from the place of incident, there was sufficient occasion for prosecutrix to alarm the persons which were found on the way, but she did not do so and did not call any one to help her, which leads to the presumption that the prosecutrix was a consenting party. It is true that the prosecutrix (PW-9) did not cried for help on way to Sarni even inform to the truck driver by which they went to Sarni, but only this fact does not lead to the presumption that the prosecutrix was a consenting party.

There is sufficient evidence on record to prove that the appellant dragged the prosecutrix from the spot and took her on bicycle thereafter, in a truck to Sarni. Prosecutrix specifically denied that the appellant used to give her money and she was intimate with the appellant. She also specifically and firmly denied that one day before the incident, the appellant met her and told her that they will go to an enjoy trip. She also denied that she herself sat on the bicycle of the appellant and went with him. She also specifically deposed that no one was found on way to Badegoan. She also specifically stated that she does not want to elope with the appellant. Looking to the facts and circumstances of the case, the arguments advanced by the learned counsel for the appellant is devoid of merit. There is no sufficient evidence on record that the prosecutrix was in love with the appellant and she voluntarily eloped with the appellant. It is evident from the evidence of prosecutrix that the appellant came on the spot and dragged her from the spot upto 1/2 kilometers and thereafter he took her away on bicycle. If it is taken to be true that the prosecutrix is a consenting party, it does not help in any way to the appellant because on 6-2-93, the age of the prosecutrix was below 16 years and her consent to sexual intercourse does not help the appellant because there is evidence that prosecutrix was enticed by the appellant to go with him. There is sufficient evidence on record that the prosecutrix was removed from the lawful guardianship of Nandlal (PW-1) by deceitful means, under compulsion. There is sufficient evidence on record that the prosecutrix was removed from the legal guardianship of her parents with intent to commit illicit sexual intercourse with her. Looking to the graveness of offence under this section, the violation, intention and the conduct of the women do not determine the offence, they can only foretell upon the intent with which the accused had kidnapped her and abducted the women and the intent of the accused is the vital question for determination in each case. Once answer to the intent of the accused is established, evidence is complete, whether accused succeeded in his purpose and whether or not in the event, the woman was consented to the marriage or illicit intercourse. On going through the evidence of prosecutrix, it is clear that that intent of the appellant was to force prosecutrix to illicit intercourse and ultimately he succeeded and seduced prosecutrix to illicit intercourse. Consequently, the offence of abduction of the prosecutrix from the legal guardianship of her parents is complete. The arguments advanced by the learned counsel for the appellant are devoid of merit.

14. The appellant by active persuasion enticed the prosecutrix below 16 years of age to come from one place to another with intent to have sex illegitimately hence, I am of the view that the learned Trial Court rightly convicted the appellant under Section 363, 366 and 376 I.P.C and no interference is warranted in the judgment of conviction. Looking to the graveness of the offence, I am of the view that the jail sentence awarded by the learned Trial Court is adequate and there is no scope to reduce the jail sentence awarded by the learned Trial court.

15. Consequently, the appeal is devoid of merit, deserves to be and is hereby

dismissed. The appellant is on bail. He is directed to surrender forthwith before the Trial court to undergo remaining part of jail sentence otherwise the learned Trial Court is directed to issue non-bailable warrant of arrest to commit him to jail to undergo remaining part of jail sentence.

Appeal dismissed.

I.L.R. [2008] M. P., 2715
APPELLATE CRIMINAL
Before Mr. Justice A.P. Shrivastava
12 August, 2008*

KAPTAN SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 376 - *Rape - Consent and Submission - Difference - There is a difference between consent and submission - Every consent involves a submission, but the converse does not follow, and a mere act of submission does not involve consent - Consent of woman in order to relieve an act of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with existing capacity and power to withdraw the assent according to one's will or pleasure - Therefore, a woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of physical and moral power to act in a manner she wanted.* (Para 13)

दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – सम्मति और समर्पण – अन्तर – सम्मति और समर्पण में अंतर है – प्रत्येक सम्मति में समर्पण अन्तर्वलित होता है, किन्तु इसका उल्टा अनुसरित नही किया जाता, और समर्पण के कृत्य मात्र में सम्मति अन्तर्वलित नही है – किसी महिला की सम्मति, बलात्संग जैसे दाण्डिक प्रकृति के कृत्य से मुक्त करने के लिए, सकारण, सोच–विचार के साथ मस्तिष्क में अच्छा–बुरा तौलने के बाद उसकी इच्छा या मर्जी के अनुसार सम्मति को वापस लेने की विद्यमान सामर्थ्य और शक्ति के साथ होना चाहिए – एक महिला ने सम्मति दी ऐसा केवल तभी कहा जाएगा जब वह स्वतंत्र रूप से स्वयं को समर्पित करती हो और वह शारीरिक और नैतिक शक्ति के कृत्य को जिस तरीके से करना चाहती हो उसके लिए स्वतंत्र हो।

Cases referred :

1997(I) MPWN 94, AIR 2001 SC 3049, 1989 C.Cr.J. NOC 45, 2005(II) MPWN 132, 2008(1) CCSC 523(SC), AIR 1958 Punjab 123.

Mukesh Gupta with *Y.S. Tomar,* for the appellant.
Mohd. Irshad, Panel Lawyer, for the respondent/State.

J U D G M E N T

A.P. Shrivastava, J. :–This appeal is directed by the appellant against the judgment of conviction and sentence dated 2.3.2002 passed by VI Additional

*Cr.A. No.150/2002 (Gwalior)

Sessions Judge, Gwalior (M.P.) in Sessions Trial No. 248/2001, whereby the appellant has been convicted under Section 366 of IPC and sentenced to undergo rigorous imprisonment for five years with a fine of Rs. 2,000/- and under Section 376 of IPC, sentenced to undergo rigorous imprisonment for seven years with a fine of Rs. 3,000/- with default stipulations.

2. According to the prosecution, the facts of the case are that a report Ex.P.1 was lodged by the complainant Ramkali(P.W.1), mother of the prosecutrix (P.W.2) at police station Padav that after taking food at about 9 in the night while she got slept her daughter was reading near her. When she woke up in the night she found that her daughter was not in the house. She enquired from Lakhan, Ramesh and Deepak, who were also residing in the same locality. When she was searching her daughter, her daughter came out from the house of the appellant. On seeing her by the locality, her daughter disclosed that the appellant had assured to marry her and on this pretext gave a Pudia for mixing in the food for which her mother got slept and she was taken by the appellant to his house and committed sexual intercourse with her. After lodging the report, she was sent for medical examination. After completion of investigation, challan was filed before the Court from where the case was committed to the Court of Session. The learned Sessions Court acquitted the appellant of the charge under Section 363 of IPC but convicted under Sections 366 and 376 of IPC and sentenced him accordingly as stated above.

3. During the course of arguments, counsel for the appellant challenged the conviction on the ground that the incident took place in the intervening night of 12-13 April, 2001 at about 9 :00 pm - 3 am but the report was lodged at 13.04.2001 at about 1:45 pm. The distance of the police station from the place of occurrence is only 1 kilometer. The relatives of the complainant was present in the house. Therefore, the explanation given by the complainant is not satisfactory. Further, regarding the age of the prosecutrix no documentary evidence has been adduced by the prosecution. As per First Information Report, the age of the prosecutrix was shown to be 14 years but in ossification test, her age was found above 16 and below 19 years. The report is Ex.P.3. Therefore, it is not conclusively established that the age of the prosecutrix is below 18 years on the date of occurrence. Further, it is also submitted that the way the incident took place; the prosecutrix went to the house of the appellant who was also residing in the same locality and they know to each other, it appears that she was a consenting party. Therefore, the learned trial Court has committed an error in convicting the appellant under Sections 366 and 376 of IPC.

4. Counsel for the respondent-State supported the judgment of the learned trial Court and submitted that from the testimony of the prosecutrix, it does not appear that she is a consenting party. She was taken away by the appellant by giving some thing to the prosecutrix so that her mother may sleep. So, she is not a consenting party.

5. Counsel for the appellant also submits that the story of the prosecutrix about

love letters Ex.D.3 to Ex.D.45 written by her and that she was forcibly taken by the appellant before the commission of act, is not truthful story. He submits that letters were written by her is not possible to be written just before commission of the act.

6. Ramkali (P.W.1) who corroborated the version of given in Ex.P1 has deposed that appellant committed sexual intercourse with her daughter(P.W.2) who is prosecutrix in the case.

