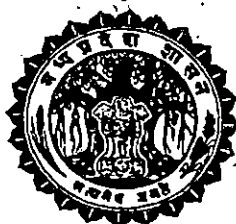


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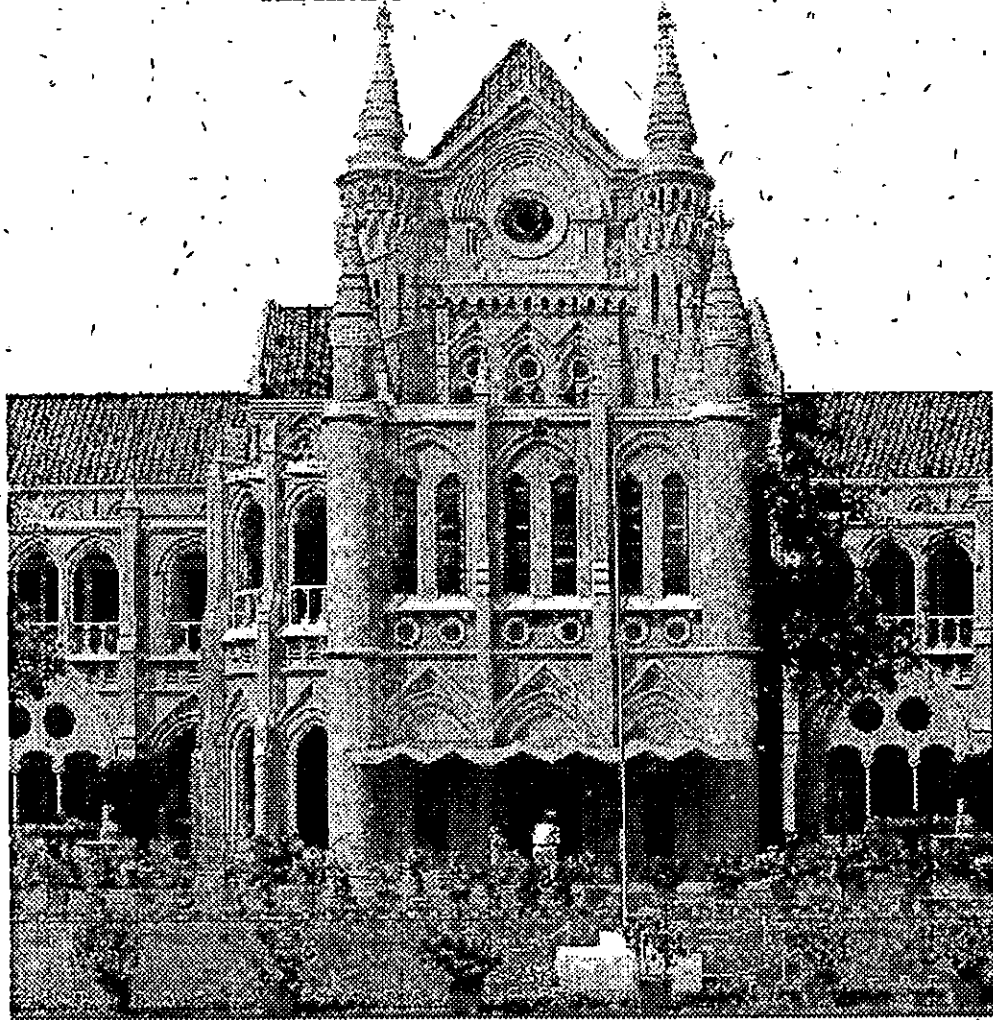
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CONTAINING M. P. SERIES

CASES DECIDED BY THE SUPREME COURT OF INDIA AND
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- Arrears of Rent - Tenant disputing quantum of rent - Tenant is bound to deposit
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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17, स्थान नियंत्रण विधान, म.प्र., 1961, धारा 12(1)(एफ) — विचारण न्यायालय ने अधिनियम की धारा 12(1)(एफ) के आधार पर किरायेदार के विरुद्ध डिक्री पारित की — किरायेदार ने सि.प्र.सं. के आदेश 6 नियम 17 के अन्तर्गत प्रथम अपील न्यायालय के समक्ष आवेदन पेश किया कि भू-स्वामी ने दुकान उसके भाई के नाम से खरीद ली है जिसमें भू-स्वामी व्यापार कर रहा है और यदि कोई आवश्यकता थी तो वह समाप्त हो गई — प्रथम अपील न्यायालय ने आवेदन पर विचार करने के पश्चात् गुणदोषों पर आवेदन खारिज कर दिया — अभिनिर्धारित — केवल आवेदन पेश करना और उसमें भू स्वामी के विरुद्ध कुछ तथ्यों का अभिकथन करना स्वतः निर्णय और डिक्री अपास्त करने और मामला प्रतिप्रेषित करने के लिए पर्याप्त नहीं था — प्रथम अपील न्यायालय ने रजिस्टर्ड विक्रयपत्र और नगर निगम द्वारा जारी किये गये लायसेंस पर विचार करने पर पाया कि आवेदन तुच्छ था और आवेदन में कथित आधारों की जाँच किया जाना आवश्यक नहीं है — आदेश में कोई त्रुटि नहीं पायी गई। (सुभाष चंद जावा वि. सुभाष गुप्ता) ...2388

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common to both but the rule that the plaintiff cannot be allowed to amend the pleadings so as to alter materially or substitute his cause of action of the nature of his claim as necessarily no counter part in law related to written statement - The courts are inclined to be more liberal in allowing the amendment of the written statement than of plaint and question of prejudice is less likely to operate on the same rigour in the former than the latter.

[Sushil Kumar Kanungo v. M.P. Rajya Sahkari Bank Maryadit] ...2238

Civil Procedure Code, (5 of 1908), Order 6 Rule 17 & Order 41 Rule 33 - See - Cooperative Societies Act, M.P, 1960, Section 55 & 64 [Sushil Kumar Kanungo v. M.P. Rajya Sahkari Bank Maryadit] ...2238

Civil Procedure Code (5 of 1908), Order 8 Rule 3 & 5, Accommodation Control Act, 1961, Section 12(1)(a) - Suit for eviction - Allegation of arrears of rent - No specific denial of arrears of rent or service of notice - Even after order of trial Court to deposit arrears of rent, appellant again committed default - Application for condonation of default rejected - In absence of specific denial, the fact will be deemed to be admitted on the ground of non-traverse - Held - Appellant failed to establish denial of the landlord-tenant relationship - Decree of eviction rightly passed by two courts below - Appeal dismissed. [Santosh (Smt.) v. Mohd. Sharif] ...2326

Civil Procedure Code (5 of 1908), Order 38 Rule 5 - Attachment before judgment - Where defendant may be called upon to furnish security for production of property - Held - A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him before judgment - A plaintiff should show, prima facie, that his claim is bonafide and also satisfy the court that defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him. [Dharampal (Dead) Through L.Rs. Smt. Ashima Syal v. Hari Chandra @ Harish Chandra (Dead) Through L.Rs. Suresh Kumar Chaudhary] ...2313

Civil Procedure Code (5 of 1908), Order 38 Rule 5 - Powers of Court - Plaintiffs have proved that they have substantive rights in their favour and prima facie defendants are enjoying the benefits of the suit property - Defendants published an advertisement with regard to sell of other land which is of the ownership of the defendants - In such circumstances, it is necessary to attach some property of the defendants or they may furnish some security to the satisfaction of the trial court - Defendants be directed to furnish a security of Rs.10 lacs before trial court - Petition disposed of accordingly. [Dharampal (Dead) Through L.Rs. Smt. Ashima Syal v. Hari Chandra @ Harish Chandra (Dead) Through L.Rs. Suresh Kumar Chaudhary] ...2313

Civil Procedure Code (5 of 1908), Order 41 Rule 33 - Power of Appellate Court - The appellate court has been conferred with the power not

अनुमति नहीं दी जा सकती जो वाद हेतुक या वाद प्रकृति को परिवर्तित या प्रतिस्थापित करे, वादोत्तर के संबंध में कानून में कोई प्रतिरूप नहीं है — न्यायालय वादपत्र की अपेक्षा वादोत्तर में संशोधन मंजूर करने में ज्यादा उदार होती है एवं प्रतिकूल प्रभाव का प्रश्न भी वादोत्तर में वादपत्र से कम शक्ति प्रभावशील होता है। (सुशील कुमार कानूनगो वि. एम.पी. राज्य सहकारी बैंक मर्यादित) ...2238

सिविल प्रक्रिया संहिता, (1908 का 5), आदेश 6 नियम 17 व आदेश 41 नियम 33 — देखें — सहकारी सोसायटी अधिनियम, म.प्र., 1960, धारा 55 व 64, (सुशील कुमार कानूनगो वि. एम.पी. राज्य सहकारी बैंक मर्यादित) ...2238

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 3 व 5, स्थान नियंत्रण अधिनियम, 1961, धारा 12(1)(ए) — बेदखली के लिए वाद — भाड़ा बकाया होने का अभिकथन — भाड़ा बकाया होने का या सूचनापत्र की तामील का विनिर्दिष्ट प्रत्याख्यान नहीं — विचारण न्यायालय के बकाया भाड़ा जमा करने के आदेश के बाद भी अपीलार्थी ने पुनः व्यतिक्रम किया — व्यतिक्रम को क्षमा करने का आवेदन खारिज — विनिर्दिष्ट प्रत्याख्यान के अभाव में अखण्डन के आधार पर तथ्य स्वीकृत हुआ समझा जाएगा — अभिनिर्धारित — अपीलार्थी भूस्वामी-अभिधारी सम्बन्ध के प्रत्याख्यान को स्थापित करने में असफल रहा — बेदखली की डिक्री दोनों अधीनस्थ न्यायालयों द्वारा सही रूप से पारित — अपील खारिज। (संतोष (श्रीमति) वि. मोहम्मद शरीफ) ...2326

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 38 नियम 5 — निर्णय के पूर्व कुर्की — जहाँ प्रतिवादी को सम्पत्ति को पेश करने के लिए प्रतिभूति देने के लिए बुलाया जाए — अभिनिर्धारित — कोई प्रतिवादी, मात्र इसलिए कि निर्णय के पूर्व उसके विरुद्ध कोई वाद पेश किया गया है या पेश किया जाने वाला है, अपनी सम्पत्ति के बारे में व्यवहार करने से विवर्जित नहीं होता है — वादी को प्रथम दृष्ट्या यह दर्शित करना चाहिए कि उसका दावा सद्भाविक है और न्यायालय का समाधान करना चाहिए कि प्रतिवादी अपनी सम्पूर्ण सम्पत्ति या उसके भाग को, किसी डिक्री, जो उसके विरुद्ध पारित की जाए, के प्रवर्तन में बाधा या विलम्ब करने के आशय से, हटाने या व्ययनित करने वाला है। (धरमपाल (मृतक) द्वारा वैध प्रतिनिधि श्रीमति आशिमा स्याल वि. हरीचन्द्र उर्फ हरीश चन्द्र (मृतक) द्वारा वैध प्रतिनिधि सुरेश कुमार चौधरी) ...2313

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 38 नियम 5 — न्यायालय की शक्तियाँ — वादियों ने साबित किया कि उनके पक्ष में सारवान् अधिकार हैं और प्रथम दृष्ट्या प्रतिवादी वादग्रस्त सम्पत्ति के लाभों का उपभोग कर रहे हैं — प्रतिवादियों ने अन्य भूमि, जो प्रतिवादियों के स्वामित्व की है, के विक्रय के संबंध में विज्ञप्ति प्रकाशित की — इन परिस्थितियों में यह आवश्यक है कि प्रतिवादियों की कुछ सम्पत्ति कुर्क की जाए या वे विचारण न्यायालय के समाधान के लिए कुछ प्रतिभूति दें — प्रतिवादियों को विचारण न्यायालय के समक्ष 10 लाख रुपये की प्रतिभूति देने के लिए निदेशित किया — याचिका तदनुसार निपटाई गई। (धरमपाल (मृतक) द्वारा वैध प्रतिनिधि श्रीमति आशिमा स्याल वि. हरीचन्द्र उर्फ हरीश चन्द्र (मृतक) द्वारा वैध प्रतिनिधि सुरेश कुमार चौधरी) ...2313

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 33 — अपील न्यायालय की शक्तियाँ — अपील न्यायालय को शक्ति दी गई है जिसका प्रयोग न्यायालय द्वारा इस बात के

withstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, then appellate court in exercise of powers vested under Order 41 Rule 33 can pass an order in favour of the respondents or parties although the respondents have not preferred any appeal or objection. [Sushil Kumar Kanungo v. M.P. Rajya Sahkari Bank Maryadit] ...2238

Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 9 - *When there is an order of acquittal in a criminal case - There is nothing in the rule relating to the spectrum of deemed suspension. [M.P. State Civil Supplies Corporation Ltd. v. Vinod Kumar Save] ...2213*

Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 9(1) - *Petitioner, an employee of Corporation acquitted of all charges against him under IPC & Prevention of Corruption Act, 1988 - Representation for revocation of suspension order rejected on the ground of pending appeal against order of acquittal - Learned Single Judge quashed order of suspension and directed employer to reinstate - Held - The rule is absolutely silent as regards the situation when a judgment of acquittal recorded against the employee - However, employee can revert back to service after acquittal - Otherwise it may cause immense hardship to employee to wait for the final adjudication of matter by the final court. [M.P. State Civil Supplies Corporation Ltd. v. Vinod Kumar Save] ...2213*

Commercial Tax Act, M.P., 1994 (5 of 1995), Entry No.22 in Part I of Schedule II, Entry No.22 in Part V of Schedule II, Entry No.39 in Part IV - *Reference made to 5 judges bench to decide "Whether the coal ash is a part of cinder and covered by the term coal in Entry No.22 in Part V of Schedule II of the Commercial Tax Act or the said commodity would be taxable under Entry No.39 in Part IV ?" - Held - "Coal Ash" is "Cinder" and covered by the term "Coal" in Entry No.22 in Part V of Schedule II and therefore it is not exigible to tax under Entry No.39 in Part IV. Further it has been held that judgment in Hukumchand Mills case de hors the earlier decisions and the view expressed therein with regard to Cinder (Coal Ash) being different commodity from its parent coal - Overruled to the extent that Cinder is not Coal - Appeal dismissed accordingly - State preferred an appeal against order of Single Judge, holding that - "The rate of tax on the sale of Coal Ash would be same as that of Coal and not prescribed under residuary entry", on the ground that it is against the ratio decided by 3 Judges bench in Hukumchand Mills Ltd. Vs. Commercial Tax MP [1988] 71 STC 101 - Hence this Reference. [Additional Commissioner of Sales Tax v. M/s. S. Kumar Limited] (FB)...2156*

Constitution, Article 14, Education Guarantee Scheme - *Payment of Honorarium - Petitioner appointed as Shiksha Karmi and was not paid*

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(II)

होते हुए भी किया जा सकेगा कि अपील डिक्री के केवल भाग के बारे में है और यह शक्ति सभी प्रत्यर्थियों या पक्षकारों या उनमें से किसी के भी पक्ष में प्रयोग की जा सकेगी यद्यपि ऐसे प्रत्यर्थियों या पक्षकारों ने कोई भी अपील या आक्षेप फाइल न किया गया हो तब अपील न्यायालय आदेश 41 नियम 33 के अधीन प्राप्त शक्तियों का प्रयोग कर प्रत्यर्थियों या पक्षकारों के पक्ष में आदेश पारित कर सकती है यद्यपि प्रत्यर्थियों ने कोई अपील या आक्षेप दाखिल न किया हो। (सुशील कुमार कानूनगो वि. एम.पी. राज्य सहकारी बैंक मर्यादित) ...2238

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 9 — जब किसी आपराधिक मामले में दोषमुक्ति का आदेश हो — नियम में समझे गये निलम्बन के प्रतिबिम्ब के संबंध में कुछ नहीं है। (म.प्र. स्टेट सिविल सप्लाईस् कापोरेशन लि. वि. विनोद कुमार सावे) ...2213

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 9(1) — याची, निगम का एक कर्मचारी, उसके विरुद्ध मा.द.सं. और भ्रष्टाचार निवारण अधिनियम, 1988 के अधीन सभी आरोपों से दोषमुक्त किया गया — निलंबन आदेश के प्रतिसंहरण का अभ्यावेदन दोषमुक्ति के आदेश के विरुद्ध अपील लम्बित होने के आधार पर अस्वीकार किया गया — विद्वान एकल न्यायाधीश ने निलंबन का आदेश अभिखंडित किया और पुनर्नियुक्ति करने के लिए नियोक्ता को निदेशित किया — अभिनिर्धारित — उस दशा के सम्बन्ध में जब कर्मचारी के विरुद्ध दोषमुक्ति का निर्णय अभिलिखित किया जाता है, नियम बिल्कुल मौन है — तथापि कर्मचारी दोषमुक्ति के पश्चात् सेवा में वापस लौट सकता है — अन्यथा यह अंतिम न्यायालय द्वारा मामले का अंतिम न्यायनिर्णयन के लिए इंतजार करने वाले कर्मचारी को अत्यधिक कष्ट कारित कर सकता है। (म.प्र. स्टेट सिविल सप्लाईस् कापोरेशन लि. वि. विनोद कुमार सावे) ...2213

वाणिज्यिक कर अधिनियम, म.प्र., 1994 (1995 का 5), अनुसूची II के भाग I में प्रविष्टि क्र. 22, अनुसूची II के भाग V में प्रविष्टि क्र. 22, भाग IV में प्रविष्टि क्र. 39 — 5 जजों की न्यायपीठ को यह विनिश्चित करने के लिए निर्देश कि "क्या कोयला भस्म सिंडर का भाग है और वाणिज्यिक कर अधिनियम की अनुसूची II के भाग V में प्रविष्टि क्र. 22 में कोयला शब्द के अन्तर्गत आती है या उक्त वस्तु भाग IV में प्रविष्टि क्र. 39 के अन्तर्गत कर योग्य होगी?" — अभिनिर्धारित — "कोयला भस्म" "सिंडर" है और अनुसूची II के भाग V में प्रविष्टि क्र. 22 में कोयला शब्द के अन्तर्गत आती है इसलिए यह भाग IV में प्रविष्टि क्र. 39 के अन्तर्गत कर के आहरण योग्य नहीं है। आगे यह अभिनिर्धारित किया गया कि हुकुमचंद मिल के मामले में दिया गया निर्णय पूर्व विनिश्चयों से असम्बद्ध है और सिंडर (कोयला भस्म) उसके मूल कोयले से भिन्न वस्तु होने के संबंध में उसमें अभिव्यक्त किया गया विचार — इस सीमा तक कि सिंडर कोयला नहीं है उलट दिया गया — अपील तदनुसार खारिज की गई — राज्य ने एकल न्यायाधीश के आदेश के विरुद्ध अपील पेश की, अभिनिर्धारित कि — "कोयला भस्म के विक्रय पर कर की दर वही होगी जो जो कोयले पर है न कि अवशिष्ट प्रविष्टि के अन्तर्गत विहित दर", इस आधार पर कि यह 3 जजों की न्यायपीठ द्वारा हुकुमचंद मिल लि. बनाम् वाणिज्यिक कर म.प्र. (1988) 71 एसटीसी 101 में विनिश्चित अनुपात के विपरीत है — इसलिए यह निर्देश। (एडीशनल कमिशनर आफ सेल्स टैक्स वि. मेसर्स एस. कुमार लि.)(FB)—2156

संविधान, अनुच्छेद 14, शिक्षा गारंटी योजना — मानदेय का भुगतान — याची शिक्षाकर्मी के रूप में नियुक्त हुआ और उसे बढ़ा हुआ मानदेय इस आधार पर नहीं दिया गया कि

enhanced honorarium on the ground that he was not fulfilling the conditions mentioned in circular dated 26.07.2003 - Action challenged on the ground that respondents are trying to create two classes of Guruji (Shiksha Karmi) which is violation of Article 14 - Held - Under Article 14 a valid classification is permitted but class legislation is not permitted - However, it is neither in accordance with the Education Guarantee Scheme nor the respondents have mentioned sufficient reasons in the return - Classification and conditions laid down by the circular are illegal and arbitrary - Petition allowed. [Brajesh Kumar Tiwari v. C.E.O. Zila Panchayat, Shivpuri] ...2292

Constitution, Articles 14, 226 - Govt. Contract - Eligibility Criteria - Earlier, Petitioner Company was working in the name of M/s Tejas Construction and M/s Agrawal Brothers - M/s Tejas Construction converted into Petitioner Company and M/s Agrawal Brothers purchased by petitioner company through sale deed - Documents not considered on the ground of non-submission of dissolution deed of M/s Agrawal Brothers and non-registration of sale deed - Reason of non-submission of dissolution deed explained in sale deed - No objection by any partners of M/s Agrawal Brothers - In the sale deed it was specifically mentioned that partners shall allow the petitioner company to submit experience certificate gained by firm - Held Rejection of experience certificate and disqualification of petitioner arbitrary, baseless and hyper technical - Petition allowed. [Tejas Construction & Infrastructure Pvt. Ltd. v. Municipality Sanawad] ...2305

Constitution, Article 20(2) - See - Penal Code 1860, Sections 147, 149, 294, 341, 323, 506-B, 307 [Rajkumar v. State of M.P.] ...2478

Constitution, Articles 21 & 38 - Government must made endeavour to eliminate inequality in status, facility and opportunity. [Nilesh Singhal v. State of M.P.] ...2264

Constitution, Articles 216, 225, 226, State Reorganisation Act, 1956, Sections 54 & 68, Government of India Act, 1915, Section 106, High Court Rules and Orders, M.P., Section 3, Court Fees Act, 1870, Section 35 - Public Interest Litigation - In order to regulate filing of PIL, the Division Bench in its order dated 09.09.1999 in W.P. No.988/1999 issued certain directions including security deposit - Matter referred by the Division Bench to Full Bench after framing 5 substantial question of law - Held - Answering the reference the Full Bench held that the directions contained in the order dated 09.09.1999 passed in W.P. No.988/1999 by Division Bench of this Court will no longer hold good and that the rules in Section 3 of the High Court Rules for proceedings under Article 226 of the Constitution made under Article 225 of the Constitution and Clause 27 of the Letters Patent made by the High Court of Judicature, Nagpur, as amended from time to time, will continue to apply to all Public Interest Litigations filed under Article 226 of the Constitution until replaced or amended by rules made by the High Court of M.P. in exercise of its powers

वह परिपत्र तारीख 26.07.2003 में वर्णित शर्तों को पूरा नहीं कर रहा था - कृत्य को इस आधार पर चुनौती दी गई कि प्रत्यर्थी, गुरुजी (शिक्षाकर्मी) के दो वर्ग निर्मित करने का प्रयास कर रहे हैं जो अनुच्छेद 14 का उल्लंघन है - अभिनिर्धारित - अनुच्छेद 14 के अन्तर्गत एक वैध वर्गीकरण अनुज्ञात है किन्तु वर्ग विधायन अनुज्ञात नहीं है - तथापि, यह न तो शिक्षा गारंटी योजना के अनुरूप है और न ही प्रत्यर्थियों ने रिटर्न में पर्याप्त कारण उल्लिखित किये हैं - वर्गीकरण और परिपत्र द्वारा अधिकथित शर्तें अवैध और मनमानी हैं - याचिका मंजूर। (ब्रजेश कुमार तिवारी वि. सी.ई.ओ. जिला पंचायत, शिवपुरी) ...2292

संविधान, अनुच्छेद 14, 226 - शासकीय संविदा - पात्रता मानदंड - पूर्व में याची कम्पनी में, तेजस कंस्ट्रक्शन एवं में, अग्रवाल ब्रदर्स के नाम से कार्य कर रही थी - में, तेजस कंस्ट्रक्शन याची कम्पनी में संपरिवर्तित हो गई और में, अग्रवाल ब्रदर्स को याची कम्पनी द्वारा विक्रय विलेख के माध्यम से क्रय कर लिया - में, अग्रवाल ब्रदर्स का विघटन विलेख प्रस्तुत न करने और विक्रय विलेख के अरजिस्ट्रीकरण के आधार पर दस्तावेजों पर विचार नहीं किया गया - विघटन विलेख प्रस्तुत न करने का कारण विक्रय विलेख में स्पष्ट किया गया - में, अग्रवाल ब्रदर्स के किसी भागीदार द्वारा कोई आपत्ति नहीं - विक्रय विलेख में यह-विशिष्ट रूप से उल्लिखित किया गया कि भागीदार याची कम्पनी को फर्म द्वारा प्राप्त अनुभव प्रमाण-पत्र को प्रस्तुत करने को अनुज्ञात करेंगे - अभिनिर्धारित - अनुभव प्रमाण-पत्र को अस्वीकृत किया जाना और याची की निरर्हता मनमानी, आधारहीन और अति तकनीकी - याचिका मंजूर। (तेजस कंस्ट्रक्शन एन्ड इन्फ्रास्ट्रक्चर प्रा. लि. वि. म्युनिस्पैलिटी सनावद) ...2305

संविधान, अनुच्छेद 20(2) - देखें - दण्ड संहिता 1860, धाराएँ 147, 149, 294, 341, 323, 506-बी, 307 (राजकुमार वि. म.प्र. राज्य) ...2478

संविधान, अनुच्छेद 21 व 38 - सरकार को प्रतिष्ठा, सुविधा और अवसर में असमानता दूर करने का प्रयत्न करना चाहिए। (नीलेश सिंघल वि. म.प्र. राज्य) ...2264

संविधान, अनुच्छेद 216, 225, 226, राज्य पुनर्गठन अधिनियम, 1956, धाराएँ 54 व 68, भारत शासन अधिनियम, 1915, धारा 106, उच्च न्यायालय नियम और आदेश, म.प्र., धारा 3, न्यायालय फीस अधिनियम, 1870, धारा 35 - लोक हित वाद - पीआईएल का पेश किया जाना नियंत्रित करने क्रम में, खण्ड न्यायपीठ ने रिट याचिका क्रमांक 988/1999 में अपने आदेश तारीख 09.09.1999 में प्रतिभूति निक्षेप को सम्मिलित करते हुए कुछ निदेश जारी किये - मामला खण्ड न्यायपीठ द्वारा 5 विधि के सारवान प्रश्न विरचित करने के उपरांत पूर्ण न्यायपीठ को निर्देशित किया - अभिनिर्धारित - निर्देश उत्तरित करते हुए पूर्ण न्यायपीठ ने अभिनिर्धारित किया कि इस न्यायालय की खण्ड न्यायपीठ द्वारा रिट याचिका क्र. 988/1999 में पारित आदेश तारीख 09.09.1999 में अन्तर्विष्ट निदेश इससे अधिक अच्छे धारित नहीं होंगे और संविधान के अनुच्छेद 226 के अन्तर्गत कार्यवाहियों के लिए संविधान के अनुच्छेद 225 के अन्तर्गत निर्मित उच्च न्यायालय नियम की धारा 3 व उच्च न्यायालय, नागपुर द्वारा निर्मित लेटर पेटेंट का खण्ड 27, समय-समय पर यथा संशोधित, सभी लोक हित वादों को लागू होना जारी रहेंगे जब तक कि 1956 के अधिनियम की धारा 54 सहपठित संविधान के अनुच्छेद 225 के अधीन शक्तियों के प्रयोग में उच्च

u/s 54 of the Act of 1956 r/w Article 225 of the Constitution. [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur] (FB)...2172

Constitution, Article 216, 225, 226, State Reorganisation Act, 1956, Section 54 & 68, Government of India Act, 1915, Section 106, High Court Rules and Orders, M.P., Section 3 - Public Interest Litigation - Powers to make Rules - These rules and orders do not provide for security deposit to be made along with a writ petition filed under Article 226 of the Constitution and it is only the High Court comprising of the Chief Justice and all Judges of the High Court of M.P. appointed by the President or a Committee of the High Court Judges or a Judge authorized to make orders or rules relating to practice and procedure of the High Court, which could make fresh orders or rules providing for a security deposit along with every PIL filed to prevent the abuse of PILs and hence the order dated 09.09.1999 of the Division Bench in W.P. No.988/1999 was without jurisdiction. [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur] (FB)...2172

Constitution, Article 226, Ancient Monuments and Archaeological Sites and Remains Act; M.P. (12 of 1964), Sections 2(a), 2(c), 3, Ancient Monuments and Archaeological Sites and Remains Rules, M.P., 1976, Rule 10 - Fort at Sendhwa declared ancient monument - Notification declaring area upto 100 meters and further beyond it upto 200 meters from protected limits near or adjoining of protected monument as prohibited and regulated areas for mining and construction - Act and Rule regulates activities in the area and do not impose total ban on construction - However, Collector of District directed to ensure that no construction shall be permitted in prohibited area except in accordance with provision of Act and Rules - Petition disposed of. [Mohammad Rafik Bhutto v. State of M.P.] ...2274

Constitution, Article 226 - Compassionate appointment - Father of petitioner died in harness on 18.05.1996 - Mother filed application for appointment of minor son - Application rejected with direction to submit fresh application on attaining majority - Fresh application filed on 06.07.2005 after attaining majority - Rejected on 18.06.2007 on the ground that Circular dated 22.01.2007 provides that if there is no eligible major member in the family of deceased, the compassionate appointment can be given only if the age of majority is attained within 7 years and if age of majority is attained by minor after 7 years there would not be eligibility - Held - Policy prevailing at the time of death and application of compassionate appointment made, has to be applied and not the policy which came into existence subsequently - Order rejecting compassionate appointment quashed - Petition allowed. [Bhupendra Bairagi v. State of M.P.] ...2310

Constitution, Article 226 - Delay - In 1993, petitioner was informed that he was not entitled to get additional increment - Subsequent communication would not give fresh cause of action - State cause of action

न्यायालय द्वारा निर्मित नियमों द्वारा प्रतिस्थापित या संशोधित नहीं कर दिये जाते। (एस.पी. आनंद वि. द रजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर) (FB)---2172

संविधान, अनुच्छेद 216, 225, 226, राज्य पुनर्गठन अधिनियम, 1956, धाराएँ 54 व 68, भारत शासन अधिनियम, 1915, धारा 106, उच्च न्यायालय नियम और आदेश, म.प्र., धारा 3 - लोक हित वाद - नियम बनाने की शक्ति - ये नियम व आदेश संविधान के अनुच्छेद 226 के अधीन पेश रिट याचिका के साथ प्रतिभूति निक्षेप करने के लिए उपबंध नहीं करते और यह केवल उच्च न्यायालय, जिसमें राष्ट्रपति द्वारा नियुक्त म.प्र. उच्च न्यायालय के मुख्य न्यायाधीश व सभी न्यायाधीश या उच्च न्यायालय के न्यायाधीशों की समिति या उच्च न्यायालय की पद्धति और प्रक्रिया से संबंधित आदेशों या नियमों को बनाने के लिए अधिकृत न्यायाधीश समाविष्ट हैं, जो लोक हित वादों का दुरुपयोग निवारित करने के लिए प्रत्येक पीआईएल के साथ प्रतिभूति निक्षेप के लिए उपबंध करने वाले नये आदेश या नियम निर्मित कर सकें और इसलिए खण्ड न्यायपीठ का रिट याचिका क्र. 988/1999 में आदेश तारीख 09.09.1999 अधिकारिता विहीन था। (एस.पी. आनंद वि. द रजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर) (FB)---2172

संविधान, अनुच्छेद 226, प्राचीन संस्मारक तथा पुरातत्वीय स्थल और अवशेष अधिनियम, म.प्र. (1964 का 12), धारा 2(ए), 2(सी), 3, प्राचीन संस्मारक तथा पुरातत्वीय स्थल और अवशेष नियम, म.प्र., 1976, नियम 10 - सेंधवा स्थित किला प्राचीन संस्मारक घोषित - अधिसूचना संरक्षित संस्मारक के निकट या लगे हुए क्षेत्र को संरक्षित सीमाओं से 100 मीटर तक और उसके पश्चात् आगे 200 मीटर तक खनन और निर्माण के लिए प्रतिषिद्ध और विनियमित क्षेत्र के रूप में घोषित करती है - अधिनियम और नियम क्षेत्र में क्रियाकलापों की विनियमित करते हैं और निर्माण पर पूर्ण पाबंदी अधिरोपित नहीं करते हैं - तथापि जिले के कलेक्टर ने यह सुनिश्चित करने के लिए निदेशित किया कि प्रतिषिद्ध क्षेत्र में अधिनियम और नियमों के उपबंध के अनुसार के अलावा कोई निर्माण अनुज्ञात नहीं होगा - याचिका निपटाई गई। (मोहम्मद रफीक मुट्टो वि. म.प्र. राज्य) ...2274

संविधान, अनुच्छेद 226 - अनुकम्पा नियुक्ति - याची के पिता की मृत्यु 18.05.1996 को सेवा में रहते हुए हुई - माँ ने अवयस्क पुत्र की नियुक्ति के लिए आवेदन पेश किया - आवेदन वयस्कता प्राप्त करने पर नया आवेदन पेश के निदेश के साथ खारिज - नया आवेदन वयस्कता प्राप्त करने के पश्चात् 06.07.2005 को पेश - 18.06.2007 को इस आधार पर खारिज हुआ कि परिपत्र दिनांकित 22.01.2007 उपबंधित करता है कि यदि मृतक के परिवार में कोई पात्र वयस्क सदस्य नहीं है तो अनुकम्पा नियुक्ति केवल तभी दी जा सकती है जब वयस्कता की आयु 7 वर्षों के अन्दर प्राप्त की गई हो और यदि अवयस्क द्वारा वयस्कता की आयु 7 वर्ष के बाद प्राप्त की जाती है वहां पात्रता नहीं होगी - अभिनिर्धारित - मृत्यु के समय पर और अनुकम्पा नियुक्ति का आवेदन देते समय प्रचलित नीति लागू की जाना चाहिए न कि नीति जो बाद में अस्तित्व में आयी हो - अनुकम्पा नियुक्ति अस्वीकार करने का आदेश अभिखंडित - याचिका मंजूर। (भूपेन्द्र बैरागी वि. म.प्र. राज्य) ...2310

संविधान, अनुच्छेद 226 - विलम्ब - 1993 में याची को सूचित किया गया कि वह अतिरिक्त वेतनवृद्धि पाने का हकदार नहीं था - पश्चात्तर्फी ससूचना नया वादकारण प्रदान नहीं

can not be entertained - Petition dismissed. [Radheshyam Surolia v. National Textile Corporation (MP) Ltd.] ...2289

Constitution, Article 226, Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973 -- *Learned Single Judge while allowing the bunch of writ petitions, had specifically mentioned that the common order would be applicable only to the petitioners who had approached this Court and not others - Held - Judgment was not in rem - Petitioner who had abandoned a part of his claim and relinquished his rights in the disputed land - It would be deemed as if petitioner had not even filed the petition qua the disputed land - Such petitioner cannot get the benefit of that common order.* [Sadashiv Joshi v. State of M.P.] ...2254

Constitution, Article 226, Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973 -- *Petitioner having abandoned a part of claim in the earlier writ petition and relinquished his right on part of disputed land - In subsequent writ petition, petitioner challenged whole scheme including disputed land which he had originally abandoned - Held - Petitioner is totally debarred and even estopped from raising that claim in subsequent writ petition - Not on the ground of res judicata but on the ground of public policy.* [Sadashiv Joshi v. State of M.P.] ...2254

Constitution, Article 226, Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973 -- *Petitioner very cleverly kept silent in subsequent writ petition that he had, in earlier writ petition, abandoned a substantial part of claim and given up his rights qua the disputed land - Held - Material concealment and not disclosing all relevant facts - Petitioner had tried to not only mislead the court but has also made an attempt to misuse and abuse the process of Court - Disentitled the petitioner from adjudication of his claim on merits.* [Sadashiv Joshi v. State of M.P.] ...2254

Constitution, Article 226 - *Petitioner a blind person, appeared and got selected in preliminary and main examination conducted by M.P.P.S.C. - Was not permitted to participate in oral interview and denied benefit of reservation for disabled person - Held - Petitioner being selected in year 1998-99, therefore, direction to appoint can not be issued after 9 years.* [Nilesh Singhal v. State of M.P.] ...2264

Constitution, Article 226 - *Petitioner during course of employment acquired LL.B. and M.B.A. degrees - Claim for additional increments for acquiring additional professional qualifications - By one increment petitioner reached the maximum of sanctioned pay scale - Held - Denial of additional increment because petitioner reached to maximum of scale would not result in discrimination - Petition dismissed.* [Radheshyam Surolia v. National Textile Corporation (MP) Ltd.] ...2289

Constitution, Article 226 - *Transfer - Mala fides - Employee is required*

करेगी - पुराना वादकारण ग्रहण नहीं किया जा सकता है - याचिका खारिज। (राधेश्याम सुरोलिया वि. नेशनल टेक्सटाइल कारपोरेशन (एम.पी.) लि.) ...2289

संविधान, अनुच्छेद 226, नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973 - विद्वान एकल न्यायाधीश ने रिट याचिकाओं के समूह को मंजूर करते समय विशिष्ट रूप से यह उल्लेख किया कि सामान्य आदेश केवल ऐसे याचियों को लागू होगा जिन्होंने इस न्यायालय को निवेदन किया और अन्य को नहीं - अभिनिर्धारित - निर्णय सर्वबन्धी (इन रेम) नहीं था - याची जिसने उसके दावे के भाग को छोड़ दिया था और विवादित भूमि में अपने अधिकार त्याग दिये थे - यह माना जाएगा कि जैसे याची ने विवादित भूमि के संबंध में कोई याचिका ही पेश नहीं की थी - ऐसा याची सामान्य आदेश का कोई लाभ नहीं पा सकता है। (सदाशिव जोशी वि. म.प्र. राज्य) ...2254

संविधान, अनुच्छेद 226, नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973 - याची ने पूर्व रिट याचिका में दावे के एक भाग को छोड़ दिया और विवादित भूमि के भाग पर अपना अधिकार त्याग दिया - पश्चात्पूर्ति रिट याचिका में याची ने विवादित भूमि, जो वह मूल रूप से छोड़ चुका था, को सम्मिलित करते हुए पूरी स्कीम को चुनौती दी - अभिनिर्धारित - याची उस दावे को पश्चात्पूर्ति रिट याचिका में उठाने से पूर्णतः विवर्जित और बिबन्धित भी है - पूर्व-न्याय के आधार पर नहीं बल्कि लोक नीति के आधार पर। (सदाशिव जोशी वि. म.प्र. राज्य) ...2254

संविधान, अनुच्छेद 226, नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973 - याची बड़ी चतुराई से पश्चात्पूर्ति रिट याचिका में इस पर मौन रहा कि उसने पूर्व में पेश रिट याचिका में उसके दावे के सारवान् भाग को छोड़ दिया था और विवादित भूमि के संबंध में उसके अधिकार त्याग दिये थे - अभिनिर्धारित - सारवान् तथ्य को छुपाया और सभी सुसंगत तथ्य प्रकट नहीं किये - याची ने न केवल न्यायालय को गुमराह करने का प्रयास किया बल्कि न्यायालय की प्रक्रिया का दुरुपयोग करने का प्रयत्न भी किया - याची को उसके दावे का गुणदोषों पर निराकरण करने के अधिकार से वंचित करता है। (सदाशिव जोशी वि. म.प्र. राज्य) ...2254

संविधान, अनुच्छेद 226 - नेत्रहीन याची म.प्र. लोक सेवा आयोग द्वारा संचालित प्रारम्भिक एवं मुख्य परीक्षा में उपस्थित हुआ और चयनित किया गया - मौखिक साक्षात्कार में शामिल होने की अनुमति नहीं दी गई और निःशक्त व्यक्ति के लिए आरक्षण के लाभ से इंकार किया गया - अभिनिर्धारित - याची वर्ष 1998-99 में चयनित हुआ इसलिए नियुक्त करने के निदेश 9 वर्ष पश्चात् जारी नहीं किये जा सकते। (नीलेश सिंघल वि. म.प्र. राज्य) ...2264

संविधान, अनुच्छेद 226 - याची ने नियोजन के दौरान एल.एल.बी. और एम.बी.ए. की उपाधियाँ प्राप्त कीं - अतिरिक्त व्यावसायिक योग्यता प्राप्त करने के कारण अतिरिक्त वेतनवृद्धि के लिए दावा - एक वेतनवृद्धि से याची अधिकतम स्वीकृत वेतनमान पर पहुँच गया - अभिनिर्धारित - याची के अधिकतम वेतनमान पर पहुँचने की वजह से अतिरिक्त वेतनवृद्धि से इनकारी के परिणामस्वरूप विवेद नहीं होगा - याचिका खारिज। (राधेश्याम सुरोलिया वि. नेशनल टेक्सटाइल कारपोरेशन (एम.पी.) लि.) ...2289

संविधान, अनुच्छेद 226 - स्थानांतरण - असदभाव - कर्मचारी को असदभाव के

to place on record strong and clinching material in support of his plea of malafides - Transfer order of petitioner issued by Director - No malafides alleged against him - Petitioner failed to place on record any cogent material in support of his plea of malafides - Petition dismissed. [Shishir Raizada v. Union of India] ...2234

Constitution, Article 226, Urban Land (Ceiling and Regulation) Act, 1976, Section 10(3), Rule 5(2)(c) - Alternative Remedy - Learned Single Judge dismissed the writ petition for want of availability of alternative remedy - Held - The Division Bench reversing the finding of the learned Single Judge held that when the notices were not served, the proceedings were not conducted manifestly in a legal manner and the principles of Natural Justice were not followed - It cannot be held that the proceedings were lawful or writ jurisdiction of High Court is barred - Since no evidence is required to assess the question of legality of the proceedings, the question can be examined by the writ court - Writ Appeal allowed. [Sohan Singh v. State of M.P.] ...2184

Constitution, Article 311 - Compulsory Retirement - Scope of interference - Petitioner remained absent without leave unauthorisedly and thereafter did not join at his transferred post in spite of receiving instructions - Held - The conduct of petitioner is not becoming that of an employee and that it has resulted in loss of faith, trust and loss of confidence in him - Punishment of compulsory retirement is not harsh or grossly disproportionate - Order does not suffer from any kind of perversity or wednesbury unreasonableness - Petition dismissed. [Hari Krishna Verma v. The District & Sessions Judge] ...2231

Contempt of Courts Act (70 of 1971), Section 19 - Appeal - Court passed certain directions in exercise of its contempt jurisdiction - Held - Not only punishment awarded to alleged contemnors can be challenged but even correctness, validity and propriety of directions can also be challenged. [Sulochana Mallaiya (Smt.) v. S.N. Shrivastava] ...2205

Cooperative Societies Act, M.P., 1960 (17 of 1961), Section 55 & 64, Staff Service Rules, 61 & 62, State Cooperative Tribunal Regulations, 2000, Regulation 31, Civil Procedure Code, 1908, Order 6 Rule 17 & Order 41 Rule 33 - Termination - Amendment of Written Statement - Petitioners employees of Cooperative Bank registered under the Act, 1960, terminated from service - Joint Registrar setting aside the order of termination on the ground of non-observance of principles of natural justice - Both petitioners and respondents filed appeal before the Cooperative Tribunal and the appeal by respondents withdrawn - Respondent carrying out extensive amendment in the written statement at the stage of appeal before the Cooperative Tribunal - Cooperative Tribunal allowed the amendment, hence the writ petition by the petitioners for setting-aside the order allowing the amendment - Held -

अपने अभिवचन के समर्थन में ठोस और स्थिर सामग्री अभिलेख पर रखना अपेक्षित है - याची का स्थानांतरण आदेश संचालक द्वारा जारी - उसके विरुद्ध तथाकथित कोई असदभाव नहीं - याची असदभाव के अपने अभिवचन के समर्थन में कोई तर्कपूर्ण सामग्री अभिलेख पर रखने में असफल रहा - याचिका खारिज। (शिशिर रायजादा वि. यूनियन ऑफ इंडिया) ...2234

संविधान, अनुच्छेद 226, नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, 1976, धारा 10(3), नियम 5(2)(सी) - वैकल्पिक उपचार - विद्वान एकल न्यायाधीश ने वैकल्पिक उपचार की उपलब्धता के कारण रिट याचिका खारिज की - अभिनिर्धारित - खण्ड न्यायपीठ ने विद्वान एकल न्यायाधीश के निष्कर्षों को उलटते हुए अभिनिर्धारित किया कि जब सूचनापत्रों की तामील नहीं की गई, कार्यवाहियाँ प्रत्यक्ष रूप से वैध तरीके से संचालित नहीं की गई और प्राकृतिक न्याय के सिद्धांतों का पालन नहीं किया गया - यह अभिनिर्धारित नहीं किया जा सकता कि कार्यवाहियाँ विधिपूर्ण थीं या उच्च न्यायालय की रिट अधिकारिता वर्जित है - चूंकि कार्यवाहियों की वैधता के प्रश्न का निर्धारण करने के लिए कोई साक्ष्य अपेक्षित नहीं है, प्रश्न का रिट न्यायालय द्वारा परीक्षण किया जा सकता है - रिट अपील मंजूर। (सोहन सिंह वि. म.प्र. राज्य) ...2184

संविधान, अनुच्छेद 311 - अनिवार्य सेवानिवृत्ति - हस्तक्षेप का विषयक्षेत्र - याची बिना अवकाश के अनधिकृत रूप से अनुपस्थित रहा और उसके पश्चात् अनुदेश प्राप्त होने के बावजूद अपने स्थानांतरित पद पर कार्यभार ग्रहण नहीं किया - अभिनिर्धारित - याची का आचरण एक कर्मचारी की तरह नहीं है और इसके परिणामस्वरूप उसने निष्ठा, विश्वसनीयता और विश्वास खो दिया - अनिवार्य सेवानिवृत्ति कठोर या अत्यधिक अनुपातहीन नहीं है - आदेश किसी प्रकार की विपर्यस्तता या वेडनेसबरी अयुक्तियुक्तता से ग्रसित नहीं है - याचिका खारिज। (हरी कृष्ण वर्मा वि. द डिस्ट्रिक्ट एन्ड सेशनस् जज) ...2231

न्यायालय अवमान अधिनियम (1971 का 70), धारा 19 - अपील - न्यायालय ने अपनी अवमान अधिकारिता के प्रयोग में कतिपय निदेश पारित किये - अभिनिर्धारित - न केवल कथित अवमानकतओं को दिये गये दण्ड को चुनौती दी जा सकती है बल्कि निदेशों की शुद्धता, विधिमान्यता और औचित्य को भी चुनौती दी जा सकती है। (सुलोचना मलैया वि. एस.एन. श्रीवास्तव) ...2205

सहकारी सोसायटी अधिनियम, म.प्र., 1960 (1961 का 17), धारा 55 व 64, कर्मचारी सेवा नियम, 61 व 62, राज्य सहकारी अधिकरण विनियम, 2000, विनियम 31, सिविल प्रक्रिया संहिता, 1908, आदेश 6 नियम 17 व आदेश 41 नियम 33 - सेवा समाप्ति - वादोत्तर में संशोधन - अधिनियम, 1960 के अधीन पंजीकृत बैंक के कर्मचारी याची की सेवा समाप्ति - संयुक्त रजिस्ट्रार ने नैसर्गिक न्याय के अपालन में सेवा समाप्ति का आदेश अपास्त किया - याची व प्रत्यर्थी दोनों ने सहकारी अधिकरण में अपील पेश की तथा प्रत्यर्थी ने अपील वापस ली - सहकारी अधिकरण के समक्ष प्रत्यर्थी द्वारा अपील में व्यापक संशोधन प्रस्तावित किये - अधिकरण ने संशोधन मंजूर किया, तब याची द्वारा संशोधन स्वीकार करने वाले आदेश को अपास्त करने याचिका पेश की - अभिनिर्धारित - संशोधन आवेदन स्वीकार करने का आदेश मुकदमेबाजी कम करना है एवं संयुक्त रजिस्ट्रार द्वारा प्रत्यर्थियों को विनियम के अनुरूप उचित आदेश पारित करने की छूट दी गई थी, याची को संशोधन स्वीकार करने से कोई प्रतिकूल प्रभाव नहीं होगा क्योंकि याची

The object of allowing an application for amendment is to minimize the litigation and as the Joint Registrar had given liberty to the respondents to pass appropriate orders in accordance with the regulations, no prejudice would be caused to the petitioners if the amendment is allowed as the petitioners again would have challenged their termination which may ultimately result into the fresh litigation - Petition dismissed. [Sushil Kumar Kanungo v. M.P. Rajya Sahkari Bank Maryadit] ...2238

Criminal Procedure Code, 1973 (2 of 1974), Sections 41(2), 102, 451, 457, Income Tax Act, 1961, Sections 132(A), 293 - Seizure - Rs.14,50,000/-seized on the suspicion of theft but no crime registered - Warrant of authorization issued u/s 132(A) of the Act - Application u/ss 451 & 457 of the Code rejected by JFMC, but allowed by ASJ in revision - Order challenged before the High Court - Held - After issuance of warrant of authorisation by the Income Tax Department, in absence of any crime having been registered - The magistrate or the police has no jurisdiction to deal with the money and the money has to handed over to the Income Tax Department for its disposal in accordance with Law - M.Cr.C. Allowed. [Director of Income Tax (Investigation) v. State of M.P.] ...2483

Criminal Procedure Code, 1973 (2 of 1974), Sections 161 & 162, Evidence Act, 1872, Section 3 - It is well settled that the contents of the spot map prepared by police at the instance of a witness would be considered as the statement of the witness recorded u/s 161 of the Code - Contents of the map can be used u/s 161 of the Code for impeaching the testimony of witness on whose instance it was prepared. [Narayan v. State of M.P.] ...2401

Criminal Procedure Code, 1973 (2 of 1974), Sections 169 & 482 - See - Penal Code 1860, Sections 147, 149, 294, 341, 323, 506-B, 307 [Rajkumar v. State of M.P.] ...2478

Criminal Procedure Code, 1973 (2 of 1974) Sections 190 & 197 - See - Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999, Section 50(2) [Arvind Kumar Bhargava v. Lalit Parashar] ...2471

Criminal Procedure Code, 1973 (2 of 1974), Section 374(2) - See - Penal Code 1860, Section 302 [Gudda @ Raho @ Gajdhar v. State of M.P.] ...2218

Criminal Procedure Code, 1973 (2 of 1974), Section 374(2) - See - Prevention of Corruption Act 1988, Sections 7, 13(1)(d) r/w Section 13(2) [Navkant Sharma v. State of M.P.] ...2425

Criminal Procedure Code, 1973 (2 of 1974), Section 378(1) - See - Penal Code 1860, Section 302 r/w Section 34 [State of M.P. v. Ballu @ Vinod Kumar] ...2420

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401, Penal Code, 1860, Section 420 - Applicant was found travelling on complementary

पुनः अपने सेवा समाप्ति आदेश को चुनौती दे सकते थे जो अन्ततः नये मुकदमे में परिणित होगा
- याचिका खारिज। (सुशील कुमार कानूनगो वि. एम.पी. राज्य सहकारी बैंक मर्यादित) ...2238

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 41(2), 102, 451, 457, आयकर अधिनियम, 1961, धाराएँ 132(ए), 293 - अभिग्रहण - 14,50,000/- रुपये चोरी के संदेह में अभिग्रहीत किन्तु कोई अपराध पंजीबद्ध नहीं - अधिनियम की धारा 132(ए) के अधीन प्राधिकार का वारंट जारी - संहिता की धारा 451 व 457 के अधीन आवेदन प्रथम श्रेणी न्यायिक मजिस्ट्रेट द्वारा खारिज, किन्तु अपर सेशन न्यायाधीश द्वारा पुनरीक्षण में मंजूर - आदेश को उच्च न्यायालय के समक्ष चुनौती - अभिनिर्धारित - आयकर विभाग द्वारा प्राधिकार का वारंट जारी करने के बाद, किसी अपराध के पंजीबद्ध होने के अभाव में मजिस्ट्रेट या पुलिस रुपयों के बारे में कार्यवाही करने की कोई अधिकारिता नहीं रखते हैं और रुपया विधि अनुसार उसका निपटारा करने के लिए आयकर विभाग को सौंपना पड़ेगा - एम.सीआर.सी. मंजूर। (डायरेक्टर ऑफ इनकम टैक्स (इनवेस्टीगेशन) वि. म.प्र. राज्य) ...2483

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 व 162, साक्ष्य अधिनियम, 1872, धारा 3 - यह सुस्थापित है कि पुलिस द्वारा किसी साक्षी के प्रेरण पर तैयार घटना स्थल के नक्शे की अन्तर्वस्तु संहिता की धारा 161 के अधीन अभिलिखित साक्षी के कथन के रूप में विचार में ली जाएगी - संहिता की धारा 161 के अधीन नक्शे की अन्तर्वस्तु, साक्षी जिसके प्रेरण पर वह तैयार किया गया था, के अभिसाक्ष्य को अधिक्षेपित करने के लिए प्रयुक्त की जा सकती है। (नारायण वि. म.प्र. राज्य) ...2401

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 169 व 482 - देखें - दण्ड संहिता 1860, धाराएँ 147, 149, 294, 341, 323, 506-बी, 307 (राजकुमार वि. म.प्र. राज्य)...2478

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 190 व 197 - देखें -सहकारी .षि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999, धारा 50(2), (अरविंद कुमार भार्गव वि. ललित पाराशर) - ...2471

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 374(2) - देखें -दण्ड संहिता 1860, धारा 302 (गुड्डा उर्फ राहो उर्फ गजधर वि. म.प्र. राज्य) ...2218

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 374(2) - देखें - भ्रष्टाचार निवारण अधिनियम 1988, धाराएँ 7, 13(1)(डी) सहपठित धारा 13(2) (नवकांत शर्मा वि. म.प्र. राज्य) ...2425

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 378(1) - देखें -दण्ड संहिता 1860, धारा 302 सहपठित धारा 34 (म.प्र. राज्य वि. बल्लू उर्फ विनोद कुमार) ...2420

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 401, दण्ड संहिता, 1860, धारा 420 - आवेदक कम्पलीमेंटरी पास पर यात्रा करता हुआ पाया गया - अनुसंधान में पास

pass - On investigation pass was found to be forged - Offence of forgery established - However, applicant being government servant and incident being 18 years old, applicant deserves benefit of probation. [Pramod v. State of M.P.] ...2466

Criminal Procedure Code, 1973(2 of 1974), Section 433 - See - Prevention of Food Adulteration Act 1954, Section 16(1)(a) r/w Section 7(1). [Tulsiram v. State of M.P.] ...2462

Criminal Procedure Code, 1973 (2 of 1974), Section 464 - Effect of omission to frame, or absence of, or error in, charge - Finding of conviction cannot be held to be invalid as omission to frame, or absence of, or error in, charge did not result in any prejudice to accused nor it occasioned failure of justice. [Anil Kumar Gupta v. State of M.P.] ...2453

Criminal Trial - Practice & Procedure - Counter case - The basic principle of criminal jurisprudence is that each case is to be decided on the basis of its own oral & documentary evidence adduced by either party and not extraneous material (i.e. evidence produced in counter case) can be taken into consideration. [Narayan v. State of M.P.] ...2401

Court Fees Act, (7 of 1870), Section 35 - See - Constitution, Articles 216, 225, 226 [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur](FB)...2172

Defence of Accused - If the defence is found probable, due weightage should be given to it. [Navkant Sharma v. State of M.P.] ...2425

Evidence Act (1 of 1872) - Accomplice - The law has developed that the corroboration of the evidence of an accomplice is a rule of prudence. [Navkant Sharma v. State of M.P.] ...2425

Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Section 326, Maxim falsus in uno, falsus in omnibus - Applicability - Held - The maxim is not acceptable as a sound principle in our country - A person can be disbelieved on a particular part of his statement may not be disbelieved for rest of his statement - The Court is required to separate the grain from the chaff instead of rejecting whole statement - Conviction can be based on such statement. [Ashok v. State of M.P.] ...*71

Evidence Act, (1 of 1872), Section 3 - See - Criminal Procedure Code, 1973, Sections 161 & 162 [Narayan v. State of M.P.] ...2401

Evidence Act, (1 of 1872), Section 3 - See - Penal Code 1860, Section 376, [Annu @ Anoop Kumar v. State of M.P.] ...2435

Evidence Act, (1 of 1872), Section 32 - See - Penal Code 1860, Section 302 [Avinashi @ Gudda v. State of M.P.] ...2431

Evidence Act (1 of 1872), Sections 40, 41, 43 - Relevancy of previous Order, Judgment, Decree in a litigation - Held - As per Section 40 of the Act a previous judgment is relevant if it creates a bar for second suit such as res

कूटरचित होना पाया गया — कूटरचना का अपराध सिद्ध — तथापि आवेदक शासकीय सेवक होने और घटना 18 वर्ष पुरानी होने से आवेदक परीक्षा का लाभ पाने का पात्र। (प्रमोद वि. म.प्र. राज्य) ...2466

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 433 — देखें — खाद्य अपमिश्रण निवारण अधिनियम 1954, धारा 16(1)(ए) सहपठित धारा 7(1) (तुलसीराम वि. म.प्र. राज्य) ...2462

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 464. — आरोप विरचित न करने या उसके अभाव या उसमें गलती का प्रभाव — दोषसिद्धि का निष्कर्ष अविधिमान्य अभिनिर्धारित नहीं किया जा सकता क्योंकि आरोप विरचित न करने, या उसके अभाव, या उसमें गलती, के परिणामस्वरूप अभियुक्त पर कोई प्रतिकूल प्रभाव नहीं पड़ा और न इसके कारण न्याय की विफलता हुई। (अनिल कुमार गुप्ता वि. म.प्र. राज्य) ...2453

दाण्डिक विचारण — पद्धति और प्रक्रिया — प्रति-मामला — आपराधिक विधिशास्त्र का आधारभूत सिद्धांत है कि प्रत्येक मामले का विनिश्चय पक्षकारों द्वारा उसी मामले में प्रस्तुत मौखिक व दस्तावेजी साक्ष्य के आधार पर करना होता है और बाहरी सामग्री (अर्थात् प्रति-मामले में प्रस्तुत साक्ष्य) को विचार में नहीं लिया जा सकता। (नारायण वि. म.प्र. राज्य) ...2401

न्यायालय फीस अधिनियम, (1870 का 7), धारा 35 — देखें — संविधान, अनुच्छेद 216, 225, 226, (एस.पी. आनंद वि. द रजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर) (FB)—2172

अभियुक्त की प्रतिरक्षा — यदि प्रतिरक्षा अधिसंभाव्य पायी जाती है तो उसे सम्यक् अधिमान दिया जाना चाहिए। (नवकांत शर्मा वि. म.प्र. राज्य) ...2425

साक्ष्य अधिनियम (1872 का 1) — सह-अपराधी — यह विधि विकसित की गई है कि सह-अपराधी की साक्ष्य की सम्पुष्टि प्रज्ञा का नियम है। (नवकांत शर्मा वि. म.प्र. राज्य) ...2425

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 326, सूत्र फेल्सस इन यूनो, फेल्सस इन ओम्नीबस (एक बात में मिथ्या तो सब में मिथ्या) — प्रयोज्यता — अभिनिर्धारित — सूत्र हमारे देश में एक दृढ़ सिद्धांत के रूप में स्वीकार्य नहीं है — एक व्यक्ति जिसके कथन के किसी विशिष्ट भाग पर अविश्वास किया जाए तो भी ऐसा हो सकता है कि उसके कथन के शेष भाग पर अविश्वास न किया जाए — न्यायालय से अपेक्षित है कि सम्पूर्ण कथन को निरस्त करने के स्थान पर भूमी से अनाज को अलग करे — ऐसे कथन पर दोषसिद्धि आधारित की जा सकती है। (अशोक वि. म.प्र. राज्य) ---*71

साक्ष्य अधिनियम, (1872 का 1), धारा 3 — देखें — दण्ड प्रक्रिया संहिता, 1973, धारा 161 व 162 (नारायण वि. म.प्र. राज्य) ...2401

साक्ष्य अधिनियम, (1872 का 1), धारा 3 — देखें — दण्ड संहिता 1860, धारा 376 (अन्नू उर्फ अनूप कुमार वि. म.प्र. राज्य) ...2435

साक्ष्य अधिनियम, (1872 का 1), धारा 32 — देखें — दण्ड संहिता (1860 का 45), धारा 302 (अविनाश उर्फ गुड्डा वि. म.प्र. राज्य) ...2431

साक्ष्य अधिनियम (1872 का 1), धाराएँ 40, 41, 43 — किसी वाद में पूर्वतन आदेश, निर्णय, डिक्री की सुसंगतता — अभिनिर्धारित — अधिनियम की धारा 40 के अनुसार पूर्वतन निर्णय

judicata - As per Section 41 previous judgment in a suit for probate, matrimonial, admiralty or insolvency can be relevant for subsequent suit - As per Section 42 previous judgment is relevant in a subsequent suit if previous judgment is of public nature - As per Section 43 previous judgment is relevant in a subsequent suit if previous judgment is a fact in issue - Appeal dismissed. [Kallu v. Antulal] ...2381

Evidence Act (1 of 1872), Section 63(2) - Whether conviction can be based on secondary evidence (photocopy of original complementary pass) to hold that the original pass was forged - Held - Yes, as original complementary pass is being in possession of the applicant (accused) and complementary pass was handed over by the applicant himself to the conductor who got the photocopy made. [Pramod v. State of M.P.] ...2466

Evidence Act, (1 of 1872), Section 102 - See - Motor Vehicles Act 1988, Section 166 [National Insurance Company Ltd. v. Smt. Setubai] ...2367

Explosive Substances Act (6 of 1908), Section 3 - Appellant was convicted for all of sudden hurled a country made bomb at his father - Bomb ultimately landed on a wall - Explosion resulted into injuries in father's scapular reason - Conviction challenged in appeal - Held - Evidence of parents of appellant suffered from serious infirmities about the bomb had exploded at the wall - Chemical examiner indicated presence of pellets in the remnants whereas no pellet injury was found on body of appellant's father - Forensic & medical evidence also not corroborate the prosecution version - Appellant entitled to benefit of doubt - Appeal allowed. [Ajay Kumar Notwani v. State of M.P.] ...2409

Fundamental Rules, M.P., Rule 56(3) - Compulsory Retirement - Service record of petitioner was good and under no circumstances can a prudent man come to conclusion that service record of petitioner warranted his compulsory retirement in public interest - Pendency of three departmental enquiries against petitioner would not warrant his compulsory retirement as pendency of D.E. have not reflected upon petitioner's performance - Compulsory retirement of petitioner on the basis of pendency of departmental enquiries per se illegal. [Suresh Chand Pandya v. State of M.P.] ...2318

General Clauses Act, (10 of 1897), Section 3 Clause 22 - See - Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999, Section 50(2) [Arvind Kumar Bhargava v. Lalit Parashar] ...2471

Government of India Act, (of 1915), Section 106. - See - Constitution, Articles 216, 225, 226 [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur] (FB)...2172

Gram Panchayat (Powers and Functions of the Secretary) Rules, M.P., 1999, Rule 4(1) - Official duties of Secretary - Petitioner appointed as Panchayat Karmi and subsequently notified as Secretary - Samajik Suraksha

सुसंगत है यदि वह द्वितीय वाद का वर्जन करता है जैसे पूर्व-न्याय - धारा 41 के अनुसार प्रोबेट, वैवाहिक, नावाधिकरण या दिवाला विषयक किसी वाद में पूर्वतन निर्णय पश्चात्पूर्ती वाद के लिए सुसंगत हो सकता है - धारा 42 के अनुसार पूर्वतन निर्णय पश्चात्पूर्ती वाद में सुसंगत है यदि पूर्वतन निर्णय लोक प्रकृति का है - धारा 43 के अनुसार पूर्वतन निर्णय पश्चात्पूर्ती वाद में सुसंगत है यदि पूर्वतन निर्णय एक विवाद्यक तथ्य है - अपील खारिज। (कल्लू वि. अंतूलाल) ...2381

साक्ष्य अधिनियम (1872 का 1), धारा 63(2) - क्या द्वितीयक साक्ष्य (मूल कम्पलीमेंटरी पास की फोटो प्रति) पर, यह अभिनिर्धारित करते हुए कि मूल पास कूटरचित था, दोषसिद्धि आधारित की जा सकती है - अभिनिर्धारित - हाँ, चूंकि मूल कम्पलीमेंटरी पास आवेदक (अभियुक्त) के कब्जे में है और कम्पलीमेंटरी पास स्वयं आवेदक द्वारा कंडक्टर को दिया गया जिसने फोटो प्रति तैयार करवायी। (प्रमोद वि. म.प्र. राज्य) ...2466

साक्ष्य अधिनियम, (1872 का 1), धारा 102 - देखें - मोटर यान अधिनियम, 1988, धारा 166 (नेशनल इंश्योरेंस कंपनी लि. वि. श्रीमति सेतु बाई) ...2367

विस्फोटक पदार्थ अधिनियम (1908 का 6), धारा 3 - अपीलार्थी को उसके पिता पर अचानक देशी बम जोर से फेंकने के लिए दोषसिद्ध किया गया - बम अंततः एक दीवार पर गिरा - विस्फोट के परिणामस्वरूप पिता के कंधे पर क्षतियाँ आई - दोषसिद्धि को अपील में चुनौती दी - अभिनिर्धारित - अपीलार्थी के माता-पिता के साक्ष्य में बम से दीवार पर विस्फोट हुआ इस बारे में गम्भीर विसंगतियाँ - रासायनिक परीक्षक ने अवशेष में छरों की उपस्थिति इंगित की जबकि अपीलार्थी के पिता के शरीर पर छरों की कोई क्षति नहीं पायी गई - न्यायालयीन (फॉरेंसिक) और चिकित्सकीय साक्ष्य भी अभियोजन की कथा की पुष्टि नहीं करते - अपीलार्थी संदेह का लाभ पाने का हकदार - अपील मंजूर। (अजय कुमार नोतवानी वि. म.प्र. राज्य) ...2409

मूलभूत नियम, म.प्र., नियम 56(3) - अनिवार्य सेवानिवृत्ति - याची का सेवा अभिलेख उत्तम था और ऐसी कोई परिस्थिति नहीं जिसके अधीन एक प्रज्ञावान व्यक्ति इस निष्कर्ष पर पहुंच सके कि याची का सेवा अभिलेख लोकहित में उसकी अनिवार्य सेवानिवृत्ति समर्थित करता है - याची के विरुद्ध तीन विभागीय कार्यवाहियों का लम्बित होना उसकी अनिवार्य सेवानिवृत्ति समर्थित नहीं करेगा क्योंकि विभागीय कार्यवाही के लम्बन ने याची के कार्य पर प्रभाव नहीं डाला है - विभागीय जाँचों के लम्बित होने के आधार पर याची की अनिवार्य सेवानिवृत्ति स्वतः अवैधानिक। (सुरेश चंद पंड्या वि. म.प्र. राज्य) ...2318

साधारण खंड अधिनियम, (1897 का 10), धारा 6 खंड 22 - देखें - सहकारी कृषि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999, धारा 50(2) (अरविंद कुमार भार्गव वि. ललित पाराशर) ...2471

भारत शासन अधिनियम, (1915 का), धारा 106 - देखें - संविधान, अनुच्छेद 216, 225, 226 (एस.पी. आनंद वि. द रजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर) (FB)---2172

ग्राम पंचायत (सचिव की शक्तियाँ और कार्य) नियम, म.प्र., 1999, नियम 4(1) - सचिव के पदीय कर्तव्य - याची पंचायत कर्मों के रूप में नियुक्त हुआ और तत्पश्चात् सचिव के रूप में अधिसूचित किया गया - सामाजिक सुरक्षा पेंशन परमो बाई के हित में मंजूर हुई - उसके

Pension sanctioned in favour of Parmo Bai - After her remarriage Gram Panchayat by resolution diverted Nirashrit Pension in favour of another lady namely Parmo Bai - Held - Gram Panchayat not empowered to sanction Nirashrit Pension - Petitioner being Secretary merely carried out resolution - Resolution passed in 1996 - Rules, 1999 came into force in 1999 - Nothing on record to show that Panchayat Karmi at that time had to use his own wisdom contrary to resolution - Petitioner has not misused his post. [Kailash Babu Rai v. State of M.P.] ...2278

High Court Rules and Orders, M.P., Section 3 - See - Constitution, Articles 216, 225, 226 [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur] (FB)...2172

Income Tax Act, (43 of 1961), Sections 132(A), 293 - See - Criminal Procedure Code, 1973, Sections 41(2), 102, 451, 457 [Director of Income Tax (Investigation) v. State of M.P.] ...2483

Industrial Disputes Act, (14 of 1947), Section 10 - See - Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P., 2005, Section 2(1) [General Manager, Bank Note Press, Dewas v. Bank Note Press Office Staff Association, Dewas] ...2218

Industrial Dispute Act (14 of 1947), Section 25-O - Closure - Closure of industrial unit challenged - Held - The Division Bench while affirming the findings of the learned Single Judge held that the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and persons interested in such closure may, having regard to genuineness and adequacy of reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission for closure of the unit - Writ Appeal Dismissed. [M.I.S.C. Karmchari Sangh v. State of M.P.] ...2197

Juvenile Justice Act (53 of 1986), Section 2(h), Juvenile Justice (Care and Protection of Children) Act, 2000, Section 2(k) - Juvenile - Appellant failed to raise any objection about his age before the committal court or the trial court - The fact of age cannot be considered at the appellate stage because the objection in respect of age, is raised for the first in appellate court - This argument is not tenable that appellant was juvenile on the date of incident and juvenile court was competent to try case. [Annu alias Anoop Kumar v. State of M.P.] ...2435

Juvenile Justice (Care and Protection of Children) Act, (56 of 2000), Section 2(k) - See - Juvenile Justice Act 1986, Section 2(h) [Annu alias Anoop Kumar v. State of M.P.] ...2435

Land Acquisition Act (1 of 1894), Sections 23 & 24 - Matters to be considered and neglected in determining compensation - Use of land on the

पुनर्विवाह के पश्चात् ग्राम पंचायत ने प्रस्ताव द्वारा निराश्रित पेंशन परमो बाई नामक दूसरी महिला के हित में परिवर्तित कर दी - अभिनिर्धारित - ग्राम पंचायत निराश्रित पेंशन मंजूर करने को सशक्त नहीं - याची ने सचिव होने के नाते केवल प्रस्ताव का पालन किया - प्रस्ताव 1996 में पारित हुआ - नियम 1999 प्रवर्तन में 1999 में आए - अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि पंचायत कर्मी को उस समय प्रस्ताव के प्रतिकूल अपनी स्वयं की बुद्धि का प्रयोग करना था। (कैलाश बाबू राय वि. म.प्र. राज्य) ...2278

उच्च न्यायालय नियम और आदेश, म.प्र., धारा 3 - देखें - संविधान, अनुच्छेद 216, 225, 226 (एस.पी. आनंद वि. द रजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर)(FB)---2172

आयकर अधिनियम, (1961 का 43), धाराएँ 132(ए), 293 - देखें - दण्ड प्रक्रिया संहिता, 1973, धाराएँ 41(2), 102, 451, 457 (डायरेक्टर ऑफ इनकम टैक्स (इनवेस्टीगेशन) वि. म.प्र. राज्य) ...2483

औद्योगिक विवाद अधिनियम, (1947 का 14), धारा 10 - देखें - उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005, धारा 2(1) (जनरल मेनेजर, बैंक नोट प्रेस, देवास वि. बैंक नोट प्रेस आफिस स्टाफ एसोसिएशन, देवास) ...2218

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-ओ - समापन - औद्योगिक इकाई के समापन को चुनौती - अभिनिर्धारित - खण्ड न्यायपीठ ने विद्वान एकल न्यायाधीश के निष्कर्षों की अभिपुष्टि करते समय अभिनिर्धारित किया कि समुचित सरकार, ऐसी जाँच जो वह उचित समझती है करने के उपरांत और नियोक्ता, ऐसे समापन में हितबद्ध कर्मचारों और व्यक्तियों को सुने जाने का उचित अवसर देने के उपरांत, नियोक्ता द्वारा कथित कारणों की विशुद्धता और पर्याप्तता, साधारण जनता के हितों और अन्य सभी सुसंगत कारकों को ध्यान में रखते हुए, आदेश द्वारा और लिखित में अभिलिखित किये जाने वाले कारणों से, इकाई के समापन के लिए ऐसी अनुमति दे सकेगी या देने से इंकार कर सकेगी। (एम.आई.एस.सी. कर्मचारी संघ वि. म.प्र. राज्य) ...2197

किशोर न्याय अधिनियम (1986 का 53), धारा 2(एच), किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम, 2000, धारा 2(के) - किशोर - अपीलार्थी उसकी उम्र के संबंध में कोई आपत्ति सुपुर्द करने वाले न्यायालय या विचारण न्यायालय के समक्ष उठाने में असफल रहा - उम्र का तथ्य अपील के प्रक्रम पर विचारित नहीं किया जा सकता क्योंकि उम्र के संबंध में आपत्ति प्रथम बार अपील न्यायालय में उठाई गई - यह तर्क मान्य नहीं है कि अपीलार्थी घटना की तारीख को किशोर था और किशोर न्यायालय मामले का विचारण करने के लिए सक्षम था। (अन्नू उर्फ अनूप कुमार वि. म.प्र. राज्य) ...2435

किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम, (2000 का 56), धारा 2(के) - देखें - किशोर न्याय अधिनियम 1986, धारा 2(एच) (अन्नू उर्फ अनूप कुमार वि. म.प्र. राज्य) ...2435

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 23 व 24 - प्रतिकर अवधारण करने में विचार करने वाले और उपेक्षा करने वाले विषय - अर्जन की तिथि पर भूमि का उपयोग सारवान्

date of acquisition is material fact - Potential value on the date of notification u/s 4 is relevant and not subsequent user - In case of acquisition of developing land, certain deduction has to be made depending upon facts of each case - In case of large piece of land certain deduction is required to be made - In case of acquisition of large piece of land grant of compensation per sq.ft. illegal - Situation of land, distance from city are relevant consideration - Genuineness of transaction and time gap between sale transactions are relevant facts. [Shanti Devi Tiwari (Smt.) v. Town Improvement Trust, Rewa] 2336

Land Revenue Code, M.P. (20 of 1959), Section 50, Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007, Section 51 - Effect of repeal of enactment - As per Section 261 of the Code, Madhya Bharat Land Revenue & Tenancy Act was repealed and, therefore, procedure provided in Section 50 of the Code shall apply and not the provisions of the repealed enactment will be applicable. [Choti Bai (Smt.) v. State of M.P.] ...2331

Land Revenue Code, M.P. (20 of 1959), Sections 50, 261, 262 & 262(1), Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007, Section 51 - Suo motu powers of revision - Held - Though no time limit has been prescribed for exercising suo moto powers of revision, yet they should be exercised within a reasonable time. [Choti Bai (Smt.) v. State of M.P.]...2331

Limitation - It was a cardinal principal of law of limitation - The prescribed-period, if any, of limitation starts running from the date of acquiring the knowledge of the relevant fact giving rise to the cause of action. [Choti Bai (Smt.) v. State of M.P.] ...2331

Limitation Act (36 of 1963), Section 5, Civil Procedure Code, 1908, Section 96 - Condonation of delay in filing appeal - Delay of 6½ years in filing appeal - Plaintiff/respondent filed suit for declaration and perpetual injunction - Appellant engaged counsel - O.I.C. became patient of cancer and was unable to devote sufficient time - Counsel not engaged by appellant cross examined plaintiff's witnesses and subsequently pleaded No Objection on the date which was fixed for appellant's evidence - Counsel engaged by appellant, is no more, never informed about the date - Appellant came to know about ex parte decree only when the same was filed by respondent in another suit - Appeal was filed after a delay of 6½ years - Held - Sufficient cause should be construed liberally as the justice should not be lost in technicalities - Length of delay is not relevant factor - When sufficient cause is made out, the interest of opposite party may be compensated by imposing cost - Delay of 6½ years condoned with cost of Rs.10,000/-. [International Association of Lions Clubs v. Dr. Jagjit Singh Khanna] ...2342

Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007, Section 51 - See - Land Revenue Code, M.P. 1959, Sections 50, 261, 262 & 262(1) [Choti Bai (Smt.) v. State of M.P.] ...2331

तथ्य है — धारा 4 के अधीन अधिसूचना की तिथि पर संभाव्य मूल्य सुसंगत है न कि पश्चात्तर्वर्ती उपयोग — विकासशील भूमि के अर्जन की दशा में प्रत्येक मामले के तथ्यों पर निर्भर रहते हुए कुछ कटौती करनी पड़ती है — भूमि के बड़े टुकड़े की दशा में कुछ कटौती की जाना अपेक्षित है — भूमि के बड़े टुकड़े के अर्जन की दशा में प्रति वर्गफुट प्रतिकर देना अवैध — भूमि की स्थिति, शहर से दूरी सुसंगत विचार हैं — संव्यवहार की विशुद्धता और विक्रय संव्यवहारों के मध्य समयान्तर सुसंगत तथ्य हैं। (शांति देवी तिवारी (श्रीमति) वि. टाउन इम्प्लूमेंट ट्रस्ट, रीवा) ...2336

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50, मध्य भारत भू-आगम और कृषकाधिकार विधान, संवत् 2007, धारा 51 — अधिनियमिति के निरसन का प्रभाव — संहिता की धारा 261 के अनुसार, मध्य भारत भू-आगम और कृषकाधिकार विधान निरसित हो गया, और इसलिए संहिता की धारा 50 में उपबंधित प्रक्रिया लागू होगी और निरसित अधिनियमिति के उपबंध लागू नहीं होंगे। (छोटी बाई (श्रीमति) वि. म.प्र. राज्य) ...2331

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 50, 261, 262 व 262(1), मध्य भारत भू-आगम और कृषकाधिकार विधान, संवत् 2007, धारा 51 — पुनरीक्षण की स्वप्रेरणाधीन शक्तियाँ — अभिनिर्धारित — यद्यपि पुनरीक्षण की स्वप्रेरणाधीन शक्तियाँ प्रयोग करने के लिए कोई समय सीमा विहित नहीं है, तथापि इनका प्रयोग युक्तियुक्त समय के भीतर किया जाना चाहिए। (छोटी बाई (श्रीमति) वि. म.प्र. राज्य) ...2331

परिसीमा — यह परिसीमा विधि का मुख्य सिद्धांत था — परिसीमा की विहित कालावधि, यदि कोई हो, सुसंगत तथ्य, जिससे वादकारण उत्पन्न हुआ, की जानकारी प्राप्त करने की तारीख से चलना प्रारम्भ होती है। (छोटी बाई (श्रीमति) वि. म.प्र. राज्य) ...2331

परिसीमा अधिनियम (1963 का 36), धारा 5, सिविल प्रक्रिया संहिता, 1908, धारा 96 — अपील पेश करने में विलम्ब की माफी — अपील पेश करने में 6¼ वर्ष का विलम्ब — वादी/प्रत्यर्थी ने घोषणा और शाश्वत व्यादेश के लिए वाद पेश किया — अपीलार्थी ने वकील मुकरर किया — प्रभारी अधिकारी कैंसर का मरीज हो गया और पर्याप्त समय देने में असमर्थ हो गया — वकील जो कि अपीलार्थी द्वारा नियुक्त नहीं किया गया था द्वारा वादी साक्षियों का प्रति परीक्षण किया गया तथा बाद में प्रतिवादी की साक्ष्य के लिए नियत तिथि को कोई अनुदेश न होना अभिवचित किया — वकील जो कि अपीलार्थी द्वारा नियुक्त किया गया था, ने तिथि के बारे में कभी सूचित नहीं किया और उसकी मृत्यु हो गयी — अपीलार्थी को एकपक्षीय डिक्री की जानकारी केवल तब हुई जब वह प्रत्यर्थी द्वारा दूसरे वाद में पेश की गयी — अपील 6¼ वर्ष के विलम्ब के बाद पेश की गई — अभिनिर्धारित — पर्याप्त कारण का अर्थ उदारता से लगाया जाना चाहिए क्योंकि तकनीकियों में न्याय की हानि नहीं होनी चाहिए — विलम्ब कितना है यह सुसंगत कारक नहीं है — जब पर्याप्त कारण का मामला बनता है तो विरोधी पक्ष का हित खर्च अधिरोपित करके प्रतिकरित हो सकता है — 6¼ वर्ष का विलम्ब रु. 10,000/- के खर्च सहित माफ किया गया। (इंटरनेशनल एसोशिएशन ऑफ लायंस क्लब वि. डॉ. जगजीत सिंह खन्ना) ...2342

मध्य भारत भू-आगम और कृषकाधिकार विधान, संवत् (2007 का), धारा 51 — देखें — भू राजस्व संहिता, म.प्र. 1959, धाराएँ 50, 261, 262 व 262(1) (छोटी बाई (श्रीमति) वि. म.प्र. राज्य) ...2331

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P., 2008, Rule 1.20.9 - Constitutional validity of Rule 1.20.9 challenged as illegal and arbitrary - The rationale behind the rule is that in service quota seats should be filled by in service candidates first - In-service candidates and non-service candidates forms different category - In case of non-availability of eligible candidate in service category - The seats in service category cannot be allotted to corresponding category candidate of non-service category - Rule 1.20.9 not ultra vires - Petition dismissed. [Ramu Thakur (Dr.) v. M.P. Professional Examination Board] ...2285

Motor Vehicles Act (59 of 1988), Sections 64, 65 & 41, Motor Vehicles Rules, Central, 1989, Rule 81, Motor Vehicles Rules, M.P., 1994, Rule 55-A - Fixation of higher fee for registration with an option to seek reservation of particular registration number - Validity - Application for allotment of particular registration number for motorcycle rejected as requisite fee for allotment of particular number was not paid - Held - Power to prescribe fee for registration of motor vehicle is conferred on Central Government - Notification issued by State Govt. prescribing fee to be charged for registration of motor vehicle by means of reservation ultra vires - Notification quashed - Respondents directed to reconsider application of petitioner - Petition allowed. [Rakesh Sethi v. State of M.P.] ...2297

Motor Vehicles Act, (59 of 1988), Sections 140, 143 & 167 - See - Workmen's Compensation Act 1923, Section 30 [Rajani Agrawal (Smt.) v. Ramswaroop] ...2384

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Appellants are brothers of deceased - Although appellants were not financially dependent on deceased but it cannot be denied that in number of respect they were dependent on the deceased and entitled for compensation - Since appellants are financially well settled Rs.1,50,000/- compensation awarded. [Gajanand v. Virendra Singh] ...*72

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Composite Negligence - Deceased was travelling in Matador which was hit by truck - In claim case truck driver remained ex-parte - Tribunal dismissed the petition on the ground that appellant has not impleaded owner & insurer of Matador - Held - Even if it is assumed that driver of Matador was negligent then too so far as appellants are concerned it was a case of composite negligence and claim petition cannot be dismissed for non-impleading owner, driver and insurer of Matador - Appeal allowed. [Gajanand v. Virendra Singh] ...*72

Motor Vehicles Act (59 of 1988), Section 166, Evidence Act, 1872, Section 102 - Burden of Proof - Eye witness lodged FIR that a truck had hit motorcycle killing the driver - Police filed charge sheet that involvement of truck not proved however Bus had caused the accident - Driver and owner

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चिकित्सा और दन्त स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र., 2008, नियम 1.20.9 - नियम 1.20.9 मनमाना और अवैध होने से संवैधानिक विधिमान्यता को चुनौती - नियम का तर्काधार यह है कि सेवा कोटे की सीटें सेवा उम्मीदवारों के द्वारा पहले मरी जायेंगी - सेवा उम्मीदवार और गैर सेवा उम्मीदवार अलग वर्ग बनाते हैं - सेवा वर्ग में अर्हता रखने वाले उपलब्ध न होने के मामले में - सेवा वर्ग की सीटें गैर सेवा वर्ग के तत्सम वर्ग को आबंटित नहीं की जा सकती - नियम 1.20.9 अधिकारातीत नहीं - याचिका खारिज। (रामू ठाकुर (डॉ.) वि. एम.पी. प्रोफेशनल एग्जामिनेशन बोर्ड) ...2285

मोटर यान अधिनियम (1988 का 59), धाराएँ 64, 65 व 41, मोटर यान नियम, केन्द्रीय, 1989, नियम 81, मोटर यान नियम, म.प्र., 1994, नियम 55-ए - विशिष्ट पंजीयन क्रमांक का आरक्षण चाहने के विकल्प के साथ पंजीयन के लिए उच्चतर शुल्क का नियत किया जाना - विधिमान्यता - मोटरसायकल के लिए विशिष्ट पंजीयन क्रमांक के आबंटन के लिए आवेदन निरस्त क्योंकि विशिष्ट क्रमांक के आबंटन हेतु आवश्यक शुल्क अदा नहीं किया - अभिनिर्धारित - मोटर यान के पंजीयन के लिए शुल्क विहित करने की शक्ति केन्द्र सरकार को प्रदत्त है - राज्य सरकार द्वारा आरक्षण के माध्यम से मोटर यान के पंजीयन के लिए प्रभारित शुल्क विहित करते हुए जारी अधिसूचना अधिकारातीत - अधिसूचना अभिखंडित - प्रत्यर्थियों को याची के आवेदन पर पुनर्विचार करने को निदेशित किया - याचिका मंजूर। (राकेश सेठी वि. म.प्र. राज्य) ...2297

मोटर यान अधिनियम, (1988 का 59), धाराएँ 140, 143, 167 - देखें - कर्मकार प्रतिकर अधिनियम 1923, धारा 30 (रजनी अग्रवाल (श्रीमति) वि. रामस्वरूप) ...2384

मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - अपीलार्थी मृतक के भाई हैं - यद्यपि अपीलार्थी मृतक पर वित्तीय रूप से आश्रित नहीं थे, किन्तु इससे इनकार नहीं किया जा सकता है कि वे अनेक विषयों में मृतक पर आश्रित थे और प्रतिकर के हकदार हैं - चूंकि अपीलार्थी वित्तीय रूप से सम्पन्न हैं, 1,50,000/- रुपये प्रतिकर अधिनिर्णीत। (गजानन्द वि. वीरेन्द्र सिंह) ---*72

मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - संयुक्त उपेक्षा - मृतक मेटाडोर में यात्रा कर रहा था जिसे ट्रक ने टक्कर मारी - दावा प्रकरण में ट्रक चालक एकपक्षीय रहा - अधिकरण ने याचिका इस आधार पर खारिज की कि अपीलार्थी ने मेटाडोर के स्वामी और बीमाकर्ता को पक्षकार नहीं बनाया है - अभिनिर्धारित - यदि यह मान भी लेवें कि मेटाडोर का चालक उपेक्षावान था, तब भी जहाँ तक अपीलार्थियों का संबंध है यह मामला संयुक्त उपेक्षा था और दावा याचिका मेटाडोर के स्वामी, चालक और बीमाकर्ता को पक्षकार न बनाये जाने के कारण खारिज नहीं की जा सकती है - अपील मंजूर। (गजानन्द वि. वीरेन्द्र सिंह) ---*72

मोटर यान अधिनियम (1988 का 59), धारा 166, साक्ष्य अधिनियम, 1872, धारा 102 - सबूत का मार - प्रत्यक्षदर्शी साक्षी ने एफआईआर दर्ज कराई कि ट्रक ने मोटरसायकल को टक्कर मारकर उसके चालक की मृत्यु कारित की - पुलिस ने आरोप-पत्र पेश किया कि ट्रक का अन्तर्ग्रस्त होना साबित नहीं तथापि बस ने दुर्घटना कारित की - दावा अधिकरण के समक्ष बस

of bus remained ex parte before Claims Tribunal - Tribunal passed award in favour of claimants - Held - It was the duty of claimants to examine the I.O. to prove that on what particular evidence he recorded a finding that the truck was not involved in the accident and in fact the bus has caused the accident - Non-examination of I.O. and first informant would give a dent to the claim. [National Insurance Company Ltd. v. Smt. Setubai] ...2367

Motor Vehicles Act (59 of 1988), Section 173(1) - Exemption from deposit amount in compliance of requirement of proviso to Section 173(1) - Award of tribunal fixing liability against owner, driver & insurer - However, tribunal permitted the insurer to recover the amount from the owner - Insurer deposited entire amount in tribunal - Appeal by owner and prayed for exemption from depositing the amount in compliance of proviso of Section 173(1) - Held - There is no provision in the Act to grant such exemption - Appellant/owner can not claim benefit of deposit made by insurer. [Chandrakanta Bhandari (Smt.) v. Manohar Lal] ...2373

Motor Vehicles Act (59 of 1988), Section 173(1) Proviso - Interpretation - When the language of statute is plain and unambiguous, effect has to be given to such words without reading anything more in them - If the intention of legislature was to provide exemption from deposit then the same would have found place in the section itself. [Chandrakanta Bhandari (Smt.) v. Manohar Lal] ...2373

Motor Vehicles Rules, Central, (of 1989), Rule 81 - See - Motor Vehicles Act 1988, Sections 64, 65 & 41 [Rakesh Sethi v. State of M.P.]...2297

Motor Vehicles Rules, M.P., (of 1994), Rule 55-A - See - Motor Vehicles Act 1988, Sections 64, 65 & 41 [Rakesh Sethi v. State of M.P.]...2297

Municipal Corporation Act, M.P. (23 of 1956), Section 307(5) - Power to require removal or alteration of work not in conformity with byelaws or any scheme or any other requirement - The issue for reference before the Full Bench was "Whether the locus standi under Sub-section (5) of Section 307 of the Act is restricted to the person affected by the violation complained of or encompasses all persons resident within the area to which the Act applies?" - Held - The locus standi under Sub-section (5) of Section 307 of the Act of 1956 is not restricted to a person affected by the violation complained of but encompasses all persons resident within the area to which the Act of 1956 applies. The reference is answered accordingly. The Division Bench decision in the case of Radhakishan Sharma (1996 MPACJ 55) to the contrary is overruled - Appeal dismissed. [Dilip Kaushal v. State of M.P.] FB)...2167

National Highways Act (48 of 1956), Section 3-A - Power to acquire land - It is not for Court, but for Central Government to decide that which particular land is to be acquired for the purposes mentioned in notification u/s 30-A. [Devi Prasad Singh v. State of M.P.] ...2189

का चालक और स्वामी एकपक्षीय रहे - अधिकरण ने दावेदारों के पक्ष में अवार्ड पारित किया - अभिनिर्धारित - यह दावेदारों का कर्तव्य था कि वे अनुसंधान अधिकारी का परीक्षण यह सिद्ध करने के लिए कराते कि किस विशिष्ट साक्ष्य पर उसने यह निष्कर्ष अभिलिखित किया कि ट्रक दुर्घटना में शामिल नहीं था और वास्तव में बस ने दुर्घटना कारित की - अनुसंधान अधिकारी और प्रथम सूचनादाता का परीक्षण न कराना दावे को क्षति पहुँचाता है। (नेशनल इश्योरेंस कंपनी लि. वि. श्रीमति सेतुबाई) ...2367

मोटर यान अधिनियम (1988 का 59), धारा 173(1) - धारा 173(1) के परन्तुक की अपेक्षाओं के अनुपालन में राशि जमा करने से छूट - अधिकरण का अवार्ड स्वामी, चालक और बीमाकर्ता के विरुद्ध दायित्व निश्चित करता है - तथापि अधिकरण ने बीमाकर्ता को स्वामी से राशि वसूल करने की अनुमति दी - बीमाकर्ता ने सम्पूर्ण राशि अधिकरण में जमा की - स्वामी द्वारा अपील और धारा 173(1) के परन्तुक के अनुपालन में राशि जमा करने से छूट की प्रार्थना - अभिनिर्धारित - अधिनियम में ऐसी छूट देने का कोई उपबंध नहीं है - अपीलार्थी/स्वामी बीमाकर्ता द्वारा किये गये जमा के लाभ का दावा नहीं कर सकता। (चंद्रकांता भंडारी (श्रीमति) वि. मनोहर लाल) ...2373

मोटर यान अधिनियम (1988 का 59), धारा 173(1) परन्तुक - निर्वचन - जब संविधि की भाषा सरल और असंदिग्ध हो, तब ऐसे शब्दों को बिना उनमें कोई और शब्द जोड़े उनका अर्थ निकाला जाना चाहिए - यदि विधायन का आशय जमा करने से छूट देना था तब यह उपबंध धारा में ही होना चाहिए था। (चंद्रकांता भंडारी (श्रीमति) वि. मनोहर लाल) ...2373

मोटर यान नियम, केन्द्रीय, (1989 का), नियम 81, - देखें - मोटर यान अधिनियम 1988, धाराएँ 64, 65 व 41, (राकेश सेठी वि. म.प्र. राज्य) ...2297

मोटर यान नियम, म.प्र., (1994 का), नियम 55-ए - देखें - मोटर यान अधिनियम 1988, धाराएँ 64, 65 व 41, (राकेश सेठी वि. म.प्र. राज्य) ...2297

नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307(5) - ऐसा निर्माण कार्य हटाने या उसमें परिवर्तन करने के संबंध में आदेश देने की शक्ति, जो उपविधियों या किसी योजना या किसी अन्य मॉग के अनुरूप न हो - पूर्ण न्यायपीठ के समक्ष निर्देश के लिए प्रश्न था "क्या अधिनियम की धारा 307 की उपधारा (5) के अधीन सुने जाने का अधिकार शिकायत किये गये उल्लंघन से प्रभावित व्यक्ति तक सीमित है या क्षेत्र, जिसे अधिनियम लागू होता है, में रहने वाले सभी व्यक्तियों को परिवेष्टित करता है?" - अभिनिर्धारित - 1956 के अधिनियम की धारा 307 की उपधारा (5) के अधीन सुने जाने का अधिकार शिकायत किये गये उल्लंघन से प्रभावित व्यक्ति तक सीमित नहीं है बल्कि क्षेत्र, जिसे 1956 का अधिनियम लागू होता है, में रहने वाले सभी व्यक्तियों को परिवेष्टित करता है। निर्देश तदनुसार उत्तरित किया गया। इसके प्रतिकूल राधाकिशन शर्मा (1996 एमपीएसीजे 55) के मामले में खण्ड न्यायपीठ का निर्णय उलटा गया - अपील खारिज। (दिलीप कौशल वि. म.प्र. राज्य)(FB)---2167

राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धारा 3-ए - भूमि अर्जित करने की शक्ति - यह विनिश्चय करने की शक्ति न्यायालय को नहीं है बल्कि केन्द्र सरकार को है कि धारा 30-ए के अन्तर्गत अधिसूचना में वर्णित प्रयोजनों के लिए कौन सी विशिष्ट भूमि अर्जित की जाए। (देवी प्रसाद सिंह वि. म.प्र. राज्य)

National Highways Act (48 of 1956), Sections 3-A, 3-D, National Highways Authority of India Act, 1988, Section 16 - Acquisition of land - Land of the appellant acquired for public purposes of building (widening), maintenance, management and operation of National Highway - Held - Acquisition of land permissible not only for above objects but for all purposes ancillary or incidental to such objects such as establishment and maintenance of hotels, motels, restaurants, rest rooms at or near Highways and facilities & amenities for users of National Highways. [Devi Prasad Singh v. State of M.P.] ...2189

National Highways Authority of India Act, (68 of 1988), Section 16 - See - National Highways Act 1956, Sections 3-A, 3-D, [Devi Prasad Singh v. State of M.P.] ...2189

Negotiable Instruments Act (26 of 1881), Section 138 - Dishonour of cheque - Trial Court acquitted the accused on the ground that complainant had not filed postal receipt regarding sending of the notice by registered post and the acknowledgment was not bearing any postal seal and who received the notice was not clear - Intimation of dishonour of cheque was sent by the advocate of complainant, which was replied by the advocate of accused - Held - In Section 138 or anywhere in the enactment, mode of service of notice is not prescribed - Sending of reply is not disputed by the accused in the statement, therefore, the statutory requirement has been complied with - Impugned order of acquittal set-aside and accused found guilty u/s 138 of the Act - Appeal allowed. [Prakashchand v. Sureshchand] ...2412

Panchayat Service (Discipline and Appeal) Rules, M.P., 1999, Rules 5(b), 7 - Major Penalty - Procedure - Petitioner working as Panchayat Karmi - Removed from his post without following procedure laid down under Rule 7 - Removal bad - Petition allowed. [Kailash Babu Rai v. State of M.P.] ...2278

Penal Code, (45 of 1860), Sections 52, 294, 452, 392, 500, 506 r/w 34 - See - Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999, Section 50(2) [Arvind Kumar Bhargava v. Lalit Parashar] ...2471

Penal Code (45 of 1860), Section 97 - Right of private defence of property - Incident occurred in day time in the field of appellants - Appellants also suffered number of serious injuries - Held - Right of private defence of property occurred to appellants - Prosecution has not explained the injuries sustained by the appellants - Trial Court committed illegality by reading and considering the evidence of counter case - Conviction and sentence set-aside - Appeal allowed. [Narayan v. State of M.P.] ...2401

Penal Code (45 of 1860), Sections 147, 149, 294, 341, 323, 506-B, 307, Criminal Procedure Code, 1973, Sections 169 & 482, Constitution, Article 20(2) - Powers of magistrate when Final Report is in favour of the accused persons - It is true that the Final Report is not binding on the magistrate and if the magistrate differs from the opinion of the I.O., he can take cognizance or

राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धाराएँ 3-ए, 3-डी, भारतीय राष्ट्रीय राजमार्ग प्राधिकरण अधिनियम, 1988, धारा 16 - भूमि का अर्जन - अपीलार्थी की भूमि राष्ट्रीय राजमार्ग के निर्माण (चौड़ीकरण), अनुरक्षण, प्रबंध और प्रचालन के सार्वजनिक प्रयोजनों के लिए अर्जित की गई - अभिनिर्धारित - भूमि का अर्जन, न केवल उक्त उद्देश्यों के लिए बल्कि ऐसे उद्देश्यों के सहायक या आनुषंगिक सभी प्रयोजनों जैसे राष्ट्रीय राजमार्ग पर या उनके निकट होटलों, मोटलों, भोजनालयों, विश्रामालयों की स्थापना और अनुरक्षण और राष्ट्रीय राजमार्ग का उपयोग करने वालों के लिए सुख सुविधाओं के लिए भी, अनुज्ञेय है। (देवी प्रसाद सिंह वि. म.प्र. राज्य) ...2189

भारतीय राष्ट्रीय राजमार्ग प्राधिकरण अधिनियम, (1988 का 68), धारा 16 - देखें - राष्ट्रीय राजमार्ग अधिनियम 1956, धाराएँ 3-ए, 3-डी, (देवी प्रसाद सिंह वि. म.प्र. राज्य) 2189

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - चेक का अनादरण - विचारण न्यायालय ने अभियुक्त को इस आधार पर दोषमुक्त किया कि परिवादी ने रजिस्टर्ड डाक से सूचनापत्र भेजने के संबंध में पोस्टल रसीद पेश नहीं की थी और पावती पर कोई पोस्टल सील अंकित नहीं थी और सूचनापत्र किसने प्राप्त किया, स्पष्ट नहीं था - चेक के अनादरण की सूचना परिवादी के अधिवक्ता द्वारा भेजी गई जिसका जवाब अभियुक्त के अधिवक्ता द्वारा दिया गया - अभिनिर्धारित - धारा 138 में अथवा अधिनियमिति में कहीं भी सूचनापत्र की तामील का तरीका विहित नहीं है - जवाब का भेजा जाना अभियुक्त द्वारा कथन में विवादित नहीं किया गया, इसलिए कानूनी आवश्यकता का अनुपालन किया जा चुका है - दोषमुक्ति का आक्षेपित आदेश अपास्त किया गया और अभियुक्त को अधिनियम की धारा 138 के अधीन दोषी पाया गया - अपील मंजूर। (प्रकाशचंद वि. सुरेशचंद) ...2412

पंचायत सेवा (अनुशासन और अपील) नियम, म.प्र., 1999, नियम 5(बी), 7 - मुख्य शास्ति - प्रक्रिया - याची पंचायत कर्मों के रूप में कार्यरत - नियम 7 के अन्तर्गत अधिकथित प्रक्रिया का पालन किये बिना उसके पद से हटाया गया - हटाया जाना दोषपूर्ण - याचिका मंजूर। (कैलाश बाबू राय वि. म.प्र. राज्य) ...2278

दण्ड संहिता, (1860 का 45), धाराएँ 52, 294, 452, 392, 500, 506 सहपठित धारा 34 - देखें - सहकारी कृषि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999, धारा 50(2); (अरविंद कुमार भार्गव वि. ललित पाराशर) ...2471

दण्ड संहिता (1860 का 45), धारा 97 - सम्पत्ति की प्राइवेट प्रतिरक्षा का अधिकार - घटना दिन के समय अपीलार्थियों के खेत में घटित हुई - अपीलार्थी भी कई गम्भीर क्षतियों से पीड़ित हुए - अभिनिर्धारित - सम्पत्ति की प्राइवेट प्रतिरक्षा का अधिकार अपीलार्थियों को प्राप्त - अभियोजन ने अपीलार्थियों को आई क्षतियों का स्पष्टीकरण नहीं दिया - विचारण न्यायालय ने प्रति-मामले की साक्ष्य पढ़कर और विचार में लेकर अवैधता कारित की - दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर। (नारायण वि. म.प्र. राज्य) ...2401

दण्ड संहिता (1860 का 45), धाराएँ 147, 149, 294, 341, 323, 506-बी, 307, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 169 व 482, संविधान, अनुच्छेद 20(2) - मजिस्ट्रेट की शक्तियाँ जब अंतिम रिपोर्ट अभियुक्त व्यक्तियों के पक्ष में हो - यह सही है कि अंतिम रिपोर्ट मजिस्ट्रेट पर बंधनकारी नहीं है और यदि मजिस्ट्रेट का अनुसंधान अधिकारी से भिन्न मत है तो वह संज्ञान ले सकता है या आगे और अनुसंधान के लिए आदेश दे सकता है, किन्तु मजिस्ट्रेट का वह

order for further investigation, but that action of magistrate is judicial action and at that stage while taking decision on the Final Report the magistrate has to act judicially as a court - When a final report is submitted in favour of the accused persons and the investigation agency is of the view that no case is made out for prosecuting the accused and prima facie, evidence is defiance, if the magistrate wants to hear complainant it is obligatory on the part of the magistrate to also hear the accused person. If any protest petition is filed it has to be treated as a complaint and law requires magistrate to record statement of complainant and his witnesses. [Rajkumar v. State of M.P.] ...2478

Penal Code, (45 of 1860), Sections 294, 452, 392, 500, 506 r/w Section 34 - See - *Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999, Section 50(2)* [Arvind Kumar Bhargava v. Lalit Parashar] ...2471

Penal Code (45 of 1860), Section 300, Exception 4 - *Ingredients* - It has to be established that act was committed without premeditation, in a sudden fight, in heat of passion upon sudden quarrel and without the offender having taken undue advantage and not having acted in a cruel or unusual manner and fight must have been with person killed. [Rakesh v. State of M.P.] (SC)...2153

Penal Code (45 of 1860), Section 302, Criminal Procedure Code, 1973, Section 374(2) - *Circumstantial Evidence* - Appellant convicted for offence punishable u/s 302 IPC, on the basis of circumstantial evidence - Held - Dead body of the deceased recovered from the appellant's house and recovery of Mangalsutra at his instance also proved - These two strongest circumstances coupled with suspicious conduct of the appellant, unerringly point out the guilt towards the appellant and if circumstances are taken into consideration cumulatively, forms a complete chain and there is no escape of appellant from any corner - Appeal dismissed. [Gudda @ Raho @ Gajdhar v. State of M.P.] ...2394

Penal Code (45 of 1860), Section 302 - *Deceased was found lying on ground in badly injured condition* - Witnesses saw appellant running with knif after commission of offence and on enquiry deceased mentioned name of appellant - One witness saw appellant quarrelling with deceased and running away - In identification parade witnesses identified appellant - Nothing has been brought in cross-examination to discredit the statement of witnesses - Conviction and sentence of life imprisonment upheld - Appeal dismissed. [Vikas v. State of M.P.] ...2416

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - *Dying Declaration* - Appellant had burnt his wife & son by pouring kerosene oil over them - Dying declaration of wife was recorded at Hospital by Executive Magistrate - Wife & son succumbed to burn injuries - Appellant has been convicted for committing murder of his wife - Conviction challenged in appeal - Held - Presence of appellant on the scene at the time of occurrence

कृत्य न्यायिक कृत्य हो और अंतिम रिपोर्ट पर निर्णय लेते समय मजिस्ट्रेट को न्यायालय के रूप में न्यायिकतः कार्य करना होता है - जब अंतिम रिपोर्ट अभियुक्त व्यक्तियों के पक्ष में दी जाती है और अनुसंधान एजेंसी का मत है कि अभियुक्त को अभियोजित करने के लिए कोई मामला नहीं बनता है और प्रथम दृष्ट्या साक्ष्य उपेक्षित है, यदि मजिस्ट्रेट परिवादी को सुनना चाहता है तो मजिस्ट्रेट के लिए यह आवश्यक है कि अभियुक्त को भी सुने। यदि कोई अभ्यापत्ति याचिका पेश की जाती है तो उसे परिवाद के रूप में मानना पड़ता है और विधि मजिस्ट्रेट से अपेक्षा करती है कि परिवादी और उसके साक्षियों के कथन अभिलिखित करे। (राजकुमार वि. म.प्र. राज्य) ...2478

दण्ड संहिता, (1860 का 45), धाराएँ 294, 452, 392, 500, 506. सहपठित धारा 34 - देखें -सहकारी कृषि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999, धारा 50(2) (अरविंद कुमार भार्गव वि. ललित पाराशर) ...2471

दण्ड संहिता (1860 का 45), धारा 300, अपवाद 4 - संघटक - यह स्थापित करना पड़ता है कि कार्य बिना किसी पूर्व चिन्तन के, आकस्मिक लड़ाई में, अचानक झगड़े पर आवेश की तीव्रता में और अपराधी के अनुचित लाभ लिये बिना और क्रूर या असामान्य तरीके से व्यवहार न करते हुए किया गया था और लड़ाई मृत व्यक्ति के साथ होनी चाहिए थी। (राकेश वि. म.प्र. राज्य)(SC)---2153

दण्ड संहिता (1860 का 45), धारा 302, दण्ड प्रक्रिया संहिता, 1973, धारा 374(2) - परिस्थितिजन्य साक्ष्य - अपीलार्थी परिस्थितिजन्य साक्ष्य के आधार पर मा.द.सं. की धारा 302 के अन्तर्गत दण्डनीय अपराध के लिए दोषसिद्ध - अभिनिर्धारित - मृतक का शव अपीलार्थी के घर से बरामद और उसकी प्रेरणा पर मंगलसूत्र की बरामदगी भी सबित - ये दो प्रबल परिस्थितियाँ अपीलार्थी के शंकास्पद आचरण के साथ मिलकर अचूक रूप से अपीलार्थी की ओर दोष के संबंध में बताती हैं और यदि परिस्थितियों को समग्र रूप से विचार में लिया जाता है, तो एक पूर्ण श्रृंखला बनाती हैं और अपीलार्थी की किसी भी कोण से बचने की संभावना नहीं है - अपील खारिज। (गुड्डा उर्फ राहो उर्फ गजधर वि. म.प्र. राज्य) ...2394

दण्ड संहिता (1860 का 45), धारा 302 - मृतक बुरी तरह क्षतिग्रस्त अवस्था में जमीन पर पड़ा हुआ पाया गया - साक्षियों ने अपीलार्थी को अपराध करने के बाद चाकू सहित भागते हुए देखा और पूछताछ पर मृतक ने अपीलार्थी का नाम उल्लिखित किया - एक साक्षी ने अपीलार्थी को मृतक के साथ झगड़ते हुए और दूर भागते हुए देखा - शनाख परेड में साक्षियों ने अपीलार्थी की शनाख की - साक्षियों के कथन पर अविश्वास करने के लिए प्रतिपरीक्षण में कुछ नहीं लाया गया - दोषसिद्ध और आजीवन कारावास के दण्डादेश की पुष्टि - अपील खारिज। (विकास वि. म.प्र. राज्य) ...2416

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 32 - मृत्युकालिक कथन - अपीलार्थी ने अपनी पत्नी और पुत्र पर मिट्टी का तेल डालकर उन्हें जला दिया - कार्यपालिक मजिस्ट्रेट द्वारा पत्नी का मृत्युकालिक कथन अस्पताल में अभिलिखित किया गया - पत्नी और पुत्र की मृत्यु जलने से आई क्षतियों से हो गई - अपीलार्थी को उसकी पत्नी की हत्या के लिए दोषसिद्ध किया गया - दोषसिद्ध को अपील में चुनौती दी गई - अभिनिर्धारित - घटना के समय घटना स्थल पर अपीलार्थी की उपस्थिति विश्वसनीय साक्ष्य द्वारा सिद्ध - मजिस्ट्रेट और

is proved by reliable evidence - Magistrate & Doctor deposed that deceased remained fully conscious during her statement and was in a fit condition to give statement - No inconsistency in the timings of recording of dying declaration and medical examination - No inconsistency in dying declaration and Dehati Nalishi - No ground to suspect that magistrate would himself manipulate the dying declaration as he had no animus against appellant - Declaration is true and voluntarily - Conviction upheld - Appeal dismissed. [Avinash @ Gudda v. State of M.P.] ...2431

Penal Code (45 of 1860), Section 302 r/w Section 34, Criminal Procedure Code, 1973, Section 378(1) - Appeal against acquittal - While dealing with a case of acquittal, it is well known, the High Court shall not ordinarily overturn a judgment if two views are possible - Appeal allowed. [State of M.P. v. Ballu @ Vinod Kumar] ...2420

Penal Code (45 of 1860), Sections 302, 304 - Murder or culpable homicide not amounting to murder - Appellant assaulted the deceased by means of knife on account of peels of eggs - Case would fall under Exception 4 to Section 300 - Appellant guilty of offence u/s 304 Part 1 and not 302 - Appeal allowed. [Rakesh v. State of M.P.] (SC)...2153

Penal Code (45 of 1860), Section 306 - Abetment to commit suicide - Applicant had threatened the deceased that he will involve him in some case under Atrocities Act and he will not sit in rest until the deceased would be sent to jail - Held - Deceased committed suicide out of sheer annoyance and frustration - Applicant cannot be blamed for the same - No material to make the case of abetment on part of applicant - Order framing charge u/s 306 set aside - Revision allowed. [Sita @ Sita Pratap Vaishya v. State of M.P.] ...*74

Penal Code, (45 of 1860), Section 326 - See - Evidence Act 1872, Section 3 [Ashok v. State of M.P.] ...*71

Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Rape - "Mere Sath Usne Galat Kam Kiya" - In dying declaration prosecutrix disclosed that when she went to answer call of nature, appellant caught hold of her from behind and swathe her mouth and then "Mere Sath Usne Galat Kam Kiya" - Held - If the words used by prosecutrix are considered coupled with other circumstances, it becomes clear that prosecutrix wanted to say that accused ravished her. [Annu @ Anoop Kumar v. State of M.P.] ...2435

Penal Code (45 of 1860), Section 376 - Rape - Appellant committed rape with girl of 13 years who became disgusted and committed suicide - Dying declarations made by prosecutrix found reliable - Appellant guilty of committing rape -- Offence of appellant in these circumstances becomes more heinous - Trial Court awarded rigorous imprisonment of 10 years - No adequate or special reason for reducing the jail sentence - Appeal dismissed. [Annu @ Anoop Kumar v. State of M.P.] ...2435

चिकित्सक ने बयान दिया कि मृतक कथन देते समय पूरी तरह होश में थी और कथन देने के लिए उपयुक्त अवस्था में थी - मृत्युकालिक कथन अभिलिखित करने और चिकित्सकीय परीक्षण के समय में कोई विसंगति नहीं - मृत्युकालिक कथन और देहांती नालिश में कोई विसंगति नहीं - शंका करने का कोई आधार नहीं कि मजिस्ट्रेट ने स्वयं मृत्युकालिक कथन में हेरफेर किया होगा क्योंकि वह अपीलार्थी के विरुद्ध कोई विद्वेश नहीं रखता था - मृत्युकालिक कथन सही एवं स्वेच्छया - दोषसिद्धि पुष्ट की गई - अपील खारिज। (अविनाश उर्फ गुड्डा वि. म.प्र. राज्य) ...2431

दण्ड संहिता (1860 का 45), धारा 302 सहपठित धारा 34, दण्ड प्रक्रिया संहिता, 1973, धारा 378(1) - दोषमुक्ति के विरुद्ध अपील - दोषमुक्ति के मामले पर कार्यवाही करते समय, यह सुविख्यात है, उच्च न्यायालय किसी निर्णय को साधारणतः नहीं उलटेगा यदि दो विचार संभव हों - अपील मंजूर। (म.प्र. राज्य वि. बल्लू उर्फ विनोद कुमार) ...2420

दण्ड संहिता (1860 का 45), धारा 302, 304 - हत्या या हत्या की कोटि में न आने वाला अपराधिक मानव वध - अपीलार्थी ने अण्डों के छिलकों के कारण मृतक पर चाकू के साधन द्वारा हमला किया - मामला धारा 300 के अपवाद 4 के अन्तर्गत आयेगा - अपीलार्थी धारा 304 भाग 1 के अधीन अपराध का दोषी न कि धारा 302 के - अपील मंजूर। (राकेश वि. म.प्र. राज्य) (SC)...2153

दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या का दुष्प्रेरण - आवेदक ने मृतक को धमकी दी थी कि वह उसे अत्याचार अधिनियम के अधीन किसी मामले में फँसा देगा और जब तक मृतक को जेल नहीं भेज देता वह आराम से नहीं बैठेगा - अभिनिर्धारित - मृतक ने मात्र क्षोभ और निराशा से आत्महत्या की - आवेदक को इसके लिए दोष नहीं दिया जा सकता - आवेदक द्वारा दुष्प्रेरण करने का मामला बनाने के लिए कोई सामग्री नहीं - धारा 306 के अधीन आरोप विरचित करने का आदेश अपास्त - पुनरीक्षण मंजूर। (सीता उर्फ सीता प्रताप वैश्य वि. म.प्र. राज्य)---*74

दण्ड संहिता, (1860 का 45), धारा 326 - देखें - साक्ष्य अधिनियम 1872, धारा 3 (अशोक वि. म.प्र. राज्य) ---*71

दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 - बलात्संग - "मेरे साथ उसने गलत काम किया" - मृत्युकालिक कथन में अभियोक्त्री ने बताया कि जब वह शौच के लिए गई, अपीलार्थी ने उसे पीछे से पकड़ लिया और उसके मुह पर पट्टी लपेट दी और तब "मेरे साथ उसने गलत काम किया" - अभिनिर्धारित - यदि अभियोक्त्री द्वारा प्रयुक्त शब्दों को अन्य परिस्थितियों के साथ विचार में लिया जाता है, यह स्पष्ट हो जाता है कि अभियोक्त्री कहना चाहती थी कि अभियुक्त ने उसके साथ बलात्संग किया। (अन्नू उर्फ अनूप कुमार वि. म.प्र. राज्य) ...2435

दण्ड संहिता (1860 का 45), धारा 376 - बलात्संग - अपीलार्थी ने 13 वर्ष की बालिका के साथ बलात्संग किया जिससे उसे ग्लानि हो गई और उसने आत्महत्या कर ली - अभियोक्त्री द्वारा किये गये मृत्युकालिक कथन विश्वसनीय पाये - अपीलार्थी बलात्संग करने का दोषी - इन परिस्थितियों में अपीलार्थी का अपराध अधिक जघन्य हो जाता है - विचारण न्यायालय ने 10 वर्ष का कठोर कारावास दिया - कारावास के दण्डादेश को कम करने के लिए कोई पर्याप्त या विशिष्ट कारण नहीं - अपील खारिज। (अन्नू उर्फ अनूप कुमार वि. म.प्र. राज्य) ..2435

Penal Code (45 of 1860), Section 376(2)(f) - Punishment for committing rape on a woman when she is under twelve years of age - Appellant sentenced to 10 year rigorous imprisonment and a fine of Rs.5000/- with default stipulation for committing rape on a minor girl of eight years of age - In appeal prayed for leniency in awarding the sentence - Held - The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern policy reflects a combination of several or all of these aims - No 'adequate and special reasons' appears to reduce the sentence - Rape is a heinous crime and against the society and a deterrent punishment is required to weed it out - Appeal dismissed. [Suneel v. State of M.P.] ...2406

Penal Code, (45 of 1860), Section 420 - See - Criminal Procedure Code, 1973, Sections 397, 401 [Pramod v. State of M.P.] ...2466

Penal Code (45 of 1860), Sections 467 & 468 - Forgery - Applicant dishonestly obtained money from complainants and issued cheques to them which were not encashed - No allegation that cheques were false or fabricated - It cannot be said that cheques were forged with intent to defraud complainants - Conviction of applicant for offence u/s 467 & 468 set-aside - Revision partly allowed. [Anil Kumar Gupta v. State of M.P.] ...2453

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Sections 32, 33 - Reservation to persons with disability made available to orthopaedically handicapped but no solace offered to blind, deaf and dumb - Bureaucratic system failed to implement legislation - Government is duty bound to identify the posts in establishment to which reservation must be made to blind, deaf, dumb and cerebral palsy - By issuing notification, subject to condition, any establishment may be exempted from purview of reservation - No such notification issued - Held - Real benefit has not been extended to the class of blind, deaf, dumb and cerebral palsy - State Government directed to identify the class of blind, deaf, dumb and cerebral palsy and implement provisions of Act and Rules. [Nilesh Singhal v. State of M.P.] ...2264

Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) r/w Section 13(2), Criminal Procedure Code, 1973, Section 374(2) - Burden of Proof - Held - The onus on an accused is not as heavy as that of the prosecution - It may be compared with a defendant in a civil proceeding - Appeal allowed. [Navkant Sharma v. State of M.P.] ...2425

Prevention of Food Adulteration Act (37 of 1954), Section 13(2) - Presumption of service of notice sent by registered post - Notice alongwith report of Public Analyst was sent to applicant's address by registered post - Held - There would be presumption of service of notice sent by registered post - Mere fact that A.D. receipt was not filed was not sufficient to rebut or

दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) — किसी स्त्री से जो बारह वर्ष से कम आयु की है, बलात्संग करने के लिए दण्ड — अपीलार्थी आठ वर्ष की अवयस्क बालिका से बलात्संग करने के लिए दस वर्ष के सश्रम कारावास और व्यक्तिगत अनुबंध के साथ 5000/- रुपये के जुर्माने से दण्डादिष्ट — अपील में दण्डादेश देने में नरमी के लिए प्रार्थना की गई — अभिनिर्धारित — अब दण्ड के उद्देश्य प्रतिकार, न्याय, निवारण, सुधार और संरक्षण विचारित किये जाते हैं और आधुनिक नीति इन उद्देश्यों के कई या सभी के संयोजन को प्रतिबिम्बित करती है — दण्डादेश को कम करने के लिए कोई 'पर्याप्त और विशेष कारण' प्रकट नहीं होते — बलात्संग एक जघन्य और समाज के विरुद्ध अपराध है और उसे बाहर उखाड़ने के लिए एक निवारक दण्ड अपेक्षित है — अपील खारिज। (सुनील वि. म.प्र. राज्य) ...2406

दण्ड संहिता, (1860 का 45), धारा 420 — देखें — दण्ड प्रक्रिया संहिता, 1973, धाराएँ 397, 401 (प्रमोद वि. म.प्र. राज्य) ...2466

दण्ड संहिता (1860 का 45), धाराएँ 467 व 468 — कूटरचना — आवेदक ने बेईमानीपूर्वक परिवादियों से धन प्राप्त किया और उन्हें चेक जारी किये जिनका भुगतान नहीं हुआ — कोई अभिकथन नहीं कि चेक मिथ्या या गढ़े हुए थे — यह नहीं कहा जा सकता कि चेक परिवादियों को धोखा देने के आशय से कूट रचित किये गए — धारा 467 व 468 के अधीन अपराध के लिए आवेदक की दोषसिद्धि अपास्त — पुनरीक्षण अंशतः मंजूर। (अनिल कुमार गुप्ता वि. म.प्र. राज्य) ...2453

निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धाराएँ 32, 33 — निःशक्त व्यक्तियों को आरक्षण विकलांग होने के कारण अपाहिज को उपलब्ध कराया गया किन्तु नेत्रहीन, बधिर और गूंगों को कोई राहत प्रस्तावित नहीं की गयी — नौकरशाही तंत्र विधायन को लागू करने में असफल रहा — सरकार स्थापना में पदों को निश्चित करने के लिए कर्तव्य द्वारा आवद्ध है जिसमें नेत्रहीन, बधिर, गूंगों और प्रमस्तिष्कीय लकवाग्रस्त के लिए आरक्षण करना चाहिए — अधिसूचना जारी करके शर्त के अध्यक्षीन कोई स्थापना आरक्षण के कार्यक्षेत्र से विमुक्त की सकती है — ऐसी कोई अधिसूचना जारी नहीं की गई — अभिनिर्धारित — वास्तविक लाभ नेत्रहीन, बधिर, गूंगों और प्रमस्तिष्कीय लकवाग्रस्त के वर्ग के लिए विस्तारित नहीं किया गया है — राज्य सरकार को नेत्रहीन, बधिर, गूंगों और प्रमस्तिष्कीय लकवाग्रस्त का वर्ग निश्चित करने और अधिनियम व नियम के उपबंधों को लागू करने के लिए निदेशित किया गया। (नीलेश सिंघल वि. म.प्र. राज्य) ...2264

घष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) सहपठित धारा 13(2), दण्ड प्रक्रिया संहिता, 1973, धारा 374(2) — सबूत का भार — अभिनिर्धारित — अभियुक्त पर भार उतना भारी नहीं है जितना कि अभियोजन पर — उसकी तुलना सिविल कार्यवाही में प्रतिवादी से की जा सकती है — अपील मंजूर। (नवकांत शर्मा वि. म.प्र. राज्य) ...2425

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2) — रजिस्टर्ड डाक द्वारा भेजे गये सूचनापत्र की तामील की उपधारणा — लोक विश्लेषक की रिपोर्ट के साथ सूचनापत्र आवेदक के पते पर रजिस्टर्ड डाक द्वारा भेजा गया — अभिनिर्धारित — रजिस्टर्ड डाक द्वारा भेजे गये सूचनापत्र की तामील की उपधारणा की जाएगी — केवल यह तथ्य, कि ए.डी. रसीद पेश नहीं की गई, किसी प्रतिकूल साक्ष्य के अभाव में, सूचनापत्र की तामील की उपधारणा का खण्डन या विस्थापन

dislodge the presumption of service of notice in absence of any evidence to the contrary. [Chhotelal v. State of M.P.] ...2458

Prevention of Food Adulteration Act (37 of 1954), Section 16(1)(a) r/w Section 7(1), Criminal Procedure Code, 1973, Section 433 - Reduction of minimum sentence in the domain of the State Government - Conviction u/s 16(1)(a) of the Act upheld by High Court - Provisions mandate that 6 months' minimum imprisonment to be imposed for such offence - Applicant aged 63 years and more than 17 years elapsed since incident - Applicant had suffered 37 days of imprisonment - Looking to the agony and mental harassment already faced - High Court directed applicant to deposit Rs.10,000/- as fine in commutation of the sentence of 6 months imprisonment and State Government to consider such commutation u/s 433(d) of Code. [Tulsiram v. State of M.P.] ...2462

Prevention of Food Adulteration Act (37 of 1954), Section 16(1)(a)(i) - Prevention of Food Adulteration Rules, 1955, Rules 17 & 18 - Whether the entire quantity of article of food stored in the container required to be stirred at the time of taking of sample - Held - If it was a usual practice to stir entire quantity of Dahi stored in a container before sale, it ought to have been done before selling to Food Inspector also - Accused cannot blame anybody and raise it as a technical defence to escape liability - Revision dismissed. [Om Prakash Agrawal v. State of M.P.] ...*73

Prevention of Food Adulteration Act (37 of 1954), Section 20(1) - Notification dated 31.12.59 & 19.10.83 authorising Food Inspector to institute prosecution - Food Inspector was competent to file complaint. [Tulsiram v. State of M.P.] ... 2462

Public Interest Litigation - Can PIL be entertained on the basis of information in the newspapers - Normally, a PIL cannot be entertained solely on the basis of information published in the newspapers but if the Chief Justice or a Judge designate finds that a particular information published in the newspapers reveals gross violation of a fundamental right guaranteed under Part-III of the Constitution of a person who does not have ready access to the court for some incapacity or the other, particularly the right to life and liberty granted under Article 21 of the Constitution, and the Chief Justice or a Judge designate has reason to believe the information to be true, a PIL can be entertained only on the basis of such information published in the newspapers for the same reasons as have been given by the Supreme Court in *Bandhua Mukti Morcha* (AIR 1984 SC 802) for entertaining a letter petition. [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur] (FB)...2172

Public Interest Litigation - Payment of court fees - Held - Court fees are payable on a PIL filed as a writ petition under Article 226 of the Constitution, except where the Chief Justice or a Judge designate directs on

करने के लिए पर्याप्त नहीं। (छोटेलाल वि. म.प्र. राज्य)

...2458

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 16(1)(ए) सहपठित धारा 7(1), दण्ड प्रक्रिया संहिता, 1973, धारा 433 — न्यूनतम दण्डादेश में कमी करना राज्य सरकार के अधिकार क्षेत्र में — अधिनियम की धारा 16(1)(ए) के अधीन दोषसिद्धि उच्च न्यायालय द्वारा पुष्ट की गई — उपबंध आदेशित करते हैं कि ऐसे अपराध के लिए कम से कम 6 माह का कारावास अधिरोपित किया जाना चाहिए — आवेदक की उम्र 63 वर्ष और घटना को 17 वर्ष से अधिक का समय व्यतीत — आवेदक 37 दिन का कारावास भुगत चुका था — कष्ट और मानसिक परेशानी, जिसका पहले ही सामना किया जा चुका है, को देखते हुए — उच्च न्यायालय ने आवेदक को छः माह के कारावास के दण्डादेश के लघुकरण में 10,000/- रुपये जुर्माने के रूप में जमा करने और राज्य सरकार को संहिता की धारा 433(डी) के अधीन ऐसे लघुकरण पर विचार करने के निदेश दिये। (तुलसीराम वि. म.प्र. राज्य)

...2462

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 16(1)(ए)(प), खाद्य अपमिश्रण निवारण नियम, 1955, नियम 17 व 18 — क्या जमूना लेते समय पात्र में संचित खाद्य पदार्थ की सम्पूर्ण मात्रा को हिलाना आवश्यक है — अभिनिर्धारित — यदि यह एक सामान्य प्रथा थी कि विक्रय से पूर्व पात्र में संचित दही की सम्पूर्ण मात्रा को हिलाया जाए, तो खाद्य निरीक्षक को विक्रय करने के पूर्व भी ऐसा अवश्य किया जाना चाहिए था — अभियुक्त दायित्व से बचने के लिए किसी व्यक्ति को दोष नहीं दे सकता और तकनीकी बचाव के रूप में इसे नहीं उठा सकता — पुनरीक्षण खारिज। (ओम प्रकाश अग्रवाल वि. म.प्र. राज्य)

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खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 20(1) — अधिसूचना दिनांकित 31.12.59 और 19.10.83 खाद्य निरीक्षक को अभियोजन संस्थित करने के लिए अधिकृत करती हैं — खाद्य निरीक्षक परिवाद पेश करने के लिए सक्षम था। (तुलसीराम वि. म.प्र. राज्य)

...2462

लोक हित वाद — क्या समाचार पत्रों में जानकारी के आधार पर पीआईएल ग्रहण की जा सकती है — सामान्यतः कोई पीआईएल एकमात्र समाचार पत्रों में प्रकाशित जानकारी के आधार पर ग्रहण नहीं की जा सकती किन्तु यदि मुख्य न्यायाधीश या मनोनीत न्यायाधीश यह पाते हैं कि समाचार पत्रों में प्रकाशित कोई विशिष्ट जानकारी संविधान के भाग तीन के अन्तर्गत प्रत्याभूत किसी व्यक्ति के किसी मूल अधिकार, विशिष्टतः संविधान के अनुच्छेद 21 के अन्तर्गत प्रदत्त प्राण और स्वतंत्रता का अधिकार, का घोर उल्लंघन प्रकट करती है, जो कुछ असमर्थता या अन्य किसी कारण से न्यायालय तक पहुंचने को तत्पर नहीं है और मुख्य न्यायाधीश या मनोनीत न्यायाधीश जानकारी के सत्य होने का विश्वास करने का कारण रखते हैं तो एक पीआईएल केवल समाचार पत्रों में प्रकाशित ऐसी जानकारी के आधार पर ग्रहण की जा सकती है उन्ही कारणों से जो उच्चतम न्यायालय द्वारा बंधुआ मुक्ति मोर्चा (एआईआर 1984 एससी 802) में पत्र याचिका को ग्रहण करने के लिए दिये गये हैं। (एस. पी. आनंद वि. द राजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर)

(FB)---2172

लोक हित वाद — न्यायालय फीस का संदाय — अभिनिर्धारित — जहाँ मुख्य न्यायाधीश या कोई मनोनीत न्यायाधीश किसी पत्र में प्राप्त जानकारी या किसी अन्य दस्तावेज के आधार पर निदेशित करते हैं और यह विचार करना है कि यह सक्रियता के अनुच्छेद 226 के अधीन मामला

the basis of information received in a letter or any other document and considers that it is a fit case for registering a case under Article 226 of the Constitution even though no court fee is paid on such letter or document. [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur] (FB)...2172

Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999 (20 of 2000), Section 50(2), Penal Code, 1860, Sections 52, 294, 452, 392, 500, 506 r/w 34, General Clauses Act, 1897, Section 3 Clause 22 - Good Faith - Defined & Explained - Without serving the notice on non-applicants and in pressing them to pay the entire amount on the same date and taking the steps to recover such amount forcibly can not be said to be justified. Apart from this, committing house trespass, abusing filthy languages, criminally intimidating, insulting and lowering down the prestige of the non-applicants can not be said to be done in good faith and can not form the part of their duties. [Arvind Kumar Bhargava v. Lalit Parashar] ...2471

Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999 (20 of 2000), Section 50(2), Penal Code, 1860, Sections 294, 452, 392, 500, 506 r/w Section 34, Criminal Procedure Code, 1973 Sections 190 & 197 - Applicants working in Sahkari Bank seeking quashment of criminal proceedings on the ground of protection given u/s 197(1) Cr.P.C. - Held - The applicants are not removable by the Government, therefore, protection given u/s 197(1) Cr.P.C. is not available to them - Petition dismissed. [Arvind Kumar Bhargava v. Lalit Parashar] ...2471

Spot Map - Merely by exhibiting the map by I.O. - Its contents would not become admissible in evidence unless the witness on whose instance map was prepared has deposed this fact on oath. [Narayan v. State of M.P.]...2401

Staff Service Rules, 61 & 62 - See - Cooperative Societies Act, M.P., 1960, Section 55 & 64 [Sushil Kumar Kanungo v. M.P. Rajya Sahkari Bank Maryadit] ...2238

State Cooperative Tribunal Regulations, 2000, Regulation 31 - See - Cooperative Societies Act, M.P., 1960, Section 55 & 64, [Sushil Kumar Kanungo v. M.P. Rajya Sahkari Bank Maryadit] ...2238

State Reorganisation Act, (37 of 1956), Sections 54 & 68 - See - Constitution, Articles 216, 225, 226 [S.P. Anand v. The Registrar General, M.P. High Court, Jabalpur] (FB)...2172

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P., 2005 (14 of 2006), Section 2 - Maintainability of Writ Appeal - Order passed by learned Single Judge in exercise of its contempt jurisdiction - Held - Proviso to Section 2(1) puts bar and ban against filing of appeal against any order except order passed by learned Single Judge in exercise of original jurisdiction under Article 226 of Constitution - Writ Appeal not maintainable. [Sulochana Mallaiya (Smt.) v. S.N. Shrivastava] ...2205

रजिस्टर्ड करने के लिए उचित मामला है यद्यपि ऐसे पत्र या दस्तावेज पर कोई न्यायालय फीस न दी गई हो, वहां के अलावा संविधान के अनुच्छेद 226 के अधीन रिट याचिका के रूप में में पेश पीआईएल पर न्यायालय फीस देय है। (एस.पी. आनंद वि. द राजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर) (FB)---2172

सहकारी कृषि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999 (2000 का 20), धारा 50(2), दण्ड संहिता, 1860, दण्ड संहिता, 1860, धाराएँ 52, 294, 452, 392, 500, 506 सहपठित धारा 34, साधारण खंड अधिनियम, 1897, धारा 6 खंड 22 - सद्भाव - परिभाषित एवं स्पष्ट करना - अनावेदकों पर सूचनापत्र की तामील किये बिना और उन पर सम्पूर्ण राशि उसी दिन अदा करने के लिए दवाब डालने में और ऐसी राशि की बलपूर्वक वसूली करने के लिए कदम उठाना न्यायसंगत नहीं कहा जा सकता है - इसके अलावा गृह अतिचार करना, गंदी गालीयुक्त भाषा का प्रयोग करना, आपराधिक रूप से अभिन्नस्त करना, अपमानित करना और अनावेदकों की प्रतिष्ठा को निम्नतर करना सद्भाव में किया गया नहीं कहा जा सकता और उनके कर्तव्यों का भाग नहीं बन सकता। (अरविंद कुमार भार्गव वि. ललित पाराशर) ...2471

सहकारी कृषि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999 (2000 का 20), धारा 50(2), दण्ड संहिता, 1860, धाराएँ 294, 452, 392, 500, 506 सहपठित धारा 34, दण्ड प्रक्रिया संहिता, 1973 धाराएँ 190 व 197 - सहकारी बैंक में कार्यरत आवेदकों ने द. प्र.सं. की धारा 197(1) के अन्तर्गत दिये संरक्षण के आधार पर आपराधिक कार्यवाहियों का अभिखण्डन चाहा - अभिनिर्धारित - आवेदकों को सरकार द्वारा नहीं हटाया जा सकता, इसलिए द.प्र.सं. की धारा 197(1) के अन्तर्गत दिया गया संरक्षण उन्हें उपलब्ध नहीं है। (अरविंद कुमार भार्गव वि. ललित पाराशर) ...2471

घटना स्थल का नक्शा - केवल अनुसंधान अधिकारी द्वारा नक्शे को साक्ष्य में प्रदर्शित करना - इससे उसकी अन्तर्वस्तु साक्ष्य में ग्राह्य नहीं हो जाती जब तक कि साक्षी, जिसके प्रेरण पर नक्शा तैयार किया गया, इस तथ्य का शपथ पर बयान न दे देवे। (नारायण वि. म.प्र. राज्य) ...2401

कर्मचारी सेवा नियम, 61 व 62 - देखें - सहकारी सोसायटी अधिनियम, म.प्र., 1960, धारा 55 व 64 (सुशील कुमार कानूनगो वि. एम.पी. राज्य सहकारी बैंक मर्यादित) ...2238

राज्य सहकारी अधिकरण विनियम, 2000, विनियम 31 - देखें - सहकारी सोसायटी अधिनियम, म.प्र., 1960, धारा 55 व 64 (सुशील कुमार कानूनगो वि. एम.पी. राज्य सहकारी बैंक मर्यादित) ...2238

राज्य पुनर्गठन अधिनियम, (1956 का 37), धाराएँ 54 व 68 - देखें - संविधान, अनुच्छेद 216, 225, 226 (एस.पी. आनंद वि. द राजिस्ट्रार जनरल, एम.पी. हाई कोर्ट, जबलपुर); (FB)---2172

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 - रिट अपील की पोषणीयता - विद्वान एकल न्यायाधीश द्वारा अपनी अवमान अधिकारिता के प्रयोग में आदेश पारित - अभिनिर्धारित - धारा 2(1) का परन्तुक, विद्वान एकल न्यायाधीश द्वारा संविधान के अनुच्छेद 226 के अधीन आरम्भिक अधिकारिता के प्रयोग में पारित आदेश के अलावा किसी आदेश के विरुद्ध, अपील के पेश करने के विरुद्ध रोक और पाबंदी लगाता है - रिट याचिका पोषणीय नहीं। (सुलोचना मलैया (श्रीमति) वि. एस.एन. श्रीवास्तव) ...2205

Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, M.P., 2005 (14 of 2006), Section 2(1), Industrial Disputes Act, 1947, Section 10 - Incentive Bonus - By scheme dated 01.09.77 not provided to employees working in Dispensary, Hospital, Estate, Office Staff and Canteen - Subsequently, on 01.07.82 aforesaid workers were granted 25% incentive bonus - Further, by circular dated 01.11.86 Canteen employees were granted 100% incentive bonus - The learned Single Judge found that there is no rationale to give different treatment and different percentage of incentive bonus to employees working in Canteen and Dispensary - Held - No perversity in the order - However, order of learned Single Judge granting interest on incentive bonus from 01.11.86 and not from initial date of scheme modified on ground of financial burden on employer and interest curtailed to 6% p.a. for period of 3 years. [General Manager, Bank Note Press, Dewas v. Bank Note Press Office Staff Association, Dewas] ...2218

Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 10(3), Rule 5(2)(c) - Possession - Possession taken from a dead person is no possession in eye of law - Paper possession without notice to holder is also no possession and cannot be affirmed or maintained. [Sohan Singh v. State of M.P.] ...2184

Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 10(3), Rule 5(2)(c) - See - Constitution, Article 226 [Sohan Singh v. State of M.P.] ...2184

WORDS & PHRASE

All consequential benefits - Learned Single Judge has directed to settle all consequential benefits - The term used in this direction are quite different than issuing a mandamus or a command to pay arrears - Order is not curtailment of power of employer. [M.P. State Civil Supplies Corporation Ltd. v. Vinod Kumar Save] ...2213

Context - Extension of rule of context permits reference to other statutes in pari materia. [Devi Prasad Singh v. State of M.P.] ...2189

Workmen's Compensation Act (8 of 1923), Section 30, Motor Vehicles Act, 1988, Sections 140, 143 & 167 - Question whether the claim petition is maintainable under the Workmen's Compensation Act after the dismissal of claim petition in miscellaneous appeal - Held - Section 143 of the Motor Vehicle Act itself provides that provision of this Act shall also apply in relation to any claim for compensation in respect of death or permanent disablement of any person under Workmen's Compensation Act resulting from an accident of the nature referred to in sub-section (1) of Section 140 - Appeal Allowed. [Rajani Agrawal (Smt.) v. Ramswaroop]...2384

उच्च न्यायालय (खण्ड न्यायापीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1), औद्योगिक विवाद अधिनियम, 1947, धारा 10 - प्रोत्साहन बोनस - स्कीम दिनांकित 01.09.77 द्वारा डिस्पेंसरी, अस्पताल, सम्पदा, कार्यालयीन स्टाफ एवं कैंटीन में कार्यरत कर्मचारियों को नहीं दिया गया - तत्पश्चात् 01.07.82 को पूर्वोक्त कर्मकारों को 25 प्रतिशत प्रोत्साहन बोनस दिया गया - आगे परिपत्र दिनांकित 01.11.86 द्वारा कैंटीन कर्मचारियों को 100 प्रतिशत प्रोत्साहन बोनस दिया गया - विद्वान एकल न्यायाधीश ने पाया कि कैंटीन और डिस्पेंसरी में कार्यरत कर्मचारियों को प्रोत्साहन बोनस का भिन्न बरताव और भिन्न प्रतिशतता देने का कोई तर्काधार नहीं है - अभिनिर्धारित - आदेश में कोई विपर्यस्तता नहीं - तथापि विद्वान एकल न्यायाधीश का प्रोत्साहन बोनस पर 01.11.86 से न कि स्कीम के आरम्भ की तारीख से ब्याज देने का आदेश नियोक्ता पर वितीय भार के आधार पर परिवर्तित और ब्याज तीन वर्षों के लिए 6 प्रतिशत प्रतिवर्ष तक घटाया गया। (जनरल मनेजर, बैंक नोट प्रेस, देवास वि. बैंक नोट प्रेस आफिस स्टाफ एसोसिएशन, देवास) ...2218

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 10(3), नियम 5(2)(सी) - कब्जा - किसी मृत व्यक्ति से लिया गया कब्जा विधि की दृष्टि में कोई कब्जा नहीं है - धारक को सूचना के बिना दस्तावेजी कब्जा भी कोई कब्जा नहीं है और अभिपुष्ट एवं कायम नहीं रखा जा सकता। (सोहन सिंह वि. म.प्र. राज्य) ...2184

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 10(3), नियम 5(2)(सी) - देखें - संविधान, अनुच्छेद 226. (सोहन सिंह वि. म.प्र. राज्य) ...2184

शब्द और वाक्यांश

समस्त पारिणामिक लाभ - विद्वान एकल न्यायाधीश ने समस्त पारिणामिक लाभ निपटाने का निदेश दिया - इस निदेश में प्रयुक्त शब्द परमादेश जारी करने या बकाया भुगतान करने का आदेश देने से बिल्कुल भिन्न है - आदेश नियोक्ता की शक्ति को न्यून नहीं करता है। (म.प्र. स्टेट सिविल सप्लाईस् कारपोरेशन लि. वि. विनोद कुमार सादे) ...2213

संदर्भ - संदर्भ के नियम का विस्तार समविषय में; पद चतुष्टय उज्जमतपद्ध अन्य संविधियों के प्रति संदर्भ की अनुमति देता है। (देवी प्रसाद सिंह वि. म.प्र. राज्य) ...2189

कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 30, मोटर यान अधिनियम, 1988, धाराएँ 140, 143, 167 - प्रश्न, क्या विविध अपील में दावा याचिका के खारिज होने के बाद कर्मकार प्रतिकर अधिनियम के अन्तर्गत दावा याचिका पोषणीय है - अभिनिर्धारित - मोटर यान अधिनियम की धारा 143 स्वयं उपबंधित करती है कि इस अधिनियम के उपबंध धारा 140 की उपधारा (1) में उल्लिखित प्रकृति की दुर्घटना के परिणामस्वरूप हुई किसी व्यक्ति की मृत्यु या स्थायी निःशक्तता के बावत् प्रतिकर के लिए कर्मकार प्रतिकर अधिनियम के अन्तर्गत किसी दावे के संबंध में भी लागू होंगे - याचिका मंजूर। (रजनी अग्रवाल (श्रीमति) वि. रामस्वरूप) ...2384

NOTES OF CASES

(71)

S.S. Dwivedi, J

ASHOK & anr.

Vs.

STATE OF M.P.

Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Section 326, Maxim falsus in uno, falsus in omnibus - Applicability - Held - The maxim is not acceptable as a sound principle in our country - A person can be disbelieved on a particular part of his statement may not be disbelieved for rest of his statement - The Court is required to separate the grain from the chaff instead of rejecting whole statement - Conviction can be based on such statement. AIR 1980 SC 957, AIR 1974 SC 308, 1989 CAR 53 (SC) (ref.)

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 326, सूत्र फेल्सस इन यूनो, फेल्सस इन ओम्नीबस (एक बात में मिथ्या तो सब में मिथ्या) - प्रयोज्यता - अभिनिर्धारित - सूत्र हमारे देश में एक दृढ़ सिद्धांत के रूप में स्वीकार्य नहीं है - एक व्यक्ति जिसके कथन के किसी विशिष्ट भाग पर अविश्वास किया जाए तो भी ऐसा हो सकता है कि उसके कथन के शेष भाग पर अविश्वास न किया जाए - न्यायालय से अपेक्षित है कि सम्पूर्ण कथन को निरस्त करने के स्थान पर भूसी से अनाज को अलग करे - ऐसे कथन पर दोषसिद्धि आधारित की जा सकती है। AIR 1980 SC 957, AIR 1974 SC 308, 1989 CAR 53 (SC) (संदर्भित)

R.K. Sharma, for the appellants.

Mohd. Irshad, P.L., for the respondent/State.

*Cr.A. No.211/2002 (Gwalior), D/- 5 August, 2008.

Short Note

(72)

N.K. Mody, J

GAJANAND & ors.

Vs.

VIRENDRA SINGH & ors.

A. Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Composite Negligence - Deceased was travelling in Matador which was hit by truck - In claim case truck driver remained ex-parte - Tribunal dismissed the petition on the ground that appellant has not impleaded owner & insurer of Matador - Held - Even if it is assumed that driver of Matador was negligent then too so far as appellants are concerned it was a case of composite negligence and claim petition cannot be dismissed for non-impleading owner, driver and insurer of Matador - Appeal allowed.

क. मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - संयुक्त उपेक्षा - मृतक मेटाडोर में यात्रा कर रहा था जिसे ट्रक ने टक्कर मारी - दावा प्रकरण में ट्रक चालक एकपक्षीय रहा - अधिकरण ने याचिका इस आधार पर खारिज की कि अपीलार्थी ने मेटाडोर के स्वामी और बीमाकर्ता को पक्षकार नहीं बनाया है - अभिनिर्धारित - यदि यह मान भी लेवें कि मेटाडोर का

NOTES OF CASES

चालक उपेक्षावान था, तब भी जहाँ तक अपीलार्थियों का संबंध है यह मामला संयुक्त उपेक्षा था और दावा याचिका मेटाडोर के स्वामी, चालक और बीमाकर्ता को पक्षकार न बनाये जाने के कारण खारिज नहीं की जा सकती है - अपील मंजूर।

B. Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Appellants are brothers of deceased - Although appellants were not financially dependent on deceased but it cannot be denied that in number of respect they were dependent on the deceased and entitled for compensation - Since appellants are financially well settled Rs.1,50,000/- compensation awarded.

खा. मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - अपीलार्थी मृतक के भाई हैं - यद्यपि अपीलार्थी मृतक पर वित्तीय रूप से आश्रित नहीं थे, किन्तु इससे इनकार नहीं किया जा सकता है कि वे अनेक विषयों में मृतक पर आश्रित थे और प्रतिकर के हकदार हैं - चूंकि अपीलार्थी वित्तीय रूप से सम्पन्न हैं, 1,50,000/- रुपये प्रतिकर अधिनिर्णीत।

Cases referred :

1987 ACJ Vol.2 Page 561, 2006 ACJ 2347, 2003 ACJ 1382, Manjuri Bera Vs. The Oriental Insurance Company Ltd. Decided on 30.03.07, 2005 (1) MPHT 486.

S. Verma, for the appellant.

S.S. Chawla, for the respondent.

*M.A. No.423/2005 (Indore), D/- 25 March, 2008.

Short Note

(73)

K.S. Chauhan, J

OM PRAKASH AGRAWAL

Vs.

STATE OF M.P.

Prevention of Food Adulteration Act (37 of 1954), Section 16(1)(a)(i) - Prevention of Food Adulteration Rules, 1955, Rules 17 & 18 - Whether the entire quantity of article of food stored in the container required to be stirred at the time of taking of sample - Held - If it was a usual practice to stir entire quantity of Dahi stored in a container before sale, it ought to have been done before selling to Food Inspector also - Accused cannot blame anybody and raise it as a technical defence to escape liability - Revision dismissed. 1986 CrLJ 719, 2001(1) FAC 234, 1989(1) CrLC 576 (Ker) (ref.)

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 16(1)(ए)(i), खाद्य अपमिश्रण निवारण नियम, 1955, नियम 17 व 18 - क्या नमूना लेते समय पात्र में संचित खाद्य पदार्थ की सम्पूर्ण मात्रा को हिलाना आवश्यक है - अभिनिर्धारित - यदि यह एक सामान्य प्रथा थी कि विक्रय से पूर्व पात्र में संचित दही की सम्पूर्ण मात्रा को हिलाया जाए, तो खाद्य निरीक्षक को विक्रय करने के पूर्व भी ऐसा अवश्य किया जाना चाहिए था - अभियुक्त दायित्व से बचने के लिए किसी व्यक्ति को दोष नहीं दे सकता और तकनीकी बचाव के रूप में इसे नहीं उठा सकता -

NOTES OF CASES

पुनरीक्षण खारिज। 1986 CrLJ 719, 2001(1) FAC 234, 1989(1) CrLC 576 (Ker) (संदर्भित) .

Sunita Chourasiya, for the applicant.

A.L. Patel, G.A., for the Non-applicant.

*Cr.R. No.741/1997 (Jabalpur), D/- 15 February, 2008.

Short Note

(74)

Rakesh Saksena, J

SITA @ SITA PRATAP VAISHYA

Vs.

STATE OF M.P.

Penal Code (45 of 1860), Section 306 - *Abetment to commit suicide* - Applicant had threatened the deceased that he will involve him in some case under Atrocities Act and he will not sit in rest until the deceased would be sent to jail - Held - Deceased committed suicide out of sheer annoyance and frustration - Applicant cannot be blamed for the same - No material to make the case of abetment on part of applicant - Order framing charge u/s 306 set-aside - Revision allowed. AIR 1979 SC 366 (ref.)

दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या का दुष्प्रेरण - आवेदक ने मृतक को धमकी दी थी कि वह उसे अत्याचार अधिनियम के अधीन किसी मामले में फँसा देगा और जब तक मृतक को जेल नहीं भेज देता वह आराम से नहीं बैठेगा - अभिनिर्धारित - मृतक ने मात्र क्षोभ और निराशा से आत्महत्या की - आवेदक को इसके लिए दोष नहीं दिया जा सकता - आवेदक द्वारा दुष्प्रेरण करने का मामला बनाने के लिए कोई सामग्री नहीं - धारा 306 के अधीन आरोप विरचित करने का आदेश अपास्त - पुनरीक्षण मंजूर। AIR 1979 SC 366 (संदर्भित)

Y.P. Sharma, for the applicant.

J.K. Jain, G.A., for the non-applicant/State.

*Cr.R. No.1152/2007 (Jabalpur), D/- 15 November, 2007.

I.L.R. [2008] M. P., 2153
SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Justice P. Sathasivam

11 February, 2008*

RAKESH

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 300, Exception 4 - *Ingredients*
- It has to be established that act was committed without premeditation, in a sudden fight, in heat of passion upon sudden quarrel and without the offender having taken undue advantage and not having acted in a cruel or unusual manner and fight must have been with person killed. (Para 6)

क. दण्ड संहिता (1860 का 45), धारा 300, अपवाद 4 - संघटक - यह स्थापित करना पड़ता है कि कार्य बिना किसी पूर्व चिन्तन के, आकस्मिक लड़ाई में, अचानक झगड़े पर आवेश की तीव्रता में और अपराधी के अनुचित लाभ लिये बिना और क्रूर या असामान्य तरीके से व्यवहार न करते हुए किया गया था और लड़ाई मृत व्यक्ति के साथ होनी चाहिए थी।

B. Penal Code (45 of 1860), Sections 302, 304 - *Murder or culpable homicide not amounting to murder* - Appellant assaulted the deceased by means of knife on account of peels of eggs - Case would fall under Exception 4 to Section 300 - Appellant guilty of offence u/s 304 Part 1 and not 302 - Appeal allowed. (Paras 3 & 9)

ख. दण्ड संहिता (1860 का 45), धारा 302, 304 - हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध - अपीलार्थी ने अण्डों के छिलकों के कारण मृतक पर चाकू के साधन द्वारा हमला किया - मामले धारा 300 के अपवाद 4 के अन्तर्गत आयेगा - अपीलार्थी धारा 304 भाग 1 के अधीन अपराध का दोषी न कि धारा 302 के - अपील मंजूर।

Cases referred :

(2006) 4 SCC 653, 2007 (11) SCR 1128.

J U D G M E N T

The Judgment of the Court was delivered by
DR. ARIJIT PASAYAT, J. :-Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Madhya Pradesh High Court at Indore, upholding conviction of the appellant for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and sentence of imprisonment for life. Four persons faced trial for committing murder of Kailash (hereinafter referred to as the 'deceased'). Though the trial court had convicted the appellant for offence punishable under Section 302 IPC, three persons were convicted for offences punishable under Section 302 read with Section 34 IPC. By the impugned judgment, conviction of others was altered

and each one of them was convicted for offences punishable under Section 326 IPC read with 34-IPC and was sentenced to undergo rigorous imprisonment for three years each and to pay a fine of Rs.1,000/- with default stipulation. But the conviction of the appellant as noted above was maintained.

3. Background facts in a nutshell are as follows:

On 15/11/1998 at about 08.30 pm, in Bhagirathpura, near the house of Sheetal Deen, Complainant Ramesh and witness Lalchand were standing near the culvert, when Praveen (PW4) came shouting that brother of Ramesh namely Kamlesh was being assaulted by the appellants. These persons, therefore, rushed to the place and witnessed that appellant Shailu, Raju, and Ravi had kept Kailash in their grip, while Rakesh was assaulting him with a knife, and others were administering kicks, fits and blows. When these persons raised an alarm, the accused persons fled away. Kailash was immediately taken to M. Y. Hospital. He had number of injuries which had been dressed initially but when Doctor saw Kailash, he declared him dead. According to Ramesh Prajapat there was a quarrel between them with regard to peels of eggs and it was on that account the accused persons had assaulted his brother. Report on this incident (Ex P /18) was lodged which was recorded in Rojnamcha. On being informed by the operator from M.Y. Hospital about death of Kailash, Inayat Hussain recorded information as (Ex. P/28m) and forwarded Raifulla Khan to investigate. Raifulla Khan then recorded Dehati Naish (Ex.P/w 2) was lodged by Ramesh and after issuing Subpoena, held inquest of which he prepared report. He also forwarded the dead body under requisition Ex.P2/27 of which post-mortem report was received from Dr. Raj Kumar Singh.

On the basis of information lodged, investigation was undertaken and charge sheet was placed. The accused persons abjured guilt and pleaded false implication. The trial court and the High Court found the evidence of the witnesses to be credible and cogent and as noted above directed conviction.

4. In support of the appeal, learned counsel for the appellant submitted that the evidence does not establish guilt of the present appellant. According to him, even if prosecution version is accepted in toto, offence under Section 302 IPC is not made out. In any event an offence under Section 302 IPC is not made out. According to him the occurrence took place in the course of a sudden quarrel and therefore Exception 4 to Section 300 IPC is attracted.

5. Learned counsel for the State supported the judgments of the Courts below.

6. 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.

7. 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 reason 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 requires 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 that there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

8. The above position is highlighted in *Sandhya Jadhav v. State of Maharashtra* (2006) 4 SCC 653, *Thankachan & Anr. v. State of Kerala* (2007 (11) SCR 1128).

9. In the background of the principles of law indicated above, the appropriate conviction would be in terms of Section 304 Part I IPC, and custodial sentence of 10 years would meet the ends of justice.

10. Appeal is allowed to the aforesaid extent.

Appeal allowed.

I.L.R. [2008] M. P., 2156

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. S.K. Kulshrestha, Mr. Justice A.M. Sapre, Mr. Justice Viney Mittal & Mr. Justice S. Kemkar

31 July, 2008*

ADDL. COMMISSIONER OF SALES TAX & ors.

... Appellants

Vs.

M/S. S. KUMAR LIMITED

... Respondent

Commercial Tax Act, M.P., 1994 (5 of 1995), Entry No.22 in Part I of Schedule II, Entry No.22 in Part V of Schedule II, Entry No.39 in Part IV - Reference-made to 5 judges bench to decide "Whether the coal ash is a part of cinder and covered by the term coal in Entry No.22 in Part V of Schedule II of the Commercial Tax Act or the said commodity would be taxable under Entry No.39 in Part IV ?" - Held - "Coal Ash" is "Cinder" and covered by the term "Coal" in Entry No.22 in Part V of Schedule II and therefore it is not exigible to tax under Entry No.39 in Part IV. Further it has been held that judgment in *Hukumchand Mills case* de hors the earlier decisions and the view expressed therein with regard to Cinder (Coal Ash) being different commodity from its parent coal - Overruled to the extent that Cinder is not Coal - Appeal dismissed accordingly - State preferred an appeal against order of Single Judge, holding that - "The rate of tax on the sale of Coal Ash would be same as that of Coal and not prescribed under residuary entry", on the ground that it is against the ratio decided by 3 Judges bench in *Hukumchand Mills Ltd. Vs. Commercial Tax MP [1988] 71 STC 101 - Hence this Reference.* (Paras 20 & 24)

वाणिज्यिक कर अधिनियम, म.प्र., 1994 (1995 का 5), अनुसूची II के भाग I में प्रविष्टि क्र. 22, अनुसूची II के भाग V में प्रविष्टि क्र. 22, भाग IV में प्रविष्टि क्र. 39 - 5 जजों की न्यायपीठ को यह विनिश्चित करने के लिए निर्देश कि "क्या कोयला भस्म सिंडर का भाग है और वाणिज्यिक कर अधिनियम की अनुसूची II के भाग V में प्रविष्टि क्र. 22 में कोयला शब्द के अन्तर्गत आती है या उक्त वस्तु भाग IV में प्रविष्टि क्र. 39 के अन्तर्गत कर योग्य होगी ?" - अभिनिर्धारित - "कोयला भस्म" "सिंडर" है और अनुसूची II के भाग V में प्रविष्टि क्र. 22 में कोयला शब्द के अन्तर्गत आती है इसलिए यह भाग IV में प्रविष्टि क्र. 39 के अन्तर्गत कर के आहरण योग्य नहीं है। आगे यह अभिनिर्धारित किया गया कि हुकुमचंद मिल के मामले में दिया गया निर्णय पूर्व विनिश्चयों से असम्बद्ध है और सिंडर (कोयला भस्म) उसके मूल कोयले से भिन्न वस्तु होने के संबंध में उसमें अभिव्यक्त किया गया विचार - इस सीमा तक कि सिंडर कोयला नहीं है उलट दिया गया - अपील तदनुसार खारिज की गई - राज्य ने एकल न्यायाधीश के आदेश के विरुद्ध अपील पेश की, अभिनिर्धारित कि - "कोयला भस्म के विक्रय पर कर की दर वही होगी जो जो कोयले पर है

न कि अवशिष्ट प्रविष्टि के अन्तर्गत विहित दर", इस आधार पर कि यह 3 जजों की न्यायपीठ द्वारा हुकुमचंद मिल लि. बनाम् वाणिज्यिक कर म.प्र. (1988) 71 एसटीसी 101 में विनिश्चित अनुपात के विपरीत है - इसलिए यह निर्देश ।

R.N. Singh, A.G., A.S. Kutumble, Addl.A.G. with Mamta Shandilya, Panel Adv., for the appellants.

Manoj Kumar Agrawal, respondent in person.

G.M. Chaphekar with C.R. Pancholia, Amicus Curiae.

ORDER

The Order of the Court was delivered by **S.K. KULSHRESTHA, J.** :-THE Division Bench while considering the Appeal of the State Government against the Order dated 4th May, 2006, passed by the learned Single Judge in Writ Petition No. 1169/2004, has referred the following question for consideration of Larger Bench in view of the cleavage of opinion between decisions rendered by the Full Bench, the Division Bench and the Single Bench :

"Whether the coal ash is a part of cinder and covered by the term coal in Entry No.22 in Part-V of Schedule-II of the Commercial Tax Act or the said commodity would be taxable under Entry 39 in Part-IV" ?

02. Initially a Three Judge Bench was constituted to consider the said question, but the Bench on being apprised that the question also involves the legality of the decision of the Full Bench in *Hukumchand Mills Ltd. Vs. Commissioner of Sales Tax, M.P.* [1988] 71 STC 101, on being requested by the Full Bench of Three Judges, Hon'ble the Chief Justice has constituted this Bench comprising Five Judges.

03. The appeal before the Division Bench was filed assailing the interpretation of Entry No.22 in Part I of Schedule II of the M.P. Commercial Tax Act, 1994. Vide judgment impugned, the learned Single Judge held that the rate of tax on the sale of Coal Ash would be the same as that of Coal and not the rate prescribed under the residuary entry. Since the said judgment militated against the ratio of the judgment of *Hukumchand Mills* (supra), the State has preferred this appeal in which, for authentic enunciation of the legal position, the case has been referred to this Five Judge Bench.

04. For better grasp of the facts, it is necessary to refer to the order passed by the Division Bench seeking opinion of the Larger Bench on the question aforesaid. The respondent is a Trader who deals in sale and purchase of "Coal Ash". According to the case of the respondent - petitioner, the partly burnt coal, which comes out of boiler is extinguished by water and thus coal ash is derived. The Dictionary meaning ascribed to coal includes, "Coke", and also "Cinder", "Churi", and "Coal Ash". In order to get the disputed question decided with regard to the position of the coal ash (cinder), under Entry 22 of Schedule II part V of the Act, the petitioner (respondent) made an application under the provisions of Sec.68 for determination and by order dated 6/9/2004, following the decision of the Full Bench

in *Hukumchand Mills* (supra), the Commissioner came to the conclusion that Coal Ash would not fall within the nomenclature "coal" or "coke" and that the commodity would be exigible to tax under the residuary Entry No.39 in Part IV of Schedule II of the Commercial Tax Act. Finding that under the provisions of law, the decision of the Commissioner was binding on all subordinate Authorities, the respondent filed the Writ Petition which was allowed by the learned Single Judge against which the present appeal has been filed.

05. During hearing of the appeal, reference was made to the decision in *M/s. Burn Standard Company Ltd., Vs. Commissioner of Sales Tax* (1993) 17 Curr. T.J. 387 which took the view that Coal Ash should be treated as different from Coal and, therefore, taxed under the residuary clause. Reference was also made to the decision of the Full Bench of this Court in *M/s. Hukumchand Mills Ltd.* (supra) and *M/s. Kalyan Mills Vs. Commercial Tax Commissioner* [1999] 32 VKN 214 to the effect that Coal Ash of Nepa Limited Company is a bye-product of Coal and will be taxed under Entry 39 of Part IV of Schedule II of the M.P. Commercial Tax Act, 1994. The State counsel, however, pointed out that the judgment in *Kalyan Mills* (supra) strongly relied upon by the learned Single Judge was of the Board of Revenue and the other cases namely; *S. Kumar Ltd. Vs. Addl. Commissioner of Sales Tax & Others* (2004) 4 STJ 785 (MP) and *Commissioner of Sales Tax Vs. Modi Spinning & Weaving Mills, Modinagar* (2004) 4 STJ 689 (All) expressing that Coal Ash was different from Coal because Coal is a mineral, clearly subscribed to the view of the said Full Bench decision in *Hukumchand Mills* (supra). It was stated that in view of the decision of the Full Bench which clinches the issue, there was no room for speculation about the position of the Coal Ash and its taxability under the residuary entry. It was also pointed out that the decision in *S. Kumar Ltd.* (supra) was that of a Single Bench which cannot prevail over the decision of the Full Bench. Attention was also invited to the case of *Commissioner of Sales Tax Vs. Samrathmal Dhoolchand* (Miscellaneous Civil Case No. 253 of 1967) decided on 23rd December, 1969 and *Binod Mills Co. Ltd., Ujjain Vs. Commissioner of Sales Tax, M.P.* [1972] 29 STC 413. We may emphasise that prior to the bringing into force of the Commercial Tax Act, the Entry 22 in Part V of Schedule II of the M.P. General Sales Tax Act reads as under :

(1) "Coal including coke in all its form, but excluding charcoal".

The Entry, however, was modified in the M.P. Commercial Tax Act ('the Act', for brevity) to the following effect :

(1) "Coal including coke in all its form and charcoal".

06. It was in this context that it was stated by the Division Bench that since the Entry in the Act prevailing at the relevant time refers to Coal including Coke in all its form and it is not stated that Coal Ash and Coal is "Charcoal" or even remotely a component of Charcoal, the decision in *Hukumchand Mills* (supra) will hold

the field. However, in view of the diverge views in the other decisions, it was observed that the appeal cannot be decided by the Division Bench without an authentic enunciation on the subject, especially the marginal change of the definition in the subsequent Act. In this context, the question referred to by the Division Bench has been reproduced hereinabove. However, before embarking upon the said exercise, it is necessary to refer to the decisions of this Court on the subject rendered prior to the decision in *Hukumchand Mills* (supra) and subsequent thereto. In *Binod Mills* (supra), a Division Bench comprising P. K. Tare and G.P. Singh, JJ, considered whether Coal includes Coal Ash and it was observed that the Entry Coal including Coke in all its form had already been interpreted in the case of *Samrathmal Dhoolchand* (supra). Thus, it is only by reference to the earlier decision that conclusion was recorded. It is, thus, necessary to examine the decision in *Samrathmal Dhoolchand* (supra).

07. In the case of *Samrathmal Dhoolchand*, the question considered by the Division Bench was as to whether Coal Ash is Coal and comes under Entry No. 1 Part III of Schedule II of the Act or whether it comes under Part VI of Schedule II of the 1958 Act. It was conceded before the Bench that Coal Ash is called "Cinder" in commercial parlance and in view of the Dictionary meaning given by Webster, Cinder being a piece of partly burnt coal capable of further burning without flame, and being partly burnt combustible, the Entry would include Coal Ash. We find it pertinent to point out that in the judgment rendered in *Hukumchand Mills*, these decisions have not been considered.

08. In *Hukumchand Mills*, the primary question that was mooted before the Court was as to whether the Tribunal was right in holding that unserviceable items of stores which comprised discarded assets like scrap, dyes, chemicals, broken iron hoops, obsolete machinery, coal ash, etc., were exigible to tax? It is, therefore, clear that the Judges dealing with the matter in the Full Bench had no occasion to focus attention on the question whether the Coal Ash was included within the entry of Coal, indeed, even the entry has not been adverted to. It is only in paragraph No. 28 that it has been observed as follows:-

28. As regards coal ash, in our opinion, the Tribunal has rightly held that coal is converted into coal ash after it is burnt in boilers and that in this way, coal undergoes a manufacturing process before becoming coal ash and is in fact a by-product of coal so that coal and coal ash cannot be treated as exactly the same goods.

09. We may clarify that the principal question which the Bench was addressing itself to was only with regard to the exigibility to tax of the items stated in the question including Coal. We are, therefore, of the view that since the observations contained in paragraph 28 of the report of the judgment of the Full Bench in *Hukumchand Mills* (supra) related only to the exigibility of tax of unserviceable items, the question decided in the passing is *obiter* and for the reasons that follow.

the opinion as regards Coal Ash not being Coal is not the correct view of the matter when examined apposite the provisions and the law on the subject.

10. The criteria for interpretation, construction and import of the fiscal statute has already been settled by the Supreme Court in various decisions. It would, therefore, be advantageous to first refer to the decisions laying down the parameters and then undertake the exercise to find whether on the anvil of the criteria laid down by the apex court and the other High Courts, the Entry concerned, would engulf within the meaning of Coal, the Coal Ash / Cinder. In *Commissioner of Income Tax, Madras Vs. Kasturi and Sons Ltd.*, (AIR 1999 SC 1275) it is held that a taxing statute has to be strictly construed and wherever the legislature intended to refer to payment in kind other than cash or money, it has taken care to provide specifically therefor. In the Constitutional Bench decision of the apex Court in *A. V. Fernandez Vs. The State of Kerala* (AIR 1957 SC 657), it has been observed that in considering fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of law. If the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by any analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. Since the above judgment is of the Constitutional Bench, we find it apt to remain within the framework laid down therein for interpreting the entry in question.

11. In *M/s. Saraswati Sugar Mills Vs. Haryana State Board and others* (AIR 1992 SC 224), while considering whether the Sugarcane is Vegetable, it was observed that one has to look merely at what is clearly said. There is no room for any intendment and there is no room for bringing within the provision of the Act anything by implication. The discussion in paragraph 21 of the said report, reads as follows :

"21. Construction of words and meaning to be given for such words shall normally depend on the nature, scope and purpose of the statute in which it is occurring and to the fitness of the matter to the statute. The meaning given to the same word occurring in a social security measure of a regulating enactment may not be apposite or appropriate when the same word is interpreted with reference to a taxing statute. The Cess Act is a fiscal enactment. In the context in which the word 'vegetable' is used in Entry 15 'vegetable product' means product of or made of or out of vegetable. 'Vegetables' as understood in common parlance are not products of manufacture unless we say that agriculture is an industry for certain purposes and vegetables are products of that industry. In order to bring an industry within any of the entries in Schedule I it has to be seen what is the end product produced by that industry. Sugarcane is not a vegetable though it may be an agricultural product. If the botanic

meaning of vegetable as referring to any and every kind of plant life is to be given then some of the industries listed in Schedule I like Paper Industry and Textile Industry and even Chemical Industry which are covered by other entries could also be brought within Entry 15. The word vegetable in the context does not attract the botanic meaning. The sugar manufacturing industry do not, therefore, come within Entry 15 of Schedule I of the Cess Act."

12. In *M/s. Geo Millar & Co. Pvt. Ltd., Vs. State of M.P.* (AIR 2004 SC 3552), the Supreme Court has stated that it is well settled position of law that in interpreting taxing statutes, one must have regard to the strict letter of law. If the person sought to be taxed comes within the letter of the law he must be taxed. However, apart from the interpretation of statute, in number of cases, it has been laid down that the commodity should be considered from the commercial sense and pedantic approach has been deprecated.

13. In *Southern Gas Ltd., Vs. State of Kerala*. [2005] 139 STC 504, the Two Judge Bench of the Kerala High Court has held that goods must be classified according to their popular meaning or as they are understood in their commercial sense and not according to the scientific or technical meaning. The test is, how the product is identified by the class or section of people dealing with or using the product and when the statute itself does not contain any definition, commercial parlance would assume importance.

14. While the learned Advocate General has insisted that the Entry should be strictly construed in the light of the judgments of the Supreme Court that the words used should be interpreted in the literal sense and nothing should be added to the legislative intent which is not reflected by the Entry concerned, unless there is an apparent ambiguity, the contention of the learned *amicus curiae*, Mr. G. M. Chaphekar, Sr. Advocate, per contra, is that the common sense cannot be abdicated and the article should be considered as known in commercial world and in common parlance. We are conscious of the fact that if the Entry is wide enough to embrace various other articles and the same is identified as such in the commercial world, it can safely be inferred that in providing for 'coal' and 'coke' and even while excluding 'charcoal', as was the case under the repealed Act, the Court can come to the conclusion that the expression "Coal" would include "Charcoal / Cinder". It is in this context that now we proceed to examine other decisions to come to the conclusion with regard to the exigibility of tax of Coal Ash / Cinder under Entry 22 or under Entry 39 (Residuary).

15. We have referred to the Entry under the erstwhile M.P. General Sales Tax Act, 1958 and the M.P. Commercial Tax Act, 1994. In order to appreciate the legal position, we may refer to the case of the Full Bench of this Court in *Hukumchand Mills* (supra). As already pointed out, *Hukumchand Mills* has not taken into consideration the earlier cases namely; *Commissioner of Sales Tax*

Vs. Samrathmal Dhoolchand (Miscellaneous Civil Case No. 253 of 1967) decided on 23rd December, 1969 and *Binod Mills Co. Ltd., Ujjain Vs. Commissioner of Sales Tax, M.P.* [1972] 29 STC 413. A Three Judge Bench of the Supreme Court has ruled in *State of Maharashtra Vs. Bradma of India Ltd.*, [2005] 140 STC 17 that a special entry in the Schedule over-rides general entry and, therefore, resort to the residuary entry can be only when a liberal construction cannot cover the goods in question. The discussion contained in paragraph 7 of the report reads as extracted below :

7. We are of the opinion that the High Court was wrong. Both the Tribunal and the High Court commonly enunciated the principle that a specific entry would override a general entry. In addition we would add, and as has been held in *Collector of Central Excise Vs. Wood-Craft Products Ltd.*, (1995) 3 SCC 454, 462, resort has to be had to the residuary heading only when a liberal construction by the specific heading cannot cover the goods in question. The language of entry 97(b) clearly shows, by use of the phrase "other than those specified elsewhere" that it is not only a residuary entry but also that electronic systems, instruments, etc., may be classified under other entries. Entry 90 on the other hand does not contain any words of limitation. The items mentioned therein would cover every species thereof irrespective of the mode of their operation. Cash registering machines are specifically mentioned. In the absence of any limitation or qualification as to the different kinds of cash registering machines, there is no reason to read in any such qualification and limit the entry to particular kinds of cash registering machines. It is significant that by contrast, data processing machines have expressly excluded computers. Were it not so excluded, computers would have also fallen within entry 90. In fact computers are separately dealt with in entry 97(a). But the exclusion of computers from data processing machines would indicate that the items mentioned in entry 90 are generic covering all species of such items. Given the language of the two entries we fail to understand how the High Court could have come to the conclusion that entry 97(b) was the specific entry and that entry 90 was the general entry. Such an interpretation goes against the express language of the two entries.

(emphasis supplied)

16. In *Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh* [1966] 17 STC 527, a Division Bench of this Court, comprising P. V. Dixit, CJ and K. L. Pandey, J, ruled that the word "Coal" occurring in a fiscal statute has to be understood in its popular and commercial sense. The word Coal as used in commerce, includes Charcoal and, therefore, Charcoal is covered by Entry No.1 of Part III of Schedule II. It was observed in paragraph 3 of the report as follows :

3. There is no doubt that the word "coal" as originally understood in England was sufficiently wide to include charcoal. But there its use in that sense has become obsolete. The usual sense in which it is now used connotes a firm, brittle (generally black) carbonaceous rock derived from mines. This will be clear from any standard dictionary. The Board has referred to the Blackies' Concise Dictionary. We may mention the Chamber's Twentieth Century Dictionary which gives the meaning of coal as "a firm brittle, generally black combustible carbonaceous rock derived from vegetable matter (the usual sense now)." But in India the English word "coal" as used in commerce includes charcoal. It is now well established that the word "coal" occurring in a fiscal statute has to be understood in its popular and commercial sense : His Majesty the King v. Planters Nut and Chocolate Company Limited, K.V. Varkey V. Agricultural Income Tax and Rural Sales Tax Officer and Madhya Pradesh Pan Merchants Association, Santra Market, Nagpur V. State of Madhya Pradesh (Sales Tax Department). We derive further support for this view from the fact that sales of both coal and firewood have been taxed at 2 per cent and there does not appear to us to be any good reason for treating charcoal differently. In our opinion, charcoal is covered by entry No.1 of Part III of Schedule II of the Act and sales of charcoal are taxable at 2 per cent.

17. We have already referred to the entry under the M.P. General Sales Tax Act, 1958 which specifically excluded charcoal from the definition of coal. It, therefore, follows that non-mention of a commodity in an entry does not by itself exclude the articles which it impliedly incorporates by choosing the all inclusive definition such as coal including coke in all its forms. The said decision was considered by the Supreme Court in *The Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Jaswant Singh Charan Singh* (AIR 1967 SC 1454). It was observed that the popular meaning and not scientific or technical meaning should be adapted. Coal, as per Blackies' Concise Dictionary, means a piece of wood or other combustible substance burning or charred; charcoal, a cinder; usually a solid black substance found in the earth, largely employed as fuel, and formed from vast masses of vegetable matter deposited through the luxurious growth of plants in former epochs of the earth's history. The observation contained on the subject in paragraph 7 of the report read as under :

(7) There is another aspect also from which Entry I of Part III may be considered. Section 14 of the Central Sales Tax Act, 1956 declares certain goods as goods of special importance in inter-State trade or commerce. One of these is 'coal' including coke in all its forms'. Section 15 of that Act provides that the State Legislatures in their respective sales tax laws can impose only 2 per cent tax on these goods. That is why in Entry I of Part III 'coal' is stated to include 'coke in all its forms'

and coal including coke in all its forms is charged at 2 per cent tax. The State Legislature, however, knew or must be presumed to know that firewood is also used by the people as fuel, but would not fall within that Entry, and, therefore, provided 2 per cent tax on it by a separate entry, namely, Entry 8 in Part III. Having taxed coal and firewood at 2 per cent, it does not appear to be possible that the Legislature deliberately left out charcoal from the connotation of the word 'coal' and left it to be charged at 4 per cent under the residuary Entry I in Part VI. The object of the Legislature clearly was to tax coal and firewood as articles used as fuel and did not make a separate entry 'in regard to charcoal as it must be aware that coal, understood in ordinary and commercial sense, would include charcoal. Had that not been so, instead of leaving it to be dealt with under the residuary item, it would have enacted a separate entry just as it did in the case of firewood which it knew would not in its ordinary meaning fall under the term 'coal'. In this view, the contention of counsel for the State must be rejected.

18. From the above decisions it is luculent that what is intended by coal and its forms is the combustible and burning article. It is clear that when a distant cousin like charcoal has been treated as coal, it would be a travesty to deprive the cinder (coal ash) of the lower marginal tax by treating it otherwise, especially when it is a part of the coal which comes out of the boiler on account of having become less combustible and unfit for use in the boiler, but retaining all properties of coal. It has not been denied that insofar as cinder is concerned, it contains sufficiently large pieces of coal and, therefore, there is no transformation or a manufacturing process.

19. We may now hasten to consider the arguments raised on the basis of various other decisions of the Supreme Court and this Court. In *India Carbon Ltd., Vs. Superintendent of Taxes, Gauhati and others* (AIR 1972 SC 154), it was observed by the Supreme Court that the language of the entry is wide and coal has been stated to include coke in all its forms. It was stated that coke is the refuse left after destructive distillation of coal, but has same properties, more or less. Paragraph 5 of the report says :

5. We are wholly unable to agree with the reasoning or the conclusion of the High Court with regard to the ambit and scope of Clause (i) of Section 14 of the Central Act. The language is clearly wide and coal has been stated to include coke in all its forms. It is not denied that petroleum coke is one of the forms of coke. Therefore on a plain reading of the aforesaid clause it is incomprehensible how petroleum coke can be excluded from its ambit. It may be that the clause mentions coal only and then declares that that word shall include coke in all its forms. That shows that the object of the words which follow coal is to

extend its meaning. In the writ petition it was stated in Para 2 that "coke is the refuse left after destructive distillation of coal, shale or oil and is called petroleum coke, Metallurgical coke or pitch coke to indicate its source or origin; but all these are carbonaceous material used for the same purpose and having same properties, more or less, main being - Mixed Carbon, - Volatile Matters, - Ash and - Moisture".

20. A crucial question that has been raised by the learned Advocate General is based on the decision of *I.T.C. Bhadrachalam Paperboards Limited Vs. State of Andhra Pradesh* [1999] 114 STC 38 (A.P.) on which heavy reliance has been placed by the Revenue. Though in answering the question No. 1, the Hon'ble Andhra Pradesh High Court has come to the conclusion that Coal Ash (cinder) is a different commodity and would, therefore, be exigible to sales tax, with respect, it is only with regard to the questions No. 2 and 3 that the matter was considered from different perspective. It is clear that what was agitated before the Hon'ble High Court was whether coal ash was a product of the petitioner's industrial unit and whether the sale of coal ash by the petitioner was eligible for exemption under G.O.Ms. No. 606 dated April 9, 1981. It was contended by the Revenue that the petitioner Company was purchasing kiln and using it as raw-material for its manufacturing activity but not as fuel which had found favour with the Tribunal against which revision was filed. Use as raw-material of a particular commodity is distinct and separate from what is obtained by use of coal in boilers. Thus, we are of the view that the ratio of the case, heavily relied upon by the learned Advocate General, does not help the Revenue. The learned Advocate General has further submitted that the said decision of the High Court was considered by the Supreme Court in *ITC Bhadrachalam Paper Boards Ltd. Vs. State of A.P.* [2002] 126 STC 541. We have considered the argument of the learned Advocate General and gone through the said judgment. Apropos the question No. 1, their Lordships observed that insofar as the "Coal" and "Coal Ash" were concerned, they were commercially two commodities and, therefore, the sale of "Coal Ash" amounted to first sale in the hands of the petitioner - Company. It was in this context that the sale of Coal Ash by the petitioner - Company was treated as first sale at the hands of petitioner - Company treating coal ash as a different commodity. On due consideration of the contention of the learned Advocate General, we may point out that the exemption was being sought in respect of the use of timber as raw - material for the manufacturing activity but not as fuel which did not find favour with the Tribunal. It was observed that the Tribunal had found that the purpose of using the same as raw - material was for manufacturing paper and paperboards and such purchase was, therefore, to be treated as unclassified goods. Even if it is construed for the sake of argument that the entry under which the commodity was required to be taxed was similar to that in the Madhya Pradesh Legislation, the question that timber purchased was a raw-material for manufacturing activity. was the question which has been considered

and decided in the said case. Their Lordships have considered the case of timber having been used as raw-material (fuel) and the resultant coal ash. It was, therefore, not a case of burning of coal, a mineral, in the boilers and collection of the cinder containing big pieces of coal and retaining substantially the identity of coal. In common parlance when the cinder is used, it is understood as coal.

21. We may also point out that Coal Ash / Cinder is purchased in the market for the purpose of burning and although the cinder loses its property of burning in flames and to reach the temperature requisite in boilers, it can be used in other activities as a fuel for heating / burning. Since properties are retained, which may not be the case as considered by the Supreme Court in *ITC Bhadrachalam Paper Boards Ltd.* (supra), we are of the view that the case relating to the exemption under the Andhra Pradesh Sales Tax Act has no bearing over the subject matter before us. The perspective from which the case was considered was as to whether the cinder was a product of the Company entitled to exemption.

22. We may now digress to consider the parallel examples contained in relation to the other goods. The Supreme Court in *Commissioner of Sales Tax, U.P. Vs. Lal Kunwa Stone Crusher Pvt. Ltd.*, [2006] 8 STJ 658 (SC) has ruled that stone gitti (metal) being smaller article of stone, cannot be treated separately. In view of the said decision and perception that smaller articles of the same article cannot be treated differently, we are of the view that Coal Ash / Cinder, by whatever name called in commercial world and in common parlance, being smaller pieces of coal, retaining the properties of the coal and used as coal in other commercial activities, cannot be denuded of its original properties and birth marks and classified as an article different from the parent article. The status of cinder was further pronounced upon in the *Union of India Vs. Ahmedabad Electricity Co. Ltd., and Others* [2003] 11 SCC 129, the commodity Cinder was described as follows :

5. Cinder is obtained as a result of burning coal in boilers and furnaces in factories. When coal is fully burnt it is reduced to ash. When it is not fully burnt, it leaves pieces behind. Such pieces of unburnt or partly burnt coal are called cinder. Cinder loses its capacity to produce flame. That is why it is of no use in the boiler and is left out. Since it is left with some combustible value, it is described as inferior quality coal.
(emphasis supplied)

23. We, therefore, hold that the "Coal Ash" is "Cinder" and covered by the term "Coal" in Entry No.22 in Part V of Schedule II of the Commercial Tax Act and, therefore, it is not exigible to tax under Entry No.39 in Part IV. The corresponding entry in the repealed Act shall be construed accordingly in relation to the matters pending under the said Act.

24. To conclude, we are of the considered view that the decision rendered by the Full Bench of this High Court in *Hukumchand Mills* (supra) is de hors the earlier decisions and the finding has been arrived at without the cogent and relevant

material being on record of that case. Under these circumstances, we find ourselves unable to subscribe to the view expressed therein with regard to Cinder (Coal Ash) being a different commodity from its parent Coal. The said decision is accordingly overruled only insofar as it holds that Cinder is not Coal. The decisions of the learned Single Judge in W.P.No. 262/1998 and W.P.No. 1169/2004, assailed in the above appeals, are upheld but it is made explicit that the decision in *S. Kumar Ltd.*, (2005) 1 MPLJ 352 deals only with the taxability which has now been rendered redundant. The decision in *Mansingh Ka Oil Mills Pvt. Ltd., Vs. Addl. Regional Asstt. Commissioner of Sales Tax, Khandwa & another* (M.P.No. 1891/1983, decided on 8/9/1992) takes the correct view, though it is based on concession. The view expressed in *Samrathmal & Binod Mills* (supra) is, accordingly, approved.

25. Since nothing remains to be decided in both these appeals, they are dismissed with no order as to costs.

Writ appeals dismissed.

I.L.R. [2008] M. P., 2167

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice A.M. Sapre & Mr. Justice S.K. Seth

31 July, 2008*

DILIP KAUSHAL & anr.

Vs.

STATE OF M.P. & ors.

... Petitioners

... Respondents

Municipal Corporation Act, M.P. (23 of 1956), Section 307(5) - Power to require removal or alteration of work not in conformity with byelaws or any scheme or any other requirement - The issue for reference before the Full Bench was "Whether the locus standi under Sub-section (5) of Section 307 of the Act is restricted to the person affected by the violation complained of or encompasses all persons resident within the area to which the Act applies?" - Held - The locus standi under Sub-section (5) of Section 307 of the Act of 1956 is not restricted to a person affected by the violation complained of but encompasses all persons resident within the area to which the Act of 1956 applies. The reference is answered accordingly. The Division Bench decision in the case of *Radhakishan Sharma* (1996 MPACJ 55) to the contrary is overruled - Appeal dismissed. (Para 10)

नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 307(5) - ऐसा निर्माण कार्य हटाने या उसमें परिवर्तन करने के संबंध में आदेश देने की शक्ति, जो उप-विधियों या किसी योजना या किसी अन्य मांग के अनुरूप न हो - पूर्ण न्यायपीठ के समक्ष निर्देश के लिए प्रश्न था "क्या अधिनियम की धारा 307 की उपधारा (5) के अधीन सुन जा-"

का अधिकार शिकायत किये गये उल्लंघन से प्रभावित व्यक्ति तक सीमित है या क्षेत्र, जिसे अधिनियम लागू होता है, में रहने वाले सभी व्यक्तियों को परिवेष्टित करता है ?" — अभिनिर्धारित — 1956 के अधिनियम की धारा 307 की उपधारा (5) के अधीन सुने जाने का अधिकार शिकायत किये गये उल्लंघन से प्रभावित व्यक्ति तक सीमित नहीं है बल्कि क्षेत्र, जिसे 1956 का अधिनियम लागू होता है, में रहने वाले सभी व्यक्तियों को परिवेष्टित करता है। निर्देश तदनुसार उत्तरित किया गया। इसके प्रतिकूल राधाकिशन शर्मा (1996 एमपीएसीजे 55) के मामले में खण्ड न्यायपीठ का निर्णय उलटा गया — अपील खारिज।

Cases referred :

1996 MPACJ 55 overruled, (1987) 2 SCC 707, (1994) 1 SCC 243.

Vivek Dalal, for the petitioners.

A.S. Kutumble, Addl.A.G., for the respondent Nos.1 & 3.

Anand Agrawal, for the respondent No.2.

A.K. Chitle with Mr. Kochatta, for the respondent No.4.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C.J.**:- This is a reference made to this Full Bench by order dated 21.8.2007 passed by a Division Bench of this Court in W.P.No.5807 of 2006.

2. The two petitioners, a Corporator of the Indore Municipal Corporation and a Mechanical Engineer, have filed this Public Interest Litigation under Art. 226 of the Constitution questioning the lay out sanctioned by the Indore Municipal corporation for construction of a building of the respondent No.4. On 21.3.2006, the Division Bench issued notices in the writ petition and directed that the interim prayer shall be considered after service of notices on the respondents. Thereafter, the respondent No.4 appeared and raised a preliminary objection that an alternative remedy was available to the petitioner under sub-section (5) of Section 307 of the M.P. Municipal Corporation Act, 1956 (for short 'the Act of 1956') to apply to the District Court for an injunction for removal or alteration of the building. The counsel for the petitioners, on the other hand, brought to the notice of the Division Bench that in *Radhakishan Sharma vs. Pravin Kumar and two others*, 1996 M.P.A.C.J. 55, on a reference made by learned single Judge of this Court, a Division Bench has held that under sub-section (5) of Section 307 of the Act of 1956, the expression 'any other person' who has been conferred with the right to apply to the District Court for injunction for removal or alteration of any building will mean such person who might feel directly affected by the building in regard to his individual right to property and, therefore, the two petitioners in Writ Petition No.5807 of 2006 may not have an alternative statutory remedy under sub-section (5) of Section 307 of the Act of 1956.

3. The Division Bench hearing W.P.No-5807 of 2006, however, found that in the earlier case of *Radhakishan Sharma* (supra), the Division Bench had taken the aid of the provisions of the Specific Relief Act, 1963 and the Code of Civil Procedure, 1908 to construe sub-section (5) of Section 307 of the Act of 1956

and had held that the expression 'any other person' in sub-section (5) of Section 307 of the Act of 1956, who has been conferred with the right to apply to the District Court for an injunction for the removal or alteration of any building, would mean only such person who might feel directly affected by the building in regard to his individual right to property. The Division Bench hearing W.P.No.5807 of 2006 was, however, of the opinion that sub-section (5) of Section 307 of the Act of 1956 did not suffer from any ambiguity either in language or in meaning and provides for remedy to 'any other person' in addition to the Corporation to apply to the District Court for an injunction for the removal or alteration of any building and the decision of the Division Bench in *Radhakishan Sharma* (supra) requires re-consideration and accordingly has referred the following question of law for our opinion:

"Whether the locus-standi under sub-section (5) of Section 307 of the Act is restricted to a person affected by the violation complained of or encompasses all persons resident within the area to which the Act applies?"

4. We have heard Mr. Vivek Dalal, learned counsel for the petitioners, Mr. Ashok Kutumble, learned Additional Advocate General for the State, Mr. Anand Agrawal, learned counsel for the Indore Municipal Corporation and Mr. A.K. Chitle, learned senior counsel for the respondent No.4 and in our considered opinion, the view taken by the earlier Division Bench in *Radhakishan Sharma* (supra) that under sub-section (5) of Section 307 of the Act of 1956 besides the Corporation, only such person who may feel directly affected by the building in regard to his individual right to property can only file application before the District Court for injunction for removal or alteration of the building, is not correct for the reasons which will now follow.

5. Sub-section (5) of Section 307 of the Act of 1956, which we are called upon to interpret is quoted below:

"Section 307 - Power to require removal or alteration of work not in conformity with byelaws or any scheme or any other requirement.-

(5) Nothing in this section shall affect the right of the Corporation or any other person to apply to the District Court for an injunction for the removal or alteration of any building on the ground that it contravenes any provision of this Act or the byelaws made thereunder, but if the building is one in respect of which plans have been deposited and the plans have been passed by the Commissioner, or notice that they have been rejected has not been given within the prescribed period after the deposit thereof, and if the work has been executed in accordance with the plans, the District Court on granting an injunction shall have power

to order the Corporation to pay to the owner of the work such compensation as the District Court thinks just, but before making any such order the District Court cause the Commissioner if not a party to be joined as a party to the proceeding."

6. Thus, the language of sub-section (5) of Section 307 of the Act of 1956 is clear that besides the Corporation, 'any' other person can apply to the District Court for injunction for removal or alteration of a building thereunder. In *Shri Balaganesan Metals vs. M.N. Shanmugham Chetty and others*, (1987) 2 S.C.C. 707, cited by Mr. Chitle, learned counsel for respondent No.4, the Supreme Court has held relying on Black's Law Dictionary:

"The word 'any' has the following meaning:

Some; one of many; an indefinite number. One indiscriminately of whatever kind or quantity.

Word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute.

It is often synonymous with 'either', 'every' or 'all'. Its generality may be restricted by the context; (Black's Law Dictionary, 5th Edn.)."

Similarly in *Lucknow Development Authority vs. M.K. Gupta*, (1994) 1 S.C.C. 243 cited by Mr. Chitle, the Supreme Court again relying on Black's Law Dictionary has held:

"In Black's Law Dictionary it is explained thus, 'word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute'. The use of the word 'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all."

The word "any" which has diverse meanings, therefore, has to be interpreted depending on the context and the subject matter of the statute in which it is used.

7. Sub-section (5) of Section 307 of the Act of 1956 itself makes it clear that the right of the Corporation or any other person to apply to the District Court for injunction for the removal or alteration of any building can be only on the ground that it contravenes any provision of the Act of 1956 or the byelaws made thereunder. Chapter XXIV of the Act of 1956 in which Section 307 is located is titled "Building Control" and contains provisions regulating the construction of buildings within the area of the Municipal Corporation. There are various other provisions in the Act of 1956 and the byelaws made thereunder relating to buildings within the area of the Corporation which have to be complied with. Legislature has, therefore, to provide for some remedy if the provisions of the Act of 1956 or the byelaws thereunder in respect of a building are violated. It is only for this

reason that under sub-section (5) of Section 307 of the Act of 1956, a right has been conferred not only on the Corporation but on any other person to apply to the District Court for injunction for removal of a building or alteration of any building on the ground that it contravenes any provisions of the Act or the byelaws made thereunder. Hence, not only the Corporation but every other person has been given the right to apply to the District Court for injunction for the removal or alteration of any building on the ground that it contravenes any provisions of the Act or the byelaws made thereunder. The context and the subject matter of the statute in which the word 'any' has been used is thus wide enough to include all persons other than the Corporation or every other person other than the Corporation or any other person other than the Corporation.