7. Prosecutrix (P.W.2) deposed that in the intervening night of 12-13 when she woke up for toilet. After opening the door, while she was going towards bathroom, she was caught hold of by the appellant, and thereafter threatened her by showing knife. Then he took her to his house by pressing her mouth. He forced her to write letters and thereafter committed sexual intercourse with her. When appellant heard the noise of people of the locality, she came out from the house and informed about the incident to her mother.In cross-examination, she deposed that when appellant caught hold of her, the appellant threatened her by showing knife. But this fact was omitted in her police diary statement Ex.D.2. This fact was also omitted in the police diary statement that when she cried the appellant had shut his mouth.In her cross-examination, material contradictions and omissions came out. She also disclosed that in the house of the appellant, paternal and maternal uncle of the appellant were present and closed the door. Her statement is also omitted in her police diary statement Ex.D.2. She denied that letters Ex.D.3 to Ex. D. 45 were written previously. But she admits that the letters were written by her hand. In cross-examination, she also disclosed her age is 06.01.1987 but he cannot say it is correct or not. No documents regarding the age of the prosecutrix have filed.

8. Deepak (P.W.3) and Ramesh (P.W.4) stated that Ramkali, mother of the prosecutrix came and informed that her daughter is in the house of the appellant. After some time, she came out from the house of the appellant at about 3 in the morning. Similar statement has been given by Dilip (P.W.5) but Ashok Kumar (P.W.6) not corroborated the prosecution case and was declared hostile.

9. Dayal Singh (P.W.7)and Mishrabai (P.W.8) are also relatives of the prosecutrix, disclosed that prosecutrix informed them that appellant was taken her forcibly and committed sexual intercourse with her.

10. Dr.Amit Saxena (P.W.12)examined the prosecutrix on 13th April, 2001 and opined that the possibility of sexual intercourse cannot be ruled out. In cross-examination, doctor submits that the some injury sustained on her hymen is not possible by self-infliction. The report is Ex. P.8.

11. The learned trial Court acquitted the appellant under section 363 of IPC by holding that it is not established that she was below 18 years of age at the time of occurrence but relying on the testimony of the prosecutrix found the appellant guilty for committing an offence of sexual intercourse with the prosecutrix and the act was committed by the appellant against her will.

12. Counsel for the appellant submits that the learned trial Court has committed an error in holding that the appellant found guilty for commission of offence. Regarding material contradictions and omissions, he relied on *Kheek Ram Vs. State of M. P.* reported in 1997 (I) MPWN [94] in which it is held that under Section 161 of Cr. P. C., 1973, police statements are the very foundation of prosecution case. No witnesses can be relied on for a fact which he does not state in police statement. Similarly, in the case of *Dilip and another Vs. State of M. P.* AIR 2001 SC 3049, it is held that truthfulness of version of the prosecutrix being doubtful, cannot be relied upon. In the case of *Sagir Vs. State of M. P.* 1989 C.Cr. J. NOC 45, it is also held that if a minor girl leaving her house voluntarily, a person commits intercourse with her, would be liable for conviction under Section 376 of IPC even though the intercourse has been done by her own will. But there is no medical evidence regarding this. Neither the statement of the prosecutrix is corroborated by any other evidence. Her own statement is exaggerated and unnatural hence unreliable. Counsel for the appellant also placed reliance in the case of *Pappu Vs. State of M. P.* 2005(II) MPWN [132] in which it is held that statement of the prosecutrix not corroborated by any witness alleged to have come on spot. Prosecutrix alleging that she was thrown on the earth but no injury was found. Medical evidence not giving definite opinion on rape. Therefore, the accused is entitled to benefit of doubt. Lastly, counsel for the appellant relied on a decision of Hon'ble Apex Court in the case of *Ujjagar Singh Vs. State of Punjab* 2008(1) CCSC 523(SC) in which the appellant-accused was tried under Sections 376 and 302 of IPC. Appellant uncle alleged to have raped his niece. As vaginal swab and clothes taken from her dead body indicated presence of semen. But, absolutely no evidence to suggest that intercourse committed by appellant without her consent or against her will. From two injuries other than gunshot wounds on the dead body of victim not indicating any attempt to commit rape or commission of rape. Moreover, no attempt made by prosecution to get appellant medically examined to ascertain his capacity to perform sexual intercourse. Conviction of appellant under Section 376 of IPC is unsustainable.

13. During the course of arguments, much emphasis has been made about the consent of the prosecutrix.

The crux of the offence of rape under Section 375, IPC is sexual intercourse by a man with a woman against her will and without her consent under any one of the six circumstances mentioned in the section.

Consent is of paramount importance to determine the liability of a person for the offence of rape. Consent exonerate the accused from liability altogether. It may be either express or implied depending upon the nature and circumstances of a case. A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and

untrammeled (not hampered) right to forbid or withhold what is being consented to, it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

Consent of the woman in order to relieve the accused of the charge of rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

Submission under the influence of fear or terror is not consent and will not exonerate a person from liability. There is difference between consent and submission. In the case of *Rao Harnarain Singh, Seoji Singh Vs. State* reported in AIR 1958 Punj 123, it is held that consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, quiescence non-resistance and passive going in cannot be deemed to be consent to exempt a man of the charge of rape. It was observed by the Court that a mere act of helpless resignation, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. It was further observed by the Court that there is a difference between consent and submission. Every consent involves a submission, but the converse does not follow, and a mere act of submission does not involve consent. Consent of girl in order to relieve an act of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with existing capacity and power to withdraw the assent according to one's will or pleasure. Therefore, a woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of physical and moral power to act in a manner she wanted.

14. Therefore, looking to the above facts and circumstances of the case specially testimony of the prosecutrix, it appears that she was compelled to sexual intercourse by the appellant without her willingness and although she may have love affairs with the appellant but it cannot be said that on the date of incident, she was a willing party and had given her consent to the appellant for sexual intercourse. The learned trial Court has rightly observed in paras 49, 51 and 52 of its judgment.

15. Regarding the delay, the fact about the incident came to the knowledge of the complainant in the early morning at about 3 and the report was lodged on the same day at about 1:45 pm. In cases of offence of rape, there are various factors which may cause some delay in lodging the report. Looking to the facts and circumstances of the case, delay of a few hours is not fatal to the prosecution case. Further, the objection regarding non-compliance of Section 157 of Cr. P. C. will not vitiate the trial of the case.

16. In view of the above submissions and the considerations of the entire evidence as adduced by the prosecution, I think the learned trial Court has rightly found the appellant guilty under Sections 366 and 376 of IPC. Thus, the finding of conviction and sentence as recorded by learned trial Court does not require any interference. Therefore, the conviction and sentence awarded by learned trial Court is hereby affirmed. If the appellant is on bail, his bail bond shall stand cancelled. He is directed to surrender before the trial Court to serve out the remaining part of sentence. In the result, the appeal stands dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2720

CIVIL REVISION

Before Mr. Justice S.K. Seth

12 August, 2008*

MOHANLAL GARG & ors. ... Applicants

Vs.

M/S. CHAUDHARY BUILDERS PVT. LTD. & ors. ... Non-applicants

Civil Procedure Code (5 of 1908), Section 115, Specific Relief Act, 1963, Section 28 - *Agreement for sale of immovable property - Award of arbitrator directing execution of sale deed - Rejection of application for rescission of contract - Revision - There was no unreasonable delay on part of non-applicant No.1 to approach court for enforcing award - Delay attributed to applicants themselves - Held - The rise in price relating to immovable property agreed to be conveyed to non-applicant No.1 would not be relevant to deny relief of specific performance - No ground for interference in order of trial court made out - Revision dismissed.* (Paras 16 & 17)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115, विनिर्दिष्ट अनुतोष अधिनियम, 1963, धारा 28 – स्थावर सम्पत्ति के विक्रय के लिए अनुबन्ध – मध्यस्थ के अवार्ड में विक्रयपत्र निष्पादित करने का निदेश – संविदा के विखण्डन के लिए आवेदन खारिज – पुनरीक्षण – अनावेदक क्र. 1 ने अवार्ड को प्रवृत्त कराने के लिए न्यायालय से निवेदन करने में कोई अयुक्तियुक्त विलम्ब नही किया – स्वयं आवेदकों द्वारा विलम्ब किया जाना माना जा सकता है – अभिनिर्धारित – अनावेदक क्र. 1 को हस्तान्तरण के लिए अनुबन्धित स्थावर सम्पत्ति के मूल्य में वृद्धि होना विनिर्दिष्ट पालन के अनुतोष से इंकार करने के लिए सुसंगत नही होगा – विचारण न्यायालय के आदेश में हस्तक्षेप करने का कोई आधार नही – पुनरीक्षण खारिज।

Cases referred :

(1997) 3 SCC 1, (2002) 1 SCC 134, (2001), SCC 617,(2004)8 SCC 689.