8. The Division Bench delivering the opinion in *Radhakishan Sharma* (supra) has lost sight of the context and subject matter of the Act of 1956 in which the word "any" was to be construed and has taken a narrow view that only a person who might feel aggrieved directly by the building in regard to his individual right to his property relying on Section 41 (j) of the Specific Relief Act, 1963 which provides that an injunction cannot be granted when the plaintiff has no personal interest in the matter. The reliefs under the Specific Relief Act, 1963 are granted for the purpose of enforcing individual civil rights as will be clear from Section 4 of the Specific Relief Act, 1963. Accordingly, injunction under Part III of the Specific Relief Act, 1963 is granted to the plaintiff either to prevent a breach of an obligation in favour of the plaintiff, or to compel the performance of an obligation in his favour. Unless, therefore, there is an obligation in favour of the plaintiff which needs to be enforced, the Court cannot grant injunction. Hence, it is provided in Section 41 (j) of the Specific Relief Act, 1963 that an injunction cannot be granted when the plaintiff has no personal interest in the matter. What the Division Bench has failed to appreciate is that the provisions of the Specific Relief Act, 1963 do not apply to the right conferred on the Corporation and any other person under sub-section (5) of Section 307 of the Act of 1956. Under the provisions of the Act of 1956, every building must comply with the provisions of the Act of 1956 and the byelaws made thereunder and hence if there is any breach of the provisions of the Act of 1956 or the byelaws made thereunder, sub-section (5) of Section 307 of the Act of 1956 confers a right not only on the Corporation but also any other person to apply to the District Court for an injunction for removal or alteration of a building on the ground that there has been the contravention of the provisions of the Act of 1956 or the bye-laws made thereunder. This remedy under sub-section (5) of Section 307 of the Act of 1956 is independent of and different from the remedies under the Specific Relief Act, 1963.

9. We also find from para 16 of the opinion of the Division Bench in *Radhakishan Sharma* (supra) that the Division Bench has held that in the event of wrongful act affecting the public, recourse to suit in terms of Section 91 of the Code of Civil Procedure, 1908 (for short 'the CPC') becomes necessary. Sub-

section (1) of Section 91 CPC provides that in case of public nuisance or other wrongful act affecting or likely to affect the public, a suit for declaration and injunction or for such other relief as may be appropriate in the circumstances may be instituted and sub-section (2) of Section 91 of the CPC 'states that nothing in the section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. Thus, it is clear that Section 91 (1) of the CPC is not exhaustive of the remedies that are available to a party even in case of a public nuisance or other wrongful act affecting or likely to affect the public. The remedy of the Corporation and any other person under sub-section (5) of Section 307 of the Act of 1956 is independent of the provisions of Section 91 of the CPC and not only the Corporation but any other person can apply to the District Court for injunction for removal or alteration of a building on the ground that the provisions of the Act of 1956 or the byelaws made thereunder have been contravened.

10. In the result, we are of the opinion that the locus standi under sub-section (5) of Section 307 of the Act of 1956 is not restricted to a person affected by the violation complained of but encompasses all persons resident within the area to which the Act of 1956 applies. The reference is answered accordingly and the decision of the Division Bench in *Radhakishan Sharma* (supra) to the contrary is over-ruled. The matter will now be placed before the Division Bench.

Order accordingly

I.L.R. [2008] M. P., 2172

FULL BENCH

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.K. Kulshrestha &
Mr. Justice A.M. Sapre*

31 July, 2008*

S.P. ANAND

Vs.

THE REGISTRAR GENERAL,
M.P. HIGH COURT, JABALPUR

... Petitioner

... Respondent

A. Constitution, Articles 216, 225, 226, State Reorganisation Act, 1956, Sections 54 & 68, Government of India Act, 1915, Section 106, High Court Rules and Orders, M.P., Section 3, Court Fees Act, 1870, Section 35 - *Public Interest Litigation* - In order to regulate filing of PIL; the Division Bench in its order dated 09.09.1999 in W.P. No.988/1999 issued certain directions including security deposit - Matter referred by the Division Bench to Full Bench after framing 5 substantial question of law - Held - Answering the reference the Full Bench held that the directions contained in the order dated 09.09.1999 passed in W.P. No.988/1999 by Division Bench of this Court will no longer hold good and that the rules in Section 3 of the

High Court Rules for proceedings under Article 226 of the Constitution made under Article 225 of the Constitution and Clause 27 of the Letters Patent made by the High Court of Judicature, Nagpur, as amended from time to time, will continue to apply to all Public Interest Litigations filed under Article 226 of the Constitution until replaced or amended by rules made by the High Court of M.P. in exercise of its powers u/s 54 of the Act of 1956 r/w Article 225 of the Constitution. (Paras 11 & 15)

क. संविधान, अनुच्छेद 216, 225, 226, राज्य पुनर्गठन अधिनियम, 1956, धाराएँ 54 व 68, भारत शासन अधिनियम, 1915, धारा 106, उच्च न्यायालय नियम और आदेश, म.प्र., धारा 3, न्यायालय फीस अधिनियम, 1870, धारा 35 – लोक हित वाद – पीआईएल का पेश किया जाना नियंत्रित करने क्रम में, खण्ड न्यायपीठ ने रिट याचिका क्रमांक 988/1999 में अपने आदेश तारीख 09.09.1999 में प्रतिभूति निक्षेप को सम्मिलित करते हुए कुछ निदेश जारी किये – मामला खण्ड न्यायपीठ द्वारा 5 विधि के सारवान प्रश्न विरचित करने के उपरांत पूर्ण न्यायपीठ को निर्देशित किया – अभिनिर्धारित – निर्देश उत्तरित करते हुए पूर्ण न्यायपीठ ने अभिनिर्धारित किया कि इस न्यायालय की खण्ड न्यायपीठ द्वारा रिट याचिका क्र. 988/1999 में पारित आदेश तारीख 09.09.1999 में अन्तर्विष्ट निदेश इससे अधिक अच्छे धारित नहीं होंगे और संविधान के अनुच्छेद 226 के अन्तर्गत कार्यवाहियों के लिए संविधान के अनुच्छेद 225 के अन्तर्गत निर्मित उच्च न्यायालय नियम की धारा 3 व उच्च न्यायालय, नागपुर द्वारा निर्मित लेटर पेटेंट का खण्ड 27, समय-समय पर यथा संशोधित, सभी लोक हित वादों को लागू होना जारी रहेंगे जब तक कि 1956 के अधिनियम की धारा 54 सहपठित संविधान के अनुच्छेद 225 के अधीन शक्तियों के प्रयोग में उच्च न्यायालय द्वारा निर्मित नियमों द्वारा प्रतिस्थापित या संशोधित नहीं कर दिये जाते।

B. Constitution, Article 216, 225, 226, State Reorganisation Act, 1956, Section 54 & 68, Government of India Act, 1915, Section 106, High Court Rules and Orders, M.P., Section 3 - Public Interest Litigation - Powers to make Rules - These rules and orders do not provide for security deposit to be made along with a writ petition filed under Article 226 of the Constitution and it is only the High Court comprising of the Chief Justice and all Judges of the High Court of M.P. appointed by the President or a Committee of the High Court Judges or a Judge authorized to make orders or rules relating to practice and procedure of the High Court, which could make fresh orders or rules providing for a security deposit along with every PIL filed to prevent the abuse of PILs and hence the order dated 09.09.1999 of the Division Bench in W.P. No.988/1999 was without jurisdiction. (Para 11)

ख. संविधान, अनुच्छेद 216, 225, 226, राज्य पुनर्गठन अधिनियम, 1956, धाराएँ 54 व 68, भारत शासन अधिनियम, 1915, धारा 106, उच्च न्यायालय नियम और आदेश, म.प्र., धारा 3 – लोक हित वाद – नियम बनाने की शक्ति – ये नियम व आदेश संविधान के अनुच्छेद 226 के अधीन पेश रिट याचिका के साथ प्रतिभूति निक्षेप करने के लिए उपबंध नहीं करते और यह केवल उच्च न्यायालय, जिसमें राष्ट्रपति द्वारा नियुक्त म.प्र. उच्च न्यायालय के मुख्य न्यायाधीश व सभी न्यायाधीश या उच्च न्यायालय के न्यायाधीशों की समिति या उच्च न्यायालय की पद्धति और प्रक्रिया से संबंधित आदेशों या नियमों को बनाने के लिए अधिकृत न्यायाधीश समाविष्ट

हैं जो लोक हित वादों का दुरुपयोग निवारित करने के लिए प्रत्येक पीआईएल के साथ प्रतिभूति निक्षेप के लिए उपबंध करने वाले नये आदेश या नियम निर्मित कर सकें और इसलिए खण्ड न्यायपीठ का रिट याचिका क्र. 988/1999 में आदेश तारीख 09.09.1999 अधिकारिता विहीन था।

C. Public Interest Litigation - Can PIL be entertained on the basis of information in the newspapers - Normally, a PIL cannot be entertained solely on the basis of information published in the newspapers but if the Chief Justice or a Judge designate finds that a particular information published in the newspapers reveals gross violation of a fundamental right guaranteed under Part-III of the Constitution of a person who does not have ready access to the court for some incapacity or the other, particularly the right to life and liberty granted under Article 21 of the Constitution, and the Chief Justice or a Judge designate has reason to believe the information to be true, a PIL can be entertained only on the basis of such information published in the newspapers for the same reasons as have been given by the Supreme Court in *Bandhua Mukti Morcha* (AIR 1984 SC 802) for entertaining a letter petition. (Para 14)

ग. लोक हित वाद - क्या समाचार पत्रों में जानकारी के आधार पर पीआईएल ग्रहण की जा सकती है - सामान्यतः कोई पीआईएल एकमात्र समाचार पत्रों में प्रकाशित जानकारी के आधार पर ग्रहण नहीं की जा सकती किन्तु यदि मुख्य न्यायाधीश या मनोनीत न्यायाधीश यह पाते हैं कि समाचार पत्रों में प्रकाशित कोई विशिष्ट जानकारी संविधान के भाग तीन के अन्तर्गत प्रत्याभूत किसी व्यक्ति के किसी मूल अधिकार, विशिष्टतः संविधान के अनुच्छेद 21 के अन्तर्गत प्रदत्त प्राण और स्वतंत्रता का अधिकार, का घोर उल्लंघन प्रकट करती है, जो कुछ असमर्थता या अन्य किसी कारण से न्यायालय तक पहुंचने को तत्पर नहीं है और मुख्य न्यायाधीश या मनोनीत न्यायाधीश जानकारी के सत्य होने का विश्वास करने का कारण रखते हैं तो एक पीआईएल केवल समाचार पत्रों में प्रकाशित ऐसी जानकारी के आधार पर ग्रहण की जा सकती है उन्ही कारणों से जो उच्चतम न्यायालय द्वारा बंधुआ मुक्ति मोर्चा (एआईआर 1984 एससी 802) में पत्र याचिका को ग्रहण करने के लिए दिये गये हैं।

D. Public Interest Litigation - Payment of court fees - Held - Court fees are payable on a PIL filed as a writ petition under Article 226 of the Constitution, except where the Chief Justice or a Judge designate directs on the basis of information received in a letter or any other document and considers that it is a fit case for registering a case under Article 226 of the Constitution even though no court fee is paid on such letter or document. (Para 13)

घ. लोक हित वाद - न्यायालय फीस का संदाय - अभिनिर्धारित - जहाँ मुख्य न्यायाधीश या कोई मनोनीत न्यायाधीश किसी पत्र में प्राप्त जानकारी या किसी अन्य दस्तावेज के आधार पर निदेशित करते हैं और यह विचार करते हैं कि यह संविधान के अनुच्छेद 226 के अधीन मामला रजिस्टर्ड करने के लिए उचित मामला है यद्यपि ऐसे पत्र या दस्तावेज पर कोई न्यायालय फीस न दी गई हो, वहाँ के अलावा संविधान के अनुच्छेद 226 के अधीन रिट याचिका के रूप में पेश पीआईएल पर न्यायालय फीस देय है।

Cases referred :

AIR 1997 MP 223, 2000(1) MPHT 203, AIR 1963 SC 996, (2005)-1 SCC 590, AIR 1984 SC 802, (1978) 2 SCC 102

S.P. Anand, petitioner in person.

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

B.L. Pavecha, for respondent / High Court Bar Association.

Piyush Mathur, Amicus Curiae.

ORDER

The Order of the Court was delivered by A.K. PATNAIK. C. J.:— This is a reference made to the Full Bench by a Division Bench of this Court in a pending Public Interest Litigation filed by the petitioner under Art. 226 of the Constitution of India.

2. The relevant facts for appreciating why the reference has been made to the Full Bench are that the petitioner filed Writ Petition No.988 of 1999 as a Public Interest Litigation (for short 'PIL') challenging the grant and payment of pension to Ex-Legislators of the State of Madhya Pradesh as well as the vires of the M. P. Vidhan Sabha Sadasya Vetan Tatha Bhatta Tatha Pension Adhiniyam. A Division Bench of this Court hearing the PIL found that the issue raised in the PIL had already been settled by another Division Bench of this Court in *Raghu Thakur vs. State*, AIR 1997 M.P. 223 and the grant and payment of pension to Ex-Legislators had been held as intra vires the Constitution. The Division Bench further held in the order dated 9.9.1999 in W.P.No-988 of 1999 reported in 2000 (2) MPLJ. = 2000 (1) MPHT 203 that the petitioner was still persisting in his efforts to file series of writ petitions on constitutional and other issues which stood settled only to hog publicity. The Division Bench also held in the order dated 9.9.1999 in W.P.No.988 of 1999 that the PIL media in this way is being used contrary to the purpose for which it was evolved, namely, redressal of public injury and hence, it was necessary to regulate filing of PIL before the Court and accordingly issued the following directions :

“(1) A “PIL” shall disclose petitioner’s social public standing/ professional status and his public spirit antecedents and specify the nature of cause and interest involved. It shall be supported by an affidavit on each averments/allegation and contain a statement/declaration that issue raised was not dealt with or decided and that a similar or identical petition was not filed earlier;

(2) It shall be accompanied by a security deposit of Rs.2,000/- and unless dispensed with on recommendation of Registrar, shall not be processed for listing before the Court;

(3) It shall be scrutinized by the Registrar to ascertain the status/ standing of petitioner and the nature of cause disclosed in it and in case it was found wanting in either respect and was not supported by some prima facie proof wherever warranted, Registrar shall return the petition for making up the deficiency to his satisfaction;

(4) If petitioner was aggrieved by the order of Registrar, he/she could take appeal to the Court on deposit of Rs.500/-; and

(5) Media, both print and electronic are required to desist from publishing the subject matter of any "PIL" unless its cognizance was taken by the Court by issuing notice to respondents." After issuing the aforesaid directions, the Division Bench dismissed the PIL W.P.No.988 of 1999 by order dated 9.9.1999.

3. One of the directions issued by the Division Bench in W.P.No.988 of 1999, quoted above, was that the writ petition filed as PIL shall be accompanied by security deposit of Rs.2000/- and unless dispensed with on the recommendation of the Registrar, shall not be processed for listing before the Court. Yet the petitioner filed another writ petition, W.P.No.1882 of 2000 without depositing the security amount and contended before another Division Bench of this Court that the order dated 9.9.1999 of the Division Bench in W.P.No.988 of 1999 was a nullity inasmuch as it was contrary to the judgment in *Prem Chand Garg and another vs. Excise Commissioner, U.P. and others*, AIR 1963 S.C. 996 in which the Supreme Court has held that the Rules framed by the Supreme Court requiring deposit of security amount is in violation of the fundamental right guaranteed to citizens to move the Supreme Court under Art. 32 of the Constitution and was, thus, invalid, but the Division Bench held that unless the order dated 9.9.1999 passed in W.P.No.988 of 1999 is set aside by a larger Bench or by a higher court, another Division Bench was bound to follow the said order.

4. Thereafter, the petitioner filed repeated writ petitions in this Court, W.P.No.1351 of 2001, W.P.No.747 of 2001 and W.P.No.443 of 2005 reiterating that the directions of the Division Bench in the order dated 9.9.1999 passed in W.P.No.988 of 1999 is a nullity for the reason that it was contrary to the judgment of the Supreme Court in *Prem Chand Garg and another vs. Excise Commissioner* (supra), but the contention was turned down in each of the cases. In the order dated 5.7.2005 in W.P.No.443 of 2005, a Division Bench of this Court in particular held that the principle laid down in *Prem Chand Garg and another vs. Excise Commissioner* (supra) was with reference to an aggrieved individual approaching the Supreme Court under Art. 32 of the Constitution complaining of infringement of his fundamental right and will not apply to a PIL under Art. 226 of the Constitution. In the order dated 5.7.2005 in W.P.No.443 of 2005, the Division Bench further held referring to the caution of the Supreme Court with regard to PIL in *Dattaraj Nathuji Thaware vs. State of Maharashtra*, (2005) 1 SCC 590 that the initial noble role of public interest litigations has now mutated into vicious, extortionist private interest litigations and all that the Division Bench of this Court has done in the order dated 9.9.1999 in W.P.No.988 of 1999 is to take some steps to discourage vicious litigation by laying down some guidelines in regard to such a public interest litigations, one of which is that public interest litigation should be accompanied by a security deposit of Rs.2000/-.

5. In the present writ petition (W.P.No.5806 of 2006), the petitioner has reiterated

that the order dated 9.9.1999 of the Division Bench in W.P.No.988 of 1999 was a nullity but has raised a new contention that the Division Bench, while issuing the directions in the order dated 9.9.1999 in W.P.No.988 of 1999, was in effect making orders or laying down rules relating to practice and procedure in relation to filing of PILs under Art. 226 of the Constitution of India, but the power to make such orders or rules relating to practice and procedure relating to filing of PILs was not vested in a Division Bench of the High Court in the judicial side but was vested in the Full Court of the High Court under Section 54 of the State Reorganization Act, 1956 (for short 'the Act of 1956'). The petitioner has also reiterated relying on the decision in *Bandhua Mukti Morcha vs. Union of India and others*, AIR 1984 S.C. 802 that no court fee is payable for enforcement of fundamental rights as a letter petition without any court fee can also be entertained by the Supreme Court as well as by the High Court, for, enforcement of the fundamental rights of the poor and of the deprived sections of the community. Mr. Ashok Kutumble, learned Additional Advocate General appearing for the State submitted that the petitioner has been filing PILs only on the basis of information derived from newspapers and such PILs cannot be entertained by the Court.

6. Considering the aforesaid contentions raised by the parties, the Division Bench passed orders in the present writ petition W.P.No.5806 of 2006 on 15.4.2008 referring the following substantial questions of law for opinion of a Larger Bench:

- (1) Whether the powers conferred under Section 54 of the States Reorganisation Act, 1956 on the High Court of Madhya Pradesh to make Rules and Orders relating to practice and procedure in the High Court can be exercised by the Division Bench of the High Court under Article 226 of the Constitution of India so as to lay down the practice and procedure of PIL ?
- (2) Whether the Division Bench of the High Court could have laid down some rules with regard to practice and procedure relating to PIL in the absence of any such rules and orders issued by the High Court under Section 54 of the States Reorganization Act, 1956?
- (3) Whether the Division Bench could have laid down the five conditions regarding PIL in the order in the case of *S.P. Anand* reported in 2001 (2) MPLJ 448, when such conditions have not been laid down by the Supreme Court in the judgments relating to PIL?
- (4) Whether court fees are payable on a PIL?
- (5) Whether PIL can be entertained only on the basis of information published in the newspapers?

By the order dated 15.4.2008 in the present case, the Court also directed that copy of the order will be sent to the Presidents of the High Court Bar

Associations at Jabalpur, Indore and Gwalior with a request to nominate Advocates on their behalf to assist the Court at the time of hearing and further directed that Mr. Piyush Mathur, Advocate who was earlier engaged by the Registrar General of the High Court as Amicus Curiae to assist the Court will continue to assist the Court.

7. We have heard the petitioner and Mr. R.N. Singh, learned Advocate General and Mr. Ashok Kutumble, learned Additional Advocate General for the State of M.P., Mr. B.L. Pavecha, learned senior counsel appearing for the High Court Bar Association, Indore and Mr. Piyush Mathur, appearing as Amicus-Curiae at length.

8. Before we answer the questions referred to us, we extract herein below Section 106 of the Government of India Act, 1915, Arts. 216 and 225 of the Constitution and Sections 54 and 68 of the Act of 1956, which are relevant to the questions referred to us for our opinion:

Section 106 of the Government of India Act, 1915 "106

(i) The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction, in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdictions, powers and authority as are vested in those courts respectively at the commencement of this Act.

(1a) The letters patent establishing or vesting jurisdiction, powers or authority in a high court may be amended from time to time by His Majesty by further letters patent.

(2) The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

Articles 216 and 225 Constitution of India

"216 Constitution of High Courts - Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint."

"225. Jurisdiction of existing High Courts - Subject to the provisions of the Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court,

including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution.

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

Sections 54 and 68 of the Act of 1956

"54. Practice and Procedure - Subject to the provisions of this Part, the law in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, with necessary modifications, apply in relation to the High Court for a new State, and accordingly, the High Court for the new State shall have all such powers to make rules and orders with respect to practice and procedure as are, immediately before the appointed day, exercisable by the High Court for the corresponding State:

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, until varied or revoked by rules or orders made by the High Court for a new State, apply with the necessary modifications in relation to practice and procedure in the High Court for the new State as if made by that Court."

"68. Interpretation - For the purposes of sections 59 to 66-

(a) proceedings shall be deemed to be pending in a Court until that Court has disposed of all issues between the parties, including any issues with respect to the taxation of the costs of the proceedings and shall include appeals, applications for leave to appeal to the Supreme Court, applications for review, petitions for revision and petitions for writs;

(b) references to a High Court shall be construed as including references to a Judge or Division Court thereof, and references to an order made by a Court or a Judge shall be construed as including references to a sentences, judgment or decree passed or made by that Court or Judge."

9. On the first two questions, our opinion is that under Article 225 of the Constitution and Section 54 of the Act of 1956, the Chief Justice and all the Judges of the Madhya Pradesh High Court have the powers to make orders or rules with regard to practice and procedure relating to PILs and the order dated 9.9.1999 of

the Division Bench in W.P.No.988 of 1999 in so far as it has laid down the five conditions for filing of PIL is without jurisdiction. The reasons for this opinion will be clear from a discussion of the relevant provisions that will follow. The High Court of Nagpur was established by a Letters Patent and the power to make rules for regulating the practice of the Court was vested by Section 106 of the Government of India Act, 1915 and Clause 27 of the Letters Patent. When the Constitution of India was adopted in 1950, this power to make the rules of the Court continued to be the same as immediately before the commencement of the Constitution, as provided under Art. 225 of the Constitution and therefore continued to be vested in the High Court of Nagpur. When the new State of Madhya Pradesh was formed under the Act of 1956 with effect from 1st November, 1956, the Rules made by the High Court of Judicature at Nagpur in respect to the practice and procedure continued to apply with necessary modifications to the State of Madhya Pradesh but the High Court of Madhya Pradesh was to have all such powers to make rules and orders with respect to the practice and procedure as were exercised by the High Court of Judicature at Nagpur under Art. 225 of the Constitution. Art. 216 of the Constitution provides that every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. Hence, the meaning of High Court in Art. 225 as well as Section 54 of the Act of 1956 would mean the Chief Justice and all the Judges of the High Court of M.P. i.e. the Full Court of the High Court and would not mean a single Judge or a Division Bench exercising judicial powers. This will be further clear from Section 68 (b) of the Act of 1956, which provides that for purposes of Sections 59 to 66, reference to a High Court shall be construed as including references to a Judge or Division Bench of the High Court, whereas for the purpose of Section 54 of the Act of 1956, reference to a High Court was not to be construed as a reference to a Judge or a Division Bench of the High Court.

10. We find authority from for our aforesaid opinion in *State of U.P. vs. Batuk Deo Pati Tripathi and another*, (1978) 2 S.C.C. 102 in which the Supreme Court while referring to the rule making power of the High Court under Arts. 225 and 235 of the Constitution has relied on Arts. 216 to say that the High Court in Articles 225 and 235 of the Constitution would mean the Chief Justice and such other Judges as the President may from time to time deemed it necessary to appoint and has further held that the Administrative Judge or the Administrative Committee can also be authorized by the High Court to exercise its powers under Arts. 225 and 235 of the Constitution. Paragraph 10 of the judgment of the Supreme Court in *State of U.P. vs. Batuk Deo Pati Tripathi and another* (supra), in which this discussion finds place is quoted herein below:

“ Article 225, it is true, preserves inter alia the pre-constitution powers of existing High Courts to frame rules and it may be assumed for purposes of argument, an assumption which is largely borne out by

provisions of the laws mentioned in the preceding paragraph, that the High Court of Allahabad did not, prior to the enactment of the Constitution, possesses the power to frame rules authorizing a Judge or a Committee of Judges of the High Court to act on behalf of the Court. But Article 225 is not the sole repository of the High Courts' power to frame rules. The relevant part of Article 235 of the Constitution provides that the control over District Courts and courts subordinate thereto shall be vested in the High Court. Since Article 216 provides that every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint, Article 235 has to be construed to mean that the control over District Courts and courts subordinate thereto is vested in the entire body of Judges who together constitute the High Court and not in the Chief Justice as representing the High Court or an Administrative Judge or a smaller body of Judges acting as an Administrative Committee. But though the control over subordinate courts is vested institutionally in the High Courts by Article 235, it does not follow that the High Courts have no power to prescribe the manner in which that control may in practice be exercised. In fact, the very circumstance that the power of control, which comprehends matters of a wide-ranging variety, vests in the entire body of Judges makes it imperative that rules must be framed to make the exercise of control feasible, convenient and effective. The seeds of the jurisdiction to frame rules regulating the manner in which the control over subordinate courts is to be exercised are thus to be found in the very nature of the power and in the fact that the power vests in the entire body of Judges. The High Court has, therefore, the power under Article 235 itself to frame rules for regulating the manner in which the control vested in it may be exercised. The power to do a thing necessarily carries with it the power to regular the manner in which the thing may be done. It is an incident of the power itself and indeed, without it, the exercise of the power may in practice be fraught with difficulties which all frustrate, rather than further, the object of the power. It is undoubtedly true that the rules framed for prescribing the manner in which a power may be exercised have to be truly regulatory in character. The reason is that under the guise of framing rules, the essence of the power cannot be permitted to be diluted. But that is a separate matter which we will consider later. The limited object of the present discussion is to show that High Courts possess the power under Article 235 to prescribe the manner in which the control over subordinate courts vested in them by that article may be exercised. That explains why the Allahabad High Court framed Rules of 1952 not only in the exercise of power possessed by it under Article 225, but in the exercise

of all other powers enabling it in that behalf. One of such powers is to be found in Article 235 itself and therefore the abstract power of the High Court to frame the impugned rules cannot be doubted and must be conceded.”

11. As a matter of fact, we find from Section 3 of the Madhya Pradesh High Court Rules and Orders presently in force that various rules to regulate the proceedings under Article 226 of the Constitution have been made by the High Court of Judicature at Nagpur in exercise of powers under Article 225 of the Constitution and clause 27 of the Letters Patent which are in force by virtue of Section 54 of the Act of 1956. These rules and orders do not provide for security deposit to be made along with a writ petition filed under Article 226 of the Constitution and it is only the High Court comprising of the Chief Justice and all Judges of the High Court of Madhya Pradesh appointed by the President or a Committee of the High Court Judges or a Judge authorized to make orders or rules relating to practice and procedure of the High Court, which could make fresh orders or rules providing for a security deposit along with every PIL filed to prevent the abuse of PILs and hence the order dated 9.9.1999 of the Division Bench in W.P.No.988 of 1999 was without jurisdiction. We answer the questions 1 and 2 referred to us by the order dated 15.4.2008 of the Division Bench accordingly. Since we have held that the Division Bench did not have the jurisdiction to pass the order dated 9.9.1999 in W.P.No.988 of 1999, the conditions for filing PILs in the order dated 9.9.1999 are not valid in law and question No.3 which relates to the validity of the conditions becomes academic and need not be answered by us.

12. Question No.4 referred to us is whether court fee is payable or not on a PIL. The contention of the petitioner on this question is that if a letter without court fees can be entertained as a PIL as per the judgment of the Supreme Court in *Bandhua Mukti Morcha* (supra), then no court fee should be payable on a PIL. The relevant portion of the judgment of the Supreme Court in *Bandhua Mukti Morcha* on which the petitioner relies upon is quoted hereunder:

“The constitution makes therefore advisedly provided in clause (1) of Article 32 that the Supreme Court may be moved by any appropriate proceeding, ‘appropriate’ not in terms of any particular form, but ‘appropriate’ with reference to the purpose of the proceedings. That is the reason why it was held by this Court in the Judges’ Appointment and Transfer Case that where a member of the public acting bonafide moves the Court for enforcement of a fundamental right on behalf of person or class of persons who on account of poverty or disability or socially or economically disadvantaged position cannot approach the Court for relief, such member of the public may move the Court even by just writing a letter, because it would not be right or fair to expect a person acting *pro bono publico* to incur expenses out of his own pocket for going to a lawyer and preparing a regular writ petition for being

filed in Court for enforcement of the fundamental right of the poor and deprived sections of the community and in such a case, a letter addressed by him can legitimately be regarded as an 'appropriate' proceedings."

"we may point out that what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Article 32 must apply equally in relation to the exercise of jurisdiction by the High Court under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide terms as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Article 226. In fact, the jurisdiction of the High Courts under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights."

(emphasis supplied)

13. A Division Bench of this Court comprised of R.V. Raveendran, J., the then Chief Justice of this Court and A.M. Sapre, J, however has considered this contention in its order dated 5.7.2005 in W.P.No-443 of 2005 and has held that there is no provision in the Court fees Act, 1870 exempting writ petitions in general or PILs in particular from court fees nor is there any provision in the Act enabling this Court or a subordinate Court to exempt payment of court fees payable on writ petitions or PILs and power is only vested under Section 35 of the Court Fees Act in the appropriate Government to reduce or remit all or any of the fees mentioned in the First and Second Schedules to the Court Fees Act but the State Government of Madhya Pradesh has not passed any orders under Section 35 of the Court Fees Act exempting a petitioner from payment of court fees in a PIL. The Division Bench has further held that the aforesaid decision of the Supreme Court in *Bandhua Mukti Morcha vs. Union of India and others* (supra) applies to a letter addressed to the High Court and not to regular writ petitions filed under Art. 226 of the Constitution. The Division Bench has explained that when a letter is received, the same is examined on the administrative side and it is purely within the discretion of the Chief Justice or any other Judge, either to act or file the letter as no action is deemed necessary and in such a case, the letter itself is not a writ petition, and only when the Chief Justice or his designate, on the basis of the letter considers it a fit case for examination, it is taken up *suo-motu* for registration as writ petition under Art. 226 of the Constitution and it is in these circumstances that no court fee is required to be paid on the letter petition. We agree with these conclusions of the Division Bench in the order dated 5.7.2005 in W.P.No.443 of 2005 and we accordingly hold that court fees are payable on a PIL filed as a writ

petition under Art. 226 of the Constitution, except where the Chief Justice or a Judge designate directs on the basis of information received in a letter or any other document and considers that it is a fit case for registering a case under Art. 226 of the Constitution even though no court fee is paid on such letter or document.

14. The last question is whether a PIL can be entertained only on the basis of information published in the newspapers. Normally, a PIL cannot be entertained solely on the basis of information published in the newspapers but if the Chief Justice or a Judge designate finds that a particular information published in the Newspapers reveals gross violation of a fundamental right guaranteed under Part-III of the Constitution of a person who does not have ready access to the court for some incapacity or the other, particularly the right to life and liberty granted under Art. 21 of the Constitution, and the Chief Justice or a Judge designate has reason to believe the information to be true, a PIL can be entertained only on the basis of such information published in the newspapers for the same reasons as have been given by the Supreme Court in *Bandhua Mukti Morcha* (supra) for entertaining a letter petition.

15. In the result, we hold that the directions contained in the order dated 9.9.1999 passed in W.P.No.988 of 1999 by Division Bench of this Court will no longer hold good and that the rules in Section 3 of the High Court Rules for proceedings under Art. 226 of the Constitution made under Arts. 225 of the Constitution and Clause 27 of the Letters Patent made by the High Court of Judicature, Nagpur, as amended from time to time, will continue to apply to all public interest litigations filed under Art. 226 of the Constitution of India until replaced or amended by rules made by the High Court of M.P. in exercise of its powers under Section 54 of the Act of 1956 read with Art. 225 of the Constitution.

Order accordingly

I.L.R. [2008] M. P., 2184

WRIT APPEAL

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

26 March, 2008*

SOHAN SINGH & ors.

... Appellants

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 226, Urban Land (Ceiling and Regulation) Act, 1976, Section 10(3), Rule 5(2)(c) - *Alternative Remedy* - *Learned Single Judge dismissed the writ petition for want of availability of alternative remedy* - *Held* - *The Division Bench reversing the finding of the learned Single Judge held that when the notices were not served, the proceedings were not conducted manifestly in a legal manner and the principles of Natural Justice*

*W.A. No.67/2006 (Gwalior)

were not followed - It cannot be held that the proceedings were lawful or writ jurisdiction of High Court is barred - Since no evidence is required to assess the question of legality of the proceedings, the question can be examined by the writ court - Writ Appeal allowed. (Para 10)

क. संविधान, अनुच्छेद 226, नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, 1976, धारा 10(3), नियम 5(2)(सी) - वैकल्पिक उपचार - विद्वान एकल न्यायाधीश ने वैकल्पिक उपचार की उपलब्धता के कारण रिट याचिका खारिज की - अभिनिर्धारित - खण्ड न्यायापीठ ने विद्वान एकल न्यायाधीश के निष्कर्षों को उलटते हुए अभिनिर्धारित किया कि जब सूचनापत्रों की तामील नहीं की गई, कार्यवाहियाँ प्रत्यक्ष रूप से वैध तरीके से संचालित नहीं की गईं और प्राकृतिक न्याय के सिद्धांतों का पालन नहीं किया गया - यह अभिनिर्धारित नहीं किया जा सकता कि कार्यवाहियाँ विधिपूर्ण थीं या उच्च न्यायालय की रिट अधिकारिता वर्जित है - चूंकि कार्यवाहियों की वैधता के प्रश्न का निर्धारण करने के लिए कोई साक्ष्य अपेक्षित नहीं है, प्रश्न का रिट न्यायालय द्वारा परीक्षण किया जा सकता है - रिट अपील मंजूर।

B. Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 10(3), Rule 5(2)(c) - Possession - Possession taken from a dead person is no possession in eye of law - Paper possession without notice to holder is also no possession and cannot be affirmed or maintained. (Para 6)

ख. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 10(3), नियम 5(2)(सी) - कब्जा - किसी मृत व्यक्ति से लिया गया कब्जा विधि की दृष्टि में कोई कब्जा नहीं है - धारक को सूचना के बिना दस्तावेजी कब्जा भी कोई कब्जा नहीं है और अभिपुष्ट एवं कायम नहीं रखा जा सकता।

Cases referred :

AIR 1958 SC 86, AIR 1999 SC 22, AIR 1961 SC 1506, AIR 1967 SC 1801, AIR 1983 SC 603, AIR 1980 SC 1037, AIR 1977 SC 685.

R.D. Jain with S.K. Jain, for the appellants.

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

J U D G M E N T

The Judgment of the Court was delivered by **ABHAY GOHIL, J.** :- The appellants have filed this writ appeal under Section 2 (1) of the Madhya Pradesh Uchcha Nayalaya (Khand Pith Ko Appeal) Adhiniyam, 2005 aggrieved by order dated 10/3/2006 passed by learned Single Judge in W.P. No. 1323/2006.

2. The brief facts of the case are that agricultural land bearing survey Nos. 858, 859, 869, 870, 875 and 876 having a total area of 2.027 hectares situated in village Shakarpur Tehsil & District Gwalior, was belonging to one Kanno alias Hargovind. Deceased Kanno was having two sons i.e. Chimman Singh alias Chimmanlal and Harprasad. It was the case of the petitioner that Chimmanlal died on 8/11/93 and thereafter, his legal heirs Sohanlal, Balwant, Sovran Singh and Pokhran alongwith Harprasad were looking after the agricultural land and became Bhumi Swami of the aforesaid land.

3. Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter shall be referred to as "Act of 1976") has found the aforesaid land lying vacant and therefore, proceedings under the Act of 1976 were initiated in the year of 1995. It was directed that notice be issued to holders of land but it is admitted position on record that notices were not served, as the correct address of the appellants was not known to the competent Authority and therefore, return was not submitted as required under the Act of 1976 by the holders of the land. By order dated 30/1/1996 the land admeasuring 15770 sq metre were declared "surplus" without notice and again it was directed that notice be served on the holders of the land. But from the record, it is clear that the notices could not be served on the appellants for one or the other reason. Thereafter, on 20/8/96 the "surplus" land was notified and proceedings under Section 10 (3) of the Act of 1976 were initiated. The notice of aforesaid notification and institution of proceedings under Section 10 (3) of the Act of 1976 were also not served on the respondents. Thereafter, it was the case of the respondent/State that on 30/7/97 receipt of possession was obtained and possession of the land was taken.

4. But the case of the appellants is that no notice was ever served on them either of registration of ceiling case or of preliminary enquiry or declaring the land "surplus" or notifying the land or before taking the possession of the land from them. It is their submission that still the land is in their possession and in the year of 1995 the respondents have sold some portion of the land to the purchasers. It is also the case of the appellants before the writ Court that after the death of Chimmanlal, no notices have ever been issued to the legal heirs of Chimmanlal for ceiling proceedings. It is also their case that some of the portion of the land have been sold to the purchasers and the land is mutated in their names in the revenue record. But even then proceedings were not dropped, therefore, they have filed W.P. No. 1323/2006 claiming the relief that the orders Annexures P/1, P/2 and P/3 may be quashed. In reply the stand of the State was that the proceedings are legal.

5. The learned writ Court was of the view that the appellants are having alternative remedy of filing civil suit and, therefore, the writ petition was dismissed with a liberty to the appellants to avail the remedy of filing civil suit. Against which the appellants have filed this writ appeal.

6. We have heard the learned counsel for the parties and perused the original record of the ceiling proceedings maintained by the competent Authority under the Act of 1976. It is admitted position on record that since very beginning i.e. from the start of the ceiling proceedings till taking over possession of the land, the notices were not duly served on the appellants. We have also perused the order-sheet dated 8/11/1995 in which it is mentioned that registered letter were sent on wrong address. Order-sheet dated 8/12/1995 indicates that when service was not affected by post, directions were given to serve notices under Rule 5 (2) (c)

of the Act of 1976 and affix on notice board and also on their last known address. Order-sheet dated 5/1/96 indicates that service was affected on notice board and case was fixed on 30/1/1996. On 30/1/96 the land was declared "surplus" and it was directed that notice be issued. Order-sheet dated 8/3/96 indicates that notices returned unserved due to incomplete address and direction was given to the Patwari to furnish the complete address. Again on 20/3/1996 notices were sent on the address given by Patwari by registered post, but the same could not be served. The names of the legal heirs of the holder were disclosed by Patwari but on 29/3/96 or thereafter, no attempt was made to issue notice to the legal heirs by the competent Authority nor any action was taken to substitute the name of legal heirs of deceased Chimmanlal. On 22/4/96 it was mentioned that service by post is not possible, therefore, direction was again given to effect the service under Rule 5 (2) (c) on the address of holders. On 24/5/96 it was found that order dated 22/4/96 is not complied with. In the order-sheet dated 20/8/96, it is mentioned that services are affected but there is no document on record to show that how these notices were served. From bare reading of this order-sheet, it appears that the notices were affixed on the notice board of the office. It is also clear that there is no report in the record whether any notice was affixed on the disputed land. Therefore, it cannot be held that notices were ever personally served on the appellants. Subsequently, direction was given that notification be sent for publication in Gazette under Section 10 (1) of the Act of 1976. On 23/9/1996 proceedings under Section 10 (3) were taken up. From the record of competent authority, it is; not clear whether the preliminary draft statement/ final draft statement or the notification was ever served on the appellants personally though the receipt of possession dated 30/7/1997 is available in the record of the competent authority but that was also not valid and duly served on the appellants. In the notice of possession, it is mentioned that Chimmanlal is dead and notice was accepted by his son but notice was not addressed to his son but was addressed to Chimmanlal. Therefore, it is clear that the fact of the death of Chimmanlal was in the knowledge of the competent Authority but even then neither the notices were ever served on the legal heirs or on purchasers nor the legal heirs of the deceased Chimmanlal were brought on record nor physical possession of the land was taken from them. Copy of the Panchnama has also not been produced for taking the physical possession from the holders of the land. Therefore, it cannot be held that the State has obtained possession legally of the aforesaid land. Possession taken from dead person is no possession in the eye of law. Paper possession without notice to holder is also no possession and cannot be affirmed or maintained.

7. So far as question of challenging the aforesaid order in the writ petition is concerned, in the writ petition if facts are not disputed nor any evidence is necessary, then the writ petition cannot be dismissed merely on the ground of availability of alternative remedy. There is no bar for filing writ petition and writ petition is also maintainable.

8. The Hon. Supreme Court in case of *State of Uttar Pradesh v. Mohd. Nooh*, AIR 1958 SC 86 and subsequently relied on in case of *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai*, AIR 1999 SC 22 has held as under:-

"If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fairplay the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance even if an appeal to another inferior court or tribunal was available...."

9. In case of *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Bobhraj Wadhwani*, AIR 1961 SC 1506, the Hon. Supreme Court has further held that a writ under Article 226 is not denied when, for instance, the alternative remedy is ill-suited, burdensome and onerous, or the petitioner has lost it through no fault of his. In case of *N.M.C.S. & Weaving Mills v. Ahmedabad Municipality*, AIR 1967 SC 1801, the Hon. Supreme Court has held that if the Tribunal in question acts under an ultra vires law, or without a law, or exceeds its jurisdiction, or had not followed the principles of natural justice, the jurisdiction of writ Court cannot be denied. In case of *Titaghur Paper Mills Co. Ltd. v. Orissa*, AIR 1983 SC 603, the Hon. Supreme Court has held that when an order has been made completely in violation of natural justice, the aggrieved party is entitled to invoke the writ jurisdiction of the High Court instead of availing the alternative statutory remedy. In case of *Shiv Shankar Dal Mills v. State of Haryana*, AIR 1980 SC 1037 and *Hay Lay Poultry v. State of Haryana*, AIR 1977 SC 685, it was held by the Hon. Supreme Court that it is not palatable to 'our jurisprudence' to turn down the prayer for a writ on the negative plea of 'alternative remedy' since the root principle of law married to justice, is *ubi jus ibi remedium*.

10. Admittedly, in this case the question before the writ Court was whether the proceedings which were initiated by competent authority under the Act of 1976 were legal or not. When the notices were not served, the proceedings were not conducted manifestly in a legal manner, no attempt was made to serve the notice nor the principles of natural justice were followed, it cannot be held that the proceedings were lawful or in such cases writ jurisdiction of the High Court is barred. Since no evidence is required to assess the aforesaid question of legality of the proceedings, the question can be examined by the writ Court in writ petition.

11. In view of the aforesaid discussion, we are of the view that the orders passed by the competent authority are not legal, the proceedings are also not legal and all orders passed and actions taken are also not binding on the appellants, as appellants were not noticed and they were also not brought on record legally.

Therefore, as a necessary consequence, we have no option but to allow this writ appeal. Accordingly, the appeal is allowed, writ petition is also allowed and the orders Annexure P/1, P/2 and P/3 are set aside. In the facts and circumstances of the case it is directed that parties shall bear their own costs.

Appeal allowed.

I.L.R. [2008] M. P., 2189

WRIT APPEAL

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

10 April, 2008*

DEVI PRASAD SINGH

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

A. National Highways Act (48 of 1956), Sections 3-A, 3-D, National Highways Authority of India Act, 1988, Section 16 - Acquisition of land - Land of the appellant acquired for public purposes of building (widening), maintenance, management and operation of National Highway - Held - Acquisition of land permissible not only for above objects but for all purposes ancillary or incidental to such objects such as establishment and maintenance of hotels, motels, restaurants, rest rooms at or near Highways and facilities & amenities for users of National Highways. (Para 12)

क. राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धाराएँ 3-ए, 3-डी, भारतीय राष्ट्रीय राजमार्ग प्राधिकरण अधिनियम, 1988, धारा 16 - भूमि का अर्जन - अपीलार्थी की भूमि राष्ट्रीय राजमार्ग के निर्माण (चौड़ीकरण), अनुरक्षण, प्रबंध और प्रचालन के सार्वजनिक प्रयोजनों के लिए अर्जित की गई - अभिनिर्धारित - भूमि का अर्जन, न केवल उक्त उद्देश्यों के लिए बल्कि ऐसे उद्देश्यों के सहायक या आनुषंगिक सभी प्रयोजनों जैसे राष्ट्रीय राजमार्ग पर या उनके निकट होटलों, मोटलों, भोजनालयों, विश्रामालयों की स्थापना और अनुरक्षण और राष्ट्रीय राजमार्ग का उपयोग करने वालों के लिए सुख सुविधाओं के लिए भी, अनुज्ञेय है।

B. Words and Phrases - Context - Extension of rule of context permits reference to other statutes in pari materia. (Para 11)

ख. शब्द और वाक्यांश - संदर्भ - संदर्भ के नियम का विस्तार समविषय में (in pari materia) अन्य संविधियों के प्रति संदर्भ की अनुमति देता है।

C. National Highways Act (48 of 1956), Section 3-A - Power to acquire land - It is not for Court, but for Central Government to decide that which particular land is to be acquired for the purposes mentioned in notification u/s 30-A. (Para 15)

ग. राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धारा 3-ए - भूमि अर्जित करने की शक्ति - यह विनिश्चय करने की शक्ति न्यायालय को नहीं है बल्कि केन्द्र सरकार को

है कि धारा 30-ए के अन्तर्गत अधिसूचना में वर्णित प्रयोजनों के लिए कौन सी विशिष्ट भूमि अर्जित की जाए।

Cases referred :

(2005) 13 SCC 477, AIR 1973 Cal 475.

Neelam Goel, for the appellant.

Vivek Awasthi, G.A., for the respondent Nos.1 to 3.

Dharmendra Sharma, A.S.G., for the respondent No.4.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :-This is the appeal filed under Section 2 (1) of the M.P. Uchha Nyayalaya Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 against the order dated 14.12.2007 passed by the learned single Judge in W.P.No.3883 of 2007.

2. The appellant is a farmer and owns agricultural land measuring area 0.640 hectare in khasra No.1/1, 0.316 hectare in khasra No.1/2, 0.680 hectares in khasra Nos.159/1 and 159/2, 1.247 hectares in khasra No.185, 4.85 hectares in khasra No.185/2, and area 4.281 hectares in khasra No.188/2 in village Paloha, Tahsil Kareli, District Narsinghpur M.P. The appellant has five sons and a daughter (widow) who are all dependent on agriculture for their livelihood.

3. The Central Government issued a notification dated 18.3.2005 under sub-section (1) of Section 3-A of the National Highways Act, 1956 (for short 'the Act of 1956') declaring its intention to acquire the land mentioned in the Schedule thereto for the public purposes of building (widening), maintenance, management and operation of National Highway No.26 (including construction of bypasses). The notification stated that any person interested in the land may raise objections to the acquisition of the land. The land measuring 0.376 hectare in Khasra No.185 and the land measuring 4.281 hectares in khasra No.188/2 owned by the appellant were included in the schedule to the notification. The appellant raised objections before the Competent Authority stating that if the valuable irrigated agricultural land was acquired by the Competent Authority, it would deprive the appellant and his family members of their only means of livelihood. The appellant also stated in the objections that the land was actually being acquired not for the national highway but for commercial activities like restaurants, repair shops etc. and such commercial activities can be undertaken on the vacant Government land in khasra Nos.158/2 to 158/2 measuring 5.414 hectares located only a few meters away from the land of the appellant. Despite the objections of the appellant, the Central Government issued a notification dated 24.8.2005 under Section 3-D of the Act of 1956 declaring that the land specified in the schedule including the land of the appellant shall vest absolutely in the Central Government free from all encumbrances.

4. The appellant filed Writ Petition No.3383 of 2007 in this Court praying for a mandamus directing the respondents to acquire the land of the appellant in equal

quantum as acquired from other farmers for widening of National Highway No.26 and not to acquire whole of the land in Khasra No.188/2 measuring 4.281 hectares and also praying for appropriate compensation calculated as per the market value of the land as well as the crops standing on the land. During the pendency of the writ petition, the appellant amended the writ petition and by the amendment prayed for quashing of the notification dated 24.8.2005 issued under Section 3-D of the Act of 1956. After considering the pleadings in the writ petition filed by the appellant and the return filed by the respondents 1, 2 and 3 and after hearing the learned counsel for the parties, the learned single Judge dismissed the writ petition by the impugned order dated 14.12.2007.

5. In the impugned order, the learned single Judge held that in *Competent Authority vs. Barangore Jute Factory and others*, (2005) 13 S.C.C. 477 cited by the learned counsel for the appellant, the question whether acquisition of land for motels/shops/petrol pumps etc. will be covered under Section 3-A of the Act of 1956 was not decided by the Supreme Court and left open. According to the learned single Judge, however, providing such amenities falls within the purview of operation of National Highway because for a four lanes or six lanes highway, it is necessary to provide these amenities. The learned single Judge further held in the impugned order that the amenities were proposed at a crossing of two National Highways within a radius of one kilometer and if the respondents for this purpose have selected the land of the appellant, no fault could be found. Regarding compensation, the learned Single Judge held that if the appellant was aggrieved by the quantum of compensation awarded for the land, he could refer the matter for arbitration under sub-section (5) of Section 3-G of the Act of 1956.

6. Ms. Neelam Goel, learned counsel for the appellant submitted that Section 3-A of the Act of 1956 only empowers the Central Government to acquire land for building, maintenance, management and operation of National Highway or part thereof. She submitted that the notification dated 18.3.2005 issued under Section 3-A of the Act of 1956 also stated that the land described in the Schedule to the notification including the land of the appellant was required for building (widening), maintenance, management and operation of National Highway No.26 (including construction of bypasses), but the land of the appellant was being acquired not for the widening of the National Highway but for providing fuel and service facility, restaurants, motels etc., which are commercial purposes. She vehemently argued that the acquisition of land of the appellant for such commercial purposes is ultra vires the Act of 1956.

7. Mr. Dharmendra Sharma, learned Assistant Solicitor General appearing for the respondent No.4, on the other hand, submitted relying on the additional reply filed on behalf of the respondent No.4 in W.P.No.3883 of 2007 that the land of the appellant is in village Paloha and at this village, two National Highways, namely NH-12 (Jabalpur to Bhopal) and NH-26 (North South Corridor connecting Kashmir to Kanyakumari) join and this junction is known as Rajmarg Choraha and was

ideally situated for different amenities for the travelling public. He submitted that as per the policy of the Ministry of Shipping, Road Transport and Highways, four/six lanes Highways must provide basic amenities like fuel services, restaurants, dormitory, trauma center, repair shops, spare parts shops and bays for parking of different categories of vehicles. He referred to Section 16 of the National Highways Authority of India Act, 1988 (for short 'the Act of 1988') to show that the functions of the National Highway Authority of India include establishment and maintenance of hotels, motels, restaurants and rest rooms and providing different amenities and facilities for the users of the National Highway at or near the highways. He submitted that thus acquisition of the land of the appellant for purposes of providing such amenities and facilities necessary for the travelling public is also permissible under Sections 3-A and 3-D of the Act of 1956. He further submitted that the appellant has not challenged the notification dated 18.3.2005 issued under Section 3-A but has only challenged the notification dated 24.8.2005 issued under Section 3-D of the Act of 1956 and this is also one of the grounds on which the learned Single Judge dismissed the writ petition of the appellant.

8. We do not think that it was necessary for the appellant to challenge the notification dated 18.3.2005 issued under Section 3-A of the Act of 1956 because by the notification dated 18.3.2005 under Section 3-A of the Act of 1956, the Central Government only evinced its intention to acquire the land of the appellant for the purposes mentioned in the notification and called for objections by persons having interest in the land. It is by the notification dated 24.8.2005 issued under Section 3-D of the Act of 1956 that the land of the appellant was acquired by the Central Government free from all encumbrances. Hence, the finding of the learned Single Judge and the contention of Mr. Sharma that the appellant cannot question the acquisition of his land because he has not challenged the notification dated 18.3.2005 issued under Section 3-A of the Act of 1956 is misconceived.

9. Sections 3-A and 3-D of the Act of 1956 as well as the notification dated 18.3.2005 without the schedule are extracted herein below:

"3-A. Power to acquire land, etc -

(1) Where the Central Government is satisfied that for a public purpose any land is required for the building, maintenance, management or operation of a national highway or part thereof, it may, by notification in the Official Gazette, declare its intention to acquire such land.

(2) Every notification under sub-section (1) shall give a brief description of the land.

(3) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which will be in a vernacular language."

"3D. Declaration of acquisition. -

(1) Where no objection under sub-section (1) of section 3C has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objection under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose or purposes mentioned in sub-section (1) of section 3A.

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of section 3A for its acquisition but no declaration under sub-section (1) has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period or periods during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of section 3A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority."

"MINISTRY OF SHIPPING, ROAD TRANSPORT AND HIGHWAYS

(Department of Road Transport and Highways)

NOTIFICATION

New Delhi, the 18th March, 2005

S.O.368 (E) - In exercise of the powers conferred by sub-section (1) of section 3-A of the National Highways Act, 1956 (48 of 1956) (hereinafter referred to as the said Act), the Central Government, after being satisfied that for the public purpose the land, the brief description of which is given in the Schedule below, is required for building (widening), maintenance, management and operation of National Highway No.26 (including construction of by passes) in Tendukheda, Gadarwara, Kareli, Narsinghpur Tehsils on the stretch of land from Km.287.000 to Km. 379.000 in Narsinghpur District, in the State of Madhya Pradesh, hereby declares its intention to acquire the said land for the aforesaid purpose.

Any person interested in the said land may, within twenty-one days from the date of publication of this notification in the Official Gazette, raise objections to the use of the said land for the aforesaid purpose, under sub-section (1) of Section 3-C of the said Act.

Every such objection shall be made to the competent authority, namely, the Joint Collector, District Narsinghpur, in the State of Madhya Pradesh, in writing and shall set out the grounds thereof and the competent authority shall give the objector an opportunity of being heard, either in person or by a legal practitioner, and may, after hearing all such objections and after making such further enquiry, if any, as the competent authority thinks necessary, by order, either allow or disallow the objections;

Any order made by the competent authority under sub-section (2) of Section 3-C of the said Act shall be final.

The land plans and other details of land covered under this notification are available and can be inspected by the interested persons at the office of the competent authority."

10. It will be clear from the language of Sections 3-A and 3-D of the Act of 1956 quoted above that land can be acquired under Sections 3-A and 3-D of the Act of 1956 for the public purposes of building, maintenance, management and operation of a National Highway or part thereof. A reading of the notification dated 18.3.2005 issued under sub-section (1) of Section 3-A of the Act of 1956 extracted above would also show that the lands described in Schedule to the notification were sought to be acquired for the public purposes of building (widening), maintenance, management and operation of National Highway No.26 (including construction of bypasses).

11. One of the settled principles of interpretation is that words used in a statute must be construed in its context and the word 'context' would mean not only the statute in which the word is used but also other *pari-materia* statutes made at different times. To quote from 'Principles of Statutory Interpretation' by Justice G.P. Singh, 11th Edition 2008 (pages 287 and 288):

"It has already been seen that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in *pari materia*, i.e. statutes, dealing with the same subject matter or forming part of the same system. VISCOUNT SIMONDS in a passage already noticed conceived it to be a right and duty to construe every word of a statute in its context and he used the word context in its widest sense including 'other statutes in *pari materia*'. As stated by LORD MANSFIELD: 'Where there are different statutes in *pari materia* though made in different time, or even expired, and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other.'"

Hence, the expression 'building, maintenance or operation of national highway' used in Section 3-A of the Act of 1956 as well as the notification dated 18.3.2005

will have to be construed in its context and the 'context' will include not only the provisions of the Act of 1956 but also the provisions of the Act of 1988 which inter alia deals with the functions of the National Highway Authority.

12. Sub-section (1) of Section 16 of the Act of 1988 provides that subject to rules made by the Central Government in this behalf, it shall be the function of the National Highway Authority to develop, maintain and manage national highway. Sub-section (2) clauses (b) and (f) of Section 16 of the Act of 1988 which is relevant for deciding this case is quoted herein below:

"16. Functions of the Authority:

(1)

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the Authority may, for the discharge of its functions -

(a)

(b) construct offices or workshops and establish and maintain hotels, motels, restaurants and rest-rooms at or near the highways vested in, or entrusted to, it;

(c) ...

(d) ...

(e) ...

(f) provide such facilities and amenities for the users of the Highways vested in, or entrusted to, it as are, in the opinion of the Authority, necessary for the smooth flow of traffic on such highways;

(g)"

Thus, establishment and maintenance of hotels, motels, restaurants and rest-rooms at or near the Highways and providing facilities and amenities for the users of the Highways vested in the National Highway Authority, which, in the opinion of Authority, are necessary for the users of the National Highway. Accordingly, acquisition of land under Sections 3-A and 3-D of the Act of 1956 for National Highways is permissible not only for the objects of building, maintenance, management and operation of National Highways or part thereof but for all purposes ancillary or incidental to such objects, such as establishment and maintenance of hotels, motels, restaurants, rest rooms at or near the Highways and facilities and amenities for users of the National Highways.

13. A similar question arose before the Calcutta High Court in *Sudhangshu Sekhar Maity and others vs. State of West Bengal and others*, AIR 1973 Calcutta 475. In the notifications issued under Section 4 and Section 6 of the Land Acquisition Act 1894, the purpose for which land was proposed to be acquired was stated to be 'the establishment of Haldia Dock', but the land was being acquired for other purposes without which the Dock could not be established i.e. for construction of railway, establishment of factories, storage houses, installation of electricity, establishment of offices of the State and Central Governments and

hospital, quarters for the staff, internal road, port township, oil refinery, fertilizer, sewage and rehabilitation etc. It was contended that the land sought to be acquired were for collateral purposes under the garb of establishment of dock and, therefore, the notifications issued under Sections 4 and 6 of the Land Acquisition Act should be set aside. The Division Bench of the Calcutta High Court rejected the contention and held that the dominant purpose for which the acquisition proceedings were started was establishment of Haldia Dock and that the Dock for its subsistence has necessarily to rely on a number of other activities and undertakings for which also lands would be required and these activities and undertakings can justly be described as purposes allied or incidental to the establishment of Dock. Similarly, the dominant purpose for which lands of the appellant and of others described in the schedule to the notification dated 25.3.2005 issued under Section 3-A of the Act of 1956 have been acquired is building (widening), maintenance and operation of National Highway No.26 and since amenities and facilities including restaurant and motels for the users of the National Highway are only ancillary or incidental to this dominant purpose, the acquisition of the land of the appellant was not ultra vires the Act of 1956.

14. Ms Goel next submitted that instead of acquiring the land of the appellant, Government land lying adjacent to the land of the appellant could have been acquired for the purpose of providing such amenities and facilities for the users of the National Highway. Mr. Sharma, learned counsel for the respondent No.4, on the other hand, submitted that the Government land is located 2.5 kilometers away from the junction of the two National Highways and was also not vacant but was occupied by the residents of the area, a village road, an electrical sub-station, a temple, a bus stop and a nala.

15. The learned single Judge has held in paragraph 7 of the impugned order that on the Government land, houses, temple and electrical transformer were located and a nala was also flowing and the land was not comparatively suitable for the purpose of acquisition for building the National Highway and providing amenities and facilities to its users and also that the land was located 2.5 kilometers away from the junction. In our considered opinion, however, it is not for the Court but for the Central Government to decide considering all relevant factors which particular land is to be acquired for the purposes mentioned in Section 3-A of the Act of 1956 and if the Central Government has taken a view that the Government land located 2.5 kilometers away from the junction and occupied by houses, temples, electrical transformer etc. was not suitable and instead the land of the appellant was suitable for acquisition for establishing different amenities and facilities for the public travelling on the National Highway, the High Court in exercise of its power of judicial review under Art. 226 of the Constitution cannot go into the question and decide that Central Government should have acquired the Government land instead of the land of the appellant. No other contention was raised by the appellant.

16. In the result, the writ appeal is dismissed, but considering the facts and circumstances of the case, the parties shall bear their respective costs.

Writ appeal dismissed.

I.L.R. [2008] M. P., 2197

WRIT APPEAL

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

13 May, 2008*

M.I.S.C. KARMCHARI SANGH

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

Industrial Dispute Act (14 of 1947), Section 25-O - Closure - Closure of industrial unit challenged - Held - The Division Bench while affirming the findings of the learned Single Judge held that the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and persons interested in such closure may, having regard to genuineness and adequacy of reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission for closure of the unit - Writ Appeal Dismissed. (Para 10)

औद्योगिक विवाद अधिनियम(1947 का 14), धारा 25-ओ - समापन - औद्योगिक इकाई के समापन को चुनौती - अभिनिर्धारित - खण्ड न्यायापीठ ने विद्वान एकल न्यायाधीश के निष्कर्षों की अभिपुष्टि करते समय अभिनिर्धारित किया कि समुचित सरकार, ऐसी जाँच जो वह उचित समझती है करने के उपरांत और नियोक्ता, ऐसे समापन में हितबद्ध कर्मकारों और व्यक्तियों को सुने जाने का उचित अवसर देने के उपरांत, नियोक्ता द्वारा कथित कारणों की विशुद्धता और पर्याप्तता, साधारण जनता के हितों और अन्य सभी सुसंगत कारकों को ध्यान में रखते हुए, आदेश द्वारा और लिखित में अभिलिखित किये जाने वाले कारणों से, इकाई के समापन के लिए ऐसी अनुमति दे सकेगी या देने से इंकार कर सकेगी।

Cases referred :

1993 MPLJ 271, (2002) 2 SCC 578.

Prashant Sharma, for the appellant.

Vivek Khedkar, G.A., for the respondent No.1 to 3 / State.

Ankur Mody, for the respondent No.4 to 6.

J U D G M E N T

The Judgment of the Court was delivered by **P. K. JAISWAL, J.** :-Challenge in this appeal is to the judgment of learned Single Judge dated 06.09.2006 passed in W.P. No.8918/03, whereby learned Single Judge dismissed the writ petition filed by the appellant/petitioner which is a union,

challenging the orders of closure dated 27.01.2000 and 11.08.2003 passed by the respondent No.1 in exercise of powers conferred under Section 25-O of the Industrial Disputes Act 1947 (for short 'the Act').

2. Brief facts of the case are that the respondent No.4 is an undertaking of respondent No.5-Hindustan Development Corporation Limited and is a public limited company. The company's Steel Division is at Malanpur and was established in the year 1992. The main raw material of the respondent No.4 is electrical energy. On 15.10.1998, the transformers were burnt and, therefore, the production of the factory was stopped. The factory was closed on account of stoppage of power supply, therefore, it had declared lay off. The said lay off was challenged and ultimately the order was passed by the Labour Commissioner, Govt. of M.P., Indore on 16.07.1999 (Annexure-A/3). Thereafter, the company applied for closure of industry under Section 25-O of the Act before the respondent No.1 on 29.11.1999.

3. The appellant raised an objection before the State Government for granting permission for closure of the unit. The respondent No.1/State after considering the objection of the appellant, vide order dated 27.01.2000 granted permission for closure of the unit under Section 25-O of the Act.

4. The appellant/petitioner which is a union of employees in the organisation of respondents No.4 has called in question the validity of the said order dated 27.01.2000 passed by the respondent/State under the provisions of Section 25-O of the Act by filing a Writ Petition No.384 of 2000 on the ground that the provisions of Section 25-O of the Act, as it now stands, require the Government to give reasons for its order. The requirements are that (a) the appropriate Government after making an enquiry as it think fit, (b) opportunity of being heard to all concerned, (c) the decision will be taken having regard to the genuineness and adequacy of the reasons stated by the employer, (d) the interest of the general public, (e) and other relevant factors. Whereas the respondent No.1 without assigning any reasons and without fulfilling requirement as required under Section 25-O of the Act passed the order, granting permission for closure of the unit which is illegal and prayed for quashing the same.

5. The writ Court vide order dated 27.02.2003 disposed of the writ petition No.384/2000 and directed the respondent No.1-State Govt. to reconsider it and thereafter, final decision be taken in accordance with law. Paras-7, 8 and 9 are relevant which reads as under:-

"7. From the records in the present case it is also seen that the order impugned was passed on 27.1.2000 more than 3 years have passed and in the additional affidavits and documents filed by the parties, it has been indicated that most of the employees have received their terminal benefits and their accounts have also been settled. It seems that after passing of the aforesaid order various developments have taken place

which have to be taken into consideration or deciding the question with regard to closure of the Establishment. These aspects need factual enquiry and the effect of these subsequent developments are also matters which have to be taken into consideration for deciding the action of the Establishment in closing down the Unit and the subsequently approval accorded by the State Govt.

8. Considering the aforesaid aspect of the matter and the subsequent developments that have taken place as is made out from the return and additional return filed by the employer, it is thought appropriate that the matter should be decided by the State Govt. in the review petition which is pending before it and it would not be appropriate for this Court to consider all these aspects in the present petition. Accordingly, without entering into the merits of the controversy, it is directed that the review petition pending before it shall be proceeded with and decided by the State Govt. in accordance with law and while considering the same, the petitioner Union shall also be permitted to participate in the proceedings and make their submissions.

9. It is made clear that while considering the review application, subsequent developments that have taken place in the matter shall also be considered by the State Govt. and then a final decision be taken in accordance with law.

Petition is accordingly disposed of with the aforesaid."

6. That, the respondent No.1 vide order dated 11.08.2003 (Annexure P/2), after hearing the appellant-union rejected the review application and upheld the order of closure dated 27.01.2000. Paras-9, 10, 11 and 12 are relevant which reads as under:-

"9. शासन द्वारा आदेश दिनांक 27.1.2000 द्वारा आवेदक संस्थान को प्रदान की गई बंदीकरण की अनुमति में यह आधार विवेचित किया गया है कि आवेदक संस्थान को रुपये 200.00 करोड़ से अधिक का घाटा हो चुका है। आदेश दिनांक 27.1.2000 के बाद से अभी तक की स्थिति में लगभग साढ़े तीन वर्ष उपरांत आवेदक संस्थान के समक्ष कारखाना बंद होने के कारण घाटे की स्थिति काफी अधिक हो चुकी होगी। इस संबंध में यह तथ्य भी महत्वपूर्ण है कि सभी श्रमिकों को शासन की अनुमति उपरांत उनके अंतिम दावों का भुगतान किया जा चुका है, इस संबंध में पक्षों के मध्य कोई विवाद भी नहीं है। उक्त दोनो श्रमिक संगठनों द्वारा केवल यह मुद्दा उठाया गया कि ट्रांसफार्मर जलने के कारण प्रबंधन द्वारा किया गया ले-ऑफ वैधानिक नहीं है, श्रमायुक्त तथा उच्च न्यायालय द्वारा ले-ऑफ को वैधानिक नहीं माना गया फिर भी श्रमिकों को प्रबंधन की ओर से आधे वेतन का भुगतान अभी तक नहीं किया गया।

10. उक्त संबंध में जो परिस्थितियाँ समक्ष आई हैं उससे ऐसा प्रतीत होता है कि नया ट्रांसफार्मर लाया जाकर कारखाने में पुनः उत्पादन प्रारंभ करने के प्रयास होने

चाहिए थे, किन्तु ट्रांसफार्मर जलने के बाद लम्बे समय तक कारखाने में उत्पादन बंद रहा तथा बाद में शासन से अनुमति दिनांक 27.1.2000 प्राप्त कर वैधानिक रूप से कारखाने को बंद कर दिया गया। आज की स्थिति में आवेदक संस्थान के समक्ष आर्थिक समृद्धता तथा कारखाना चलाने के उपयुक्त प्रयास की कोई संभावना नजर नहीं आती।

11. अतएव पूर्व में पारित आदेश दिनांक 27.1.2000 में किसी संशोधन अथवा परिवर्तन के लिए कोई उपयुक्त स्थिति समक्ष नहीं होने के कारण महामंत्री, आयरन एण्ड स्टील मजदूर एकता यूनियन, मालनपुर, जिला मिण्ड द्वारा प्रस्तुत पुनर्विलोम आवेदन दिनांक 16.2.2000, बाद में एम.आई.एस.सी. कर्मचारी संघ द्वारा प्रस्तुत आवेदन दिनांक 2.4.2003 एतद् द्वारा निरस्त किया जाता है।

12. श्रमिक संगठनों द्वारा सुनवाई के दौरान ले-ऑफ का पूर्ण भुगतान श्रमिकों को नहीं होना बताया गया है। चूंकि इस संबंध में प्रकरण न्यायालय में विचाराधीन है, अतः पृथक से कोई निर्देश देना अपेक्षित नहीं है।”

7. That, the appellant challenged the said orders dated 27.01.2000 and 11.08.2003 by filing W.P. No.8918/2003.

8. The writ Court after relying the Division Bench decision of this Court in the case of *Union Carbide Karmachari Sangh Bhopal Vs. Union of India and others*, 1993 M.P.L.J. 271 and decision of the Constitutional Bench of the Hon'ble Apex Court in the case of *Orissa Textile & Steel Ltd. Vs. State of Orissa and others*, (2002) 2 SCC 578 has held that company is in loss of more than 400 crores and it has already been undergone B.I.F.R. and proceedings are going on under the provisions of Sick Industrial Companies (special provisions) Act, 1985 with regard to payment of dues to the other party vide Case No.158/01 before the Board of Industrial and Financial Reconstruction at New Delhi. It is also held that it is not possible to run the company again and the workers and employees have received their dues as per law on account of closure of the company, the appropriate authority have considered all the aspect of the case and granted permission for closure of the unit and the writ Court cannot enforce the management to run the company because it would amount to accumulation of further losses. With the above reasons, the writ Court has held that there is no illegality or irregularity in the permission granted by the appropriate Government for closure of the company and dismissed the writ petition.

9. Section 25-O of the Industrial Disputes Act 1947 read as under:-

“25-O. Procedure for closing down an undertaking

(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall apply for prior permission at least ninety days before the date on which the intended closure is to become effective, to the State Government stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the

representatives of the workmen by registered post with acknowledgment due."

(2) Where a notice has been served on the State Government by an employer under sub-section (1) of Section 25-FFA and the period of notice had not expired on the 5th August, 1983, such employer shall not close down the undertaking but shall, within a period of fifteen days from the said date, apply to the State Government for permission to close down the undertaking.

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

(4) Where an application has been made under sub-section (1) of sub-section (2), as the case may be, and the State Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(5) An order of the State Government granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(6) The State Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (3) or refer the matter to a Tribunal for adjudication:

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

(7) Where no application for permission under sub-section (1) or sub-section (2) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

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

(9) Where an undertaking is permitted to be closed down under sub-section (3) or where permission for closure is deemed to be granted under sub-section (4), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months."

10. As per sub-section 3, the appropriate Government, after making such enquiry and after giving a reasonable opportunity of being heard to the employer, the workmen and person interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission for closure of the unit.

11. A right to close down a business being an integral part of the fundamental right to carry on business, the words "genuine and adequate" must have that meaning which is consistent with the nature of that right. If the course is bona fide or on account of unavoidable circumstances beyond the control of the employer then they will have to be regarded as genuine and adequate. If the employer wants to close down his undertaking bona fide and because of financial or commercial compulsions or serious management problem then the authorities will have to grant permission unless there are compelling and over-whelming reasons of general public interest justifying refusal.

12. Learned counsel for the appellant submitted that the authority while exercising its powers under Section 25-O of the Act, it did not considered all aspect as required under sub-section 2 of Section 25-O of the Act, granted permission without recording any genuine and adequate reasons and the unavoidable circumstances which is beyond the control of the employer to run the factory or because of financial compulsions, the employer is not in a position to run the industry, granted permission of closure of unit.

13. On the other hand, Shri Ankur Mody, learned counsel for the respondents No.4 to 6 in support of the order of closure has submitted that the appropriate authority has correctly analyse the pleadings of the party and granted permission for closure of the unit. The writ Court considered these aspects and upheld the order of the appropriate authority while dismissing the writ petition of the appellant/

petitioner and in this appeal, there is no justification to interfere with such finding recorded by the Writ Court as well as by the appropriate authority. He drew our attention to the pleadings of the parties and report of the Annual General Meeting of the company and submitted that company is running in losses to the tune of crores of rupees and every year, losses are accumulated and, therefore, it was not viable to continue with the production and, therefore, they applied for closure on 29.11.1999. The appropriate authority after adjudication granted permission which is just and proper. It is also submitted that orders dated 27.01.2000 and 11.08.2003 clearly disclosed the reasons why the company had become inviable and why it was not able to carry out its activities any further. The reasons assigned by the appropriate authority is genuine and adequate and appropriate authority was justified in granting permission for closure of the company. With the above, he prayed for dismissal of the appeal.

14. We have heard the arguments of the learned counsel for the parties at length and perused the record of the case.

15. The Division Bench of this Court in the case of *Union Carbide Karmachari Sangh Bhopal* (supra) while considering the question of closure and power of State Government who grant or refuse permission has held that the scope of an enquiry in a writ petition is limited to the questions as to whether the ultimate opinion formed by the State Government is vitiated on account of ignoring any relevant factor, or taking into account any irrelevant, extraneous or non-existing factor so as to disclose any error apparent on face of the record. The High Court cannot in its writ jurisdiction delve into the dark crevices of the files of the State Secretariat for the purpose of probing into and examining the correctness of the conclusion relating to the adequacy of reasons unless there is an error apparent on the fact of record.

16. In the case of *Orissa Textile & Steel Ltd.* (supra), the Hon'ble Apex Court has upheld the validity of the closure and with regard to right of management and right of the union and parties in event of closure, has observed the following which reads as under:-

“4. At this stage a submission made by Ms Jaising needs to be set out. Ms Jaising submitted that in *Meenakshi Mills Case* a Constitution bench of this Court has extracted the reasons why in *Excel Wear case* Section 25-O was struck down. It was submitted that that decision would be binding on this Court. It was submitted that this Court should not itself go into *Excel Wear case* to find out the reasons why Section 25-O was struck down. We are unable to accept this submission. As has been held by this Court, in the case of *Prakash Amichand Shah v. State of Gujarat* it is the duty of the Constitution Court to form its own opinion about a given case and to consider the effect of a precedent by reading it over again, instead of relying upon the gloss placed on that precedent

by some other decision. In our view the submissions of all the learned counsel will have to be considered in the light of what is laid down in Excel Wear case and Meenakshi Mills case.”

17. After passing of the order dated 27.02.2003 in W.P. No.384/2000, the respondent No.1 considered all the necessary facts, particularly into the genuineness and adequacy of the reasons after giving an opportunity to the appellant, assigned the reasons for granting permission for closure of industry. In our view, the reasons assigned by the respondent No.1 in granting permission for closure is genuine and adequate.

18. On perusal of the documents and reply filed by the respondents No.4 to 6, due to financial crunch and loss, it has become impossible for them to continue to run the establishment. We also saw no substance in the submissions made by the learned counsel for the appellant. Learned counsel for the appellant only drew our attention to the order dated 27.01.2000. During the course of arguments, he could not pointed out that in compliance to the direction issued by the writ Court in W.P. No.384/2000, the respondent No.1-appropriate authority again reconsidered the whole matter an after assigning the reasons, upheld the order dated 27.01.2000. The respondent No.1 while exercising powers of review would be performing quashi-judicial functions. The orders passed by the respondent No.1 was subject matter of judicial review under Article 226 of the Constitution of India before the learned Single Judge. The learned Single Judge after examining the matter found that there is no illegality or irregularity in the permission granted by the respondent No.1 for closure of the company and dismissed the writ petition. The scope in this writ appeal is very limited unless there is an error apparent on the face of the record. The orders dated 27.01.2000 and 11.08.2003 clearly states that the reasons given by the management for closure of the two industrial units appears to be reasonable and genuine. The order says that the reasons shown are reasonable and genuine. Therefore, simply because the order only narrates the facts and finding all the facts given in the application to the reasonable and genuine it cannot be said that there is non-application of mind and the order is not a speaking order.

19. For the reasons aforementioned, there is no merit in this writ appeal. Accordingly, it is dismissed, but without any order as to cost.

Appeal dismissed.

I.L.R. [2008] M. P., 2205

WRIT APPEAL

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

1 July, 2008*

SULOCHANA MALLAIYA (SMT.)

... Appellant

Vs.

S.N. SHRIVASTAVA & ors.

... Respondents

A. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P., 2005 (14 of 2006), Section 2 - Maintainability of Writ Appeal - Order passed by learned Single Judge in exercise of its contempt jurisdiction - Held - Proviso to Section 2(1) puts bar and ban against filing of appeal against any order except order passed by learned Single Judge in exercise of original jurisdiction under Article 226 of Constitution - Writ Appeal not maintainable. (Para 24)

क. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 - रिट अपील की पोषणीयता - विद्वान एकल न्यायाधीश द्वारा अपनी अवमान अधिकारिता के प्रयोग में आदेश पारित - अभिनिर्धारित - धारा 2(1) का परन्तुक, विद्वान एकल न्यायाधीश द्वारा संविधान के अनुच्छेद 226 के अधीन आरंभिक अधिकारिता के प्रयोग में पारित आदेश के अलावा किसी आदेश के विरुद्ध, अपील के पेश करने के विरुद्ध रोक और पाबंदी लगाता है - रिट याचिका पोषणीय नहीं।

B. Contempt of Courts Act (70 of 1971), Section 19 - Appeal - Court passed certain directions in exercise of its contempt jurisdiction - Held - Not only punishment awarded to alleged contemnors can be challenged but even correctness, validity and propriety of directions can also be challenged. (Para 17)

ख. न्यायालय अवमान अधिनियम (1971 का 70), धारा 19 - अपील - न्यायालय ने अपनी अवमान अधिकारिता के प्रयोग में कतिपय निदेश पारित किये - अभिनिर्धारित - न केवल कथित अवमानकर्ताओं को दिये गये दण्ड को चुनौती दी जा सकती है बल्कि निदेशों की शुद्धता, विधिमान्यता और औचित्य को भी चुनौती दी जा सकती है।

Cases referred :

1996 AIR SCW 4272, (2006) 5 SCC 399.

V.S. Shroti with Vikram Johri, for the appellant.

Sankalp Kochar, for the respondent No.1.

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

The Judgment of the Court was delivered by R.S. GARG, J. :-Shri V.S.Shroti, learned senior counsel for the appellant after taking us through the provisions of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005 {No.14 OF 2006} submitted

that as the order under challenge has tenets of an order under Article 226 of the Constitution of India and as the directions issued by the learned Single Judge could not be issued in its contempt jurisdiction, the same have to be presumed to be the directions under Article 226 of the Constitution of India and, therefore, the appeal is maintainable.

2. It is also submitted by him that the proviso appended to Sub-section {1} of Section 2 would not come in his way because the nature of the order passed by the learned Single Judge infact decides the rights of the parties finally and, therefore, the order would not be an interim order or an interlocutory order.

3. It is also submitted by him, placing reliance upon the judgments of the Supreme Court in the matter of *J.S.Parihar Vs. Ganpat Duggar & Others* {1996 AIR Supreme Court Weekly 4272} and *Midnapore Peoples' Cooperative Bank Limited & Others Vs. Chunilal Nanda & Others* {2006} 5 Supreme Court Cases 399 that if the order passed by the learned Single Judge is deciding the rights of the parties and such an order could only be passed by the learned Single Judge in his jurisdiction under Article 226 of the Constitution of India then such an order can be challenged in an intra-court appeal.

4. After taking us through the provisions of Section 19 of the Contempt of Courts Act, learned senior counsel for the appellant submitted that an appeal under Section 19 of the Contempt of Courts Act would not be maintainable but an appeal under Section 2 of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005 would be maintainable.

5. Shri Sankalp Kochar, learned counsel for respondent No. 1, on the other hand, submitted that the provisions of the Letters Patent which provided for appeal under Clause 10 having been repealed, an appeal cannot now be filed against every order passed by a learned Single Judge. According to him, an appeal would be maintainable before the Division Bench if the appeal is maintainable under Section 2 of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005. He also submitted that the order passed by the learned Single Judge is an explanatory order and is virtually a direction to the alleged contemnors to purge the contempt.

6. We have heard the parties at length. Clause 10 of the Letters Patent read as under :-

"10. Appeal to the High Court from Judges of the Court.- And we do further ordain that an appeal shall lie to the said High Court of judicature at Nagpur from the judgment {not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of the appellate jurisdiction by a court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the powers of superintendence

under the provisions of section one hundred and seven of the Government of India Act, or in the exercise of criminal jurisdiction} of one Judge of the said High Court or one Judge of any Division Court, pursuant to section one hundred and eight of the Government of India Act, and that notwithstanding anything herein before provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section one hundred and eight of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judge of the said High Court or of such Division Court shall be to us. Our Heirs and Successors in Our or Their Privy Council, as hereinafter provided."

7. Undisputedly, the Madhya Pradesh Uchcha Nyayalaya {Letters Patent Appeals Samapti} Adhiniyam, 1981 provided abolition of appeal from judgment or order of one Judge of the High Court made in exercise of original or appellate jurisdiction. A Division Bench of this Court held the Act to be *ultra vires* as the Act was taken to be beyond the jurisdiction of the State Legislature. Undisputedly, the order passed by the Division Bench has been set aside by the Apex Court and the provisions of the Madhya Pradesh Uchcha Nyayalaya {Letters Patent Appeals Samapti} Adhiniyam, 1981 are held valid and the appeals which were pending on the date of the judgment came to be dismissed but thereafter the State Government brought Act No. 14 of 2006 into force. The said Act has received the assent of the President on 28th March, 2006 and the Act came into force on the date it was published in the Official Gazette. Section 2 of the Act reads as under:-

"2. Appeal to the Division Bench of the High Court from a judgment or or of one Judge of the High Court made in exercise of original jurisdiction.--

{1} An appeal shall lie from a Judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a Division Bench Comprising of two Judges of the same High Court:

Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

{2} An appeal under Sub-section {1} shall be filed within 45 days from the date of order passed by a Single Judge:

Provided that any appeal may be admitted after the prescribed period

of 45 days, if the petitioner satisfies the Division Bench that he had sufficient cause for not preferring the appeal within such period.

Explanation – The fact that the petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this sub-section.

{3} An appeal under Sub-section {1} shall be filed, heard and decided in accordance with the procedure as may be prescribed by the High Court.”

8. A fair reading and understanding of Section 2 would clarify that according to the intention of the legislature, an appeal shall lie from a judgment or an order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India. The proviso appended to Sub-section {1} of Section 2 clearly provides that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. Such an appeal is required to be filed within 45 days and if the appeal is not filed within 45 days then the High Court under particular circumstances shall have powers to condone the delay in filing the appeal. Section 4 of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005 repealed the Madhya Pradesh Uchcha Nyayalaya {Letters Patent Appeals Samapti} Adhiniyam, 1981.

9. Section 2 and its sweep had been a subject of controversy in number of cases. A Full Bench of this Court has held that if an interlocutory order has the tenets of being final in nature and it affects the rights of the parties permanently or the parties are left at an irretrievable position then an order can be challenged in an appeal. However, none of the judgments of this High Court say that when a learned Single Judge has exercised his jurisdiction under the provisions of Contempt of Courts Act, an appeal shall be maintainable under Section 2 of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005.

10. Section 2 of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005 clearly provides that an appeal shall lie from a judgment or an order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India. Section 2 of the Adhiniyam, 2005 does nowhere provide that if an order passed under some proceedings other than writ proceedings can be treated to be an order under Article 226 of the Constitution of India then also an appeal would be maintainable.

11. The key words in Section 2 are “in exercise of original jurisdiction under Article 226 of the Constitution of India”. If a learned Single Judge issues some direction in a civil matter or in a criminal matter, which even otherwise he could have issued under Article 226 of the Constitution of India then such a direction cannot be challenged before a Division Bench. The basic question is whether the

Judge is exercising the jurisdiction under Article 226 of the Constitution of India or any other jurisdiction.

12. Undisputedly, the learned Single Judge was not exercising his jurisdiction under Article 226 of the Constitution of India but was exercising his contempt jurisdiction. Assuming for a minute that the order passed by the learned Single Judge is beyond his jurisdiction and the same can be set aside by an Appellate Court then the appeal must be filed before a proper forum because an *intra-court* appeal, which is a statutory appeal, would not be maintainable against such directions or illegal exercise of the jurisdiction.

13. In the matter of *J.S. Parihar* {supra}, a three Judges Bench of the Supreme Court was considering the question relating to Rajasthan High Court Ordinance Section 18, which was in relation to powers of the Division Bench. There also while exercising the contempt jurisdiction, a learned Single Judge had issued certain directions and the order came to be challenged before the Division Bench. The Supreme Court held that an appeal under Section 19 was not maintainable because there was no order punishing the respondent for violation of the order of the High Court. Their Lordships thereafter made following observations in paragraph 5 of the judgment:-

"5. The question then is: whether the Division Bench was right in setting aside the direction issued by the learned Single Judge to redraw the seniority list. It is contended by Mr. S.K. Jain, learned counsel appearing for the appellant, that unless the learned Judge goes into the correctness of the decision taken by the Government in preparation of the seniority list in the light of the law laid down by three Benches, the learned Judge cannot come to a conclusion whether or not the respondent had willfully or deliberately disobeyed the orders of the Court as defined under Section 2(b) of the Act. Therefore, the learned Single Judge of the High Court necessarily has to go into the merits of that question. We do not find that the contention is well founded. It is seen that, admittedly, the respondents had prepared the seniority list on 2.7.1991. Subsequently, promotions came to be made. The question is: whether seniority list is open to review in the contempt proceedings to find out, whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the Court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the willful violation of the order. After re-exercising then judicial review in contempt proceedings.

afresh direction by the learned Single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible under Section 12 of the Act. Therefore, the Division Bench has exercised the power under Section 18 of the Rajasthan High Court Ordinance being a judgment or order of the Single Judge, then Division Bench corrected the mistake committed by the learned Single Judge. Therefore, it may not be necessary for the State to file an appeal in this Court against then judgment of the learned Single Judge when the matter was already seized of the Division Bench."

14. The question before the Supreme Court was that whether the Division Bench was right in setting aside the directions issued by the learned Single Judge to redraw the seniority list. The Supreme Court observed that what was not permissible under Section 12 of the Contempt of Courts Act, if was directed to be done then it would be assumed that the learned Single Judge had exercised such powers, which did not vest in him and, therefore, the Division Bench could exercise the powers under Section 18 of the Rajasthan High Court Ordinance as the judgment or order of the Single Bench was under challenge before the Division Bench and the Division Bench had jurisdiction to correct the wrong. There again the judgment of the Supreme Court was based upon interpretation of Clause 18 of the Rajasthan High Court Ordinance.

15. In the matter of *Midnapore Peoples' Cooperative Bank Limited* {supra}, after considering the entire law on the subject, the Supreme Court in paragraph 11 of the judgment observed as under:-

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarized thus:

{I} An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

{II} Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19n of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

{III} In a proceeding for contempt, the High Court can decide whether any contempt of Court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

{IV} Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

{V} If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal {if the order was of a learned Single Judge and there is a provision for an *intra-court* appeal}, or by seeking special leave to appeal under Article 136 of the Constitution of India {in other cases}.

The first point is answered accordingly."

16. Learned senior counsel for the appellant has placed his reliance on Sub-note IV and Sub-note V contained in paragraph 11. In Sub-note IV, the Supreme Court had simply observed that any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the Contempt of Courts Act. The Supreme Court while carving out an exception observed that where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

17. In our opinion, Sub-note IV would apply to a case where while issuing a final direction in exercise of jurisdiction to punish for contempt, the High Court also issues certain directions. In such a case in an appeal under Section 19 of the Contempt of Courts Act, not only the punishment awarded to the alleged contemnors can be challenged but even the correctness, validity and propriety of the directions can also be challenged.

18. Sub-note V of paragraph 11 of the judgment in *Midnapore Peoples' Cooperative Bank Limited* {supra} clearly observes that if the High Court decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. According to the Apex Court, such an order is open to challenge in an intra-court appeal if the order was of a learned Single Judge and there is a provision for an intra-court appeal, or by seeking special leave to appeal under Article 136 of the Constitution of India.

19. It is to be seen that the Supreme Court has not issued blanket direction that

whenever any order is made in exercise of the contempt jurisdiction then such an order can be challenged before the higher forum in an intra-court appeal. The Supreme Court has observed that in a case where the High Court decides an issue or makes any direction, relating to the merits of the dispute between the parties, in contempt proceedings, the aggrieved person can challenge the order in an intra-court appeal. Such an appeal can be filed if the order is passed by a learned Single Judge and there is a provision for an intra-court appeal. The word 'and' is not disjunctive, it cannot be read as 'or'. Instead of word and, if the word or was used in the provision then certainly the argument of Shri V.S.Shrotri, learned senior counsel for the appellant could have carried some weight because we could read the direction of the Supreme Court that if the order is passed by a learned Single Judge, an intra-court appeal would be maintainable irrespective of the provisions contained in any law for the time being in force. The requirement is not only that the order impugned must be passed by a learned Single Judge but the requirement also is that there must also be a provision for an intra-court appeal against such an order.

20. We will again refer back to Section 2 of the Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005 and would again observe that under Section 2, an appeal shall lie from a judgment or an order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India. The requirement is that the order must be passed by a learned Single Judge of the High Court; it must have been passed in exercise of the original jurisdiction and lastly it should be an order under Article 226 of the Constitution of India.

21. In the present matter, undisputedly, the order was passed by the learned Single Judge but it was not passed in exercise of the jurisdiction under Article 226 of the Constitution of India. A perusal of the order would make it clear that the learned Single Judge was clear in his mind that the earlier observations made by the learned Judge while disposing of the writ petition were to be understood in a particular form. While disposing of the writ petition, if the learned Single Judge made certain observations, issued certain directions and such directions were not wholeheartedly followed or complied with and ultimately a contempt proceedings came before the Court then even in such jurisdiction, the learned Single Judge could explain that what was really meant by the order. It would altogether be a different thing that the alleged contemnors may come before the competent Court and say that the interpretation made by the learned Single Judge is wrong or bad but the forum to challenge such observations or directions would be different not a Division Bench in an *intra-court* appeal under the Adhiniyam.

22. If the interpretation put forth by the learned senior counsel for the appellant is accepted then that would create a situation of impossibility because every order issued by a Court, any direction issued by a learned Single Judge, can always be challenged before the Division Bench on the ground that some additional directions

have been issued even in a criminal matter, therefore, an intra-court appeal would be maintainable.

23. For example, we take case of a petition under Section 482 of the Code of Criminal Procedure, where the High Court issues a direction to the subordinate Tribunal, Authority, Investigating Agency, Police or the State to do a particular thing. If the parties are aggrieved then taking advantage of the interpretation put forth by the learned senior counsel for the appellant contrary to the intention expressed by the legislature, a writ appeal would be maintainable. In our opinion, such is not the intention of the legislature.

24. A right of appeal cannot be claimed in air, it has to be statutory. It is a right conferred upon an aggrieved party under some statute or by the Letters Patent. The provisions contained the repealed provisions of Clause 10 infact were wider in nature as they provided that any person aggrieved by the judgment or order passed by the learned Single Judge in its first appellate jurisdiction or in its original jurisdiction could file an appeal. The Letters Patent if provided extra and larger avenue then the provisions contained in the Letters Patent cannot be read in Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhiniyam, 2005 because the statute clearly puts a bar and ban against filing of an appeal against any order except an order passed by a learned Single Judge in exercise of original jurisdiction under Article 226 of the Constitution of India.

25. Taking into consideration the totality of the circumstances, without entering into the merits of the matter, we hold that the appeal is not maintainable. It is accordingly dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2213

WRIT APPEAL

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

22 July, 2008*

M.P. STATE CIVIL SUPPLIES CORPORATION LTD.

... Appellant

Vs.

VINOD KUMAR SAVE

... Respondent

A. Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 9(1) - Petitioner, an employee of Corporation acquitted of all charges against him under IPC & Prevention of Corruption Act, 1988 - Representation for revocation of suspension order rejected on the ground of pending appeal against order of acquittal - Learned Single Judge quashed order of suspension and directed employer to reinstate - Held - The rule is absolutely silent as regards the situation when a judgment of acquittal recorded against the employee - However, employee can revert back to service

after acquittal - Otherwise it may cause immense hardship to employee to wait for the final adjudication of matter by the final court. (Paras 10 & 12)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 9(1) - याची, निगम का एक कर्मचारी, उसके विरुद्ध भा.द.सं. और भ्रष्टाचार निवारण अधिनियम, 1988 के अधीन सभी आरोपों से दोषमुक्त किया गया - निलंबन आदेश के प्रतिसंहरण का अभ्यावेदन दोषमुक्ति के आदेश के विरुद्ध अपील लम्बित होने के आधार पर अस्वीकार किया गया - विद्वान एकल न्यायाधीश ने निलंबन का आदेश अभिखंडित किया और पुनर्नियुक्ति करने के लिए नियोक्ता को निदेशित किया - अभिनिर्धारित - उस दशा के सम्बन्ध में जब कर्मचारी के विरुद्ध दोषमुक्ति का निर्णय अभिलिखित किया जाता है, नियम बिल्कुल मौन है - तथापि कर्मचारी दोषमुक्ति के पश्चात् सेवा में वापस लौट सकता है - अन्यथा यह अंतिम न्यायालय द्वारा मामले का अंतिम न्यायनिर्णयन के लिए इंतजार करने वाले कर्मचारी को अत्यधिक कष्ट कारित कर सकता है।

B. Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 9 - *When there is an order of acquittal in a criminal case - There is nothing in the rule relating to the spectrum of deemed suspension.*

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 9 - जब किसी आपराधिक मामले में दोषमुक्ति का आदेश हो - नियम में समझे गये निलम्बन के प्रतिबिम्ब के संबंध में कुछ नहीं है।

C. Words & Phrase - All consequential benefits - *Learned Single Judge has directed to settle all consequential benefits - The term used in this direction are quite different than issuing a mandamus or a command to pay arrears - Order is not curtailment of power of employer.*

ग. शब्द और वाक्यांश - समस्त पारिणाभिक लाभ - विद्वान एकल न्यायाधीश ने समस्त पारिणाभिक लाभ निपटाने का निदेश दिया - इस निदेश में प्रयुक्त शब्द परमादेश जारी करने या बकाया भुगतान करने का आदेश देने से बिल्कुल भिन्न है - आदेश नियोक्ता की शक्ति को न्यून नहीं करता है।

Case referred :

2002(4) MPLJ 401.

Vinay Zelawat, for the appellant.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- In this appeal preferred under Section 2(1) of Madhya Pradesh Uchcha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005, the correctness and soundness of the order dated 21.1.2008 passed by learned Single Judge in W.P. No. 5173/2007(S) is called in question by the M.P. State Civil Supplies Corporation Ltd. (hereinafter referred to as "the Corporation").

2. The facts which are requisite to be exposited for appreciating the stands put forth in appeal are that the respondent who was an employee of the appellant Corporation, was put under suspension as per order dated 16.1.1996, Annexure P/1, on the base that a charge-sheet was filed against him in Crime No. 24/1989

for the offences punishable under Sections 408, 409, 161, 477-k and 120-B of I.P.C. read with Section 5(1)(d)/13(2) and Section 7 of Prevention of Corruption Act, 1988. The respondent faced trial and eventually, by judgment dated 7.3.2007, he was acquitted of the charges levelled against him by the competent criminal court. After being acquitted, the respondent preferred W.P. No. 4220/2007(S) on 8.8.2007 for revocation of the order of suspension and this Court had directed to consider the representation preferred for revocation of the said order. After the order was passed in the writ petition, the employer by order dated 1.9.2007 rejected the representation on the ground that against the order of acquittal, an appeal has been preferred before the competent court and till the decision is taken in criminal appeal, the order of suspension was to remain in vogue. Being aggrieved by the said order, the present writ petition was filed for quashment of the same appropriate direction.

3. Before the learned Single Judge it was contended that the order of suspension could not be allowed to stand as the respondent has been acquitted in the criminal case and there is no other proceeding pending against him. To buttress the said stand, reliance was placed on the decision in *Ram Ratan Tiwari V/s. State of M.P. & others* : 2002 (4) M.P.L.J. 401. The said submission was criticised on the foundation that due to the conduct of the respondent, the appellant Corporation had been put to loss and once an appeal has been filed, there was no warrant for revocation of the order of suspension.

4. Learned Single Judge took note of the fact that the respondent had been acquitted; that the employee was put under suspension as per Rule 9(1)(b) of M.P. Civil Services (CCA) Rules, 1966 which entitles the employer to put an employee under suspension where a criminal case has been instituted against him or any criminal offence which is under investigation or trial; that there is no provision enabling the employer to put the employee under suspension under these circumstances; and that the order of suspension during the pendency of appeal against the judgment of acquittal is impermissible. Being of this view, the learned Single Judge quashed the order of suspension and directed appellant employer to reinstate the respondent and settle all the consequential benefits within four months by passing a reasoned and speaking order.

5. We have heard Mr. Vinay Zelawat, learned counsel for appellant-Corporation on the question of admission. It is submitted by Mr. Zelawat that the appellant has inherent jurisdiction to put an employee under suspension by not taking work from him and, therefore, the order passed by learned Single Judge is erroneous and deserves to be interfered with in this intra-court appeal. It is also his submission that the respondent would not be entitled to all consequential benefits as the Fundamental Rules would come into play.

6. It is not in dispute that the respondent was put under suspension because of the initiation of the criminal case against him. It is not controverted that he has

been acquitted on 7.3.2007. There is no cavil over the fact that the respondent was suspended taking recourse to the provisions contained in 1966 Rules. Under these circumstances, the pivotal question that emerges for consideration is whether after acquittal, the employer can be permitted to contend that as an appeal has been preferred in a higher forum, the order of suspension shall be allowed to continue.

7. In this context, we think it apt to refer to Rule 9(1) of 1966 Rules. The said Rule is reproduced below :-

“9. (1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Governor, by general or special order, may place a Government servant under suspension :-

(a) Where a disciplinary proceeding against him is contemplated or is pending; or

(b) Where a case against him in respect of any criminal offence is under investigation, inquiry or trial :

Provided that a Government servant shall invariably be placed under suspension when a challan for a criminal offence involving corruption or other moral turpitude is filed against him :

Provided further that where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made.”

We have reproduced the said Rule to understand the basic tenor of it. In this context it is essential to scan the other rules so that a complete picture is projected. Sub Rule (2) of Rule 9 deals with the concept of deemed suspension and other aspects relating to the same. Sub Rule (3) of Rule 9 provides the consequences when the punishment imposed against a Government servant under suspension is set-aside in appeal or in review. Sub Rule (4) deals with the situation where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set-aside or declared or rendered void in consequence of or by a decision of Court of law. Sub Rule (5) of Rule 9 stipulates that an order of suspension made or deemed to have been made under Rule 9 to continue to remain in force until it is modified or revoked by the authority competent to do so. The aforesaid are the basic features of Rule 9. The Rule is absolutely silent as regards the situation when a judgment of acquittal is recorded against the accused employee.

8. The Division Bench of this Court in a case of *Ram Ratan Tiwari* after referring to the Rule expressed the opinion as follows :-

“One of the circumstances for placing the government servant under

suspension is when a case against him in respect of any criminal offence is under investigation, inquiry or trial. Part IV of Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 deals with suspension. Rule 9(1) provides for circumstances when a person can be placed under suspension by the government. Petitioner was placed under suspension under the above quoted Rules which means he remains under suspension when criminal offence against him is under investigation, enquiry or trial. Investigation, enquiry or trial is over after announcement of judgment dated April 30, 2001. Therefore, this provision stands exhausted and petitioner can revert back to service. To hold otherwise would mean reading something in the provision which it does not provide. Further it may cause immense hardship to person to wait for the final adjudication of the matter by the final Court. Therefore, submission of Shri P.D. Gupta, learned Dy. A.G. cannot be appreciated to the extent that once a person is placed under suspension, he continues under suspension during the appeal as well."

9. In this regard, we may fruitfully refer to certain observations made in *L.K. Verma V/s. HMT Ltd. and another* : (2006) 2 SCC. 269, wherein their Lordships have held thus –

"17. Suspension is of three kinds. An order of suspension may be passed by way of punishment in terms of the conduct rules. An order of suspension can also be passed by the employer in exercise of its inherent power in the sense that it may not take any work from the delinquent officer but in that event, the entire salary is required to be paid. An order of suspension can also be passed, if such a provision exists in the rule laying down that in place of the full salary, the delinquent officer shall be paid only the subsistence allowance specified therein."

10. We have reproduced the above solely to understand the various facets of an order of suspension. As has been stated earlier, there has been a judgment of acquittal in favour of the respondent. It is submitted by Mr. Zelawat that the concept of deemed suspension is attracted. In a case when an order of dismissal is set-aside and the matter is remitted to the disciplinary authority for fresh consideration, the delinquent may be deemed to be under suspension depending upon the language in which the rule is couched or the action taken by the employer. But, when there is an order of acquittal in a criminal case and there is nothing in the rule relating to the spectrum of deemed suspension and nothing has been brought before us that any action has been taken, we are of the considered opinion that there cannot be deemed suspension.

11. We will be failing in our duty if we do not take note of the other submission canvassed by Mr. Zelawat, learned counsel for the appellant. He has invited our attention to the last paragraph of the order, whereby the learned Single Judge has

directed the appellant to reinstate the petitioner by revoking the suspension and to settle all consequential benefits within four months by passing a reasoned and speaking order. Learned counsel for the appellant submitted that the learned Single Judge has granted all financial benefits to the respondent by which the power/authority of the employer under the law has been totally curtailed. A close and studied scrutiny of the order would clearly reveal that there is a direction for reinstatement. The same is beyond assail.

12. As far as second plank of submission of Mr. Zelawat is concerned, as is perceived, learned Single Judge has directed the employer to settle all consequential benefits by passing a reasoned and speaking order. The terms used in this direction are quite different than issuing a mandamus or a command to pay the arrears. Hence, the submission put forth by learned counsel for the appellant is sans substance. We hasten to clarify that discretion as per law still rests with the employer.

13. Consequently, we find no merit in this intra-court appeal and accordingly the same stands dismissed in limine.

Appeal dismissed.

I.L.R. [2008] M. P., 2218

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice A.M. Sapre

24 July, 2008*

GENERAL MANAGER, BANK NOTE PRESS, DEWAS

... Appellant

Vs.

BANK NOTE PRESS OFFICE STAFF ASSOCIATION,

DEWAS & ors.

... Respondents

Uchha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhinyam, M.P., 2005 (14 of 2006), Section 2(1), Industrial Disputes Act, 1947, Section 10 - Incentive Bonus - By scheme dated 01.09.77 not provided to employees working in Dispensary, Hospital, Estate, Office Staff and Canteen - Subsequently, on 01.07.82 aforesaid workers were granted 25% incentive bonus - Further, by circular dated 01.11.86 Canteen employees were granted 100% incentive bonus - The learned Single Judge found that there is no rationale to give different treatment and different percentage of incentive bonus to employees working in Canteen and Dispensary - Held - No perversity in the order - However, order of learned Single Judge granting interest on incentive bonus from 01.11.86 and not from initial date of scheme modified on ground of financial burden on employer and interest curtailed to 6% p.a. for period of 3 years. (Paras 22 & 23)

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का

14). धारा 2(1), औद्योगिक विवाद अधिनियम, 1947, धारा 10 - प्रोत्साहन बोनस - स्कीम दिनांकित 01.09.77 द्वारा डिस्पेंसरी, अस्पताल, सम्पदा, कार्यालयीन स्टाफ एवं कैंटीन में कार्यरत कर्मचारियों को नहीं दिया गया - तत्पश्चात् 01.07.82 को पूर्वोक्त कर्मचारों को 25 प्रतिशत प्रोत्साहन बोनस दिया गया - आगे परिपत्र दिनांकित 01.11.86 द्वारा कैंटीन कर्मचारियों को 100 प्रतिशत प्रोत्साहन बोनस दिया गया - विद्वान एकल न्यायाधीश ने पाया कि कैंटीन और डिस्पेंसरी में कार्यरत कर्मचारियों को प्रोत्साहन बोनस का भिन्न बरताव और भिन्न प्रतिशतता देने का कोई तर्कधार नहीं है - अभिनिर्धारित - आदेश में कोई विपर्यस्तता नहीं - तथापि विद्वान एकल न्यायाधीश का प्रोत्साहन बोनस पर 01.11.86 से न कि स्कीम के आरम्भ की तारीख से ब्याज देने का आदेश नियोक्ता पर वित्तीय भार के आधार पर परिवर्तित और ब्याज तीन वर्षों के लिए 6 प्रतिशत प्रतिवर्ष तक घटाया गया।

Case referred :

Brain Da'Silva with Vivek Patwa, for the appellant.

G.M. Chapekar with Manish Nair, for the respondents.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.:-**These two appeals preferred under Section 2(1) of the Madhya Pradesh Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for brevity 'the Act') being inter-linked and inter-connected were heard analogously and are disposed of by a common order.

2. In Writ Appeal No-24/2006 it is the writ petitioner in W.P.No-2242/2001 General Manager, Bank Note Press, Dewas, which has called in question the sustainability and substantiality of the order passed by the learned Single Judge.

3. In W.A.No.335/2006 the Bank Note Press Office Staff Association Dewas and another employee who were respondents in the writ petition being dissatisfied with and aggrieved by the modification of the award passed by the Industrial Tribunal by the learned Single Judge, have called the pregnability of the same in question.

4. In view of the aforesaid it is necessitous to adumbrate the factual matrix in a common canvas so that the points urged by both the parties in the appeals can be properly appreciated. The Bank Note Press, Dewas is a Government of India Undertaking registered under the Factories Act and is engaged in production, distribution, sale, etc. of various items. The factory has various sections such as Control, Printing, Plate Making, Store Workshop, Dispensary, Canteen, Estate Administration, etc. The employees are required to work overtime to augment the production. The Press is highly mechanized and individuals complement in the productive measures. With the view to increase production the Management introduced an incentive scheme on 01.9.1977. Under the said scheme certain incentives (bonus) were extended to the employees excluding the employees working in the Instate and Dispensary and Office Staff. The Bank Note Press Office Staff Association (hereinafter referred to as 'the Union') the appellant in

W.A.No.335/2006 being dissatisfied with the Scheme as it had excluded certain categories of employees raised an industrial dispute. The Conciliation Officer submitted a failure report to the appropriate Government which refused to refer the same for adjudication. Being aggrieved by the said action the Union preferred a writ petition vide W.P.No.255/1985 and by order dated 16-01-89 a Division Bench of this Court directed the appropriate Government to make a reference. The Government referred the dispute to the Industrial 'tribunal. Jabalpur for adjudication. The term of reference reads as under:

"Whether the demand of the workman working in Bank Note Press Dewas and represented by Bank Note Mudranalaya Shramik Sangh and Bank Note Office Staff Association for grant of incentive to office, Canteen, dispensary and Estate staff under Group incentive Scheme at par with etc. BNP with retrospective Staff from 3-9-1977 is Justified? If so, what relief the workmen are entitled and from what date?"

5. The Industrial Tribunal on the basis of the material brought before it and the evidence adduced came to hold that there is discrimination in respect of non-payment of the bonus (incentive) to the employees working in the Office, Estate Staff, Dispensary and Canteen and there is no justification for non-payment of bonus or less payment to the workers and accordingly passed the award in favour of the Union directing the Management to pay full bonus of Group Incentive Scheme to the said categories of employees with effect from 01.01.1978 within a period of three months with the further stipulation that if the amount was not paid within the aforesaid period the employees would be entitled to interest at the rate of 12% per annum on the aforesaid amount.

6. Being aggrieved by the aforesaid award, the General Manager, Bank Note Press knocked at the doors of this Court in a writ petition invoking jurisdiction of this Court under Article 226 of the Constitution of India contending, inter alia, that the award passed by the Tribunal is bereft of appropriate reasons: that there had been no discussion on the evidence and the documents brought on record to arrive at the conclusion that there was discrimination: that the scheme had been introduced on the basis of the recommendations of a private agency, namely. M/s.IBCON Pvt. Ltd. and the agency classified the workers between the industrial and non-industrial and as per their contribution in the production the bonus was granted as there was apposite and relevant classification: that the tribunal has grossly erred by concluding that there was discrimination: that the Central Administrative Tribunal at Jabalpur and Calcutta under the similar circumstances has rejected the payment of the employees working in the Office at par with the industrial workers working in the Factory.

7. The respondent-Union supported the award passed by the tribunal contending inter alia, that the Management itself had considered the dues of the workers working in the Office and had granted them the benefit of incentive

bonus of 25%: the canteen workers had been extended benefit of 100% at par with the industrial workers: that there is no rationale for discrimination and the classification made by the Management: that no expert was consulted prior to granting of benefit to the canteen workers; that the workers and the employees working in the Office are entitled to the same benefit which had been granted to the canteen workers. The learned Single Judge asserting the factual position referred to the report of M/s. IBCON Pvt. Ltd. and the acceptance of the report by the Government of India. The learned Single Judge analysed the object of the scheme the eligibility for group incentive scheme for Bank Note Press, Dewas. After stating so the learned Single Judge noted the facts that the expert agency had not granted incentive benefits to the employees working in the Dispensary, State and Staff of Canteen. He took note of the fact that by a subsequent notification the canteen employees had been given 100% incentive at par with direct workers who had been included in the category. The employees working in the Dispensary, Estate and Office Staff had been given only 25% incentive. Before grant of 100% incentive bonus to the Canteen employees, the expert agency M/s. IBCON Pvt. Ltd. had not been consulted, 'this factual position, be it noted, was not disputed, before the learned Single Judge by the Management. After stating the facts the learned Single Judge, as is manifest, addressed himself with regard to the rationale for grant of 100% incentive bonus to the canteen workers, 25% incentive bonus to the employees working in the Dispensary, Estate and Office Staff. The learned Single Judge by testing the justifiability of the award addressed himself with regard to the contribution of Canteen employees in production in comparison to the employees working in the Dispensary, State and Office Staff. He also took note of the fact of the data with regard to the total strength of the employees in the establishment which had been included in the incentive scheme which is 2000 out of which 45 had been working in the Canteen and about 300 had been working in the Dispensary, Estate and Office Staff.

8. It was admitted before the learned Single Judge that incentive bonus scheme is not the part and parcel of the regular wages because it has relation with enhancement of production and, therefore, criteria for grant of incentive bonus as per the Scheme depends upon participation of the employees for enhancement of production. The expert body employed by the Management granted benefit of incentive bonus to the employees on the foundation of their contribution and participation in production: The learned Single Judge referring to certain decisions and analyzing the factual matrix expressed the opinion that in the facts and circumstances of the case there is no rationale or cogent reasons to give differential treatment and different percentage of incentive bonus to the employees working in the Canteen and the employees working in the Office, Estate and Dispensary. Being of this view, the learned Single Judge did not accept the view expressed by the Central Administrative Tribunal, Jabalpur, in T.A.No. 116/80 and O.A.No.722/90 by the said Tribunal on the ground of factual difference

and in any case, grant of incentive bonus to the Canteen employees had not been considered. Being of this view the learned Single Judge concurred with the view expressed by the Industrial Tribunal that the employees are entitled to the incentive bonus with effect from 1-11-86 and not from the initial date of introduction of the scheme and further they would not be entitled to interest as directed by the tribunal.

9. We have heard Mr. Brain Da' Silva, learned Senior Counsel alongwith Mr. Vivek Patwa for the appellant in W.A.No.24/2006 preferred by the Management and Mr. G.M. Chapekar, learned senior counsel alongwith Mr. Manish Nair, Advocate for the appellant-Union in W.A.No.335/2006.

9. It is submitted by Mr. Brain Da' Silva, learned senior counsel appearing for the Management has raised the following contentions :-

(a) The learned Single Judge has fallen into grave error by not perceiving unmistakable difference between the productive unit and non-productive sector in the factory and expressed the opinion that there has been discrimination without any rationale and thereby concurring with the view expressed by the Industrial tribunal which entailed in fallacious conclusion.

(b) The learned Single Judge would have been well advised to hold that the workers in the canteen stand on a different footing and the staff in the office especially in the factory stand on a different pedestal and the concept of grant of incentive to the canteen workers in the form of bonus is something different and hence, the staff in the office cannot claim parity.

(c) The learned Single Judge should have taken note of the fact that the Central Administrative Tribunal had rejected the demand of employees, therefore, it would have been apt and appropriate to quash the order of the Industrial Tribunal.

(d) The Industrial Tribunal could have determined the fixation of incentive bonus as that is the functioning beyond the Expert Committee and as it has done that exercise the learned Single Judge should have dislodged the said award as it goes to the root of the matter instead of modifying it.

To bolster his submissions the learned senior counsel has commended us to the decisions rendered in *M/s. Titaghur Paper Mills Co. Ltd. Vs. Their Workmen etc.* AIR 1959 SC 1095, *M/s. Burn and Co. Ltd., Howrah Iron Works Howrah Vs. Their Employees and another*, AIR 1960 SC 896, *M/s. National Iron and Steel Co. Ltd. Belur Vs. The Workmen and another*, AIR 1963 SC 325, *Mukund Ltd. Vs. Mukund Staff & Officers' Association*, AIR 2004 SC 3905.

10. Mr. Chapekar, learned senior counsel alongwith Mr. Manish Nair.

Advocate for the Union has supported the order passed by the learned Single Judge as far as he has accepted the order of the tribunal with regard to the finding recorded by him that the office staff is entitled to incentive. Learned senior counsel in support of his appeal has submitted that there was no justification on the part of the learned single Judge to curtail the benefit restricting it from the date 01.11.1986. Learned senior counsel further submitted that there was no warrant not to grant interest which was extended by the tribunal in the absence of any kind of special reasons.

11. To appreciate the submissions raised at the bar we have carefully perused the order passed by the learned Single Judge and that of the tribunal. Before we dwell upon the finding recorded by the tribunal and affirmed by the learned Single Judge with regard to entitlement of the office staff on the bedrock of discrimination it is apposite to refer to certain decisions with regard to the jurisdiction of the tribunal for grant of relief, especially the incentive bonus in the factual backdrop.

12. In *Western India Automobiles Association Vs. Industrial Tribunal, Bombay and others*, AIR (36) 1949 federal Court III their Lordships have opined that the award of the tribunal may contain a provision for settlement of the dispute which no court could order if it was bound by ordinary law, but the tribunal is not fettered in any way by these limitations.

13. In *M/s. Titagurh Paper Mills Co.* (supra) the Constitution Bench has expressed the view on following terms:-

"(9).....The payment of production bonus depends upon production and is in addition to wages. In effect, it is an incentive to higher production and is in the nature of an incentive wage. There are various plans prevalent in other countries for this purpose known as Incentive wage Plans worked out on various bases, for example, Halsey Premium Plan, Haynes Munit System and Emerson Efficiency Bonus Plan: (see Labour Law by Smith, Second Edition, p-723). The simplest of such plans is the straight piece-rate plan where payment is made according to each piece produced, subject in some cases to a guaranteed minimum wage for so many hours work. But the straight piece-rate system cannot -work where the finished product is the result of the cooperative effort of a large number of workers each doing a small part which contributes to the result. In such cases, production bonus by tonnage produced, as in this case, is given. There is a base or standard above which extra payment is made for extra production in addition to the basic wage. Such a plan typically guarantees time wage up to the time represented by standard performance and gives workers a share in the savings represented by superior performance. But whatever may be the nature of the plan the payment in effect is an extra emolument for extra effort but in by workmen over the standard that may be fixed. That is the

reason why all these plans are known as Incentive Wage Plans and generally speaking have little to do with profits. The extra payment depends not on extra profits but on extra production. This extra payment calculated on the basis of extra production is in a case like the present where the payment is made after the annual production is known, in the nature of emoluments paid at the end of the year. Therefore generally speaking, payment of production bonus is nothing more nor less than a payment of further emoluments depending upon production as an incentive to the workmen to put in more than the standard performance. Production bonus in this case also is of this nature and is nothing and is nothing more than additional emolument paid as an incentive for higher production.....”

14. In the said case their Lordships dealt with the power of the tribunal as regards the delineation with regard to grant of bonus under the scheme and expressed the view as under:-

“10... .. We are, however, not called upon to decide in this case whether a demand for the introduction a production bonus scheme where there, was none before can be made a subject-matter of industrial dispute as defined in S. 2(k) of the Act or whether a scheme of production bonus can for the first time be imposed on the employer by a tribunal under the Act. The problem that is before us is whether the tribunal under the Act will have jurisdiction to deal with a production bonus scheme, in a concern where it has been introduced. The answer to this question depends upon the terms of the Act and not on the consideration whether the scheme can be initiated only by the employer in the first instance. In order that the tribunal may have jurisdiction all that is necessary is that an industrial dispute within the meaning of S.2(k) of the Act should exist, or be apprehended and there should be a reference of such dispute by the appropriate government to the tribunal under S.10. Now ‘industrial dispute’ has been defined in very wide terms in S.2(k) and for our purpose it means an dispute or difference between the employer and workmen which is connected with the employment or non-employment or the term of employment or with the conditions of labour of any person. We have already held that the production bonus scheme in this case is an incentive wage plan and what is paid under the scheme over and above the basic wage is supplementary emoluments depending upon annual production. A dispute arising about such an emolument clearly comes within the words “terms of employment”. As soon therefore as an employer introduces a production bonus scheme and the same is put in operation and the workmen accept it, it becomes a term of employment of the workmen working under him and any dispute with respect to such a

term of employment, is an industrial dispute and if it is referred to a tribunal under S. 10 as has been done in this case, it has jurisdiction under S.15 to deal with it. The argument therefore on his head must be reacted and it must be held that the tribunal had jurisdiction under the Act to deal with the scheme of production bonus which had been introduced in this company and was in force at all material times.

15. In the said case it has been further held as follows:-

"(12)... ..On a parity of reasoning, the Industrial Tribunal has the 'power under the Act to revise the production bonus scheme once it has been initiated. It will do so only for good and cogent reasons, such as a material change in method, product, tools, material, design, or production conditions, or a saving in labour cost and the like, maintaining as far as possible the established relationship between earnings and effort and avoiding rates which will give results out of all proportion to the basic wage... .."

16. In *M/s. Burn & Co.* (supra) it has been held as follows:-

"(4).....It is also true that the clerical staff and the subordinate staff do not directly produce goods like manual workers and that may be a reason for treating them somewhat differently in the matter of incentive bonus and that is what the tribunal seems to have done, for it has directed the company to extend the scheme of incentive bonus to the clerical and subordinate staff and to lay down the rates and conditions of the same and has not said that exactly the same rates and conditions should apply to the clerical and subordinate staff as apply to the manual workers. But there can be no doubt that economically speaking the clerical staff and the subordinate staff also take part in the production and there is no reason therefore for excluding them altogether from the scheme of incentive bonus. Besides, as the tribunal has pointed out, in other comparable concerns incentive bonus is being paid to the clerical and subordinate staff. The fact that dearness allowance was paid to the clerical staff at a higher scale is also, in our opinion, no reason for depriving them altogether of the benefits of the incentive bonus scheme."

(Emphasis supplied)

17. In *National Iron & Steel Co.Ltd.* (supra) the Apex Court has referred to its earlier decision rendered in *M/s. Titagurh Paper Mills Co.* (supra) and expressed the view that once a scheme of incentive bonus is introduced and such bonus becomes a condition of service of workmen the Industrial 'tribunal has the jurisdiction to vary the terms of the scheme enforced by the employer including the rate of bonus. After reiterating the said view their Lordships held that when the tribunal has adequate data for judging what would be reasonable and proper targets from the point of view of both the employers and the employees and what would be the reasonable

rates of incentive bonus, it can so do. As in the said case there was no proper material the Apex Court opined that in the absence of the appropriate material the award passed by the 'tribunal deserves to be quashed. Be it noted that in the said case the Apex Court opined that ordinarily the rate of incentive bonus is co-related to the target and that is the question to be decided by the tribunal. In the said case their Lordships further proceeded to state which we think apt to reproduce:-

"(22) We may further point out that in *Burn & Co.'s case*, 1960-3 SCR 423: (AIR 1960 SC 896) the Tribunal did not proceed to lay down the rate of incentive bonus to the clerical and subordinate staff but merely directed the company to extend the scheme to them and lay down the rates and conditions for those classes of workmen to be entitled to get the incentive bonus. This Court has impliedly approved this direction. Indeed, bearing in mind the principle that initially the whole question of incentive bonus involving the fixation of targets, prescribing rates, and laying down other conditions is the function of the management, we have no doubt that the course taken by the Tribunal in *Burn & Co.'s case*, 1960-3 SCR 423 : (AIR 1960 SC 896) was the proper one."

18. In *Western India Watch Co. Ltd. Vs. Their Workmen*, AIR 1964 SC 472 the Apex Court while dealing with the issue whether the employer is required to pay the production bonus to the workman-employees in the sales office expressed the view as under:-

"9.....It is enough to mention that among the many tests that have been evolved, functional integrality, inter-dependence, or community of financial control and management, community of man-power and of its control, recruitment and discipline, the manner in which the employer has organized the different activities, whether he has treated them as independent, of one another or as inter-connected and inter-dependent, enjoy pride of place. But this list is by no means exhaustive."

19. In the said case their Lordships further proceeded to state that the tests and principles that have been laid down cannot be applied mechanically or by way of syllogism. Their Lordships after discussing the various facets that the production bonus scheme should be extended to the Sales Office Staff remanded the matter to the tribunal for decision after taking all relevant facts whether the production bonus scheme in force in the factory and the factory staff should be extended to the Sales Office Staff with or without modification. The remit was directed as certain factual aspects were to be dealt with relating to salary paid to the office staff and other benefits but as a principle it was held that the scheme should be extended to the Sales Office Staff.

20. In *Hindustan Steel Ltd. Vs. The Presiding Officer, Industrial Tribunal*

and another. AIR 1975 SC 1114 the Apex Court referred to the decision rendered in *M/s. Burn Standard Co. Ltd.* (supra) opined that when the scheme in question is called a productive incentive scheme and the benefit of the scheme has been extended to the Sewage Treatment Plant workers, the workers of the scrap and the workers of the Salvage Department, Time Keepers and Time Checkers and such other categories of workers with regard to whom it is not quite clear in what sense they are said to contribute to the production, the bus drivers employed by the company were entitled to the benefit of scheme as the bus drivers driving the bus may be taken to the plant as a truck drivers.

21. We would be failing in our duty if we do not take note of the decision rendered in *Mukund Ltd.* (supra) on which the learned senior counsel has placed immense emphasis. On a perusal of the said judgment we have no scintilla of doubt that the said decision does not assist the learned counsel for the appellant-employer as the factual matrix is absolutely different, in the case at hand the matter relates to the conferral of benefit of incentive bonus because of the introduction of the scheme by the employer but in the case which was the subject-matter before their Lordships pertained to the grant of basic wages to the workman as well as non-workman. It is seemly to state here that the same is not the issue here. Accordingly, we distinguish the said decision.

22. From the aforesaid pronouncements of law the principles that can be culled out are that once the employer has introduced a bonus production scheme and the same is put in operation it becomes a term of employment of the workmen working under him; that the production bonus is an additional emolument as an incentive for higher production; that the Industrial Tribunal has the jurisdiction to deal with the scheme once it is introduced by the employer; that the tribunal has the power to revise the production bonus scheme once it has been initiated on certain cogent grounds like material change in method, product, tools, material, design, etc. that there is distinction between the Fixation of rate of incentive bonus by the tribunal and issue of a direction to extend the scheme relating to bonus and economically speaking the clerical staff and the subordinate staff also take part in the production and there is no reason for excluding them from the scheme of the incentive bonus; and that the Industrial Tribunal has the jurisdiction to issue a direction to the employer to grant the benefit of the scheme to the clerical staff and subordinate staff.

23. The present factual matrix is to be tested on the anvil of the aforesaid principles. It is unmistakably clear from the factual exposition that in June, 1975 *M/s. IBCON Pvt. Ltd.*, a Firm of Industrial and Business Consultants was engaged by the appellant-employer to carry out the time and motion study and formulate an incentive scheme to boost the production. The said consultant company submitted its report and the Government of India accepted the same. The said scheme was introduced to increase production. The said Committee further proposed to help the workers earn additional monetary benefits without working

for more than 9 hours per day and to discourage the absenteeism amongst the workers. The scheme covered various other categories of employees, namely, Direct Industrial Workers of the Printing, Control Department and Ink Factory, Essential Indirect workers of the Workshop, Stores (Security, Non-security and Ink Factory Stores) and Time Keeping Office (Head Time Keepers only). Supervisory staff on the shop floor who are observing the same working hours and holidays as the factory and whose presence throughout is necessary for efficient working of the industrial workers, Non-essential indirect workers of the Canteen, Dispensary Hospital, Estate and Office. Initially, the employees working in Dispensary, Hospital, Estate, Office Staff and Canteen were not included in the incentive bonus scheme but subsequently vide notification dated 01.7.82, the aforesaid workers were granted 25% incentive bonus and included in the scheme. By further notification dated 1.11.86 the canteen employees were granted 100% incentive bonus and added as an essential indirect workers treating them at par with the direct workers and essential indirect workers. The learned Single Judge has taken note of the fact that the consulting agency had not recommended for grant of any incentive bonus to the employees working in the Dispensary, Estate, Official Staff and Canteen but by subsequent notification the canteen employees and other categories of employees were included and granted 25% incentive and thereafter 100% incentive bonus to the canteen employees though the expert agency was not consulted.

24. Submission of Mr. Da' Silva, learned senior counsel is that the canteen workers stand on a different footing than the Dispensary, Estate and Official staff. It is urged by him that the classification is correct and the tribunal has grossly erred by putting him in the same pedestal. It is contended by him that the canteen employees have been given 100% benefit but subsequently notified as industrial workers by the government. The Industrial Tribunal, as is manifest, has expressed the opinion that the contribution of the canteen employees in comparison to the employees working in Dispensary, Estate and Official Staff cannot be made and the said class cannot be put on a higher pedestal. The tribunal has adverted to the factual matrix and come to hold that the employees who are working in the canteen are serving meals or sweeping and cleaning the floor of the canteen. They are admittedly not directly related with the production. The employees who are working in the Dispensary, Estate and Official Staff have some nexus with the production, keeping in view the role ascribed to them and comparing them with the canteen workers. It is worth noting that initially the canteen workers and the workers working in Dispensary, Estate and Official Staff were extended the benefit of 25%. Thereafter, the canteen workers have been given 100% bonus with effect from 1.11.86 but the other categories were denied. As has been held by the Apex Court in *M/s. Burn Standard & Co. Ltd.* (supra) there can be no doubt that economically speaking the clerical staff and the subordinate staff also take part in the production and there is no reason therefore for excluding them

altogether from the scheme of incentive bonus. Their Lordships have opined in *National Iron & Steel Co. Ltd.* (supra) that the tribunal can direct the employer to extend the scheme to a particular categories of workmen to get the bonus. Here the facts are tale tell. The employer extended the benefit to the canteen workers and to the workman in the Dispensary, Estate and Official Staff. They were treated at par. The expert body had not included the said categories, 'the employer in its wisdom and extended the benefit of incentive bonus scheme to them at 25%. What could have been the rate is a different matter, but a pregnant and significant one, later on the canteen workers were extended the benefit of 100% from 01.11.86. A classification is sought to be drawn on the foundation that they have been included as they have been notified as industrial workers by the government. It is clear from various judgments which we have referred to above that under the incentive bonus scheme the workers got the emoluments on certain basis. The only reason ascribed is that the canteen workers later on have been notified as industrial workers. Nothing has been brought on record that the Dispensary, Estate and Official Staff are not the workmen and ceased to be the workmen. The learned Single Judge has referred to the concept of Articles 14 and the equality clause as has been laid down by the Apex Court in the case of *State of Mysore Vs. P.Narsinga Rao*. AIR 1968 SC 349. *M.P. Rural Agriculture Extension Officers Association v. State of M.P. and another*, (2004) 4 SCC 646 and opined that there is no rationale to give differential treatment and different percentage of incentive bonus to the employees working in canteen and employees working in the Dispensary, Estate and Official Staff. In our considered opinion the analysis made in that regard is absolutely justified as it meets the normative paradigm.

25. Another aspect which has been highlighted by Mr. Brain Da' Silva, learned counsel for the appellant-employer is that the Central Administrative Tribunal, Calcutta Bench in certain original applications had rejected the same relief and, therefore, the Industrial Tribunal could not have dwelled into it. The learned Single Judge in the order impugned has addressed itself to the same and come to hold that in the said case the grant of incentive bonus to the canteen employees has not been considered. The learned Single Judge has opined by placing reliance on the decision rendered in *Union of India Vs. Chaju Ram*, (2003) 5 SCC 568 that the decision is an authority for what it decides and not what can logically be deduced therefrom. That apart, the Industrial Court has dealt with the jurisdictional faces and the facts in issue and recorded a finding. Nothing has been brought on record that there had been similar adjudication or delineation. The tribunal has appreciated the material which constituted ample and sufficient base for recording the findings. The approach undertaken by the tribunal is absolutely objective and findings recorded by it clearly exposit reasonableness. There is no perversity of approach. Hence, perceive no error in the conclusion that the Dispensary, Estate and Official Staff cannot be treated differently than the canteen staff.

26. Presently to the modification of the order of the tribunal by the learned Single Judge. The learned Single Judge has modified the award passed by the tribunal to the effect that the Dispensary, Estate and Official staff would be entitled to the incentive bonus at par with the canteen employees and from the same date with effect from 1.11.86 and not from the initial date of introduction of the scheme. The learned Single Judge has held that the employees would not be entitled to any interest on the amount which is payable to them as per the direction given by the tribunal. The learned Single Judge has further clarified that no direction should be issued to the canteen employees as they have already given the benefit. Submission of Mr. Chapekar is that when the reference is to the effect whether the Office, Canteen, Dispensary and Estate Staff under Group Incentive Scheme at par with other employees should get the benefit from 03.9.1977 and the tribunal had granted full benefits with effect from 01.1.78 with 12% interest per annum there was no justification on the part of the learned Single Judge to modify the same. It is worth noting that the employer had extended 25% to all categories of workers on its own. 100% incentive bonus was given to the canteen employees from 1.11.86. This is so because the scheme was introduced by the employer on its own. The reasoning of the tribunal to grant it from 1.1.78 is neither just nor proper because the employer had accepted 25% initially. The distinction between the canteen workers and others state only came into fore front on 1.11.86 when the canteen workers were given 100% bonus. The tribunal in its wisdom should have given interest from that date and not from the prior date. Thus, we do not find any error in the said modification by the learned Single Judge.

27. As far as deletion of interest in toto in concerned submission of Mr. Chapekar is that the learned Single Judge has fallen into grave error by opining that the employees would not be entitled to any interest on the amount which is payable to them despite the direction for payment of incentive bonus with effect from 01.11.86. Submission of Mr. Chapekar is that the High Court was not sitting in appeal and when the tribunal had granted interest the learned Single Judge could not have totally annihilated it inasmuch as by such deletion of interest injustice has been caused. On a First blush the aforesaid submission of Mr. Chapekar, learned senior counsel looks quite attractive but on a keener scrutiny it pales into insignificance. Interference by the High Court in exercise of Article 226 of the Constitution as regards denial fact or findings based on material evidence is different than passing an order which strikes a balance or moulds a direction by taking note of various factors. True it is the learned Single Judge has not ascribed reasons but in an intra-court appeal certain facts can be taken note. The employer itself had introduced a scheme and under the erroneous impression it opined that the canteen workers stand on a different footing. It has come out on record that the canteen workers are 45 in number and Dispensary, Estate and Official Staff are more than 300. 'the employer had been misguided by some notion of productive sector and non-productive sector without being guided by the facet that clerical staff and

official staff have a role to play in the production and further there was no reason to discriminate between the canteen workers and the workers working in Dispensary, Estate and Official Staff. The Industrial Disputes Act is a piece of legislation which has been brought into existence for industrial harmony. The collective and the individual interests are to be balanced. The grant of interest from 1.11.86 to all the workers would cause heavy financial burden on the employer, there is no mandatory and statutory provision to grant interest. In view of the aforesaid the writ court can curtail the relief and that would not tantamount to interfering in the question jurisdictional fact which is based on ample of evidence or material fact.

28. The question then would be whether the total denial of interest would be absolutely just and proper or there should be balancing direction by the writ court. In a case of this nature, we are disposed to think is that a balance should have been struck. The total denial of interest by the learned Single Judge, as we perceive, does not exposit a balancing phenomenon. We are inclined to grant interest at the rate of 6% per annum for a period of three years on the accrued incentive bonus as that would sub-serve the cause of justice. We have so thought regard being had to the facts which we have mentioned hereinabove.

29. In the result, the writ appeal preferred by the employer stands dismissed and the writ appeal filed by the workmen is allowed in part. There shall be no order as to costs.

Writ appeal dismissed.

I.L.R. [2008] M. P., 2231

WRIT PETITION

Before Mr. Justice R.S. Jha.

16 January, 2008*

HARI KRISHNA VERMA

Vs.

THE DISTRICT AND SESSIONS JUDGE & ors.

... Petitioner

... Respondents

Constitution, Article 311 - Compulsory Retirement - Scope of interference - Petitioner remained absent without leave unauthorisedly and thereafter did not join at his transferred post in spite of receiving instructions - Held - The conduct of petitioner is not becoming that of an employee and that it has resulted in loss of faith, trust and loss of confidence in him - Punishment of compulsory retirement is not harsh or grossly disproportionate - Order does not suffer from any kind of perversity or wednesbury unreasonableness - Petition dismissed. (Paras 7 & 8)

संविधान, अनुच्छेद 311 - अनिवार्य सेवानिवृत्ति - हस्तक्षेप का विषयक्षेत्र - याची बिना अवकाश के अनधिकृत रूप से अनुपस्थित रहा और उसके पश्चात् अनुदेश प्राप्त होने के

बावजूद अपने स्थानांतरित पद पर कार्यभार ग्रहण नहीं किया – अभिनिर्धारित – याची का आचरण एक कर्मचारी की तरह नहीं है और इसके परिणामस्वरूप उसने निष्ठा, विश्वसनीयता और विश्वास खो दिया – अनिवार्य सेवानिवृत्ति कठोर या अत्यधिक अनुपातहीन नहीं है – आदेश किसी प्रकार की विपर्यस्तता या वेड़नेसबरी अयुक्तियुक्तता से ग्रसित नहीं है – याचिका खारिज।

Cases referred :

(1999) 7 SCC 739, (2007) 1 SCC 222.

Ramesh Shrivastava, for the petitioner.

A.P. Shrotri, for the respondents.

ORDER

R.S. JHA, J.:—The petitioner has filed this petition being aggrieved by order dated 2.4.1993 passed by The District and Sessions Judge, Shivpuri, compulsorily retiring him from service, and order dated 29.6.1994 rejecting the appeal filed by the petitioner against the said order.

2. The facts in brief are that the petitioner was initially appointed as Lower Division Clerk on 25.9.1972 and was posted at Shivpuri. On 17.5.1977 he was posted as Lower Division Clerk in the Court of Civil Judge, Class-II, Pohri. He was granted adhoc promotion as Upper Division Clerk on 18.7.91 and was transferred from Pohri to Pichhore as Reader to the Court of Additional District Judge on 24.7.91. The petitioner did not join his place of transfer and applied for leave. He remained on leave till 27.9.91. When he reported for duty at Pohri he was relieved on 4.10.91 and directed to join at his place of transfer at Pichhore. The petitioner joined his transferred place of posting on 21.10.91 and thereafter from 23.10.91 went on unauthorized leave. As services of a Reader were urgently required, the Additional District Judge, Pichhore requested for a replacement of the petitioner vide his letter dated 30.11.91 and on 16.1.92 one Shri Ashok Sharma was transferred in his place and he joined as Reader to the Court of Additional District Judge, Pichhore. As the petitioner did not report on duty inspite of repeated reminder/letters written by the Additional District Judge, he was reverted to the post of Lower Division Clerk vide order dated 9.1.92 and by another order of the same date he was transferred as Execution Clerk in the Court of District Judge, Shivpuri. Thereafter, the petitioner reported at Pichhore on 27.1.92 on which date the Additional District Judge, Pichhore did not permit him to join and directed him to join his transferred present place of posting at Shivpuri.

Admittedly, the petitioner did not do so and sought clarification from the Registrar General, High Court of M.P., vide letters dated 26.2.92 and 23.3.92. The District Judge, Shivpuri again directed the petitioner to join his place of posting, but the petitioner did not do so on the ground that no order of transfer had been served on him, though, admittedly he had been informed that he had been reverted and transferred to Shivpuri. As the petitioner did not comply with the order of transfer or the clarification and notices issued by the District Judge, Shivpuri dated 26.2.92 and 23.3.92, a notice of suspension and a charge sheet dated 28.4.92 was served upon him.

3. After conducting a full fledged Departmental Enquiry, a punishment of

compulsory retirement was imposed upon the petitioner vide impugned order dated 2.4.93. The appeal, filed by the petitioner against the order of punishment, also suffered dismissal vide order dated 29.6.94. Hence this petition.

4. It is submitted by the learned counsel for the petitioner that the petitioner was on leave till January 1992 and the order of reversion and transfer was passed while the petitioner was on leave and, therefore, as the said orders were not served upon him and inspite of seeking clarification, no specific direction was issued by the authorities to join at Shivpuri, the petitioner did not do so. It is submitted that this factual aspect has not been appreciated by the Disciplinary and Appellate Authority in its proper perspective and, therefore, the impugned orders suffer from perversity and deserve to be set aside. It is further submitted that the punishment of compulsory retirement for remaining absent unauthorizdly is patently shocking and apparently disproportionate to the alleged misconduct and, therefore, deserve to be set aside.

5. Per contra learned counsel for the respondents, submitted that the charges leveled against the petitioner were (i) that he remained absent without leave unauthorizdly for the period from 27.2.92 to 2.4.93; (ii) That the past record of the petitioner which demonstrated that the petitioner had earlier also remained absent unauthorizdly in the year 1974-75 and 1975-76 indicated that he was in the habit of doing so; and (iii) that the petitioner willfully and knowingly disobeyed the direct instructions of the District Judge issued on 28.2.92 to join his services at Shivpuri. It is submitted that the Disciplinary Authority has given full opportunity of hearing to the petitioner and permitted him to lead evidence, on the basis of which the Authority has found all the 3 charges proved against the petitioner. It is also stated that from a perusal of the reply filed by the petitioner it is apparent that the petitioner admittedly remained absent without leave or authorization from 27.2.92 till the date of the impugned order of punishment without filing any application or requesting for leave and that till the very end the petitioner did not comply with the direct orders of the District Judge, Shivpuri, directing him to join services at Shivpuri. It is submitted that the Disciplinary Authority, after looking into all the facts and documents brought on record, has recorded a finding against the petitioner in respect of all the 3 charges and as this Court does not sit in appeal over departmental proceedings and as the present case is not one of absence of facts or non-consideration of material evidence, the impugned orders do not call for any interference.

6. The learned counsel for the respondents has further submitted that looking to the conduct of the petitioner i.e. not complying with the order of transfer, remaining absent without authorization and disobeying direct instructions issued by the District Judge, Shivpuri, the punishment imposed upon the petitioner cannot, by any stretch of imagination, be said to be disproportionate warranting interference by this Court under Article 226 of the Constitution of India.

7. In the present case, as is apparent from a perusal of the replies filed by the

petitioner to the charge-sheet as well as his memo of appeal, it is clearly established without any shadow of doubt that the petitioner remained absent without leave unauthorizedly from 27.2.92 onwards and inspite of having been told that he had been transferred from Shivpuri and inspite of receiving instructions for joining his place of posting on 28.2.92, he did not do so on the pretext that he had some family problems and that the order of transfer was not served upon him.

8. In the circumstances, the present case is not one of no evidence nor can it be held that the impugned orders suffer from any kind of perversity or wednesbury unreasonableness which are the only ground on which this Court can interfere in departmental proceedings as has been held by the Supreme Court in the case of *Yoginath D. Bagde vs. State of Maharashtra and Another*, reported in 1999 (7) SCC 739.

9. It is also clear from a perusal of the record that the charges have been found proved against the petitioner and it has been established that he has not complied with the order of transfer, that he has remained on leave unauthorizedly and that he has not complied with the direction issued by the District Judge, Shivpuri even till the end of the Departmental Proceedings and, therefore, apparently the conduct of the petitioner is not becoming that of an employee and that it has resulted in loss of faith and trust as well as loss of confidence in him and, therefore, in my considered opinion, the punishment of compulsory retirement cannot be said to be harsh or grossly disproportionate. I find support in this view from the judgment of the Supreme Court in the case of *A. P. SRTC vs. Raghuda Siva Sanikar Prasad* reported in (2007) 1 SCC 222.

10. In view of the above, I do not find any merit in the petition which is accordingly, dismissed. In the peculiar facts and circumstances of the case there shall be no order as to the costs.

Petition dismissed.

I.L.R. [2008] M. P., 2234

WRIT PETITION

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

21 January, 2008*

SHISHIR RAIZADA

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

Constitution, Article 226 - Transfer - Malafides - Employee is required to place on record strong and clinching material in support of his plea of malafides - Transfer order of petitioner issued by Director - No malafides alleged against him - Petitioner failed to place on record any cogent material in support of his plea of malafides - Petition dismissed. (Para 7)

संविधान, अनुच्छेद 226 – स्थानांतरण – असदभाव – कर्मचारी को असदभाव के अपने अभिवचन के समर्थन में ठोस और स्थिर सामग्री अभिलेख पर रखना अपेक्षित है – याची का स्थानांतरण आदेश संचालक द्वारा जारी – उसके विरुद्ध तथाकथित कोई असदभाव नहीं – याची असदभाव के अपने अभिवचन के समर्थन में कोई तर्कपूर्ण सामग्री अभिलेख पर रखने में असफल रहा – याचिका खारिज।

Cases referred :

(2004) 11 SCC 402, 1995 Supp (2) SCC 151, (1993) 1 SCC 148, (1986) 1 SCC 133, 1993 Supp (4) SCC 46, (1986) 4 SCC 131, 1991 Supp (2) 659, (1993) 4 SCC 357, (1995) 2 SCC 532, (2001) 8 SC 574.

Sujoy Paul with Akash Choudhary, for the petitioner.

Dharmendra Sharma, A.S.G., for the respondent No.1 to 3.

Respondent No.6 in person.

ORDER

The Order of the Court was delivered by **Prakash Shrivastava, J.** :-Petitioner, who was working as Principal Systems Analyst (Scientist D), was transferred vide order dated 9.8.05 from N.I.C. Seoni District Center to N.I.C. Panna District Center.

2. Challenge to the said transfer order was made by the petitioner before the Tribunal by filing O.A.No.296/06 which was dismissed by the Tribunal vide order dated 15.11.07. The present writ petition has been filed impugning the order of Tribunal amongst others.

3. Counsel for the petitioner has raised the argument that the impugned order of transfer has been passed in the malafide exercise of power and that the plea of malice can be found in paragraph 5.3, 5.5 and 5.6 of the writ petition. His further contention is that there was no reply to paragraph 4.15 of the O.A. by the concerned respondent no.4 against whom the malafides were alleged in the said paragraph. He has also argued that the petitioner is suffering from mal-absortion syndrome and if he is transferred from Seoni to Panna he may not be able to get the proper treatment.

4. In response to the above counsel for the respondents has pointed out that the order dated 9.8.05 has been passed as a consequence of petitioner's promotion from Scientist C (Senior Systems Analyst) to Scientist D (Principal Systems Analyst), thus his contention is that the impugned order dated 9.8.05 is infact a posting order having been issued consequent to the promotion of the petitioner.

5. So far as the plea of malafide is concerned, apart from making vague allegations in the writ petition the petitioner has failed to place on record any cogent material in support of the said plea. The impugned order dated 9.8.05 has been passed by the Director (Pers. & Lit.) against whom no malafides have been alleged. Petitioner's reliance on communication of the Collector dated 9.6.05, annexure A/4 also does not carry his case any further since there is nothing on

record to connect the said communication with the order of transfer. The said plea of the petitioner even otherwise is bereft of merit since the opening paragraph of the transfer order dated 9.8.05 itself states that the order was passed consequent to the promotion of the petitioner from the post of Scientist C (Senior Systems Analyst) to Scientist D (Principal Systems Analyst). A perusal of the impugned order also shows that the same has been passed in public interest and on the existing terms and conditions of the petitioner's appointment.

6. Tribunal while dealing with the plea of malafides has rightly come to the following conclusion in para 10 of its order :

"In this regard we have perused the decisions rendered in 2006(5) Supreme Today 92 - *P.K.Jha Vs. State of Jharkhand* and 2005(8) SCC 760 - *Union of India V. Ashok Kumar* wherein the Hon'ble Supreme Court has clearly held that it is well settled that whenever allegations of malafide has been alleged sufficient and cogent material making out prima facie case must be set out in the pleadings. The plea of malafide advanced on behalf of the applicant is not very much convincing. Merely on the ground that the respondent no.4 has not filed any counter reply denying the allegations contained in the Original Application would not reach to the conclusion that whatever has been stated therein is gospel truth. The allegations of malafide are not supported by any material document it is true that the person against whom malafide has been alleged has been made a party in the proceedings but at the same time the plea of malafide must be specific. The burden is very heavy on the person who alleges malafide and malafide can be established either by direct evidences or can be deduced from proved facts.

7. It is the settled law that so far as the challenge to the transfer order on the ground of malafides is concerned, the employee concerned is required to place on record strong and clinching material in support of his plea of malafides.

8. While dealing with the challenge to transfer order on the ground of malafide Supreme Court in the case of *State of U.P. and others V. Gobardhan*, ((2004)11 SCC 402) has held that

"8..... even allegations of malafides when made must be such as to inspire confidence in the court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures and surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer".

9. In *State of U.P. and another V. V.N.Prasad*, 1995 Supp(2) SCC 151 the Supreme court has expressed that the presumption is in favour of the bona fides or the order unless contradicted by acceptable material. Strong and convincing evidence is required to establish the plea of malafides. The view of the Supreme

Court in *Rajendra Roy V. Union of India*, 1993(1) SCC 148 is that it may not be always possible to establish malice in fact in a straight cut manner. In an appropriate case, it is possible to draw reasonable inference of malafide action from the pleadings and antecedent facts and circumstances but for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestion.

10. In the present case, we find that the petitioner has failed to place on record strong and convincing material in support of his plea of malafides and the allegations made by him in the writ petition do not inspire confidence.

11. Judgments of Apex court in the matter of *Express Newspaper Pvt. Limited and others V. Union of India and others* ((1986) 1 SCC 133) and *Naseem Bano (Smt.) V. State of U.P. and others*, 1993 Supp (4) SCC 46, cited by the counsel for the petitioner are of no help to him for the reasons that no material in support of the plea of malafides is on record except for the vague allegations in the writ petition. Thus, we find no merit in the petitioner's challenge to the transfer on the ground of malafides.

12. So far as the other ground of challenge relating to ailment of the petitioner is concerned, there is nothing on record to indicate that the petitioner would get better treatment at Seoni or at Panna. Since the order dated 9.8.05 is passed in public interest and on the existing terms and conditions of the appointment of the petitioner, the same is in accordance with law, hence no interference is required.

13. Supreme Court in the matter of *B. Varadha Rao. V. State of Karnataka and others*, (1986)4 SCC 131, *Shipli Bose (Mrs.) and others V. State of Bihar and others*, 1991 Supp (2) SCC 659, *Union of India and others V. S.L. Abbas*, (1993)4 SCC 357, *Chief-General Manager (Telecom) N.E. Telecom Circle and another V. Rajendra CH. Bhattacharjee and others*, 1995(2) SCC 532, and *National Hydroelectric Power Corporation Ltd. V. Shri Bhagwan*, (2001)8 SCC 574 has laid down that transfer of a Government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service. No Government servant can claim to remain in a particular place or in a particular post unless his appointment itself is to a specified, non-transferable post. It has further been laid down that if the transfer order has been issued by the competent authority which did not violate any mandatory rule the interference by the Court in such transfer order is not required. Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order; instead affected party should approach the higher authorities in the department. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by malafides or is made in violation of any statutory provisions, the court cannot interfere with.

14. The petitioner's case does not fall in any of the grounds for interference in

the transfer matter, which have been laid down by the Supreme Court in the aforesaid judgments, hence the impugned order passed by the competent authority cannot be interfered with.

15. No other ground of challenge has been raised by the petitioner. For the reasons aforesaid the writ petition is dismissed. However, no orders as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 2238

WRIT PETITION

Before Mr. Justice R.K. Gupta

29 January, 2008*

SUSHIL KUMAR KANUNGO & ors.

... Petitioners

Vs.

M.P. RAJYA SAHKARI BANK MARYADIT & ors.

... Respondents

A. Cooperative Societies Act, M.P, 1960 (17 of 1961), Section 55 & 64, Staff Service Rules, 61 & 62, State Cooperative Tribunal Regulations, 2000, Regulation 31, Civil Procedure Code, 1908, Order 6 Rule 17 & Order 41 Rule 33 - *Termination - Amendment of Written Statement - Petitioners employees of Cooperative Bank registered under the Act, 1960, terminated from service - Joint Registrar setting aside the order of termination on the ground of non-observance of principles of natural justice - Both petitioners and respondents filed appeal before the Cooperative Tribunal and the appeal by respondents withdrawn - Respondent carrying out extensive amendment in the written statement at the stage of appeal before the Cooperative Tribunal - Cooperative Tribunal allowed the amendment, hence the writ petition by the petitioners for setting-aside the order allowing the amendment - Held - The object of allowing an application for amendment is to minimize the litigation and as the Joint Registrar had given liberty to the respondents to pass appropriate orders in accordance with the regulations, no prejudice would be caused to the petitioners if the amendment is allowed as the petitioners again would have challenged their termination which may ultimately result into the fresh litigation - Petition dismissed.* (Paras 10 & 11)

क. सहकारी सोसायटी अधिनियम, म.प्र., 1960 (1961 का 17), धारा 55 व 64, कर्मचारी सेवा नियम, 61 व 62, राज्य सहकारी अधिकरण विनियम, 2000, विनियम 31, सिविल प्रक्रिया संहिता, 1908, आदेश 6 नियम 17 व आदेश 41 नियम 33 - सेवा समाप्ति - वादोत्तर में संशोधन - अधिनियम, 1960 के अधीन पंजीत बैंक के कर्मचारी याची की सेवा समाप्ति - संयुक्त रजिस्ट्रार ने नैसर्गिक न्याय के अपालन में सेवा समाप्ति का आदेश अपास्त किया - याची व प्रत्यर्थी दोनों ने सहकारी अधिकरण में अपील पेश की तथा प्रत्यर्थी ने अपील वापस ली - सहकारी अधिकरण के समक्ष प्रत्यर्थी द्वारा अपील में व्यापक संशोधन प्रस्तावित किये - अधिकरण ने संशोधन मंजूर किया, तब याची द्वारा संशोधन स्वीकार करने वाले आदेश को अपास्त करने याचिका

पेश की - अभिनिर्धारित - संशोधन आवेदन स्वीकार करने का आदेश मुकदमेबाजी कम करना है एवं संयुक्त रजिस्ट्रार द्वारा प्रत्यर्थियों को विनियम के अनुरूप उचित आदेश पारित करने की छूट दी गई थी, याची को संशोधन स्वीकार करने से कोई प्रतिकूल प्रभाव नहीं होगा क्योंकि याची पुनः अपने सेवा समाप्ति आदेश को चुनौती दे सकते थे जो अन्ततः नये मुकदमे में परिणित होगा - याचिका खारिज।

B. Civil Procedure Code (5 of 1908), Order 41 Rule 33 - Power of Appellate Court - *The appellate court has been conferred with the power not withstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, then appellate court in exercise of powers vested under Order 41 Rule 33 can pass an order in favour of the respondents or parties although the respondents have not preferred any appeal or objection.* (Para 13)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 33 - अपील न्यायालय की शक्तियाँ - अपील न्यायालय को शक्ति दी गई है जिसका प्रयोग न्यायालय द्वारा इस बात के होते हुए भी किया जा सकेगा कि अपील डिग्री के केवल भाग के बारे में है और यह शक्ति सभी प्रत्यर्थियों या पक्षकारों या उनमें से किसी के भी पक्ष में प्रयोग की जा सकेगी यद्यपि ऐसे प्रत्यर्थियों या पक्षकारों ने कोई भी अपील या आक्षेप फाइल न किया गया हो तब अपील न्यायालय आदेश 41 नियम 33 के अधीन प्राप्त शक्तियों का प्रयोग कर प्रत्यर्थियों या पक्षकारों के पक्ष में आदेश पारित कर सकती है यद्यपि प्रत्यर्थियों ने कोई अपील या आक्षेप दाखिल न किया हो।

C. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Principles - *Amendment of plaint & amendment of written statement are not necessarily governed by exactly the same principles though some general principles are common to both but the rule that the plaintiff cannot be allowed to amend the pleadings so as to alter materially or substitute his cause of action of the nature of his claim as necessarily no counter part in law related to written statement - The courts are inclined to be more liberal in allowing the amendment of the written statement than of plaint and question of prejudice is less likely to operate on the same rigour in the former than the latter.* (Para 17)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 - सिद्धांत - वाद में संशोधन व वादोत्तर में संशोधन अनिवार्य रूप से समान सिद्धांतों से नियंत्रित नहीं होते तथापि कुछ सामान्य सिद्धांत दोनों में समान हैं किन्तु यह सिनयम कि वादी को अभिवचन में ऐसा संशोधन की अनुमति नहीं दी जा सकती जो वाद हेतुक या वाद प्रकृति को परिवर्तित या प्रतिस्थापित करे, वादोत्तर के संबंध में कानून में कोई प्रतिरूप नहीं है - न्यायालय वादपत्र की अपेक्षा वादोत्तर में संशोधन मंजूर करने में ज्यादा उदार होती है एवं प्रतिकूल प्रभाव का प्रश्न भी वादोत्तर में वादपत्र से कम शक्ति प्रभावशील होता है।

D. Change in Government - Effect - *Merely because there had been a change in the political scenario does not mean that an unauthorized act can be legalized and new body coming shall have no power to check the action to correct the unauthorized act of the earlier body.* (Paras 25 to 27)

घ. सरकार में परिवर्तन — प्रभाव — राजनैतिक परिक्षेप में परिवर्तन मात्र का यह अर्थ नहीं है कि एक अप्राधिकृत कृत्य विधिपूर्ण किया जा सके एवं नयी सरकार को पुरानी सरकार के अप्राधिकृत कार्य को विधिपूर्ण करने के कार्य को जाँच करने का अधिकार नहीं होगा।

Cases referred :

AIR 1977 SC 680, AIR 1998 SC 618, 2001(3) MPLJ 439, (2007) 8 SCC 264, (2006) 6 SCC 498, AIR 1969 SC 215, AIR 1969 SC 258.

Shobha Menon with Amit Singh Handa, for the petitioners.

N.S. Kale with Abhijeet Bhowmik, for the respondents.

O R D E R

R.K. GUPTA, J. :-In the aforesaid two petitions under Article 227 of the Constitution of India common questions of facts and law are involved, therefore, both these petitions were heard together and a common order is passed.

2. The facts are referred to from W.P.No.4822/2006(S) (*Sushil Kumar Kanungo & others Vs. M.P. Rajya Sahkari Bank Maryadit & others*). The petitioners by way of filing this petition have challenged the order dated 29.3.2006 (Annexure P-1) passed by the M.P. State Cooperative Tribunal, Bhopal (hereinafter referred to as "the Tribunal"). The Tribunal has allowed the application of amendment submitted by the respondents on 9.9.2005 (Annexure P-2) whereby permission was sought to amend the written statement. The Tribunal has further remanded the case for its fresh adjudication by the Joint Registrar.

3. The facts leading to the present petition are that the petitioners were initially employed by the respondents on probation on 20.1.1996. Thereafter, the respondents directed to terminate the services of the petitioners by passing an order on 27.10.1997. As the termination orders of the petitioners are common, therefore, they have filed the copy of one such order as Annexure P-4 to the petition. This order was passed by the respondents in exercise of their powers vested with them under Rule 62 of the Staff Service Rules. The Rules 61 and 62 of the Staff Service Rules read as under:-

"61. The services of a permanent employee may be terminated by the Managing Committee or Staff Committee of the Bank, after giving three months notice or three months pay in lieu of notice.

62. The services of a probationer may be terminated by the Staff Committee/Chairman without assigning any reasons."

4. The petitioners filed a dispute before the Registrar, Cooperative Societies, Bhopal under Section 55(2) read with Section 64 of the M.P. Cooperative Societies Act, 1960 (hereinafter referred to as "the Act") which was made over to the Joint Registrar, Cooperative Societies. Before the Joint Registrar, Cooperative Societies various grounds were alleged by the petitioners to challenge their termination. The respondents were noticed and they filed their written statement. Copy of the same is placed on record as Annexure P-6. The Joint Registrar, thereafter,

decided the said dispute by passing an order on 10.8.2001 (Annexure P-7). The Joint Registrar held that the order of termination has been passed in violation of the principles of natural justice and directed for the reinstatement of the petitioners. The Joint Registrar further directed that the respondent-Bank may take an action to terminate the services of the petitioners by taking recourse to the powers vested with them under the Staff Service Rules 61-62.

5. Being aggrieved by the order passed by the Joint Registrar, the petitioners as well as the respondents both preferred first appeals to the Tribunal. Before going further to the facts it would be appropriate to mention that the appeal which was preferred by the respondents before the Tribunal was withdrawn. The appeal preferred by the petitioners before the Tribunal was heard. Before the Tribunal an application for amendment was moved on behalf of the respondents to amend the written statement (Annexure P-2). The Tribunal found that the amendment which is sought to be incorporated in the written statement is necessary as earlier the relevant and necessary facts were not pleaded in the written statement by the respondents, therefore, the Tribunal considered the relevancy of the amendment and the said application of amendment was allowed.

6. Before this Court the present petitions have been preferred by the petitioners challenging the order dated 29.3.2006 (Annexure P-1). Before considering the facet of the said amendment it is appropriate to refer to certain provisions. The M.P. State Cooperative Tribunal was constituted by the respondents and the State Government framed the M.P. State Cooperative Tribunal Regulations, 2000. These regulations have been brought into force after the constitution of the M.P. State Cooperative Tribunal. The Regulation 31 of the said Regulations reads as under:-

"31. Rules relating to civil rules of practice and procedure to be followed. - Whenever these regulations are silent on the question of any procedure, the Tribunal shall follow the procedure stipulated under the Code of Civil Procedure, 1908 (V of 1908)."

7. The constitution of the M.P. State Cooperative Tribunal was after the amendment in the Act. Earlier Chapter-X was repealed and new Chapter X was inserted by the M.P. Amendment Act 14 of 1976, which was brought into force by the State Government w.e.f. 1.5.1999. According to the same, Section 77-B of the Act states that in exercise of the powers conferred on the Tribunal, the Tribunal shall have all the powers which are vested in civil courts while trying a suit under the Code of Civil Procedure, 1908 in respect of proof of facts by affidavits; summoning and enforcing the attendance of any person and examining him on oath; compelling discovery or the production of any document; and issuing commissions for the examination of the witnesses. Section 77(17) further prescribes that the Tribunal hearing an appeal under the Act shall exercise all the powers conferred upon an appellate court by Section 97 and Order XLI in the First Schedule to the Code of Civil Procedure, 1908.

8. Learned counsel appearing on behalf of the petitioners submitted that the application for amendment which was submitted by the respondents could not have been allowed by the Tribunal as the first appeal submitted by the respondents against the order passed by the Joint Registrar was already dismissed as withdrawn and on this basis it is submitted that it was the petitioners appeal which was pending and in the petitioners appeal the respondents cannot file application for amendment. It is also contended on behalf of the petitioners that the judgment passed by the Tribunal allowing amendment has resulted into substantial prejudice and injustice to the rights of the petitioners. It is also contended that by way of amendment a new case has been substituted which was inconsistent to the earlier written statement filed by the respondents and on this basis it was submitted that the Tribunal has committed a jurisdictional error while allowing the application for amendment submitted by the respondents.

9. With a view to appreciate the submission of the learned counsel for the petitioners with respect to prejudice, the arguments of the respondents to justify the application for amendment are to be appreciated. The order passed by the Joint Registrar has set aside the order of termination on the ground that no opportunity was given to the employees before passing the order. The Joint Registrar after passing the order further gave a direction to the employer-bank to pass a fresh order to terminate the services of the respondents by exercising their powers under Rule 61 to 63. This order was challenged by both the parties in appeal before the Tribunal. The impact and effect of the order passed by the Tribunal had been that no lis on merits was decided finally but on technical ground of non-observation of principles of natural justice the order was set aside. It appears that the Joint Registrar was of the view that on the basis of the evidence which was adduced by the parties, the Bank has failed to comply with the principles of natural justice and for this reason the orders of termination were set aside. When the appeal was pending before the Cooperative Tribunal of the employees, an application for amendment was moved highlighting all relevant facts to justify the termination and also to show that the appointment was bad. Under the circumstances, if the order passed by the Joint Registrar even assuming is held to be good then the employer since was given an opportunity to proceed with the matter by effecting the termination afresh then the petitioners again would have approached the Joint Registrar challenging their termination.

10. On the basis of the same, if the purpose of Order 6 Rule 17 is seen, then the dominant purpose of the same is to minimise the litigation so that all relevant facts could be decided finally on merits in the same suit without permitting for further litigation. The dominant purpose for amendment to minimise the litigation has been considered by the Apex Court in *Ragu Thilak D. John Vs. S. Rayappan and others*, 2001 (2) SCC 472 wherein the Apex Court has considered all the earlier judgments relating to amendment and ultimately came to a conclusion that the purpose and object of filing the application for amendment is also to minimise

the litigation. The relevant para 5 from the judgment rendered by the Apex Court in Ragu Thilak's case (supra) is reproduced as under:-

"After referring to the judgments in *Charan Das v. Amir Khan*, *L. J. Leach & Co. Ltd. v. Jardine Skinner & Company*, *Ganga Bai v. Vijay Kumar*, *Ganesh Trading Co. v. Moji Ram* and various other authorities, this Court in *B.K.Narayan Pillai v. Parameswaran Pillai* held: (SCC p. 715, para 3):

"3. The purpose and object of Order 6, Rule 17, C. P. C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation."

11. On the basis of the aforesaid if all the pleadings and facts by way of amendment are permitted to be raised by allowing the amendment then there would have been no occasion for the employer to take an action to terminate again, which may ultimately result to the fresh litigation. On the basis of the aforesaid reasoning, I do not find that the amendment which has been allowed in the written statement had been of any prejudice to the petitioners but the amendment is *bona fide*.

12. The question in this reference could also be viewed from a different angle. Under the Code of Civil Procedure, 1908, Order 41 Rule 33 would also be relevant to decide the present case. The same is reproduced as under:-

"33. Power of Court of Appeal. - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees):

Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

13. Thus, the power of the appellate Court under the Code of Civil Procedure wherein the appellate Court has been conferred with a power notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, then the appellate Court in exercise of powers vested under Order 41 Rule 33 can also pass an order in favour of the respondents or parties although the respondents have not preferred any appeal or objection. Thus, the vesting of power is writ large with the Court under Order 41 Rule 33 even to allow the amendment in an appeal of the other side and even no appeal has been preferred by the respondents yet the order in favour of the respondents can be passed by the appellate Court.

14. In this reference it would be appropriate to refer to the power of the Tribunal conferred upon it under the regulations of the M.P. State Cooperative Tribunal Regulations, 2000. These regulations have been framed by the State Govt. in exercise of its power under Section 77(12) of the Act. The Regulation 31, which has already been reproduced above states that whenever these regulations are silent on the question of any procedure, the Tribunal shall follow the procedure stipulated under the Code of Civil Procedure, 1908. The Tribunal is equipped with the power to deal with the amendment under Chapter X of the Act. Even otherwise if the powers of the Tribunal under Chapter X including the regulations are seen then they are silent with regard to the procedure to be followed by the Tribunal while deciding the appeal. If the procedure is not specifically provided under Chapter X read with the Regulations of 2000, as aforesaid, then the power vested with the Tribunal under Regulation 31 will apply and the Tribunal shall follow the procedure stipulated under the Code of Civil Procedure, 1908. On this basis, I am of the view that the Tribunal has rightly followed the principles while deciding the application for amendment of the employer/respondents and the power as such is in consonance with the Order 41 Rule 33.

15. An argument has also been advanced on behalf of the respondents that by submitting an application for amendment of the written statement the relevant and proper facts, which could not brought on record earlier which were necessary for the adjudication, have merely been brought on record for the sake of justice in the case. Since the Tribunal has already exercised its discretion in allowing the amendment, therefore, the Tribunal has not committed any error jurisdictional or otherwise in allowing the amendment.

16. The rival submissions so made by the parties are considered. In the present case, as it has been put forth, against the order passed by the Joint Registrar a

first appeal was preferred to the Tribunal. The appeal being in continuation of the original suit, the application for amendment can be filed by the respondents. There is no prohibition in filing an application for amendment on behalf of the respondents in an appeal preferred by the petitioners.

17. The Apex Court in its judgment rendered in *Baldev Singh and others Vs. Manohar Singh and Another* 2006 (6) SCC 498, after considering the earlier judgments, has held that in view of the provisions made under Order 6 Rule 17 of the C.P.C. it cannot be doubted that wide power and unfettered discretion has been conferred on the Court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the court just and proper. Further, the Apex Court in para-15 of its judgment held that amendment in a plaint is entirely different than an amendment in the written statement. The amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle though some general principles are common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. On this basis, the Apex Court held that in case of amendment to the written statement, the Courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case. The relevant paras 15 and 16 from the case of *Baldev Singh* (supra) are reproduced as under:-

15. Let us now take up the last ground on which the application for amendment of the written statement was rejected by the High Court as well as the Trial Court. The rejection was made on the ground that inconsistent plea cannot be allowed to be taken. We are unable to appreciate the ground of rejection made by the High Court as well as the Trial Court. After going through the pleadings and also the statements made in the application for amendment of the written statement, we fail to understand how inconsistent plea could be said to have been taken by the appellants in their application for amendment of the written statement, excepting the plea taken by the appellants in the application for amendment of written statement regarding the joint ownership of the suit property. Accordingly, on facts, we are not satisfied that the application for amendment of the written statement could be rejected also on this ground. That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or

substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

16. This being the position, we are therefore of the view that inconsistent pleas can be raised by defendants in the written statement although the same may not be permissible in the case of plaint. In the case of *M/s. Modi Spinning and Weaving Mills Co. Ltd. and Anr. vs. M/s. Ladha Ram and Co.*, this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative pleas can be made in the written statement. Accordingly, the High Court and the Trial Court had gone wrong in holding that the defendants/appellants are not allowed to take inconsistent pleas in their defence."

18. On the basis of the same, the question in the present case is whether amendment in the written statement could have been ignored because of the prejudice as according to the judgment passed by the Apex Court in *Baldev Singh* (supra) the question of prejudice is less likely to operate with same rigour in case of amendment in the written statement and thereafter the Apex Court held that in the written statement even an inconsistent plea can also be raised and the new grounds of defence or substituting or altering a defence can also be raised in the written statement but the same may not be permissible in case of an amendment in the plaint. The Apex Court in the said judgment further held that in the amendment of the written statement additional ground by way of defence can be introduced as an additional plea by altering the pleadings.

19. On the basis of the aforesaid yardsticks as laid down by the Apex Court in the case of *Baldev Singh* (supra), since the Tribunal has already examined the relevancy of the amendment and thereafter the Tribunal came to the conclusion that earlier there had been no proper defence raised in the written statement by the employer and the amendment which was sought to be incorporated throws light substantially on the lis for its proper adjudication. Therefore, the Tribunal after considering the nature of the amendment has allowed the said application.

20. It is contended on behalf of the petitioners that the Tribunal after considering the application for amendment has also considered the merits of the amendment. The submission so raised by the learned counsel for the petitioners is considered. While examining the judgment passed by the Tribunal it cannot be said that the Tribunal has entered into the merits of the amendment and thereafter the said

amendment was allowed. The Tribunal has only examined the relevancy of the amendment and found that the amendment which is sought to be incorporated in the written statement is *prima facie* necessary and relevant for the proper and final adjudication of the case. It is not a case that the Tribunal has taken over a task to amend the pleadings by deciding the case against the petitioners. As I have held earlier that the Tribunal has only examined the nature of the plea raised by the respondents and whether the amendment as such was necessary. Thus, the submission so put forth by the learned counsel for the petitioners is misconceived.

21. In this reference, it would also be appropriate to refer to the written statement submitted on behalf of the respondents before the Joint Registrar. In the written statement though the allegations have been denied but no specific facts were stated in the written statement for the denial of the claim and the facts. In the application for amendment the reason for amendment, which has been stated is that since at the time when the written statement was submitted an elected Board of Directors was functioning, who appointed the petitioners into the services, therefore, no proper written statement could be filed by the Officer-in-charge and no details were given to deny the pleadings and ultimately when the Board of Directors was superseded on 7.5.2004, the Officer-in-charge was appointed by the State Government to look into the affairs of the respondent-Bank, has examined the papers and thereby came to the conclusion that for the purposes of arriving at a correct conclusion and decision in the case, certain facts are necessary to be brought on record by way of an application for amendment.

22. Learned counsel appearing for the petitioners submitted that the same officer who has filed application for amendment has also filed the earlier written statement. The same Officer-in-charge has subsequently come out with a plea that because of connivance no proper written statement could be filed. On this basis it is submitted on behalf of the petitioners that the reason behind the amendment is connivance and prejudice, therefore, it would be inappropriate to allow the amendment because both the written statement as well as the application for amendment were filed by the Officer-in-charge of the case.

23. The aforesaid submission put forth by the learned counsel for the petitioners is considered. In the present case the application for amendment has not been submitted only because there had been connivance. The reason to move an application for amendment, as discussed hereinabove, was that at the time when the written statement was filed an elected Board of Directors was functioning which appointed the petitioners and ultimately when the said Board of Directors was superseded by order dated 7.5.2004 and the Officer-in-Charge was appointed to look after the affairs who studied the case and after considering the case he found that there had been no proper pleadings and material submitted in the written statement. Therefore, he found that it was necessary to file a proper written

statement and thereafter an application for amendment was moved. Merely because the same officer has filed the application for amendment who earlier filed the written statement that does not mean that the institution cannot subsequently file application for amendment when the new officer-in-charge was appointed after supersession of the Board by order dated 7.5.2004 but on instructions of such officer-in-charge the same officer was bound to follow the instruction of the institution who was party. If the argument of the learned counsel for the petitioners as such is accepted, then no institution shall be permitted to amend their pleadings, which may result into prejudice and injustice to the institution while deciding the case. The purpose of adjudication is to hold an enquiry. The facts as such are permitted to be enquired into and the Courts cannot ignore to decide the case merely because of technicalities.

24. On the basis of the aforesaid discussion, I am of the view that the reason for amendment is not alone the connivance but the reasons in detail have been submitted in the application for amendment of the written statement and on the basis of the reasons, which have been discussed hereinabove, I am of the view that in the present case moving of an application for amendment is bona fide particularly keeping in view the earlier written statement which was filed wherein no details were given.

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

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

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

service of the people and involves sacrificing one's life and comforts for raising the living standard of the overwhelming poverty-stricken people of our State and our country so that they may enjoy a good life and hold up their heads with pride." In para 5 he has denied that there was any intention on his part to carry on character assassination of Shri Biju Patnaik, Shri Bireu Mitra and their group. It is true that the appointment of the Commission of Inquiry may have been made partly on account of the political rivalry between the parties but having perused the affidavits filed by the appellants and the respondents in this case, we are satisfied that the main object of the appointment of the Commission Inquiry was not to satisfy the political rivalry of the politicians at present in power in Orissa but to promote measures or maintaining purity and integrity of the administration in future in the Orissa State. We are accordingly of the opinion that Mr. Asoke Sen is unable to make good his argument that the impugned notification is a mala fide exercise of the statutory power and it should be struck down as illegal.

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

"It cannot be denied that the physical act of changing the surface of

a road when the corporation thought fit and proper so to do was within their statutory powers and there is no case proved by the evidence which shows either that they wastefully used the public money or that they did so with improper motives. The case would be quite different if one came to the conclusion that under the guise of improvement of a road, certain moneys had been used really for diminishing the expenses of the Automobile Club or anything of that sort and that there had been a turning aside of public moneys to illicit purposes".

The principle was applied by Denning, L. J. in *Earl Fitzwilliam's Wentworth Estate Co. Ltd. v. Minister of Town and Country Planning*, 1951-2 KB 284. It was a case concerning the validity of a compulsory purchase made by the Central land Board, and confirmed by the Minister, under the provisions of the Town and Country Planning Act, 1947, in respect of a plot of land, ripe for development, which the owner was not prepared to sell at the existing use value. The landowner applied to have the order quashed, as not having been made for any purpose connected with the Board's function under the Act, but for the purpose of enforcing the Board's policy of sales at existing use values. The majority (consisting of Somerwell and Singleton, L. J.) held that, though the main purpose of the Board may well have been to induce landowners in general and the company, in particular, to adopt one of the methods of sale favoured by the Board, it was nevertheless in connection with their function as the authority operating the development charge scheme, and at any rate, "the case was not one in which it could be said that powers were exercised for a purpose different from those specified in the statute". Denning, L. J. disagreed with the majority and held that the dominant purpose of the Board was not to assist in their proper function of collecting the development charge, but to enforce their policy of sales at existing use value only. The dominant purpose being unlawful, the order was invalid, and could not be cured by saying that there was also some other purpose which was lawful. The Board and the Minister had misunderstood the extent of their compulsory powers and their affidavits showed that they had overlooked that their ultimate purpose in exercising their powers should be connected with the performance of the Board's functions under the Act. At page 307 of the Report Denning L. J. observed as follows:-

"What is the legal position when the board have more than one purpose in mind? In the ordinary way, of course, the courts do not have regard to the 'purpose' or 'motive' or 'reason' of an act but only to its intrinsic validity. For instance, an employer who dismisses a servant for a bad reason may justify it for a good one, so long as he finds it at any time before the trial. But sometimes the validity of an act does depend on the purpose with which it is done-as in the case of a conspiracy-and in such a case, when there is more than one purpose, the law always has regard to the dominant purpose. If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be

cured by saying that they had some other purpose in mind and which was lawful see what Lord Simon, Lord Maugham and Lord Wright said in *Crofter Hand Woven Harris Tweed Co. v Veitch*, (1942 AC 435, 445, 452-3, 469, 475).

So also the validity of government action often depends on the purpose with which it is done. There, too, the same principle applies. If Parliament grants a power to a government department to be used for an authorized purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinate to some other purpose which is not authorized by law, then the department exceeds its powers and the action is invalid."

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

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

27. On the basis of the aforesaid law laid down by the Apex Court merely because there had been a change in the political scenario that does not mean that an unauthorized act can be legalized and new body coming shall have no power to take an action to correct the unauthorized acts of the earlier body.

28. Learned counsel for the petitioners placed reliance upon the judgments passed by the Apex Court in *M/s Modi Spinning & Weaving Mills Co. Ltd. and another Vs. M/s Ladha Ram & Co.*, AIR 1977 SC 680, *Heeralal Vs. Kalyan Mal and others*, AIR 1998 SC 618 and also the judgment passed by the Division Bench of this Court in *Shantibai and others Vs. Ganpat Rao Gujar and others*, 2001 (3) M.P.L.J. 439. While placing heavy reliance on the judgment passed by the Apex Court in the case of *M/s Modi Spinning* (supra) and referring to paras 7, 8, 9 and 10 of the said judgment, learned counsel for the petitioners argued that

the Apex Court has held that the defendant cannot be permitted by way of amendment in the written statement to change the case completely which was earlier set up by the defendant by substituting the entire different and new case.

29. To appreciate the aforesaid submission and the judgments relied upon by the learned counsel for the petitioners, I have already held earlier that a new case or inconsistent case has not been set up by way of defence by the respondents by applying to amend their pleadings in the written statement. Earlier there was nothing submitted by the respondents other than the denial. The averments with reference to para-7 of the application submitted on behalf of the petitioners under Section 55(2) before the Joint Registrar were denied but no facts in detail for the denial as such were stated. There was no explanation in the written statement as why the facts or grounds raised by the petitioners in their application are denied. It is not a case where the respondents have made out a case different than the earlier one but the present case falls in the category of a case where merely to explain the denial by giving facts in detail the amendment was sought. Therefore, I am of the view that the aforesaid judgments so relied upon by the learned counsel for the petitioners shall have no application in the present case.

30. Learned counsel for the petitioners also referred to and relied upon the judgment passed by the Apex Court in Civil Appeal No. 4481/2007 arising out of SLP(C) No. 12236 of 2006 (*M.P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav & Ors.*) reported in 2007 (8) SCC 264 and on that basis it is submitted that there was no necessity to amend the pleadings as the matter was squarely covered by the said judgment. The judgment as such is perused and on an analysis of the same I am of the opinion that the facts of the present case are entirely different from the facts of the said judgment. In the case before the Apex Court an action was taken by the employer under Rule 61 of the Staff Service Rules, which provides for termination of a permanent employee by giving three months notice. But, in the case in hand the action has been taken under Rule 62 of the Staff Service Rules, which provides for the termination of a person employed on probation. Both these rules have already reproduced in the earlier part of this judgment. Thus, in the present case, the termination was effected of the petitioners at the time when they were on probation and the present petitioners are not permanent employees. Thus, the judgment rendered by the Apex Court in *Nanuram Yadav's case* (supra) shall also have no application in the present case.

31. For the reasons stated hereinabove, I do not find any substance in the petitions and the present petitions are as such dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 2254

WRIT PETITION

Before Mr. Justice Viney Mittal

8 February, 2008*

SADASHIV JOSHI

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 226, Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973 -- *Petitioner very cleverly kept silent in subsequent writ petition that he had, in earlier writ petition, abandoned a substantial part of claim and given up his rights qua the disputed land - Held - Material concealment and not disclosing all relevant facts - Petitioner had tried to not only mislead the court but has also made an attempt to misuse and abuse the process of Court - Disentitled the petitioner from adjudication of his claim on merits.*

(Para 19)

क. संविधान, अनुच्छेद 226, नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973 – याची बड़ी चतुराई से पश्चात्पूर्ति रिट याचिका में इस पर मौन रहा कि उसने पूर्व में पेश रिट याचिका में उसके दावे के सारवान् भाग को छोड़ दिया था और विवादित भूमि के संबंध में उसके अधिकार त्याग दिये थे – अभिनिर्धारित – सारवान् तथ्य को छुपाया और सभी सुसंगत तथ्य प्रकट नहीं किये – याची ने न केवल न्यायालय को गुमराह करने का प्रयास किया बल्कि न्यायालय की प्रक्रिया का दुरुपयोग करने का प्रयत्न भी किया – याची को उसके दावे का गुणदोषों पर निराकरण करने के अधिकार से वंचित करता है।

B. Constitution, Article 226, Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973 -- *Petitioner having abandoned a part of claim in the earlier writ petition and relinquished his right on part of disputed land - In subsequent writ petition, petitioner challenged whole scheme including disputed land which he had originally abandoned - Held - Petitioner is totally debarred and even estopped from raising that claim in subsequent writ petition - Not on the ground of res judicata but on the ground of public policy.*

(Para 29)

ख. संविधान, अनुच्छेद 226, नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973 – याची ने पूर्व रिट याचिका में दावे के एक भाग को छोड़ दिया और विवादित भूमि के भाग पर अपना अधिकार त्याग दिया – पश्चात्पूर्ति रिट याचिका में याची ने विवादित भूमि, जो वह मूल रूप से छोड़ चुका था, को सम्मिलित करते हुए पूरी स्कीम को चुनौती दी – अभिनिर्धारित – याची उस दावे को पश्चात्पूर्ति रिट याचिका में उठाने से पूर्णतः विवर्जित और बिबंधित भी है – पूर्व-न्याय के आधार पर नहीं बल्कि लोक नीति के आधार पर।

C. Constitution, Article 226, Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1973 -- *Learned Single Judge while allowing the bunch of writ petitions, had specifically mentioned that the common order would be applicable only to the petitioners who had approached this Court and not others - Held -*

Judgment was not in rem - Petitioner who had abandoned a part of his claim and relinquished his rights in the disputed land - It would be deemed as if petitioner had not even filed the petition qua the disputed land - Such petitioner cannot get the benefit of that common order. (Para 32)

ग. संविधान, अनुच्छेद 226, नगर तथा ग्राम निवेश अधिनियम, म.प्र., 1973 - विद्वान एकल न्यायाधीश ने रिट याचिकाओं के समूह को मंजूर करते समय विशिष्ट रूप से यह उल्लेख किया कि सामान्य आदेश केवल ऐसे याचियों को लागू होगा जिन्होंने इस न्यायालय को निवेदन किया और अन्य को नहीं - अभिनिर्धारित - निर्णय सर्वबन्धी (इन रेम) नहीं था - याची जिसने उसके दावे के भाग को छोड़ दिया था और विवादित भूमि में अपने अधिकार त्याग दिये थे - यह माना जाएगा कि जैसे याची ने विवादित भूमि के संबंध में कोई याचिका ही पेश नहीं की थी - ऐसा याची सामान्य आदेश का कोई लाभ नहीं पा सकता है।

Cases referred :

AIR 1987 SC 88, AIR 1998 SC 1445.

Vijay Assudani, for the petitioner.

Umesh Gajankush, G.A., for the respondents No.1 & 2.

V.K. Jain, for the respondent No.3.

VINEY MITTAL, J.:-The present writ petition presents a classic illustration of a persistent effort made by the petitioner, Sadashiv Joshi, to repeatedly approach this Court by filing one writ petition after another and in process, misusing the process of this Court in invoking its extraordinary writ jurisdiction under Article 226 of the Constitution of India.

2. The relevant facts be noticed as follows:

The petitioner was the owner of land measuring 16.276 hectares in village Khajrana, Tehsil and District Indore. A town improvement scheme under the then Town Improvement Trust Act, 1960 was floated, known as Scheme No. 53, for the city of Indore. On enactment of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereinafter referred to as Act), the provisions of erstwhile Town Improvement Trust Act, 1960 stood repealed and the then Indore Improvement Trust was dissolved and Indore Development Authority under the Act was constituted. The aforesaid Scheme No. 53 was adopted and taken for implementation by Indore Development Authority (IDA). The aforesaid land of the petitioner measuring 16.276 hectares was included in the said scheme and was sought to be acquired for the purposes of execution of the scheme.

3. The petitioner, Sadashiv Joshi, along with many other land owners, whose land were also included, approached this Court through various writ petitions. A challenge was made to the scheme as well as to the consequential acquisition of their lands. The writ petition filed by the petitioner, Sadavshiv Joshi, was numbered as MP No. 244/1987 and was filed by him on February 19, 1987.

4. A perusal of the writ petition MP No. 244/1987 filed by the petitioner (a copy whereof is available as Annexure R-1 with the reply filed by respondents

No. 1 and 2), shows that while filing the writ petition, the petitioner gave the details of his 16.276 hectares of land as follows:

Survey Nos. 56 (1.154 hectares), 57(1.121 hectares), 58 (1.335 hectares), 497 (1.857 hectares), 498(2.132 hectares), 499(2.322 hectares), 500(0.971 hectares), 506(0.793 hectares), 527(1.100 hectares), 528(1.526 hectares), 530 (0.745 hectares), 540(0.652 hectares), 541 (0.324 hectares), 572 (0.571 hectares) and 575(0.668 hectares), total 16.276 hectares.

5. An interim order was passed in the said writ petition on October 3, 1987 and dispossession of the petitioner from the land in question was stayed.

6. During pendency of the said writ petition, an application being IA No. 5002/92 was filed by Sadashiv Joshi, petitioner, on October 24, 1992 with a prayer that he (writ petitioner) wanted to relinquish his rights in the writ petition with regard to the land, the details whereof were given in para 2 of the application, and a prayer was made to amend his claim in the writ petition, by deleting the prayer qua the aforesaid land as detailed in the application. A copy of IA No. 5002/92 filed by the aforesaid writ petitioner (present petitioner) is available on record as Annexure R-3 with the reply filed by respondents No. 1 and 2. A perusal of para 2 of the said application depicts that the following land was deleted in the said application, qua which the claim made in the writ petition was relinquished/abandoned.

Survey Nos. 497(1.857 hectares), 498(2.132 hectares), 499(2.322 hectares), 500(0.971 hectares), 540(0.552 hectares), 541(0.324 hectares) and 572(0.571 hectares).

7. The aforesaid IA No. 5002/92 came up for hearing before a Division Bench of this Court on December 1, 1992 and the prayer made in the application was allowed. The petitioner, Sadavshiv Joshi, was permitted to delete the aforesaid survey numbers, as detailed in the application, and consequently to amend the writ petition.

8. The aforesaid writ petition filed by the petitioner, along with other writ petitions filed by various other land owners, was ultimately allowed by a learned Single Judge of this Court vide judgment dated October 5, 1996. It was noticed by the learned Single Judge that the procedure as laid down in law under the Act, had not been followed by IDA and therefore, the scheme in question and consequential acquisition of the land of the writ petitioners (qua only the writ petitioners), was quashed. The aforesaid judgment of the learned Single Judge is available on record as Annexure R-5 with the reply filed by respondents No. 1 and 2. A perusal of the judgment Annexure R-5, shows that it was specifically mentioned by the learned Single Judge that the order made in the writ petitions was only made applicable to the petitioners, who had approached the Court and not to others. It may also be noticed that the learned Single Judge had granted a liberty to IDA, to take fresh steps, in accordance with law, for framing a fresh scheme, if so desired.

9. A Letter Patent Appeal No. 45/1997 along with other Letters Patent Appeals, against the judgment of the learned Single Judge, was also dismissed by a Division Bench of this Court vide judgment dated April 30, 1998. The judgment of the Division Bench is available on record as Annexure R-6. A perusal of the judgment by the Division Bench also shows that the judgment of the learned Single Judge was affirmed in its entirety.

10. However, it is conceded petition between the parties that after judgment of the Division Bench, no fresh steps were ever taken by IDA, to include the lands of the aforesaid writ petitioners into the scheme, which stood excluded on account of a successful challenge made by them before the High Court against the scheme and the acquisition.

11. It may also be pertinent to point out at this stage that during pendency of the writ petition itself, the Land Acquisition Collector, had pronounced an award dated May 5, 1994 qua the lands which stood acquired under the said scheme.

12. After the matter had attained finality on dismissal of the Letters Patent Appeals filed by IDA, the present petitioner again approached this Court through a writ petition W.P. No. 1578/2001 with the allegations that after the judgments of the learned Single Judge and the Division Bench, IDA was not implementing the said judgments and therefore, directions were sought to comply with the said judgments. However, in the said writ petition, it was never disclosed by the writ petitioner that a substantial part of the claim, out of the total land holding of the petitioner, had already been given up by him during course of earlier writ petition MP No. 244/87. A grievance was made that inspite of judgment of the Division Bench, IDA was taking steps to take possession of the land of the petitioner. However, when the said writ petition came up for hearing before this court on November 7, 2001, the same was dismissed with the observations that since the judgments of the learned Single Judge and Division Bench had attained finality and the scheme in question and the acquisition proceedings, as noticed in the judgment, had been quashed, therefore, if IDA was taking steps to dispossess the petitioner, he should take recourse to a civil suit. A copy of the order dated November 7, 2001 passed in WP No. 1578/01 is available on record as Annexure R-8.

13. Since, as noticed above, an award had been pronounced by the Land Acquisition Collector on May 5, 1994, therefore, the writ petitioner filed an application before the Land Acquisition Collector to set aside the award on the ground that the acquisition proceedings had already been set aside by the High Court. Since the aforesaid application was not being decided by the Land Acquisition Collector, the petitioner approached this Court yet again, through WP No. 755/2003. It was still not disclosed even in the said writ petition that he had already abandoned a substantial part of his claim in the earlier writ petition No. 244/87. The aforesaid writ petition WP No. 755/03 was disposed of by this Court vide order dated May 19, 2005 with a direction to the Land Acquisition Officer to hear the petitioner on the application filed by him and decide the same.

14. Continuing with his persistence, the petitioner yet again filed a writ petition WP No. 1622/06 before this Court. This time, it was pointed out that although the arguments in the application had been heard by Land Acquisition Officer, but no decision was being taken. In the said writ petition, a show cause notice was issued. The Land Acquisition Officer appeared before the Court and disclosed that a decision had already been taken on October 31, 2005 in the application filed by the petitioner and the said application had been rejected. On the basis of the said statement made by the Land Acquisition Officer, the writ petitioner withdrew the said writ petition with a liberty to challenge the order dated October 31, 2005. Consequently, with the aforesaid liberty, the writ petition was disposed of vide order dated May 16, 2006. It may again be noticed that even in the aforesaid writ petition also, the petitioner did not choose to disclose the material fact of having abandoned a substantial part of his claim through IA No. 5002/92 in the earlier writ petition being MP No. 244/97.

15. It is in these circumstances that the writ petitioner has approached this Court, once again, through the present writ petition. However, rather than challenging the order dated October 31, 2005, though the same has been appended as Annexure P-15 with the writ petition, the petitioner has chosen to seek quashing of scheme No. 53, in respect of the land qua which he had originally abandoned his claim in the earlier writ petition and has also sought directions against the respondents that the said scheme is not applicable to the petitioner and also that an agreement between IDA and some third parties is not binding upon him.

16. The claim of the petitioner has been contested by the respondents. On a show cause notice issued to the respondents by this Court, two separate replies have been filed by the respondents. A detailed reply has been filed on behalf of respondents no. 1 and 2. A separate and an independent reply has been filed by IDA. All the facts stated in the petition have been denied. The order, Annexure P-15, though not challenged in the writ petition, has been defended by the said respondents. It has been maintained that since the petitioner in an earlier writ petition had abandoned his claim qua the said land, therefore, he could not be heard to raise a challenge of inclusion of the said land in the scheme or acquisition thereof, including the passing of the award qua the said land.

17. In the reply filed by IDA, the entire history of earlier litigation in MP No. 244/87 filed by the petitioner has been detailed. It has also been detailed that the petitioner had filed an IA in the said writ petition through which he had given up his right with regard to the survey numbers detailed in the application. IDA has also maintained that all these facts had been kept concealed by the petitioner in the present writ petition and as such the writ petition was liable to be dismissed on this ground also.

18. I have heard Shri Vijay Assudani, learned counsel for the petitioner, Shri Umesh Gajankush, learned Government counsel, for respondents No. 1 and 2 and

Shri V.K. Jain, learned counsel, for respondents No 3 and with their assistance, have also gone through the record of the case.

19. At the outset, it may be noticed that although the writ petitioner has mentioned the details of his earlier writ petition MP 244/87 and has also quoted from the judgment of the learned Single Judge dated October 5, 1996 and also from the judgment dated April 30, 1998 of the Division Bench in Letters Patent Appeal, but has very cleverly kept silent about filing of IA No. 5002/92 by him, whereby in MP No. 244/87, he had abandoned a substantial part of his claim and had given up his rights qua the land mentioned in the said application. It has also not been disclosed that the aforesaid application filed by the writ petitioner was allowed by a Division Bench of this Court on November 1, 1992 (Annexure R-4). In my considered opinion, by this material concealment and by not disclosing all the relevant facts before this Court, the petitioner has in fact, tried to not only mislead this Court, but has also made an attempt to misuse and abuse the process of this Court. The least what can be said about this concealment and suppression of facts by the petitioner is, that this Court deprecates the aforesaid conduct of the petitioner very strongly. That there has been suppressio veri and suggestio falsi is in controvertible.

20. Although, the aforesaid suppression of material facts by the petitioner, and rather an intentional concealment by him, has already dis entitled the petitioner from adjudication of his claim on merits, but since the detailed replies have been filed by the respondents and arguments have also been heard by me on merits therefore, I deem it appropriate to adjudicate the controversy on merits of the claim of the petitioner as well.

21. Shri Vijay Assudani, learned counsel for the petitioner, has vehemently argued that the scheme No. 53 and the acquisition proceedings qua the land acquired for the said scheme, had been quashed and in these circumstances the award dated May 5, 1994, qua the acquired land of the petitioner was to be treated as non-est and not binding on him, therefore, the State Government or IDA had absolutely no legal authority to take the possession of the land, as detailed in the present petition, from the petitioner, for utilizing the said land qua the scheme in question. The learned counsel maintains that for all practical purposes, the scheme in question qua the petitioner had been quashed and therefore, as far as the petitioner is concerned, the said scheme could not be implemented by utilizing his land.