G.M. Chaphekar with *D.M. Shah*, for the applicants.

A.S. Garg with *N.K. Maheshwari & G.S. Yadav*, for the non-applicants.

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*C.R. No.49/2008 (Indore)

(ORAL) O R D E R

S.K. SETH, J. :–This order shall also govern the disposal of Civil Revision No. 50/2008 (*Mohanlal Garg S/o. Prahaladdasji Garg V/s. M/s. Chaudhary Builders Pvt. Ltd. and two others*) as learned counsel appearing for the parties agreed that common facts and law are involved in both the civil revisions and both civil revisions arise out of the common impugned order dated 14.12.2007 passed by Additional District Judge, Indore in Civil Suit No. 52-A/2007.

2. By the impugned order, learned Court below has rejected applicants' application u/s. 28 of the Specific Relief Act, (hereinafter referred to as 'the Act' for short), while it allowed the application for extension of time filed by non-applicant No.1. Hence, these two revisions are against the common impugned order. The facts relating to these two revisions are common and the relevant facts for the disposal of these revisions are as under.

3. It is undisputed that on 15.7.1992, an agreement of sale was executed jointly by Late Rajendra Kumar Garg and the above applicants in favour of non-applicant No. 1 in respect of the suit property situated in the heart of the city of Indore. As per agreement, they had agreed to sell suit property @ Rs. 130/- per Sq. ft. to the non-applicant No. 1. Thus, the total sale-consideration comes to Rs. 40.95 lacs and as against the same, applicants had received Rs. 22,44,500 as an advance. Said agreement of sale contained an arbitration clause to resolve mutual disputes by the sole arbitrator – Shri Gulabchandji.

4. Dispute arose between the parties and applicants refused to submit to the arbitration; therefore, the non-applicant No.1 filed an application u/s. 20 of the Arbitration Act, 1940 in the year 1994 which was subsequently registered as Civil Suit No. 12-A/1996 in the Court of XVIth Additional District Judge, Indore. The application was allowed and by order dated 27.11.1998, the dispute was referred to sole arbitrator, Shri Gulabchandji, for arbitration. This order of the Civil Court was challenged in this Court in M.A. No. 173/1999 by applicants and without inviting any final decision on merit, the said appeal was withdrawn on 15.1.2004. As a result, the order dated 27.11.1998 passed by XVIth Additional District Judge, Indore became final.

5. It seems that after withdrawal of the said appeal, the sole arbitrator issued notices to the parties and invited their respective claims. The applicants in their claim admitted the execution of agreement of sale, but contended that the non-applicant No.1 had failed to pay the balance amount of consideration within the stipulated time, therefore, the agreement of sale had come to an end. In the alternative, the applicants also submitted that apart from the sale consideration, if they were paid damages for the last twelve years, then they were ready and willing to perform their part of the contract.

6. The parties before the sole arbitrator agreed not to adduce any evidence, therefore, the sole arbitrator after discussing the matter with the parties, passed

the award dated 24.9.2004, wherein the non-applicant No.1 was directed to pay the balance amount of sale consideration amounting to Rs. 18,50,500/- together with damages as mentioned in the award itself. The award was filed in the Court in the presence of the parties by the sole arbitrator. No objections were raised by either of the parties, therefore, on 19.10.2004, the Court below passed order relevant portion whereof is extracted below :-

" उभय पक्ष ने अवार्ड पर कोई आपत्ति भी प्रस्तुत नहीं की है आर्बिट्रेशन एण्ड कन्सीलेशन एक्ट के प्रावधानों के अनुसार अब अवार्ड को रूल ऑफ कोर्ट बनाने की कोई आवश्यकता नहीं है अवार्ड का निष्पादन सीधे भी किया जा सकता है"

This order went unchallenged and the award passed by the sole arbitrator attained finality.

7. On 16.12.2005, the non-applicant No.1 filed execution case in the lower Court for the execution of sale-deed in its favour pursuant to the award, alleging that despite order passed by the Court on 19.10.2004, the applicants were delaying or avoiding to execution of the sale-deed in favour of non-applicant No.1.

8. The applicants submitted an application praying for dismissal of the execution proceedings on the allegation that they had never delayed or avoided execution of the sale-deed. On the contrary, it was contended that right from beginning, they were ready and willing to perform their part of the contract for which several letters were written to the non-applicant No.1. In reply to the said application, the non-applicant No.1 contended that at no point of time, the applicants had issued any letter nor they submitted any amendment to the draft sale-deed sent along with the notice of the execution application. A rejoinder dated 4.9.2006 to the said reply was filed by the applicants; wherein they had taken a stand that the non-applicant No.1 had not sufficient money with him for payment of balance amount of sale consideration to the applicants and the non-applicant No.1 was never ready and willing to perform his part of the contract.

9. On 4.10.2006, the applicants herein filed an application u/s. 28 of the Act read with Section 46 of the Indian Contract Act for rescission of contract for sale of immovable property (the suit property). The non-applicant No.1 filed reply to the said application, and also deposited the balance amount of sale consideration including the damages awarded by the sole arbitrator in the month of January, 2007.

10. Looking to the factual controversy, learned trial Court recorded evidence, but before any order could be passed, the non-applicant No.1 filed an application on 18.8.2007 for extension of time u/s. 28 of the Act read with Section 148 of the Civil Procedure Code. Learned trial Court heard arguments on both the applications and thereafter, by the common impugned order rejected the applicants' application u/s. 28 of the Act read with Section 46 of the Indian Contract Act and allowed the application of non-applicant No.1 for extension of time, as aforesaid. Hence, these two revisions.

11. It is well settled that revisional owers of this Court under Section 115 of the CPC are limited to keep the subordinate Courts within the bounds of their jurisdiction. It is only where there is a jurisdictional error or illegality or material irregularity in the exercise of jurisdiction that interference by way of revision is called for. It is against this backdrop, that the case of applicants has to be examined.

12. A brief reference may be made to the grounds raised in the Memo of Revision; that the applicants' application under Section 28(1) of the Act was wrongly rejected, lower Court was in error in not rescinding the contract for laches by the respondent No. 1; lower erred in extending time for performance of the contract; lower Court erred in ignoring material evidence; the evidence was wholly ignored; the discretion was arbitrarily exercised in granting extention of time to respondent No. 1.

13. Shri Chaphekar, learned senior counsel appearing for the applicants, contended that specific performance is an equitable relief and notwithstanding law being in favour of vendee, the Court has discretion to refuse to grant of specific relief if it is found to be iniquitous. He submitted that the applicants cannot be pinned down to the agreement of sale executed in the year 1992 specially keeping in view the steep rise in the prices of urban properties in a city like Indore. In support of his contention, Shri Chaphekar has placed strong reliance on the following passage from *K. S. Vidyanadam v/s. Vairavan*: (1997) 3 SCC. Page 1. :-

> "It has been consistently held by the Courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property. While exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties)."

14. It was also contended by Shri Chaphekar that the agreement of sale of immovable property was executed on 15.7.1992 which the non-applicant No.1 is trying to enforce in the year 2007, therefore, it could not be said that steps were taken by the non-applicant No.1 within reasonable time. Even otherwise, the Court had accepted the award in 2004 and the non-applicant No.1 came forward for execution of the award only after fifteen months and this delay is also fetal to the applicants. Thus, according to Shri Chaphekar, the Court below while exercising its jurisdiction has acted with an illegality or with material irregularity and as such, the common impugned order is unsustainable in law.