22. On the other hand, Shri Umesh Ganankush and Shri V.K. Jain, learned counsel for the respondents, have refuted the aforesaid contention of the learned counsel for the petitioner and have argued that as is clear from a perusal of the judgment of the learned Single Judge, Annexure R-5, that the scheme in its entirety had not been quashed, but the aforesaid scheme, and the consequential acquisition proceedings, had been quashed only qua the persons who had approached the Court. The learned counsel point out that the aforesaid observations made by the

learned Single Judge would necessarily follow that the relief had been granted only qua such persons and qua such challenge, which was before the Court and although in MP No. 244/87, the writ petitioner had raised an original challenge qua 16.276 hectares of his total land, but by filing IA No. 5002/92, he had abandoned a substantial portion of it, by giving up his rights in the land and abandoning all his claim thereto, the details whereof were mentioned in the application. Thus, argue the learned counsel for the respondents, at the time of final hearing of the writ petition before the learned Single Judge, the petitioner having already given up his rights qua the land mentioned in the application (IA No. 5002/92), the said claim could never be deemed to have been allowed. The learned counsel further argue that even the Letters Patent Bench had affirmed the judgment of the learned Single Judge. The learned counsel, thus, maintain that the present writ petition filed by the petitioner with regard to the land, qua which the rights had already been abandoned in the earlier writ petition, was wholly misconceived and not even maintainable in law.

23. I have duly considered the rival contentions of the learned counsel for the parties. I have also gone through the record of the case.

24. The facts as noticed above, clearly depict that although at the time of filing the writ petition MP No. 244/87 on February 19, 1987, the present writ petitioner had included and detailed out his total land measuring 16.276 hectares. The initial challenge was to the inclusion of his aforesaid total land into the scheme and acquisition thereof. However, when IA 5002/97 was filed by him on October 24, 1992, the petitioner chose to give up his rights qua the land, the details whereof were mentioned in the application, and as such abandoned his claim in the writ petition by relinquishing his rights in the said land. The prayer made in IA 5002/97 was allowed by a Division Bench of this Court vide order dated December 1, 1992 (Annexure R-4). The petitioner was permitted to amend his writ petition. Thus, once the petitioner had relinquished his rights in a substantial portion of the land, out of his total land, originally detailed in the petition, then subsequently, he cannot be heard to raise any grievance with regard to the aforesaid abandoned land, when the same is being included in the scheme in question by IDA, and its acquisition by the acquiring authorities for the said scheme. As far as the petitioner is concerned, he having already relinquished his rights and given up his claim qua the said land, he has no further right to challenge either the acquisition proceedings or inclusion thereof in the scheme in question.

25. At this stage, it might be pertinent to refer to the provisions of Order 23 Rule 1 of the Code of Civil Procedure, which deals with a withdrawal of suit or abandonment of part of claim by a plaintiff. It is provided therein that at any time after the institution of a suit, the plaintiff, may abandon his suit or a part of his claim. Sub Rule 4 of Rule 1 further provides that where the plaintiff abandons any suit or part of claim without permission to file a fresh suit on the same cause of action, he shall be precluded from any fresh suit in respect of such subject matter

or such part of the claim. Although the provisions of CPC are not directly attracted to a petition filed under Article 226 of the Constitution of India, but the principles underlying the said provisions are in fact, the principles of equity, fair play and public policy and are based upon the principle that when a suit or a part of the claim under the suit has been relinquished or abandoned by a suitor, the the aforesaid relinquishment/abandonment must be treated as final between the parties and such a suitor would not be permitted to re-agitate the said claim or part thereof in future.

26. The provisions of Order 23 Rule 1 of the Code of Civil Procedure and its application to a writ petition filed under Article 226 of the Constitution of India were considered by the Apex Court in the case of *Sarguja Transport Service Vs. State Transport Appellate Tribunal*, AIR 1987 SC 88. The following observations made by the Apex Court may be noticed with advantage.

"The Code as it now stands thus makes a distinction between 'abandonment' of a suit and 'withdrawal' from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission referred to in sub-rule(3) of R.1 of O.XXIII of the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying R.1 of O.XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of R. 1 of O.XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of *res judicata* contained in S.11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of *res judicata* applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit

without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of R.1 of O. XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court".

27. It was further held by the Apex Court in the said case as follows.

"The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Art. 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in *Daryao's case* (supra) is of no assistance. But we are of the view that the principle underlying R.1 of O. XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of *res judicata* but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Art. 32 of the Constitution since such withdrawal does not amount to *res judicata*, the remedy under Art. 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Art. 21 of the Constitution since such a case stands on a different footing altogether. We, however, leave this question open".

28. Again in the case of *HP State Electricity Board Vs. K.R. Gulati*, AIR 1998 SC 1445, it was observed by the Apex Court that a person having accepted his promotion in the clerical line and continuing thereunder was not entitled to re-open the matter again by filing a fresh petition before the Tribunal. The Court observed that since with regard to the cause of action the claimant had filed a writ petition and had withdrawn the same, then later on, he could not have agitated

his claim by filing afresh application before the Tribunal challenging a fresh same cause of action which had arisen earlier.

29. On consideration of the claim of the petitioner on the touchstone of the principles, noticed above, as also the law laid down by the Apex Court, it is also apparent that the petitioner having abandoned a part of his claim in the earlier writ petition and having relinquished his rights in the suit land, involved in the present petition, while filing IA No. 5002/92 in the earlier writ petition, he is totally debarred and even estopped from raising the aforesaid claim in the present writ petition.

30. Therefore, in my considered view, the claim made by the writ petitioner in the present writ petition is wholly misconceived, frivolous and is liable to be rejected.

31. It appears that the writ petitioner himself was conscious of the aforesaid position of law while filing the present writ petition, in as much as, it was on account of the said fact alone that he has chosen not to give any details about abandonment of a part of his claim by him in the earlier writ petition.

32. I have also gone through the judgment of the learned Single Judge, Annexure R-5, dated October 5, 1996. The learned Single Judge, while allowing the bunch of writ petitions, had specifically mentioned that the aforesaid order in the writ petitions would be applicable only to the petitioners who had approached this Court and not others. It must necessarily follow that the judgment of the learned Single Judge (and also of the Division Bench in Letters Patent Appeals) would only be applicable to such petitioners who had approached this Court through the writ petitions and qua such land with regard to which the challenge had been raised. As laid down by the learned Single Judge himself, the judgment was not to be treated as a judgment in rem, but was to be treated between the specified parties and qua specified claim. In fact, by abandoning a part of his claim and relinquishing his rights in the land, as detailed in the application, for all practicable purposes, it would be deemed as if the petitioner had not even filed the petition qua the said land, therefore, the judgment of the learned Single Judge and the Division Bench quashing the scheme and acquisition proceedings, are not attracted to the present land of the petitioner.

33. Before parting with this order, it may also be noticed that while permitting the writ petitioner to withdraw WP No. 1622/2006 on May 16, 2006, the petitioner had been granted a liberty to challenge the order dated October 31, 2005 vide which the application filed by the petitioner for setting aside the award rendered by the Land Acquisition officer, had been rejected. Although, the said order has been appended as Annexure P-15 with the writ petition, but for the reasons best known to the petitioner, he has not challenged the said order. The award dated May 5, 1994, has, in fact, attained finality qua the land of the petitioner, which stood deleted from the earlier writ petition. The acquisition proceedings on that account shall also be deemed to have been finalized in the year 1994 itself. Thus, at this stage, the petitioner cannot be heard to raise a grievance against the aforesaid

acquisition proceedings, which had in fact attained finality qua the present land in question in the year 1994 itself.

34. In view of the aforesaid discussion, the present petition is wholly devoid of any merit and is dismissed accordingly.

C.c. as per rules.

Petition dismissed.

I.L.R. [2008] M. P., 2264

WRIT PETITION

Before Mr. Justice J.K. Maheshwari

26 February, 2008*

NILESH SINGHAL

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 226 - Petitioner a blind person, appeared and got selected in preliminary and main examination conducted by M.P.P.S.C. - Was not permitted to participate in oral interview and denied benefit of reservation for disabled person - Held - Petitioner being selected in year 1998-99, therefore, direction to appoint can not be issued after 9 years. (Para 5)

क. संविधान, अनुच्छेद 226 - नेत्रहीन याची म.प्र. लोक सेवा आयोग द्वारा संचालित प्रारम्भिक एवं मुख्य परीक्षा में उपस्थित हुआ और चयनित किया गया - मौखिक साक्षात्कार में शामिल होने की अनुमति नहीं दी गई और निःशक्त व्यक्ति के लिए आरक्षण के लाभ से इंकार किया गया - अभिनिर्धारित - याची वर्ष 1998-99 में चयनित हुआ इसलिए नियुक्त करने के निदेश 9 वर्ष पश्चात् जारी नहीं किये जा सकते।

B. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Sections 32, 33 - Reservation to persons with disability made available to orthopaedically handicapped but no solace offered to blind, deaf and dumb - Bureaucratic system failed to implement legislation - Government is duty bound to identify the posts in establishment to which reservation must be made to blind, deaf, dumb and cerebral palsy - By issuing notification, subject to condition, any establishment may be exempted from purview of reservation - No such notification issued - Held - Real benefit has not been extended to the class of blind, deaf, dumb and cerebral palsy - State Government directed to identify the class of blind, deaf, dumb and cerebral palsy and implement provisions of Act and Rules. (Paras 9, 10, 16 & 17)

ख. निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धाराएँ 32, 33 - निःशक्त व्यक्तियों को आरक्षण विकलांग

होने के कारण अपाहिज को उपलब्ध कराया गया किन्तु नेत्रहीन, बधिर और गूंगों को कोई राहत प्रस्तावित नहीं की गयी - नौकरशाही तंत्र विधायन को लागू करने में असफल रहा - सरकार स्थापना में पदों को निश्चित करने के लिए कर्तव्य द्वारा आबद्ध है जिसमें नेत्रहीन, बधिर, गूंगों और प्रमस्तिष्कीय लकवाग्रस्त के लिए आरक्षण करना चाहिए - अधिसूचना जारी करके शर्त के अध्यक्षीन कोई स्थापना आरक्षण के कार्यक्षेत्र से विमुक्त की सकती है - ऐसी कोई अधिसूचना जारी नहीं की गई - अभिनिर्धारित - वास्तविक लाभ नेत्रहीन, बधिर, गूंगों और प्रमस्तिष्कीय लकवाग्रस्त के वर्ग के लिए विस्तारित नहीं किया गया है - राज्य सरकार को नेत्रहीन, बधिर, गूंगों और प्रमस्तिष्कीय लकवाग्रस्त का वर्ग निश्चित करने और अधिनियम व नियम के उपबंधों को लागू करने के लिए निदेशित किया गया।

C. Constitution, Articles 21 & 38 - Government must made endeavour to eliminate inequality in status, facility and opportunity.

ग. संविधान, अनुच्छेद 21 व 38 - सरकार को प्रतिष्ठा, सुविधा और अवसर में असमानता दूर करने का प्रयत्न करना चाहिए।

Anil Trivedi, for the petitioner.

A.S. Gokhale & L.R. Bhatnagar, G.A., for the respondent / State.

V.P. Khare, for the respondent No.3 / M.P. Public Service Commission.

ORDER

J.K. MAHESHWARI, J.:-By filing this petition a blind citizen has knocked the door of this Court for enforcement of the mandate of law known as "Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" (for brevity hereinafter referred to as "the Act"), seeking protection of the umbrella of justice delivery system. The non-enforcement of the provisions of the said Act in true spirit and sense is writ at large to establish social justice envisaged under the Constitution of India.

2. Petitioner had passed intermidate 10+2, B.A.and M.A.in Political Science in first class in 1997, and secured second position in the merit list of Devi Ahilya Vishwavidyalaya, Indore. Being a blind he has filed disability certificate showing 100% absence of sight. It is further pleaded that the M.P.Public Service Commission had issued an advertisement for recruitment to various posts, wherein he had appeared and got selected in preliminary and mains exam. But in oral interview he was not permitted to participate and denied the benefit of reservation to the persons with disability as per the provisions of the Act, however, sufferer otherwise he may be appointed on the posts reserved for disabled persons. Shri Anil Trivedi, learned counsel appearing for petitioner has drawn my attention to various provisions of the Act and also on the judgments of the Apex Court as well as of other High Courts and urged that mandate of the law of the said Act is the pious obligation of the executive authorities of the State to implement it, for upliftment of the weaker section and to secure social order in the society. Ignorance is amounting to denial of the social justice, which is the soul of Constitution of India.

3. Per contra, Shri A.S.Gokhale and Shri L.R.Bhatnagar, Govt.Advocates, have filed various circulars issued by the Govt.of Madhya Pradesh through General Administration Department dated 30.5.97, 19.12.97, 19.3.98 and 13.10.99, whereby it is contended that the Govt. of M.P. having full consensus to the Act of 1995 and intended to uplift the disabled persons accordingly, the percentage of reservation has been enhanced from 3% to 6% and have also notified those posts in hundred point roster making it reserve to the candidates of persons with disabilities, therefore, the Govt. of M.P. is having true spirit to act upon and implement the mandate of law. It is further said that recently the General Administration Department has further issued a circular on 31.3.2005 in concise form to show their commitment, to extend the benefit of reservation to the citizens of handicapped category. However, on account of issuance of various instructions for implementation of the provisions of the Act, the grievance as put forth in this petition is devoid of any merit and substance, hence it is liable to be dismissed.

4. On the other hand the M.P. Public Service Commission, which is a body constituted for selection and appointment to public employment in the State of Madhya Pradesh, by filing its reply has contended that implementation of the mandate of law in the matter of reservation is to be done by the Govt. of Madhya Pradesh. It is the State Govt., who decides the number of vacant posts available in the department, percentage of reservation in each category and class then made requisition to the Commission for selection on those posts. In furtherance to the said requisition, the Commission advertises the posts and after following the procedure for selection, makes recommendation for appointment. In view of the above facts, it is said that the Public Service Commission had discharged their duty, and made the recommendation on the posts as requisitioned for appointment by the State Government. In the present case it is specified that in 1997 and 1998, 39 posts were advertised for selection of Co-operative Inspectors/Co-operative Extension Officers, out of which two posts were reserved for disabled candidates other than 'Blind, Deaf & Dumb. In 1999, 50 posts of Co-operative Inspectors/Co-operative Extension Officers were advertised, out of which, three posts were kept reserved for disabled persons (orthopaedically handicapped). In the year 1999, 24 posts of Additional Asstt. Development Commissioner were advertised out of which, one post was reserved for Scheduled Tribe orthopaedically Handicapped person. In the 2000, 20 posts of Block Development Officer were published, out of which, one post of General category and one for Scheduled Caste were reserved to Orthopaedically Handicapped persons. However, it is the State Govt., who had not requisitioned the posts providing reservation to the blinds, deaf and dumbs, however, the Public Service Commission is not at fault in not making any recommendation to them. It is said that until and unless the requisition is sent for, by the Government to extend the benefit of reservation to blinds, deaf and dumb, the Commission is not in a position to make recommendation in their favour. In view of the said submissions, prayer is made to dismiss the petition.

5. After having heard learned counsel appearing for the parties on 25.2.2008 and as per the request of the Govt. Advocate a day's time was allowed to produce the Notification, if any, issued for the purpose of the proviso to Section 33 of the said Act. Today at the time of hearing, learned Govt. Advocate is not in a position to file any such Notification, accordingly the hearing is concluded. After hearing, I am of the opinion that by afflux of time, no direction for appointment of petitioner pursuant to his selection in 1998-99 may be issued after nine years, but looking to the issue of public importance of the blinds, deaf and dumb and down trodden, who are denied the equal opportunities in public employment, by the ingenuity of bureaucratic system despite having best intended legislation, academically, I have decided to deal with the issue on merit.

6. The preamble of the Constitution of India provides equality of status and opportunities to the citizens and to promote them among all. Article 21 envisages life and personal liberty, which includes livelihood. Part IV of the Constitution makes it obligatory by Article 38 upon the State Govt. to secure a social order and to promote for welfare of the people in society by uplifting them socially, economically, educationally and politically sound. The Government must minimise the inequalities in income, and made endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Thus, a citizen, who is blind or of low vision or having hearing impairment or having locomotor disability or cerebral palsy having right to live with dignity, status and to get equal opportunities in public employment and the State Government is duty bound to promote the welfare of such people and to secure the social order.

7. It is the common experience that the persons having disability are unable to lead their life properly and facing discrimination in employment, they are most neglected in the families and society, however could not have yet been uplifted. No meaningful attempts were made to join them with main stream of the society and the country. T.R. Dye, policy analyst, in his book Understanding Public Policy says: "Conditions in society which are not defined as a problem and for which alternatives are never proposed, never become policy issues. Government does nothing and conditions remain the same." The said quotation applies to the disabled in true sense. In fact the conditions of the disabled have not been defined as a problem, however, not remained as public issue to the politicians and the bureaucrats. This issue has been focussed by NGOs, authors, human right groups, who are fighting to restore their life with dignity. Until and unless realisation comes in the mind of politicians, bureaucrats and policy makers; that the right of a disabled citizen is also a human right, the class of these persons may not get status and to secure social order in the society of our country. In Asian and Pacific countries, primarily with this end in view, started the decade of disabled persons from the year 1993 till 2002. A meeting was held in Beijing on 1st to 5th December, 1992 called the "Meet to Launch the Asian and Pacific Decade of

Disabled persons. In this meeting Asian and Pacific countries adopted the Proclamation on the "Full Participation and Equality of People with Disabilities in the Asian and Pacific Regions". To give effect to this proclamation Parliament in India passed the enactment known as "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995".

8. In order to appreciate the intended benefit of reservation provided under the Act some relevant provisions are referred here. Section 2 (a) "appropriate Government" meaning thereby a Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924 and in relation to a State Govt. or any establishment wholly or substantially financed by that Govt. or any local authority, other than the Cantonment Board, the State Government; Section 2 (b) defines "blindness" whereby the person suffers from total absence of sight or visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or limitation of the field of vision subtending an angle of 20 degree or worse. Section 2 (c) defines "cerebral palsy" meaning thereby a group of non-progressive conditions of a person characterised by abnormal motor control posture resulting from brain insult or injuries occurring in the pre-natal, peri-natal or infant period of development. Section 2 (d) defines "disability" meaning thereby blindness, low vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation and mental illness. Section 2 (e) defines "hearing impairment" means loss of sixty decibels or more in the better ear in the conversational range or frequencies. Section 2 (f) defines "leprosy cured person" which means any person who have cured of leprosy but is suffering from "loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity; manifest deformity and paresis but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity; extreme physical deformity as well as advanced age which prevents him from undertaking any gainful occupation may be construed as per above. Section 2 (g) defines locomotor disability means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any from of cerebral palsy. Section 2 (h) defines "mental illness" means any mental disorder other than mental retardation. Section 2 (i) "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterized by subnormality of intelligence. Section 2 (j) defines "person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority. Section 2 (k) defines "person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or executing of a task with appropriate assistive device. Chapter-II of the said Act deals with Central Co-ordination Committee and Chapter-III deals with State Co-ordination Committee, where under the Central or the State

Government may constitute a body to exercise the powers and functions assigned under the Act. The said Chapter further deals with terms and conditions of the appointments and powers of the Committee. Chapter-IV give enormous powers to the appropriate Government to prevent occurrence of disabilities. Chapter-IV also provides that appropriate Governments and local authorities to provide free education to the children with a disability and to make schemes and programmes for formal education to them. Chapter-VI deals with the issue of employment whereunder as per Section 32 the appropriate Government shall identify the posts in the establishment which can be reserved for the persons with disability and may be reviewed at periodical intervals not exceeding three years. Section 33 provides reservation of posts, whereby appropriate Government shall appoint in every establishment such percentage of vacancies not less than three percent for persons or class or persons with disability of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment (iii) locomotor disability or cerebral palsy. Proviso of Section 33 confers a discretion to the appropriate Government, who may having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section. Section 34 enumerates that employer in every establishment shall furnish such information or return as may be prescribed in relation to vacancies appointed for persons with disability that have occurred or about to occur in that establishment to such Special Employment Exchange as may be prescribed and the establishment shall thereupon comply with such requisition. Section 35 specifies that any person authorised by Special Employment Exchange in writing shall have access to any relevant record or document in the possession of any establishment. Section 36 makes it obligatory on the employer to maintain the record of the persons with disability employed in the establishment in such form and in such a manner as prescribed by the authority. Section 38 gives power to the appropriate Government and local authorities, who shall by notification formulate schemes for ensuring employment of persons with disabilities. Section 39 specifies that all education institutions to reserve seats for persons with disabilities. Section 40 specifies that not less than 3% vacancies may be available in all poverty alleviation schemes for the benefit of persons with disabilities. Section 41 specifies the Government is under obligation to offer incentive to the employer both in public and private sectors to ensure at least 5% of the work force is composed of persons with disabilities. Chapter-VII provides that persons with disabilities must be given allotment of land and houses at concessional rates and on preference. Chapter-VIII makes it clear that persons with disabilities should be given special measures and they are not required to be discriminated in transport, on the roads, in the economic capacity and development and in the Government employment. Chapter-IX and X enumerates about the research and manpower development, and recognition of the institutions for persons with disabilities. Chapter-XI provides for institution for persons with severe disabilities.

Chapter-XII related to execution of the said provisions by appointing Chief Commissioner and Commissioners to achieve ultimate object specified in Chapter 13, by which the appropriate Government is bound to provide social security to the persons with disabilities.

9. Thus, entire scheme of the Act makes it clear that persons with disabilities are required to be uplifted since education, employment and to provide them all opportunities to get status in every walk of life, which is in accordance with the basic structure of our Constitution and to uphold the object specified in the preamble of the Constitution of India. Thus the enactment, persons with disability (Equal Opportunities, Protection of Right and the Participation) Act, 1995 is the best intended legislation. In the case in hand the meritorious blind citizen, who has passed the preliminary and main examination of M.P. Public Service Commission has not been offered to participate in the oral interview only because he was a blind and looking to the nature of the duties attached to the post, however, by giving a purposive interpretation, the mandate of the said Act and the right of reservation, which was available to him, has been denied.

10. The Government in their return is unable to deny or discard the protection of the said Act, on the contrary by filing various Circulars, it has conveyed to Court that the Government is vigilant enough to protect the right of such class of the persons and issued various Circulars in their favour. But surprisingly the ingenuity of the clutches of the executive fiat of the bureaucraties of the State Govt. has been brought on record by the return of the Public Service Commission, whereby the reservation to the persons with disability was made available only to orthopaedically handicapped, no solace was offered to blind, deaf and dumb because the State Govt. had made the requisition of posts to be reserved to other than blind or of low vision or deaf and dumb, thus, the person, who is handicapped with locomotor disability, and popularly known as orthopaedically handicapped were only extended the benefit of reservation. Thus, the stand of the State Government and the policies, which showers protection of reservation to blind, deaf and dumb is available only on papers, as apparent from the return and documents produced by Public Service Commission. Therefore, it is to be held that by the ingenuity of the bureaucratic system has set at naught of implementation of best piece of intended legislation denying the benefit of reservation to the blinds, deaf and dumb and cerebral palsy.

11. In the case of *National Federation of Blind Vs. Union Public Service Commission and others*, reported in (2005) 1 PDD 268, the Apex Court has observed that visually handicapped constitute a significant section of our society and as such it is necessary to encourage their participation in every walk of life. It is further considered that Ministry of Welfare, Government of India has undertaken various measures to utilize the potentialities of the visually handicapped persons. The Central Government has provided the reservation minimum to the extent 3% to group 'C' and 'D' posts to the physically handicapped persons including blind

and partially blind. The Apex Court after perusing various circulars directed the Government of India and the Union Public Service Commission to promote the visually (blind and partially blind persons) and to permit them to compete the examination, which is held by Union Public Service Commission. It was further held that they shall be provided facility of writing Civil Services Examination either in Braille-script or with the help of a scribe.

12. The Apex Court in other case of *Bhagwan Dass and another Vs. Punjab State Electricity Board*, reported in (2008) 1 SCC 579, observed and highlighted the highly insensitive and apathetic attitude harboured by some of us, living a normal healthy life, towards those unfortunate fellowmen who fell victim to some incapacitating disability. The facts of the case reveal that officers of the Punjab State Electricity Board were quite aware of the statutory rights of appellant No. 1 and their corresponding obligation yet they denied him his lawful dues by means that can only be called disingenuous. In this case the Apex Court dealt with the argument of purposive interpretation, as officers of the Board were acted to the best of interest of the Board, but such argument was declined with the observation that still under the old mindset it would appear to them just not right that the Board should spend good money on someone who was no longer of any use, but they were quite wrong, seen from any angle. The Apex Court has further observed that from the narrow point of view the officers were duty bound to follow the law and it was not open to them to allow their bias to defeat the lawful rights of the disabled employee. It is further observed that from the larger point of view the officers failed to realise that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. Ultimately it is held that the denial of their rights would not only be unjust or unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largesse but their right as other equal citizens of the country.

13. The High Court of Andhra Pradesh in the case of *Perambaduru Murali Krishna and others Vs. State of Andhra Pradesh and others*, reported in (2005) 1 PDD (CC) 231, has observed that the State Government is itself competent to make the law on the point while recruiting through Public Service Commission and the reservation to the blinds or low vision, hearing impairment ought to have been allowed. Similarly Punjab & Haryana High Court in the case of *Surnder Kumar Vs. Panjabi University and others*, reported in (2005) 1 PDD (CC) 72 has directed to extend the benefit of the mandate of the Act of 1995 and in terms of the directives issued in the case of *National Federation of Blind* (supra).

14. I have also come across to the Division Bench judgment of this Court in the case of *Medical Council of India Vs. Nitin Mantri and others*, reported in I.L.R. (2007) M.P. 1065, whereby this Court has touched the issue of purposive interpretation and held that the persons with visual disability may not be made entitled to seek admission in the medical college in view of the guidelines issued by Medical Council of India. The said matter was related to the admission to the

medical colleges, which are governed by Section 39 of the Act and the decision is based on a letter dated 5.7.2001 of a joint meeting of Medical Council of India, whereby the visually handicapped have not not been considered suitable for the studies of MBBS course. Thus, in view of the said letter and with a view of purposive interpretation the benefit of reservation made available to them by Section 39 of the Act was denied. In the case in hand, the benefit of reservation is claimed on the basis of the provisions of Section 32 and 33 of the Act and the Apex Court has also interpreted it, even by giving purposive interpretation in the case of *Bhagwan Dass* (supra).

15. The perusal of language of Section 32 of the Act of 1995 makes it clear that the appropriate Government shall identify the posts in the establishment, which can be reserved for the person with disability. Section 33 specifies the reservation of the posts, by which the appropriate Government shall mandatorily appoint such percentage of disabled persons not less than 3% in every establishment from blindns or low vision, deaf and dumb, locomotor disability or cerebral palsy. The proviso of Section 33 gives an exemption to the appropriate Government, for purposive interpretation, whereby having regard to the work carried out in the department or establishment of the said Government by way of Notification and subject to conditions, if any, may exempt any establishment from the implementation of the provisions of this Section. However, the joint reading of Section 32 and 33 makes it amply clear that the Government is duty bound to identify the posts in the establishment to which the reservation must be made to the blinds or of low vision, hearing impairment and physically handicapped persons. By issuing a Notification and subject to the conditions so mentioned any of the establishment may be exempted from the purview of reservation. Thus, it is clear that to exempt any establishment, from reservation of Sections 32 and 33 of the Act, a Notification is required to be published in the Govt. Gazette, as defined under Section 2(s). In the present case no such notification has been brought to my notice despite giving an opportunity to the State Govt. to produce the same. In such circumstances, the only irrestiable conclusion may arrive, that even after issuing various circulars by the State to uplift the mandate of the Act of 1995, its real benefit has not been extended to the petitioner as well as to the class of blind, low vision, deaf and dumb and cerebral palsy, it was made available only the orthopaedically handicapped persons.

16. In view of the foregoing discussion, I am of the considered view that the State Government has failed to discharge its obligation, commensurate to Article 21 and 38 of the Constitution of India, to secure social order and to protect the disabled persons signifying their participation in every walk of life. The Government has failed to equate the disabled persons with other citizens and denied their legal rights envisaged in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which is amounting to denial of social justice, though their rights are protected by rule or law. It is neither charity, bounty

or largesse in the hands of Govt. but their rights are equal to other citizens of the country. Thus, in the facts, the stand taken by the State Government is attractive enough on the papers but not in reality, which reflects from the documents produced by Public Service Commission, therefore, the action of the Government is unjust, unfair to the disabled persons and their families, and creates greater problem to them and to society at large.

17. Thus, in view of the foregoing discussion, the ingenuity of the bureaucrats in non-implementation of the mandate of the Act of 1995 and non-implementation of their circulars is a writ at large and compelled me to command them, directing, to recognise the beneficial piece of legislation and to implement it and establish the rule of law to secure social recognition to such class of persons, accordingly I am constrained to issue following directions.

i) The State Government is directed to implement the mandate of the act, "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the provisions of the rules made thereunder, by issuing appropriate instructions in this regard to all the departments of the State Government.

ii) The State Government is further directed to identify the posts of the disabled including the posts of blind or low vision, hearing impairment or locomotor cerebral palsy and the benefit be made available to the candidates of such class in future employment as specified in Section 32 and 33 of the Act.

iii) It is further directed that until and unless any establishment is exempted by way of issuing a notification, the mandate of Section 32 and 33 of the Act of 1995 be not flouted with by the authorities/officials in any manner and on violation of the same, they must be dealt with in accordance with the provisions of law.

iv) The State Government is directed to strictly adhere to the reservation to all three categories with the ratio of 1:1 in minimum or as observed by them in their own circular dated 31.3.2005, 2:2 for each class.

v) A copy of this order be also parted with the Chief Secretary of Madhya Pradesh for its circulation to all the concerned departments of the State Government and local bodies, which fall within the purview of appropriate Government for its real implementation and to secure social justice in the State of Madhya Pradesh.

vi) The Government is also directed to give wider publicity by print and electronic media indicating the rights of reservation to the disabled persons and the notification of exemption, if any, be issued to them.

Order accordingly.

I.L.R. [2008] M. P., 2274

WRIT PETITION

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

4 April, 2008*

MOHAMMAD RAFIK BHUTTO

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 226, Ancient Monuments and Archaeological Sites and Remains Act, M.P. (12 of 1964), Sections 2(a), 2(c), 3, Ancient Monuments and Archaeological Sites and Remains Rules, M.P., 1976, Rule 10 - Fort at Sendhwa declared ancient monument - Notification declaring area upto 100 meters and further beyond it upto 200 meters from protected limits near or adjoining of protected monument as prohibited and regulated areas for mining and construction - Act and Rule regulates activities in the area and do not impose total ban on construction - However, Collector of District directed to ensure that no construction shall be permitted in prohibited area except in accordance with provision of Act and Rules - Petition disposed of. (Para 8)

संविधान, अनुच्छेद 226, प्राचीन संस्मारक तथा पुरातत्वीय स्थल और अवशेष अधिनियम, म.प्र. (1964 का 12), धारा 2(ए), 2(सी), 3, प्राचीन संस्मारक तथा पुरातत्वीय स्थल और अवशेष नियम, म.प्र., 1976, नियम 10 - सेंधवा स्थित किला प्राचीन संस्मारक घोषित - अधिसूचना संरक्षित संस्मारक के निकट या लगे हुए क्षेत्र को संरक्षित सीमाओं से 100 मीटर तक और उसके पश्चात् आगे 200 मीटर तक खनन और निर्माण के लिए प्रतिषिद्ध और विनियमित क्षेत्र के रूप में घोषित करती है - अधिनियम और नियम क्षेत्र में क्रियाकलापों को विनियमित करते हैं और निर्माण पर पूर्ण पाबंदी अधिरोपित नहीं करते हैं - तथापि जिले के कलेक्टर ने यह सुनिश्चित करने के लिए निदेशित किया कि प्रतिषिद्ध क्षेत्र में अधिनियम और नियमों के उपबंध के अनुसार के अलावा कोई निर्माण अनुज्ञात नहीं होगा - याचिका निपटाई गई।

*Anil Trivedi, for the petitioner.**A.S. Kutumble, Addl. A.G. with Mamta Shandilya, Panel Adv., for the respondents No.1 to 5.**M.A. Bohra & M.R. Sheikh, for the respondents No.6 & 7.*

ORDER

The Order of the Court was delivered by S.K. KULSHRESTHA, J. :- THIS petition, pro bono publico, seeks to enforce the provisions contained in the Madhya Pradesh Ancient Monuments and Archaeological Sites and Remains Act, 1964 and the Rules framed thereunder entitled 'The Madhya Pradesh Ancient Monuments and Archaeological Sites and Remains Rules, 1976 (hereinafter referred to as 'the Act' and 'the Rules') and seeks a mandamus for removal of the unauthorised structures under Section 19(2) of the Act and execution of the order (Annexure P/7) passed by the Collector. In

the year 1964, the Act was passed to provide for preservation of certain ancient and historical monuments and archaeological sites and remains and for the regulation of excavation of archaeological sites in Madhya Pradesh and matters ancillary thereto. Section 2(a) defines ancient monuments to be any building structure, erection, monolith or monument or any mound or tumulus or any tomb or place of interment or any cave or any sculpture or inscription on an immovable object which is of historical archaeological or artistic interest and which has been in existence for not less than hundred years. The definition also includes the monuments and remains as enumerated in clause (i) to (iv). For better appreciation of the controversy, Section 2(a) is reproduced hereinafter :

2.(a) "Ancient monument" means any building structure, erection, monolith or monument or any mound or tumulus or any tomb or place of interment or any cave or any sculpture or inscription on an immovable object which is of historical archaeological or artistic interest and which has been in existence for not less than hundred years, and includes,

- (i) the remains of such monument,
- (ii) the site of such monument,
- (iii) such portion of land adjoining the site of such monument as may be required for fencing or covering in or otherwise preserving the monument, and
- (iv) the means of access to, and convenient inspection of, such monument.

02. Section 2(c) defines "archaeological sites and remains" to mean any area which contains or is reasonably believed to contain ruins or relics of historical or archaeological importance which have been in existence for not less than hundred years. Clause (g) defines State protected area as an archaeological site and remains which is declared to be a State protected area under this Act.

03. Section 3 empowers the State Government to declare ancient monument to be State protected monuments or archaeological sites and remains to be State protected area. Chapter VI of the Rules provides for restraining of mining operation and construction near State protected area. Rule 30 of the Rules contains the effect of declaration of prohibited or regulated area and reads as follows :

30. **Effect of declaration or prohibited or regulated area.**(1) Subject to the provisions of sub-rule (2), no person, other than the Director shall undertake, any mining operation or any other construction (a) in a prohibited area, or (b) in a regulated area except under and in accordance with the terms and conditions of a licence granted by the Director.

(2) Where a mining operation intended to be undertaken (a) in a prohibited area or (b) in a regulated area is subject to the provisions of the Mines and Minerals (Regulation and Development) Act, 1957 (LXVII

of 1957) and the rules made thereunder no person shall undertake such mining operation in that area without the permission of the Director.

(emphasis supplied)

04. The counsel for the petitioner has brought to our notice a Notification dated 10th March, 1999, No. F.6-10-97-Cul.99, whereby in exercise of the power under Rule 28 of the Rules, the State Government has declared the area upto 100 metres and further beyond it upto 200 metres from the protected limits near or adjoining of the protected monuments of the State as prohibited and regulated areas for the purpose of mining and construction as required by sub-Rule (1) of Rule 28.

05. The precise grievance of the petitioner is that by order (Annexure R/4), the Collector, Barwani, has yielded to the political pressure and has restrained himself and the other authorities from proceeding in accordance with the Act and the Rules for removal of the construction around the Fort at Sendhwa. We may add that so far as the area within the Fort is concerned, it is not disputed that there are number of Departments of the Government and it also houses the Civil Court and other Government Offices. The learned counsel has pointed out that as per order dated 9th May, 2001 (Annexure P/12), the Collector had, in keeping with the provisions, issued directions and sought report of compliance by 11/1/2001, but surprisingly, the legal direction issued vide Annexure P/12 was more or less recalled by order Annexure R/4. According to the learned counsel for the petitioners, since no permission of construction or mining can be granted within the peripheral limits of 100 – 200 meters of the ancient monuments except in accordance with the permission granted under Rule 10(2), the letter of the Collector (Annexure R/4) is illegal and deserves to be quashed and a mandamus deserves to be issued to the respondents to enforce the letter Annexure P/12 and the other provisions of the Act.

06. Before considering the rival contentions it is necessary to record the contention of the learned Addl. Advocate General that after the letter Annexure P/12 was issued by the Collector directing removal / demolition of the illegal constructions within the peripheral limits of 100 – 200 metres from the boundary of the Fort at Sendhwa, a letter Annexure R/6-1 was sent by the local M.L.A., apprising the Government of the true situation prevailing in the area around the Fort at Sendhwa. It was pointed out that the Act was brought into force in the year 1964 while there were constructions dating back to half a century from the date of bringing into force of the Act. He has further pointed out that the Notification relied upon by the petitioner is dated 10th March, 1999 with the result the same will have no retrospective effect and, therefore, the constructions which have come up prior to the Notification relied upon by the petitioner, cannot be subjected to the provisions of the Act and the Rules prohibiting such constructions. He has also pointed out that subsequently, constructions have been made with the prior permission of the Municipality with the result the legal construction should

not be disturbed merely because they are within the peripheral area of 100 metres from the Fort.

07. We have heard the learned counsel for the parties and perused the record. The real issue raised by the petitioner, if understood in its proper perspective, is that while by Annexure P/12, the Collector, Barwani, directed obedience of the mandatory provisions of the Act and the Rules, he had to yield to the pressure of the Government on the basis of the letter of the local M.L.A. (Annexure R/6-1) and send the letter Annexure R/4, contrary to the desired steps to be taken vide Annexure P/12.

08. It is not disputed that the Government has the power under Rule 10 for grant of permission for construction. The said Rule provides that no person shall undertake any construction or mining operation within a State protected area, except under and in accordance with the permission granted in this behalf by the State Government. In view of the exception carved out by the statute itself, it is manifest that the limit of 100 meters or 100 – 200 meters is not sacrosanct and is subject to other regulatory provisions such as the one contained in Rule 10. Therefore, the contention of the learned counsel for the petitioner that once a Notification u/S. 28 has been issued and u/S. 29 an area has been declared as prohibited or regulated area, the provisions of the Act and the Rules become operative without any power to cause infraction of the said Notification, does not appeal to us. When the provisions of the Act and the Rules are harmonised, the Notification is issued only for regulating the activities in the area and not for total ban on constructions within the area. Had it been that no construction can be made within the prohibited area, the provision contained in Rule 10 would have become otiose.

09. Coming to the facts of the case, the grievance of the petitioners is with regard to the constructions being made outside the southern wall of the Fort by the local municipality. This grievance was raised in the year 2001 after having lost in appeal filed to the State Government u/S. 19(2). We have already observed that the declaration under Rr. 28 and 29, does not divest the State Government of the power to grant permission for construction even within the prohibited area. The counsel for the respondents has invited our attention to the document Annexure R/2, a letter of the Government, dated 19th April, 2001, granting permission to the Nagar Palika to construct shops near the Fort. Under these circumstances, the grievance of the petitioners that the shops are being illegally constructed near the southern wall of the said Fort, is illusory. We are, therefore, not inclined to accept the grievance of the petitioners with regard to the construction of the shops near the southern wall of the Fort.

10. However, since a general allegation has been made by the petitioners about the constructions within the prohibited area without the permission of the Government, as required under Rule 10(2) of the Rules, we are of the view that

the Collector of the District shall now ensure that no construction is permitted in area except in accordance with the provisions of the Act and the Rules and the other provisions of law regulating such permission.

11. With the above observation, and the direction to the State Government and the Collector to restrain such constructions, as do not comply with the provisions, this petition is disposed of with no order as to costs. The amount of security deposit be refunded to the petitioner, on due verification.

Petition disposed of.

I.L.R. [2008] M. P., 2278

WRIT PETITION

Before Mr. Justice Abhay M. Naik

11 April, 2008*

KAILASH BABU RAI

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Gram Panchayat (Powers and Functions of the Secretary) Rules, M.P., 1999, Rule 4(1) - Official duties of Secretary - Petitioner appointed as Panchayat Karmi and subsequently notified as Secretary - Samajik Suraksha Pension sanctioned in favour of Parmo Bai - After her remarriage Gram Panchayat by resolution diverted Nirashrit Pension in favour of another lady namely Parmo Bai - Held - Gram Panchayat not empowered to sanction Nirashrit Pension - Petitioner being Secretary merely carried out resolution - Resolution passed in 1996 - Rules, 1999 came into force in 1999 - Nothing on record to show that Panchayat Karmi at that time had to use his own wisdom contrary to resolution - Petitioner has not misused his post. (Paras 13 & 14)

कं. ग्राम पंचायत (सचिव की शक्तियाँ और कार्य) नियम, सचिव के रूप में अधिसूचित किया गया - सामाजिक सुरक्षा पेंशन परमो बाई के हित में मंजूर के पश्चात् ग्राम पंचायत ने प्रस्ताव द्वारा निराश्रित पेंशन परमो बाई नामक दूसरी महिला के हित में परिवर्तित कर दी - अभिनिर्धारित - ग्राम पंचायत निराश्रित पेंशन मंजूर करने को सशक्त नहीं - याची ने सचिव होने के नाते केवल प्रस्ताव का पालन किया - प्रस्ताव 1996 में पारित हुआ - नियम 1999 प्रवर्तन में 1999 में आए - अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि पंचायत कर्मी को उस समय प्रस्ताव के प्रतिकूल अपनी स्वयं की बुद्धि का प्रयोग करना था।

B. Panchayat Service (Discipline and Appeal) Rules, M.P., 1999, Rules 5(b), 7 - Major Penalty - Procedure - Petitioner working as Panchayat Karmi - Removed from his post without following procedure laid down under Rule 7 - Removal bad - Petition allowed. (Para 16)

ख. पंचायत सेवा (अनुशासन और अपील) नियम, म.प्र., 1999, नियम 5(बी), 7 - मुख्य शास्ति - प्रक्रिया - याची पंचायत कर्मी के रूप में कार्यरत - नियम 7 के अन्तर्गत

अधिकथित प्रक्रिया का पालन किये बिना उसके पद से हटाया गया - हटाया जाना दोषपूर्ण - याचिका मंजूर।

K.K. Pandey, for the petitioner.

Ashok Agrawal, G.A., for the respondent No.1.

Pradeep Dwivedi, for the respondent No.2.

J U D G M E N T

ABHAY M. NAIK, J.:—Petitioner was appointed as Panchayat Karmi of Gram Panchayat, Manpur, District Raisen. He was also notified as Secretary of the Gram Panchayat. A complaint was made on 16.6.1999 against the Sarpanch and the Secretary of the Gram Panchayat by one Parmo Bai widow of Halke, alleging that they have pocketed the amount of 'Nirashrit Pension Yozna' allotted to her in the year 1995. Proceedings were initiated by the Sub Divisional Officer, Raisen, and the preliminary enquiry was made by the Chief Executive Officer of Janpad Panchayat Sanchi. Sarpanch and Secretary were served with show cause notices. In reply, the Sarpanch stated that the amount of Nirashrit Pension was diverted to another candidate because the complainant had lost her entitlement on account of leaving the Panchayat area and performing second marriage. A resolution to this effect was passed by the Gram Panchayat. Sarpanch also submitted his affidavit stating therein that the petitioner was not at fault at all as he being the Secretary of Gram Panchayat, took action under the directions of the Sarpanch in accordance with the resolution which is on record as Annx.P/7. Copy of the affidavit is on record as Annx.P/8. Petitioner submitted the reply and stated that he acted according to the directions of the Sarpanch as well as the resolution passed by the general body of the Gram Panchayat. Copy of the reply is on record as Annx.P/9.

2. After enquiry, the Sub Divisional Officer Raisen, removed the petitioner from the post of Panchayat Karmi (Secretary) vide order Annx.P/1 dated 24.8.1999. Appeal and revision were preferred before the Upper Collector Raisen and Commissioner Bhopal and Hoshangabad division which, too, have been dismissed on 8.11.1999 (Annexure P-2) and 8.5.2000 (P/3) respectively. This petition has been preferred challenging Annx.P/1, Annx.P/2 and Annx.P/3 on the ground that the petitioner being the Secretary of Gram Panchayat is bound to obey the orders of Sarpanch and the Gram Panchayat. The complainant having lost her entitlement on account of shifting to another Gram Panchayat area and further performing the second marriage was rightly not paid the Nirashrit Pension.

3. In the return, respondent No.1 stated that while discharging the duties as Secretary of Gram Panchayat he was supposed to act in honest, fair and responsible manner. On receiving the complaint, an enquiry was made by the Sub Divisional Officer Raisen, through the Chief Executive Officer, Janpad Panchayat Sanchi. It was found that the pension was being disbursed to Smt. Parmo Bai, widow of Late Shri Karan Singh and was not being disbursed to Parmo Bai, widow of Halke, who was the actual beneficiary and for whom the pension was sanctioned. Copy

of the report of Chief Executive Officer is on record as Annx.R/2. If, the actual beneficiary of the pension was not available, the amount of pension ought to have been refunded to the Janpad Panchayat Sanchi. Even if, Parmo Bai widow of Karan Singh was found entitled to receive the pension amount under Nirashrit Pension Yozna, a separate course of action ought to have been resorted to get the pension sanctioned in her name. Thus, the Sarpanch of Gram panchayat as well as the petitioner misappropriated the Government money by disbursing it to an unauthorised person. Thus, the petitioner is rightly found responsible and is being removed accordingly. Order of removal was rightly passed by the Sub Divisional Officer, which has already been confirmed by the Additional Collector as well as the Commissioner.

4. After hearing the learned counsel for the parties in the light of material on record, the facts which emerge are that the petitioner was duly appointed as Panchayat Karmi vide resolution dated 19.11.1995 marked as Annx.P/4. He was appointed as Panchayat Karmi vide order dated 19.11.1995 marked as Annx.P/5. He was notified as Secretary by the Collector Raisen in exercise of powers under Section 69 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as Panchayat Raj Adhiniyam for brevity). Samajik Suraksha Pension was sanctioned to Parmo Bai, widow of Halke. On 2.10.1996, Gram Panchayat Manpur found that Parmo Bai widow of Halke got remarried and left the village and made herself disqualified for the said pension. Accordingly, it was resolved by the Gram Panchayat that the pension amount sanctioned in the name of Parmo Bai, widow of Halke, may be paid to Parmo Bai, widow of Karan Singh. Copy of the resolution is on record as Annx.P/7. Phoola Bai, who was Sarpanch of Gram Panchayat Manpur, personally disbursed the amount of pension in accordance with the resolution to Parmo Bai, widow of Karan Singh.

5. In reply to show cause, petitioner categorically stated that Parmo Bai, widow of Halke had left the village and got remarried. Parmo Bai widow of Karan Singh was aged 70 years and made an application to the Gram Panchayat for grant of Samajik Suraksha Pension, which was allowed by the Gram Panchayat by the resolution Annx.P/2. Accordingly, amount of pension was disbursed to Parmo Bai, widow of Karan Singh by the Sarpanch herself and in her absence, the petitioner being Secretary in compliance of the order/direction of the Gram Panchayat disbursed the same.

6. Enquiry report of the Chief Executive Officer, Janpad Panchayat Sanchi is on record as Annx.R/2, wherein it was found that Parmo Bai, widow of Halke got remarried with Naryan, son of Lalli Singh after the sanction of the pension and, accordingly, amount of pension sanctioned in her name was paid by Gram Panchayat to another widow, namely, Parmo Bai, widow of Karan Singh of the same village. The Chief Executive Officer concluded that the amount of Samajik Suraksha Pension sanctioned in the name of Parmo Bai, widow of Halke was

paid to Parmo Bai, widow of Karan Singh and the Sarpanch and Secretary of Gram Panchayat Manpur, were responsible for it. On the basis of this report, learned Sub Divisional Officer Raisen, issued the impugned order dated 24.8.1999 (Annx.P/1) of removal of petitioner from the post of Secretary on the ground that he has misused his post and has made payment of Samajik Suraksha Pension to Parmo Bai, widow of Karan Singh without sanction.

7. Powers and Functions of Sarpanch of Gram Panchayat are prescribed under the Madhya Pradesh Panchayat (Powers and Function of Sarpanch and Up-Sarpanch of Gram Panchayat, President and Vice-President of Janpad Panchayat and Zila Panchayat) Rules, 1994. Rule 3 of the aforesaid Rules, clearly lays down that the Sarpanch shall be directly responsible for carrying out or getting to be carried out :-

“(a) the resolutions of the Gram Panchayat passed by it for the purpose of carrying out the provisions of the Act;

(b) -----

(c) all functions assigned to the Gram Panchayat under Section 49 of the Act.”

8. Aforesaid provision clearly makes it out that the Sarpanch was responsible for carrying out or getting to be carried the resolutions of the Gram Panchayat. Resolution of Gram Panchayat Manpur is on record as Annx.P/7, thereby a decision was taken to make payment of Samajik Suraksha Pension, sanctioned in the name of Parmo Bai, widow of Halke to Parmo Bai, widow of Karan Singh on account of former having left the village by performing marriage. Sarpanch has also admitted in her affidavit marked as Annx.P/8, that the Gram Panchayat had resolved that Parmo Bai, widow of Halke having incurred disqualification for grant of pension. Samajik Suraksha Pension sanctioned in her name may be paid to Parmo Bai, widow of Karan Singh. The Sarpanch herself made disbursement of the pension to Parmo Bai, widow of Karan Singh as admitted by her in her affidavit marked as Annx.P/8. Only during her absence, Samajik Suraksha Pension was paid to Parmo Bai, widow of Karan Singh in accordance to the resolution and direction of the Gram panchayat. Petitioner being the Secretary of Gram Panchayat obeyed the direction of the Sarpanch which was in accordance with the resolution of Gram Panchayat.

9. However, this case is to be viewed from two additional angles, firstly, whether the Gram Panchayat was empowered to divert the amount of pension sanctioned to another lady and, secondly, whether the petitioner being the Secretary of Gram Panchayat was obliged to give effect to the resolution without having an independent valid opinion.

10. Samajik Suraksha Yozna introduced by the State and Rashtriya Vriddhavastha Pension Yozna of the Central Government were unified by the

Social Welfare Department/ Mantralaya of Government of Madhya Pradesh vide its order dated F-1/59/95/26-2, dated 25.6.1996. Accordingly, a guiding Scheme was introduced by the said department on 4.9.1996. Clause (1) prescribes the requisites for entitlement to receive the pension, whereas, Clause (2) defines destitute persons. Clause (4) provides the procedure for making application for pension, whereas, Clause (5) lays down the specific procedure for sanction of pension. Clause (5) of the said Order is reproduced herein below :-

“(5) पेंशन मंजूर करने की प्रक्रिया :-

1. शहरी क्षेत्र की दशा में नगर निगम/नगर पालिका/नगर पंचायत तथा ग्रामीण क्षेत्र में जनपद पंचायत में प्राप्त आवेदन-पत्रों के परीक्षण उपरांत मुख्य कार्यपालन अधिकारी उन्हें अपनी टीम के साथ जनपद पंचायत अथवा नगर निगम/नगर पालिका/नगर पंचायत की अगली बैठक में निर्णय हेतु प्रस्तुत करेंगे ।
2. शहरी क्षेत्र की दशा में नगर निगम/नगर पालिका/नगर पंचायत तथा ग्रामीण क्षेत्र की दशा में जनपद पंचायत को प्राप्त आवेदन पत्रों पर सामाजिक सुरक्षा पेंशन स्वीकृत/अस्वीकृत करने का अधिकार होगा । किन्तु जनपद पंचायत/नगरीय निकायों के लिये आवश्यक होगा कि कोई आवेदन अस्वीकृत करने की दशा में उसके कारणों का भी उल्लेख करें ।
3. स्वीकृतकर्ता प्राधिकारी को पंजीकृत आवेदन पत्र पर आवेदन कार्यालय में प्राप्ति के अधिकतम 60 दिन के अन्दर निर्णय ले कर आवेदक को सूचित करना आवश्यक होगा । पेंशन स्वीकृत या अस्वीकृत करने सम्बन्धी निर्णय की सूचना आवेदक को प्रारूप-3 में दी जावेगी ।
4. पेंशन की पात्रता होने की स्थिति में पेंशन राशि आवेदन-पत्र पंजीयन होने के माह से स्वीकृत की जावेगी ।
5. सामाजिक सुरक्षा पेंशन प्राप्त कर रहे निराश्रित की मृत्यु होने या अन्यथा अपात्र पाए जाने की सूचना मिलने पर अगले माह से पेंशन राशि का भुगतान बन्द कर दिया जावेगा । ग्राम पंचायत/नगरीय निकाय के संबंधित वार्ड मेम्बर/पार्षद से अपेक्षा है कि वे पेंशनर की मृत्यु होते ही जनपद पंचायत को/नगरीय निकाय को सूचना देंगे । (ग्राम पंचायत के सदस्य ग्राम पंचायत के माध्यम से सूचना देंगे ।)

11. From the aforesaid, it is clear that the power to sanction Samajik Suraksha Pension (hereinafter referred to as Pension for brevity) is vested for the purposes of rural area in Janpad Panchayat alone and Gram Panchayat had no power to sanction such pension in the name of any person though he/she may be entitled to it under the guidelines. Pension was earlier sanctioned in the name of Parmo Bai widow of Halke. On her leaving the area of Gram Panchayat and further getting remarried, a resolution was passed determining her pension which ought to have been forwarded or at least informed to the Janpad Panchayat as required under sub-clause (5) of Clause-5. However, in no case, the Gram Panchayat could have itself diverted the amount of pension payable to Parmo Bai widow of Halke to Parmo Bai widow of Karan Singh. Procedure for seeking pension is provided

in Clause (4) which lays down that an application by the concerning applicant ought to have been submitted in prescribed format to the Janpad Panchayat. Such applications received by the Gram Panchayat were required to be forwarded to the Janpad Panchayat within seven days with its comments after the necessary enquiry. Gram Panchayat itself had no power to entertain an application for grant of pension and to take a decision in the matter. Thus, the action of Gram Panchayat to divert the pension of Parmo Bai widow of Halke to Parmo Bai, widow of Karan Singh and its payment to latter is without jurisdiction. This action of the Gram Panchayat being in contravention of the guidelines, cannot be treated as justified, *moreso*, because there is no provision where from Gram Panchayat may be said to have derived such powers.

12. Although, a resolution vide Annx.P/7 was passed by the Gram Panchayat Manpur, to make payment of pension sanctioned in the name of Parmo Bai widow of Halke to Parmo Bai widow of Karan Singh, a crucial question would be whether the petitioner was bound to give effect to this resolution. Powers and functions of the Seceretary of Gram Panchayat are prescribed in Madhya Pradesh Gram Panchayat (Powers and Functions of the Secretary) Rules, 1999, which were published in the Madhya Pradesh Gazette (Extraordinary) dated 22.6.1999. Official duties of the Secretary are prescribed in Rule 4. It would be interesting to take note of Clause (1) which runs as follows :-

"4(1) : Give correct advice, to Sarpanch, members of the Gram Panchayat and members of Gram Sabha on the basis of the Act and the rules made thereunder and to draw their attention in case of any work, resolution, which is against the provisions of Act or rules made thereunder."

13. In view of the aforesaid clause, it is no more necessary for the Secretary to act in the direction of execution or implementation of the resolution, if, it is against the provisions of Act or Rules made thereunder. This Court shall not detain on this point any more because aforesaid Rules including the said clause came into force with effect from 22.6.1999, whereas, the resolution contained in Annx.P/7 was passed on 2.10.1996. No provision of law has been brought before this Court which required at that time the Panchayat Secretary to use his own wisdom, contrary to the resolution passed by the Gram Panchayat. Moreover, the Sarpanch herself had disbursed the pension to Parmo Bai widow of Karan Singh and it is only in her absence that the petitioner might have disbursed the amount of pension on few occasions to Parmo Bai widow of Karan Singh, in accordance with the resolution contained in Annx.P/7.

14. Accordingly, the petitioner is not found to have misused his post. He has, merely made the compliance of the resolution as well as direction of Gram Panchayat and its Sarpanch. He has, obviously not made any personal gain. Even the Chief Executive Officer Raisen has given a finding that the amount of pension sanctioned in the name of Parmo Bai, widow of Halke has been paid to

Parmo Bai, widow of Karan Singh. Thus, the petitioner is not found to have misappropriated the money for his own benefit. In case, if, there is any incorrect or illegal resolution, the same ought to have been dealt with in exercise of powers under Section 85 of Panchayat Raj Adhiniyam. State Government or the prescribed authority could have well suspended the execution of the resolution Annx.P/7.

15. It is not the case of the respondents in its return that the said resolution was ever suspended or cancelled. In the absence of any such situation, petitioner is not found to have acted illegally in making compliance of the resolution. On the contrary, he would have made himself liable for non-compliance of the resolution and would have exposed himself to an action against him by the Gram Panchayat. The Sub Divisional Officer Raisen, appellate and revisional authorities are not found to have considered the aforesaid aspects of law while passing the impugned order. Petitioner is found to have acted with good faith while making payment of pension in accordance with the resolution to Parmo Bai widow of Karan Singh who was not found by the authorities to be not entitled to Nirashrit Pension.

16. It may be seen that the order of removal of the petitioner was passed on 24.8.1999, whereas, Madhya Pradesh Panchayat Service (Discipline and Appeal) Rules, 1999, were published and enforced with effect from 22.6.1999. Sub-section (3) of Section 1 of the rules reads as under :-

“(3) Except as otherwise provided by or under these rules, they apply to all persons employed in connection with the affairs of Zila Panchayats, Janpad Panchayats and the Gram Panchayats and discharging the functions of Zila Panchayat, Janpad Panchayat and Gram Panchayat :

Provided that nothing in these rules shall apply to officers and servants of the state service who are posted under the Panchayats under Section 69 or are on lone service to the panchayats under section 71 of the Act.”

Member of Panchayat Service or a Panchayat Servant is defined in clause (f) of Section 2 which is as follows :-

“(f) “Member of Panchayat Service or a Panchayat Servant” means any person appointed to the Panchayat Service and includes an officer or servant allocated to the panchayat service;”

Petitioner having been appointed as Panchayat Karmi and thereafter notified as Panchayat Secretary falls within the ambit of member of Panchayat Service or Panchayat Servant as defined in clause (f) supra. Removal from service of the petitioner falls in sub-clause (6) of Clause (b) of rule 5, which is a major penalty. Procedure for imposing major penalty is provided in Rule 7. This procedure was not followed in the case of the petitioner, inasmuch as, the charge sheet required under

sub-rule (2) of Rule 7, was not issued at all. Thus, the impugned order being in contravention of these rules are also not otherwise sustainable in law.

17. In the result, the writ petition deserves to succeed and is, hereby, allowed accordingly. Impugned orders marked as Annx.P/1 to P/3 are, hereby, quashed. Respondents are directed to reinstate the petitioner.

No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2285

WRIT PETITION

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

16 April, 2008*

RAMU THAKUR (DR.)

... Petitioner

Vs.

M.P. PROFESSIONAL EXAMINATION BOARD

... Respondent

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P., 2008, Rule 1.20.9 - Constitutional validity of Rule 1.20.9 challenged as illegal and arbitrary - The rationale behind the rule is that in service quota seats should be filled by in service candidates first - In-service candidates and non-service candidates forms different category - In case of non-availability of eligible candidate in service category - The seats in service category cannot be allotted to corresponding category candidate of non-service category - Rule 1.20.9 not ultra vires - Petition dismissed. (Para 4)

चिकित्सा और दन्त स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र., 2008, नियम 1.20.9 - नियम 1.20.9 मनमाना और अवैध होने से संवैधानिक विधिमान्यता को चुनौती - नियम का तर्कधार यह है कि सेवा कोटे की सीटें सेवा उम्मीदवारों के द्वारा पहले भरी जायेंगी - सेवा उम्मीदवार और गैर सेवा उम्मीदवार अलग वर्ग बनाते हैं - सेवा वर्ग में अर्हता रखने वाले उपलब्ध न होने के मामले में - सेवा वर्ग की सीटें गैर सेवा वर्ग के तत्सम वर्ग को आबंटित नहीं की जा सकतीं - नियम 1.20.9 अधिकारातीत नहीं - याचिका खारिज।

Rajesh Maindiretta, for the petitioner.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J.:— The writ petition has been preferred by the petitioner assailing vires of Rule 1.20.9. of the rules called 'M.P. Medical and Dental Post Graduate Course Entrance Examination Rules, 2008' (hereinafter to be referred to as the Rules of 2008).

2. The aforesaid provision has been assailed as illegal and arbitrary by the petitioner on the ground that in case of non availability of ineligible candidates of

ST category, in service candidates, the seats should have gone to the corresponding category candidates of open candidates, it should not have been permitted to be filled by SC category in service and in case no SC/ST category in service candidates are available, by OBC in service candidates and in case no OBC in service category candidate is available, by general category in service candidates. It is submitted that aforesaid rule disturb the ratio of a particular category candidates to be maintained in the colleges for SC/ST and OBC category candidates for whom the provision for reservation has been made. In the rules for the year 2007 the seats to be filled by ST in service category candidates in case remained vacant, they were to be filled by the corresponding category candidates of open competition. This year departure has been made. In the year 2006 also the provision was like framed this year i.e. in the year 2008.

3. Shri Rajesh Maindiretta, learned counsel appearing for petitioner has submitted that the operation of the rule 1.20.9 of the Rules of 2008 is going to create anomalous situation and going to disturb the percentage of reservation provided of SC/ST and OBC category candidates in the post graduate courses. He has submitted that in service and open examination candidates should have been treated as one class only, consequently the seats of in service ST candidates, if remain vacant should have been filled by ST category open examination candidates, that would have maintained the percentage of the reservation for ST category and for other categories in the colleges. There was no justifiable reason to depart from the rules of the year 2007 which contained the provision as per the case set up by the petitioner.

The rule 1.20.9 & 1.20.10 of the Rules of 2008 are quoted below :-

1.20.9: Counselling of In-Service candidates will be done first category wise in the following sequence.

I. In-SERVICE

- A. ST Category
- B. SC Category
- C. OBC Category
- D. Unreserved Category

In case eligible In-Service candidates to the extent of reservations in any category are not available, the vacant seats of that category will be filled up by making available to other In-Service categories as given below:-

- (a) The vacant seats of ST category shall be filled up by the eligible SC category candidates.
- (b) The vacant seats of SC category shall be filled up by eligible ST category candidates.

(c) In case the eligible candidates to the extent of reservation in ST and SC categories are not available, the vacant seats shall be filled up by eligible OBC category candidates.

(d) In case the eligible candidates are not available in these three reserved categories in the above manner, the vacant seats shall then be filled up by the eligible Unreserved category candidates.

1.20.10: Seats remaining vacant after counselling (allotment) of In-Service candidates shall be made available to Non Service (Open) candidates category wise.

Horizontal reservation for handicapped category is also provided under Rule 1.8.4, the same is quoted below :-

1.8.4: For Physically Handicapped persons who are bonafide residents of Madhya Pradesh and who belong to ST, SC, OBC and Unreserved category, three percent (3%) seats are reserved for admission to P.G. courses. Reservation will be horizontal. According to the above reservation if eligible candidates are not available the above mentioned seats shall be filled from the related category only.

The candidate claiming admission against these seats will have to produce a valid certificate at the time of counselling, in the prescribed form from District Medical Board and Eligibility Certificate from Superintendent Vocational Rehabilitation Centre for Physically Handicapped, Government of India, Ministry of Labour, Napier Town, Jabalpur. (Seats shown on Table-5). However it will be governed by guidelines framed by MCI.

Following disabilities are not eligible-

1. Upper limb Handicapped
2. Visually Handicapped
3. Hearing Handicapped
4. Lower limb more than 70% Handicapped.

Certificate of eligibility should not be more than 3 months old at the time of counselling.

The rule 1.20.11 with respect to non service candidates is quoted below :-

1.20.11: Counselling of Non-Service candidates will be done according to following sequence category wise :-

- II. NON SERVICE
- A. ST Category
- B. SC Category
- C. OBC Category

D. Unreserved Category

In case the eligible candidates to the extent of reservations in any category i.e. Non-Service (Open) and Physically Handicapped are not available, the vacant seats of that category will be filled up by making available to other categories as given below :-

(a) The vacant seats of ST category shall be filled up by the eligible SC category candidates.

(b) The vacant seats of SC category shall be filled up by eligible ST category candidates.

(c) In case the eligible candidates to the extent of reservation in ST and SC categories are not available, the vacant seats shall be filled up by eligible OBC category candidates.

(d) In case the eligible candidates are not available in these three reserved categories in the above manner, the vacant seats shall then be filled up by the eligible Unreserved category candidates.

A bare reading of the rule 1.20.9 of the aforesaid Rules of 2008 makes it clear that the wisdom of the State Government is that the seats of in service candidates should be filled firstly by the in service candidates in order of categories prescribed therein. In case in service ST category seats remains vacant, it has to be filled by in service SC category candidates and in case no SC category in service candidate is available then it has to be filled by the OBC in service category candidate and then by unreserved category in service candidate, thereafter in case the seat is not filled in aforesaid manner after counseling, seat/seats shall be made available to non service open exam candidates category wise as provided in rule 1.20.10 of the Rules of 2008.

4. In our opinion the rule 1.20.9 and 1.20.10 of the Rules of 2008 cannot be said to be illegal or arbitrary as in service category candidates form different class altogether and provision of reservation has been made for ST, SC and OBC category candidates and remaining seats are to be filled by unreserved category candidates. Similarly the reservation has been provided for non service open category candidates categorywise i.e. ST, SC, OBC and unreserved. Non service open category candidates form a different class together. The rationale behind the rule is that in service quota seats should be filled by in service candidates firstly and in case they remained vacant, they are to be given firstly to the ST, thereafter to SC and thereafter to OBC and then to unreserved candidates in both classes.

5. Shri Rajesh Maindiretta has relied upon Rule 1.8.4 which provides reservation of physically handicapped persons. The aforesaid provision provides horizontal reservation. The seats which remain vacant shall be filled up from related category only as that is the horizontal reservation for SC, ST, OBC and unreserved category.

Obviously seats are to be filled by related category only. As in service candidates form a different class, it cannot be said that the seats of in service candidates without rotating them amongst in service candidates should have been given directly to the non service open examination candidates that would disturb the ratio of in service and open category candidates and take away the seats reserved for benefit of in service candidates. Both the classes are entirely different, we do not find any illegality or arbitrariness in the rule 1.20.9 and 1.20.10, provision for reservation is separately provided in both the categories. In case seat remains vacant of a particular category, in what manner they have to be filled is specifically provided in the aforesaid rules. We do not find that the aforesaid rules are violative of Art. 14 of the Constitution in any manner.

6. Writ petition is devoid of merit, same is hereby dismissed.

Petition dismissed.

I.L.R. [2008] M. P., 2289

WRIT PETITION

Before Mr. Justice S.K. Seth

24 April, 2008*

RADHESHYAM SUROLIA

... Petitioner

Vs.

NATIONAL TEXTILE CORPORATION (MP) LTD.

... Respondent

A. Constitution, Article 226 - Petitioner during course of employment acquired LL.B. and M.B.A. degrees - Claim for additional increments for acquiring additional professional qualifications - By one increment petitioner reached the maximum of sanctioned pay scale - Held - Denial of additional increment because petitioner reached to maximum of scale would not result in discrimination - Petition dismissed. (Para 5)

क. संविधान, अनुच्छेद 226 - याची ने नियोजन के दौरान एलएल.बी. और एम.बी. ए. की उपाधियाँ प्राप्त कीं - अतिरिक्त व्यावसायिक योग्यता प्राप्त करने के कारण अतिरिक्त वेतनवृद्धि के लिए दावा - एक वेतनवृद्धि से याची अधिकतम स्वीकृत वेतनमान पर पहुँच गया - अभिनिर्धारित - याची के अधिकतम वेतनमान पर पहुँचने की वजह से अतिरिक्त वेतनवृद्धि से इनकारी के परिणामस्वरूप विभेद नहीं होगा - याचिका खारिज।

B. Constitution, Article 226 - Delay - In 1993, petitioner was informed that he was not entitled to get additional increment - Subsequent communication would not give fresh cause of action - Stale cause of action can not be entertained - Petition dismissed. (Para 7)

ख. संविधान, अनुच्छेद 226 - विलम्ब - 1993 में याची को सूचित किया गया कि वह अतिरिक्त वेतनवृद्धि पाने का हकदार नहीं था - पश्चात्पूर्ती संसूचना नया वादकारण प्रदान नहीं करेगी - पुराना वादकारण ग्रहण नहीं किया जा सकता है - याचिका खारिज।

S. Bhargava with Smt. R. Bhargava, for the petitioner.
V. Sharan, for the respondent.

ORDER

S.K. SETH, J. :-Being aggrieved by the Order dated 31-12-2001(Ann.P-1), present writ petition was filed for directions to respondent to pay additional increments petitioner for having acquired professional qualifications of LL.B. and M.B.A. Subsequently petition was amended and the Order dated 24.11.1989 was also simply mentioned in paragraph 3 of the prescribed format of the writ petition as one of the impugned order.

2. Undisputed facts are as under. Petitioner was working with the respondent Corporation in managerial capacity. He retired from service while holding the post of General Manager. During the course of employment first he did LL.B. and later on M.B.A. Degrees. Respondents as per order dated 4.10.1988 (Ann. P-4) introduced scheme for payment of different additional increment on acquiring specified professional qualifications. For LL.B. one additional increment was payable and for M.B.A. two additional increments was payable to the employee acquiring such qualification during service. Petitioner was sanctioned and paid w.e.f. 1.4.1988 one increment for obtaining LL.B. degree. He subsequently applied for grant of two additional increments on obtaining M.B.A. degree. Although, a sanction was accorded for additional increments w.e.f. 21.5.1993 but said increments were never released/paid to the petitioner on the ground that he had already reached the maximum of the sanctioned pay-scale. Said order was passed on 29.9.1993. Against said order, petitioner preferred representations after representation reiterating his demand for release of three additional increments for obtaining professional qualification of LL.B. and M.B.A. When he was communicated the order impugned taking cue from the order dated 29.9.1994, he filed the present writ petition.

3. Respondents have denied the claim of the petitioner and in their reply they have submitted that so far as additional increment for obtaining professional qualification of LL.B. they pointed out that same was released and paid to the petitioner from April 1988 to March 1990. It was also pointed out that when petitioner obtained M.A.B. degree in 1993 petitioner was getting basic salary at the maximum of the scale from 1.4.1990 in the pay scale prescribed for post held by him. As such no additional increments could be paid to the petitioner either for obtaining LL.B. or M.B.A. Degrees. They also contended that the petitioner suffers from laches and gross delay and therefore is not entitled for any relief.

4. After having heard rival submissions and going through the material available on record, we do not find any merit and substance in this writ petition. We may point out that respondents have introduced scheme of one time cash award in place of the earlier scheme for grant of additional increments. From the documents filed along with the writ petition, it is clear that all along the case of the petitioner

before the respondents was that he was not covered by scheme of one time cash award but he was entitled for three additional increments for obtaining LL.B and M.B.A. degrees.

5. In the service jurisprudence, 'Time Scale of Pay' has a definite connotation. In a Time Scale of Pay, increments are provided so that upon successful completion of specified period of service, an increment is added and the basic is enhanced by that amount in the same scale of pay. Thus, it is gradual rise of the basic salary by way of release of increments. In order to elaborate, let us take an example that A was appointed to a post carrying the Time Scale of Pay of Rs. 150-25-300. The basic is Rs. 150 and the maximum is Rs. 300. Once A after availing benefits of all increments sanctioned in scale of pay and starts drawing pay at the maximum of the scale Rs.300/- then he will continue to draw the pay @ Rs. 300/- because beyond that stage a scale could not be enhanced by adding or releasing increment. This gradual increase in the pay will continue till the person has not reached or touched the maximum of the scale of pay prescribed. This exactly has happened in the present case. In Annexure P-8, there is categorical admission of the petitioner that in the pay scale of Rs. 3700-125-4700-150-5000, he had reached the maximum of pay in March 1990 and an additional increment on account of the LL.B. degree which petitioner was getting earlier was stopped. Thus petitioner was aware even prior to Annexure P-8(dated 10.10.1993) that he was not entitled to get the benefit of additional increment once he had reached the maximum of the scale. Learned counsel for the petitioner is not correct in contending that reaching of the maximum of the scale is neither relevant nor a decisive factor for release of additional increment as it would be against the established principles of service jurisprudence. Similarly, we do not find any force in the submission that the petitioner was denied additional increments because he had reached the maximum of the scale would result in discrimination between him and a person who has not reached the maximum of pay in the same scale. Petitioner and persons like him, who were drawing maximum pay, formed a class by themselves vis-a-vis persons who had not reached the maximum of the pay scale. Thus, the plea of discrimination also fails.

6. Next contention that upon revision of pay scale, petitioner entitled to get the benefit is neither here or there. Any subsequent change in the pay scale would not be material for the simple reason that his claim has to be decided on the date of application/of acquiring additional qualifications and not on the basis of subsequent revision of pay. Moreover before revision of pay scales was introduced, the Board of Directors of respondent No. 1 in its meeting held on 24-12-1993 approved one time cash award in place of additional increment to such employees who had reached the maximum of their pay scales and had acquired prescribed professional qualification (See Annexure P-25 filed alongwith rejoinder). Petitioner could have availed of this benefit, but his own case has been that he was entitled only for additional increments and not the one time cash award.

7. Perhaps there may be another reason which disentitles petitioner to any

relief on ground of inordinate delay. Petitioner was informed in no uncertain terms vide communication dated 29.9.1993 (Annexure P-7) that he was not entitled to get the benefit of additional increments as he had already reached the maximum of the scale. Thereafter any subsequent communication, like Ann.P-1 dated 31.12.2001 would not come to his rescue. It seems that petitioner while he was in service, might have had his own reasons not to rub salt on the wrong side of the management by initiating legal proceedings in a Court of Law therefore he entangled the management with repetitive representations. No doubt, no period of limitation is prescribed for invoking the jurisdiction under Article 226, but as a self restriction, we would not like to entertain a stale cause of action. It is now well established principle of law that repeated unsuccessful representations not provided by law, would not come to rescue of the petitioner.

8. Before parting with case, we must say a word about impugned Annexure P-30. Except to make a mention of it in paragraph 3 of the prescribed format, there is not even a whisper in the entire petition for what reasons and ground, said order is bad. There is not even amendment in relief clause qua Annexure P-30 and no arguments were advanced on invalidity of the said document. In view of this, we are not examining the validity of said order which apparently seems to in order.

9. In view of the above discussion, we do not find any merit and substance in the writ petition. Accordingly, it is hereby dismissed but without any orders as to costs.

Petition dismissed.

I.L.R. [2008] M. P., 2292

WRIT PETITION

Before Mr. Justice S.K. Gangele

9 May, 2008*

BRAJESH KUMAR TIWARI

Vs.

C.E.O., ZILA PANCHAYAT, SHIVPURI & ors.

... Petitioner

... Respondents

Constitution, Article 14, Education Guarantee Scheme - Payment of Honorarium - Petitioner appointed as Shiksha Karmi and was not paid enhanced honorarium on the ground that he was not fulfilling the conditions mentioned in circular dated 26.07.2003 - Action challenged on the ground that respondents are trying to create two classes of Guruji (Shiksha Karmi) which is violation of Article 14 - Held - Under Article 14 a valid classification is permitted but class legislation is not permitted - However, it is neither in accordance with the Education Guarantee Scheme nor the respondents have mentioned sufficient reasons in the return - Classification and conditions laid down by the circular are illegal and arbitrary - Petition allowed.

(Para 11)

संविधान, अनुच्छेद 14, शिक्षा गारंटी योजना — मानदेय का भुगतान — याची शिक्षाकर्मी के रूप में नियुक्त हुआ और उसे बढ़ा हुआ मानदेय इस आधार पर नहीं दिया गया कि वह परिपत्र तारीख 26.07.2003 में वर्णित शर्तों को पूरा नहीं कर रहा था — कृत्य को इस आधार पर चुनौती दी गई कि प्रत्यर्थी, गुरुजी (शिक्षाकर्मी) के दो वर्ग निर्मित करने का प्रयास कर रहे हैं जो अनुच्छेद 14 का उल्लंघन है — अभिनिर्धारित — अनुच्छेद 14 के अन्तर्गत एक वैध वर्गीकरण अनुज्ञात है किन्तु वर्ग विधायन अनुज्ञात नहीं है — तथापि, यह न तो शिक्षा गारंटी योजना के अनुरूप है और न ही प्रत्यर्थियों ने रिटर्न में पर्याप्त कारण उल्लिखित किये हैं — वर्गीकरण और परिपत्र द्वारा अधिकथित शर्तें अवैध और मनमानी हैं — याचिका मंजूर।

Cases referred :

(2004) 4 SCC 646, (1989) 2 SCC 235, (1989) 3 SCC 191, AIR 1963 SC 222, AIR 1968 SC 349.

J.D. Suryavanshi, for the petitioner.

Ami Prabal, Dy.A.G., for the respondent(s)/State.

ORDER

S.K. Gangele, J.:—Petitioner has filed this petition with regard to following reliefs :

(a) That, the direction be issued to the respondents to make the payment of Honorarium to the petitioner @ Rs. 2500/- per month as per Government Circular (Annexure P/1) and also direction be given to pay the difference of Honorarium with effect from 1st July, 2003.

(b) That, direction be given to the respondents to make the payment of Honorarium from 22.10.1999 to June, 2002 @ Rs. 1000/- per month which has not been paid to the petitioner.

(c) That, direction be given to make payment as per prevailing revised rate along with all arrears.

(d) That, any other relief which this Hon'ble Court deem fit may kindly be granted."

2. The State Government issued a policy with regard to Education Guarantee for all students in the State of M.P. The aforesaid policy has been named as M.P. Education Guarantee Scheme (Annexure P/2). As per aforesaid policy, there will be a Centre named as E.G.S. Centre where within one kilometer from the area no school was available for teaching the students and there must be demand from the community for the teachers. For the aforesaid purpose teachers will be appointed at the E.G.S. Centre and there will be one teacher for 40 students.

3. The petitioner was appointed as Shiksha Karmi vide appointment order dated 20.10.1999 at E.G.S. Centre, Amarpura, copy of the appointment order has been filed as Annexure P/4. The petitioner had gone on training and passed the training successfully. Since then the petitioner has been working as Guruji at E.G.S. Centre, Amarpura. As per petitioner, he was not paid the Honorarium at the rate of Rs.

1000/- per month upto June, 2002 and the same was further revised at the rate of Rs. 2,500/- w.e.f. 1st July, 2003. As per petitioner, he has been teaching upto class Vth Standard at E.G.S. Centre, Amarpura and the students have passed class Vth examination from the centre.

4. The respondents in the return stated that the petitioner is not entitled to receive enhanced Honorarium because the enhanced Honorarium was paid only to those Gurujis who have fulfilled the conditions mentioned in the circular dated 26.07.2003, copy of the circular has been filed as Annexure R/1 and because the petitioner did not fulfill the requisite conditions mentioned in the circular, hence, the petitioner has not been paid the enhanced rate of Honorarium.

5. Learned counsel for the petitioner submitted that non-payment of enhanced rate of Honorarium to the petitioner is arbitrary and illegal and the same is in violation of Article 14 of the Constitution because the petitioner has been performing similar work and the respondents could not be permitted to create class within class for the purpose of grant of Honorarium. In support of his contentions, the learned counsel relied on the Judgments of Hon'ble the Supreme Court in *M.P. Rural Agricultural Extension Officers Association Vs. State of M.P. & Another* reported in (2004) 4 S.C.C. pg. 646, in *Mewa Ram Kanojia Vs. All India Institute of Medical Sciences* reported in (1989) 2 S.C.C. pg. 235, in *Markendeya Vs. State of A.P.* reported in (1989) 3 S.C.C. pg. 191, in *Lachhman Dass Vs. State of Punjab* reported in AIR 1963 S.C. pg. 222 and also in *State of Mysore Vs. P. Narasinga Rao* reported in AIR 1968 S.C. pg. 349.

6. Contrary to this, learned Deputy Advocate General for the State submitted that the conditions imposed by the impugned circular are as per law and the Mission has right to fix different Honorarium of Gurujies in certain circumstances based on the basis of experience and working conditions.

7. Undisputed facts of the case are that the petitioner was appointed on the post of Guruji in accordance with M.P. Education Guarantee Scheme, Annexure P/2 vide order dated 20.10.1999. Since then the petitioner has been performing the work of Guruji at E.G.S. Centre, Amarpura. The petitioner stated in the petition that he is teaching upto Vth Class students. In Education Guarantee Scheme there is a provision for Shiksha Karmi. Subsequently, it has been designated as Guruji. It has further been mentioned in the policy that the Shiksha Karmis shall be entitled for Honorarium or stipend which shall be paid to them every month. In the aforesaid scheme there is no provision to pay different Honorarium to different Gurujies. Rajiv Gandhi Shiksha Mission issued another circular dated 26.07.2003 Annexure R/1. It has been mentioned in the circular that enhanced rate of Honorarium shall be paid to the Guruji who had been working at E.G.S. Centre and fulfills following conditions:

- (1) That the Education Centre must has been sanctioned prior to 31.03.2001.

(2) From 1st Standard to Vth Standard classes shall be conducted at the centre.

(3) There must be an agreement between Guruji and Palak Shikshak Sangh before 01.07.2001.

From the aforesaid circular it is clear that Rajiv Gandhi Shiksha Mission has created two classes of Gurujies. One class is of those who fulfill the conditions as mentioned in Annexure R/1 and another class is of those who do not fulfill the conditions. However, there is no such condition mentioned in the scheme. Apart from this, it is clear that it is not within the control of the Guruji to fulfill the conditions. Although in the present case, petitioner fulfills all the conditions because he has been working at E.G.S. Centre since, 1999. The Doctrine of Article 14 gives power for classification but it forbids class legislation.

8. The Constitutional Bench of Hon'ble the Supreme Court in *Lachhman Dass Vs. State of Punjab* reported in AIR 1963 S.C. pg. 222 has held as under:

"..... The law is now well settled that while Art. 14 prohibits discriminatory legis-lation directed against one individual or class of individuals, it does not forbid rea-sonable classification, and that for this pur-pose even one person or group of persons can be a class. Professor Willis says in his Constitutional Law p. 580 "a law applying to one person or one class of persons is con-stitutional if there is sufficient basis or rea-son for it". This statement of the law was approved by this Court in *Chiranjit Lal Chowdhury v. Union of India*, 1950 SCR 869: (AIR 1951 SC 41). There the question was whether a law providing for the management and control by the Government, of a named company, the Sholapur Spinning and Weav-ing Company Ltd. was bad as offending Art. 14. It was held that even a single Company might, having regard to its features, be a category in itself and that unless it was shown that there were other Companies similarly circumstanced, the legislation must be presumed to be constitutional and the attack under Art. 14 must fail. In *Ram Krishna Dalmia v. S. R. Tendolkar*, 1959 SCR 279 at p. 297: (AIR 1956 SC 538 at p. 547) this Court again examined in great de-tail the scope of Art. 14, and in enunciating the principles applicable in deciding whether a law is in contravention of that Article ob-served:

"that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applica-ble to others that single individual may be treated as a class by himself."

9. Further, another Constitution Bench of Hon'ble the Supreme Court in *State of Mysore Vs. P. Narasinga Rao* reported in AIR 1968 S.C. pg. 349 has held as under:

"It is well settled that though Article 14 forbids class legislation, it does

not forbid reasonable classification for the purpose of legislation. When any impugned rule or statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group, and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. In other words, there must be some rational nexus between the basis of classification and the object intended to be achieved by the statute or the rule. As we have already stated, Articles 14 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words, Art. 16 is only an instance of the application of the general rule of equality laid down in Art. 14 and it should be construed as such. Hence there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection."

10. The aforesaid principle of law as laid down by Hon'ble the Supreme Court has further been followed by subsequent Benches of Hon'ble the Supreme Court in *Markendeya Vs. State of A.P.* reported in (1989) 3 S.C.C. pg. 191 and also in *Mewa Ram Kanojia Vs. All India Institute of Medical Sciences* reported in (1989) 2 S.C.C. pg. 235.

11. From the above principle of law as laid down by Hon'ble the Supreme Court, it is crystal clear that under Article 14 a valid classification is permitted but class legislation is not permitted. In the present case, the respondents are trying to create two classes of Guruji. However, it is neither in accordance with the Education Guarantee Scheme nor the respondents have mentioned sufficient reasons in the return for the same. Hence, the aforesaid classification and the conditions laid down by the circular Annexure R/1 dated 26.07.2003 are illegal and arbitrary. The arguments advanced by the learned counsel for the State that there is delay and laches on the part of the petitioner cannot be accepted because this Court has struck down the circular on the basis of arbitrariness.

12. Consequently, the petition of the petitioner is allowed. It is ordered that the petitioner is entitled enhanced rate of Honorarium from the date of his initial appointment as enhanced by the Government from time to time. The arrears be also paid to the petitioner. The order be complied with within a period of six weeks from the date of receipt of certified copy of this order.

No order as to cost.

Petition allowed.

I.L.R. [2008] M. P., 2297

WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice Rajendra Menon

15 May, 2008*

RAKESH SETHI

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Motor Vehicles Act (59 of 1988), Sections 64, 65 & 41, Motor Vehicles Rules, Central, 1989, Rule 81, Motor Vehicles Rules, M.P., 1994, Rule 55-A - *Fixation of higher fee for registration with an option to seek reservation of particular registration number - Validity - Application for allotment of particular registration number for motorcycle rejected as requisite fee for allotment of particular number was not paid - Held - Power to prescribe fee for registration of motor vehicle is conferred on Central Government - Notification issued by State Govt. prescribing fee to be charged for registration of motor vehicle by means of reservation ultra vires - Notification quashed - Respondents directed to reconsider application of petitioner - Petition allowed.* (Paras 18 to 20)

मोटर यान अधिनियम (1988 का 59), धाराएँ 64, 65 व 41, मोटर यान नियम, केन्द्रीय, 1989, नियम 81, मोटर यान नियम, म.प्र., 1994, नियम 55-ए - विशिष्ट पंजीयन क्रमांक का आरक्षण चाहने के विकल्प के साथ पंजीयन के लिए उच्चतर शुल्क का नियत किया जाना - विधिमान्यता - मोटरसायकल के लिए विशिष्ट पंजीयन क्रमांक के आबंटन के लिए आवेदन निरस्त क्योंकि विशिष्ट क्रमांक के आबंटन हेतु आवश्यक शुल्क अदा नहीं किया - अभिनिर्धारित - मोटर यान के पंजीयन के लिए शुल्क विहित करने की शक्ति केन्द्र सरकार को प्रदत्त है - राज्य सरकार द्वारा आरक्षण के माध्यम से मोटर यान के पंजीयन के लिए प्रसारित शुल्क विहित करते हुए जारी अधिसूचना अधिकारातीत - अधिसूचना अभिखंडित - प्रत्यर्थियों को याची के आवेदन पर पुनर्विचार करने को निदेशित किया - याचिका मंजूर।

Case referred :

(1992) 3 SCC 285.

Rajendra Tiwari with Thaman Kumar Khadka, for the petitioner.

V.K. Shukla, Dy.A.G., for the respondent No.1, 3 & 4.

O.P. Namdeo, for the respondent No.2.

ORDER

Challenging the validity of Rule 55-A inserted in the M.P. Motor Vehicles Rules, 1994 (hereinafter referred to as 'Rules of 1994') vide Notification (Annexure P/1) dated 15.2.2001, petitioner has filed this petition seeking a declaration to the effect that the aforesaid rule is *ultra vires* to Section 64 read with section 41 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'Act of 1988') and is also violative of Article 14, of the Constitution of India.

2. Petitioner claims to be owner of a motorcycle purchased by him sometime in May 2004 and for the registration of which the requisite application, in Form No.20, prescribed under the Rules of 1994 was submitted on 25.5.2004 before respondent No.4. Vide order dated 27.5.2004, respondent No.4 rejected the aforesaid application on the ground that prayer made by the petitioner for allotment of registration number 'MP-KL-4646' cannot be accepted, as the petitioner has not paid the requisite fee prescribed for allotment of the aforesaid number. It is the case of the petitioner that instead of allotting the aforesaid number prayed for, petitioner has been allotted number MP20-KL-5100, against his wishes. *Interalia* contending that allotment of a particular number on payment of the prescribed fee as provided in Rule 55-A is contrary to and inconsistent to the provisions of Section 41 and the powers conferred on the State Government to frame Rules under section 65 of the Act of 1988, challenge is made to the amendment incorporated in the Rules of 1994 by the aforesaid Notification.

3. Shri Rajendra Tiwari, learned Senior Advocate for the petitioner, placing reliance on the provisions of Section 41(2) of the Act of 1988, emphasized that the power to prescribe fee for registration of a motor vehicle is conferred on the Central Government, prescribing a higher fee for registration with an option to seek reservation of a particular number, is beyond the competence of the State Government. Learned Senior Counsel argued that under section 64 of the Act of 1988, power to fix the fee and formulate rules for the purposes of registration of motor vehicle is conferred on the Central Government and the State Government under section 65 of the Act of 1988 is not empowered to fix any fee to be paid for registration of a motor vehicle. It is emphasized by him that the State Government can only make provision with regard to the amount to be recovered under sub-section (13) of Section 41 and not under sub-section (1) of Section 41. It is argued that the impugned Notification issued exercising powers under section 65 read with 211 of the Act of 1988 is unsustainable. Shri Rajendra Tiwari, learned Senior Advocate, argued that the power under section 211 can be exercised only for levy of such fee in respect of the various items contemplated therein only when the State Government is empowered under the Act to frame Rules to give effect to the provision for levy of such fee. It was submitted that when the power to levy fee for registration is conferred on the Central Government and when fee is already fixed under Rule 81 of the Central Motor Vehicles Rules, 1989, the State Government is not empowered to fix any further fee for the purpose of registration of a motor vehicle by exercising powers under section 211. *Interalia* contending that the fee fixed for allotment of registration mark by permitting reservation of a particular number is unsustainable and beyond the powers vested in the State Government, Shri Rajendra Tiwari, learned Senior Advocate, prays for interference into the matter. Further contention is that the guidelines prescribed and the procedure contemplated for reservation of registration numbers is arbitrary and would result in granting undue benefit to certain class of persons and denying benefit to others

similarly situated. Accordingly on these grounds learned Senior Counsel prays for interference into the matter.

4. Shri V.K. Shukla, learned Dy. Advocate General, supports the Notification issued and argued that the same is issued by the State Government by virtue of the powers conferred under section 65 of the Act of 1988, which empowers the State Government to make Rules with regard to issue or renewal of certificate of registration so also the amounts to be charged for such registration. *Inter alia* contending that under section 211, State Government is entitled to levy fee with respect to applications that may be submitted for issuance of certificates, licenses or registration and as the State Government has fixed the procedure for allotment of registration mark by reservation exercising powers under section 211, Shri Shukla argues that the same is in accordance to law and does not warrant any interference in these proceedings. It was emphasized by Shri V.K. Shukla, learned Dy. Advocate General, that under sub-section (6) of Section 41, the Registering Authority is empowered to assign to any vehicle for display thereon, a distinguishing mark which is known as the registration mark and in this particular case, as Rule 55-A only empowers the registering authority to give a particular registration mark, on demand to a person concerned, the power exercised being permissible under sub-section (6) of Section 41, the arguments advanced are refuted and it is submitted by Shri Shukla that the power is properly exercised and the same does not warrant any interference.

5. Shri O.P. Namdeo, learned counsel representing the Union of India, submits that the question of registration of vehicle falls under the purview of the State Government and as the dispute is between the State Government and the petitioner, it is stated in the return that the matter pertains to Government of Madhya Pradesh, and as the petitioner has not sought any relief from the Central Government no direction can be issued to the Central Government. However, in paragraph 5.3 of the return, the following averments are made on behalf of the Union of India:

"Every application for registration of motor vehicles should be accompanied with the fees as specified by the Central Government. The Central Government has already specified fees for registration of vehicles under Rule 81 of the Central Motor Vehicles Rules, 1989."

6. We have heard the learned counsel for the parties and have considered the rival contentions.

7. Before adverting to consider the same, it would be appropriate to take note of the various statutory provisions which require consideration for determination of the dispute in question.

8. Section 41 of the Act of 1988 contemplates a provision for registration of a motor vehicle and how the same is to be done. Under sub-section (1), an application by or on behalf of the owner of the motor vehicle for registration is to be submitted in such form and is to be accompanied by such documents, particulars and information which the Central Government may prescribe and the application is to

be submitted within such period as may be prescribed by the Central Government. Proviso to this sub-section provides for submitting an application by one of the owners in case of joint ownership of a motor vehicle. Sub-section (2) of Section 41, which is relevant for deciding the dispute in question, reads as under:

"(2) An application referred to in sub-section (1) shall be accompanied by such fee as may be prescribed by the Central Government."

Thereafter, sub-section (6) of Section 41, reliance on which was placed by Shri V.K. Shukla, learned Dy. Advocate General, reads as under:

"(6) The registering authority shall assign to the vehicle, for display thereon, a distinguishing mark (in this Act referred to as the registration mark) consisting of one of the groups of such of those letters and followed by such letters and figures as are allowed to the State by the Central Government from time to time by notification in the Official Gazette, and displayed and shown on the motor vehicle in such form and in such manner as may be prescribed by the Central Government."

9. Section 64 confers power on the Central Government to make Rules for matters provided in Clause (a) to (p) of the said section, and similarly Section 65 empowers the State Government to make Rules for carrying out and giving effect to the provisions of Chapter IV of the Act of 1988, and the matters on which the State Government is empowered to make Rules are contemplated in sub-clause (a) to (p) of sub-section (2) of Section 65. Clauses (d) and (k) thereof which are relevant for the case in hand read as under:

" XXX XXX XXX XXX
(d) the issue of renewal of certificates of registration and fitness and duplicates of such certificates to replace the certificates lost, destroyed or mutilated;

 XXX XXX XXX XXX
(k) the amount or amounts under sub-section (13) of Section 41 or sub-section (7) of Section 47 or sub-section (4) of Section 49 or sub-section (5) of Section 50.

 XXX XXX XXX XXX"

10. Power to levy fee is provided for under section 211 of the Act of 1988 and according to this section any Rule which the Central Government or the State Government is empowered to make under the Act of 1988 may notwithstanding the absence of any express provision provide for levy of such fee in respect of applications, amendment of documents, issue of certificates, license permits and various other items provided therein.

11. A complete reading of the aforesaid provisions would indicate that the application seeking registration of a motor vehicle has to be made under sub-section (1) of Section 41, and the said application has to be accompanied by such

fee as may be prescribed by the Central Government. It is clear from a reading of this provision that the fee to be prescribed for registration of a motor vehicle under sub-section (1) of Section 41 is to be prescribed by the Central Government under sub-section (2). Sub-section (6) of Section 41 only contemplates a provision empowering the registering authority to assign to the motor vehicle, seeking registration, a right to display on the vehicle a distinguishing mark which is known as a registration mark and this distinguishing mark is to consist of one of the group of such of those letters and is to be followed by such letters and figures as are allotted to the State by the Central Government from time to time by Notification in the official gazette. This provision does not, in any manner, whatsoever confer any authority on the State Government the power to levy any fee for the purpose of registration of a motor vehicle over and above the one already prescribed by the Central Government under sub-section (2) of section 41, that being so, arguments advanced by Shri V.K. Shukla, learned Dy. Advocate General, with regard to power conferred on the State Government under sub-section (6) of Section 41 is wholly misconceived. That apart, a perusal of the Notification impugned in this petition dated 15.2.2001 (Annexure P/1) indicates that the Notification is not issued on the basis of power conferred under this sub-section, but is issued on the basis of power conferred under section 211 read with section 65 of the Act of 1988, that being so, it would be appropriate to consider the nature of power conferred on the State Government by section 211 and Section 65 of the Act of 1988.

12. Section 211 as already indicated hereinabove contemplates that if by any Rule, the Central Government or the State Government is empowered to make under the Motor Vehicles Act, then the Central Government or the State Government as the case may be, notwithstanding the absence of any express provision, are empowered to provide for levy of such fees in respect of various items like applications, applications for amendment to the issue of certificates and other matters provided therein. The pre-condition requisite for exercising powers prescribing Rule for levy of fee under section 211 is that under the Act of 1988, a provision exists empowering the Central Government or the State Government to make Rule. This power cannot be exercised in connection with the matter for which the act itself does not give power to the State Government to make Rules. As already indicated hereinabove, the power to prescribe fee for registration of a motor vehicle is conferred on the Central Government by virtue of sub-section (2) of Section 41, that being so, the power to levy fee under section 211 can be exercised by the State Government only if it is empowered under the Act of 1988 to prescribe fee for the purpose of registration of a motor vehicle. If the motor vehicle Act does not confer or empower the State Government to levy fee for registration of a vehicle, no fees can be prescribed for allotment of a registration mark for a motor vehicle exercising powers under section 211.