15. On the other hand, Shri A.S. Garg, learned senior counsel for the non-applicant No.1 submitted and in our opinion not without justification, that the delay was entirely due to the applicants. He has mentioned following facts in support of his contention. He submitted that right from the beginning applicants did not accept the nomination of sole arbitrator which compelled the non-applicant No.1 to file an application in the trial Court. When the said application was allowed, the applicants challenged the order of the trial Court in this Court in M.A. No. 173/1999. The said miscellaneous appeal was unilaterally withdrawn by the applicants in the year 2004 without obtaining any decision on merit. Thus, according to Shri Garg, the applicants cannot make capital on account of their own conduct so as to deprive the non-applicant No.1 of the fruits of the agreement relating to immovable property. Shri Garg also pointed out that after death of Shri Rajendra Kumar Garg during the pendency of M.A. No. 173/1999, inter-se disputes arose between the applicant No.1 and the widow and daughter of Late Rajendra Kumar Garg (non-applicants No. 2 and 3 herein) and a civil suit is pending between them filed by applicant No.1. One of the reliefs prayed in that suit is that the applicant No. 1 be declared authorised to execute the sale-deed(s) in favour of non-applicant No.1 pursuant to the agreement of sale dated 15.7.1992. It was also contended that in the pleadings the applicant No.1 took a stand that the agreement of sale has come to an end, whereas in the evidence, he has stated that he accepted the agreement valid for a period of one month from the date of the award and thereafter, the agreement ceased to have any force. He further submitted that looking to the shifting stand taken by the applicant No.1 in his pleadings and evidence, it became necessary for the non-applicant No.1 to apply for extension of time by way of abundant caution though in fact, there was no delay on the part of the non-applicant No.1 to perform his part of the contract, which he was ever ready and willing to perform. Shri Garg also submitted that considering the overall facts and circumstances of the case, it could not be said that the Court below while exercising its discretion and the jurisdiction has acted with illegality or material irregularity so as to warrant interference with the order impugned u/s. 115 of the Civil Procedure Code.

16. After having heard learned counsel for the parties at length and going through the material available on record, we find that there is no merit and substance in the revisions. There is no infirmity in the impugned order to bring it within the mischief of

Section 115 of the CPC. The court below has analysed the material before it before coming to conclusion that there was no unreasonable delay on the part of the non-applicant No.1 to approach the Court for enforcing the award. Reasonable time is a relative concept and it would vary from case to case depending upon the facts. In *Veerayee Ammal V/s. Seeni Ammal* : (2002) 1 SCC. 134, their Lordships of Supreme Court have explained what is a reasonable time in relation to a person seeking specific performance when the time is not essence of the contract. it was held as under :-

> "The word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to given an exact definition of the word 'reasonable'.The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of 'reasonable time' is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. It other word, it means as soon as circumstances permit."

17. The contention of Shri Chaphekar that rise in price of immovable property agreed to be conveyed would be a relevant factor to deny the relief of specific performance is based upon (1997) 3 SCC. 1 (Supra). It may be relevant to point out that the said decision was distinguished in a subsequent decision of Supreme Court in *V. Pechimuthu V/s. Gowramma* : (2001) 7 SCC. 617, wherein it has been held by their Lordships that :

> "Rise in price of land agreed to be conveyed may be a relevant factor in denying the relief of specific performance when Court is considering whether to grant decree for the first time." [Emphasis added].

Same principle was reiterated by their Lordships of Supreme Court in a decision reported in (2004) 8 SCC. 689 : *Swarnam Ramachandran V/s. Aravacode Chakungal Jayapalan.* Thus, it is clear that at this stage, the rise in prices, if any, relating to the immovable property agreed to be conveyed to the non-applicant No.1. would not be a relevant or telling factor to deny the relief of specific performance in terms of the arbitration award. We have already pointed hereinabove that the delay is on the part of the applicants and, therefore, no premium can be put on the said delay so as to relieve the applicants from their contractual obligations under the agreement of sale.

18. In view of the foregoing discussion, both the revisions fail and are hereby dismissed with costs. Counsel's fee Rs.1,000/- (One Thousand), if certified.

19. Let a copy of this order be retained in the file of Civil Revision No. 50/2008 (*Mohanlal Garg V/s. M/s. Chaudhari Builders Pvt. Ltd.*).

20. Order accordingly.

Order accordingly.

I.L.R. [2008] M. P., 2726

CRIMINAL REVISION

Before Mr. Justice Rakesh Saksena

15 January, 2008*

RAVI NEAL ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

A. **Criminal Procedure Code, 1973 (2 of 1974), Section 311-A** - *Power of magistrate to order person to give specimen signatures or handwriting - Charge-sheet filed against applicant and almost all prosecution witnesses examined - Investigation Officer also partially examined - Provision not attracted.* (Para 5)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311–ए – नमूना हस्ताक्षर या हस्तलेख देने के लिए किसी व्यक्ति को आदेश देने की मजिस्ट्रेट की शक्ति – आवेदक के विरुद्ध आरोप–पत्र पेश और लगभग सभी अभियोजन साक्षियों का परीक्षण किया गया – अनुसंधान अधिकारी का भी अंशतः परीक्षण किया गया – प्रावधान आकृष्ट नही होता है।

B. **Criminal Procedure Code, 1973 (2 of 1974), Section 173(8)** -*During investigation standard handwriting of accused (applicant) was collected and sent to handwriting expert but no definite opinion given by expert - Thereafter, charge-sheet filed - During trial another application filed by I.O. for collecting specimen handwriting afresh - Trial court allowed the application - Held - After charge-sheet is filed, I.O. is not precluded from obtaining and forwarding further evidence to magistrate - However, that evidence is to be forwarded by way of further report in respect of such evidence - Prosecution evidence has almost been completed - First report of expert was not favourable to prosecution - No provision under which such order can be passed - Trial court committed error in allowing application - Revision allowed.* (Para 6)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173(8) – अनुसंधान के दौरान अभियुक्त (आवेदक) के मानक हस्ताक्षर संकलित कर हस्तलेख विशेषज्ञ को भेजे गये, किन्तु विशेषज्ञ ने कोई निश्चित राय नही दी – तत्पश्चात् आरोप–पत्र पेश किया गया – विचारण के दौरान अनुसंधान अधिकारी द्वारा नये नमूना हस्ताक्षर संकलित करने के लिए अन्य आवेदन पेश किया गया – विचारण न्यायालय ने आवेदन स्वीकार किया – अभिनिर्धारित – आरोप–पत्र पेश होने के उपरांत अनुसंधान अधिकारी अतिरिक्त साक्ष्य प्राप्त करने और मजिस्ट्रेट को प्रेषित करने से निवारित नही हो जाता – तथापि वह साक्ष्य, ऐसी साक्ष्य के सम्बन्ध में अतिरिक्त रिपोर्ट के रूप में प्रेषित की जाना चाहिए – अभियोजन साक्ष्य लगभग पूर्ण हो चुकी है – विशेषज्ञ की प्रथम रिपोर्ट अभियोजन के अनुकूल नही थी – कोई उपबंध नही जिसके अन्तर्गत ऐसा आदेश पारित किया जा सकता हो – विचारण न्यायालय ने आवेदन मंजूर करने में त्रुटि कारित की – पुनरीक्षण मंजूर।

Amit Verma, for the applicant.

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

*Cr.R. No.583/2007 (Jabalpur)

ORDER

RAKESH SAKSENA, J. :–Applicant has filed this revision against the order dated 28.2.2007, passed by Second Additional Sessions Judge, Bhopal, in Sessions Trial No. 321/05, allowing the application filed by the Investigating Officer for collecting the standard handwritings of the accused and for sending the same to handwriting expert.

2. Applicant is facing trial under Sections 302/394 and 120-B of Indian Penal Code. Almost all the prosecution witnesses have been examined and on 25.11.2006 the case was fixed only for recording the evidence of Investigating Officer. The evidence of Investigating Officer R. Sharma was partly recorded on 5/6.12.2006, but later on he filed an application praying for time to collect the standard handwritings of the accused and send the same to handwriting expert. During investigation the standard handwriting of the accused was collected and sent to handwriting expert. Report of the handwriting expert was filed in the Court. However, according to the said report, no definite opinion could be given as to whether the questioned documents were in the handwriting of the accused. Investigating Officer moved an application on 24.4.2006 before the Trial Court for again collecting the standard handwriting of accused. The said application was allowed on 2.5.2006 and the accused was directed to give specimen handwriting for examination by the handwriting expert for comparison with the questioned documents. In compliance of the aforesaid order, the specimen of the handwriting of the accused was taken on 8.5.2006 before the Court. The standard documents were sent to handwriting expert and were compared with the questioned document and the report was submitted. The report filed before the Court is dated 24.10.2006. According to said report, the supplied standard writing did not provide sufficient data as well as variations in the writing characteristics for thorough comparison. Hence, it was found not possible to express definite opinion on questioned documents on the basis of available data. It was mentioned in the report that for definite opinion, well proved contemporaneous admittedly genuine writings containing voluminous capital English letters of person concerned, were required. In view the said report, Investigating Officer again filed an application on 5.12.2006 seeking time for collection of documents. The said application was allowed by the impugned order. It was ordered that prosecution may collect/bring some other standard documents and may file a report after getting it examined by the expert.