13. Even otherwise section 211 only enables the State Government to prescribe

fee to be submitted alongwith applications or applications for amendment to the issuance of certificate and various other matters. Prescribing a fee to be paid alongwith an application is different from prescribing a fee for grant of registration of a motor vehicle with a particular registration number. In the present case, in the garb of prescribing fees on the application the amount indicated in the Notification are infact a separate registration fee to be paid for allotment of a particular registration number. It is, therefore, clear that what is charged by the impugned Notification under Rule 55-A is nothing but a fee for registration of a motor vehicle.

14. By incorporating Rule 55-A, the State Government has prescribed a separate procedure for allotment of registration mark and for the said purpose has also prescribed the fees to be charged. Even though the fees prescribed is for seeking reservation of a particular number alongwith an application the Rule infact incorporates a provision for charging registration fees as per choice of the applicant. The number as per choice is allotted on deposit of this fee, which is nothing but a fee for registration of motor vehicle with a particular number. In the case of *Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and Others* [(1992) 3 SCC 285], a provision imposing development fee by the Ahmedabad Urban Development Authority was challenged and while dealing with the question of imposition of development fee by way of a Regulation, the Supreme Court has so observed in paragraph 6 of the aforesaid judgment:

"The imposition of development fee by framing the impugned Regulations was wholly unauthorized and as such illegal and void. In a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. Whenever there is compulsory exaction of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used. The delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power."

15. Power to frame Rules is conferred on the State Government under section 65 of the Act of 1988. The State Government is empowered to make Rules, providing for issuance or renewal of certificate of registration and fitness, duplicate of registration, to replace registration certificate lost destroyed or mutilated and also provide for the amounts or amount that may be charged under sub-section (13) of Section 41. Reading Section 211 alongwith Section 65 (d) and (k) would clearly indicate that the State Government is only empowered to make Rule with regard to the subjects on which the State Government is specifically empowered to make Rules and as far as registration of motor vehicles and prescribing the fees for registration are concerned, power is only conferred on the State

Government to make Rules for the purpose of providing the procedure for issue or renewal of certificate or recovery of amount or amounts under sub-section (13) of Section 14 i.e., to prescribe the amount to be paid for delay on the part of owner to file an application for registration of motor vehicle under sub-section (1) of Section 41 or under sub-section (8) of Section 41 for renewal of motor vehicles. None of these provisions empower the State Government to make a Rule fixing the fee to be charged for registration of a motor vehicle. It is, therefore, clear that under the Act of 1988 the power to prescribe fee for registration of motor vehicle is only conferred under the Central Government and in exercise of the aforesaid power Central Government has already fixed the fee under Rule 81 of the Central Motor Vehicle Rules, 1989. By various gazette notifications, Central Government has already fixed the fee from time to time to be charged for the purposes of issue or renewal of certificate of registration and for assignment of new registration mark to various classes of vehicles. A notification bearing No. GSR-221(E) dated 28.3.2001 has been made available for perusal of this Court and the said notification and the table annexed thereto indicates that under Serial No.4 to the said table, amount of fee to be levied for the purpose of issuing, renewal of certificate of registration and assignment of new registration mark is provided for. It is, therefore, clear that the power to prescribe fee for registration and assignment of new registration mark to various classes of motor vehicles is conferred on the Central Government and the Central Government has fixed the fee in this regard. Section 65 and Section 211 of the Act of 1988 only empowers the State Government to levy fee in respect of various matters indicated in Section 211 provided the State Government is empowered to make Rule in that regard under the Act of 1988. When the State Government is not empowered to prescribe the fee for registration under the Act of 1988, section 211 cannot be made use of for levying fee for the purpose of granting a particular registration mark by means of reservation.

16. Similarly, sub-section (2) of Section 65 also does not confer any power on the State Government to make Rule fixing the fee to be charged for allotment of a registration mark. The power to charge extra fees or additional fees for allotment of a particular registration number is beyond the legislative competence of the State Government.

17. Under sub-rule (4) of Rule 55, the amount to be paid in cases of delay in submitting the application beyond the period prescribed under sub-section (1) of Section 41 is contemplated. This is by virtue of the power conferred on the State Government under section 65 (2) (k). As the said provision empowers the State Government to prescribe the amount that may be levied in case of delay in submitting the application within the time stipulated and the period indicated under sub-section (1) or sub-section (8) of section 41. However, by incorporating Rule 55-A by the impugned Notification, a further provision is incorporated for charging registration fees @ Rs.15000/-, Rs.12000/-, Rs.10000/- and Rs.2000/- respectively for the purposes of allotment of a particular registration mark by adopting mode of

reservation. Allotment of registration mark even by reservation is nothing but a process of registration of a vehicle under section 41 of the Act of 1988. The State Government may be empowered to formulate Rules for the purpose of issuance or renewal of registration certificate, fitness certificate or duplicate service, but the State Government is not empowered to fix any fees for the purpose of registration of a motor vehicle. This power is exclusively conferred on the Central Government by virtue of sub-section (2) of Section 41 and in the absence of any power being conferred on the State Government to levy any fee for the purpose of registration of motor vehicle, a notification issued prescribing the fee is clearly beyond the legislative competence of the State Government.

18. A provision made statutory in nature in respect of a matter beyond the competence of the State is null and void. The validity of the notification issued impugned in this petition is required to be tested on the basis of the power conferred on the State Government to prescribe the fee to be charged for registration of a motor vehicle. As the fee prescribed is beyond the legislative competence of the State Government, this Court cannot uphold the same. No fee can be imposed by any Rule unless the Act under which the Rule is made specifically authorizes such imposition.

19. In our opinion neither section 211 nor section 65 of the Act of 1988 empowers the State Government to formulate a rule for the purpose of imposition of registration fee. The power to prescribe registration fee as indicated hereinabove, is clearly conferred on the Central Government under sub-section (2) of Section 41, that being so, the notification issued impugned in this petition fixing registration fee for allotment of registration mark by reservation has to be declared as *ultra vires* and unsustainable, being beyond the legislative competence of the State Government.

20. Accordingly, this petition is allowed. Impugned notification dated 15.2.2001 (Annexure P/1), prescribing fee to be charged for registration of motor vehicle by means of reservation is declared *ultra vires* to section 41(1) read with Section 64 of the Motor Vehicles Act, 1988 and is hereby quashed to that extent.

21. Respondents are directed to reconsider the claim of the petitioner for grant of registration number without insisting upon payment of any extra fee over and above the one prescribed by the Central Government.

22. Petition stands allowed without any order so as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2305

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

9 June, 2008*

TEJAS CONSTRUCTION & INFRASTRUCTURE

PVT. LTD.

... Petitioner

Vs.

MUNICIPALITY SANAWAD

... Respondent

Constitution, Articles 14, 226 - Govt. Contract - Eligibility Criteria - Earlier, Petitioner Company was working in the name of M/s Tejas Construction and M/s Agrawal Brothers - M/s Tejas Construction converted into Petitioner Company and M/s Agrawal Brothers purchased by petitioner company through sale deed - Documents not considered on the ground of non-submission of dissolution deed of M/s Agrawal Brothers and non-registration of sale deed - Reason of non-submission of dissolution deed explained in sale deed - No objection by any partners of M/s Agrawal Brothers - In the sale deed it was specifically mentioned that partners shall allow the petitioner company to submit experience certificate gained by firm - Held Rejection of experience certificate and disqualification of petitioner arbitrary, baseless and hyper technical - Petition allowed. (Para 5)

संविधान, अनुच्छेद 14, 226 - शासकीय संविदा - पात्रता मानदंड - पूर्व में याची कम्पनी मे. तेजस कंस्ट्रक्शन एवं मे. अग्रवाल ब्रदर्स के नाम से कार्य कर रही थी - मे. तेजस कंस्ट्रक्शन याची कम्पनी में संपरिवर्तित हो गई और मे. अग्रवाल ब्रदर्स को याची कम्पनी द्वारा विक्रय विलेख के माध्यम से क्रय कर लिया - मे. अग्रवाल ब्रदर्स का विघटन विलेख प्रस्तुत न करने और विक्रय विलेख के अरजिस्ट्रीकरण के आधार पर दस्तावेजों पर विचार नहीं किया गया - विघटन विलेख प्रस्तुत न करने का कारण विक्रय विलेख में स्पष्ट किया गया - मे. अग्रवाल ब्रदर्स के किसी भागीदार द्वारा कोई आपत्ति नहीं - विक्रय विलेख में यह विशिष्ट रूप से उल्लिखित किया गया कि भागीदार याची कम्पनी को फर्म द्वारा प्राप्त अनुभव प्रमाण-पत्र को प्रस्तुत करने को अनुज्ञात करेंगे - अभिनिर्धारित - अनुभव प्रमाण-पत्र को अस्वीकृत किया जाना और याची की निरर्हता मनमानी, आधारहीन और अति तकनीकी - याचिका मंजूर।

Cases referred :

AIR 2005 MP 96, AIR 1991 SC 1579, 1995(1) SCC 478.

Ajay Bagadiya, for the petitioner.

Vivek Dalal, for the respondent.

ORDER

SHANTANU KEMKAR, J. :- The petitioner a private limited company engaged in the business of civil construction works has filed this petition under Article 226 of the Constitution of India challenging the action on the part of the respondent Municipality Sanawad in not accepting its technical bid on the ground of non fulfillment of the eligibility criteria and is seeking direction to the respondent to open its financial bid.

2. Pursuant to the notice inviting tender (Annexure P/2) issued by the respondent, published on 14.01.08, for awarding the work of construction of water supply project of the respondent including construction of intact wells, treatment plant, installation and erection of turbine pumping sets, the petitioner submitted its bid.

3. On 18.02.08 all the bidders including the petitioner attended the pre-bid meeting convened by the respondent. In the said meeting the representative of the petitioner who attended the meeting was informed by the respondent that the petitioner's bid would be liable to be rejected for not holding the minimum experience required in the condition no.4 of the eligibility criteria fixed in the tender document. Thereafter on 04.03.08 it was orally informed to the petitioner's representative that the petitioner's bid has been rejected. Aggrieved by this, the petitioner has filed this petition.

4. The case of the petitioner is that its representative explained to the respondent that the petitioner is not lacking the experience and fully satisfies the eligibility criteria. He on the basis of the various documents submitted along with the bid, explained that the petitioner has purchased the partnership firm M/s. Agrawal Brothers of which the experience certificate has been filed. It was also made clear that earlier the Directors of the petitioner company were partners of the firm M/s. Agrawal brothers. In the circumstances the experience of the said firm of which a certificate has been filed entitles the petitioner to claim the eligibility of experience. Immediately after the pre bid meeting the petitioner also submitted a letter on 20.02.08 (Annexure P/5) to the respondent clarifying and substantiating its plea about the experience.

5. It is averred in the petition that the decision of the respondent in ousting the petitioner from the zone of consideration inspite of petitioner's fulfilling and satisfying the eligibility criteria is arbitrary and unfair. According to the petitioner before incorporation of the company the Director's of the petitioner were working in the name of (1) M/s. Tejas Construction and (2) M/s. Agrawal Brothers. Both these firms were partnership firms consisting of family members of the Directors of the petitioner company. In the month of June 2007 the firm M/s. Tejas Construction was converted into the petitioner company namely M/s. Tejas Construction and Infrastructure Private Limited. On such conversion the firm M/s. Tejas Construction got dissolved. Thereafter on 01.10.07 another partnership firm which was being run by the Directors of the petitioner company in the name of M/s. Agrawal Brothers was purchased by the petitioner company through sale deed dated 01.10.07 (Annexure P/4). In the said sale deed it was specifically mentioned that the partnership firm M/s. Agrawal Brothers and all its partners shall allow the petitioner company to submit all the experience certificates gained by the partnership firm through various contracts. It was also made clear and agreed in the sale deed that the firm M/s. Agrawal Brothers shall surrender all its original certificates and shall not use the same for bidding any tender. As

regards dissolution of the firm M/s. Agrawal Brothers it was clarified in the sale deed that the same would not be immediately possible in view of the fact of having contracts in hand and the payments are to be received in the name of the partnership firm. However it was made clear in the sale deed that the firm M/s. Agrawal Brothers shall not participate any more in the tender process. It is further case of the petitioner that inspite of these documents being filed along with bid documents and also the letter dated 20.02.08 (Annexure P/5) the respondent proceeded to reject the petitioner's bid for non fulfillment of the experience criteria.

6. The respondent in its return raised preliminary objection stating therein that the petition deserves to be dismissed on the ground of delay and laches. According to the respondent the petition has been filed after opening of the financial bids of other bidders and therefore it was already infructuous when it was filed. On merits, it has been stated in the return that the petitioner is claiming experience in view of the sale deed executed in its favour by M/s. Agrawal Brothers. Whereas, the certificate of experience filed along with the bid is in the name of M/s. Agrawal Brothers Engineers and Contractors, Chalisgaon. It is further stated that the sale deed being not a registered sale deed the same has rightly been ignored by the respondent. It is also averred that the petitioner having not submitted the dissolution deeds of M/s. Agrawal Brothers and M/s. Tejas Construction it has rightly been declared disqualified for opening of its financial bid.

7. Shri. Ajay Bagadiya learned counsel for the petitioner argued that in view of the Judgment of this Court passed in case of *M/s. C.K. Asati v. Union of India and two others* (AIR 2005 MP 96), the experience claimed by the petitioner through M/s. Agrawal Brothers could not have been ignored by the respondent. He further argued that there is no discrepancies in the certificate filed by the petitioner and the sale deed as there is only one firm which is partnership firm in the name of M/s. Agrawal Brothers in Chalisgaon of which the sale deed and the certificate has been filed. The certificate in the name of M/s. Agrawal Brothers Engineers and Contractors, Chalisgaon has been issued by none other then the firm M/s. Agrawal Brothers of which purchase was made by the petitioner through sale deed. The respondent if, had any doubt about the difference in the names shown in the sale deed and the experience certificate it was incumbent upon the respondent to call the petitioner seeking explanation about it instead of outrightly rejecting the petitioner's technical bid. According to him such a hyper-technical approach on the part of the respondent is unfair and arbitrary exercise of powers. He submitted that the inability on the part of the petitioner to submit the dissolution deed of firm M/s. Agrawal Brothers was duly explained both in the sale deed as well as in the letter dated 20.02.08 (Annexure P/5). However the same has been completely ignored by the respondent just to oust the petitioner from the tender process. He further submitted that there is no requirement of the sale deed to be registered as has been stated by the respondent. According to him in the absence of any objection to that effect from any of the partners of M/s. Agrawal Brothers

such a plea at the instance of the respondent was not justified. He also pointed out that the respondent has not disputed the petitioner's averment that there is no other Firm except M/s. Agrawal Brothers in Chalisgaon of whom the petitioner is claiming the experience. As regards the non submission of the dissolution deed of M/s. Tejas Construction, the document of incorporation of petitioner was submitted fulfilling the requirement.

8. Shri Vivek Dalal, learned counsel appearing for the respondent on the other hand supported the decision of the respondent and the stand taken in the return. Accordingly to him on the basis of unregistered sale deed the petitioner cannot claim any right to consider its claim in regard to the experience. He argued that the petitioner claimed experience of the firm M/s. Agrawal Brothers whereas the experience certificate which was submitted is of M/s. Agrawal Brothers Engineers and Contractors, Chalisgaon. In the circumstances the action of the respondent was perfectly justified. He placed reliance on the judgment of Supreme Court in the case of *M/s. Poddar Steel Corporation v. M/s. Ganesh Engineering Works* (AIR 1991 SC 1579) to contend that the petitioner having failed to fulfill the essential condition of eligibility the respondent has rightly rejected its technical bid. He finally argued that since the petitioner failed to submit the dissolution deeds the respondent rightly rejected the petitioner's bid.

9. So far as the preliminary objection raised by the respondent about the delay and laches and the petition was being infructuous at the time of its filing, it is clear from the record that on 18.02.08 the pre-bid meeting was held by the respondent. It is revealed from the decision (Annexure R/3) of the tender evaluation committee that on the request of one of the bidders H.L.Passey Hytro-Tech the date of submission of tenders was extended upto 04.03.08. On 04.03.08 the petitioner was orally informed about the rejection of its tender. Having received this information the petitioner promptly filed this petition on 14.03.08. On 02.04.08 this Court passed interim order directing the respondent not to finalize the bids received pursuant to the notice inviting tenders. In the circumstances there is no delay on the part of the petitioner in filing this petition and also the petition cannot be said to be a infructuous petition. The preliminary objection of the respondent is wholly misconceived and is accordingly rejected.

10. Having gone through the documents filed by the parties I find that the petitioner along with its technical bid submitted the sale deed, the experience certificate and also the documents in regard to its incorporation. From the documents it is also revealed that earlier the petitioner was working in the name of M/s. Tejas Construction and M/s. Agrawal Brothers. Firstly in June 2007 M/s. Tejas Construction was converted into the petitioner company. Thereafter the firm M/s. Agrawal Brothers was purchased by the petitioner through the aforesaid sale deed. The petitioner placing reliance on the sale deed, the experience certificate and the explanation submitted vide letter dated 20.02.08 claimed experience as required in the eligibility criteria. It is not the case of the respondent

that the experience certificate submitted by the petitioner is lacking with any requirement of the experience. It is also not the case of the respondent that the experience gained by the Directors of the petitioner company as partners of M/s. Agrawal Brothers cannot be taken into consideration but the case of the respondent is that the certificate submitted by the petitioner is not in the name of M/s. Agrawal Brothers but is in the name of M/s. Agrawal Brothers Engineers and Contractors, Chalisgaon. When there is no rebuttal or denial on the part of the respondent to the contention and the pleadings of the petitioner that there is no partnership firm in the name of M/s. Agrawal Brothers Engineers and Contractors, Chalisgaon and there is only one firm which is M/s. Agrawal Brothers of which the petitioner is claiming experience and had filed the experience certificate the rejection of the said experience certificate by raising such a hyper-technical plea that too for the first time in return cannot be said to be justified. In the circumstances the petitioner who is having the requisite experience cannot be adjudged disqualified for non fulfillment of eligibility criteria of experience. From the aforesaid discussion it is clear that the rejection of the petitioner's technical bid is not for non fulfillment of essential condition about experience but the rejection as noticed above is for the reason that the experience certificate is not in the name of M/s. Agrawal Brothers. As already observed this reason is totally arbitrary, baseless and hyper technical.

11. The petitioner having duly explained the circumstances under which the deed of dissolution could not be submitted by stating that the dissolution of M/s. Agrawal Brothers is not immediately possible in view of the works in hand and payments to be received, the rejection of the petitioner's bid on this ground is misconceived and is arbitrary exercise of powers. Moreover when it was specifically stated in the sale deed that M/s. Agrawal Brothers shall not participate any more in the tender process and shall not use the certificates in bidding any tender there was absolutely no justification on the part of the respondent to have insisted for submitting the dissolution deed. The respondent by not considering the reasons assigned by the petitioner for non submission of the dissolution deed in respect of M/s. Agrawal Brothers and ignoring the documents establishing the dissolution of M/s. Tejas Construction have acted in most arbitrary manner and treated the petitioner unfairly. The non consideration of the sale deed submitted by the petitioner on the ground of it being not registered sale deed is also unjustified, more particularly in view of the fact that there was no dispute in that regard between the partners and the partners of the M/s. Agrawal Brothers are the Directors of the petitioner company.

12. The action on part of the respondent in ignoring the sale deed, the explanation offered by the petitioner and taking decision by adopting a hyper-technical approach, in my considered view, is arbitrary and irrational. The respondent is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in state action and requires to act fairly and reasonably. It is true that

the government must have freedom of contract and a fair play in the joints. is a necessary concomitant for an administrative body. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by malafides. [See *New Horizons Ltd/and another v. Union of India and others* 1995(1) SCC 478].

13. In view of the aforesaid, the decision of the respondent to hold the petitioner disqualified by adopting a hyper technical approach is unfair, arbitrary and unreasonable and as such cannot be sustained.

14. Accordingly the petition deserves to be and is hereby allowed. As a result the respondent is directed to treat the petitioner eligible for opening its technical bid. The respondent is further directed to open the petitioner financial bid and thereafter proceed further in the matter for award of the contract to the bidder who may be found eligible. No order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2310

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

20 June, 2008*

BHUPENDRA BAIRAGI

Vs.

STATE OF M.P. & ors.

Petitioner

Respondents

Constitution, Article 226 - Compassionate appointment - Father of petitioner died in harness on 18.05.1996 - Mother filed application for appointment of minor son - Application rejected with direction to submit fresh application on attaining majority - Fresh application filed on 06.07.2005 after attaining majority - Rejected on 18.06.2007 on the ground that Circular dated 22.01.2007 provides that if there is no eligible major member in the family of deceased, the compassionate appointment can be given only if the age of majority is attained within 7 years and if age of majority is attained by minor after 7 years there would not be eligibility - Held - Policy prevailing at the time of death and application of compassionate appointment made, has to be applied and not the policy which came into existence subsequently - Order rejecting compassionate appointment quashed - Petition allowed.

(Paras 5, 7 & 8)

संविधान, अनुच्छेद 226 - अनुकम्पा नियुक्ति - याची के पिता की मृत्यु 18.05.1996 को सेवा में रहते हुए हुई - माँ ने अवयस्क पुत्र की नियुक्ति के लिए आवेदन पेश किया - आवेदन वयस्कता प्राप्त करने पर नया आवेदन पेश के निदेश के साथ खारिज - नया आवेदन वयस्कता प्राप्त करने के पश्चात् 06.07.2005 को पेश - 18.06.2007 को इस आधार पर खारिज हुआ कि परिपत्र

दिनांकित 22.01.2007 उपबंधित करता है कि यदि मृतक के परिवार में कोई पात्र वयस्क सदस्य नहीं है तो अनुकम्पा नियुक्ति केवल तभी दी जा सकती है जब वयस्कता की आयु 7 वर्षों के अन्दर प्राप्त की गई हो और यदि अवयस्क द्वारा वयस्कता की आयु 7 वर्ष के बाद प्राप्त की जाती है वहां पात्रता नहीं होगी - अभिनिर्धारित - मृत्यु के समय पर और अनुकम्पा नियुक्ति का आवेदन देते समय प्रचलित नीति लागू की जाना चाहिए न कि नीति जो बाद में अस्तित्व में आयी हो - अनुकम्पा नियुक्ति अस्वीकार करने का आदेश अभिखंडित - याचिका मंजूर।

Case referred:

2002 (III) MPLJ 242

D.M. Kulkarni, for the petitioner.

Arvind Gokhale, G.A., for the respondents.

ORDER

SHANTANU KEMKAR, J. :-Petitioner's father late Shyam Sundar Bairagi was working on the post of Forester in the Forest Department of the State of Madhya Pradesh. He died in harness on 18.05.1996. On his death, petitioner's mother had applied for compassionate appointment of the petitioner, who was minor aged 10 years. The said application was rejected by the 4th respondent District Forest Officer, Neemuch vide order dated 13.02.97 (Annexure P/5) directing to the petitioner's mother that the petitioner may apply after attaining the age of majority. Pursuant to this, on attaining the age of majority the petitioner submitted an application for his compassionate appointment on 6.7.05 and again on 11.7.05. The said applications were considered by the respondents and the petitioner was informed vide letter dated 6.12.05 (Annexure P/7) that he can not be appointed on the post of Assistant Grade III or on the post of Peon but if he is willing to accept compassionate appointment on the post of Forest Guard, he may furnish the required information.

2. Pursuant to the aforesaid letter dated 6.12.05, the petitioner gave his consent for his appointment on the post of Forest Guard and submitted requisite information with consent letter dated 23.12.05 (Annexure P/8). He also submitted requisite affidavit. Thereafter the petitioner's case was referred to 3rd respondent for further action in the matter. The 3rd respondent along with the recommendation sent the proposal on 2.05.2006 (Annexure P/15) of the petitioner's appointment referring therein that as on 31.3.06 total 29 posts of forest guards in the category of OBC are lying vacant and the petitioner being from OBC category he can be given compassionate appointment. However, in stead of passing the order of appointment the petitioner was informed vide letter dated 18.6.2007 (Annexure P/1) that no compassionate appointment can be given to him in view of Circular dated 22.01.07 providing that if there is no eligible major member in the family of the deceased, the compassionate appointment can be given only if the age of majority is attained within 7 years and if the age of majority is attained by the minor after 7 years there would not be eligibility. Feeling aggrieved by this order dated 18.06.07 (Annexure P/1) the petitioner has filed this petition.

3. Shri D.M. Kulkarni, learned counsel for the petitioner contends that the respondents while rejecting the petitioner's claim for compassionate appointment have acted arbitrarily and committed serious illegality in rejecting the petitioner's claim on the basis of the policy which came into effect much later from the date of filing of the petitioner's application. He further contends that the petitioner's mother when applied for compassionate appointment of the petitioner she was informed by the respondents that the petitioner can submit an application after attaining the age of majority. On attaining the age of majority, the application submitted by the petitioner was duly forwarded and consent was obtained by the respondents for his appointment on the post of Forest Guard and the application was further processed. In this back ground, the rejection order Annexure P/1 on the basis of the subsequent policy is wholly unjustified.

4. Shri Arvind Gokhale, learned Government Advocate for the respondents contends that the application having been filed after 7 years of the death of the deceased/employee, the same has rightly been rejected in view of the policy dated 22.01.2007.

5. On the death of the petitioner's father, the mother of the petitioner (widow of the deceased) immediately applied for the compassionate appointment for her son (petitioner) aged 10 years. She was asked to wait till the petitioner attains the age of majority. On attaining majority the petitioner immediately applied for his compassionate His case was duly considered for appointing him on the post of Forest Guard. After receipt of the petitioner's consent his case was recommended for compassionate appointment for the post of Forest Guard. At this stage, instead of giving compassionate appointment altogether new stand was taken by the respondents for rejecting his case on the basis of the policy dated 22.01.07.

6. In the case of *T. Swami Dass v/s Union of India and Ors* (2002 (III) MPLJ 242) Division Bench of this Court has held that the policy prevailing at the time of death and when the application for compassionate appointment has made, has to be applied and not the policy which came into existence subsequently.

7. Having regard to the law laid down in the case of *T. Swami Dass* (Supra) and the facts as enumerated above, the impugned order by which the petitioner's application for compassionate appointment has been rejected by applying the policy which came into existence much later is not sustainable. The petitioner's case ought to have been considered in view of the policy invogue at the time of death of his father and when the the petitioner applied for compassionate appointment.

8. In the circumstances, impugned order dated 18.06.07 (Annexure P/1) deserves to be and is hereby quashed. Respondents are directed to re-consider and decide the petitioner's case for compassionate appointment within three months from the date of receipt of copy of this order, keeping in view the policy prevailing at the time of death of the petitioner's father and at the time of petitioner's making application, keeping in mind that the petitioner's case, was already recommended

by the authorities of the Forest Department for compassionate appointment prior to coming into force of the policy dated 22.01.2007.

9. Thus the petition succeeds and is allowed in terms of the order aforesaid. However, with no order as to costs.

Cc within three days.

Petition allowed.

I.L.R. [2008] M. P., 2313

WRIT PETITION

Before Mr. Justice S.K. Gangele

24 June, 2008*

DHARAMPAL (DEAD) THROUGH L.R.S.

SMT. ASHIMA SHYAL & anr.

... Petitioners

Vs.

HARI CHANDRA @ HARISH CHANDRA (DEAD)

THROUGH L.R.S. SURESH KUMAR CHAUDHARY & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 38 Rule 5 - Attachment before judgment - Where defendant may be called upon to furnish security for production of property - Held - A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him before judgment - A plaintiff should show, prima facie, that his claim is bonafide and also satisfy the court that defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him. (Para 8)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 38 नियम 5 - निर्णय के पूर्व कुर्की - जहाँ प्रतिवादी को सम्पत्ति को पेश करने के लिए प्रतिभूति देने के लिए बुलाया जाए - अभिनिर्धारित - कोई प्रतिवादी, मात्र इसलिए कि निर्णय के पूर्व उसके विरुद्ध कोई वाद पेश किया गया है या पेश किया जाने वाला है, अपनी सम्पत्ति के बारे में व्यवहार करने से विवर्जित नहीं होता है - वादी को प्रथम दृष्टया यह दर्शित करना चाहिए कि उसका दावा सद्भाविक है और न्यायालय का समाधान करना चाहिए कि प्रतिवादी अपनी सम्पूर्ण सम्पत्ति या उसके भाग को, किसी डिक्री, जो उसके विरुद्ध पारित की जाए, के प्रवर्तन में बाधा या विलम्ब करने के आशय से, हटाने या व्ययनित करने वाला है।

B. Civil Procedure Code (5 of 1908), Order 38 Rule 5 - Powers of Court - Plaintiffs have proved that they have substantive rights in their favour and prima facie defendants are enjoying the benefits of the suit property - Defendants published an advertisement with regard to sell of other land which is of the ownership of the defendants - In such circumstances, it is necessary to attach some property of the defendants or they may furnish some security to the satisfaction of the trial court - Defendants be directed to furnish a security of Rs.10 lacs before trial court - Petition disposed of accordingly. (Para 8)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 38 नियम 5 - न्यायालय की शक्तियाँ - वादियों ने साबित किया कि उनके पक्ष में सारवान् अधिकार हैं और प्रथम दृष्ट्या प्रतिवादी वादग्रस्त सम्पत्ति के लाभों का उपभोग कर रहे हैं - प्रतिवादियों ने अन्य भूमि, जो प्रतिवादियों के स्वामित्व की है, के विक्रय के संबंध में विज्ञप्ति प्रकाशित की - इन परिस्थितियों में यह आवश्यक है कि प्रतिवादियों की कुछ सम्पत्ति कुर्क की जाए या वे विचारण न्यायालय के समाधान के लिए कुछ प्रतिभूति दें - प्रतिवादियों को विचारण न्यायालय के समक्ष 10 लाख रुपये की प्रतिभूति देने के लिए निदेशित किया - याचिका तदनुसार निपटाई गई।

Cases referred :

(2007) 8 SCC 493, 2008(1) MPHT-426 SC.

Aniket Naik, for the petitioners.

Deepak Khot, for the respondents.

ORDER

S.K. GANGELE, J.:-Petitioners/plaintiffs filed this petition challenging the order Annexure P/11 dated 24.11.2000, whereby the application filed by the plaintiffs under Order 38 Rule 5 of C.P.C has been rejected.

2. The plaintiffs filed a Civil Suit for declaration, injunction, recovery of possession and mesne profits with regard to land situated at Gwalior named as Temak Bagh (in brevity suit property). It has a long history of persons who got the ownership and also litigation. Initially it was a property of Jagir managed by Madhav Rao who had two sons namely Bapu Saheb and Yashwant Rao, Yashwant Rao was the elder son, hence he became owner of the Jagir property and thereafter when he died in the year 1924 his wife Janki Bai became owner of the property. She executed a sale deed of the suit property in favour of Dharmawati Bai on 10.01.1963. Thereafter Dharmawati sold it to Purendra Kumar by another sale deed on 27.12.1968. Then Purendra Kumar sold it to Dharampal and Rajendra Syal by two sale deeds dated 13.07.1981 and 20.07.1981. The present petitioners/plaintiffs got the property by way of aforesaid sale deeds. One Bapu Saheb filed a suit in the year 1961 which was registered as Civil Suit No.25-A/1962 claiming himself to be landlord for recovery of rent and that suit was dismissed.

3. Thereafter one Shiv Singh Temak also filed a suit of the property which was registered as Civil Suit No.5-A/1964. It was decreed on 14.09.1974. Thereafter First Appeal was filed before the High Court which was registered as F.A No.1/1975. During pendency of the appeal the plaintiffs of the present suit were impleaded as appellants in place of Dharampal because they purchased the property by registered sale deeds. Harichand was also permitted as conductor of the suit in place of Shiv Singh. The appeal was allowed and suit filed by Shiv Singh was dismissed. Thereafter LPA No.55/1989 was filed which was also dismissed on 02.09.2005. Thereafter SLP was filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court granted leave and it was registered as Civil Appeal No.4361/2007. The Hon'ble Supreme Court dismissed the appeal by holding that

the Janki Bai was the owner of the suit property and Shiv Singh had no right in the suit property.

4. Shiv Singh executed an agreement in the year 1967 to sale the property in favour of Harichand when he failed to perform his act then Harichand filed a suit for specific performance of contract, which was registered as 15-A/1975. The trial Court decreed the suit, no appeal had been filed against the judgment of the trial Court. In the aforesaid Civil Suit Harichand was the plaintiff and Shiv Singh was the defendant.

5. The petitioners/plaintiffs filed the present suit in the year 1998 for declaration, possession and mesne profits. It is also an admitted fact that the plaintiffs are not in possession over the suit property and the defendants are in possession over the suit property. The petitioners/plaintiffs also filed an application before the trial Court under Order 38 Rule-5 of C.P.C that the defendants published an advertisement for sale of some other property which was of the ownership of the defendants and the property be attached because the plaintiffs have strong case for mesne profits. That application has been dismissed by the trial Court vide impugned order dated 24.11.2000. The plaintiffs claimed mesne profits at the rate of Rs.30,000/- per month.

6. The learned counsel for the petitioners/plaintiffs has submitted that the plaintiffs have become owner of the suit property in accordance of the judgment of the Hon'ble Supreme Court, hence they have a strong case for mesne profits. The defendants are trying to sale the property which is of other property of their ownership. Even if a decree be passed by the trial Court then the plaintiffs would not be entitled to execute the decree. Hence the property of the defendants has to be attached. Contrary to this learned counsel for the defendants submitted that they have been in possession of other suit property since 1967. The plaintiffs have no prima facie case they have not paid the proper Court fee and the trial Court has ordered to deposit the proper Court fee to the plaintiffs. The mesne profit have not been determined even though the suit is for declaration of title. It is barred by limitation. In such circumstances, the trial Court has rightly rejected the application of the petitioners as stated above.

7. It is clear from the facts that the litigation went upto the Hon'ble Supreme Court. The Hon'ble Supreme Court in Civil Appeal No.4361/2007, reported in 2007(8) Supreme Court Cases 493 *Harichand Vs. Dharampal Singh Baba and Others* has held that Janki Bai was the owner of the suit property. It has further held by the Hon'ble Supreme Court that Shiv Singh had no right in the suit property relevant findings of the Hon'ble Supreme Court are as under:-

"7. So far as the present suit is concerned, this was wholly misconceived and engineered by the plaintiff on the basis of a so-called family settlement. In fact, the rights of the parties having matured in Civil Suit No.25 of 1962 wherein the High Court took the view in second

appeal that the position of Bapu Saheb Temak was nothing but, of the manger and in that connection they relied on the regency order dated 17.11.1931 and indicated that Bapu Saheb Temak was never appointed as a manager and, therefore, so far as the right of Smt. Janki Bai was concerned, the same stood affirmed. The subsequent suit brought by Shiv Singh was totally misconceived as on the basis of the so-called family settlement once the rights of the parties have matured by operation of the decision of the High Court, there was no occasion for the present suit being filed on the basis of the so-called family settlement. When the land did not belong to Bapu Saheb Temak or his son, Shiv Singh, there was no occasion for the so-called family settlement. Family settlement could only be if one has lawful right over that property and then alone family settlement could be executed. When there was no lawful right of the parties over the property, there was no occasion for the suit being filed on that basis. Therefore, in our opinion, the view taken by the High Court appears to be correct that Janki Bai was the owner of the property. When Bapu Saheb Temak was only the manger of the property and the real owner was Janki Bai, the suit filed by Shiv Singh was rightly dismissed in first appeal by the High Court setting aside the judgment and decree passed by the trial Court."

In the aforesaid proceedings in the First Appeal before the High Court Harichand was permitted as conductor of the case he contested the case upto the Supreme Court. The same Harichand is the defendant in the present case. He is said to get the right in the property on the basis of agreement which is said to be executed by Shvi Singh when the Hon'ble Supreme Court has already held that Shiv Singh had no right in the suit property then certainly prima facie in my opinion, the petitioners have right of ownership in the suit property. Admittedly defendants are in possession over the suit property. It is a land of 36,000 Sqft having two rooms house. It is situated at Gwalior. Hence prima facie it cannot be said that the petitioners/plaintiffs has no case for mesne profit. The respondents have been enjoying the benefit of possession for a number of years.

8. The Hon'ble Supreme Court reported in 2008(1) M.P.H.T 426 (SC) *Raman Tech. & Process Engg. Co. and another Vs. Solanki Traders* has held as under with regard to exercising of powers under Order 38 Rule 5 of the C.P.C

"5. The power under Order 38 Rule 5, C.P.C is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realized by

unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of Court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, *prima facie*, that his claim is bonafide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5, CPC. Courts should also keep in view the principles relating to grant of attachment before the judgment."

As per the principal of law laid down by the Hon'ble Supreme Court, in my opinion petitioners/plaintiffs has proved that they have substantive right in their favour and *prima facie* defendants are enjoying the benefits of the suit property. The defendants further published an advertisement with regard to sale of other land, which is of the ownership of the defendants. Copy of the advertisement has been filed as Annexure P/7. In such circumstances, it is necessary to attach some property of the defendant or he may furnish some security to the satisfaction of the trial Court. Looking to the facts and circumstances of the case it would be just and proper that defendants be directed to furnish a security of Rs.10 Lacs before the trial Court. Petition is disposed of with the following directions:-

(i) The impugned order passed by the trial Court Annexure P/11 dated 24.11.2000 is hereby quashed.

(ii) The application filed by the petitioners/plaintiffs under Order 38 Rules 9 & 5 of C.P.C is hereby allowed of with the direction that the legal representatives of defendants/respondents furnish security of Rs.10. Lacs to the satisfaction of the trial Court within a period of three months from today.

(iii) Looking to the facts of the case that the litigation is pending for a long period, the trial Court is directed to complete the trial of the suit within a period of one year from the receipt of the copy of the order.

It is hereby clarified that the observations made by this Court in the order are *prima facie* and the learned trial judge shall decide the case finally on the merits and evidence of the case without influencing the observation made in this order. No order as to cost.

Order accordingly.

I.L.R. [2008] M. P., 2318

WRIT PETITION

Before Mr. Justice R.S. Jha

26 June, 2008*

SURESH CHAND PANDYA

... Petitioner

Vs.

STATE OF M.P.

... Respondent

Fundamental Rules, M.P., Rule 56(3) - Compulsory Retirement -
Service record of petitioner was good and under no circumstances can a prudent man come to conclusion that service record of petitioner warranted his compulsory retirement in public interest - Pendency of three departmental enquiries against petitioner would not warrant his compulsory retirement as pendency of D.E. have not reflected upon petitioner's performance - Compulsory retirement of petitioner on the basis of pendency of departmental enquiries per se illegal. (Paras 6, 8 & 9)

मूलभूत नियम, म.प्र., नियम 56(3) - अनिवार्य सेवानिवृत्ति - याची का सेवा अभिलेख उत्तम था और ऐसी कोई परिस्थिति नहीं जिसके अधीन एक प्रज्ञावान व्यक्ति इस निष्कर्ष पर पहुंच सके कि याची का सेवा अभिलेख लोकहित में उसकी अनिवार्य सेवानिवृत्ति समर्थित करता है - याची के विरुद्ध तीन विभागीय कार्यवाहियों का लम्बित होना उसकी अनिवार्य सेवानिवृत्ति समर्थित नहीं करेगा क्योंकि विभागीय कार्यवाही के लम्बन ने याची के कार्य पर प्रभाव नहीं डाला है - विभागीय जाँचों के लम्बित होने के आधार पर याची की अनिवार्य सेवानिवृत्ति स्वतः अवैधानिक।

Cases referred :

(1992) 2 SCC 299, (2001) 3 SCC 314, AIR 1954 SC 369, AIR 1960 SC 1305, AIR 1967 SC 1260, (1995) 1 SCC 336, 2002 (4) MPLJ 343.

Hemant Shrivastava, for the petitioner.

Ashok Agrawal, G.A., for the respondent/State.

ORDER

R.S. JHA, J.:-The petitioner, who was at the relevant time working as Superintending Engineer in the Water Resources Department in the State of Madhya Pradesh, has filed this petition being aggrieved by order dated 6-1-2000 whereby the petitioner has been compulsorily retired from Government service under sub rule (3) of Rule 56 of M.P. Fundamental Rules (hereinafter referred to as the 'Rules') after giving him three months' pay in lieu of notice.

2. The petitioner submits that he was initially appointed as Assistant Engineer in the year 1970 in the Water Resources Department and was thereafter promoted as Executive Engineer in the year 1978. Vide order dated 13-10-1997 the petitioner was promoted on the post of Superintending Engineer with retrospective effect from 23-12-1993. Thereafter the petitioner's case was scrutinized under F.R. 56(3)

of M.P. Fundamental Rules and the impugned order dated 6-1-2000 was issued compulsorily retiring the petitioner from Government service.

3. The contention of the learned counsel for the petitioner is that the petitioner's service record was throughout good which is evident from the fact that he was awarded three promotions in the year 1970, 1978 and 1997 and, therefore, the impugned order of compulsory retirement has been issued with an oblique motive as certain juniors have been retained to give them benefit by removing the petitioner from service who was an impediment to their interest. It is further submitted that the impugned order is not in public interest as envisaged by F.R. 56 and is, therefore, arbitrary, illegal and mala fide as other persons similarly situated as the petitioner have been retained. The petitioner further submits that though departmental enquiries were initiated against the petitioner in the year 1999 in respect of alleged misconducts relating to the period prior to 1997, the said departmental enquiries could not be made the basis for issuing the impugned order of compulsory retirement as the petitioner was subsequently promoted in the year 1997 and as the pendency of the departmental enquiries could not have been made the basis for issuance of the impugned order without awaiting their conclusion. The learned counsel for the petitioner, during arguments, also stated that in the first departmental enquiry initiated against the petitioner, he was exonerated on 18-6-1991, in the second departmental enquiry initiated against the petitioner, he was exonerated on 17-9-2003 and the third departmental enquiry, wherein penalty of reduction in pension by 50% was imposed upon the petitioner, has been quashed vide order dated 7-7-2006 passed by Indore Bench of this Court in W.P.No. 877/2006 (s).

4. The respondent, per contra, submits that the impugned order of compulsory retirement has been issued after due and proper screening of the petitioner's case by a screening committee and after duly taking into consideration the entire service record of the petitioner as well as the pendency of three departmental proceedings against the petitioner in respect of which the respondents have filed documents Annexure R-9 to R-11 along with the return. It is submitted by the learned counsel for the respondent that the screening committee which is an expert body has applied its mind by scrutinizing the entire service record of the petitioner and has thereafter recommended the case of the petitioner for compulsory retirement which cannot be made the subject-matter of judicial review before this Court in the present petition. It is submitted that even otherwise, in view of the fact that three departmental enquiries were pending against the petitioner, the continuance of the petitioner in Government service was not in public interest and, therefore, no fault can be found with the impugned order of compulsory retirement of the petitioner.

5. The proceedings of the screening committee as well as the service record of the petitioner have been produced before this Court and have been scrutinized by the learned counsel appearing for the parties as well as this Court. From a perusal of the service record as well as the record of the screening committee it

is apparent that the service record of the petitioner was not deteriorating or bad. Details of the service record of the petitioner are as under :-

Confidential Valuation Sheet of last 15 years of Supdt.

Engineers of Water Resources Department

Name of officer : Shri S.K.Pandya.
 Date of Birth : 20-2-42.
 Date of First Appointment : 10-10-65.

Years	Report
1983-84	: K (d)
1984-85	: Kh ([k)
1985-86	: K (d)
1986-87	: Kh ([k)
1987-88	: Kh ([k)
1988-89	: K (d)
1989-90	: K (d)
1990-91	: Kh ([k)
1991-92	: Kh ([k)
1992-93	: K (d)
1993-94	: K (d)
1994-95	: +K/K (+d@d)
1995-96	: K (d)
1996-97	: K (d)
1997-98	: Kh ([k)

It is also an undisputed fact that the petitioner was awarded promotion in the year 1978 and then again in the year 1997 with effect from 1993 and, therefore, in view of the law as laid down by Supreme Court in the case of *Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another*, (1992) 2 SCC 299 any adverse remarks in the service record of a Government servant prior to the period of his promotion lose their sting, more so, in cases where the promotion is made on the basis of selection and merit and, therefore, the service record of the petitioner prior to the period 1993 has to be taken to be good for two reasons; firstly, that there are no adverse remarks awarded to the petitioner prior to the period 1993 and secondly, as the petitioner was granted promotion on the basis of the aforesaid record on the post of Superintending Engineer.

6. It is also apparent from a perusal of the gradings awarded to the petitioner subsequent to the year 1993 as enumerated in the preceding paragraph that the service record of the petitioner even subsequent to 1993 was good as the grading awarded to him during that period was mostly 'very good' or 'good' and, therefore, under no circumstances can a prudent man come to the conclusion that the service

record of the petitioner warranted his compulsory retirement from service in public interest.

7. I may hasten to add that I have recorded the aforesaid conclusion on the scrutiny of the service record of the petitioner on applying the law as settled by the Supreme Court in the cases of *Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another*, (1992) 2 SCC 299 wherein, in paragraph 34 the following guidelines have been laid down :

"34. The following principles emerge from the above discussion :

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) *mala fide* or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course, attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

and in the case of *State of Gujrat v. Umedbhai M. Patel*, (2001) 3 SCC 314, wherein, in paragraph 11 the following guidelines have been laid down by the Supreme Court :-

"11. The law relating to compulsory retirement has now crystallised into definite principle, which could be broadly summarised thus :-

(i) Whenever the services of a public servant are no longer useful

to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

8. In the aforesaid facts and circumstances, the only question that remains to be decided in the present petition is as to whether in spite of a good service record, the pendency of three departmental enquiries against the petitioner would justify his compulsory retirement and that such a compulsory retirement would be in public interest.

9. In the present case, the service record of the petitioner does not indicate that his performance is deteriorating or that he has become dead wood for the department. From a perusal of the record it is also clear that the petitioner's integrity is beyond reproach and that his performance has been consistently very good and good. It is also clear from a perusal of the record that though the departmental proceedings were pending against the petitioner at the relevant time, they have not reflected upon the petitioner's performance as the reporting and reviewing authorities have given him very good and good gradings in the relevant years. In such circumstances, to compulsorily retire the petitioner on the basis of the pendency of departmental proceedings is *per se* unreasonable as there is nothing in the service record of the petitioner to indicate that his continuance in service is not in public interest only on basis of the issuance of charge sheets and pendency of departmental proceedings as there was full chance of his being exonerated and in fact, been exonerated, which fact has not been controverted by the respondents. The proper course to be adopted by the respondents in the present case would have been to either drop his case from consideration or defer his case for consideration till the departmental proceedings were ultimately concluded. In the

aforesaid circumstances, the action of the respondent-authorities is unreasonable and contrary to law.

10. It is settled law that compulsory retirement of a Government servant on the basis of scrutiny of his entire service record is not a punishment if it is not based on any particular allegation or imputation of charges against the petitioner but is based on a re-evaluation of his entire service record as it does not deprive him of his pensionary and other retiral benefits. For the aforesaid proposition I profitably rely upon the Constitution Bench judgment of the Supreme Court in the case of *Shyamlal v. State of Uttar Pradesh and another*, AIR 1954 SC 369 wherein it has been held that :-

"There is no such element of charge or imputation in the case of compulsory retirement. The two requirements for compulsory retirement are that the officer has completed twenty-five years' service and that it is in the public interest to dispense with his further services. It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the directions in the last sentence in Note 1 to Article 465A makes it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of that power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity."

11. The aforesaid principles have also been reiterated by of the Supreme Court in the cases of *Dalip Singh v. State of Punjab*, AIR 1960 SC 1305 and another Constitution Bench judgment in the case of *The State of Uttar Pradesh v. Madan Mohan Nagar*, AIR 1967 SC 1260. A perusal of the aforesaid judgments also makes it abundantly clear that if the order of compulsory retirement is passed solely upon imputation of charges and not upon the scrutiny or analysis of the entire service record of the Government servant, the order would be more in the nature of a punishment rather than based on any criteria of public interest.

12. In the case of *State of U.P. and another v. Abhai Kishore Masta*, (1995) 1 SCC 336 it has been held that where it is found that the main reason for compulsorily retiring the employee is the pendency of the disciplinary proceeding or the leveling of charges, the action would be penal in nature and, therefore, unsustainable. It has also been held that the pendency of the departmental proceedings can be one of the factors on the basis of which a person can be compulsorily retired in cases where the service record of the Government servant is also found to be bad or deteriorating in the concluding years and such other factors evident from the service record of the petitioner which indicate that his continuance in Government service could not be in public interest. The Supreme Court has, however, categorically stated that compulsory retirement based solely on the basis of the pendency of departmental proceedings or without conclusion

of the enquiry in which imputation of charges have been made against the Government servant would amount to an attempt on the part of the authorities to adopt the easier course of retiring the employee under the concerned rules relating to the compulsory retirement with a view to circumvent the departmental proceedings pending against him and in such circumstances would be penal in nature and would not be in public interest. The relevant parts of the judgment of the Supreme Court in the case of *Abhay Kishore Masta* (supra) are in the following terms :-

"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 a 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 and 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.

"9. It is true that merely because the order of compulsory retirement is couched in innocuous language without making imputations against the government servant, the court need not conclude that it is not penal in nature. In appropriate cases the court can lift the veil to find out whether, in truth, the order is penal in nature vide *Ram Ekbal Sharma v. State of Bihar*, (1990) 3 SCC 504."

The same view has also 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.

13. In the present case, as the impugned order of compulsory retirement dated 6-1-2000 has been sought to be justified only on the ground of pendency of three disciplinary proceedings against the petitioner as the petitioner's service record is otherwise very good as is evident from the gradings awarded to him during his service period, I have no hesitation in concluding that the impugned order of compulsory retirement deserves to be quashed in view of the law laid down by the Supreme Court in the aforementioned judgments as well as the fact that it is apparently not in public interest as envisaged by F.R.56 and is also not based on proper appreciation of the service record of the petitioner which is apparently very good. The impugned order is, therefore, perverse, not in public interest and beyond the powers conferred on the authority under F.R.56(3) of the Rules.

14. In the light of the above, the petition filed by the petitioner deserves to be and is hereby allowed. The impugned order of compulsory retirement dated 6-1-2000 is hereby quashed.

15. 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.

16. 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.

17. The petition is accordingly allowed to the extent indicated above. In the facts and circumstances of the case, there shall be no order as to costs.

Petition allowed.

I.L.R. [2008] M. P., 2326
APPELLATE CIVIL
Before Mr. Justice S.K. Seth
3 January, 2008*

SANTOSH (SMT.) & ors.
Vs.

... Appellants

MOHD. SHARIF & ors.

... Respondents

Civil Procedure Code (5 of 1908), Order 8 Rule 3 & 5, Accommodation Control Act, 1961, Section 12(1)(a) - *Suit for eviction - Allegation of arrears of rent - No specific denial of arrears of rent or service of notice - Even after order of trial Court to deposit arrears of rent, appellant again committed default - Application for condonation of default rejected - In absence of specific denial, the fact will be deemed to be admitted on the ground of non-traverse - Held - Appellant failed to establish denial of the landlord-tenant relationship - Decree of eviction rightly passed by two courts below - Appeal dismissed.* (Paras 7 & 8)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 3 व 5, स्थान नियंत्रण अधिनियम, 1961, धारा 12(1)(ए) - बेदखली के लिए वाद - भाड़ा बकाया होने का अभिकथन - भाड़ा बकाया होने का या सूचनापत्र की तामील का विनिर्दिष्ट प्रत्याख्यान नहीं - विचारण न्यायालय के बकाया भाड़ा जमा करने के आदेश के बाद भी अपीलार्थी ने पुनः व्यतिक्रम किया - व्यतिक्रम को क्षमा करने का आवेदन खारिज - विनिर्दिष्ट प्रत्याख्यान के अभाव में अखण्डन के आधार पर तथ्य स्वीकृत हुआ समझा जाएगा - अभिनिर्धारित - अपीलार्थी-मूस्वामी-अभिधारी सम्बन्ध के प्रत्याख्यान को स्थापित करने में असफल रहा - बेदखली की डिक्री दोनों अधीनस्थ न्यायालयों द्वारा सही रूप से पारित - अपील खारिज।

Cases referred :

2000(2) J.L.J. 1 (SC), AIR 2003 SC 2985, AIR 1915 PC 2.

J U D G M E N T

S.K. SETH, J.:—Appellants are the legal representatives of the original tenant. They are in appeal against the concurrent judgment and decree of eviction passed under Section 12(1)(a) of the M. P. Accommodation Control Act, 1961 (hereinafter referred to as 'the Act' for short) by the Courts below.

2. The appeal was admitted for final hearing and the following substantial questions of law were formulated:—

"1. Whether the first appellate court was justified in confirming the

decree passed by the trial court under section 12(1)(a) of the M.P. Accommodation Control Act, and granted decree for eviction?

2. Whether on facts pleaded and found proved, a decree under section 12(1)(a) *ibid* could be passed against the defendant(tenant) and whether he was entitled to get the benefit of section 12(3) of the Act?"

3. Plaintiff sought eviction of the tenant from the residential suit accommodation situated in Indore. Plaintiff sought eviction on various grounds including the ground covered by Section 12(1)(a) of the Act. Claim was resisted by the appellants. Based upon pleadings, trial Court framed issues and allowed the parties to adduce evidence. Learned trial Judge on appreciation of evidence, decreed the suit and ordered eviction of the appellants herein. Matter was carried in first appeal. Learned first appellate Court by the impugned judgment and decree, dismissed the appeal and maintained the judgment and decree of the trial Court. Hence this second appeal as stated above.

4. Shri S.C. Bagadia, learned senior counsel appearing for the appellants contended that in order to pass a decree under section 12(1)(a) of the Act, service of demand notice for payment of arrears of rent is *sine-qua-non*. In this connection, he referred to pleadings contained plaint as well in the written statement. He also referred to the evidence of the plaintiff, Mohd. Sharif(P.W.1). He submitted that Courts below erred in coming to the conclusion that in absence of specific denial, there was tacit admission on the part of appellants that they were served with the demand notice. According him, Courts below proceeded against appellants on the ground that there was non traverse of pleadings made by the landlord in the plaint. According to him, the so called admission in the written statement has to be seen and read as whole and not in a truncated manner. He further contended that even assuming without conceding, that there was no specific denial on the part of the appellants, still as per Order VII Rule 5 of the C.P.C., Courts below, should have had asked the landlord to prove the fact of service of notice, instead of ordering eviction of the appellants under section 12(1)(a) of the Act. Thus, according to him in absence of any positive evidence with regard to service of demand notice, Courts below committed manifest error in ordering eviction of the appellant from the suit premises. In support of his contention, Shri Bagadia placed strong reliance on the decision of the Supreme Court in the case of *Patna Regional Development Authority & others vs. M/s. Rashtriya Pariyojna Nirman Nigam and others-*, (1996) 4 SCC 529, especially the observations made at page 531. He has also contended that appellants are entitled to protection under Section 12(3) of the Act.

5. On the other hand, Shri A.S. Garg, learned senior counsel appearing for the legal representatives of the landlord, while supporting the impugned judgment and decree submitted, that Courts below have recorded pure findings fact based upon proper appreciation of evidence and as such they are not open to interference by

this Court in the second appeal. He further submitted that in the plaint there is specific allegation about service of notice demanding payment of arrears of rent, therefore, in absence of specific denial, Courts below were justified in holding that there was an admission regarding service and non payment of arrears of rent as per demand notice to the respondents in view of provisions contained in Order VIII Rule 3 of the C.P.C. He further contended that in absence of any dispute with regard to rate or arrears of rent, appellants were duty bound to comply with both limbs of Section 13 of the Act, i.e. deposit or tender legally recoverable arrears of rent within one month of the service of writ of summons and continue to deposit or pay month by month by 15th of each succeeding month, a sum equivalent to rent, till the decision of suit or appeal. Since they failed to do so, now it is not open for them to contend that the decree for eviction passed against them under Section 12(1)(a) of the Act is illegal or unsustainable in law. Shri Garg in support of his contentions has placed reliance on the decision of the Supreme Court in the case of *Jamnial and others vs. Radheshyam* reported in 2000(2) J.L.J. 1(SC) and *Sayeda Akhtar vs. Abdul Ahad* reported in AIR 2003 SC 2985; and *Imdad Ali v. Keshav Chand* reported in 2004(1) J.L.J. 397(SC).

6. There is no quarrel with the proposition of law that an admission in pleadings is quite different than an admission in the testimony of a witness. As observed by the Privy Council in *M.M. Essbhoj vs. M. Haridas* AIR 1915 PC 2, it may be permissible for a court/tribunal to accept a part and reject of rest any of any witness's testimony, but so far as admission in pleading is concerned, it can not be so dissected. It may be accepted as a whole or not at all. Now keeping this principle in mind, we have to evaluate picture emerging from facts, which are no longer in dispute. It is clear that the plaintiff is the owner/landlord of the suit accommodation. There was an earlier litigation between the plaintiff and Seth Gopilal, previous occupier of the suit accommodation. That suit ended in a compromise decree and Seth Gopilal recognized plaintiff as the landlord of the suit accommodation. After the death of Seth Gopilal, his legal representatives, by registered sale deed dated 9.9.1981 sold away the suit accommodation to tenant in the present proceeding, including rights and liabilities of a tenant and that is how tenant stepped into the shoes of the previous occupier of the suit premises. It is also clear from the record, that appellants never challenged the rate of rent nor the legally recoverable arrears thereof. Despite this, appellants took a calculated risk by denying the relationship of landlord and tenant between the parties but neither established their case nor deposited the legally recoverable arrears of rent within the time permitted under the Law. It is also no in dispute that appellants did not file any application seeking condonation of default or delay with regard to payment/deposit of legally recoverable arrears of rent. For the first time appellants have made this kind of application (I.A. 11894/06) before this Court during the pendency of this appeal.

7. The Civil Suit was instituted in the year 1987 with the specific allegations

that the appellants were in arrears of rent for which demand notice were served upon the original defendants- Ramesh Chandra and Shyam Bihari (Def. No. 2), both father and son respectively. Original tenant and defendant No.1 Ramesh Chandra died during the suit, therefore, his other legal representatives were brought on record. A joint written statement of his widow and defendant No. 2 was filed without any specific denial of arrears of rent or service of notice demanding payment thereof. It is pertinent to point out that that was no dispute with regard to rate of rent. That being the situation, appellants were bound to tender or deposit legally recoverable arrears of rent in compliance of Section 13 of the Act, or in case of refusal by the respondents, then appellants could have resorted to Section 25 of the Act to avoid eviction under Section 12(1)a). The trial Court on 16.2.2004 ordered appellants to deposit arrears of rent. Although the said order was duly complied with without delay, however, learned senior counsel appearing for appellants was fair enough to accept that there was a default on the part of the appellants to deposit the monthly rent of July 2004 in time. Thus, it is clear that appellants, even after availing the benefit of the order dated 16.2.2004, again committed default, therefore, in view of the law laid down in *Imdad Ali supra*, the I.A. No. 11894/06 is of no avail, consequently it stands rejected and closed. The inevitable result, therefore, is to confirm the concurrent decree for eviction passed against the appellants. In the opinion of this Court the reliance placed on the decision of the Supreme Court in *Patna Regional Development Authority (supra)* is clearly distinguishable on facts. That was a case where contract was not awarded to the first respondent, though its bid was the lowest because of Government's order dated 26.9.1991 black listing first respondent. The black listing order as well as non award of contract both was challenged in two separate writ petitions. Writ Petition challenging black listing was dismissed on the ground of delay, however, the other writ petition was allowed by the learned single judge. In Letters Patent Appeals, the decision of the single judge dismissing the writ petition challenging order of black listing was set aside on the ground of breach of principles of natural justice and matter was sent back to reexamine the question of award of tender. Against the decision in L.P.As, matter went to the Supreme Court and it was in this context, the following observations, on which reliance is placed by Shri Bagadia, were made:

"6: In our view the impugned decision of the Division Bench of the Patna High Court cannot be sustained. The decision of 26-6-1991 taken by the Water Resources Department to blacklist the first respondent for five years was communicated by a letter of the same date to the first respondent. The High Court has, however, held that the letter of 26-9-1991 addressed by the Water Resources Department, Government of Bihar to the first respondent was not served on the first respondent. This conclusion is arrived at by the High Court only on the ground that the allegation of non-service of the letter, made by the first respondent

in their pleading is not denied by the appellants in their pleading. But as the High Court's judgment itself records, the appellants had, in fact, stated in their pleading that the letter of 26-9-1991 was communicated to the first respondent. The High Court, however, has proceeded on the basis that there was non-traverse of the statement made by the first respondent that the letter of 26-9-1991 was not received by the first respondent. The appellants had clearly pleaded that the order of 26-9-1991 was communicated to the first respondent. This cannot be construed as non-traverse (emphasis is added)."

8. On the other hand, in the case on hand, there was a clear averment in the plaint by the plaintiff of non-payment of any rent by the appellants since September 1, 1981 despite the decree for recovery of rent having been passed against their predecessor occupier. There was no specific denial of this fact. Even otherwise, the tenant did not plead payment of any rent or its deposit before any authority. In absence of specific denial, this fact would be deemed to be admitted on the ground of non-traverse by the tenant. Learned counsel for the tenant strenuously urged before us that the appellants-tenant is entitled to the protection of Section 12(3) of the Act and that the appellants had in fact deposited arrears of rent within the meaning of Section 13(1) of the Act. We cannot permit this plea to be raised at this stage. The only plea taken by the appellants-tenant being the denial of relationship of landlord and tenant between the parties and having failed to establish same on the uncontroversial facts, eviction from the premises is unavoidable. So far as proviso to Order VIII Rule 5(1) is concerned, it merely states that the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. A wrong exercise of discretion would not give rise to substantial question of law to interfere with findings of fact. Even otherwise, looking to the nature of the pleadings we are of the view that the Courts below were not wrong in refusing to exercise discretion in favour of the appellants.

9. In view of the foregoing discussion, we do not find any merit and substance in this appeal. In the result appeal fails. Accordingly it is hereby dismissed, however, without any orders as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2331
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
 10 January, 2008*

CHOTI BAI (Smt.) & ors.
 Vs.

... Appellants

STATE OF M.P.

... Respondent

A. Land Revenue Code, M.P. (20 of 1959), Sections 50, 261, 262 & 262(1), Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007, Section 51 - *Suo motu powers of revision - Held - Though no time limit has been prescribed for exercising suo moto powers of revision, yet they should be exercised within a reasonable time.* (Para 14)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 50, 261, 262 व 262(1), मध्य भारत भू-आगम और कृषकाधिकार विधान, संवत् 2007, धारा 51 - पुनरीक्षण की स्वप्रेरणाधीन शक्तियाँ - अभिनिर्धारित - यद्यपि पुनरीक्षण की स्वप्रेरणाधीन शक्तियाँ प्रयोग करने के लिए कोई समय सीमा विहित नहीं है, तथापि इनका प्रयोग युक्तियुक्त समय के भीतर किया जाना चाहिए।

B. Limitation - *It was a cardinal principal of law of limitation - The prescribed period, if any, of limitation starts running from the date of acquiring the knowledge of the relevant fact giving rise to the cause of action.* (Para 14)

ख. परिसीमा - यह परिसीमा विधि का मुख्य सिद्धांत था - परिसीमा की विहित कालावधि, यदि कोई हो, सुसंगत तथ्य, जिससे वादकारण उत्पन्न हुआ, की जानकारी प्राप्त करने की तारीख से चलना प्रारम्भ होती है।

C. Land Revenue Code, M.P. (20 of 1959), Section 50, Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007, Section 51 - *Effect of repeal of enactment - As per Section 261 of the Code, Madhya Bharat Land Revenue & Tenancy Act was repealed and, therefore, procedure provided in Section 50 of the Code shall apply and not the provisions of the repealed enactment will be applicable.* (Para 17)

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50, मध्य भारत भू-आगम और कृषकाधिकार विधान, संवत् 2007, धारा 51 - अधिनियमिति के निरसन का प्रभाव - संहिता की धारा 261 के अनुसार, मध्य भारत भू-आगम और कृषकाधिकार विधान निरसित हो गया, और इसलिए संहिता की धारा 50 में उपबंधित प्रक्रिया लागू होगी और निरसित अधिनियमिति के उपबंध लागू नहीं होंगे।

Cases referred :

AIR 1969 SC 1297, 1989 RN 332, 1999 RN 82.

V.K. Bhardwaj, for the appellants.

C.S. Dixit, G.A., for the respondent/State.

JUDGMENT

P.K. JAISWAL, J. :- This appeal is filed by the plaintiffs against the judgment and decree dated 15.07.1998 passed by Additional District Judge, Gohad, District Bhind in Civil Appeal No.28/97, whereby learned Additional District Judge affirmed the judgment and decree of the trial court dated 08.03.1997 by which suit of the plaintiffs was dismissed.

2. Brief facts of the case are that the appellants filed a suit for declaration and permanent injunction in respect of an area of Survey No.3714/2, 3718/2, 3718/3 and old Survey No.3675 (New No.3675/3) over an area of 4 Bigha and 9 Biswa of land situated at Gohad, District Bhind on the ground that the said land was in possession of Nathuram and Kashiram, father of appellant No.1 and Uncle of appellant No.2. In Samvat 2007, the land was in possession of the father of appellant No.1 and Uncle of appellant No.2. They purchased the land vide registered sale deed dated 21.09.1948 from the then Zamindar Gauri Shankar S/o Jwalaprasad for a sum of Rs.1,200/- and thereafter, land was recorded as Khudkasht land of Nathuram and Kashiram.

3. The appellants case was that Khasra No.3714/2, 3718/2 and 3718/3 were the Khudkasht of his father and Khasra No.3675/3 was his own cultivated land. In the year 1954, the Patwari recorded Khasra No.3718/1, 3718/2, area 1 Bigha as Khudkasht land and the rest as Grass land and recorded 2 Bigha out of Khasra No.3714 in Samvat 2008 in the name of Kashiram, Nathuram. They filed an application under Section 51 of the Madhya Bharat Land Revenue Tenancy Act (for short 'the Act') for correction of entries. The Additional Tehsildar vide order dated 27.07.1963 corrected the record in the name of Nathuram and Haribabu, adopted son of Kashiram. Subsequently, the Collector took up the matter in *suo motu* revision and served a notice upon the appellants to show cause why the aforesaid orders passed by the Tehsildar in their favour should not be set aside because the Tehsildar even under the provisions of Section 51 of the Act was not empowered to make correction in the record and the Tehsildar had proceeded to pass an order in favour of the appellants without obtaining previous sanction of the Collector (Suba). The proceedings were initiated on the basis of a complaint made by the general public vide case No.114/65-66-A/68. The report was submitted to the Collector on 27.07.1965. The Collector after receiving the report initiated proceedings against Nathuram and Haribabu vide Case No.297/68 and issued notices to them. After hearing them, the Collector set aside the order passed by the Tehsildar vide Ex.P/1. They challenged the said order by filing revision before the Additional Commissioner who vide order dated 10.06.1981 affirmed the order of the Collector. Thereafter, second revision was filed before the Board of Revenue. The learned Board of Revenue confirmed the order on 29.05.1982. The appellants challenged the said proceedings by filing the present suit and prayed that they may be declared as owners and title holders of the suit

land on the basis of order dated 27.07.1963 passed by the Additional Tehsildar vide Ex.P/1.

4. The respondent/State denied the averments made in the plaint and in para-7 of the written statement averred that the Collector, Bhind received a complaint in the year 1965. He constituted a Committee who examined the matter and submitted its report vide Case No.117/65-66-A/68 on 27.07.1965. The Collector after receiving the said report initiated proceedings in exercise of powers conferred under Section 50 of the M.P. Land Revenue Code 1959 (for short 'the Code') and issued notices to Nathuram and Haribabu and drew proceedings against them vide Case No.297/67-68. The plaintiffs challenged the said proceedings by filing Civil Suit No.70/72 and 60/72 in connivance with Nathuram and Haribabu. It is also averred that under Section 51 of the Code, the Tehsildar was not empowered to make corrections in regard to land which was recorded as Government land and the Tehsildar had proceeded to pass an order in favour of the petitioner without obtaining the previous sanction of the Collector. With the above, the respondent-defendant prayed for dismissal of the suit.

5. The trial court after appreciating the oral and documentary evidence dismissed the suit of the appellants vide judgment and decree dated 08.03.1997.

6. In an appeal filed by the appellants, the learned Additional District Judge after appreciating the judgment and decree of the trial court affirmed the findings recorded by the trial court and dismissed the appeal of the appellants by impugned judgment and decree dated 15.07.1998.

7. This second appeal was admitted on 10.05.2007 on the following substantial questions of law:-

1. "Whether the Collector could have exercised the revisional jurisdiction under Section 51 of the Madhya Bharat Land Revenue and Tenancy Act after coming into force of Madhya Pradesh Land Revenue Code.

2. Whether the order Ex.P-1 dated 27.7.63 could have been suo moto revised by the Collector in the year 1979."

8. The sole contention of the learned counsel for the appellants is that Additional Tehsildar passed an order on 27.07.1963 vide Ex.P/1 and, thereafter, after period of 16 years, the Collector exercised its suo motu powers and revised the order which is not permissible under law. In support of the said contention, he drew my attention to the decision in the case of *State of Gujarat Vs. Patel Raghav Natha and others*, AIR 1969 SC 1297, *Mahant Ballabhdas and others Vs. State of M.P. and others*, 1989 RN 332 and *Sitaram Vs. State of M.P. and others*, 1999 RN 82.

9. Shri C.S. Dixit, learned Govt. Advocate, on the other hand, has submitted that a complaint was lodged in the year 1965 and the said complaint was examined by the Collector. After examination, report was submitted on 27.07.1965 and,

thereafter, Collector in exercise of the powers conferred under Section 50 of the Code initiated proceedings vide Case No.297/67-68 i.e. within reasonable time and notices were issued to the interested persons i.e. Nathuram and Haribabu and they in connivance with the appellants filed a Civil Suit No.70/72 and 60/72 challenging the said proceedings. It is further submitted that the learned Collector after giving ample opportunities to the appellants passed an order in the year 1979 and, therefore, contention of the appellants that order was passed after period of 16 years is incorrect and the findings recorded by the courts below is just and proper and no interference in this second appeal is warranted.

10. I have heard the arguments of the learned counsel for the parties and perused the record of the case.

11. Section 51 of the Act reads as under:-

51. Dispute regarding entry in Annual Village Papers--

(1) If any person is aggrieved about any entry in the annual village papers, he shall apply to the Tehsildar for its correction within one year of the preparation of the papers or the date of that entry.

(2) The Tehsildar shall, after making an enquiry into the respective claims of the parties, pass necessary orders in the matter;

Provided that if the correction affects any entry in the settlement papers, the Tehsildar shall obtain the previous sanction of the Suba.

A plain reading of the above provision of law would show that since the lands in question were recorded as Government lands, the permission of the Collector was necessary before the Tehsildar could take any action on the petition.

12. It is not in dispute that an application for correction of entries was decided by the Tehsildar on 27.07.1963 without obtaining the previous sanction of the Collector in violation to the proviso of sub-section 2 of Section 51 of the Act. In such circumstances, the order which was passed in the year 1963 by the Tehsildar was without jurisdiction. It is also not in dispute that disputed lands were recorded as Charnoi land belonging to the State Government and entered in the Nistar Patrak. A correction of entry amounted to an amendment of Nistar Patrak which could only have been undertaken under sub-section 2 of Section 237 of the Code which had already come into force before the final order was passed in the year 1963. In such circumstances, the order which was passed in 1963 by the Tehsildar was without jurisdiction. Section 50 of the Code confer powers to the Collector to revise any order of a subordinate revenue officer either *suo motu* (of its own motion) or on an application made by some party. General public lodged a complaint before the Collector which was found to be correct by the Collector and, thereafter in the year 1967-68, proceedings were initiated against Nathuram and Haribabu, the ancestors of the appellants and notices were issued to them. The Collector found that there were serious irregularities and order passed by the Tehsildar is

without jurisdiction and no previous sanction was obtained from the Collector. It cannot be said that revisional authority should not interfere with the order or there was delay and laches in exercising the said power. The expression "at any time qualifies exercise of powers on its/his own motion on application made by any party" is settled. The application was made by the complainant in the year 1965. Thus, the Collector within a reasonable time exercised his *suo motu* powers. The reasonableness or otherwise of a party for purpose of *suo motu* revision must necessarily depend on the facts and circumstances of each case. The proceedings were initiated in the year 1965 itself and notices were issued in the year 1967-68 and after issuance of notices, two civil suits were filed and, therefore, matter was pending before the Collector for a long time. Mere passage of time should not bar the rectification of the gross illegality. It is not the case of the appellants that *suo motu* powers was exercised by the Collector in the year 1979. The Collector exercised its powers as prescribed under Section 50 of the Code immediately within a reasonable time in the year 1967 itself.

13. The Apex Court in the case of *Patel Raghav Natha and others* (Supra) has held that there is no period of limitation prescribed under Section 211 of Bombay Land Revenue Code 1879, but it seems to us plain that this power must be exercised in reasonable time and the length of reasonable time must be determined on the facts of the case and the nature of the order which is being revised.

14. It has been, in the last, argued for the appellants that though no time limit has been prescribed for exercising *suo motu* powers of revision, yet they should be exercised within a reasonable time. In this regard, it has to be seen that it was a cardinal principle of law of limitation the prescribed period (if any) of limitation starts running from the date of acquiring the knowledge of the relevant fact giving raise to the cause of action. In the instant case, the Collector started proceedings as soon as the fact of the alleged change of entry in the names of ancestors of the appellants were brought to his notice. "Taking action within a reasonable time was a relative term." In the facts and circumstances of the instant case, action was taken within a reasonable time.

15. In proceedings initiated under Section 51 of the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007, the order was passed on 27.07.1963 vide Ex.P/1. The said Act has been repealed and the M.P. Land Revenue Code 1959 had came into force on 02.10.1959. On the date when the order was passed, M.P. Land Revenue Code, 1959, came into force.

16. Section 262 of the Code provides for decision of a pending case in a particular revenue court. According to Section 262 (1) of the code, all pending case will be governed by the provisions of the repealed enactment, and not by the provisions of the repealing enactment.

17. As per Section 261 of the Code, Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007 was repealed and the procedure prescribed in the repealed

laws not saved. The order dated 27.07.1963 was passed after enforcement of the Code, that is, on 27.07.1963 and, therefore, the procedure provided in Section 50 of the M.P.L.R. Code shall apply and not the provisions of the Repealed enactment will be applicable. The further proceedings would be governed by the Code.

18. For the above-mentioned reasons, I am of the considered view that the Collector had exercised power of suo motu within a reasonable time and under Section 50 of the Code, he had power to exercise the revisional jurisdiction and the order of the Tehsildar was wholly without jurisdiction, therefore, both the substantial questions of law are decided against the appellants. The appeal filed by the appellants has no merit and is accordingly dismissed with cost of Rs.2,000/- Counsel fee, as per Schedule, if pre-certified.

Appeal dismissed.

I.L.R. [2008] M. P., 2336

APPELLATE CIVIL

Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi

13 February, 2008*

SHANTI DEVI TIWARI (SMT.)

... Appellant

Vs.

TOWN IMPROVEMENT TRUST, REWA

... Respondent

Land Acquisition Act (1 of 1894), Sections 23 & 24 - *Matters to be considered and neglected in determining compensation - Use of land on the date of acquisition is material fact - Potential value on the date of notification u/s 4 is relevant and not subsequent user - In case of acquisition of developing land, certain deduction has to be made depending upon facts of each case - In case of large piece of land certain deduction is required to be made - In case of acquisition of large piece of land grant of compensation per sq.ft. illegal - Situation of land, distance from city are relevant consideration - Genuineness of transaction and time gap between sale transactions are relevant facts.*

(Para 9)

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 23 व 24 - प्रतिकर अवधारण करने में विचार करने वाले और उपेक्षा करने वाले विषय - अर्जन की तिथि पर भूमि का उपयोग सारवान् तथ्य है - धारा 4 के अधीन अधिसूचना की तिथि पर संभाव्य मूल्य सुसंगत है न कि पश्चात्तवर्ती उपयोग - विकासशील भूमि के अर्जन की दशा में प्रत्येक मामले के तथ्यों पर निर्भर रहते हुए कुछ कटौती करनी पड़ती है - भूमि के बड़े टुकड़े की दशा में कुछ कटौती की जाना अपेक्षित है - भूमि के बड़े टुकड़े के अर्जन की दशा में प्रति वर्गफुट प्रतिकर देना अवैध - भूमि की स्थिति, शहर से दूरी सुसंगत विचार हैं - संव्यवहार की विशुद्धता और विक्रय संव्यवहारों के मध्य समयान्तर सुसंगत तथ्य हैं।

Cases referred :

AIR 1992 SC 421, AIR 1997 SC 3661, (1996) 11 SCC 542, AIR 1992 SC

2298, (1998) 11 SC 170, AIR 1996 SC 531, AIR 1988 SC 1652, AIR 2007 SC 740, 2007 AIR SCW 1109, (1997) 9 SCC 330, (2003) 12 SCC 334 = AIR 2004 SC 1031, (2004) 10 SCC 186.

June Choudhary with J.L. Aiyer & L.N. Namdeo & D.S. Baghel, for the appellant.

Avinash Patel, for the respondent / Municipal Corporation Rewa.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :- The appeals have been preferred by the claimants and erstwhile Town Improvement Trust, Rewa, substituted by Municipal Corporation, Rewa (hereinafter referred to as 'the Corporation') during the pendency of the appeals. The determination of compensations by Joint Tribunal of Town Improvement Trust of M.P. (in reference cases no.3/85, 5/85, 2/88, 1/87 & 2/85) has been assailed.

2. It is not in dispute that notification regarding the acquisition was published in the gazette dated 25.2.1984 under erstwhile Town Improvement Trust Act, 1960. In M.A. No.567/91 the area admeasuring 0.59 acres comprised in survey no.379 was acquired by the Land Acquisition Officer at the rate of Rs.27,600/- per acre. On reference being sought the tribunal has determined the compensation at the rate of Rs.2.50 per sq. ft. In M.A. No.568/91 compensation at the similar rate has been awarded. Consequently Town Improvement Trust taken over by Municipal Corporation, Rewa has come up in M.A. No.571/91. In M.A. No.571/91 the tribunal has awarded compensation at the rate of Rs.2/- per sq. ft. In M.A. No.596/91 the claimants have come up in the appeal for enhancement of compensation. The tribunal has awarded compensation at the rate of Rs.4.50 per sq. ft. whereas a cross appeal M.A. No.595/91 has been preferred by the Trust/ Corporation for reduction of the amount of compensation awarded by the tribunal. M.A. No.588/91 has been preferred by the Trust/ Corporation. The tribunal has awarded compensation at the rate of Rs.2/- per sq. ft. Prayer has also been made to award solatium, interest at the higher rate considering the provisions of Land Acquisition Act.

3. In M.A. No.571/91 the area of 2.71 acres comprised in survey nos.347, 358, 359, 361, 362 and 363 has been acquired. In M.A. No.568/91 the area admeasuring 0.90 acres comprised in survey no.196 has been acquired. In M.A. No.540/91, 596/91 and 595/91 area admeasuring 2.71 acres, 5.73 acres comprised in survey no.368 and 369 situated at village Saman, Tehsil and district Rewa has been acquired. The rate of Rs.2/- to Rs.2.50/- and Rs.4.50/- per sq. ft. has been awarded by the tribunal as per the impugned awards.

4. Smt. June Choudhary, learned Sr. counsel with Smt. Jai Laxmi Aiyer, Adv. and Shri D.S. Baghel, Adv. appearing on behalf of the claimants, has submitted that the compensation awarded by the tribunal at the rate of Rs.2/- per sq. ft. is inadequate considering the various sale-deeds placed on record development in

the area and also considering the potential value of the land as on the date of acquisition, the land was being used for the purpose of construction of the houses in nearby area, several houses had already been constructed, considering the other development in the area also, it has rightly been found by the tribunal that land is capable of being used as house site and in the case of Surendra Singh (M.A. No.595/91 & 596/91) the tribunal has awarded for similar land compensation of Rs.4.50/- per sq. ft., the land of the other claimants being similar the compensation at the similar rate ought to have been awarded by the tribunal.

5. Shri L.N. Namdeo, learned counsel for the claimants, has submitted that even the compensation awarded in the case of Surendra Singh is inadequate, compensation at the rate of Rs.6.50/- per sq. ft. ought to have been awarded. He has further relied upon the decision of the Apex Court in *Jabalpur Improvement Trust v. Shakuntala Malhotra & others* decided on 10.9.2003 in civil Appeal no.4938-4952 of 1993 to contend that solatium at the rate of 30% and the interest from the date of acquisition till realization. He has placed reliance upon the decision of the Apex Court in *Savitri Cairae v. U.P. Awam Vikas Parishad and another*, AIR 2003 SC 2725 to contend that in the matter of grant of solatium etc. the provisions of the Land Acquisition Act have to be adhered to and the provisions of solatium of 15% in the Town Improvement Trust could not come in the way of the Court to award solatium and interest at the rate prescribed under the Land Acquisition Act.

6. Shri Avinash Patel, learned counsel appearing for the corporation, has submitted that the compensation determined by the tribunal is excessive in the cases, 'large tract' of the land was acquired, it would not fetch same value further, no deduction has been made for development, sale deeds evinced transaction with respect to the smaller piece of land, thus, could not have been relied upon so as to work out the compensation at the rate awarded by the tribunal, there is provision in Town Improvement Trust for awarding solatium at the rate of 15%, that has been rightly allowed, thus, the compensation be suitably reduced and no case for enhancement of compensation is made out.

7. Before we examine the rival submissions, we place it on record, it has not been disputed that land is capable of being used as house sites, several houses had come in the close vicinity of the area in question and it appears that there was pond between the high way and the land in question. The land appears to be situated adjacent to each other, thus, cannot be said that any part of land has the different potential value than the other land. It is also clear that large tract of the land was acquired by the erstwhile Town Improvement Trust which has been abolished and assets were taken over by the Corporation, Rewa during the pendency of appeals, the tribunal has rightly found that acquired land has urban site value, the claim of claimants in that regard has been rightly accepted.

8. Coming to the evidence furnished by the sale-deeds, in M.A. No.540/91

(Ex.C.1) dated 26.4.83 was with respect to 2613 sq. ft. but it was sold for Rs.26,000/-, the rate per sq. ft. was Rs.9.80. The sale-deed (Ex.C.2) dated 13.10.82 was with respect to 1500 sq. ft. for Rs.3375/- at the rate of Rs.2.30 per sq. ft.. Sale-deed (Ex.C.3) dated 8.7.83 was with respect to 2100 sq. ft. land sold for Rs.15,750/- at the rate of Rs.7.50/- per sq. ft. Sale-deed (Ex.C.6) dated 6.8.81 evince transaction of Rs.8,000/- sq. ft. sold for Rs.16,000/- at the rate of 2/- per sq. ft. Sale-deed (Ex.C.4) dated 30.11.81 with respect to Rs.4,000/- sq. ft. land was for consideration of Rs.10,000/- at the rate of Rs.2.50/- per sq. ft. As per sale-deed (Ex.C.5) dated 25.8.83 area of 3200 sq. ft., sold for Rs.15,000/- at the rate of 4.20 per sq. ft. In M.A. No.571/91 the sale-deeds are similar. In M.A. No.567/91 similar evidence was adduced. In the case of Surendra Singh sale-deed of small plots of land were for Rs.7.47 per sq. ft., Rs.9.80 per sq. ft., Rs.4.64 per sq. ft., Rs.6.50 per sq. ft., Rs.10 per sq. ft., the tribunal has worked out average Rs.5.50 per sq. ft. and deduction of 75 p. per sq. ft. was made so as to arrive at the figure of Rs.4.50 per sq. ft. It is not in dispute that sale-deeds were with respect to small piece of land.

9. Before dilating upon the valuation of the land we deem it appropriate to note certain decisions of the Apex Court laying down the principles for determination of compensation. In *P.S. Krishna & Co. Pvt. Ltd. v. LAO, Hyderabad*, AIR 1992 SC 421, it was observed that use on the date of acquisition is one of the material factors and on facts 1/5th deduction was made towards development. In *LAO Karnataka Housing Board v. P.N. Malappa*, AIR 1997 SC 3661, the court held that potential value on the date of notification u/s 4 is relevant, not the subsequent user. In case of the acquisition of the developing land certain deduction has to be made depending upon the facts of each case. In *Basant Kumar v. Union of India*, (1996) 11 SCC 542, 60% deduction towards development was held permissible on facts. In case the land is developed less deduction can be made as observed in *B. Sammano v. LAO Vishakhapatnam*, AIR 1992 SC 2298. In case of acquisition of large piece of land certain deduction is required to be made, 1/3rd deduction was made in *Karan Singh v. Union of India*, (1998) 11 SCC 170. In case of acquisition of large piece of land - 17.57 acres was acquired, grant of compensation per sq. ft. was held to be illegal, compensation should be awarded on per acre basis as held in *Indumati Chitle v. Union of India*, AIR 1996 SC-531. If the situation of the land is relevant criteria if the land is situated near the road as it may fetch higher value higher compensation is permissible. Distance from the city is relevant consideration for arriving at the value of the land which a prudent buyer would have offered. Genuineness of the transaction is also relevant consideration. Time gap between sale transaction, situation, are relevant factors while determining the price/ compensation for the land acquired. Similarly, acquisition of the plot whether it is small or large is relevant factor, nearness to road where land is in frontage or only small opening on front, proximity to developed area, depressed portion requiring filling, shape, level etc. are relevant considerations. Offer of two different price abutting road and the land which was low lying area

was upheld by Apex Court, dealing with various aspects for determination of compensation elaborately in *Chimanlal Hargoinddas v. LAO, Poona*, AIR 1988 SC 1652. In *The Deputy Director, land Acquisition v. Malla Atchinaidu & others*, AIR 2007 SC 740, considering the potential value of the land proximity of the area, deduction of 20% was made on facts instead of 35%. In *Sharadamma v. Special Land Acquisition Officer & another*, 2007 AIR SCW 1109, the acquired land was surrounded by factories, there was industrial potential in land, it was situated adjoining national highway and railway line and near corporation limit, development had taken place in the nearby area; compensation at the rate of Rs.20/- per square yard was awarded. In *P. Rajan v. Kerala State Electricity Board*, (1997) 9 SCC 330, it was observed that determination of compensation per sq. ft. in the case of large tract of land would be confined only to highly developed commercial land. In *Land Acquisition Officer v. Nookala Rajamallu*, (2003) 12 SCC 334 : AIR 2004 SC 1031, deduction at the rate of 53% was made from the value as the evidence indicated that acquired lands were agricultural lands.

10. As in the instant cases large tract of the land has been acquired, the sale deeds were of small piece of land, thus, for large tract of land valuation could not have been made at the same rate and further deduction was required to be made for the development as the amount/area was required to be deducted. It would be appropriate to deduct 40% amount from the valuation to be made towards development of the area in the facts & circumstances of the instant cases as that area would have been consumed for providing facilities such as road and the other amenities in the area in question.

11. Coming to the question of valuation per square ft., as the evidence discloses in the case of Surendra Singh the average value was at the rate of Rs.5.50/- but that could not be the rate offered for the large tract of the land by a prudent buyer, it would be appropriate to assess the rate at Rs.3.25 per sq. ft. and after making 40% deduction for development the valuation per sq. ft. comes to Rs.1.95/- per sq. ft.

12. The question of award of solatium at the rate of 30% on the amount awarded is covered by the decision of the Apex Court, reference was made to larger bench in *Jabalpur Improvement Trust v. Shakuntala Malhotra & others*, (2004) 10 SCC 186; reference was made on 15th July, 2003, the question has been answered by the Apex Court relying upon the decision of the Apex Court in *Savitri Cairae v. U.P. Avas Evam Vikas Parishad & another* (supra) in which the Apex Court has laid down that in the matter of award of additional compensation, enhanced rate of solatium can be claimed on the basis of the parity invoking Article 14. The reference has been answered thus:-

"The appellant herein is established and constituted under the Madhya Pradesh Improvement Trust Act, 1960 (hereinafter referred to as 'the Act'). One of the purposes of the Act is to acquire land for housing

Schemes. The appellant herein, in pursuance of that object issued a notification on 2nd September, 1966, acquiring a large tract of land situated at village Chawanpur in the city of Jabalpur. On 23rd March, 1973, the appellant took over the possession of the land. The respondents herein submitted their separate claims for compensation in respect of acquired land before the Tribunal, constituted under the Act. On 10th March, 1983, the Tribunal gave an Award. Under the Award the claimants were given compensation at the rate of Rs.0.25 paise per sq. ft. to Rs.0.45 paise per sq. ft. with interest at the rate of 6% per annum from 23rd March, 1973 till the date of payment. The Tribunal also awarded solatium at the rate of 15%. The appellant as also the claimants, both aggrieved, preferred cross objections/ appeals under Section 54 of the Land Acquisition Act before the High Court. The High Court after hearing the matter, allowed the appeals holding that the lands falling under Category 'A' be valued at Rs.0.90 paise per sq. ft.; Category 'B' be valued at Rs.0.70 paise per sq. ft.; and Category 'C' be valued at Rs.0.55 paise per sq. ft. The High Court further granted solatium at the rate of 30% on the amount awarded to the claimants, interest at the rate of 12% from the date of acquisition till realisation of the amount and 15% for compulsory acquisition of land on the amount of compensation so determined. Aggrieved, the appellants are in appeals before us.

We have heard learned counsel for the parties. We are of the view that these matters stand covered by the decision of this Court in the case of *Savitri Cairae vs. U.P. Avas Evam Vikas Parishad & anr.*, reported in 2003 (6) SCC 255.

In view of the above, the appeals are, accordingly, dismissed. No costs.

W.P...of 1992:

Learned counsel states that this petition is rendered infructuous and is, accordingly, dismissed."

Thus, the appellants-claimants are held entitled for solatium at the rate of 30% on the value determined, apart from the interest at the rate of 12% per annum from the date of notification till the taking over the possession and thereafter as provided in section 28 at the rate of 9% from the date of taking the possession till the compensation determined is paid. The claimants are held entitled to claim the compensation at the rate determined by this Court in the aforesaid manner. They are also entitled for interest and solatium at the aforesaid rate.

Resultantly, the appeals are accordingly disposed of. No costs.

Appeal disposed of.

I.L.R. [2008] M. P., 2342

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

20 March, 2008*

INTERNATIONAL ASSOCIATION OF LIONS CLUBS

... Appellant

Vs.

DR. JAGJIT SINGH KHANNA

... Respondent

Limitation Act (36 of 1963), Section 5, Civil Procedure Code, 1908, Section 96 - Condonation of delay in filing appeal - Delay of 6¼ years in filing appeal - Plaintiff/respondent filed suit for declaration and perpetual injunction - Appellant engaged counsel - O.I.C. became patient of cancer and was unable to devote sufficient time - Counsel not engaged by appellant cross examined plaintiff's witnesses and subsequently pleaded No Objection on the date which was fixed for appellant's evidence - Counsel engaged by appellant, is no more, never informed about the date - Appellant came to know about ex parte decree only when the same was filed by respondent in another suit - Appeal was filed after a delay of 6¼ years - Held - Sufficient cause should be construed liberally as the justice should not be lost in technicalities - Length of delay is not relevant factor - When sufficient cause is made out, the interest of opposite party may be compensated by imposing cost - Delay of 6¼ years condoned with cost of Rs.10,000/-.

(Paras 14 & 18)

परिसीमा अधिनियम (1963 का 36), धारा 5, सिविल प्रक्रिया संहिता, 1908, धारा 96 - अपील पेश करने में विलम्ब की माफी - अपील पेश करने में 6¼ वर्ष का विलम्ब - वादी/प्रत्यर्थी ने घोषणा और शाश्वत व्यादेश के लिए वाद पेश किया - अपीलार्थी ने वकील मुकर्रर किया - प्रभारी अधिकारी कैंसर का मरीज हो गया और पर्याप्त समय देने में असमर्थ हो गया - वकील जो कि अपीलार्थी द्वारा नियुक्त नहीं किया गया था द्वारा वादी साक्षियों का प्रति परीक्षण किया गया तथा बाद में प्रतिवादी की साक्ष्य के लिए नियत तिथि को कोई अनुदेश न होना अभिवचित किया - वकील जो कि अपीलार्थी द्वारा नियुक्त किया गया था, ने तिथि के बारे में कभी सूचित नहीं किया और उसकी मृत्यु हो गयी - अपीलार्थी को एकपक्षीय डिक्री की जानकारी केवल तब हुई जब वह प्रत्यर्थी द्वारा दूसरे वाद में पेश की गयी - अपील 6¼ वर्ष के विलम्ब के बाद पेश की गई - अमिनिधायित - पर्याप्त कारण का अर्थ उदारता से लगाया जाना चाहिए क्योंकि तकनीकियों में न्याय की हानि नहीं होनी चाहिए - विलम्ब कितना है यह सुसंगत कारक नहीं है - जब पर्याप्त कारण का मामला बनता है तो विरोधी पक्ष का हित खर्च अधिरोपित करके प्रतिकरित हो सकता है - 6¼ वर्ष का विलम्ब रु. 10,000/- के खर्च सहित माफ किया गया।

Cases referred :

(1996) 5 SCC 529, AIR 1996 MP 243, AIR 2001 SC 2497, (1998) 7 SCC 123, AIR 1962 SC 361, AIR 1981 SC 1921, AIR 1998 SC 2276, AIR 1972 SC 749, AIR 1054 SC 340.

Ashutosh Dharmadhikari, Shreyas Dharmadhikari, Shakil Deshmukh & Blossom Naronna, for the appellant.
Pranay Verma, for the respondent.

ORDER

U.C. MAHESHWARI, J.:- This order shall decide IA No.12694/07, appellant's application for condoning the delay in filing the appeal against the judgment and decree dated 21.4.01 passed by XIth Addl. District Judge, Jabalpur in Civil Original Suit No.383-A/94, whereby the suit for declaration and perpetual injunction, filed by the respondent has been decreed ex-parte against it.

2. The facts giving rise to this appeal in short are that the plaintiff/respondent, being member of Institution, namely, "LIONS INDIA", (association of persons) having its Head Office at 19, Naya Bazar, Jabalpur, filed the aforesaid representative suit declaring the threats of an action for the infringement, passing-off or for consequential damages as contained in the notice of the appellant dated 23.8.1993 are unjustified and groundless, and also issuing injunction against the appellant desisting it from continuing such threats in the forum of legal proceedings or in any other manner either personally or through the servants or agents with a prayer of any other relief which the court deems fit and proper under the circumstances.

3. As per averments of the aforesaid application, the above-mentioned suit was filed by the plaintiff/respondent on 4.4.1994 under Section 120 of the Trade And Merchandise Marks Act, 1958 (Now the same is Section 142 of the Trade Marks Act, 1999, hereinafter referred to as 'the Act') in the representative capacity. The appellant was served with the summons of the suit on dated 23.6.94, on which, Mr Sumer Chand Jain, Advocate of Jabalpur was engaged on its behalf to defend the case, who filed his Vakalatnama by mentioning the additional names of Mr. J.L.Soni and Mr Dipak Jain, Advocates on dated 12.8.94. The reply of the plaint was also filed on affidavit of Shri Ratan Dhunjishaw Mehta of Bombay, the then constituted attorney of the appellant/defendant. Thereafter on placing the case for recording the evidence, the in-chief of the respondent/plaintiff was recorded on dated 10.8.99 and 15.11.99 whose cross-examination was carried out on 22.8.2000 and 16.2.01 by Shri J.K.Verma, Advocate and on closing the evidence of respondent he took the date to adduce the evidence of appellant. Shri J.K.Verma, Advocate was never engaged to defend the suit how he appeared and defended the case it is surprise for the appellant. The appellant is unable to find out the actual circumstances regarding engagement of Shri J.K.Verma Advocate because of duly appointed counsel Shri Sumer Chand Jain is no more now. It is further stated that without giving any pre-intimation to the appellant, Shri J.K.Verma, Advocate pleaded no instructions on dated 31.3.2001, on which the case was proceeded ex-parte against it and in such premises without recording evidences of the appellant the case was closed and fixed for judgment on 12.4.01.

without any fresh notice of hearing. It is also stated that engaged counsel Shri Sumer Chand Jain, never informed the appellant regarding any date of recording the evidence. On the aforesaid adjourned date 12.4.01, some additional issues No.3 to 8, were also framed for which without giving any notice to the appellant, the impugned judgment was delivered on 24.4.01 and in pursuance of it, the decree was passed. It is further stated that initially this matter was entrusted to Mr Vispy Engineer, the then International Secretary of the appellant for India and South- East Asia. Unfortunately, he became patient of cancer and underwent for its treatment. So, under the medical advice in his remaining life he was looking after the limited work of appellant. Shri Sumer Chand Jain, Advocate assured the said office bearer informing the status of the case. Subsequently, no information in this regard, was received in the office of the appellant from the said Advocate. The named Advocates Mr J.L.Soni and Mr Dipak Jain also did not send any information about the case. The appellant being international institution involved in the activities to serve the human being at large with its principle and ethics, could not know about the aforesaid case that what kind of arrangement to defend the case was made by Shri Sumer Chand Jain Advocate in his lifetime. The same was known to official of the appellant only on filing the certified copy of the impugned judgment and decree with the affidavit of the respondent between April to June, 2007 in its civil suit No.1312/07 pending before the High Court of Judicature at Bombay, on which, the appellant/institution shocked and immediately instructed to its Advocate M/s Jahagir Gujabbhai & Bilimosia and Daruwalla to get the details about the matter why such an ex-parte decree had been passed. Thereafter, in the month of August, 2007 the certified copies of the proceedings and concerned papers were obtained from the record of the trial court. The major part of such record was in Hindi-Devnagri script and the Office Bearer of it's Advocate Firm was not acquainted with such language, therefore, the same was got translated in English, in which some time was spent, and thereafter it spent the time in obtaining the legal opinion from different Advocates. The Advocate handling the suit before the High Court of Bombay advised it, not to file the proceedings under Order 9 rule 13 of the CPC for setting aside the ex-parte decree, while some conflicting opinion was given by the counsel of Jabalpur. Thereafter, the Advocate of Nagpur, advised it to file the regular appeal with an application under Section 5 of the Limitation Act mentioning the aforesaid all the facts along with the grounds on which the decree is not sustainable under the law. Then, this appeal along with the aforesaid IA with a prayer to condone the delay was filed on dated 26.10.07.

4. In addition to the aforesaid, on merits it is stated that the appellant being an international institution, is carrying its activities with various branches not only in India but all over the world. It had its own registration, the same is known in the name of "The International Association of Lions Clubs"/ "Lions Clubs International"/ "Lions Clubs"/ "Lions Club" and its functions are carried-out in

accordance with its constituted by-laws. Its Head Office is in U.S.A, while the Area Office is situated in Mumbai. It is registered proprietors of various famous and well known trade marks in India and all over the world including collective membership marks in relation to their various services, programmes, articles and merchandise all over the world including India such as "LIONS (word per se), LIONS (EMBLEM), LIONESS (EMBLEM), LEO (EMBLEM), LIONS CLUB (words per se), LIONS INTERNATIONAL (Word per se) and LIONS CLUBS INTERNATIONAL (work per se). Its recognition is covered under the provisions of the Trade & Merchandise Marks Act, 1958 and Trade Marks Act, 1999. It is further pleaded that on payment of appropriate charter fees, the "LIONS CLUB" is constituted and its initial declaration is issued. The relationship between such chartered institution with its Members, are governed by the aforesaid constituted by-laws. The appellant/institution receives vast amount of donations because of its excellent track record in rendering the services towards the Society and the Nation. In accordance with the aforesaid procedure, "The LIONS CLUB (Mid Town) Jabalpur was chartered by the appellant but subsequently, on account of non-payment of the international fee, it was placed on status-quo. In pursuance of it, such Club was deprived by all the privilege and identity as an occupant LIONS CLUB associated with the appellant. Its charter was also cancelled on 19.6.1992 with two options, either to start the new LIONS Club with due compliance of the procedure or its Members could seek their transfer to other CLUB within the time frame. On such cancellation, the aforesaid CLUB of Jabalpur, instead to opt any of the aforesaid alternative, illegally changed its identity and converted to "LIONS INDIA JABALPUR MID-TOWN, JABALPUR".

5. The aforesaid illegally constituted association of persons in the name of "LIONS INDIA MID-TOWN JABALPUR adopted that distinct intention and propriety, thereby committed flagrant infringement of the statutory right of the appellant, on which, such illegal organization was given the notice 28.1.93 through their solicitor "Crawford Bayley & Company of Bombay" intimating not to use the name of LION or LIONESS in any manner by such institution or its members. Instead to comply the aforesaid both the intimation the respondent as Member of the aforesaid illegally constituted club without having any locus standi, filed the impugned suit. With these averments the prayer for condoning the delay from 24.4.01 up to 26.10.07 the date of filing the appeal is made. The IA is further supported by an affidavit of Shri Navroj Patel, the attorney and Development Manager of the appellant.

6. In reply of the respondent objecting the admissibility of the affidavit filed on behalf of the appellant. It is stated that the alleged delay of more than 2289 days round about 6 ¼ years has not been explained with sufficient cause. Thus, the application is liable to be dismissed on this count only. While in parawise reply of the application, the grounds and circumstances stated by the appellants are denied.

Inter alia, it is stated that the averments of the application are falsified only on the ground that on receiving the summons of the suit, the matter was entrusted to Mr Vispy Engineer, the then International Secretary of the appellant but in the record of the trial court, the Vakalatnama with his signature is not available. In fact, Shri Sumerchand Jain appeared by filing the memo of appearance only. The written statement in the shape of affidavit filed in the trial court on 18.8.94 was also sworn by one Ratan Dhunjishaw Mehta of Bombay the constituted attorney of the appellant conversant with the facts of the case. So far the conduct of the office bearers of the appellant are concerned, it is stated that as per proceedings of the trial court, after engaging the counsel they did not care about the pendency and proceedings of the case. Even on demise of said Sumer Chand Jain, Advocate, the appellant did not take care to look-after the matter. The respondent Dr. Jagjit Singh Khanna (PW 1) was duly cross-examined on behalf of the appellant by competent counsel of Jabalpur Shri J.K.Verma, Advocate even after demise of Shri Sumerchand Jain Advocate not only for one day but for various days. At the stage of appellant evidence, when he did not receive the instructions from the appellant even on taking the adjournment then pleaded no instructions, on which, the case was proceeded ex-parte and the impugned judgment and decree was passed. Subsequent to such decree, the care was not taken by the appellant, since the date of its passing upto filing this appeal. Even after receiving the information about passing the impugned judgment and decree as stated on behalf of the appellant between April to June, 2007 on filing the certified copy of the same, before the High Court of Bombay in some case from the month of April up to filing this appeal on 26.10.07, the delay of more than five months has not been properly explained with sufficient cause. Even in support of alleged causes the affidavits of concerned solicitor or it's officials and the advocates whom the Office Bearer of appellant consulted are not filed. Specific dates of such events are not mentioned in the application. In view of such gross negligence on the part of appellant in defending the case, it does not deserve for any relief prayed in the application and prayer for dismissal of such IA is made. The reply is supported by an affidavit of the respondent.

7. Shri Ashutosh Dharmadhikari, the appearing counsel of the appellant by stating the facts stated in the IA said that appellant being international social institution and juristic person, it's case in the available circumstances, by adopting the liberal approach, the alleged delay, in filing the appeal may be condoned. He elaborated his arguments by referring some reported cases of the Apex court and said that while dealing with the application for condoning the delay, the merits of the case should also be taken into consideration. According to him, the impugned judgment and decree are not sustainable in existing law. He also said that the Advocate J.K.Verma was never engaged to defend the case on behalf of the appellant. In any case, the Advocate was bound to inform the appellant before pleading no instructions. The same was not intimated. Even on pleading such no

instructions, before proceeding ex-parte, the trial court was bound to issue the fresh notice to the appellant by fixing the date of hearing but the same was not issued and under wrong premises the ex-parte judgment and decree has been passed the same is not sustainable. The same was known to the appellant only on filing its copy in a case pending in High Court of Bombay. Thereafter the appellant spent the time in obtaining the copies, in its translation and also in taking the opinion from the different counsel to file the appropriate proceedings and in continuation of it the appeal is filed and prayed for condoning the alleged delay by allowing the IA.

8. Responding the aforesaid arguments Shri Pranay Verma, learned counsel for the respondent by referring the averments of the reply said that the appellant has failed to explain the sufficient cause for condoning the alleged delay in filing the appeal. The same is not supported by the affidavit of Ratan Dhunji Shaw Mehta, with whose signature the written statement in the shape of affidavit was filed before the trial court, stating the cause why he did not care to defend the case. Besides this, the affidavits of the concerned counsel through whom the certified copy was obtained and the counsel of different places from whom the opinion were taken by the appellant are not filed in support of such averments. Even the affidavit of Navroj Patel, the Office Bearer of the appellant is not admissible as the same is not sworn in accordance with the prescribed procedure. In such premises, the entire delay of more than 6 ¼ years in filing the appeal, in any case the period from April 2007, to October 2007, has not been properly explained with sufficient cause. In the lack of such causes, even on having the good case on merits, the appellant does not deserves for condoning the alleged delay and prayed for dismissal of the appeal.

9. Having heard the counsel, keeping in view the facts stated by the parties in the application and its reply, I have examined the record of the trial court and also perused the impugned judgment and decree. It is undisputed fact on record that after filing the aforesaid suit by the respondent, its notice was duly served on the respondent, on which the appellant engaged Shri Sumar Chand Jain Advocate of Jabalpur to defend the case. Although he filed the memo of appearance along with the name of Shri J.L.Soni, Advocate and the same was submitted through Dipak Jain Advocate on 20.7.94 but the same is not signed by said Dipak Jain Advocate. Subsequent to it, a Vakalatnama of Srikrishna Jain and Surendra Kumar Jain Advocate of Indore was filed on behalf of the appellant. So, it can be inferred that the pendency of the case was in the knowledge of the appellant through its Office Bearers. The witness of respondent was cross-examined on behalf of the appellant by its counsel Shri J.K.Verma Advocate on various dates with all his ability. But on fixing the case for recording the evidence on 16.3.01, he took adjournment saying that inspite his intimation the witnesses have not come from Bombay on which the case was fixed for appellant's evidence on 31.3.01. On such date, Shri J.K.Verma pleaded no instructions on which, the case was

proceeded ex-parte and posted for ex-parte judgment on 12.4.01. On such date some additional issues were framed and again fixed for argument on 16.4.01. It is apparent from the proceedings of the trial court that on making the aforesaid submission by the appellant counsel on dated 16.3.01 in support of it, the copy of the letter, it's postal receipt or certificate intimating the date to the appellant was not placed on record. Subsequent to it, on adjourned date 31.3.01 without making any submission about intimating such date to the appellant Shri J.K. Verma Advocate pleaded no instructions on which the trial court without issuing any fresh notice to appellant proceeded ex-parte against it and fixed the case for judgment on 12.4.01, on which instead to deliver the judgment some additional issues were framed and without giving the notice of such additional issues to the appellant by fixing the date 16.4.01 heard the case and decided ex-parte. It has been revealed by the aforesaid proceedings that on fixing the case for appellants evidence, twice the same was not intimated to the appellant in any case the subsequent adjourned date was not intimated and no instruction was pleaded by it's counsel Shri J.K. Verma, on which, the trial court proceeded ex-parte without-issuing a notice to the appellant by fixing some other date of hearing. Subsequent to it, on first date of delivery of the judgment on framing the additional issues and fixing the date for argument, on such issues, no notice was given to the appellant in this regard. I have not found any circumstance showing that after passing such ex-parte decree the same was intimated to the appellant either by it's engaged counsel or the counsel who pleaded no instructions on it's behalf or even by the trial court. It is noted that the appellant being an international institution, is a juristic person and not the living person, thus, it cannot be expected from it that it could have received the intimation regarding the stage and status of the case or the factum of ex-parte decree specially when it's Advocate himself pleaded no instructions without intimating to it. Such decree was known to it's officials only on producing it's copy in the above mentioned case before the High Court of Bombay between April to June 2007.

10. It is apparent from the averments of the IA that soonafter receiving the knowledge of such decree the steps to file the appropriate proceedings in this regard the Office Bearer approached to different Advocates, Solicitors for their opinion, meanwhile also got translated the pleadings and document, in english language to consult them. In such process, the time was spent by the appellant and appeal was preferred on 26.10.07. Thereby the delay in filing the appeal after having the knowledge of the decree appears to be properly explained. In the above-mentioned factual matrix filing the affidavits of the Advocates and Solicitors from whom the opinion was taken by the appellant do not appear to be necessary.

11. Considering the situation, withdrawal of the counsel from the case without pre-intimation to the party by pleading no instruction, on which the ex-parte decree was passed, the apex Court answered such questions in the matter of *Sushila Narhari Vs. Nand Kumar*- (1996) 5 SCC 529 in following terms :-

“(4) A reading of the facts leaves us with no doubt that the advocate has derelicted his duty to inform the client by registered post if there was any non-cooperation on behalf of the appellants. Consequently, when the suit had come up for trial, he had withdrawn his vakalatnama without notice to the appellants. The trial court set the appellants ex parte and decreed the suit for specific performance. The application for condonation of delay of 40 days was filed. The court refused to condone the delay. In view of the above, we find that she is well justified in filing the application with the delay. The delay is accordingly condoned. The ex parte decree is set aside. The trial court is directed to give opportunity to the appellants to cross-examine the witness examined by the respondents of the suit and also adduce evidence on her behalf. The trial court is further directed to dispose of the matter as expeditiously as possible, preferably within one year from the date of receipt of the copy of the order.”

12. Such question is also answered by this Court in the matter of *Beni Bai Vs. Smt Champa Bai* -AIR 1996 MP 243 in which it was held as under :-

“7.....It is the duty of a counsel to inform him before he proceeds to plead no instructions. If Shri Lokras had pleaded no instructions it was the duty of the Court also to inquire from Shri Lokras as to why and under what circumstances he was pleading no instructions. The Court cannot be a silent spectator to the scene which is staged in the Court. If a counsel declined to act up to his duty then the Judge is posed to the duty to the judicial administration. The judicial conscience of the Judge should always be satisfied before he permits a lawyer either to withdraw or to retire from the case. In the instant case, it does not appear from the proceedings that the learned Judge had taken all necessary steps to ensure that the counsel had sufficient reason not to appear for the party who engaged him or to plead no instructions. If a Judge in disregard of duties permits a lawyer to withdraw from the case then he is virtually violating the principle of justice. A party who reposes confidence and relies on counsel is entitled to be under the belief that his interest would be looked after properly by the counsel. A Judge ordinarily should not permit a lawyer to plead no instructions unless the lawyer satisfies the judicial conscience of the Court that for the compelling reasons he was posed to plead no instructions. In the instant case on that short ground alone the ex parte order passed on 27-6-90 is liable to be set aside.”

13. Apart the above, in view of the facts of the case as mentioned-above, the valuable rights of the appellant protected under the Trade Marks Act and concerning laws may be affected and destroyed without deciding the same on merits, if by

condoning the delay this appeal is not adjudicated on merits. In such circumstances, this court is lashed with the authority to examine the rights of the parties under dispute on merits for condoning the delay. Such authority may be invoked by this court in the light of the judgment of the Apex Court announced in the matter of *M. K. Prasad V. P. Arumugam*- AIR 2001 SC 2497:-

“9. In the instant case, the appellant tried to explain the delay in filing the application for setting aside the ex parte decree as is evident from his application filed under S.5 of the Limitation Act accompanied by his own affidavit. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex parte decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case we set aside the order impugned and condone the delay in filing the application for setting aside ex parte decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the ex parte decree as well.”

14. So far condoning the long delay is concerned, it is settled proposition of law that the sufficient cause should be construed liberally as the justice should not be lost in technicalities or because of the barrier of procedure. In such premises the acceptability of the explanation of such delay is the sole criterion, length of delay is not the relevant factor. When sufficient cause is made out then by condoning the delay, the interest of the opposite party may be compensated by imposing the cost keeping in view the litigation expenses incurred by him. Such principle is laid down by the Apex Court in the matter of *N. Balkrishnan Vs. M. Krishnamurthy*- (1998) 7 SCC 123 in which it was held as under :-

“9. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient it is

the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court.

10. The reason for such a different stance is thus : The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain v. Kuntal Kumari*, AIR 1969 SC 575 and *State of West Bengal v. The Administrator, Howrah Municipality*, AIR 1972 SC 749.

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss."

15. In view of the aforesaid discussion, the cause mentioned by the appellant is held to be sufficient for condoning the alleged delay of 2289 days in filing the appeal but simultaneously court is bound to compensate the other side by imposing the cost on the appellant.

16. It is noted that the respondent's counsel placed his reliance on following citations :-

1. *Ramlal V. Rewa Coalfields Ltd*-AIR 1962 SC 361.
2. *State of Gujarat V. Sayed Mohd. Baquir El. Edross*-AIR 1981 SC 1921.
3. *P. K. Ramachandran V. State of Kerala* -AIR 1998 SC 2276.
4. *State of W.B. V. Administrator, Howrah Municipality*-AIR 1972 SC 749.
5. *Kiran Singh V. Chaman Paswan*-AIR 1954 SC 340.

17. So far principles laid by the Apex Court in the aforesaid cases are concerned, this court did not have dispute but in view of holding the sufficient cause for condoning the alleged delay in former paras of this order, these citations are not helping to the respondent in present circumstances of the case at hand.

18. Under the aforesaid premises, by holding the sufficient cause for condoning the delay in filing the appeal, subject to payment of the cost Rs.10,000/- to the respondent within fifteen days, the IA is allowed and the aforesaid entire delay is hereby condoned. Now, subject to payment of the cost in the aforesaid period, this matter be listed for admission and consideration of other pending I.A.

Order accordingly.

I.L.R. [2008] M. P., 2352

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

31 March, 2008*

BHAGWATI TIWARI (SMT.) & anr.

... Appellants

Vs.

MAKHANLAL YADAV & ors.

... Respondents

A. Civil Procedure Code (5 of 1908), Section 11 - *Res judicata* - In order to prove question of *res judicata*, not only earlier decision but pleadings of earlier case and issues framed by such court requires to be proved - Any order passed by any authority on merits in any proceeding which is not entertainable or maintainable could not be treated as enforceable order - Any finding on merits in non-entertainable proceedings did not have effect of *res judicata*. (Paras 13 to 15)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 - पूर्व-न्याय - पूर्व-न्याय के प्रश्न को साबित करने के लिए, न केवल पूर्व विनिश्चय बल्कि पूर्व मामले के अभिवचनों एवं ऐसे न्यायालय द्वारा विरचित विवादकों को भी साबित किया जाना अपेक्षित है - किसी प्राधिकारी द्वारा, किसी कार्यवाही में, जो ग्रहण किये जाने योग्य एवं पोषणीय नहीं है, गुणदोषों पर पारित कोई आदेश प्रवर्तनीय आदेश के रूप में नहीं माना जा सकता - अग्रहण योग्य कार्यवाहियों में गुणदोषों पर कोई निष्कर्ष पूर्व-न्याय का प्रभाव नहीं रखता।

B. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(a), 13(1) - *Arrears of Rent - Tenant disputing quantum of rent - Tenant is bound to deposit such sum only on fixing the interim rent by Court - Tenant depositing entire arrears of rent within one month from the date of fixation of interim rent by Court - Subsequently also rent was deposited regularly - No decree u/s 12(1)(a) could be passed.* (Para 24)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए), 13(1) - बकाया भाड़ा - अभिधारी ने भाड़े की मात्रा को विवादित किया - न्यायालय द्वारा अंतरिम भाड़ा नियत किये जाने पर ही अभिधारी ऐसी रकम निक्षेप करने के लिए आबद्ध है - अभिधारी ने न्यायालय द्वारा अंतरिम भाड़ा नियत किये जाने के एक माह के भीतर सम्पूर्ण बकाया भाड़ा निक्षेपित किया - तत्पश्चात् भी नियमित रूप से भाड़े का निक्षेप किया - धारा 12(1)(ए) के अधीन कोई डिक्री पारित नहीं की जा सकती।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - *Denial of title - Appellant purchased suit property from owner who had inducted respondents as tenant - Respondents never challenged the title of original landlords by whom they were inducted - No evidence that rent of any period was paid to appellants - If derivative title was denied by tenant then such could not be treated as ground of disclaimer of title.* (Para 25)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) - स्वत्व से इंकारी - अपीलार्थी ने वादग्रस्त सम्पत्ति उस स्वामी से क्रय की जिसने प्रत्यर्थियों को अभिधारी के रूप में अधिवासित किया था - प्रत्यर्थियों ने मूल मकान मालिक, जिनके द्वारा उन्हें अधिवासित किया गया था, के स्वत्व को कभी चुनौती नहीं दी - कोई साक्ष्य नहीं कि किसी कालावधि का भाड़ा अपीलार्थियों को अदा किया गया - यदि व्युत्पन्न स्वत्व अभिधारी द्वारा इंकार किया गया तब यह स्वत्व से इंकारी का आधार नहीं माना जा सकता।

D. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e) - *Bonafide requirement - Plaintiff admitted that she has purchased adjoining house and has got vacated from tenant - She is living all alone in her house - Appellant failed to prove bonafide requirement - Appeal dismissed.* (Para 27)

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ई) - सद्भावी आवश्यकता - वादी ने स्वीकार किया कि उसने लगा हुआ मकान क्रय कर लिया है और अभिधारी से रिक्त करा लिया है - वह अपने मकान में अकेली रह रही है - अपीलार्थी सद्भावी आवश्यकता साबित करने में असफल रही - अपील खारिज।

Cases referred :

AIR 1976 SC 2335, 1999(2) JLJ 126, 1980 MPLJ 361, 1976(I) MPWN 93, AIR 1999 SC 3335, 1989(II) MPWN 228, (2000) 4 SCC 380, AIR 1969 MP 32, AIR 1981 SC 1711.

S.P. Tripathi with Sushil Tripathi, for the appellants.

Girish Shrivastava with Vijay Raghav Singh, for the respondents.

J U D G M E N T

U.C. MAHESHWARI, J.:—The appellants/plaintiffs have directed this appeal under Section 96 of the CPC being aggrieved by the judgment and decree dated 9.9.2002 passed by XIIth Addl. District Judge, Jabalpur in Civil Original Suit No.89-A/2000 dismissing their suit filed against the respondents for declaration, possession, eviction, arrears of rent and mesne profits.

2. The facts giving rise to this appeal in short are that the appellants herein filed a suit for declaration, possession, eviction, arrears of rent and mesne profits against the respondents contending that the House No.2042 (Old No.626) situated at Sitlamai, Ward No.10, Jabalpur, was bought by the appellants from its earlier owners, namely, Gulam Qadir, Sheikh Ramzan, Sheikh Zafar, Mohd. Sameer and Mussamat Sameeran with consideration vide registered sale deed dated 27.2.1989. In two rooms (one room and one Kotha) of the aforesaid house described in the annexed map with the plaint, the predecessor of the respondents, namely, Late Narmada Prasad Yadav, was the tenant of the earlier aforesaid owners. On acquisition of the title by the appellants, such tenancy was attorned by the respondents in favour of the appellants. Accordingly, the respondents became their tenant at the rate of Rs.75 P.M. The predecessor of the respondents was inducted in such premises for residential purpose. The same was remain continued even after attornment of the aforesaid tenancy. The month of the tenancy was the English Calender month commencing from the first day of each month. After attornment of the tenancy, the respondent paid one month rent of March, 1989 to the appellants and thereafter they did not pay the same and became defaulter in that regard. The appellant No.1 Smt Bhagwati Tiwari was under bonafide, genuine need of such accommodation for the purpose of residence of her family members. Thus, she being widow, filed the application against the respondents for their eviction under Section 23-A of the Accommodation Control Act (in short 'The Act') before the Rent Controlling Authority on dated 19.2.1990 as Case No.19-A/90(7) 89-90. The same was dismissed vide order dated 11.2.91 holding that such proceeding is filed at pre-mature stage before completion of one year from the date of acquisition of the title and the relationship as landlord and tenant has not been proved between them. Subsequent to such dismissal, on completion of one year again an application under Section 23-A of the Act on the ground of bonafide, genuine requirement of residential purpose was filed against the respondents for eviction as Case No.12-A/90(7)91-92 the same was dismissed vide order dated 26.12.1993 holding that the subsequent application is barred by resjudicata in view of the aforesaid earlier order dated 11.2.91, by which the relationship of the landlord and tenant between them was not found to be proved, on which, the appellants preferred civil revision No.145/94 before this court. The same was dismissed by affirming the aforesaid subsequent order of the Rent Controlling Authority. Subsequent to such dismissal a suit for mandatory injunction directing the respondents to vacate such premises stating them to be the licensee of the

appellants, was filed. The same was dismissed by the IVth Civil Judge Class-I, Jabalpur in Civil Original Suit No.697-A/98 vide judgment and decree dated 30.6.2000 holding that such court has no territorial jurisdiction over the matter as the suit is not filed on proper valuation with requisite court fees as the court was having the territorial jurisdiction to decide the suit valued upto Rs.30,000/- to 50,000/- while the valuation of the disputed house was Rs.80,000/-. Simultaneously, it was held that the respondents are not in possession of such accommodation as licensee of the appellants. After dismissal of such suit, the present suit was filed declaring the respondents to be the tenants of the appellants in the aforesaid premises at the rate of Rs.75/- P.M and claiming their eviction from it on the grounds available under Section 12(1)(a), 12(1)(c), 12(1)(d), 12(1)(e), 12(1)(h) and 12(1)(k) of the Act stating that the appellants intimated to the respondents regarding acquisition of the aforesaid title of the house, on which, they attorned their tenancy in their favour and also paid the rent of a month. Thereafter, they became defaulter and the aforesaid other grounds for eviction are also available to the appellants. The suit was filed after giving the notice for termination of tenancy on the aforesaid grounds.

3. In the written statement of the respondents, by denying the averments of the plaint it is stated that there is no relationship of landlord and tenant between them as held by the Rent Controlling Authority. The same is also upheld by this Court. Therefore, the aforesaid earlier order, having the effect of resjudicata and such findings cannot be interfered by holding the relationship between the parties as landlord and tenant. It is also stated that in the lack of relationship as landlord and tenant between the parties, the appellants are not entitled to get the decree on the ground available for eviction under Section 12 of the Act. The alleged arrears of rent is also denied. As per further averments the respondents never denied the title of the landlord. The alleged need of the appellants is neither bonafide nor genuine as they had additional alternate accommodation with them. The contention of the plaint alleging that the house was damaged by the respondents is also denied. In such premises the prayer for dismissal of the suit is made.

4. In view of the pleadings of the parties as many as nine issues were framed and evidence was recorded, on appreciation of the same, the suit of the appellants was dismissed on all the grounds stated by the appellants in the plaint and it was also held that the relationship as landlord and tenant has not been proved between them, hence this appeal.

5. Along with the appeal, appellants have also filed IA No.3114/02 under Order 1 rule 10(2) of the CPC for bringing the legal representatives of Abdul Shakur, Abdul Gafoor alias Acche Mian and one Smt Subadra Bai on record as defendants in the suit as well as the respondent No.4 to 13 in this appeal. The same is to be adjudicated while deciding this appeal.

6. Shri S.P.Tripathi, learned appearing counsel for the appellants assailed the

impugned judgment saying that in the facts and circumstances of the case and in view of the existing legal position, the trial court ought to have decreed the suit for declaration and eviction with arrears of rent and mesne profits as prayed but under the wrong premises, the same has been dismissed. By elaborating the arguments, he said that it is undisputed facts between the parties that the respondents from the time of their father are the tenants at the rate of Rs.75 P.M. As per the case of the appellants the aforesaid house was purchased by them through registered sale deed from the legal representatives of said Abdul Shakur. As per the averments of the sale deeds, after death of Abdul Shakur and Abdul Gafoor their properties were mutually divided between the legal representatives of both the brothers Abdul Shakur and Abdul Gafoor. In such division, the aforesaid house was given to the sellers from whom the appellants bought it. In such premises, the respondents being the tenants in the premises became the tenants of the seller and thereafter on acquisition of the title by the appellants, they became the tenants of the appellants. In any case, the rights of the appellants as co-owners of such house could not be discarded and co-owner has every right over the property including the right to file the suit for eviction. Thus, the findings of the trial court holding that the relationship between them as landlord and tenant has not been proved, is not correct. He also argued that the order passed by the Rent Controlling Authority on dated 11.2.91 was passed in a proceeding which was not entertainable as the same was filed within a year from the date of acquisition of the title. Hence, such finding was not binding on the appellants in any subsequent litigation. Besides this, such finding was given in the lack of the registered sale deed on record. Subsequently, by filing such document, the other proceedings were filed. In subsequent proceedings of the Rent Controlling Authority, the aforesaid earlier order was not having the effect of resjudicata as the aforesaid earlier proceedings of the Rent Controlling Authority was not the legally filed proceeding in the eye of law. Although the subsequent proceeding was dismissed in the light of earlier order by holding the resjudicata and the same was affirmed by this court. But in view of the existing legal position, if any finding is given in a proceeding which is not entertainable by the court, then such finding could not be treated as having the effect of resjudicata. He further said that in order to prove the resjudicata, the respondents were bound to prove the pleadings and the issues of the earlier case, otherwise such finding could not be given by the trial court. It is apparent on record that neither the pleadings nor the issues of the earlier proceedings of the RCA was filed by the respondents before the trial court. So, in any case, the findings of the resjudicata given by the trial court is not sustainable.

7. It was also argued that after passing the order in the civil revision and the earlier civil suit for mandatory injunction, the appellants filed the suit for eviction on the basis of his title acquired by them through registered sale deed from the earlier owners, declaring the respondents to be their tenants and the same was

not barred by any law. The trial court ought to have declared their title on the basis of the sale deed. In any case, such acquisition of the title was informed to the respondents through notice of termination of the tenancy dated 15.12.89. The same could be treated the notice of attornment of the tenancy but this aspect was not considered by the trial court. By referring the deposition of Mohd. Sabir (PW 3), he said that he being one of the legal representative of Abdul Shakur, proved the title of the appellant and the status of the respondents as tenant in such premises. Accordingly, the attornment of the tenancy was proved. The same are also proved by other documents of the local authorities. So far grounds of eviction are concerned, he said that there was sufficient circumstance to draw the inference for passing the decree of eviction on all the grounds mentioned in the plaint. According to him, the grounds relating to arrears of rent, disclaimer of the title, inconsistent user of the property, bonafide genuine requirement of the appellant, acquisition of the sufficient accommodation by the respondent for their need, causing substantial damage to the disputed property by the respondents are proved with all probabilities and there was no occasion to refuse the decree on such grounds. In such background, firstly, he prayed for decreeing the suit by setting aside the impugned judgment and decree. In alternative, he said that if the court comes to the conclusion that for the purpose of declaration the presence of all the legal representatives of the earlier owners and the wife of Narmada Prasad Yadav are necessary then by allowing this application for impleading all such persons as respondents herein and as defendants in the plaint the case be remanded to the trial court to decide afresh with appropriate directions.

8. On the other hand Shri Girish Shrivastava, learned appearing counsel for the respondent by justifying the impugned judgment and decree said the same is based on proper appreciation of evidence and also in conformity with law. It does not require any interference at this stage. He further said that in view of the findings of the aforesaid civil revision holding that there is no relationship between the parties as landlord and tenant, the subsequent suit is barred on that ground in view of the principle of resjudicata. He further said that in the lack of any evidence of attornment of the tenancy, the appellants could not be declared to be the landlord of the respondents. So far the grounds of eviction stated by the appellants are concerned, on merits, he said that the respondents never denied their tenancy in such accommodation of such landlords who inducted them but they denied to be the tenants of the appellants, he also said that the tenant has a right to challenge the derivative title of the appellants and in such way, the same could not be a ground to pass the decree against them on the ground of nuisance or disclaimer or the title of the landlord. So far arrears of rent is concerned, he said that the tenancy was at the rate of Rs.35/- PM with Abdul Shakur and Abdul Gafoor and at the initial stage of the suit there was a dispute regarding rate of rent and also in respect of the quantum of arrears of the rent, hence, the provision of Section 13 of the Act was arrested. As soon as the interim order was passed by the trial

court, the same was complied with by the respondents and the directed rent was deposited within time. Therefore, the ground under Section 12(1)(a) regarding arrears of rent is not made out. So far bonafide, genuine requirement is concerned, he said that firstly, the accommodation is claimed by the appellant for residential purpose, while the same was given by the landlords for non-residential purpose. In such premises, it could not be inferred that the respondents are using the same for any inconsistent purpose. Besides this, in view of the available evidence, it is apparent that the appellants have various alternate accommodation with them for the alleged need but no explanation about such available accommodation has been purforth by them in their pleadings, hence, their need could not be termed to be bonafide and genuine in any manner. The respondents themselves acquired sufficient accommodation for their alleged need has not been proved by the appellants by cogent and reliable evidence. So far damaging the house by the respondents, is concerned, the same has not been proved by the appellants. Therefore, even on holding the relationship between the parties as landlord and tenant, there is no circumstance to pass the decree for eviction against them, hence in that way also this appeal deserves to be dismissed and prayed for dismissing the same.

9. Having heard the counsel after examining the record and perusing the impugned judgment and decree, I am of the considered view that the trial court has not committed any error in dismissing the suit on the grounds of eviction under the Act stated by the appellants but it committed an error in holding that there is no relationship as landlord and tenant between the parties because of the following reasons.

10. From the record it is apparent that the aforesaid house was purchased by the appellants from the legal representatives of Abdul Shakur vide registered sale deed dated 27.2.89(Ex.P/1). As per averments of the sale deed the aforesaid house was received by the sellers in mutual partition between the legal representatives of late Abdul Shakur and Abdul Gafoor alias Acheche Mian, while as per admission of the respondents, they are in possession of such house as tenants of Abdul Gafoor and Abdul Shakur and not the appellants as they never attorned their tenancy in favour of the appellants. This admission of the respondents shows that Abdul Shakur was the co-owner of such house with the Abdul Gafoor and on demise of Abdul Shakur his legal representatives the sellers of the aforesaid sale deed became the owners of the aforesaid house and on executing the aforesaid sale deed such rights have been acquired by the appellants. In such way, the appellants have also become the co-owners of the house. It is settled preposition of the law that every co-owner of the property is owner of every part of such property till the same is not partitioned between them or their share are not separated. Thus in such premises the suit for eviction could be filed by the co-owners and presence of other co-owners in such suit are not required. Besides the co-owners, against all other persons, such co-owners had the capacity of owner. Such principle was laid down by the Apex court long back in the matter

of *Ram Pasricha V. Jagannath*- AIR 1976 SC 2335 in which it was held as under :-

"30. Mr. Tarkunde also submitted that since the Calcutta High Court has held in *Yogamaya Pakhira v. Santi Sudha Bose*, ILR.(1968) 2 Cal 70 that a permanent lessee is not an owner within the meaning of Section 13 (1) (f) a co-owner would not be in a better position. We are of opinion that a co-owner is as much an owner of the entire property as any sole owner of a property is. We, however, express no opinion about the case of a permanent lessee as this point does not arise in this appeal."

Such principle was also laid by this court in the matter of *Amar Singh Vs. Ramkunwarbai and others*-1999 JIJ-II 126 in which it was held as under :-

"8.....It is well settled that a co-owner is as much an owner of the entire property as any other owner and so the absence of other co-owners will not dis-entitle a co-owner from maintaining an action for eviction when the other co-owners do not object to the same. The Full Bench of this Court in *Harbansh* (1990 JIJ 97) has also taken the same view. I, therefore, find myself in full agreement with the appellate Court below that the said first wife of late Gaurishankar was not a necessary party to the suit and the suit by other heirs of late Gaurishankar was maintainable."

11. It is undisputed fact on record that the title of the appellants regarding alleged house in the present suit or of any other proceedings has not been challenged by any of the legal representatives of Abdul Shakur and Abdul Gafoor while the tenant did not have any authority to challenge the same. The status of the tenant is remained the same even on partition of the property between amongst the co-owners. The partition of the properties between the co-owners could never be challenged by the tenants. Such principle is laid down by this Court in the matter of *Mohanlal Mintoal and ano. Vs. Hakimsingh Gopalsingh and ano.*- 1980 MPLJ-361 in which it was held as under :-

"14. From the rulings..... Before partition, every member of the joint family is owner of every part of the property, but as soon as there is partition, the mode of enjoyment is changed, that is to say, the separated members become the owners in their own right, of the share which is allotted to them and they are held to be in exclusive possession of their share. This result which is brought about by the members of the joint Hindu family, a stranger to the joint Hindu family, like a tenant has no right to challenge. If a stranger to joint Hindu family is given a right to control the mode of enjoyment of members of the joint Hindu family, it will lead to drastic results. Therefore, I am of the opinion that the defendants have no right to challenge the partition effected by the plaintiffs and their father....."

12. It is true that after acquisition of the title of the aforesaid property by the appellants, Smt. Bhagwati Tiwari filed an application for eviction of the respondents from the accommodation on the ground of bonafide, genuine requirement under Section 23-A of the Act on dated 19.2.1990 before expiry of one year from acquisition of the title. Therefore, such petition was not entertainable. In spite of it, by order dated 11.2.91 (Ex.D/10) in Case No. 19-A/90(7)89-90 the same was dismissed holding that the relationship of landlord and tenant has not been established between the parties and also on the ground that the application being pre-mature, is not maintainable. So, firstly, if the application was not maintainable even then the order was passed. Subsequent to such dismissal, the other application under the same provision for bonafide, genuine requirement was filed by the said applicant Bhagwati Bai. The same was dismissed as case No.12-A/90(7)91-92 vide order dated 26.12.93 (Ex.D/11) holding that the same is barred by the principle of resjudicata in view of the aforesaid earlier order by which the relationship between the parties as landlord and tenant was not found to be proved. The same was challenged by the appellants before this court under Section 23-E of the Act in Civil Revision No.145/94. The same was dismissed by affirming the order (Ex.D/11) of the Rent Controlling Authority. Thereafter, the appellant filed the Civil Original Suit No.697-A/98 for mandatory injunction for eviction stating the respondents to be licensee in such premises but the same was dismissed by IVth Civil Judge Class-I, Jabalpur vide order dated 30.6.2000 holding the suit is barred by territorial jurisdiction of such court as the property was having the worth of Rs.80,000/- while the jurisdiction of such court was between Rs.35000 to Rs.50000/-. Although, as per other findings of the said judgment the respondents are not held to be the licensee of the appellants in such premises then ultimately appellants filed the impugned title suit declaring them to be the landlords of respondents with a prayer for eviction on various grounds available under the Act along with recovery of arrears of rent and mesne profits. The aforesaid title is claimed on the basis of the sale deed (Ex.P/1). Again the objection of resjudicata was taken by the respondents on the basis of the aforesaid earlier order of the RCA affirmed by this court under the revisional jurisdiction.

13. Firstly, it is settled preposition of the law that in order to prove the question of resjudicata, not only the earlier decision but the pleadings of the earlier case and the issues framed by such court requires to be proved by the parties who took such objection in the suit. Such principle was answered by this Court in the matter of *Munishlal Vs. Kanna*-1976 MPWN-1-93 in which it was held as under :-

“Held: In order to decide the plea of res judicata the trial Court has relied only on the certified copy of the judgment in the earlier suit. Copies of the pleadings in the earlier have not been filed. In order to find out the real questions in controversy on the basis of pleadings in the earlier suit for deciding question of res judicata, the proper thing to do was to require certified copies of the pleadings in the earlier suit to be filed.....”

14. It is apparent fact on record that no such pleadings or the issues of the earlier case of the RCA to prove the question of resjudicata are neither filed nor proved on record, therefore, firstly on this count the findings of the trial court regarding resjudicata are not sustainable. Secondly, it is also settle proposition of law that the pre-mature proceeding is not entertainable or maintainable before the court of law and if any order is passed by any authority on merits in such proceedings then same could not be treated as enforceable order in the eye of law as entering to decide the question in non-entertainable proceedings is deprecated by the Apex Court in the matter of *T.K.Lathika Vs. Seth Karsandas Jamnadas*-AIR 1999 SC 3335 in which it was held as under :-

“9. If the ban contained in the third proviso to Section 11(3) of the Act applies, its corollary is that the petition filed by the landlord has to be expelled on the sole ground that the landlord was then not entitled to file it. In such a situation the Court should not enter into the merits because whatever is said or found on the merits would then be without jurisdiction. High Court should have first decided the question of maintainability of the petition and only if that point was found in the affirmative the merits need have been gone into.”

15. It is apparent that the RCA in order dated 11.2.91 held that the application filed under section 23-A of the Act is pre-mature and not tenable as the same is preferred within one year from the date of acquisition of the title. In such situation, the RCA was not having any right to give any findings on merits of the matter and if such finding was given on merits and subsequently in another proceeding, the same was treated as res-judicata which was upheld by this court, the same could not be treated as resjudicata in view of the aforesaid decision of the Apex Court in which it is held that if the proceeding is pre-mature and not maintainable then the court has no enter on merits of the matter. Therefore, it is held that the earlier findings of R.C.A on merits in non-entertainable proceedings did not have the effect of resjudicata.

16. Apart the above there is difference between the title suit and the suit filed for eviction under the Accommodation Control Act. It is apparent fact on record that the aforesaid earlier cases were decided by the RCA without considering the sale deed (Ex.P/1), the document of title of the appellants and such authority was not empowered to decide the question of title relating to the property, the same could be decided by the civil court in which the impugned suit was filed. The impugned suit has been filed for eviction based on the title, therefore, it could not be said that the civil court has no jurisdiction to enquire the title and the relationship between the parties for declaring their respective rights. In such way the civil suit was rightly entertained by the civil court. Some time even after having the title the parties for one reason or another could not prove the relationship with the person who is in possession of the property to evict him from such premises. In such situation, on considering the evidence led by the parties, the decree for eviction

may be passed on the basis of title. Such question is answered by the Apex Court in the matter of *Ram Pasricha V. Jagannath*-AIR 1966 SC 735 in which it was held as under :-

“ In a suit for ejectment the defendant admitted the title of the plaintiff in regard to the plot and pleaded that he was to remain in possession of the house until the amount spent by him in its construction was returned by the plaintiff. The plaintiff led evidence about the tenancy set up by him and defendant led evidence about the agreement on which he relied. Both the pleas were clear and specific and the common basis of both the pleas was that the plaintiff was the owner and the defendant was in possession by his permission. In such a case the relationship between the parties would be either that of a landlord and tenant or that of an owner of property and a person put into possession of it by the owner's licence. No other alternative was logically or legitimately possible.

Held that in absence of proof of tenancy and of defendant's agreement the conclusion of the High Court in first appeal that the defendant was in possession of the suit premises by the leave and licence of the plaintiff, did not cause prejudice to defendant. There was no error of law if the decree for ejectment was passed. F.A No.564 of 1958 dated 14.12.1962 (All) affirmed.” ...placitum

17. In view of the aforesaid, on the basis of the title the appellants' suit could have been decreed by the trial court by appreciation of the evidence and considering the sale-deed Ex.P/1, keeping in view the deposition of Mohd Shabir (PW 3) one of the seller, the son of late Abdul Shakur, the co-owner. The trial court was empowered for declaring the rights and relationship of the parties. So, in this way, the findings of the trial court holding that there is no relationship of landlord and tenant between the parties is not sustainable.

18. I would like to examine this case by other way in view of the provision of Section 58 of the Evidence Act which read as under :-

“58. Facts admitted need not be proved.”

No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

“If the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.”

According to this section, if some facts are admitted by the parties then it is not necessary for the other side to prove the same by some other evidence and such admission of the parties is always binding against them. Besides the aforesaid

provision, such admission is also binding on the principle of estoppel enumerated under section 115 of the Evidence Act.

19. On perusing the deposition of respondent No.2 Anil Kumar Yadav (D.W.1) in para 11, he categorically deposed that "यह कहना सही है कि वर्तमान में वादग्रस्त मकान की मालिक वादी है। यह कहना सही है कि मैं वादग्रस्त मकान में किरायेदार हूँ। यह कहना सही है कि भागवती बाई को किराया देने के लिए मैं न्यायालय में किराया जमा कर रहा हूँ।" Such admission is sufficient circumstance to hold that there is relationship of landlord and tenant between the parties.

20. I have also found a notice (Ex.P/4) given by the appellants to respondent NO.2 on dated 15.12.89 just before filing the first application for eviction in the court of the RCA contending the acquisition of the title of the aforesaid house. The notice and its averments are not specifically denied by the respondents in their written statement even in the cross-examination of the plaintiff, it was not challenged and nothing was stated by respondent NO.2 in this regard on recording his deposition, therefore, such un rebutted evidence gives sufficient circumstance to draw the inference that the intimation of attornment of the tenancy was given to the respondent No.2 by the appellants.

21. Besides the above, on transferring the immovable property by the landlord through a registered sale-deed in favour of the purchaser then as soon as such document is registered and comes in operation, in such circumstances, the tenant of such premises becomes the tenant of purchaser and in view of such document of transfer the attornment of tenancy may be inferred. Such Principle is laid down by this court in the matter of *Ramprasad Vs. Dasrath*-1989(2) MPWN-228 in which it was held as under :

".....In the present case, the tenant/applicant admits the title of Totaram over the suit accommodation and also admits that he was inducted as a tenant by Totaram. The existence of registered sale deed in favour of the landlord non-applicant is also not denied. What has been stated is only this much that the sale-deed has been brought into existence nominally.... for seeking ejection of the tenant/applicant. Such a plea is not open to a tenant in ejection proceedings based on landlord/tenant relationship. A registered sale-deed having been executed by the previous owner landlord under whom the tenant was holding by operation of section 109 of Transfer of Property Act, 1882, the transferee would become the owner of the property and also landlord in relation to the tenant (See *Shankar Sahai V. Kanmal and others* (1971 J LJ 102)....."

22. In such premises, the findings of the trial court in this regard are not sustainable, hence by setting aside the same, it is held that after acquisition of the title by the appellants through registered sale-deed (Ex.P/1) and on giving the quit notice to respondents by them. The tenancy of the respondents was attorned in

favour of the appellants. In such premises, the relationship between them as landlord and tenant is inferred.

23. After holding the aforesaid relationship between the parties, I proceed to examine the merits of the matter whether on the grounds mentioned by the appellants, they deserve for decree of eviction against the respondents.

24. So far arrears of rent is concerned, the appellants claimed the rent at the rate of Rs.75/- P.M. The quantum of rent has also been claimed on the basis of this rate, while as per the case of the respondents, the rent was only Rs.35/- P.M. Besides this, the derivative title of the appellant was also challenged by the respondents. In such circumstances, the provision of Section 13(1) of the Act was arrested, thus at the initial stage the respondent was not bound to deposit such sum. They were bound to deposit such sum only on fixing the interim rent by the court. The same was fixed by the trial court at the rate of Rs.75/- P.M. On dated 20.12.01 with a direction to deposit the arrears of three years. In compliance of such order, the respondents have deposited the sum with the trial court on dated 16.1.02 vide receipt No.35 of Book No.75580 i.e Rs.3825/- within one month and I am apprised by the counsel for the respondents that subsequent to it, the regular rent has been deposited by them and such submission was not objected by the appellants' counsel. In such circumstances, it is apparent that initially the quantum and the rate of rent, both were disputed, therefore, in view of the law laid down by the Apex court in the matter of *Jamnalal Vs. Radheshyam*- 2000(4) SCC 380, the provision of Section 13(1) of the Act was arrested and the respondents were bound to deposit such sum only after passing the interim order, on passing such order same has been complied with as said above, therefore, it could not be said that that respondents have committed any default in depositing the rent. Hence the decree under Section 12(1)(a) of the Act could not be passed in favour of the appellants.

25. Coming to the question regarding disclaimer of the title of the appellants by the respondents is concerned, it is settled preposition of the law that every tenant has a right to challenge the derivative title of the plaintiff if the relationship as landlord and tenant is not established between them it is apparent on record that respondents never challenged the title of their original landlords, by whom they were inducted. On the other hand there is no evidence showing that any point of time before filing the suit by attorning the tenancy, the rent of any period was paid to the appellants by the respondents. In such premises, if by admitting the tenancy of seller if the derivative title of the appellants is denied by the respondents then such could not be treated the ground of disclaimer of title and decree of eviction could not be passed under section 12(1)(c) of the Act. Such principle is laid down by this court in the matter of *Smt Sugga Bai and others Vs. Smt Hiralal and others*- AIR 1969(MP) -32 in which it was held as under :-

"10. Therefore what a tenant cannot be permitted to do is to deny

the title of the original lesser. Similarly, he cannot be permitted to deny the derivative title of a reversioner if he has attorned to him.....”

26. Coming to the other ground regarding inconsistent user of the premises is concerned, firstly the appellants could not proved by cogent and admissible evidence that the respondents were inducted in such premises only for residential purpose on the contrary on perusing the evidence it appears that the same was given for composite purpose and accordingly it was a composite tenancy. Therefore even on using such premises by the respondents for non-residential purposes the decree of eviction either under Section 12(1)(c) or 12(1)(d) could not be passed against them.

27. So far question of bonafide, genuine requirement of such accommodation to the appellants for residential purpose is concerned, the appellant No.1 Smt Bhagwati Tiwari (PW 1) while recording her deposition categorically deposed in para-12 of her cross-examination that she also purchased the adjoining house to the disputed house and the same got vacated by her from the concerning tenant. She further stated that her one son is residing at Maihar with his family while the other son is residing in some other house of six rooms given to him by his father, such son is insisting her to reside with him. While the other appellant Vijay Kumar (D.W.2) deposed that he is serving at Maihar and his transfer to Jabalpur is not possible. In para-12 of his cross-examination, he categorically stated that appellant No.1 Smt Bhagwati Tiwari her mother is residing all-alone in her own house, having two rooms one godown and corridor, while his brother is residing in separate place, having two rooms. Accordingly, as per admission of the aforesaid witnesses they have alternate sufficient accommodation with them for the alleged need, if any. Besides this, they also have adjoining house to the disputed house. As per settled preposition of the law, while filing the suit for eviction on the ground of bonafide, genuine requirement either for residential or non-residential purpose, the plaintiffs like appellants are bound to putforth the account of available alternate accommodation with them in their pleadings. In the lack of such explanation their alleged need could not be held to be bonafide or genuine. In such premises the appellants suit could not be decreed under Section 12(1)(e) of the Act. My aforesaid view is fortified by the decision of the Apex Court in the matter of *Hasmat Rai V. Raghunath Prasad*- AIR 1981 SC 1711 in which it was held as under :-

“16. There is an error apparent.....Minutely scanning the plaint presented by the landlord there is not the slightest suggestion that he needs any accommodation for his residence. He has not even stated whether at present he is residing in some place of his own though he claimed to be residing in the same town. He does not say whether he is under any obligation to surrender that premises. Section 12 (1)(e) specifically provides for a landlord obtaining possession of a building

let for residential purposes if he bona fide requires the same for his own use and occupation. But there is an additional condition he must fulfil namely he must further show that he has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned. Utter silence of the landlord on this point would be a compelling circumstance for the Court not to go in search for some imaginary requirement of the landlord of accommodation for his residence. In the context of these facts the Trial Court and the first Appellate Court committed a manifest error apparent on the record by upholding the plaintiff's case by awarding possession also on the ground neither pleaded nor suggested the landlord must have been quite aware that he cannot obtain possession of any accommodation for his residence. Therefore, the finding of the High Court and the Courts subordinate to it that the respondent-landlord requires possession of the whole of the building including the one occupied by the tenant for starting his business as Chemists & Druggists as also for his residence is vitiated beyond repair. Once impermissible approach to the facts of the case on hand is avoided although facts found by the Courts are accepted as sacrosanct yet in view of the incontrovertible position that emerges from the evidence itself that the landlord has acquired major portion of the building in which he can start his business as Chemists and Druggists he is not entitled to an inch of an extra space under Section 12 (1)(f) of the Act."

28. So far the ground that the respondents have acquired the sufficient accommodation of their own for their requirement is concerned, such ground was pleaded by the appellants, thus they were duty bound to prove the same by cogent and reliable evidence with the title deeds of such alleged accommodation but the same is neither produced nor proved by them on record. In the lack of it, mere on some statement of the respondents, no inference could be drawn in favour of the appellants to pass the decree under Section 12(1)(i) of the Act. It is settled proposition of the law that plaintiffs are bound to prove their own case, they cannot get the decree on any weakness of the defendants/respondents. In such premises also, the appellants do not deserve for decree of eviction.

29. So far rate of monthly rent is concerned, the rent Rs. 75/- per month fixed and held by the trial court appears to be based on proper appreciation, thus the same is hereby affirmed.

30. In the aforesaid premises the approach of the trial court holding that there is no relationship between the parties as landlord and tenant is apparently perverse and contrary to law, hence the same is hereby set aside. While, the findings of the trial court regarding dismissal of the suit for eviction holding that appellants failed to prove any of the grounds of eviction enumerated under Section 12(1) of

the Act, are hereby affirmed as the same do not require any interference at this stage.

31. In view of the aforesaid findings of relationship between the parties as landlords and tenants, the presence of other co-owners to decide the impugned suit are not necessary, hence the IA No.3114/02 filed by the appellants under Order 1 rule 10(2) of the CPC, does not require any further consideration. Hence, the same is hereby disposed of.

32. In view of the aforesaid, by allowing this appeal in part, it is declared that the respondents are in possession of the disputed accommodation as monthly tenants of the appellants at the rate of Rs.75/- per month for composite tenancy, residential and non-residential both. While the remaining findings of the trial court dismissing the suit of the appellants regarding eviction are hereby affirmed. In the facts and circumstances of the case, the parties are directed to bear their own cost throughout. Decree be drawn-up accordingly.

33. The appeal is allowed in part as indicated above.

Appeal allowed in part.

I.L.R. [2008] M. P., 2367

APPELLATE CIVIL

Before Mr. Justice R.S. Garg & Mr. Justice A.M. Sapre

22 April, 2008*

NATIONAL INSURANCE COMPANY LTD.

... Appellant

Vs.

SMT. SETUBAI & ors.

... Respondents

Motor Vehicles Act (59 of 1988), Section 166, Evidence Act, 1872, Section 102 - Burden of Proof - Eye witness lodged FIR that a truck had hit motorcycle killing the driver - Police filed charge sheet that involvement of truck not proved however Bus had caused the accident - Driver and owner of bus remained ex parte before Claims Tribunal - Tribunal passed award in favour of claimants - Held - It was the duty of claimants to examine the I.O. to prove that on what particular evidence he recorded a finding that the truck was not involved in the accident and in fact the bus has caused the accident - Non-examination of I.O. and first informant would give a dent to the claim. (Paras 10 & 11)

मोटर यान अधिनियम (1988 का 59), धारा 166, साक्ष्य अधिनियम, 1872, धारा 102 - सबूत का भार - प्रत्यक्षदर्शी साक्षी ने एफआईआर दर्ज कराई कि ट्रक ने मोटरसायकल को टक्कर मारकर उसके चालक की मृत्यु कारित की - पुलिस ने आरोप-पत्र पेश किया कि ट्रक का अन्तर्ग्रस्त होना साबित नहीं तथापि बस ने दुर्घटना कारित की - दावा अधिकरण के समक्ष बस का चालक और स्वामी एकपक्षीय रहे - अधिकरण ने दावेदारों के पक्ष में अवार्ड पारित किया -

अभिनिर्धारित – यह दावेदारों का कर्तव्य था कि वे अनुसंधान अधिकारी का परीक्षण यह सिद्ध करने करने के लिए कराते कि किस विशिष्ट-साक्ष्य पर उसने यह निष्कर्ष अभिलिखित किया कि ट्रक दुर्घटना में शामिल नहीं था और वास्तव में बस ने दुर्घटना कारित की – अनुसंधान अधिकारी और प्रथम सूचनादाता का परीक्षण न कराना दावे को क्षति पहुँचाता है।

Case referred :

2006 ACJ 717.

Vishal Baheti, for the appellant.

V.P. Saraf, for the respondent No.1 to 6.

None, for the respondent No.7 & 8 though served.

ORDER

The Order of the Court was delivered by **R.S. GARG, J.** :-The appellant Insurance Company being aggrieved by the judgment and award dated 10.10.2006 passed by Shri I.S.Shrivastava Member MACT Indore in Claim Case No. 144/2005 awarding a sum of Rs. 5,47,000/-as compensation in favour of respondent No.1 to 6 has filed this appeal.

02. The short facts necessary for disposal of the present appeal are, that, a FIR Ex.P/1 was lodged by one Salim Khan at Police Station Dewas informing the Police that while he was going towards Dewas on a Motorcycle a Truck bearing Registration No. U.P.-80/S-9912 had hit another Motorcycle as a result of which the Motorcyclist fell. It was found that the Motorcyclist died on the spot. Thereafter the complainant chased the Truck but the driver of the truck could avoid his apprehension.

03. On the basis of this FIR the Police reached the spot prepared certain Panchnamas and also recorded the statements of number of the persons. On completion of the investigation, the Police filed challan with a submission that Truck No. U.P. 80/S-9912 was not involved in the accident but in fact Bus No. M.P.09-S/1732 was involved in the accident. The respondent No.1 to 6/ original claimants filed a claim petition before the learned Member Motor Accident Claims Tribunal claiming compensation of Rs. 15,00,000/-with a submission that Bus No. M.P.09-S/1732 was involved in the accident. It was submitted that non-claimant No.1 and 2 were the driver and the owner of the bus while the bus was insured with the present appellant/non-claimant No.3. Notices were issued to the parties but the owner and the driver did not appear in the Court. It appears that the present appellant Insurance Company made an application under Section 170 of the Motor Vehicles Act seeking permission to defend the claim on all possible grounds which were even available to the driver/owner of the bus. Undisputedly the application was allowed and as the owner and the driver were ex-parte, the Court granted permission in favour of the Insurance Company to contest the claim petition on all grounds.

04. From the side of the claimant Setubai (P.W.1) widow of the deceased, Hukum

Khatri (P.W.2) an alleged witness, Tarun Bansal (P.W.3) the employer of the deceased and Rajusingh (P.W.4) son of the deceased were examined. They were allowed to be cross-examined. Number of documents were filed by the original claimants in support of their claim. However, the present appellant Insurance Company did not produce any witness nor did produce any document in support of their defence. The learned Trial Court after hearing the parties held that Truck No. U.P.80-S/9912 was not involved in the accident but in fact the bus driven and owned by the respondent No.1 and 2 was involved in the accident. After holding that the bus No. M.P.09-S/1792 was involved in the accident, the learned Court below awarded a sum of Rs. 5,47,000/-in favour of the original claimants/respondents No.1 to 6. The Insurance Company being aggrieved by the said award has filed this appeal.

05. Shri Baheti learned Counsel for the appellant after taking us through the evidence and the documents filed by the other side submitted that the Court below erred in holding that the bus No. M.P.09-S/1732 was involved in the accident. It is submitted by him that it was for the claimants to show and prove before the Court that under what circumstances involvement of Truck No. U.P.80-S/9912 was shown in the FIR. It is also submitted by him that the learned Court below erred in not appreciating that the claimants did not even plead that the truck was not involved in the accident but the accident was caused because of rash and negligent driving of the bus. It is also submitted by him that the learned Court below erred in holding that because a challan has been filed by the Investigating Agency against the driver of Bus No. M.P.09-S/1732, therefore, involvement of the bus in the accident was sure and certain. It is submitted by him that the four witnesses examined by the claimants do not say nor do they explain that under what circumstances the truck was shown to have caused the accident and later on under what circumstances the involvement of the bus was shown. It is also submitted by Shri Baheti that the learned Court below erred in not appreciating that Salim the person who lodged the FIR and the Investigating Officer were required to be examined by the claimants to show that under what circumstances involvement of the truck was shown and on what basis the Investigating Officer came to the conclusion that the bus in dispute was involved in the accident. It is submitted by Shri Baheti that the Court below committed an absolute illegality in making the award in favour of the original claimants.

06. Shri Saraf learned Counsel for the respondent No.1 to 6 however, placing reliance upon a judgment of the Himachal Pradesh High Court in the matter of *National Insurance Co. Ltd. V. Rattani Devi and others* 2006-ACJ 717 submitted that if the involvement of a motor vehicle is found by a Court and the said finding is not challenged by the owner or the driver of the vehicle then the Insurance Companies would be forbidden from challenging such findings. It is also submitted by him that the burden to examine the first informant Salim Khan and the Investigating Officer was upon the Insurance Company and as they did not examine

those two witnesses, the Trial Court was justified in holding that the claimants could successfully prove their claim. It is also submitted by him that once the Investigating Agency found that the driver was prima facie answerable to the charge levelled against him for commission of a crime then that in itself would be sufficient to fix liability upon the driver and consequently upon the owner and the Insurance Company.

07. We have heard the parties at length and have also perused the records.

08. At this stage at least it is not disputed before us that Ex.P/1 the FIR was lodged by one eye witness Salim and he had clearly mentioned that Truck No. U.P.-80-S/9912 was involved in the accident. If this was the first information at the first point of time, then unless such fact is disputed or is explained by the claimants, the fact would remain a fact that the truck was involved in commission of the accident. True it is that the Insurance Company did ask the Court below that they wanted to examine Salim and the Investigating Officer as their witnesses but even if they did not examine them as their witnesses, the lapse on their part would not affect their interest adversely nor would permit the Court to draw adverse inference against them. The burden to prove that the bus was involved in commission of the crime was basically upon the claimants. On one side the claimants had filed the FIR which showed involvement of the truck in the accident and at the same time, they wanted to convey to the Court that in fact the truck was not involved in the accident but the bus in dispute caused the accident. What was the investigation, who were the witnesses, what evidence came to be recorded by the Investigating Officer, what persuaded him to give a report contrary to the FIR was required to be explained by the Investigating Officer. When the claimants wanted to rely upon the challan/charge sheet then the burden was upon them to examine the Investigating Officer to prove that on what particular evidence he recorded a finding that the truck was not involved in the accident and in fact the bus had caused the accident. The non-examination of the Investigating Officer would give a first dent to the claim of the original claimants. Non-examination of Salim who had lodged FIR as an eyewitness would again give another dent to the reliability of the claim because it was always for the claimants to prove before the Court that the FIR contained certain incorrect statements which were later on corrected. Even at that point of time, statement of Salim which were recorded by the Investigating Officer were required to be produced on record to prove that he had resiled from the FIR and stated before the Police that the truck was not involved in commission of the offence.

09. None of the witnesses have said rather explained as to what was the reason which persuaded Salim to make the FIR involving the truck. We could well understand the plea of the present claimants that under some misapprehension the truck was shown as the cause of the accident but unfortunately not even a single witness comes before the Court and says that under some mistake or misapprehension the truck was shown as cause of the accident.

10. P.W.-2 Hukum Khati has appeared before the Court as an eye-witness, unfortunately we do not know whether he was examined as an eye-witness at the time of the investigation by the Police. It is not known to us that Hukum Khati immediately after the accident ever lodged any FIR or appeared before the Police for recording of his statements or at any point of time, informed the Police that the bus was involved in the accident. In the examination-in-chief which is typed and prepared by the Counsel he has shown the involvement of the bus but however, in the cross-examination in paragraph 5 he made a statement that he could remember number of the truck. From this statement of the witness it would appear that in fact a truck was involved in the accident.

11. Learned Counsel for the respondent claimants placed reliance upon paragraph 10 of the judgment of the learned Court below. We are sorry to record that the contents of paragraph 10 of the judgment show absolute non application of mind on the part of the learned Court below. The learned Court below had ignored the FIR and its contents simply observing that it was not the positive evidence. The learned Court below failed to appreciate that Ex.P/1 was a document which was filed by the claimants and they placed reliance upon it. If the claimants wanted to explain the contents then they were obliged to inform the Court that under some misapprehension wrong details of the offending vehicle were given in the FIR. The learned Court below in our considered opinion committed an absolute illegality in observing that as the Police had filed challan against the driver of the bus and as the driver of the bus has not taken any steps against filing of the challan it has to be presumed that the bus and the driver of the bus were involved in the accident. The approach of the learned Court below in our considered opinion is absolutely perverse. Filing of the challan against a particular person would only show that there was some evidence to connect the person with the alleged crime but on the basis of filing of the challan a Court would not be entitled to presume or record a finding that such person was involved in commission of the crime. If the approach of the learned Court below is accepted as a principle of law then the ceremonial trial would not be required and simply on the basis of filing of the challan an accused would stand convicted. Filing of the challan against a particular person would only clothe a Court to go for a trial. In our system after giving due opportunity of hearing to the parties a Court is required to record a finding that whether the person had authored the crime or not. Filing of the challan would not gag the mouth of the Court in delivering a judgment in favour of the accused. In the present case the learned Court below simply observed that because the driver and the owner have not challenged the contents of the challan before any Superior Court or under Section 482 of the Code of Criminal Procedure it would be justified to hold that the bus and the driver were involved in the offence.

12. In dealing paragraph 10 the learned Court below observed that at the time of the investigation it was found that the truck was not involved in commission of the accident. Unfortunately the learned Court below erred in not appreciating that it

was a simple opinion of the Investigating Officer that a particular vehicle was involved or not involved in commission of the offence. For proving such prima facie opinion the claimants were obliged to examine the Investigating Officer which they failed to examine. It is to be seen from the evidence that out of four witnesses barring Hukum Khati none of the others were present on the spot. Hukum Khatis statement prima facie does not appear to be reliable because he nowhere stated that immediately after the accident or after the arrival of the Police he informed the Police that a truck was not involved in the causing the accident but it was the present bus which caused the death of the deceased. The findings recorded by the Learned Court below are absolutely wrong. It is also to be seen from paragraph 10 of the judgment that the learned Court below was alive to the fact that some of the witnesses had admitted that a truck was involved in commission of the accident but the Court below very conveniently brushed aside these admissions observing that the witnesses were not eye-witnesses. P.W.2 Hukum Khati claimed to be an eye-witness and was also referring to a truck in paragraph 5 of his statement. Paragraph 11 of the judgment on which further reliance was placed by the learned Counsel for the claimants simply shows that the Court below was placing its absolute reliance upon the statement of Hukum Khati. In our opinion P.W.2-Hukum Khati was not a witness to the incident.

13. For the reasons stated aforesaid, we are of the opinion that the learned Court below was not justified in placing reliance upon the statement of Hukum Khati. In our opinion Hukum Khati cannot be taken to be an eye-witness or the witness of the occasion. He is absolutely unreliable.

14. Once we ignore the statements of Hukum Khati then there is no evidence on the record to connect the present bus with the alleged accident.

15. For the reasons stated aforesaid, we are unable to hold that the findings recorded by the learned Court below are based on proper appreciation of the evidence or can be upheld in our appellate jurisdiction. The findings recorded by the learned Court below are, hereby, set-aside and instead it is held that the respondent No.1 to 6/ original claimants failed in connecting the bus with the alleged accident and the death of deceased Kalusingh in the said accident.

16. The appeal is, accordingly, allowed. The award made by the learned Court below is set-aside and the claim petition filed by the claimants is dismissed. However, the parties shall bear their own costs throughout.

Appeal allowed.

I.L.R. [2008] M. P., 2373

APPELLATE CIVIL

Before Mr. Justice A.M. Sapre & Mr. Justice S.K. Seth

28 April, 2008*

CHANDRAKANTA BHANDARI (SMT.)

... Appellant

Vs.

MANOHAR LAL & ors.

... Respondents

A. Motor Vehicles Act (59 of 1988), Section 173(1) - Exemption from deposit amount in compliance of requirement of proviso to Section 173(1) - Award of tribunal fixing liability against owner, driver & insurer - However, tribunal permitted the insurer to recover the amount from the owner - Insurer deposited entire amount in tribunal - Appeal by owner and prayed for exemption from depositing the amount in compliance of proviso of Section 173(1) - Held - There is no provision in the Act to grant such exemption - Appellant/owner can not claim benefit of deposit made by insurer.

(Paras 17 & 19)

क. मोटर यान अधिनियम (1988 का 59), धारा 173(1) - धारा 173(1) के परन्तुक की अपेक्षाओं के अनुपालन में राशि जमा करने से छूट - अधिकरण का अवार्ड स्वामी, चालक और बीमाकर्ता के विरुद्ध दायित्व निश्चित करता है - तथापि अधिकरण ने बीमाकर्ता को स्वामी से राशि वसूल करने की अनुमति दी - बीमाकर्ता ने सम्पूर्ण राशि अधिकरण में जमा की - स्वामी द्वारा अपील और धारा 173(1) के परन्तुक के अनुपालन में राशि जमा करने से छूट की प्रार्थना - अभिनिर्धारित - अधिनियम में ऐसी छूट देने का कोई उपबंध नहीं है - अपीलार्थी/स्वामी बीमाकर्ता द्वारा किये गये जमा के लाभ का दावा नहीं कर सकता।

B. Motor Vehicles Act (59 of 1988), Section 173(1) Proviso - Interpretation - When the language of statute is plain and unambiguous, effect has to be given to such words without reading anything more in them - If the intention of legislature was to provide exemption from deposit then the same would have found place in the section itself.

(Para 17)

ख. मोटर यान अधिनियम (1988 का 59), धारा 173(1) परन्तुक - निर्वचन - जब संविधि की भाषा सरल और असंदिग्ध हो, तब ऐसे शब्दों को बिना उनमें कोई और शब्द जोड़े उनका अर्थ निकाला जाना चाहिए - यदि विधायन का आशय जमा करने से छूट देना था तब यह उपबंध धारा में ही होना चाहिए था।

Cases referred :

2000 ACJ 255, 1998 ACJ 472, 2007 ACJ 2877, 2004 ACJ 315, 2005 ACJ 682, 2008 ACJ 373, (2000) 9 SCC 223.

A. Kamungo, for the appellant.

S. Patwa, for the respondent Nos.1 to 3.

Anand Bhatt, for the respondent No.4.

Monesh Jindal, for the respondent No.5.

ORDER

The Order of the Court was delivered by A.M. SAPRE, J. :- Heard on I.A. No.7965 of 2007.

2. This is an application made by the appellant whereby he has sought exemption from ensuring compliance of the requirement of proviso to section 173 (1) of Motor Vehicles Act (for short called 'The Act'). In other words, the appellant prays that he be exempted from depositing any amount i.e. whether Rs.25,000/- or 50% of the awarded amount as may be directed by the High Court as a condition precedent for entertainment of this appeal. So, the question that arises for consideration in this appeal is whether appellant can be exempted from ensuring compliance of the requirement of proviso to section 173 (1) *ibid*.
3. In order to answer the question posed *supra*, it is necessary to state relevant facts.
4. On 11.11.2005 one lady - Jyoti died in vehicular accident. It is this incident which gave rise to filing of claim petition by respondent no.1 to respondent no.3 (claimants) claiming to be the legal representatives of deceased under section 166 of the Act before the claims Tribunal seeking compensation for her death. The claim petition was filed against the driver (non-applicant no.1), owner (non-applicant no.2) and Insurer (non-applicant no.3) of the offending vehicle (No.MP-45-F-0128). It was contested by the non-applicants. So far as non-applicants no.1 and 2 were concerned, they filed a common written statement, whereas non-applicant no.3 filed their separate written statement. According to non applicants no.1 and 2, they were not liable but it was non-applicant no.3, who was liable to suffer the liability arising out of the accident - they being the insurer of the offending vehicle. So far as non-applicant no.3 i.e. Insurer was concerned, their case was that driver of offending vehicle was not having driving licence hence, no liability could be fastened upon non-applicant no.3 arising out of the accident. Parties then adduced evidence. By impugned award, the Tribunal partly allowed the claim petition and awarded a total sum of Rs.1,64,500/-. The Tribunal held that all the non-applicants i.e. driver, owner (insured) and insurer are liable to suffer the liability jointly and severally arising out of the accident. However, the Tribunal permitted the insurance company (non-applicant no.3) to recover the awarded sum from the owner of the offending vehicle (insurer) after satisfying payment of awarded sum to claimants. The insurance company (non-applicant no.3) in compliance to the impugned award deposited the entire sum in Tribunal. It is against this award, the owner of offending vehicle (non-applicant No.2) has filed present appeal being M.A. No.2470 of 2007 contending *inter alia* that Tribunal erred in fastening liability on the owner whereas, claimants have filed an appeal being M.A. No.2138 of 2007 praying for enhancement in the compensation awarded by the Tribunal.
5. As observed *supra*, by making an application under consideration (I.A. No.7965 of 2007), the appellant (owner of offending vehicle) has prayed that he

may be exempted from ensuring compliance of proviso to section 173(1) *ibid*. According to appellant since insurance company (non-applicant no.3) has already deposited the whole awarded sum in the Tribunal and hence, there arise no occasion for the appellant to again deposit any money i.e. whether Rs.25,000/- or otherwise as may be directed by this court under section 173 (1) proviso as a pre condition for entertainment of appeal filed by him under section 173 of the Act against the impugned award.

6. Notice of this application was served on non-applicants. Since the issue under consideration was legally debatable specially in view of divergent views of different High Courts including that of the view taken by M.P. High Court in 2 decisions hence, we requested Shri BL Pavecha, senior Advocate of this Court to assist the Bench as amicus for resolving the issue under consideration.

7. Having heard the learned counsel for the parties and learned Amicus, we are of the considered view that the application made by the appellant (I.A. No.7965 OF 2007) is liable to be dismissed.

8. Section 173(1) of the Act which is relevant for disposal of this application reads as under :-

“173. Appeals.- (1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court :

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court :

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.”

9. The Division Bench of this Court had the occasion to interpret section 173 and its proviso in the case reported in 2000 ACJ 255 (*Oriental Insurance company Ltd. vs. Gopal Singh & others*). The learned Judge Dharmadhikari (as his Lordship then was) speaking for the Bench held as under :-

“10. The aim and object of requiring deposit of Rs.25,000 or fifty per cent amount of the award whichever is less, as a pre-condition of appeal, appear to be with twin purposes. The legislature by introducing first proviso under section 173 clearly intends that during pendency of appeal against the award the victim of the accident must be provided with certain percentage of amount of compensation as minimum required relief and he should not be allowed to wait indefinitely until the decision of the appeal. The other purpose is that the appellants should not be

allowed to prefer an appeal on frivolous grounds just to delay the payment of compensation under the award. Only such appeals which are bonafide and backed by payment of reasonable amount under the award should be allowed to be entertained.

11. The language of the first proviso quoted above uses the expression 'unless he has deposited with it'. It prima facie conveys that the requisite amount of Rs.25,000 or fifty per cent of the award whichever is less should be deposited alongwith the memo of appeal in the high Court.

12. In construing the proviso, the proviso has to be read as a whole and apart from the above language, on which much emphasis has been laid, the other expression used in the same proviso particularly the words, 'in the manner directed by the High Court', cannot be ignored. The first proviso has to be read as a whole in all its parts to ascertain the meaning conveyed by the language employed, particularly the expressions 'unless he has deposited with it' and the latter part 'in the manner directed by the High Court' should both be given full meaning and effect.

13. On reasonable construction of the language employed by the proviso, we are of the considered opinion that the requisite amount, as a pre-condition for preferring appeal, can be deposited in the High Court and if the High Court directs, it can be deposited in the Tribunal which is the proper forum where the amount should be deposited. From there, it may be collected by the claimants without much difficulty."

10. The issue under consideration in this case came up for consideration before Punjab & Haryana High Court in the case reported in 1998 ACJ 472 (*Sohan Singh vs. Kushla Devi & others*). It is clear from the very question posed by the Bench at the outset :-

"An important issue which has arisen for determination by this court in view of the office objection raised to the entertainability of the appeal is whether an appeal filed by a party against an award of the Motor Accidents Claims Tribunal can be entertained by a court without compliance of the proviso to section 173(1) of the Motor Vehicles Act, 1988 ?"

11. The learned Judge GS Singhvi (as his Lordship then was) speaking for the Bench held that no exemption can be granted to the appellant from depositing the amount as required by the proviso to section 173 *ibid* in any circumstances. Since we respectfully concur with the reasoning and conclusion rendered in this case, it being in accord with the true interpretation of section 173 *ibid* and hence, it is proper to reproduce the reasoning of their Lordships in detail *infra*. This is what the learned Judge held in para 4, 5 and 13 :-

"4. A careful reading of the above quoted provision shows that sub-section (1) of section 173 gives a right of appeal to any person aggrieved by an award of the Claims Tribunal. The period of limitation for filing such appeal is 90 days from the date of award. Second proviso to section 173(1) empowers the High Court to entertain the appeal after the expiry of the period of 90 days in case the High Court is satisfied that the appellant was prevented by sufficient cause from preferring an appeal in time. First proviso to section 173 (1) refers to an appeal by a person who is required to pay any amount in terms of the award. It lays down that no appeal by a person who is required to pay any amount in terms of the award shall be entertained by the High Court unless such person deposits with the High Court Rs.25,000/- or 50 per cent of the amount so awarded by the Tribunal, whichever is less. The deposit is required to be made in the manner directed by the High Court. The significant difference between the language used in sub-section (1) of section 173 and the first proviso is that whereas the expression 'any person aggrieved by the award' has been used in the main sub-section, the proviso uses the expression 'by the person who is required to pay any amount in terms of such award'. This clearly means that the appeal can be filed by a person who may be aggrieved by the award but who may not be required to pay any amount in terms of the award. Ordinarily an appeal by the claimant will be covered by this category. However, the legislature has thought it proper to impose a restriction to the entertainability of the appeal by the High Court by a person who is required to pay any amount in terms of the award appealed against by requiring deposit of Rs.25,000/- or 50 per cent of the amount awarded by the Tribunal, whichever is less. The legislature must be deemed to be fully cognizant of the fact that the award can be against one party or more than one party and such parties may be jointly or severally made liable to satisfy the award. Keeping in view these situations, the legislature has incorporated the requirement of the deposit by a person who wants to prefer an appeal against the award and who is required to pay any amount in terms of the award. If the legislature intended that out of several respondents before the Tribunal, deposit of amount only by one should be sufficient to enable the filing of the appeal by more than one person who may be aggrieved by the award, then, the proviso would have altogether been differently worded and we do not find any reason to interpret the proviso in a manner which would lead to rewriting of the same.

The learned Judge further went on to hold in para 5 :-

5. The object behind incorporating the proviso to section 173(1) of the Act is remedial and beneficial. The requirement of the deposit of

the amount as condition precedent to the entertainability of the appeal protects the interest of the claimant in whose favour an award has been made. By making it obligatory to deposit the amount specified in the proviso to section 173(1), it has been made clear by the legislature that one who wants to challenge the award of compensation must part with a specific amount which in appropriate cases may be made available to the claimants even before final adjudication of the appeal. Keeping in view the object behind the legislative intent, we do not find any reason not to accept the plain language used in the proviso and apply different principles of interpretation which may lead to rewriting of the statute.

Lastly, the learned Judge held in para 13 :-

13. Applying the above referred rule of interpretation, we are clearly of the opinion that on a plain reading of the proviso to section 173(1), any person who is required to pay any amount under an award passed by the Claims Tribunal, prefers an appeal, his appeal can be entertained by the High Court only if he makes deposit of a specific amount as required by the said proviso and he cannot claim exemption from making the deposit on the ground that a co-respondent before the Tribunal has filed an appeal and has made the requisite deposit. It is a different thing that the High Court will not order the disbursement of the entire amount deposited by different parties under the proviso to section 173(1)."

(emphasis supplied)

12. A more or less similar question arose before the Division Bench of this Court (*Gwalior Bench*) in the case reported in 2007 ACJ 2877 (*Anuradha Kaushik vs. Varan Ground Water Development Corporation*) as to whether cross objection filed by owner / driver under Order 41 rule 22 of the C.P. Code who have suffered an award can be entertained on merits in an appeal filed by claimant without ensuring compliance of the requirement of proviso to section 173 *ibid* ? The Division Bench in para 5 of the judgment held that it is mandatory on the part of owner / driver who has filed the cross objection under Order 41 Rule 22 of C.P. Code to first comply the requirements of section 173 *ibid* then only his cross objection can be entertained on merits. Similar is the view taken by Single Bench of Kerala High Court in the case reported in 2004 ACJ 315 (*Kesaran Nambeesan vs. Madharan*) wherein the learned Judge has held that High Court has no power to dispense with the requirement of deposit under section 173 *ibid*.

13. Learned counsel for the appellant placed heavy reliance on the decision rendered by the Division Bench of Kerala High Court in the case reported in 2005 ACJ 682 (*Abdul Rahiman vs. Rajan & others*) as also one decision of this Court (SB) reported in 2008 ACJ 373 (*Kamlesh vs. Madan Sing & others*) and contended that in the light of view taken in these two decisions the appellant can be exempted from making deposit of amount under section 173 *ibid*. We have

carefully perused the reasoning and ratio of these two decisions. With great respect, we express our dissent to the view taken by Kerala High Court in the case of *Abdul Rahiman* (supra) as also of the view taken by Single Bench of this Court in the case of *Kamlesh* (supra). Instead, we respectfully follow the well considered view taken by Punjab & Haryana High Court in the case of *Sohan Singh* (quoted supra), so also the view taken by Division Bench of this Court in the case reported in *Anuradha Kaushik* (supra) and Single Bench of Kerala High Court in the case of *Kesaran* (supra).

14. In the first place, view taken by Kerala High Court in the case of *Abdul Rahiman* is contrary to the view taken by the same High Court in the case of *Kesaran*. Secondly, though the view taken in *Kesaran's case* was earlier in point of time, yet it was not taken note of by the same High Court in *Abdul Rahiman* (supra), which was subsequent in point of time. Thirdly, it does not take into account the law laid down by Supreme Court in the case of *Trilochan Singh* 2000 (9) SCC 223 and other High Courts on the issue. Fourthly, we are bound by the view taken by our High Court in the cases reported in 2000 ACJ 255 (*Oriental Insurance Co. Ltd. vs. Gopal Singh*) and 2007 ACJ 2877 (*Anuradha Kaushik vs. Varun Ground Water Development Corporation*) wherein the 2 Division Bench of this Court have interpreted section 173 (1) proviso and have held that deposit of money specified in section 173(1) is mandatory.

15. It is for all these reasons, we respectfully disagree with the view expressed by Kerala High Court in the case of *Abdul Rahiman vs. Rajan* (2005 ACJ 482) and follow the view taken by 2 Division Bench decisions of our High Court reported in 2000 ACJ 255 (*Oriental Insurance Co. Ltd. vs. Gopal Singh*) and 2007 ACJ 2877 (*Anuradha Kaushik vs. Varun Ground Water Development Corporation*).

16. In our considered opinion and with respect the view taken by the learned Single Judge of this Court in the case reported in 2008 ACJ 373 (*Kamlesh vs. Madan Singh*), is not the correct view and hence, liable to be overruled being per incurium. In the first place, it is in conflict with the view taken by Division Bench of this Court reported in 2007 ACJ 2877 (*Anuradha Kaushik vs. Varun Ground Water Development Corporation*) which was already in force but was not taken note of by Single Bench while deciding the case of *Kamlesh*. Secondly, the view taken by Division Bench was binding on Single Bench and therefore, the Single Bench had no jurisdiction to take a contrary view on the issue except to follow the view taken by the Division Bench. Thirdly, the Single Bench as observed supra, did not take note of the view of the Division Bench which was holding the field on that day and proceeded to take a view contrary to Division Bench by placing reliance on the decision of Kerala High Court reported in 2005 ACJ 682 (*Abdul Rahiman vs. Rajan*). Fourthly, as held supra, since we have expressed our dissent to the view taken by Kerala High Court in the case of *Abdul Rahiman* and hence, as a necessary corollary, the view taken by Single Judge in the case of *Kamlesh*

(supra) stands overruled and lastly our view finds support from the view taken by Supreme Court in the case reported in 2000 (9) SCC 223 (*Trilochan Singh vs. Kanta Devi*) and 2 decisions of this court. It is for all these reasons, we overrule the decision of Single Bench rendered in the case reported in 2008 ACJ 373 (*Kamlesh vs. Madan Singh*).

17. Even independent of aforesaid decisions and on plain reading of section 173(1) proviso, we are of the view that legislature while enacting section 173(1) proviso, did not intend to provide grant of exemption from deposit of the whole awarded sum but only relieved the appellant from full deposit. It is clear from the ceiling limit of Rs.25,000/- or 50% of awarded sum whichever is less provided in proviso to section 173 (1). In no case, therefore, the appellant can be compelled to deposit the whole awarded sum. This itself in our opinion is in the nature of relieving factor for the appellant. It is a settled rule of interpretation that when the language of statute is plain and unambiguous, effect has to be given to such words without reading anything more in them. If the intention of legislature was to provide exemption from deposit then the same would have found place in the section itself. A provision to grant exemption from deposit has to be made in the statute in express term. It can not be inferred nor can be read down while interpreting the section. It can not be said that legislature while drafting section 173 (1) proviso was not aware of the situation which has arisen in this case. Despite that no provision was made for grant of exemption. Indeed whenever, the legislature has decided to grant exemption from making deposit of any demand in any statute then, it has always made specific provision to that effect. Such is not the case here when we read section 173(1) proviso.

18. We also find support to our reasoning and conclusion from the decision of Supreme Court reported in 2000 (9) SCC 223 (*Trilochan Singh vs. Kanta Devi*). In this case also, the High Court had dismissed the appeal filed by owner of offending vehicle on the ground of non compliance of section 173(1) proviso despite the fact that Insurance Company had paid the full awarded sum to claimants thereby satisfying the award passed in favour of claimants. Feeling aggrieved by this dismissal, the owner filed S.L.P. before Supreme Court. Their Lordships took note of the fact of deposit made by Insurance Company and yet declined to grant exemption to owner of offending vehicle from making deposit of sum specified in section 173(1) *ibid*. Their Lordship however, directed the owner to deposit a sum of Rs.10,000/- as a precondition for entertainment of his (owner's) appeal filed under section 173(1) *ibid* and accordingly, remanded the case to High Court for its disposal on merits. As observed supra, the issue involved in the present case is similar to the one decided by the Supreme Court in the case of *Trilochan Singh* (supra).

19. In view of foregoing discussion, we hold that appellant (owner of offending vehicle) can not take any benefit of deposit made by Insurance Company of the

awarded sum in the Tribunal and is required to ensure compliance of the provisions of section 173 (1) *ibid* as a pre condition for entertainment of the appeal filed by him under section 173(1) of the Act.

20. Accordingly the application made by appellant seeking exemption from deposit of amount in term of section 173 (1) proviso (I.A. No.7965 of 2007) is rejected. However looking to the facts of the case, the appellant is granted 3 weeks' time to deposit a sum of Rs.25,000/-. In case, if the amount as directed is deposited by the appellant within the time granted then the appeal shall be placed for admission, failing which the appeal shall stand dismissed for non-compliance of the requirement of section 173(1) proviso.

21. Before parting with the case, we express our sincere gratitude to Mr. BL Pavecha, Senior Advocate for his valuable assistance which he rendered on our request.

Order accordingly.

I.L.R. [2008] M. P., 2381

APPELLATE CIVIL

Before Mr. Justice Subhash Samvatsar

20 June, 2008*

KALLU & ors.

... Appellants

Vs.

ANTULAL & ors.

... Respondents

Evidence Act (1 of 1872), Sections 40, 41, 43 - Relevancy of previous Order, Judgment, Decree in a litigation - Held - As per Section 40 of the Act a previous judgment is relevant if it creates a bar for second suit such as *res judicata* - As per Section 41 previous judgment in a suit for probate, matrimonial, admiralty or insolvency can be relevant for subsequent suit - As per Section 42 previous judgment is relevant in a subsequent suit if previous judgment is of public-nature - As per Section 43 previous judgment is relevant in a subsequent suit if previous judgment is a fact in issue - Appeal dismissed.

(Paras 11, 13 to 15)

साक्ष्य अधिनियम (1872 का 1), धाराएँ 40, 41, 43 - किसी वाद में पूर्वतन आदेश, निर्णय, डिक्री की सुसंगतता - अभिनिर्धारित - अधिनियम की धारा 40 के अनुसार पूर्वतन निर्णय सुसंगत है यदि वह द्वितीय वाद का वर्जन करता है जैसे पूर्व-न्याय - धारा 41 के अनुसार प्रोबेट, वैवाहिक, नावाधिकरण या दिवाला विषयक किसी वाद में पूर्वतन निर्णय पश्चात्पूर्ती वाद के लिए सुसंगत हो सकता है - धारा 42 के अनुसार पूर्वतन निर्णय पश्चात्पूर्ती वाद में सुसंगत है यदि पूर्वतन निर्णय लोक प्रकृति का है - धारा 43 के अनुसार पूर्वतन निर्णय पश्चात्पूर्ती वाद में सुसंगत है यदि पूर्वतन निर्णय एक विवाद्यक तथ्य है - अपील खारिज।

Raja Sharma, for the appellants.

P.S. Raghuvanshi, for the respondents.

J U D G M E N T

S.SAMVATSAR, J. :- This appeal is preferred by the defendant being aggrieved by the judgment and decree dated 15/7/1998 delivered by First Additional District Judge, Gwalior in Civil Appeal No.9A/98 whereby the first appellate Court has affirmed the judgment and decree dated 27/2/1998 passed by Civil Judge Class II, Gwalior in Civil Suit No.46A/90.

2. Brief facts of the case are that the respondents plaintiffs filed a civil suit for declaration of title, injunction and return of possession against the present appellants defendants alleging that father of the plaintiffs was the owner of the house No.7/15 new number 42/5 situated at Tatiya Pakhre Ki Payga near Saligram Darji Ki Bagiya, Taraganj, Lashkar, Gwalior. According to the plaintiffs, their father constructed the said house in the year 1934 and the property was his self acquired property. Father of the plaintiff died in the year 1974 and after the death of father of the plaintiffs, plaintiffs became the owner of the property by succession. It is alleged that defendants being cousins of the plaintiffs; were allowed to reside in the property and their possession was permissive possession. They have no right to continue in possession. Hence, the present suit was filed on these premises.

3. On notice, the defendants filed their written statement alleging that the property was owned by one Jasoda. Jasoda had executed a will in their favour. The defendants also claimed that they have acquired right in the suit property by adverse possession.

4. The Two courts below have concurrently found that the Will executed by Jasoda is not proved and plea of adverse possession is also not proved and decreed the suit. Hence, this second appeal.

5. This appeal was admitted by this Court on 24/3/1999 the following substantial question of law :-

Whether on the pleading that the property is ancestral and in the absence of any evidence in respect of partition, the finding that the plaintiffs are exclusive owners of the property is perverse ?

The gist of the said question is whether the property in question is ancestral and in the absence of any evidence in respect of partition, the finding that the plaintiff is exclusive owner is perverse.

6. From perusal of the pleadings of the parties, I find that this question in fact does not arise for consideration in the present appeal. None of the parties has pleaded that the property was ancestral. In such circumstances, the question framed by this Court does not arise for consideration.

7. Shri Raja Sharma, the learned counsel for the appellants defendants submitted that even though there is a finding by the two courts below that the Will executed by Jasoda is not proved, still there is a judgment and decree dated 30/9/1999 in Civil Suit No.32A/99 (Antulal and others vs. Mahila Mohaniya) wherein it

was held that Jasoda had executed a Will in respect of the property. Said judgment and decree is filed by the appellants alongwith an application I.A.5463/2000 under Order XLI Rule 27 of C.P.C.

8. Now the question is whether the said judgment and decree can be taken on record.

9. Shri Raja Sharma, learned counsel for the appellants defendants contended that as in the said judgment, it is held that Jasoda had executed a Will and the said judgment was delivered during the pendency of this appeal on 30/9/1999, the same can be taken on record.

10. Shri learned counsel for the respondents- plaintiffs, on the other hand, contended that the said judgment and decree is not relevant and therefore, cannot be taken on record. He invited attention of this Court to Sections 40,41,42 and 43 of the Indian Evidence Act, 1872.

11. Section 40 of the Evidence Act provides that the previous judgment is relevant to bar a second suit or trial. It provides that the existence of any judgment, order or decree which by law prevents any courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial. This Section, thus, provides that previous judgment can be considered to create a bar for the second suit such as res judicata.

12. In the present case, from perusal of the copy of the judgment filed by the appellants defendants alongwith their application under Order XLI Rule 27 of C.P.C., it appears that the present appellants were not parties to the said suit, hence, the question of res judicata or any other bar does not arise.

13. Section 41 of the Evidence Act provides that final judgment order or decree of a competent court, in the exercise of probate, matrimonial admiralty or insolvency can be relevant for the in subsequent suit. From perusal of the judgment and decree filed by the appellant in Civil Suit No.32A/99 alongwith the application under Order XLI Rule 27 of C.P.C. it is apparent that said judgment and decree was not passed either in matrimonial proceedings, probate case or insolvency proceedings, but is passed in a suit for ejectment. Hence, provisions of Section 41 of the Evidence Act are also not applicable in the present case.

14. Section 42 of the Evidence Act provides that judgments, orders or decrees other than those mentioned in section 41 are relevant, if they relate to matters of public nature. Judgment and decree filed by the appellants defendants does not relate to public nature, and therefore, this provision also will not be applicable.

15. Section 43 further provides that judgments, orders or decrees other than those mentioned in sections 40,41 and 42 are irrelevant unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act. As the judgment and decree filed by the appellants defendants

is not covered by Sections 40, 41 and 42 of the Evidence Act, said Section is irrelevant and therefore, cannot be taken into consideration.

16. In such circumstances, I find that the judgment and decree filed by the appellants defendants alongwith the application I.A.5463/2000 under Order XLI Rule 27 of C.P.C. cannot be allowed and the judgment and decree cannot be taken on record. Hence, I dismiss the application I.A.5463/2000.

17. As the question which has been framed by this Court at the time of admission does not arise from the judgments and decrees passed by the two Courts below, I hold this appeal to be without any merit and is dismissed without any order as to costs.

Appeal dismissed.

I.L.R. [2008] M. P., 2384

APPELLATE CIVIL

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

3 July, 2008*

RAJANI AGRAWAL (SMT.)

... Appellant

Vs.

RAMSWAROOP & ors.

... Respondents

Workmen's Compensation Act (8 of 1923), Section 30, Motor Vehicles Act, 1988, Sections 140, 143 & 167 - Question whether the claim petition is maintainable under the Workmen's Compensation Act after the dismissal of claim petition in miscellaneous appeal - Held - Section 143 of the Motor Vehicle Act itself provides that provision of this Act shall also apply in relation to any claim for compensation in respect of death or permanent disablement of any person under Workmen's Compensation Act resulting from an accident of the nature referred to in sub-section (1) of Section 140 - Appeal Allowed. (Para 13)

कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 30, मोटर यान अधिनियम, 1988, धाराएँ 140, 143, 167 - प्रश्न, क्या विविध अपील में दावा याचिका के खारिज होने के बाद कर्मकार प्रतिकर अधिनियम के अन्तर्गत दावा याचिका पोषणीय है - अमिनिर्धारित - मोटर यान अधिनियम की धारा 143 स्वयं उपबंधित करती है कि इस अधिनियम के उपबंध धारा 140 की उपधारा (1) में उल्लिखित प्रकृति की दुर्घटना के परिणामस्वरूप हुई किसी व्यक्ति की मृत्यु या स्थायी निःशक्तता के बावत् प्रतिकर के लिए कर्मकार प्रतिकर अधिनियम के अन्तर्गत किसी दावे के संबंध में भी लागू होंगे - याचिका मंजूर।

Cases referred :

2006 ACJ 528, 2007(1) MPLJ 325.

B.N. Malhotra, for the appellant.

Vandana Kekre, for the respondent No.2.

H.K. Shukla, for the respondent No.3.

None, for other respondents.

ORDER

The Order of the Court was delivered by SUBHASH SAMVATSAR, J. :- This appeal is preferred by the claimant being aggrieved by the award dated 4/6/2007 passed by Commissioner, Workmen's Compensation, Labour Court No. 1, Gwalior in case No. C.O.C.8/B/WCA/2004 (Fetal); whereby the Commissioner has dismissed the claim petition filed by the present appellant/claimant on the ground that she has already approached the Motor Accidents Claims Tribunal for compensation and her claim was dismissed.

2. The brief facts of the case are that the appellant, who is widow of deceased Sanjeev alias Munna Agrawal has filed claim petition for compensation for the death of her husband before the Motor Accidents Claims Tribunal, Dabra, which was registered as claim case No. 40/02. The Claims Tribunal dismissed the claim petition by award dated 29/3/03. From the perusal of the said award, it is clear that the claims Tribunal while dismissing the claim petition has granted liberty to the present appellant to move appropriate application before Commissioner, Workmen's Compensation for award for the death of her husband and for redressal of her grievance. It also appears that Smt. Pushpa Bai and Madanlal were also the claimants before the Claims Tribunal along with the present appellant. After dismissal of her claim petition, being aggrieved by this award, Madanlal and Smt. Pushpa Bai preferred appeal before this Court by filing M.A. No. 555/05, which was dismissed as withdrawn on 25/07/03 and therefore, the present claimant/appellant has filed this appeal under Section 30 of Workmen's Compensation Act, 1923.