3. Learned counsel submits that this order is beyond the jurisdiction of the trial Court. This power of investigation for collection of evidence cannot be exercised by the trial Court during pendency of the trial when almost all the evidence has been completed. In the past, prosecution had adduced two reports of handwriting expert, but they did not support the prosecution case. Therefore, the prosecution again moved an application for collecting evidence during pendency of the trial for filling up the lacunae found in the prosecution case.

4. Learned counsel for the State, on the other hand, submits that under Section 311-A of the Code of Criminal Procedure a Court can direct the accused to give

specimen signatures or handwritings for getting it examined by the expert. According to him, trial Court did not commit any error in permitting the Investigating Officer to collect further evidence and send for examination to handwriting expert.

5. Under Section 311-A of the Code of Criminal Procedure the power to direct a person including accused person to give specimen signature or handwriting is given to a Magistrate, when a person has been arrested sometime in connection with investigation. Apparently, the aforesaid provision is not attracted in the present case.

6. Once a charge sheet is filed, the stage of investigation is over. However, after filing of the charge sheet Investigating Officer is not precluded from obtaining and forwarding further evidence to Magistrate under Section 173(8) of the Code of Criminal Procedure. However, that evidence is to be forwarded by way of a further report to Magistrate in respect to such evidence. This situation is not present in the case in hand. Here the prosecution evidence in the sessions trial has almost been completed. At one stage the trial Court allowed the application filed by the prosecution for obtaining specimen handwriting of the accused, however, as the report of the expert was not favourable to prosecution, it again moved an application for collecting further evidence during pendency of the trial. This procedure does not find favour of law. Learned counsel for the State is also not able to point out as to under what provision such an order can be passed. If such an application is allowed, it would be an unending process. The prosecution cannot be given any such right or opportunity which is not sanctioned by law in order to fill up its lacunae.

7. In view of the above discussion, I am of the considered opinion that the trial Court has committed error in allowing the application filed by the prosecution to collect further evidence during pendency of the trial.

8. Accordingly, this revision is allowed. The impugned order passed by the trial Court is set aside.

Revision allowed.

I.L.R. [2008] M. P., 2728

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

14 February, 2008*

BASANT KUMAR ... Applicant

Vs.

SMT. KAVITA BAI & ors. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 146 - *Attachment - Dispute regarding possession - Applicant was recorded Bhumiswami, whereas, non-applicant No.1 was having a decree of declaration of title on the basis of adverse possession - S.D.M. had passed an order of attachment of property and a receiver has been appointed to lookafter the property - Held - Section 146*

*M.Cr.C. No.3873/2007 (Indore)

attracted - Order of attachment can not be said to be illegal - However, the magistrate erred in not directing parties at the time of attachment to approach competent civil court for establishment of their entitlement to possession - Petition disposed of with such direction. (Paras 5 & 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 146 – कुर्की – कब्जे के सम्बन्ध में विवाद – आवेदक अभिलिखित भूमिस्वामी था, जबकि अनावेदक क्रमांक 1 के पास प्रतिकूल कब्जे के आधार पर स्वत्व घोषणा की डिक्री थी – एस.डी.एम. ने सम्पत्ति की कुर्की का आदेश पारित कर सम्पत्ति की देखभाल करने के लिए रिसीवर नियुक्त किया – अभिनिर्धारित – धारा 146 आकृष्ट – कुर्की का आदेश अवैध होना नही कहा जा सकता – तथापि, मजिस्ट्रेट ने कुर्की के समय पक्षकारों को कब्जे की उनकी हकदारी की स्थापना के लिए सक्षम सिविल न्यायालय के समक्ष जाने के लिए निदेशित न करने में त्रुटि की – याचिका इस निदेश के साथ निपटाई गई।

Milind Phadke, for the applicant.
K.C. Gangrade, for the non-applicants.

ORDER

S.C. VYAS, J. :–This is a petition filed by petitioner under the provisions of S. 482 of Cr. P.C. being aggrieved by the impugned order dated 11.6.07, passed by Sub Divisional Magistrate, Shujalpur in Case No.147/145/2007, whereby the disputed land was attached under the provisions of S.146 of the Code and was given in possession of a Receiver duly appointed by him.

2. The said order was challenged by filing a criminal revision No.119 of 07 before Addl. Sessions Judge, Shujalapur and the same was dismissed on 4.7.2007. After dismissal of Criminal Revision, pertitioner approached this court by filing this petition.

3. Learned counsel appearing for petitioner submitted that in the impugned order passed by SDM, nothing has been stated as to how the court has come to the conclusion that either of the parties were not found in actual physical possession prior to two months from the date of passing of preliminary order, or, there was some state of emergency and it was necessary to appoint a Receiver attaching the disputed land/property.

4. On the other hand, learned counsel appearing for Respondents submitted that as per deceree passed by Lok Adalat presided over by Addl. Distt. Judge vide order dated 23.2.1997, Bhumiswami rights of present respondent was declared on the basis of adverse possession and therefore respondent was in continuous possession, despite that petitioner was continuously interfering in her possession and therefore complaint under the provisions of S.145 of the Code was filed.

5. On perusal of the decree it appears that it was passed by Lok Adalat on the basis of compromise arrived at between the parties and it was declared that the decree would be effective only after its registration in the office of Registrar, but at the time of passing this decree, both parties were in agreement that Mrs. Kavita wife

of Shailendra was in long possession over the disputed land/property. It appears that after passing the alleged decree, some dispute arose between the parties regarding possession, because petitioner was recorded bhumiswami, whereas, respondent Kavita was having a decree of declaration of title in her favour on the basis of adverse possession. In such situation, learned SDM had passed an order of attachment of the disputed property/land under the provisions of S.146 of the Code and a Receiver has been appointed to lookafter the disputed property.

S. 146 of the Code reads as under;

" 146, Power to attach subject of dispute and to appoint receiver:- (1) If the Magistrate at any time after making the order under sub-section (1) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof;

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no9 longer any likelihood of breach of the peace with regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who, shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Proceldure, 1908 (5 of 1908);

Provided that in the event of receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate---

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) may make such other incidental or consequential orders as may be just.

6. In view of aforesaid situation, the impugned order of SDM cannot be said to be illegal, but an error is there in the impugned order. As per provisions of S.146 of the Code, it is necessary for the court concerned at the time of appointing a Receiver on a disputed property to direct the parties to approach the competent civil court for establishment of their entitlement to the possession thereof. Such direction has not been given in the impugned order. In the interest of justice to adjudicate the matter, such direction is now being given.

7. Resultlantly the petition is partly allowed. The order of attachment and with

regard to appoint a receiver shall remain as it is, but both the parties are directed to approach to competent court for establishment of their title and possession also over the disputed property/land.

With the aforesaid direction, the petition stands disposed of.

Petition disposed of.

I.L.R. [2008] M. P., 2731

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

17 March, 2008*

MANJU LATA TIWARI (SMT.) & anr. ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 216, Prevention of Corruption Act, 1988, Section 13(1)(d), (2) - *Alteration of Charges* - *Charge sheet filed against applicants and other accused persons u/ss 420, 467, 468, 471, 120B of IPC and Section 13(1)(d) r/w 13(2) of the Act - No charge u/s 13(1)(d), (2) of the Act framed against applicants although the same was framed against some of co-accused persons - Charges can be altered or added at any time - Framing of charge u/s 13(1)(d), (2) of the Act not illegal.* (Para 3)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216, भ्रष्टाचार निवारण अधिनियम, 1988, धारा 13(1)(डी), (2) – आरोपों का परिवर्तन – आवेदकों और अन्य अभियुक्त व्यक्तियों के विरुद्ध भा.द.सं. की धारा 420, 467, 468, 471, 120बी और अधिनियम की धारा 13(1)(डी) सहपठित 13(2) के अन्तर्गत आरोप–पत्र पेश किया गया – आवेदकों के विरुद्ध अधिनियम की धारा 13(1)(डी), (2) के अन्तर्गत कोई आरोप विरचित नही किया गया यद्यपि वह सहअभियुक्त व्यक्तियों में से कुछ के विरुद्ध विरचित किया गया – आरोप किसी भी समय परिवर्तित या परिवर्धित किये जा सकते हैं – अधिनियम की धारा 13(1)(डी), (2) के अन्तर्गत आरोप विरचित करना अवैध नही।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 217 - *Recall of witnesses when charge altered - Charges altered or added by trial court - Interest of prosecution and defence of accused to be safeguarded by permitting them to further examining or cross-examine witnesses - Order refusing to recall witnesses set-aside.* (Paras 4 & 6)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 217 – जब आरोप परिवर्तित किया जाता है तब साक्षियों का पुनः बुलाया जाना – आरोप विचारण न्यायालय द्वारा परिवर्तित या परिवर्धित किये गये – अभियोजन का हित और अभियुक्त की प्रतिरक्षा उन्हें साक्षियों का अतिरिक्त परीक्षण या प्रतिपरीक्षण करने की अनुमति देकर सुरक्षित रखा जाना चाहिए – साक्षियों को पुनः बुलाने से इंकार करने वाला आदेश अपास्त।

*M Cr C. No 11196/2007 (Jabalpur)

Cases referred :

(2004) 5 SCC 347, AIR 1970 SC 359, AIR 1943 PC 192, (1995) 4 SCC 392, 2001 CrLJ 3665, 1982 CrLJ 2087.

Prakash Upadhyay, for the applicants.

Ramesh Shukla, Dy.G.A., for the non-applicant.

ORDER

R.C. MISHRA, J. :–These petitions, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), are interlinked as arisen from the orders-dated 07.11.2007 and 22.11.2007 (for short 'the first and second order') passed by the Special Judge (under the Prevention of Corruption Act, 1988) [hereinafter referred to as 'the Act'], Rewa in Special Case No.97/98.

2. In that case, cognizance of the offences punishable under Sections 420, 467, 468, 471 read with Section 120-B of the IPC and Section 13(1)(d) read with 13(2) of the Act was taken on 04.11.2004 upon the charge-sheet submitted by Dy. Superintendent of Police (SPE), Lokayukt arraigning 9 persons including the petitioners as accused. However, for the reasons recorded in the order-dated 17.08.2005, the then trial Judge charged only three accused namely R.P. Tiwari, Dr. Pradeep Mishra and D.P. Singh with the offences punishable under Sections 120-B and 420 of the IPC and also under Section 13(1)(d) read with 13(2) of the Act whereas charges of the offences under the IPC only were framed against the remaining six accused including the petitioners. All the accused abjured the guilt and they were, accordingly, tried on the respective charges. However, on 30.10.2007, while hearing the final arguments, learned trial Judge, expressing an opinion that prima facie the offence under the Act was also made out against all the six accused charged with the offences punishable under IPC only, proceeded to afford them an opportunity of hearing. Thereafter, vide the first order in question, he added the offence under Section 13(1)(d) read with 13(2) of the Act to the earlier charges framed against the petitioners and the identically placed co-accused namely Gokaran Kushwaha, Kaushlesh Dwivedi and Kaushal Saket. Subsequently, by the second order under challenge, the applications, under Section 217 of the Code, moved on behalf of the petitioners, for recalling all the prosecution witnesses and those filed by co-accused Gokaran Kushwaha and Kaushal Saket, for re-summoning some of them was rejected.

3. The first order has been sought to be quashed inter alia on the ground that the learned Judge had grossly erred in reviewing the earlier order, passed on 17.08.05, impliedly discharging the petitioners and three other accused in respect of the offence under the Act. However, the contention deserves to be rejected as apparently misconceived simply because, under Section 216 of the Code, an existing charge can be altered or added to at any time before the judgment (*Hasanbhai Valibhai Qureshi vs. State of Gujarat* (2004) 5 SCC 347). Moreover, charge can be altered even at appellate stage (*Kantilal Chandulal Mehta vs. State of Maharashtra* AIR 1970 SC 359). But, the alteration or addition of any charge, in the words of Lord Porter, is

always subject to limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred (*Thakur Shah vs. Emperor* AIR 1943 PC 192). In this view of the matter, no interference is called for with the first order.

4. Adverting to the second order, it may be seen that the prayer to recall the prosecution witnesses was rejected on the ground that no prejudice was going to be caused to the petitioners or the similarly placed co-accused as the allegation that the offending acts in question were committed during discharge of their duties as public servant was never put to challenge during cross-examination. However, the provisions of Section 217 of the Code are almost peremptory and the interests of the prosecution as well as of the defence have to be safeguarded by permitting them to further examine or cross-examine the witness already examined, as the case may be, and by affording them an opportunity to call other witnesses (*Ranbir Yadav vs. State of Bihar* (1995) 4 SCC 392 referred to). Further, true ambit and scope of Section 217 of the Code has already been examined by a single Bench of this Court in *Vikas vs. State of M.P.* 2001 CrLJ 3665. Dipak Misra J, who authored the judgment, while making reference to the corresponding recommendation of Law Commission in its 41st report leading to introduction of the material change in sub-section (a) of Section 217 of the Code, explained the effect thereof in the following words :-

> "On a purposeful reading of the provision keeping in view the backdrop of revision in the provision it becomes quite clear that unless there is an attempt to re-examine a witness for the purpose of vexation or delay or in defeating the ends of Justice the Court ordinarily should allow the recall or re-summon and examination of witnesses with reference to such alteration or addition of charge."

5. In *Vikas's case* (supra), the under-mentioned ruling of a Division Bench of Kerala High Court in *Moosa Abdul Rehman vs. State of Kerala* 1982 CriLJ 2087 was also quoted :-

> "It has to be borne in mind in terms of Section 217, Criminal Procedure Code whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecution and the accused shall be allowed to recall or re-summon, and examine, any witness who may have been examined, unless the Court for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or defeating the ends of Justice."

6. Accordingly, an application for recalling the witnesses in the light of any additional charge could be disallowed only on three grounds namely (i) vexation (ii) delay and (iii) defeating the ends of justice. But, none of these has been specifically mentioned as the ground for rejection of the prayer made on behalf of

the petitioners. Further, the reasoning given by him can also not be sustained in view of the fact that the ingredients of the offence punishable under Section 13(1)(d) read with Section 13(2) of the Act are altogether different from the corresponding offence under the IPC with which the petitioners were charged initially. Thus, it is the second order only that squarely attracts exercise of inherent powers to secure ends of justice.

7. In the result, the petitions are allowed in part. The first order is affirmed whereas the second order is set aside and the petitioners' applications, under Section 217 of the Code, are allowed. The trial Judge is, accordingly, directed to re-summon the prosecution witnesses for further cross-examination as per the prayer made by the petitioners and to proceed with the trial in accordance with law.

8. Copy of the order be retained in the connected petition.

Petition allowed in part.

I.L.R. [2008] M. P., 2734

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.P. Shrivastava

4 August, 2008*

NEERAJ RATHORE ... Applicant

Vs.

SMT. PRAMODIN RATHORE ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 177, 178, 179, Dowry Prohibition Act, 1961, Section 4 r/w Section 6 - *Territorial jurisdiction - Offence alleged to have committed in Ujjain and complaint filed at Vidisha wherein non-applicant residing with her parents - Held - The venue of enquiry or trial of case is determined by averments made in complaint - The question of jurisdiction is question of law and fact and it needs enquiry - Cannot be interfered by the High Court.* (Paras 6 & 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 177, 178, 179, दहेज प्रतिषेध अधिनियम, 1961, धारा 4 सहपठित धारा 6 – क्षेत्रीय अधिकारिता – अपराध कथित रूप से उज्जैन में कारित और परिवाद विदिशा में पेश जहाँ अनावेदक अपने माता–पिता के साथ रह रही थी – अभिनिर्धारित – मामले की जाँच और विचारण का स्थान परिवाद में किये गये प्रकथनों द्वारा अवधारित किया जाता है – अधिकारिता का प्रश्न विधि और तथ्य का प्रश्न है उसमें जाँच की आवश्यकता है – उच्च न्यायालय द्वारा हस्तक्षेप नही किया जा सकता।

Cases referred :

AIR 1982 SC 1556, 2002(2) VB 300, M.Cr.C. No.1787/2006 decided on 05.07.2006, 2005(1) MPWN [95], 2007(1) ANJ (SC) 1, AIR 1983 SC 1219, 1980 Cr.L.J. 1171, 1999 Cr.L.J. 681.

A.K. Ahirwar, for the applicant.

S.S. Rajput, for the non-applicant.

*M.Cr.C. No.711/2008 (Gwalior)

ORDER

A.P. SHRIVASTAVA, J. :–Heard finally at motion stage on the petition under Sections 482 and 177 of Cr. P. C. filed by the petitioner for quashing the criminal proceedings which are pending before the Court of Chief Judicial Magistrate, Vidisha (M.P.) in Case No. 5/2007 under Section 4 read with Section 6 of the Dowry Prohibition Act.

2. Brief facts of the case are that the respondent filed a criminal complaint against the petitioner under Section 4 read with Section 6 of the Dowry Prohibition Act. It is submitted that her parents are residing at Vidisha and before that she was residing at Ujjain, where her in-laws are residing. The respondent filed a case against the petitioner. The copy of complaint is Annexure P/1. The allegation regarding demand of dowry was falsely made against the petitioner by the respondent. The petitioner is residing at Ujjain, therefore, Vidisha Court has no jurisdiction to entertain the complaint.

3. In support of the above contention, learned counsel for the petitioner relied on *Baljit Singh and Another Vs. State of J. & K and others* reported in AIR 1982 SC 1558. He also placed reliance in the case of *Sita Devi (Smt.) and others Vs. State of M. P.* reported in 2000(2) Vidhi Bhasvar 300 in which it is held that under Sections 407 of Cr. P. C., assurance of fair trial is first imperative of dispensation of justice --- motion for transfer--- considerations. It is also held that trial should be allowed to take place in the Court who has territorial jurisdiction. Further, counsel for the petitioner relied on a decision of the other Bench of this Court in the case of *Ku.Archana Vs. State* in Misc. Cri. Case No. 1787/2006 vide order dated 05.07.2006,in which it is observed that case was registered before the court of J. M. F. C. Morena while incident took place at Gwalior within the jurisdiction of P.S. Janakganj. Proceedings of the criminal case pending before the trial Court were quashed. Similarly, learned counsel for the petitioner relied on *Om Hemrajani Vs. State of U. P.* reported in 2005(1) MPWN [95] in which the Hon'ble Apex Court held that place to try the offence, emphasis is on the place where offence has been committed. Similar view has been expressed in the case of *Manish Ratan & Ors. Vs. State of M. P. & Anr.* reported in 2007 (1) ANJ (SC) 1.

4. On the other hand, contention of the learned counsel for the respondent is that the citations as referred by the counsel for the petitioner is not related on the face of this case. They are related to other offence under Section 4 read with Section 6 of the Dowry Prohibition Act. As per Section 7 sub-clause 2 of the Dowry Prohibition Act, it is mentioned that nothing in Chapter XXXVI of the Code of Criminal Procedure, 1973 shall apply to any offence punishable under this Act. Counsel for the respondent submits that when the respondent used to come to her parental house, she used to disclose the fact about demand of dowry. As per the allegation in the complaint, it is mentioned that at the time of marriage including cash and ornaments worth of Rs. 4,50,000/- were given to the petitioner and she wants to take back the above property which comes within the ambit of

Streedhan. Learned counsel for the respondent relied on *L.V. Jadhav Vs. Shankarrao Abasaheb Pawar and Others* reported in AIR 1983 SC 1219 in which the Hon' ble Apex Court held that offence under Section 4 is complete when demand of dowry is made. Consent for meeting the demand is not necessary. Offence is complete when demand made if consented would become "dowry" within Section S. 2. It is also held by the Apex Court that inherent powers of Court should be used sparingly and with circumspection when there is reason to believe that process of law is being misused to harass a citizen. In this regard, learned counsel for the respondent submits that it is pertinent to mention paras 5 and 7 of the judgment rendered by the High Court of Bombay in the case of *Daulat Mansigh Aher Vs. C.R. Bansi & another* reported in 1980 Cri. L. J. 1171 as follows under:-

> "5. So far as the first contention based on the challenge to territorial jurisdiction is concerned, in our opinion, there is no substance in the said contention. As observed by the Supreme Court in *State of Madhya Pradesh Vs. K. P. Ghiara*, AIR 1957 SC 196: (1957 Cri L J 322), the venue of enquiry or trial of a case is primarily to be determined by the averments contained in the complaint or charge-sheet and unless the facts therein are positively disproved, ordinarily the Court, where the charge-sheet or complaint is filed, has to proceed with it, except where action has to be taken under Section 202, Criminal Procedure Code (old Code). From the averments made in the complaint, it is quite clear that it is the case of the complainant that he received a letter from P.M. Aher his son-in-law and brother of the accused from Agartala. The said letter is dated 14th April, 1977 and was written to Shri P. K. Aher by the accused himself, in his own handwriting from Bombay demanding the dowry of Rs. 30,000/- from him and also transfer of the fields in the name of his son-in-law or father in marriage, with Alka, complainant's daughter.
>
> 7. It is well settled that while dealing with such question under the inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, normally it will have to be presumed at this stage, that the averments made in the complaint are true. If this is so then obviously in the present case on the allegations made in the complaint it could be said that the demand was made from Wadala, Bombay-31 from where the letter was written and posted and also at Andheri where the letter was received by the complainant. In this view of the matter in our opinion, the learned Magistrate was right in coming to the conclusion that his Court had jurisdiction in view of the provisions of Sections 178 and 179 of the Code of Criminal Procedure."

5. Similarly, in the case of *Maqsood Main and another Vs. Rukhsana Tazeem and another*, 1999 Cri. L. J. 681, the High Court of Allahabad held that under the Dowry Prohibition Act (28 of 1961), Section 6-Criminal breach of trust. Non-return of money and gifts given to bride by her parents at time of marriage. Complaint

against - Limitation for taking cognizance-Offence was of continuous nature. Limitation for taking cognizance would be as provided under Section 473 of the Cr.P. C.

6. In this petition, question of territorial jurisdiction and limitation was also raised. The venue of enquiry or trial of the case is determined by the averments made in the complaint.

7. Looking to the submissions made by the parties and the fact that under Section 6 of the Dowry Prohibition Act, there was demand of articles by the petitioner at Vidisha. Therefore, the question of jurisdiction is a question of law and fact which cannot be interfered by this Court and it needs enquiry. The petitioner may raise the ground about jurisdiction before the the lower Court at appropriate stage and the Court shall decide the same. Accordingly, M.Cr.C. stands dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 2737

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.P. Shrivastava

8 August, 2008*

NANJIRAM ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 202 - *Procedure when offence complained of is triable exclusively by Court of Session - In case the offence is triable exclusively by the Court of Session - The magistrate has no jurisdiction to direct investigation by police in exercise of powers u/s 156(3) of Code - He has to make inquiry himself as provided u/s 202 of Code.* (Para 9)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 202 – प्रक्रिया जब परिवादित अपराध अनन्यतः सेशन न्यायालय द्वारा विचारणीय है – यदि अपराध अनन्यतः सेशन न्यायालय द्वारा विचारणीय है – मजिस्ट्रेट को संहिता की धारा 156(3) के अन्तर्गत शक्तियों के प्रयोग में पुलिस द्वारा अनुसंधान करने का निदेश देने की अधिकारिता नही है – उसे संहिता की धारा 202 के उपबंधानुसार स्वयं जाँच करनी चाहिए।

B. Penal Code (45 of 1860), Sections 147, 148, 323, 395 r/w 149, Criminal Procedure Code, 1973, Sections 156, 202(2) proviso - *Procedure when allegation in the complaint are exclusively triable by Sessions Court - Held - The scheme of the provisions and the language employed in the proviso show that conducting of inquiry in complaint case is not left to the discretion of the magistrate concerned - Magistrate has no discretion except to call upon the complainant to produce all his witnesses and examine them on oath - The provisions of Section 202(2) of Cr.P.C. are mandatory.* (Para 10)

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*M.Cr.C. No.933/2006 (Gwalior)

ख. दण्ड संहिता (1860 का 45), धाराएँ 147, 148, 323, 395 सहपठित 149, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 156, 202(2) परन्तुक – प्रक्रिया जब परिवाद में वर्णित आरोप अनन्यतः सेशन न्यायालय द्वारा विचारणीय है – अभिनिर्धारित – उपबंधों की स्कीम और परन्तुक में प्रयुक्त भाषा दर्शित करते हैं कि परिवाद पर संस्थित मामले में जाँच करना सम्बन्धित मजिस्ट्रेट के विवेक पर नही छोड़ा गया है – मजिस्ट्रेट को, परिवादी को अपने सभी साक्षियों को पेश करने और उनकी शपथ पर परीक्षा कराने के लिए बुलाने के अतिरिक्त, कोई विवेकाधिकार नही है – द.प्र.सं. की धारा 202(2) के उपबंध आज्ञापक हैं।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 202(2) proviso - *Effect of non-compliance of proviso - Statute does not expressly provide for nullification of the committal order - But provides that unless prejudice is caused, the order is not to be set-aside - This would mean that during inquiry u/s 202 of Code when magistrate examines the witnesses on oath, as far as possible proviso is to be complied with but the mandate is not absolute - Further, where objection as to how prejudice was caused, was not raised at earliest stage, fresh inquiry into Section 202 is unnecessary.* **(Para 11)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 202(2) परन्तुक – परन्तुक के अपालन का प्रभाव – अधिनियमिति मामले के सुपुर्द करने के आदेश के अकृतिकरण के लिए अभिव्यक्त रूप से उपबंध नही करती है – किन्तु यह उपबंधित करती है कि यदि पूर्वाग्रह कारित नही हुआ है तो आदेश अपास्त नही किया जाना चाहिए – इसका अर्थ यह होगा कि संहिता की धारा 202 के अन्तर्गत जब मजिस्ट्रेट जाँच के दौरान साक्षियों का शपथ पर परीक्षण करता है, जहाँ तक संभव हो परन्तुक का पालन करना चाहिए किन्तु मैंडेट निरपेक्ष नही है – जहाँ पूर्वाग्रह कारित होने की आपत्ति प्रारम्भिक प्रक्रम पर न उठायी गई हो, वहाँ धारा 202 में नवीन जाँच अनावश्यक है।

Cases referred :

AIR 2000 SC 637, 2000 CrLJ 2816, AIR 1987 Ker 184.

S.K. Tiwari, for the applicant.

V.S. Chaturvedi, P.P., for the non-applicant/State.

ORDER

A.P. Shrivastava, J. :–Being aggrieved by the order dated 19.09.2003, passed by the Judicial Magistrate First Class, Raghogarh, District Guna (M.P.) in Criminal Case No. 356/2003, which has been set aside by the II Additional Sessions Judge, Guna in Criminal Revision No. 223/03, vide order dated 24.08.2004, this petition under Section 482 of the Code of Criminal Procedure Code has been filed by the petitioner.

2. The facts giving rise to this petition, in short, are that the petitioner filed a private complaint in the Court of Judicial Magistrate First Class, Raghogarh under Sections 147, 148, 323, 395 read with section 149 of IPC against 28 accused persons, in which about 18 accused persons were Police Officers. Prior to the date of incident, a murder case was got registered against 15 family members belonging to the complainant. The learned trial Court sent the complaint under Section 156(3) of Cr. P. C. to the police for investigation and after receiving the

report from the police, dismissed the complaint against all the accused persons under Section 148 and 395 of IPC and took cognizance against accused Vijay Singh, Lekhraj, Komal, Lal Singh, Ram Singh, Prabhulal, Bahadur Singh, Kamal Singh, Chhatar Singh and Kalyan Singh under Sections 147 and 323 read with Section 149 of IPC and they were summoned on 19.09.2003.

3. Learned counsel for the petitioner submits that as per allegation of the complainant, the offence is triable exclusively by the Court of Session. Therefore, the learned trial Court has committed illegality by calling report under Section 156(3) of Cr. P. C. It is the duty of the Magistrate to consider the case as per provision of Section 202 of Cr.P.C. to examine all the witnesses and thereafter he shall take cognizance of the offence. But in this case the Court with the aid of Section 156(3) of Cr.P.C. registered the case against few accused persons under Sections 147, 323 read with Section 149 of IPC and not registered the complaint for the offence under Section 395 read with Section 149 of IPC. Further, it is also submitted that the revision petition was filed by the complainant against the order of the learned trial Court partly registered the criminal complaint.

4. Being aggrieved by the order of the learned trial Court, the complainant filed a revision petition but the Sessions Court committed error by setting aside the complete order dated 19.09.2003 of the learned trial Court when there was no revision filed by the accused persons against whom the case was registered under Sections 147, 323 read with 149 of IPC. As there was no revision filed by the aggrieved persons, the Sessions Court ought not to have set aside the whole order of the learned trial Court. It is also submitted that the Sessions Court by passing the impugned order, mis-construed the facts and law against the cognizance of offences which are exclusively triable by the Court of Session. The revision was filed only for direction to the learned trial Court for taking cognizance against the remaining accused persons by complying the provisions of Section 202 (2) of Cr.P.C. In this regard, learned counsel for the petitioner relied on *Rosy and another Vs. State of Kerala and others* reported in AIR 2000 SC 637.

5. On behalf of the respondent, the impugned order has been supported by learned Public Prosecutor.

6. Two points are involved in this case, whether the learned trial Court has power to direct investigation under Section 156(3) of Cr.P.C. in case of complaint in which the allegations are that it is triable by the Court of Session and second is that when accused persons who are aggrieved persons, have not filed any revision against the cognizance of offence taken by the learned trial Court, whether the Sessions Court has power to set aside the whole order instead which was challenged by the petitioner in the revision petition?

7. Section 156(1) of Cr. P. C. lays down that any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such

station would have power to inquire into or try under the provisions of Chapter XIII. Sub-clause (2) lays down that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer not empowered under this section to investigate and lastly, sub-clause(3) lays that any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

8. It is pertinent to see the provisions of Section 202 of Cr. P. C which are quoted below:-

> "(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.
>
> Provided that no such direction for investigation shall be made-
>
> (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or
>
> (b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.
>
> (2) In any inquiry under sub -Section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:
>
> Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.
>
> (3) If an investigation under sub-section(1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

9. In the case of *Laxmidhar Das etc. and others Vs. State of Orissa and another* reported in 2004 Cri. L. J. 2816, it is held that in case the offence is triable exclusively by the Court of Session, the Magistrate has no jurisdiction to direct investigation by police officer in exercise of powers under Section 156(3) of Cr. P. C. He has to make inquiry himself as provided under Section 202 of Cr. P. C.

10. Sub-Section(2) of Section 202 of Cr. P. C. serves the purpose of preliminary inquiry as regards private complaint triable exclusively by a Court of Session. It is evident that the legislature intended two different types of enquiries, a discretionary enquiry in ordinary complaint case and a mandatory enquiry in complaint case under Section 202 of Cr.P.C. In a discretionary enquiry the Magistrate can either

enquire into the case himself or direct an investigation to be made by a police officer or such other person as he thinks fit. In a mandatory enquiry in a complaint case that discretion is taken away by proviso (a) to Section 202(1) of Cr. P. C. The Magistrate will have to conduct the enquiry himself and he cannot order investigation. The scheme of the provisions and the language employed in the proviso show that conducting of enquiry in complaint case is not left to the discretion of the Magistrate concerned. The Magistrate has no discretion except to call upon the complainant to produce all his witnesses and examine them on oath. The provisions of Section 202(2) are mandatory. In this regard, reliance can be placed in the case of *Moideenkutty Haji Vs. Kunhikoya* AIR 1987 Ker 184 and in the case of *Rosy* (supra).

11. The next question is what would be the impact if all the witnesses were examined under Section 202 of Cr.P.C. In this regard, the Hon'ble Apex Court in the case of *Rosy* (supra) held that when the offence, sought to be taken cognizance of by the Magistrate, is exclusively triable by the Court of Session, the statute does not expressly provide for nullification of the committal order as a consequence of non-compliance of proviso to sub-sec.(2) of Section 202 Cr. P.C, but provides that unless prejudice is caused, the order is not to be set aside. This would mean that during inquiry under Section 202 when Magistrate examines the witnesses on oath, as far as possible proviso is to be complied with but the mandate is not absolute. Further where objection as to how prejudice was caused, was not raised at earliest stage, fresh inquiry into Section 202 is unnecessary. In this regard, para-47 of the judgment is relevant and follows as under:-

> "47. Hence, what emerges from the above discussion is :
>
> I. (a) Under Section 200 Magistrate has jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present;
>
> (b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses;
>
> (c) In such case Court may issue process or dismiss the complaint.
>
> II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorized by him.
>
> (b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions

that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204(2) before issuance of the process.

(c) The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later."

12. In view of the above, it is clear that it was obligatory on the part of the Magistrate to summon all the witnesses who have been cited by the complainant under Section 202 of Cr. P. C. The grievance of the petitioner is that when the learned trial Court registered the complaint against the accused persons under Sections 147, 323 read with 149 of IPC, complaint ought not to be quashed because no revision was filed by the aggrieved persons.

13. In view of sub-clause (1) of Section 397 of Cr. P. C., the High Court or any Court of Session may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, Sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

14. In this regard, as the order on the part of those accused is also set aside against whom the learned trial Court took cognizance partly and after setting aside the order directed to examine all the witnesses as per provisions laid down under Section 202(2) of Cr.P.C. It may cause prejudice to the accused persons who have not filed revision petition against the said order as the learned Court already took cognizance against the concerned persons and order is passed against them, which may cause prejudice to the concerning party. Therefore, the order of the Revisional Court is set aside and case is remanded back with a direction to issue notice to the aggrieved persons against whom the learned trial Court has registered the complaint and after hearing the complainant and the accused person may pass order in accordance with law.

15. Accordingly, M. Cr. C. stands disposed of.

Petition disposed of.