3. From the perusal of the impugned award, it also appears that Smt. Pushpa Bai and Madanlal has also filed a separate application before the Commissioner, Workmen's Compensation, which was registered as case No. COC 19/B/W.C.A./04(Fetal). This claim petition was also dismissed. The petition filed by Smt. Rajani Agrawal was dismissed by the impugned award, hence this appeal.

4. This appeal was admitted by this Court on 5/10/07 on following substantial question of Law:-

“Whether dismissal of the Claim Petition under the Motor Vehicles Act with liberty to the claimant to file a petition under Workmen's Compensation Act will operate as res judicata before the Commissioner, Workmen's Compensation ?”

5. The question which was framed by this Court at the time of admission is that the dismissal of claim petition under Motor Vehicles Act with liberty to the claimant to file a petition under Workmen's Compensation Act will operate as res judicata before the Commissioner, Workmen's Compensation.

6. So far as the question framed by this Court about applicability of principle of res judicata is concerned, in the present case, in fact, the said question does not

arise for consideration because the Claims Tribunal itself has held that the Claims Petition before Claims Tribunal is not maintainable and proper forum for deciding the matter is Commissioner, Workmen's Compensation and even it is held that the said finding has attained the finality, as per the said finality, the claim petition is maintainable.

7. The main question which is to be considered is whether the claim petition under Workmen's Compensation Act is maintainable after dismissal of claim petition in a miscellaneous appeal.

8. Section 167 of the Motor Vehicles Act, 1988 provide that a claimant can approach for compensation either before the Claims Tribunal situated under the Motor Vehicles Act or under Workmen's Compensation, Act but, he can avail both the remedies. The Section reads as under:-

"167. Option regarding claims for compensation in certain cases-Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

9. Shri B.N. Malhotra, the learned counsel for appellant has contended that the Commissioner has erred in relying on a judgment of Apex Court in *National Insurance Co. Ltd. Vs. Mastan and another*, 2006 ACJ,528, as the facts of the case were quite distinguishable. In that case, the claimant has first approached the Commissioner, Commissioner, Workmen's Compensation, where a sum of Rs.2,70,264/- was awarded as compensation and, thereafter, he approached Motor Accident Claims Tribunal and, therefore, the said claim was not maintainable. In the present case, Motor Accident Claims Tribunal has not awarded anything to the appellant except the interim Award under Section 140 of the Motor Vehicles Act but dismissed the claim on the ground that it is not maintainable before the said forum and appropriate forum is Commissioner, Workmen's Compensation. The Claims Tribunal, while dismissing the claim has granted liberty to the present appellant to move the Commissioner under Workmen's Compensation, which is not the situation in the case before the Apex Court.

10. Counsel for the appellant relied on a Division Bench Judgment of this Court in the case of *Raja S/o Girdharilal Solanki Vs. Ajay S/o Bharat Rajput*, 2007 (1) M.P.L.J., 325. In that case the claimant has first approached to the Commissioner, Workmen's Compensation and when his claim petition was dismissed on technical ground, he approached the Claims Tribunal under Motor Vehicles Act and the Division Bench held as under:-

"However, in such a situation, where a person has been deprived of from taking remedy on the ground that basic foundation on which he

was proceeded on existing then, we are of the view that even after dismissal of their case on technical ground, they cannot be deprived of a remedy of approaching the tribunal under Motor Vehicles Act”

11. In the present case, the claim petition filed by the present appellant before the Motor Vehicles Act was dismissed on technical ground and a liberty was granted to her to approach under Workmen's Compensation Act. Hence, in the present case, it cannot be said that dismissal of the claim petition before the Commissioner was not maintainable.

12. Smt. Vandana Kekre, the learned counsel for the Insurance Company has contended that as the claim petition filed by Smt. Pushpabai and Madanlal which was registered as Case No.19-B/WCA/04 (Fetal) was also dismissed and as this award is not challenged by Smt. Pushpabai and Madanlal and has attained the finality, the present appeal is not maintainable.

13. After hearing the parties, we find that these objections is without any merit merely because Smt. Pushpabai and Madanlal have not challenged the award passed against them, hence, it cannot be said that Rajani Agrawal has no right to file an appeal against the award. Her claim of filing appeal cannot be defeated only because the other claimants in some other case are not challenged the award. It is further contended by Ku. Vandana Kekre that the claimants have received a sum of Rs.50,000/- under Section 140 of Motor Vehicles Act, therefore, they are not entitled to any compensation. The said argument is also is not maintainable under Section 143 of Motor Vehicles Act itself, which provides that provision of this act shall also apply in relation to any claim for compensation in respect of death or permanent disablement of any person under the Workmen's Compensation resulting from an accident of the nature referred to in sub-section (1) of Section 140. In view of this provision, on this ground also the claim petition filed by the appellant cannot be dismissed.

14. As Commissioner of Workmen's Compensation has not assessed the amount of damages, the appeal is allowed and the matter is remitted back to Commissioner, Workmen's Compensation, who shall decide the claims in accordance with law. Parties are directed to remain present before the Commissioner on 1st August, 2008 and the Commissioner shall decide the case afresh within a period of four months from today.

Order accordingly.

I.L.R. [2008] M. P., 2388
- APPELLATE CIVIL
Before Mr. Justice K.K. Lahoti
 31 July, 2008*

SUBHASH CHAND JAWA

... Appellant

Vs.

SUBHASH GUPTA & Ors.

... Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(a) & 13(1) - Suit for eviction was filed on the ground of arrears of rent - It was the duty of tenant to deposit the rent as required u/s 13(1) of the Act - Tenant has not deposited rent as per requirement u/s 13(1) of the Act and has not filed any application for condonation of delay before trial court but filed the application before first appellate court - Held - If there were default on the part of tenant, tenant ought to have filed application forthwith before the trial court explaining the circumstances in which he could not deposit the rent - First appellate court rightly rejected the application. (Paras 9 & 10)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ए) व 13(1) - किराये के बकाया होने के आधार पर बेदखली का वाद पेश - यह किरायेदार का कर्तव्य था कि अधिनियम की धारा 13(1) की अपेक्षानुसार किराया जमा करे - किरायेदार ने अधिनियम की धारा 13(1) की अपेक्षानुसार किराया जमा नहीं किया और विलम्ब को क्षमा करने के लिए विचारण न्यायालय के समक्ष कोई आवेदन पेश नहीं किया बल्कि प्रथम बार आवेदन प्रथम अपील न्यायालय के समक्ष पेश किया - अभिनिर्धारित - यदि किरायेदार की ओर से व्यतिक्रम किया गया तो किरायेदार को, परिस्थितियाँ जिनमें वह किराया जमा नहीं कर सका, स्पष्ट करते हुए विचारण न्यायालय के समक्ष तत्काल आवेदन पेश करना चाहिए था - प्रथम अपील न्यायालय ने आवेदन उचित रूप से निरस्त किया।

B. Civil Procedure Code (5 of 1908), Order 6 Rule 17, Accommodation Control Act, M.P., 1961, Section 12(1)(f) - Trial court passed the decree against tenant on the ground of Section 12(1)(f) of the Act - Tenant filed application under Order 6 Rule 17 CPC before First Appellate Court that landlord purchased shop in the name of his brother, in which landlord was carrying on business and necessity, if any, had come to an end - First Appellate Court considering the merits of the application rejected it - Held - Merely an application was filed alleging certain facts against the landlord by itself was not sufficient to set-aside the judgment & decree and remand the case - First Appellate Court after considering the registered sale deed and licence issued by Municipal Corporation found that application was frivolous and grounds stated in the application needs not to be enquired into - No error found in order. (Para 11)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17, स्थान नियंत्रण अधिनियम, म.प्र., 1961, धारा 12(1)(एफ) - विचारण न्यायालय ने अधिनियम की धारा

12(1)(एफ) के आधार पर किरायेदार के विरुद्ध डिक्री पारित की - किरायेदार ने सि.प्र.सं. के आदेश 6 नियम 17 के अन्तर्गत प्रथम अपील न्यायालय के समक्ष आवेदन पेश किया कि भू-स्वामी ने दुकान उसके भाई के नाम से खरीद ली है जिसमें भू-स्वामी व्यापार कर रहा है और यदि कोई आवश्यकता थी तो वह समाप्त हो गई - प्रथम अपील न्यायालय ने आवेदन पर विचार करने के पश्चात् गुणदोषों पर आवेदन खारिज कर दिया - अभिनिर्धारित - केवल आवेदन पेश करना और उसमें भू स्वामी के विरुद्ध कुछ तथ्यों का अभिकथन करना स्वतः निर्णय और डिक्री अपास्त करने और मामला प्रतिप्रेषित करने के लिए पर्याप्त नहीं था - प्रथम अपील न्यायालय ने रजिस्टर्ड विक्रयपत्र और नगर निगम द्वारा जारी किये गये लायसेंस पर विचार करने पर पाया कि आवेदन तुच्छ था और आवेदन में कथित आधारों की जाँच किया जाना आवश्यक नहीं है - आदेश में कोई त्रुटि नहीं पायी गई।

Cases referred :

(2000) 4 SCC 380, 1988(II) MPWN 78, 2000(2) MPLJ 385, AIR 2003 SC 2985.

Mohd. Yunus, for the appellant.

R.S. Tiwari, for the respondents.

J U D G M E N T

K.K.LAHOTI, J.:-The defendant/tenant who suffered a decree of eviction under section 12(1)(a), (b) & (f) of the M.P.Accommodation Control Act, 1961 (hereinafter referred to as 'Act' for short) by the Court below has preferred this appeal.

2. The trial Court, 9th Civil Judge, Class-II, Jabalpur in civil suit no.491-A/1997 dated 3.8.2001 decreed the suit against appellant and respondent no.2 Mohd. Naseer, against which an appeal was preferred by the appellant before the Vth Additional District Judge, Jabalpur as Civil Appeal No.6-A/2002 which was dismissed on 30.6.2004.

3. Learned counsel for appellant submitted :-

(a) That the appellate Court erred in rejecting the application filed by appellant under Order 6 Rule 17 C.P.C., by which the appellant alleged that respondent Anil Kumar Gupta purchased shop from Dilip Kumar Sahu in the name of his brother Rajesh Kumar, in which Anil Kumar was carrying on hotel business and the necessity if any had come to an end, but the appellate Court considering the merits of the application rejected which was not permissible. Reliance is placed to a judgment of this Court in *Yadunandan Vs. Madhusingh* (1988 II MPWN 78).

(b) That the Court below erred in arriving at a finding that the appellant had sub-let the shop to respondent no.2 Mohd. Naseer while the fact was that appellant's son Sonu Suresh Jawa was seriously sick and appellant was busy in his treatment. During this period to take care of shop respondent no.2 was sitting at the shop for the appellant. Infact because of aforesaid circumstances, Mohd. Naseer was sitting

at the shop and it was not an act of sub-tenancy. In respect of ailment of Sonu Suresh Jawa appellant filed documents before the Trial Court, but the aforesaid documents were rejected which had caused serious prejudice to the appellant. This appeal deserves to be allowed by extending an opportunity to the appellant to prove the aforesaid documents in support of his contention.

(c) That there was default in payment of monthly rent as required under section 13(1) of the Act, but it was because of ailment of Sonu Suresh Jawa for whose treatment appellant was busy and continuously stationed at Delhi. In these circumstances there was default in payment of rent and appellant filed an application before the trial Court and also before appellate Court, but the Court below rejected the application without considering the merits of these applications.

It is submitted that on the aforesaid grounds this appeal may be admitted for final hearing:

4. To appreciate the aforesaid contention of the appellant factual position in the present case may be looked into. It was not in dispute that appellant was tenant of the disputed shop @ Rs.700/- per month and his tenancy was monthly in accordance with the English Calendar month. The plaintiff sought eviction of appellant on the ground that appellant was in arrears of rent of Rs.3,800/- which was not paid by the appellant inspite of demand notice as required under section 12(1)(a) of the Act. That the suit shop was sub-let by the appellant to Mohd. Naseer, without permission of the landlord respondent no.2, who was carrying on his business of Chappals in the suit shop. That the suit accommodation was required by the landlord for starting hotel business to his son Anil Kumar Gupta, who was major and unemployed. In the township of Jabalpur, plaintiff was not having any other suitable accommodation in his possession for the need. On the aforesaid grounds the suit was filed for eviction under section 12(1)(a) (b) & (f) of the Act.

5. The appellant and respondent no.2 filed separate written statements. The appellant contested the suit on the ground that appellant was never denied to pay the rent, but the plaintiff himself had refused to accept the money orders sent by the appellant. After filing of suit the appellant had deposited all the arrears of rent in CCD before the trial Court. The appellant was not available at Jabalpur because of ailment of his son. The notice of plaintiff was received by defendant no.2 because he was taking care of business of appellant. Infact appellant himself was carrying on Chhappal business. The defendant no.2 is his friend and in the same capacity he was helping the plaintiff in the business. The defendant no.2 was not parted with the accommodation as sub-tenant. The plaintiff was having 5 other accommodations in which other tenants were in possession. The plaintiff's son Anil Kumar was also running business. On these grounds the suit was contested.

6. The trial Court framed issues and after recording evidence on 12.11.1999 arrived at following findings :-

(i) That the appellant was in arrears of rent and had not paid rent to the landlord inspite of demand notice.

(ii) That the appellant failed to comply with section 13 of the Act by not depositing rent regularly month to month.

7. That against the judgment and decree dated 12.11.1999 the appellant preferred an appeal before the 11th Additional District Judge, Jabalpur which was registered as Civil Appeal No.96-A/1999, who by judgment and decree dated 6.12.2000 remanded the case to the trial Court. The trial Court as per the direction of appellate Court permitted appellant to amend the written statement, again proceeded with the trial and by judgment and decree dated 3.8.2001 decreed the suit of plaintiff/respondent with the findings that suit accommodation was bonafide required by the landlord for starting business of hotel for his son Anil Kumar, for which he was not having any other accommodation in the township of Jabalpur.

8. Against the judgment and decree the appellant preferred First Appeal No.6-A/2002. The appellate Court after hearing both the parties re-appreciated the evidence and arrived at following findings :-

(I) That the suit accommodation was required by the landlord for his major son Anil Kumar Gupta.

(II) That Anil Kumar Gupta was not having any other business in the township of Jabalpur. The suit was filed on 8.12.1997 on which date Anil Kumar Gupta was sitting alongwith his father who was carrying on his hotel business in a tenanted accommodation.

(III) The appellate Court also considered the application filed by appellant under Order 6 Rule 17 C.P.C., in para 16 of the judgment and found that alleged shop was purchased by Rajesh Gupta from Dilip Kumar Sahu. The registered sale deed was also produced before the appellate Court which reflects that infact Rajesh Kumar Gupta purchased the property. In the suit shop Rajesh Kumar Gupta had commenced his business of hotel and in this regard he also obtained permission for hotel business from Municipal Corporation and the licence was also in the name of Rajesh Kumar Gupta. The appellate Court considering the aforesaid found that proposed amendment was not necessary for the decision of the case and rejected it.

(IV) So far as deposit of rent by the appellant before the trial Court is concerned, the appellate Court in para 19 to 22 considered this aspect and found in para 19 that there were several defaults on the part of appellant, who had not deposited rent as required under section 13(1) of the Act. Till the decision by the trial Court no application was filed

seeking condonation of delay. After the remand the application was filed, but because of limited remand by the appellate Court who directed the trial Court to decide issue no.4 alone the application was rightly rejected. The appellate Court considered the application on merits in para 22 of the judgment found that no document in support of this contention was filed by the appellant and rejected the prayer. In para 19 of the judgment the appellate Court found that defaults were continuing since the date of filing of suit till 2000, when initially the suit was decreed. The applicant's application was not found on merit and relying on the judgment of *Jamnial & others Vs. Radheshyam* [2000(2) MPLJ 385] and *Sayeda Akhtar Vs. Abdul Ahad* (AIR 2003 SC 2985) found that there were more than 1 defaults by the appellant and such conduct of appellant cannot be condoned by allowing the aforesaid application and rejected the prayer. The appellate Court considered the evidence in respect of grounds enumerated in 12(1)(b) of the Act in para 23 to 29 of the judgment and found that when the shop was let out to the appellant he was carrying on his electrical goods business, but thereafter the shop was sub let to Naseer, who was carrying on his Chappal business. The appellate Court also considered the contention of the appellant that infact the appellant was carrying on his Chappal business, but found that no document in this regard was filed by the appellant before the trial Court, while the appellant had admitted existence of various documents in this regard. The appellate Court also found a glaring fact that alongwith Naseer, his son was also sitting in the shop and the shop was infact in possession of Naseer, who was running Chappal business in the shop. The appellate Court in para 28 of the judgment also considered that appellant failed to explain when he closed electrical goods business and started Chappal business, which was a material fact which ought to have been proved. The appellate Court drawing adverse inference against the appellant for non-production of registration of the shop, purchase and sale bills, account of shop, sale tax registration, Municipal Corporation registration arrived at a finding that the shop was sub-let to Naseer who was running his business and infact the appellant was not running the business. On these grounds the decree under section 12(1)(b) of the Act was affirmed.

(V) So far as bonafide necessity for the business of son of plaintiff Anil Kumar is concerned, the appellate Court reconsidering the entire evidence and recorded finding that in para 12 to 18 of the judgment that the suit shop was required bonafide by the landlord for starting business of hotel of his son Anil Kumar Gupta and affirmed the finding of trial Court.

9. Though the appellant has assailed the aforesaid findings, but the fact remains

that when a suit for eviction was filed on the ground of arrears of rent it was the duty of appellant to deposit the rent as required under section 13(1) of the Act. If there were default on the part of appellant, appellant ought to have filed application forthwith before the trial Court explaining the circumstances in which appellant could not deposit the rent. But till the decision by the trial Court on 12.11.1999 no such application was filed and for the first time before the appellate Court such application was filed. The appellant ought to have explained each and every default by filing affidavit and documents in support of his contention, but no such recourse was taken by the appellant. Though some document in respect of treatment of Sonu Suresh Jawa are available in the file, but the aforesaid document does not co-relate with the period of default in which appellant failed to deposit monthly rent before the trial Court. Apart from this such prayer was made belatedly before the appellate Court. Appellant was contesting a suit under section 12(1)(a) of the Act and ought to have remained vigilant in depositing the rent. When the sword was hanging on the appellant of eviction some diligence was required from the appellant.

10. The Apex Court in *Sayed Akhtar (supra) and Jamnalal and others Vs. Radheshyam* [(2000) 4 SCC 380] considering the provisions of section 13(1) of the Act held that such application ought to have been filed immediately and any such application which suffers from delay or laches was not entertainable. In these circumstances, if the appellant had failed to file such an application promptly before the trial Court, the Court below rightly rejected the aforesaid application, in which no fault is found. So far as sub-tenancy is concerned, the Court below considered the evidence minutely and appellate Court in this regard has re-appreciated the evidence and recorded finding in para 23 to 31 of the judgment, in which no error is found. In absence of any error or perversity, such finding of fact cannot be interfered in second appeal.

11. So far as bonafide necessity of landlord for the business of Arun Kumar is concerned the appellant has given much emphasis on consideration of application under Order 6 Rule 17 C.P.C., before the appellate Court, alleging that the aforesaid application was not properly considered and wrongly rejected on merits. The aforesaid contention also has no substance. The appellant sought amendment in the written statement alleging certain allegations and to consider the application it was necessary on the part of appellate Court to look into the averments made in the application. Merely an application was filed alleging certain facts against the landlord by itself was not sufficient to set aside the judgment and decree of the trial Court and to remand the case. From the perusal of facts stated by the appellant and reply filed by respondents, if the appellate Court arrived at a finding that application was frivolous and the grounds stated in the amendment application needs not to be enquired into, the appellate Court was right in considering the averments of application and rejecting it. When a decree of eviction was passed against the appellant and even after initial remand the findings were confirmed, the appellate Court rightly observed the aforesaid precaution that unnecessary

remand is not made. In these circumstances, if the appellate Court after considering the sale deed and license which was issued by the Municipal Corporation found that the aforesaid application was without merit and rejected it, no fault is found. The shop was purchased by Rajesh Kumar Gupta by registered sale deed in which he was carrying on hotel business after obtaining licence from Municipal Corporation, these facts supported by the documents were sufficient to reject the application, in which no error is found.

12. In the result, this appeal is found without merit and does not involve any substantial question of law for consideration of this Court. This appeal is accordingly dismissed at admission stage, with no order as to costs.

Appeal dismissed.

**I.L.R. [2008] M. P., 2394
APPELLATE CRIMINAL**

Before Mr. Justice A.K. Shrivastava & Mr. Justice S.C. Sinho

15 January, 2008*

GUDDA @ RAHO @ GAJDHAR

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 302, Criminal Procedure Code, 1973, Section 374(2) - Circumstantial Evidence - Appellant convicted for offence punishable u/s 302 IPC, on the basis of circumstantial evidence - Held - Dead body of the deceased recovered from the appellant's house and recovery of Mangalsutra at his instance also proved - These two strongest circumstances coupled with suspicious conduct of the appellant, unerringly point out the guilt towards the appellant and if circumstances are taken into consideration cumulatively, forms a complete chain and there is no escape of appellant from any corner - Appeal dismissed. (Para 26)

दण्ड संहिता (1860 का 45), धारा 302, दण्ड प्रक्रिया संहिता, 1973, धारा 374(2) - परिस्थितिजन्य साक्ष्य - अपीलार्थी परिस्थितिजन्य साक्ष्य के आधार पर भा.द.सं. की धारा 302 के अन्तर्गत दण्डनीय अपराध के लिए दोषसिद्ध - अभिनिर्धारित - मृतक का शव अपीलार्थी के घर से बरामद और उसकी प्रेरणा पर मंगलसूत्र की बरामदगी भी साबित - ये दो प्रबल परिस्थितियाँ अपीलार्थी के शंकास्पद आचरण के साथ मिलकर अचूक रूप से अपीलार्थी की ओर दोष के संबंध में बताती हैं और यदि परिस्थितियों को समग्र रूप से विचार में लिया जाता है, तो एक पूर्ण श्रृंखला बनाती हैं और अपीलार्थी की किसी भी कोण से बचने की संभावना नहीं है - अपील खारिज।

Cases referred :

(1994) 5 SCC 152, (2004) 10 SCC 786, AIR 2000 SC 3475.

Satish Shrivastava, for the appellant.

T.K. Modh, Dy.A.G., for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by A.K. SHRIVASTAVA, J. :-Feeling aggrieved by the judgment of conviction and order of sentence dated 7/2/1997 passed by learned Additional Sessions Judge, Mandla in Sessions Trial No.56/96 convicting appellant for the offence punishable under Sections 302, IPC and sentencing him to suffer life imprisonment and fine of Rs.1,000/-, in default of payment of fine further RI of four months, this appeal has been preferred by the appellant under Section 374 (2), Code of Criminal Procedure, 1973.

2. In brief, the case of prosecution is that Suniya Bai (hereinafter referred to as 'the deceased') got married to one Gopal several years prior to the date of incident. After the marriage, deceased and her husband Gopal were residing in village Maharajpur. Appellant is also residing in the same village. It is said that illicit relations between appellant and the deceased started developing, as a result of which for several times altercation took place between the deceased and her husband. Thereafter husband of the deceased namely Gopal migrated to village Anjaniya and started living there. However, deceased was residing in the house of her parents in village Maharajpur.

3. It is the further case of prosecution that appellant was restraining and was not allowing the deceased to go and to live in the company of her husband Gopal in village Anjaniya and was giving threat to her that in case she would go to village Anjaniya and live with her husband, she may face dire consequences.

4. Prior to the date of incident (incident took place on 25/1/1996), Gopal, husband of the deceased, came to village Maharajpur and stayed there for some days. Thereafter, deceased gave her consent and was ready to go with her husband and it was settled between them that on 28th January, 1996 both of them will go to village Anjaniya. Thereafter husband of the deceased Gopal went back to his village Anjaniya. This fact any how came into the knowledge of appellant.

5. On the fateful day i.e. 25/1/1996, the deceased in the afternoon by saying that she is going to Mandla came out from her house and proceeded for Mandla. Since she happened to knit the sweater, as a result of which she did go to the house of Sushila Bai. Thereafter on the way appellant met and forcibly took her in his house and killed her by throttling her neck. The dead body of the deceased was kept in his house and the *Mangalsutra* which she was wearing, was carried away by the appellant and was kept in the house of her sister Savita Bai. According to the prosecution, there is extra judicial confession on the part of appellant which he made before his mother Kamla Bai and one Narmada Prasad. The mother of appellant namely Kamla Bai along with Sumarulal saw the dead body of the deceased and thereafter went to lodge the report to the Police Station where Marg report was registered. The factum of the death of the deceased was also intimated to her parents, as a result of which they also arrived at the spot and

saw the dead body and also saw the injuries on the neck of the deceased. It is said that *Mangalsutra* was purchased by the father of the deceased and the deceased happened to wear the same but the same was missing from her neck.

6. The investigating agency after completion of the investigation submitted a charge sheet in the committal Court which, on its turn, committed the case to the Court of Session and from where it was received by the trial Court for trial.

7. Learned trial Judge, on the basis of the averments made in the charge sheet, framed charge punishable under Section 302, IPC against present appellant which he denied and requested for trial.

8. In order to prove the charge prosecution examined as many as thirteen witnesses and placed Ex.P/1 to P/17, the documents on record. The defence of accused is of maladroitness and the same defence he set forth in his statement recorded under Section 313, Cr.P.C. However in support of his defence, he did not choose to examine any witness.

9. Learned trial Judge, after appreciating and marshalling the evidence, came to hold that appellant did commit the offence for which he was charged and, eventually, convicted him and passed the sentence which we have mentioned herein above.

10. In this manner, present appeal has been filed by the appellant assailing his judgment of conviction and order of sentence.

11. The contention of Shri Satish Shrivastava, learned counsel for the appellant, is that there is no direct evidence in the present case and the prosecution has based its case solely on the circumstantial evidence. According to learned counsel, if the case is based on circumstantial evidence, the law in that regard is well settled that the prosecution is obliged to collect each and every relevant piece of evidence in order to form a complete chain unerringly pointing out the guilt towards the accused. The contention of learned counsel is that in the present case there is no clinching evidence and the links are not so well connected in order to form a complete chain, therefore, learned trial Court erred in convicting the appellant. It has also been put forth by him that the dead body is said to have been seized from the house of appellant's mother namely Kamlā Bai but there is no evidence in order to hold that appellant was living with his mother. It has also been argued by him that prosecution has not taken pains to collect the evidence of last seen which could have been very material piece of evidence. The alleged recovery of *Mangalsutra*, at the instance of appellant, is also not proved and, therefore, since there is no evidence against the appellant and the evidence so collected by the prosecution does not form a complete chain in order to point out the guilt towards the appellant, therefore, this appeal be allowed by acquitting the appellant.

12. On the other hand, Shri T.K. Modh, Dy. Advocate General, argued in support of the impugned judgment

13. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be dismissed.

14. Since prosecution has based its case solely on circumstantial evidence, therefore, prosecution is obliged to produce all the relevant piece of evidence forming a complete chain unerringly pointing out the guilt towards appellant. Since the case is based on circumstantial evidence, we shall now examine the testimony of each and every witnesses one by one.

15. P.W.1-Parmulal is the father of the deceased. This witness has stated that deceased got married to Gopal. Thereafter, Gopal migrated to village Anjaniya and the deceased started earning the money by knitting the clothes and was living in village Maharajpur along with her parents. According to this witness, when he was informed that her daughter has been murdered and mother of the appellant has lodged the report that the dead body is lying in her house, he went to Police Station, Samaru and thereafter along with police persons came to the house of appellant where he found the dead body of the deceased and there was a ligature mark on her neck. This witness has also proved Panchnama of the dead body Ex.P/1 and stated that the same has been prepared in his presence and it bears his signatures. In the cross-examination, he has stated that when he saw the dead body of the deceased, he did not find *Mangalsutra* in the neck. He has further stated in his cross-examination that in the room where the dead body was lying, nearby to it there is *Balwadi*. Further in para-10 of his cross-examination, this witness has stated that on 14/1/1996 on the occasion of *Sankranti* festival his son-in-law Gopal came to his house and compromised with the deceased and it was settled between them that the deceased will go to village Anjaniya where his son-in-law Gopal resides. The suggestion put to him that appellant purchased the *Mangalsutra*, has been firmly denied by this witness. On scanning the evidence of this witness, nothing has been carved out in order to hold that this witness is a liar and his evidence is not worth reliable. On the contrary his evidence is found to be clear, cogent and trustworthy. This witness was cross-examined at length but he remained embedded in his version despite there being a roving cross-examination over him. Unerringly the inference which could be drawn from his testimony is that the dead body of the deceased was found in the house of appellant. We do not find any merit in the contention of learned counsel that the house in which the dead body of the deceased was found is of appellant is not proved, as that house is of his mother and there is no evidence that appellant was residing with her mother. In para-4 of his testimony, it has been specifically stated by him that when he went to the house of the appellant, he found the dead body there. In this para the word accused has been used by this witness which would mean that the house where the dead body was found was of appellant. No suggestion is put to this witness that appellant is not residing in that house and is residing at some other place. Hence, it is proved that the dead body of the deceased was found in the house of appellant.

16. P.W.2-Asha Chelani is the lady who was assigning the work of knit to the deceased. Though this witness is a hostile witness but it has been stated by her that on the fateful day i.e. 25/1/1996 in the afternoon deceased came to her house in between 3 to 3.30 p.m. This has also come in her cross-examination that the dead body of the deceased was found in the house of Kamla Bai who is mother of appellant. Thus, from the testimony of this witness, it is proved that the deceased was seen alive on the fateful day in between 3 to 3.30 p.m. and her dead body was found in the house of Kamla Bai who is the mother of appellant.

17. P.W.3-Sumarulal is the another important witness who has said that on the fateful day when he was going to evacuate and reached nearby the house of Kamla Bai (mother of appellant), she asked this witness to open the door and to see inside the room. Thereafter this witness opened the door and saw the legs of a lady, as a result of which he told Kamla Bai to report the matter in the Police Station. Thereafter this witness as well as Kamla Bai went to lodge the report and came back along with police persons to the place of occurrence. This witness has further stated that police persons opened the door and found the dead body of the deceased inside the room. This witness has also proved the first information report Ex.P/4 lodged by him. Thus, from the statement of this witness also it is proved that the dead body of the deceased was found in the house of appellant.

18. P.W.4-Champa Bai is the mother of the deceased and is neighbour of appellant. According to this witness, dead body of the deceased was found in the house of appellant but *Mangalsutra*; was missing from her neck. She has specifically stated that *Mangalsutra* was purchased by her and was given to the deceased. In para-6 of her statement, she has specifically stated that there was a ligature mark on the neck of the deceased. This witness thereafter concealed the factum of illicit relations between appellant and deceased, as a result of which she was declared hostile on that point. However, in cross-examination by the Public Prosecutor, this witness specifically stated that 3-4 days prior to the date of incident, appellant came to her house and gave threat to the deceased that she should not go to village Anjaniya otherwise she would be murdered. This witness was also confronted by her case diary statement Ex.P/6 in which we find that it was so stated. Thus, from the testimony of this witness, it is proved that appellant came 3-4 days prior to the incident and gave threat to the deceased not to go to village Anjaniya, otherwise she would be murdered. The presence of ligature mark on the neck of the deceased has also been proved by this witness.

19. P.W.5-Savita Bai is the sister of the appellant and is a hostile witness and has denied that police arrived at Jabalpur at her house and seized *Mangalsutra*.

20. P.W.6-Narmada Prasad, P.W.7-Sushila Bai, P.W.8-Mahendra and P.W.10-Baba @ Munna are the hostile witnesses and have not supported the case of prosecution.

21. P.W.9-Gopal is the husband of the deceased and has proved that deceased

told that appellant happened to threaten her that if she would go to village Anjaniya, she would be killed. This witness has also proved that deceased happened to wear *Mangalsutra*. Hence, the threat to kill the deceased by appellant is also proved from the evidence of this witness.

22. P.W.12- Dr.A.K. Shrivastava is the Autopsy Surgeon who, after conducting the post-mortem opined that the deceased died on account of asphyxia due to strangulation. This witness has proved his post-mortem report Ex.P/14. There is no effective cross-examination on the statement of Autopsy Surgeon. Thus, it is proved that deceased had died on account of asphyxia due to strangulation.

23. Last witness is P.W.13-K.B. Singh, S.I., who is the Investigating Officer. Apart from proving the other relevant documents, this witness has also proved the recovery of *Mangalsutra* Ex.P/11. On going through the statement of the investigating officer, we find that at the instance of memorandum statement of appellant Ex.P/12, *Mangalsutra* was seized vide Ex.P/11 which bears his signatures and the same was seized from the house of sister of appellant. Though there is specific averment of investigating officer in examination-in-chief in respect to the recovery of *Mangalsutra* at the instance of appellant from his sister's house, but no cross-examination was made on this material point on behalf of defence and, thus, recovery of *Mangalsutra* is also proved. Merely because P.W.10-Baba @ Munna and P.W.11- Abdul Jabbar who are witnesses of seizure memo of *Mangalsutra*, have turned hostile and have not proved the recovery of *Mangalsutra* from the house of appellant's sister, would not be a ground to hold that recovery of *Mangalsutra* cannot be proved from the statement of investigating officer P.W.13-K.B. Singh. The defence counsel has not put even a single question to investigating officer who had proved the recovery and, therefore, his testimony in respect to recovery remains unchallenged. It cannot be disputed and there is no law as such that recovery cannot be proved from the evidence of Investigating Officer. Thus, according to us, recovery of *Mangalsutra* at the instance of appellant is also proved.

24. For the reasons stated herein above, we find that following are the proved material circumstances forming a complete chain pointing out the guilt towards appellant, they are :

“(i) the dead body of the deceased was found from the house of appellant and this has been proved from the statement of P.W.1-Parmulal, P.W.2-Asha Chelani, P.W.3-Sumarulal and P.W.4-Champa Bai;

(ii) the deceased was found alive between 3 to 3.30 p.m. and this fact is proved from the statement of P.W.2-Asha Chelani;

(iii) prior to the date of incident when appellant came to know that the deceased is ready to go and would start living with her husband at village Anjaniya, he gave threat to her and this has been proved by P.W.4-Champa Bai and P.W.9-Gopal; and

(iv) there is recovery of *Mangalsutra* at the instance of appellant from the house of his sister and this has also been proved by the investigating officer P.W.13-K.B.Singh.

25. Apart from the above said strong circumstances unerringly pointing out the guilt towards appellant, there is one more incriminating circumstance that appellant soon after the incident was absconding from the village and ultimately he was found and was arrested on 28/1/1996 and, therefore, by the conduct of appellant also, which is also an important link and one of the important circumstance in order to hold that appellant has committed the offence. The Supreme Court in the case of *Sukhvinder Singh and others V. State of Punjab*, (1994) 5 SCC 152, has held that though the conduct of the accused by itself may not be of much consequence but when considered along with the other two circumstances, that is the disclosure statement suffered by the accused leading to the recovery of the dead body from his house on his pointing out, assumes much significance. The disclosure statement and recovery of the dead body are both highly incriminating circumstance and both the circumstances have not only been successfully established by the prosecution but they also connect definitely and positively the accused with the crime. There was no infirmity insofar as the evidence regarding the disclosure statement or the recovery of the dead body is concerned. Each one of these circumstances which has been established by the prosecution against the accused has been successfully proved. The chain of circumstances against the accused is so complete that it excludes the possibility of any hypothesis other than the one which is consistent only with the guilt of the accused and inconsistent with his innocence. All the circumstances from which the inferences have been drawn have been firmly established by the prosecution and have remained unchallenged in the cross-examination of the prosecution witnesses. All the circumstances relied upon by the prosecution against the accused definitely and unerringly point towards the guilt of accused appellant and taken cumulatively from a chain so complete that there is no escape from the conclusion that the crime was committed by the accused appellant and none else.

26. The decision of *Sukhvinder Singh* (supra) is squarely applicable in the present factual scenario because in the present case also the dead body was recovered from the house of appellant and the recovery of *Mangalsutra* at the instance of appellant is also proved. These two strongest circumstances coupled with the suspicious conduct of the appellant, unerringly point out the guilt toward the appellant and if these circumstances are taken into consideration cumulatively, forms a complete chain and there is no escape of appellant from any corner. Another decision on the point is *Usman Mian and others V. State of Bihar*, (2004) 10 SCC 786. In this case also the dead body of wife was found in the house of the husband and the husband wanted to hurriedly bury the dead body, in those circumstances also it was held that there are the strongest links in order to form a complete chain pointing out the guilt of accused. Yet there is another

decision on the point where the dead body of the deceased was found in the house of appellant it was held that this was one of the most reliable and strong circumstantial evidence pointing out the guilt towards the accused (see *Geetha V. State of Karnataka*, AIR 2000 SC 3475).

27. Judging from all the angles the above said strong circumstances, if connected together, form a complete chain unerringly pointing out the guilt towards the appellant.

28. We could not find any fault in the judgment of learned trial Court convicting the appellant under Section 302, IPC and, therefore, no option is left with us except to uphold the conviction by extending our stamp of approval to the reasonings assigned by learned trial Judge convicting the appellant under Section 302, IPC and passing the sentence.

29. Resultantly, this appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2401
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
 28 January, 2008*

NARAYAN & ors.

Vs.

STATE OF M.P.

... Appellants

... Respondent

A. Penal Code (45 of 1860), Section 97 - Right of private defence of property - Incident occurred in day time in the field of appellants - Appellants also suffered number of serious injuries - Held - Right of private defence of property occurred to appellants - Prosecution has not explained the injuries sustained by the appellants - Trial Court committed illegality by reading and considering the evidence of counter case - Conviction and sentence set-aside - Appeal allowed. (Para 9)

दण्ड संहिता (1860 का 45), धारा 97 - सम्पत्ति की प्राइवेट प्रतिरक्षा का अधिकार - घटना दिन के समय अपीलार्थियों के खेत में घटित हुई - अपीलार्थी भी कई गम्भीर क्षतियों से पीड़ित हुए - अभिनिर्धारित - सम्पत्ति की प्राइवेट प्रतिरक्षा का अधिकार अपीलार्थियों को प्राप्त - अभियोजन ने अपीलार्थियों को आई क्षतियों का स्पष्टीकरण नहीं दिया - विचारण न्यायालय ने प्रति-मामले की साक्ष्य पढ़कर और विचार में लेकर अवैधता कारित कीं - दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर।

B. Criminal Trial - Practice & Procedure - Counter case - The basic principle of criminal jurisprudence is that each case is to be decided on the basis of its own oral & documentary evidence adduced by either party and not extraneous material (i.e. evidence produced in counter case) can be taken into consideration. (Para 7)

ख. दण्डिक विचारण — पद्धति और प्रक्रिया. — प्रति-मामला — आपराधिक विधिशास्त्र का आधारभूत सिद्धांत है कि प्रत्येक मामले का विनिश्चय पक्षकारों द्वारा उसी मामले में प्रस्तुत मौखिक व दस्तावेजी साक्ष्य के आधार पर करना होता है और बाहरी सामग्री (अर्थात् प्रति-मामले में प्रस्तुत साक्ष्य) को विचार में नहीं लिया जा सकता।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 161 & 162, Evidence Act, 1872, Section 3 - *It is well settled that the contents of the spot map prepared by police at the instance of a witness would be considered as the statement of the witness recorded u/s 161 of the Code - Contents of the map can be used u/s 161 of the Code for impeaching the testimony of witness on whose instance it was prepared.* (Para 9)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 व 162, साक्ष्य अधिनियम, 1872, धारा 3 — यह सुस्थापित है कि पुलिस द्वारा किसी साक्षी के प्रेरण पर तैयार घटना स्थल के नक्शे की अन्तर्वस्तु संहिता की धारा 161 के अधीन अभिलिखित साक्षी के कथन के रूप में विचार में ली जाएगी — संहिता की धारा 161 के अधीन नक्शे की अन्तर्वस्तु, साक्षी जिसके प्रेरण पर वह तैयार किया गया था, के अभिसाक्ष्य को अधिक्षेपित करने के लिए प्रयुक्त की जा सकती है।

D. Spot Map - *Merely by exhibiting the map by I.O. - Its contents would not become admissible in evidence unless the witness on whose instance map was prepared has deposed this fact on oath.* (Para 9)

घ. घटना स्थल का नक्शा — केवल अनुसंधान अधिकारी द्वारा नक्शे को साक्ष्य में प्रदर्शित करना — इससे उसकी अन्तर्वस्तु साक्ष्य में ग्राह्य नहीं हो जाती जब तक कि साक्षी, जिसके प्रेरण पर नक्शा तैयार किया गया, इस तथ्य का शपथ पर बयान न दे देवे।

Case referred :

AIR 1975 SC 149.

Ashish, 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, by preferring this appeal, have challenged their conviction under sections 341, 323 and 325 read with section 34 of the Indian Penal Code and sentences passed by the learned Addl. Sessions Judge, West Nimar Mandleshwar by judgment dated 14.03.95 in S. No. 121/93 thereby sentencing each of the appellants to pay a fine of Rs. 200/-, in default of payment of fine to suffer S.I. for ten days, fine of Rs. 300/-, in default of payment of fine to suffer S.I. for three months and R.I. for four years with fine of Rs. 500/-, in default of payment of fine to suffer additional S.I. for six months, respectively.

2. The prosecution case as unfurled before the trial Court is that on 13.09.92 in the evening at 4.05 PM the complainant PW-2 Gabru and his brother PW-3 Pratap were returning back in a bullock cart from their field and when they were passing through the field of appellant No. 1 Narayan who was sitting there, met them. Naarayan objected to their taking of the bullock cart and abused them.

Appellant Narayan dealt a blow from blunt side of axe on the head of Gabru and he was caught by appellants Bhuwaniram and Rewaram. The fourth accused Rameshwar caught Pratap (PW-3) and he was also belaboured. The incident was reported by PW-2 Gabru vide First Information Report Ex.P/1. On the basis of this report, Crime No. 293 of 1992 for commission of offence punishable under sections 341, 294 and 323 read with section 34 of the Indian Penal Code was registered against the appellants. The Police took up investigation and sent Gabru and Pratap for medical examination. From complainant Gabru a broken pesticide spray machine was seized vide seizure memo Ex. P/4. Ex. P/6, memorandum of damage of property of the complainant was prepared and his Baniyan was also seized through seizure memo Ex.P/5. Spot map Ex. P/7 was prepared by the Investigating Officer PW-4 Nawaz Khan Head Constable at the instance of one Lakhan. The appellants were arrested and from the possession of appellant Narayan one axe was seized vide seizure memo Ex.P/12. PW-9 Dr S.K. Rawat medically examined complainant PW-2 Gabru and injured witness PW-3 Pratap. Their medical reports are Ex. P/16 and P/17. After completion of investigation, the appellants were charge-sheeted for commission of offences punishable under sections 323, 325, 341 and 427 read with section 34 of the Indian Penal Code.

3. The appellants denied the charges and pleaded innocence. They have examined DW-1 Shambhu in defence who also sustained injuries in the same incident. The prosecution, in order to establish its case, examined as many as nine witnesses and adduced in total 17 documents. Learned trial Court, finding the appellants guilty, convicted and sentenced them as indicated herein-above.

4. Learned counsel for the appellants has submitted that the incident occurred in the field of the appellants which is clear from the First Information Report Ex.P/1 and the prosecution witnesses have not explained the injuries sustained by all the three appellants as well as DW-1 Shambhu in the same incident for which the report Ex. D/1 was lodged by appellant Narayan recorded by PW-1 Sub Inspector PW-1 H. Ohariya. The medical reports of the appellants and defence witness Shambhu have been proved by PW-9 Dr Rawat. Learned counsel has also submitted that trial Court has committed grave error of law while appreciating the evidence of the prosecution witnesses in the instant case while taken into consideration the statements of the witnesses examined in the counter case against the complainant party vide Crime No. 292/92 for commission of offence punishable under section 307 read with section 34 of the Indian Penal Code in Sessions Trial No. 9/93.

5. On the other hand, learned counsel appearing for the State has supported the impugned judgment and finding passed by the learned trial Court.

6. Having heard learned counsel for the parties and after perusing the entire record, this Court is of the opinion that the learned trial Court has committed

serious illegality by reading and considering the evidence adduced by the prosecution in the counter case vide Sessions Trial No. 9/93 against the complainant party (Gabru, Pratap and Babulal). Learned trial Court, in para 8 has specifically mentioned that the complainant of the instant case i. e. Gabru ((PW-2), Pratap, the injured were prosecuted in Sessions Trial No. 9/93 along with third accused Babulal for causing injuries to the appellants and one Shambhu, examined as DW-1. Learned trial Court has also mentioned some facts of the prosecution case of the counter case. Again in para 16, while appreciating the evidence of the defence witness DW-1 Shambhu who was an injured eye witness in counter case, the trial Court has taken into consideration his statement given in the counter case and disbelieved his testimony. In para 16, learned trial Court has considered in detail the evidence of the prosecution witnesses in the counter case and compared the statements regarding individual overt act, place of incident, and weapon of offence etc. Again in para 21, the trial Court has mentioned that in S.T. No. 9/93, the trial Court came to the conclusion that the appellants were the aggressors and caused injuries to the complainant PW-2 Gabru and PW-3 Pratap and gave finding that they acted in right of private defence of person and there were no embellishment or contradictions in their statements for disbelieving their testimony.

7. Consideration of evidence recorded in the counter case as well as the finding given while passing the impugned judgment, the learned trial Court has failed to keep in mind the basic principles of criminal jurisprudence that each case is to be decided on the basis of its own oral and documentary evidence adduced by either party and no extraneous material can be taken into consideration. This Court can usefully refer herein the Supreme Court judgment passed in the case of *Mitthulal and another V/s State of M.P* (AIR 1975 SC 149). wherein in para 4, it has been laid down thus:-

“It is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case, though it may be a cross-case cannot be taken into account in arriving at the decision. Even in civil cases this cannot be done unless the parties are agreed that the evidence in one case may be treated as evidence in the other. Much more so in criminal cases would this be impermissible. It is doubtful whether the evidence recorded in one criminal case can be treated as evidence in the other even with the consent of the accused. Decision of Madhya Pradesh High Court reversed.”

8. Apart from the aforementioned grave illegality, the learned trial Court has also failed to consider that both the prosecution witnesses PW-2 Gabru and PW-3 Pratap have failed to explain the injuries sustained by the three appellants in the same incident as well as the defence witness DW-1 Shambhu for which, the complainant party was prosecuted for the offence punishable under section 307 read with section 34 of the Indian Penal Code and their injury reports Ex. D/12-C,

D/13-C, D/14-C and P/15-C have been proved by the prosecution witness PW-9 Dr S.K. Rawat. Dr Rawat also found that all these four persons had sustained ten injuries on different parts of the body including head, chest, and rib area etc. All the injuries were caused by hard and blunt object and the injuries were contusions, lacerated wounds and abrasions.

9. PW-8 Dr T.H. Malik proved the Bed Head Ticket Ex. D/11 of appellant Rewaram and found clinically fractures of 7th and 8th ribs of left chest. PW-7 Dr J.D. Gupta has proved the X-Ray report Ex. D/9-C of Rewaram and found fracture of skull bone. Ordinarily non-explanation of injuries on the persons of the accused itself would not be sufficient to discard the whole prosecution case as well as the eye witnesses' account. But in the instant case having regard to the number and nature of injuries, day time of the incident and the incident occurred according to the prosecution case itself in the field of the appellants, when complainant Gabru along with his brother was taking bullock cart from the field of Narayan, the appellants had accrued the right of private defence of property. Under these circumstances witnesses must explain the injuries sustained by the accused persons. The appellants were also having right of private defence of property. Though the Investigating Officer Nawaz Khan (PW-4) has stated in para 3 of his examination-in-chief that he prepared the spot map Ex.P/7 at the instance of one Lakhan s/o Ranchhor, but the prosecution has not examined this witness. It is well settled legal position that the contents of the spot map prepared by police at the instance of a witness would be considered as the statement of the witness recorded under section 161 of the Code of Criminal Procedure and merely by exhibiting the map by the Investigating Officer, its contents would not become admissible in evidence. The use of the contents of the map can be as per provision under section 162 of the Code of Criminal Procedure for impeaching the testimony of witness Lakhan.

10. In view of the foregoing discussion, this Court is of the firm view that the impugned judgment of conviction and sentence of the appellants is not sustainable and the same is liable to be and is hereby set aside.

11. Resultantly this appeal succeeds and is hereby allowed. The conviction and sentences of the appellants as passed by the learned trial Court are hereby set aside. They are acquitted from the charges levelled against them. The appellants are on bail. Their bail and surety bonds stand discharged. Office is directed to send a copy of this judgment to the trial Court along with its record in due course.

Appeal allowed.

I.L.R. [2008] M. P., 2406
APPELLATE CRIMINAL
Before Mr. Justice A.P. Shrivastava
 28 February, 2008*

SUNEEL

... Appellant

Vs.**STATE OF M.P.**

... Respondent

Penal Code (45 of 1860), Section 376(2)(f) - Punishment for committing rape on a woman when she is under twelve years of age - Appellant sentenced to 10 year rigorous imprisonment and a fine of Rs.5000/- with default stipulation for committing rape on a minor girl of eight years of age - In appeal prayed for leniency in awarding the sentence - Held - The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern policy reflects a combination of several or all of these aims - No 'adequate and special reasons' appears to reduce the sentence - Rape is a heinous crime and against the society and a deterrent punishment is required to weed it out - Appeal dismissed. (Paras 8 & 9)

दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) - किसी स्त्री से जो बारह वर्ष से कम आयु की है, बलात्संग करने के लिए दण्ड - अपीलार्थी आठ वर्ष की अवयस्क बालिका से बलात्संग करने के लिए दस वर्ष के सश्रम कारावास और व्यक्तिगत अनुबंध के साथ 5000/- रुपये के जुर्माने से दण्डादिष्ट - अपील में दण्डादेश देने में नरमी के लिए प्रार्थना की गई - अभिनिर्धारित - अब दण्ड के उद्देश्य प्रतिकार, न्याय, निवारण, सुधार और संरक्षण विचारित किये जाते हैं और आधुनिक नीति इन उद्देश्यों के कई या सभी के संयोजन को प्रतिबिम्बित करती है - दण्डादेश को कम करने के लिए कोई 'पर्याप्त और विशेष कारण' प्रकट नहीं होते - बलात्संग एक जघन्य और समाज के विरुद्ध अपराध है और उसे बाहर उखाड़ने के लिए एक निवारक दण्ड अपेक्षित है - अपील खारिज।

Cases referred :

AIR 2000 SC 1920, AIR 2006 SC 1267, ILR (2008) MP 6, 1990 JLJ 734.

O.P. Mathur, for the appellant.

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

J U D G E M E N T

A.P. SHRIVASTAVA, J.:-This appeal is directed against the judgment of conviction and sentence dated 15.05.02 passed by the Additional Sessions Judge, Lahar, Dist. Bhind in ST No.03/01 by which the appellant has been convicted under section 376 of IPC and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.5,000/-with default stipulation. He has further been convicted under section 323 of IPC and sentenced to undergo rigorous imprisonment for six months.

2. The story of the prosecution, in short, is that on 23.10.2000 at about 11:00 am,

*Cr.A. No.308/2002 (Gwalior)

when the prosecutrix [minor girl of about eight years of age] went to pick up dung, the appellant came there, took the prosecutrix to the nearby bushes ("Beshram ki Jhadi"), threatened her, removed her undergarments and committed sexual intercourse with her. On hearing her cries, her mother Munni Devi and uncle Rajesh came there rescued her from the appellant. On this the appellant started beating the mother of the complainant/prosecutrix. At that time, Suresh [co-accused], who is the brother of the appellant, came there and he beat both Rajesh and the prosecutrix and ran away alongwith the appellant from there. The report was lodged at police station. The prosecutrix was sent for medical examination. Clothes and slides were seized by the police during investigation. After investigation, charge sheet was filed and the trial court after conclusion of trial found the appellant guilty as stated in para one of this judgment. While the co-accused Suresh has been convicted and sentenced under section 323 of IPC but the present appeal has been filed by only appellant Suneel.

3. Learned counsel for the appellant has not challenged the finding of conviction of the appellant but regarding sentence it is submitted that at the time of incident the age of the appellant was about 18 years and he has remained in custody for more than seven years, therefore, he prayed for leniency in awarding the sentence and also prayed for undergone sentence.

4. In this case, the trial court found the age of the prosecutrix as eight years. Therefore clause (f) of sub-section (2) of Section 376 of IPC would be applicable which reads as follows:

Clause (f) of sub-section 2 of Section 376 of IPC lays down that-

"Whoever, commits rape on a woman when she is under twelve years of age, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

5. It is a settled view that punishment should always be awarded in accordance with the crime committed by the offender and the gravity of the offence. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal."

6. The Apex Court in the case of *Dinesh @ Buddha v. State of Rajasthan*

reported in AIR 2006 SC 1267 has held that the physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.

7. In *Kamal Kishore Vs. State of Himachal Pradesh* AIR 2000 SC 1920, it was observed by the Apex Court that only in very very exceptional situations and extremely rare contingencies, the less than the minimum sentence should be awarded. In this regard, it is observed that there should be "adequate and special reasons" and the other is that such reasons should be mentioned in the judgment. The expression "adequate and special reasons" indicates that it is not enough to have special reasons; nor adequate reasons disjunctively. There should be a conjunction of both for enabling the Court to invoke the discretion. It is also held that sentence -Imposition of less than minimum sentence -Special reason -Reason that occurrence took place 10 years ago and accused might have settled in life - Not special reason -Such reasons can be noticed in many other cases -Reason that victim has since married and has settled in life whereas accused could not marry because of disrepute - Also not special reason.

8. Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. ILR (2008) MP, 6 *State of M.P. Vs. Babulal*.

9. The learned trial court has awarded the minimum sentence as prescribed under the relevant law. No 'adequate and special reasons' appear to reduce the sentence of appellant/accused. Rape is a heinous crime. It is against the society and a deterrent punishment is required to weed it out. Hence, the conviction and sentence as recorded by the learned trial Court is affirmed. The appellant shall be given the benefit of Section 428 of Cr.P.C.

10. In the result, this appeal fails and is hereby dismissed. A copy of this judgment be sent to the trial court for necessary action.

Appeal dismissed.

I.L.R. [2008] M. P., 2409
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
 7 March, 2008*

AJAY KUMAR NOTWANI

... Appellant

Vs.

STATE OF M.P.

... Respondent

Explosive Substances Act (6 of 1908), Section 3 - *Appellant was convicted for all of sudden hurled a country made bomb at his father - Bomb ultimately landed on a wall - Explosion resulted into injuries in father's scapular region - Conviction challenged in appeal - Held - Evidence of parents of appellant suffered from serious infirmities about the bomb had exploded at the wall - Chemical examiner indicated presence of pellets in the remnants whereas no pellet injury was found on body of appellant's father - Forensic & medical evidence also not corroborate the prosecution version - Appellant entitled to benefit of doubt - Appeal allowed.* (Paras 11 & 12)

विस्फोटक पदार्थ अधिनियम (1908 का 6), धारा 3 - अपीलार्थी को उसके पिता पर अचानक देशी बम जोर से फेंकने के लिए दोषसिद्ध किया गया - बम अंततः एक दीवार पर गिरा - विस्फोट के परिणामस्वरूप पिता के कंधे पर क्षतियाँ आई - दोषसिद्धि को अपील में चुनौती दी - अभिनिर्धारित - अपीलार्थी के माता-पिता के साक्ष्य में बम से दीवार पर विस्फोट हुआ इस बारे में गम्भीर विसंगतियाँ - रासायनिक परीक्षक ने अवशेष में छरों की उपस्थिति इंगित की जबकि अपीलार्थी के पिता के शरीर पर छरों की कोई क्षति नहीं पायी गई - न्यायालयीन (फॉरेंसिक) और चिकित्सकीय साक्ष्य भी अभियोजन की कथा की पुष्टि नहीं करते - अपीलार्थी संदेह का लाम पाने का हकदार - अपील मंजूर।

Case referred :

1965 (1) CrLJ 160.

Chandrapal Singh, for the appellant.*Ramesh Shukla*, Dy.G.A., for the respondent/State.**J U D G M E N T**

R.C. MISHRA, J.:-This appeal has been preferred against the judgment dated 21/3/2006 passed by the IVth Additional Sessions Judge, Jabalpur in S.T.No.375/04, whereby the appellant was convicted and sentenced as under with the direction that the custodial sentences shall run concurrently :-

Convicted under Section	Sentenced
3 of the Explosive Substance Act, 1908 (for short 'the Act')	to undergo RI for 10 years and to pay fine of Rs.5000/-, and in default, to suffer RI for 5 months.
323 of the IPC	to undergo RI for 3 months.

2. However, during pendency of this appeal, pursuant to permission granted by this Court on 29/10/2007, complainant Hargovind (PW2), who is none other than the father of the appellant, has compounded the offence under Section 323 of the IPC. Consequently, he stands acquitted of the corresponding charge.
3. The prosecution story, in short, may be narrated as under :
 - (i) At the relevant point of time, the parents of the appellant namely Hargovind (PW2) and Rekha (PW5) were residing in a house bearing no.190 situated at Lalmati, Ghamapur, Jabalpur whereas the appellant was living with his wife separately in an adjacent house. Prior to the incident in question, the appellant had entered into a scuffle with his brother Ajay and the matter was reported by Hargovind to the police. This had led to bitterness in their relationship.
 - (ii) On 15/3/2004 at about 9:15 p.m., Hargovind (PW2) was busy in cutting of cloths for the purpose of stitching. At this point of time only, the appellant, all of a sudden, hurled a country made bomb at him but it ultimately landed on a wall. However, the consequent explosion resulted into injuries in Hargovind's scapular region
 - (iii) It was upon the FIR lodged by Hargovind that a case under Section 3 of the Act and Section 324 of the IPC was registered at P.S. Ghamapur against the appellant. He was sent to hospital where Dr. G.K. Agrawal examined him and found that the injury sustained by him was simple in nature.
 - (iv) During investigation, ASI S.K. Ojha (PW4) inspected the spot; seized the remnants of the bomb and forwarded the same to FSL, Sagar for chemical examination. The Chemical Examiner found that the articles were components of a country made bomb and the explosion was capable of endangering life.
 - (v) After obtaining necessary consent of the District Magistrate under Section 7 of the Act, charge-sheet was put up in the Court of JMFC, Jabalpur who committed the case to the Court of Session for trial.
4. On being charged with the offences punishable under Section 3 of the Act and Section 324 of the IPC, the appellant abjured the guilt. In examination, under Section 313 of the IPC, he pleaded false implication at the instance of his younger brother Jay Kumar due to animosity in view of dispute concerning property left by their grandfather.
5. To bring home the charges, the prosecution examined as many as five witnesses including complainant Hargovind and his wife Rekha. In defence, the appellant produced his wife Manisha (DW1) and two neighbours namely Jiyalal (DW2) and Suresh Kumar (DW3).
6. Upon consideration of the evidence on record and for the reasons assigned

in the judgment under challenge, the learned ASJ convicted and sentenced the appellant as indicated hereinabove.

7. Legality and propriety of the impugned conviction have been assailed mainly on the ground that the trial Court had not appreciated the prosecution evidence in a right perspective whereas the learned Dy. Govt. Advocate, while highlighting the fact that appellant's conviction is based on the evidence of his parents only, has contended that the view taken by learned trial Judge was the only possible view.

8. It is true that the prosecution case hinges on the evidence of parents of the appellant viz. Hargovind (PW2) and Rekha (PW5) but it suffers from the following material contradiction :-

(i) In his chief-examination, Hargovind (PW2) deposed that the bomb thrown by the appellant had rebounded from a wall but in the cross-examination, he clearly admitted that the bomb had struck the doors of the room wherein he was sitting whereas the fact that the bomb has hit the doors was specifically denied by his wife viz. Rekha (PW5) who also did not corroborate the prosecution version that the bomb had exploded at the wall.

(ii) As per statement of Hargovind, the bomb explosion had resulted into injury on the right buttock whereas Rekha was categorical in stating that the bomb had directly hit his right shoulder.

9. Both Hargovind and Rekha stressed that after hearing the explosion, people living in the vicinity had assembled at their house. However, none of them was examined as a witness of prosecution. On the other hand, Jiyalal (PW2), the next-door neighbour and Suresh Kumar (DW3), admittedly, residing in the house opposite stated categorically that no sound of any explosion was heard by them. They also substantiated the plea of defence by deposing that a dispute relating to partition of the ancestral property had given rise to animosity between the appellant and his father viz. Hargovind. The Investigating Officer S.L. Ojha (PW4), while admitting existence of such a dispute, failed to explain as to why no independent inhabitant of the locality was called to witness the seizure of remnants of the bomb. It is relevant to note that in the corresponding Seizure Memo (EX.P-4), complainant Hargovind and his wife Rekha were named as the panch witnesses.

10. In accordance with the corresponding recitals of FIR (Ex.P-2) recorded by him only, ASI S.K. Ojha (PW4) also asserted that the bomb thrown at the first informant viz. Hargovind had exploded upon hitting a wall. However, as pointed out already, this fact did not derive support from the evidence of Rekha and the relevant parts of the statement of Hargovind were also self-contradictory.

11. Although, the prosecution failed to examine Dr. G.K. Agrawal yet, it was fairly admitted by Investigating Officer S.K. Ojha (PW4) that no injury caused by

any explosive substance was noticed by the medical expert on the person of Hargovind. This apart, the report of chemical examiner (Ex.C-1) indicated presence of pellets in the remnants whereas, admittedly, no pellet injury was found on Hargovind's body. Moreover, in absence of any independent evidence as to the explosion, contents of the report reflecting existence of potassium chlorate and arsenic sulphide in the residues were not sufficient to establish that the nature of explosion or the mischief-making power of the bomb (*Nemai Adak vs. State* 1965(1) CRI.L.J. 160 referred to).

12. To sum up, on one hand, evidence of complainant Hargovind (PW2) and his wife Rekha (PW5) suffered from serious infirmities and, on the other, there was no corroborative, forensic and medical evidence on record to support their assertions against the appellant. The appellant, therefore, was entitled to benefit of doubt.

13. In the result, the appeal is allowed and the impugned conviction of the appellant for the offence punishable under Section 3 of the Act and consequent sentences are hereby set-aside. Instead, he is acquitted of the charge. The fine amount, if deposited, be refunded to the appellant.

14. The appellant Ajay Kumar is on bail. His bail bonds shall stand discharged.

Appeal allowed.

Appeal allowed.

I.L.R. [2008] M. P., 2412
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochhar
18 March, 2008*

PRAKASHCHAND

Vs.

SURESHCHAND

... Appellant

... Respondent

Negotiable Instruments Act (26 of 1881), Section 138 - *Dishonour of cheque* - Trial Court acquitted the accused on the ground that complainant had not filed postal receipt regarding sending of the notice by registered post and the acknowledgment was not bearing any postal seal and who received the notice was not clear - Intimation of dishonour of cheque was sent by the advocate of complainant, which was replied by the advocate of accused - Held - In Section 138 or anywhere in the enactment, mode of service of notice is not prescribed - Sending of reply is not disputed by the accused in the statement, therefore, the statutory requirement has been complied with - Impugned order of acquittal set-aside and accused found guilty u/s 138 of the Act - Appeal allowed. (Paras 5 to 9)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - चेक का अनादरण -

विचारण न्यायालय ने अभियुक्त को इस आधार पर दोषमुक्त किया कि परिवादी ने रजिस्टर्ड डाक से सूचनापत्र भेजने के संबंध में पोस्टल रसीद पेश नहीं की थी और पावती पर कोई पोस्टल सील अंकित नहीं थी और सूचनापत्र किसने प्राप्त किया, स्पष्ट नहीं था - चेक के अनादरण की सूचना परिवादी के अधिवक्ता द्वारा भेजी गई जिसका जवाब अभियुक्त के अधिवक्ता द्वारा दिया गया - अभिनिर्धारित - धारा 138 में अथवा अधिनियमिति में कहीं भी सूचनापत्र की तामील का तरीका विहित नहीं है - जवाब का भेजा जाना अभियुक्त द्वारा कथन में विवादित नहीं किया गया, इसलिए कानूनी आवश्यकता का अनुपालन किया जा चुका है - दोषमुक्ति का आक्षेपित आदेश अपास्त किया गया और अभियुक्त को अधिनियम की धारा 138 के अधीन दोषी पाया गया - अपील मंजूर।

Gangwal, for the appellant.

K.N. Vijayvergiya, for the respondent.

JUDGMENT (ORAL)

S.L. KOCHAR, J.:-Appellant has filed this appeal after grant of leave to file appeal by this Court against the impugned judgment dated 01/02/2000 passed in Criminal Case No. 484/1997 by the learned Judicial Magistrate First Class (Ku. Sunita Balo), Indore whereby acquitting the respondent Sureshchandra from the charge under Section 138 of the Negotiable Instrument Act (for short the Act).

2. The appellant filed the criminal complaint against the respondent alleging that he advanced loan of Rs.1,00,000/- (One Lac) to respondent on 12/10/1996 and respondent promised to repay the same within one month and issued a cheque of rupees one lakh dated 12/11/1996 bearing number 258954. On the same day, respondent also issued a receipt for taking loan amount from the appellant and given a cheque of State Bank of India, Industrial Estate Branch. The respondent issued a account payee cheque, but appellant wanted the money in cash on the same day, therefore, on his request respondent scored out the cross account payee and made of bearer. On 12/11/1996, appellant produced the cheque, which was returned back on the same day to the appellant/complainant with a remark, "refer to drawer". The account of the respondent was already closed in the year 1987. After receiving intimation from the Bank, appellant sent a notice dated 14/11/1996 to the respondent and respondent replied the same on 30/11/96. Since the respondent did not make the payment within 15 days, the appellant filed the complaint before the Trial Court.

3. Learned Trial Court registered the complaint under Section 138 of the Act and issued notice to the respondent.

4. After appearance of the respondent, the learned Trial Court read over the particulars of the charges which were denied by the respondent. Respondent in his statement recorded under Section 313 of the Criminal Procedure Code, has stated that he had no transaction with the appellant and he was not even knowing to him and falsely implicated. The respondent was put to trial. Appellant examined himself as well as witness PW-2 Vijayvergiya, Manager of the Bank and adduced in evidence original cheque Ex.P/1, receipt of one lac rupees and issuance of

cheque by the respondent Ex.P/2, intimation sent by the Bank to appellant Ex.P/3, acknowledgment of the notice Ex.P/4, carbon copy of the notice dated 14/11/99 Ex.P/5 and reply sent by the respondent dated 30/11/96 Ex.P/6. Respondent has not examined any witness in defence.

5. The learned Trial Court after hearing both the parties held that receipt (Hundi) Ex.P/2 was issued by the respondent and his signature were available at 'A to A' - 'B to B' portion and respondent has not adduced any evidence to establish that these were not his signatures, he could have examined handwriting expert in his defence. Therefore, the learned Trial Court has held that cheque Ex.P/1 was issued in favour of the appellant by the respondent and respondent also issued receipt Ex.P/2. The learned Trial Court has also held in paragraph-10 of the impugned judgment that the appellant/complainant gave cheque Ex.P/1 of rupees one lac to respondent/accused dated 12/11/96 and same was presented by the appellant to the concerned Bank. On the same day i.e. 12/11/96, same was returned with memo Ex.P/3 with a note "refer to drawer" since there was no sufficient fund in the account of the respondent. The learned Trial court, dismissed the complaint and acquitted the respondent on the ground that after receiving information of dishonour of the cheque from the Bank, notice was not served upon the respondent by the appellant as per provision under Section 138 of the Act. The learned Trial Court has held that appellant had not filed postal receipt regarding sending of notice by registered post dated 14/11/96. Acknowledgment Ex.P/5 was not bearing any postal seal and who received the notice is also not clear from the acknowledgment as well as acknowledgment is bearing the sender's name as Narendra Patodi and no such person was examined by the complainant. Therefore, the learned Trial Court held that the appellant failed to establish that he sent notice Ex.P/4 to the respondent.

6. Learned counsel for the appellant has submitted that since respondent had sent the reply Ex.P/6 to the notice sent by the appellant dated 14/11/96 Ex.P/5 has clearly established that notice sent by appellant Annexure P/5 was received by the respondent and there is sufficient compliance of the provision of Section 138 Proviso (b) of the Act.

7. Learned counsel for the respondent has supported the impugned judgment of acquittal of the respondent and submitted that appellant failed to establish the compliance of mandatory provision regarding sending of notice to the respondent.

8. Having heard the learned counsel for the parties and after perusing entire record, this Court is of the view that learned Trial Court has committed error of law as well as fact by holding that appellant failed to establish that he had served notice dated 14/11/96 upon the respondent. (in the statement of the complainant acknowledgment is described as Annx. P/5 whereas on the acknowledgment the learned Trial Court has mentioned Ex.P/4 and notice is described as Annx.P/4, but on the notice the Court has mentioned Annx.P/5). Section 138 Proviso (b) reads as under :-

138.- Dishonour of cheque for insufficiency, etc., of funds in the account. -

Where any cheque - - - - - or with both.

Provided that nothing contained in this section shall apply unless --

- (a) the cheque - - - - - is earlier.
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and
- © the drawer - - - - - the said notice.

9. In Section 138 Proviso (b) or anywhere in the enactment, mode of service of notice is not prescribed. When respondent has accepted the receipt of notice dated 14/11/96 sent to him by Advocate Shri B.K. Vaidya on behalf of the appellant and also sent the reply to the Advocate of the appellant through his Advocate Shri Devdatta Govinda Pathak Annx.P/6 dated 30/11/96, there was no need of any other proof regarding sending of notice Annx.P/4 (Annx.P/5). This is the admitted position and sending of reply Ex.P/6 has not been denied by the respondent in his accused statement recorded under Section 313 of the Cr.P.C. The statutory requirement is to serve the notice upon the drawer of the cheque within 15 days (as the law then was) from the date of receipt of information by him from the Bank regarding return of the cheque as unpaid and this has been complied with by the appellant. Cheque was received back with information Ex.P/3 on 12/11/96 thereafter notice was sent demanding cheque amount of rupees one lakh within 15 days from the date of receipt of notice, sent to the respondent on 14/11/96 and same was replied by the respondent Annx.P/6 dated 30/11/96 through his Advocate Shri Pathak and in reply the respondent denied the raising of loan amount of rupees one lac and mentioned some other story regarding issuance of cheque, which is not the subject matter in this appeal. In reply Ex.P/6, addressed to the Advocate Shri Vaidya of appellant, it is mentioned that this reply was given to the notice received by respondent dated 14/11/96 sent by his Advocate Shri Vaidya.

10. In view of the foregoing discussion, this appeal is allowed. The impugned order of acquittal is hereby set aside. The respondent is found guilty under Section 138 of the Act and sentence to S.I for three months and pay compensation of Rs.1,10,000/- (rupees one lakh ten thousand). Respondent is directed to surrender himself before the trial Court on 07th July, 2008 and the Trial Court is directed to send the respondent to jail for serving out the jail sentence. On failure of the respondent to appear before the Trial Court, the 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., 2416
APPELLATE CRIMINAL**

Before Mr. Justice S.K. Kulshrestha & Mr. Justice S.S. Samvatsar

19 March, 2008*

VIKAS

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 302 - Deceased was found lying on ground in badly injured condition - Witnesses saw appellant running with knife after commission of offence and on enquiry deceased mentioned name of appellant - One witness saw appellant quarrelling with deceased and running away - In identification parade witnesses identified appellant - Nothing has been brought in cross-examination to discredit the statement of witnesses - Conviction and sentence of life imprisonment upheld - Appeal dismissed. (Para 12)

दण्ड संहिता (1860 का 45), धारा 302 - मृतक बुरी तरह क्षतिग्रस्त अवस्था में जमीन पर पड़ा हुआ पाया गया - साक्षियों ने अपीलार्थी को अपराध करने के बाद चाकू सहित भागते हुए देखा और पूछताछ पर मृतक ने अपीलार्थी का नाम उल्लिखित किया - एक साक्षी ने अपीलार्थी को मृतक के साथ झगड़ते हुए और दूर भागते हुए देखा - शनाख परेड में साक्षियों ने अपीलार्थी की शनाख की - साक्षियों के कथन पर अविश्वास करने के लिए प्रतिपरीक्षण में कुछ नहीं लाया गया - दोषसिद्धि और आजीवन कारावास के दण्डादेश की पुष्टि - अपील खारिज।

None, for the appellant.

Girish Desai, Dy.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **S.K. KULSHRESTHA, J.** :- This appeal is directed against the judgment dated 30th January, 1999 passed by the learned 2nd Additional Sessions Judge, Ujjain in Session Trial No.302/1997 whereby the appellant has been convicted under Section 302 of the Indian Penal Code and sentenced to imprisonment for life.

02. According to the prosecution, deceased Vinay was in his book shop at about 04.30 in the evening on 24.09.1997 along with accused Vikas Bhandari. Vinay was found lying on the ground in badly injured condition and at that time PW-10 Sunil Kumar Yadav who lives across the road, PW-6 Akhilesh who was passing by the shop and PW-7 Varisuddin whose father had a shop opposite the shop of the deceased, saw the accused running away with knife in his hand. PW-6 Akhilesh and PW-10 Sunil Kumar Yadav inquired from the deceased as to what had transpired. The deceased mentioned the name of the accused and thereafter lost consciousness. He had a number of injuries on his body from which blood was spurting out. He was taken on a handcart to the hospital where Dr. S. Porwal (PW-1) admitted him in the hospital but the deceased succumbed to the injuries at

06.00 p.m. on the same day. While the deceased had been brought to the hospital, doctor had examined his injuries and as per the injury report Ex.P/3 dated 24.09.1997, the following injuries were found on his body: -

- (1) Stab wound transverse in direction spindle shaped, clean cut margins, clotted blood present, measuring 2 cm x $\frac{3}{4}$ cm x deep into thoracic cavity over anterior aspect of chest left side in 4th intercostal space 4 cm medial to left areola.
- (2) Stab wound transverse in direction spindle shaped clean cut margins, clotted blood present, reddish blood containing froth escaping from the wound, 2 cm x $\frac{3}{4}$ cm x deep into thoracic cavity over anterior aspect of chest left side in the 6th intercostal space in mid clavicular line.
- (3) Stab wound vertical in direction spindle shaped, clean cut margins, clotted blood present, 2 cm x $\frac{3}{4}$ cm x 3 cm over anterior aspect of upper 1/3rd of right thigh 10 cm below right inguinal ligament.
- (4) Stab wound spindle shaped, clean cut margins, transverse in direction, clotted blood present 1.5 cm x $\frac{3}{4}$ cm x 2.5 cm over posterior aspect of lower 1/3rd right arm.
- (5) Incised wound superficial, clean cut margins, transverse in direction, clotted blood present 4 cm x $\frac{1}{4}$ cm over right side neck at the level of cricoid cartilage 8 cm right to mid line over neck.

03. On the death of Vinay during treatment, the Police was informed vide Ex.P/5, in pursuance whereof PW-11 Badrilal Soni, S.H.O. reached the hospital and held inquest of which memo Ex.P/18 was prepared. Requisition Ex.P/1 was made for postmortem examination of the deceased. PW-1 Dr. S. Porwal conducted autopsy and on external examination of the body found the injuries that had already been described in Ex.P/3 as injury report.

04. In the opinion of the doctor, cause and mode of death of Vinay s/o Vipin Kumar Sharma was shock and haemorrhage due to injuries to vital organs.

05. On 29.09.1997, accused was arrested vide memo Ex.P/15 and on the basis of the disclosure made as recorded in Ex.P/13, a knife was recovered and seized vide Ex.P/14. His clothes were also seized vide Ex.P/16 and since the accused was having injuries, he was sent to the hospital for examination. After examining the accused on 29.09.1997, PW-1 Dr. S. Porwal gave report Ex.P/7 containing the following injuries: -

- (1) Infected wound crust present pus discharge present $\frac{3}{4}$ cm x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm over palmar aspect, left hand, 2 cm proximal to base of left index finger.
- (2) Abrasion linear in shape, transverse in direction crust present,

pus discharge present 2 cm x 1/10 cm over medial (ulna) aspect of right hand 3 cm proximal to base of left little finger.

(3) Abrasion linear in shape oblique in direction, crust present, pus discharge present 2 cm x 1/10 cm over medial aspect of right hand, ½ cm proximal to base of left little finger.

(4) Abrasion linear in shape, transverse in direction, crust present ½ cm x 1/10 cm over palmer aspect left ring finger proximal phalanx.

All the injuries were simple and had been caused within seven days from the date of examination.

06. The knife recovered from the accused was sent to the doctor for his opinion and as per the opinion Ex.P/8, the injuries could have been caused by the said knife. The articles seized were sent to the Forensic Science Laboratory and report Ex.P/24 indicated that the clothes were stained with blood. However, blood was not found on the knife. After completion of the investigation, the accused was prosecuted.

07. On being indicted for an offence under Section 302 of the IPC, the accused stated that he had not committed any offence and had been falsely implicated. The learned Additional Sessions Judge, however, found the appellant guilty and convicted and sentenced him as stated.

08. The homicidal death of Vinay Kumar stands established by the testimony of PW-1 Dr. S. Porwal and the PM report Ex.P/2, testimony of PW-11 Badrilal Soni, SHO, as per the marg report Ex.P/18 registered by him and the statement of PW-6 Akhilesh and PW-7 Varisuddin. It is thus amply proved that Vinay Kumar died a homicidal death.

09. The question that falls for consideration now is, as to whether appellant Vikas s/o Prakash Bhandari was the perpetrator of the crime which resulted in the death of deceased Vinay Kumar.

10. The prosecution examined 11 witnesses to prove its case. Though none was examined as eye witness to the incident, PW-6 Akhilesh and PW-7 Varisuddin had a good look of the accused who was fleeing after commission of the offence. PW-10 Sunil Kumar Yadav also saw the accused quarreling with the deceased and running away thereafter leaving the deceased in a badly injured condition. It has also come in their evidence that when it was inquired as to what had transpired, the deceased had given the name of accused Vikas. PW-2 Tehsildar Bharatlal Nanama had conducted test identification parade as per memo Ex.P/9 in which PW-6 Akhilesh and PW-7 Varisuddin had correctly identified the accused. PW-3 Bhanupratap Gehlot, Patwari had prepared the spot map while other witnesses were examined to prove steps taken in the investigation. Before we advert to the testimony of PW-6 Akhilesh and PW-7 Varisuddin, it would be apt to refer to the deposition of PW-2 Bharatlal Nanama, Tehsildar who prepared memo Ex.P/9 as regards the test identification parade.

11. PW-2 Bharatlal Nanama has deposed that on 08.10.1997 he was posted as Tehsildar in Khachrod. When he received requisition from the Police for holding test identification of Vikas, he had mixed up six persons of the same description as the accused and called the witnesses for identification. Varis, Akhilesh and Abdul Kiram had correctly identified the accused. Nothing has been brought out in his cross examination to discredit the statement of this witness. If in the context of testimony of PW-2 Bharatlal Nanama and the test identification memo, testimony of PW-6 Akhilesh and PW-7 Varisuddin is taken into account, the monosyllable Vikas uttered by the deceased clearly refers to the present appellant and none-else. PW-6 Akhilesh has deposed that he knew the accused and the deceased well. On the date of the incident while he was proceeding to Ganesh Gali and passing by the book shop of the deceased. He witnessed altercation between the two with regard to some monetary dispute. While he returned, he noticed that Vikas was running away with a knife in his hand. He, therefore, proceeded towards the shop and found that the deceased Vinay was lying on the ground and bleeding through a large number of injuries. When he inquired about the incident, the deceased took the name of Vikas and thereafter became unconscious. Same is the evidence of PW-7 Varisuddin, a child aged 12 years. He has also stated that after seeing the person running, he noticed that Vinay was lying on the ground in injured condition. Both these witnesses have identified the appellant in test identification parade and it, therefore, confirms that reference to Vikas by the deceased, was to the accused and the accused alone. If this testimony is further examined in the context of the statement of PW-9 Vikas Jain, he has also stated that while there was quarrel between the deceased and the accused, the accused had threatened that the deceased will have to repent and later when he approached his shop, he was informed that the deceased had been stabbed. At that time, Akhilesh informed him Vikas was the perpetrator of the crime.

12. Insofar as the injuries sustained by the accused were concerned, as evident from Ex.P/7, it is apparent that the injuries are insignificant and not on any vital part. It is also clear that it was never the case of the appellant that he had acted in exercise of right of private defence. The injuries found on the accused being insignificant, it was also not necessary for the prosecution to explain the injuries of the accused and, therefore, the decision of the Supreme Court in Lakshmi Singh and others versus State of Bihar [AIR 1976 SC 2263] does not come to the rescue of the appellant. The fact that the appellant was seen in the company of the deceased, the deceased had immediately after the incident divulged his name, the witness PW-6 Akhilesh and PW-7 Varisuddin had seen him running away and had later correctly identified him in the test identification parade conducted by Bharatlal Nanama (PW-2) and PW-9 Vikas Jain had seen the accused and the deceased quarreling on account of some money transaction and had thereafter learnt that the deceased had been stabbed by the accused, are strong circumstances which point to the guilt and guilt alone of the appellant. We are, therefore, of the

firm view that the judgment of the trial Court and the conviction and sentence awarded to the appellant/accused, does not call for any interference in this appeal.

13. Accordingly, the appeal is dismissed. The accused is on bail. He shall now surrender to his bail bonds and serve out the sentence awarded to him. Simultaneously, an arrest warrant be issued against the accused for sending him to jail for serving out the sentence awarded to him.

Appeal dismissed.

I.L.R. [2008] M. P., 2420

APPELLATE CRIMINAL

Before Mr. Justice Abhay Gohil & Mr. Justice Abhay M. Naik

16 May, 2008*

STATE OF M.P.

... Appellant

Vs.

BALLU alias VINOD KUMAR

... Respondent

Penal Code (45 of 1860), Section 302 r/w Section 34, Criminal Procedure Code, 1973, Section 378(1) - *Appeal against acquittal - While dealing with a case of acquittal, it is well known, the High Court shall not ordinarily overturn a judgment if two views are possible - Appeal allowed.* (Para 12)

दण्ड संहिता (1860 का 45), धारा 302 सहपठित धारा 34, दण्ड प्रक्रिया संहिता, 1973, धारा 378(1) - दोषमुक्ति के विरुद्ध अपील - दोषमुक्ति के मामले पर कार्यवाही करते समय, यह सुविख्यात है, उच्च न्यायालय किसी निर्णय को साधारणतः नहीं उलटेगा यदि दो विचार संभव हों - अपील मंजूर।

Cases referred :

1987 CAR 200 (SC), 2007 CrLJ 1661, (2007) 1 SCC (Cri) 113.

M.P.S. Bhadauria, G.A., for the appellant.

V.K. Saxena with M.K. Jain, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by ABHAY M. NAIK, J.:- This appeal has been preferred by the State of Madhya Pradesh (appellant against acquittal of accused / respondent from the charge under Section 302 read with Sec. 34 of Indian Penal Code.

2. According to the prosecution story, Mishrilal son of Chironjilal was tenant in the house of respondent's father, namely, Chandra Kumar Jain. On the date of occurrence i.e. 3.11.1986 Rajesh and Dilip, sons of Mishrilal (PW/1) were returning to their home when landlord's son, namely, praveen picked up quarrel with them and gave beatings to Rajesh. He also broke fused mercury tube light which was collected by Rajesh and Dilip from the road. On return, Rajesh and Dilip made complaint to their father Mishrilal in presence of complainant Hukumchand (PW/3),

who happened to be there with his wife Sheela Devi for celebrating 'Bhai Dooj'. Hukumchand was brother of Mishrilal's wife. Mishrilal told his sons that he will persuade Chandra kumar, father of respondent to make his sons understand to behave properly and not to act in this manner. Mishrilal with Hukumchand and others came down stairs to Chandrakumar. He asked Chandrakumar to persuade his sons o behave properly. Suddenly, Pradeep, Praveen, Pramod and Vinod appeared there and started abusing them. They were asked to refrain from abusing. However, they shouted "Maro Salon Ko" Ballu alias Vinod handed over a knife to Pramod. Others were armed with lathi and rods. Pramod inflicted injuries on Dilip Kumar on right chest, left side of stomach and on the cheek near nose. Complainant Hukumchand made efforts to save Dilip. He was also attacked by Pramod, who inflicted injuries by knife on the left hand and wrist of Hukumchand. Pradeep, Vinod and Pramod were shouting that "do not leave him" take his life." Mishrilal's sister, namely, Khumania Bai also tried to protect Dilip, but she was also attacked by knife. Dilip Kumar on account of aforesaid injuries became serious and was taken to Vidisha Hospital on a handcart. Complainant Hukumchand lodged FIR at 0:30 A.M. At Police Station Vidisha on the same day, i.e. in the intervening night between 3rd & 4th November, 1986.

3. On 5.11.1986, Dilip succumbed to injuries and, ultimately, died at about 2:00 P.M. Police Vidisha submitted challan against pramod Kumar (Appellant in Cr. Appeal No. 60/ 2000) and Ballu alias Vinod Kumar (respondent in the persent appeal bearing Cr. Appeal No. 36 / 2001). Pradeep Kumar and Praveen Kumar, accused No. 3&4 were discharged by this Court in Cr. Revision No. 307/ 95 vide order dated 15.2. 1996. Accused Pramod Kumar has been found guilty for offence under Sections 302 and 324 of Indian Penal Code and was sentenced to life imprisonment and two year's rigorous imprisonment with fine of Rs. 500/-, whereas, Ballu alias Vinod Kumar was acquitted by the Court of First Additional Sessions Judge Vidisha vide judgment dated 5.1.2000. Aggrieved by the acquittal of Ballu alias Vinod Kumar, present appeal has been preferred.

4. Contention of the learned Govt. Advocate is that the appellant had provided a knife to Pramod Kumar, who inflicted injuries on Dilip Kumar which ultimately caused the death. It has been proved by the evidence on record that the knife was handed over by Vinod Kumar to Pramod Kumar. Pramod Kumar having been held guilty, Ballu alias Vinod Kumar could not have been legally acquitted. It was Vinod Kumar who brought the knife from inside and provoked Pramod Kumar to inflict injuries on Dilip Kumar by handing it over and saying 'Aaj Mat Chhodo Maro Salon Ko, Jaan Se Mar Do'. Thus, Vinod Kumar has abetted the offence and is equally guilty with Pramod Kumar. It is further contended that Learned Sessions Court while acquitting Vinod Kumar has not properly appreciated the evidence and the judgment of the learned Sessions Court to this extent is liable to be reversed. Vinod Kumar being equally guilty for offence under Sections 302 and 324 of Indian Penal Code, is liable to be punished with the same punishment/ sentence, like pramod Kumar.

5. Before entering into the question of appreciation, this Court is obliged to keep in mind that the appeal is directed against acquittal. Scope of interference is not without limitations. There has been various occasions for the Apex Court to consider the scope of interference in appeal against acquittal. Hon'ble Supreme Court in the case of *Tota Singh and another Vs. state of punjab* [1987 CAR 200 (SC)] has held :

" The jurisdiction of the Appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterized as perverse. Where two views are possible on an appraisal of the evidence aduced in the case and the Court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous,"

6. Likewise the Apex Court in the case of *State of Madhya Pradesh Vs. Bacchudas alias Balaram and others* (2007 Cri. L. J. 1661) has observed :-

" The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned Judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process.

7. If the judgment of acquittal of respondent is viewed on the aforesaid yardsticks, it may be seen that the First Information Report (Ex. P/5) was lodged by Hukumchand Jain, who informed the police that Vinod brought the knife and handed over it to pramod and pramod inflicted injuries on Dilip Kumar by knife on right side of chest, left side of stomach and on nose Mishrilal (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) were present on the spot and had witnessed the incident. None of other witnesses (except) PW/1 & PW/3) has stated in the court on oath that the knife was brought by Vinod from inside and was handed over by him to Pramod Kumar. Moreover, dying declaration of Dilip Kumar was recorded by Naib Tahsildar which is on record as Ex. P/ 11. In the dying declaration there is no mention that the knife was brought from inside by Vinod Kumar and was handed over by him to Pramod Kumar. It is not the case of the prosecution that any such statement was given at the time of recording of dying declaration and was not recorded by the Naib Tahsildar. Shri S.K.

Suryawanshi, Naib Tahsildar, was examined as PW/ 13, who recorded the dying declaration. In cross- examination, this witness was never suggested that Dilip Kumar at the time of dying declaration had stated that the knife was brought from inside by Vinod Kumar and was handed over to Pramod Kumar by him.

8. Learned Govt. Advocate contended that the fact that Vinod Kumar had handed over the knife to pramod Kumar is well established and Pramod Kumar having been found guilty of stabbing the deceased by knife, Vinod Kumar cannot be acquitted in the impugned manner. Countering it, it has been argued by Shri V.K. Saxena, learned Senior Counsel that the alleged factum of handing over the knife by Vinod Kumar to Pramod Kumar is not corroborated by other witnesses and, accordingly Vinod Kumar has been rightly acquitted .

9. This Court is now required to examine the effect of non- corroboration by other witnesses with regard to alleged factum of handing over of knife by Vinod Kumar to Pramod Kumar. Section 134 of the Indian Evidence Act, 1872, makes it clear that no particular number of witnesses shall, in any case, be required for the proof of any fact. Thus, a particular fact may be proved even by a single witness. If a fact stands proved, then it does not require any corroboration at all. What is required in law is, the demolition of the evidence adduced by such a sole witness to prove a particular fact. Demolition of evidence and non- corroboration of evidence are quite different. A fact if stands Proved in the eye of law needs no corroboration, but is required to be demolished by contrary cogent evidence. Non- corroboration of such a fact by other evidence is insignificant. It is the demolition of evidence only which would give advantage to the opposite party and absence of corroboration in such a case will not affect the result. This being so, it is to be examined that whether the allegation of the prosecution that the knife was handed over to pramod Kumar by Vinod Kumar, was fully established by the evidence of Hukum Chand Jain (PW/3 FIR lodger and Mishrilal, father of decesased) requiring demolition or the same was not duly established by such evidence and required corroboration.

10. In the FIR (Ex. P/5) there is no mention that Vinod had brought the knife from inside. Even in the statement (Ex. D-2) recorded under Section 161 of Cr. P.C. there was no specific mention that Vinod had brought the knife from inside. Although, in the statement recorded in the Court PW/3 Hukumchand, has stated in chief examination that Vinod had brought the knife from inside, but in the cross-examination he has admintted that Vinod had not gone inside for bringing the knife. This witness has further failed to assign any reason for not mentioning in Ex. P/5 (FIR) and Ex. D/2 (statement under Section 161 of Cr. P.C.) that Vinod had brought the knife from inside. He has further stated in paragraph 11 that he himself, Mishrilal and other family members of Mishrilal were present when the Knife was handed over. Mishrilal, father of the deceased (PW/1) has stated that Vinod went inside and brought the knife from inside. He handed it over to pradeep,

then he stated that he handed it over to Pramod. This witness has categorically stated in paragraph 3 that the incident occurred in the presence of himself, Hukumchand, Hukum Chand's wife Sheela, Khumaniya, Mishrilal son of Gorelal, Raj Kumar, Suresh and Rajesh. His daughter and Rajaram also watched the incident. Since the incident is stated to have occurred in the presence of aforesaid persons, corroboration was expected from them. Dying declaration of Dilip Kumar is on record as Ex. P/11 which was recorded by the Naib Tahsildar, who was examined as PW/ 13. In Ex. P/1, there is no mention that the knife was brought from inside by Vinod Kumar and was handed over by him to Pramod Kumar. There was absolutely no reason for the deceased not to mention such an important fact and further involvement of Vinod Kumar in the alleged incident. Shri S.K. Suryawanshi, Naib Tahsildar (PW/ 13) has recorded the dying declaration. It is not the case of the prosecution that the deceased while giving dying declaration gave any such statement that the knife was brought by Vinod Kumar from inside and was handed over to Pramod Kumar. Even in the cross examination, no such suggestion was made to PW/ 13 Naib Tahsildar. Absence of the alleged fact of bringing the knife by Vinod Kumar from inside and handing it over to Pramod Kumar in the dying declaration is an important lacuna in the evidence which remained unexplained.

11. In the light of aforesaid discrepancies, the fact that the knife was brought from inside by the respondent and was handed over to Pramod Kumar, is not fully established and required corroboration by other witnesses who are stated to be present at the place of occurrence. Evidence of Mishrilal and Hukumchand is insufficient to hold that the alleged fact that Vinod Kumar brought the knife from inside and handed it over to Pramod Kumar is fully established. This being so, it is not a case where demolition of aforesaid evidence was required, rather, it is a case where evidence of Mishrilal and Hukumchand required corroboration by other witnesses who are stated to be present at the place of occurrence. From the statements of other eye witnesses, it is clear that these witnesses have not corroborated the case of prosecution on the point of handing over of knife by Vinod Kumar to Pramod Kumar. In the absence of such corroboration, learned Sessions Judge is not found to have committed any error in holding that the charge against Vinod Kumar is not proved beyond doubt.

12. We may profitably refer to the decision of the Hon'ble Supreme Court in the case of *Samghaji Hariba Patil Vs. State of Karnataka* [(2007) 1 SCC (Cri) 113] wherein it has been held:-

"We have noticed hereinbefore that the High Court has taken a contrary view. Had the High Court been the first court, probably its view could have been upheld. but it was dealing with a judgment of acquittal. We have taken notice of the depositions of the main prosecution witnesses only to show that the view of the learned trial judge cannot be said to be perverse or the same was not possible to be taken. While dealing

with a case of acquittal it is well known, the High Court shall not ordinarily overturn a judgment if two views are possible".

Similarly, it would not be out of place to mention here another decision in the case of *Kashiram & others Vs. State of M.P.* [(2002) 1 SCC 71] wherein it has been held :-

" In case of appeal before High Court against acquittal, though judgment of trial court acquitting the accused was somewhat perfunctory and lacking clarity in certain respects, on the whole, the approach and conclusions of the trial court were not perverse or vitiated by any serious error warranting interference with the verdict of acquittal. View taken by trial court was a reasonably possible view; the Apex Court held that High Court was not justified in reversing the acquittal."

13. Accordingly it is found that the learned Sessions Court has rightly appreciated the evidence on record and the finding of acquittal is based on material evidence on record. This Court does not find any perversity in appreciation warranting interference in the appeal against acquittal.

14. In the result, there is no substance in the appeal. The same is, hereby dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2425

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava

9 June, 2008*

NAVKANT SHARMA

Vs.

STATE OF M.P.

... Appellant

... Respondent

A. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) r/w Section 13(2), Criminal Procedure Code, 1973, Section 374(2) - *Burden of Proof - Held - The onus on an accused is not as heavy as that of the prosecution - It may be compared with a defendant in a civil proceeding - Appeal allowed.* (Para 19)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) सहपठित धारा 13(2), दण्ड प्रक्रिया संहिता, 1973, धारा 374(2) - सबूत का भार - अभिनिर्धारित - अभियुक्त पर भार उतना भारी नहीं है जितना कि अभियोजन पर - उसकी तुलना सिविल कार्यवाही में प्रतिवादी से की जा सकती है - अपील मंजूर।

B. Evidence Act (1 of 1872) - *Accomplice - The law has developed that the corroboration of the evidence of an accomplice is a rule of prudence.* (Para 15)

ख. साक्ष्य अधिनियम (1872 का 1) – सह-अपराधी – यह विधि विकसित की गई है कि सह-अपराधी की साक्ष्य की सम्पुष्टि प्रज्ञा का नियम है।

C. **Defence of Accused** - *If the defence is found probable, due weightage should be given to it.* (Para 19)

स. अभियुक्त की प्रतिरक्षा – यदि प्रतिरक्षा अधिसंभाव्य पायी जाती है तो उसे सम्यक् अधिमान दिया जाना चाहिए।

Cases referred :

(2006) 2 SCC 250, AIR 2007 SC 489, (2006) 6 SCC 39, AIR 1987 SC 689, 1972 CAR 344 (SC), 2006 Cr.L.J. 518, AIR 2002 SC 486, AIR 1979 SC 1191, AIR 200 SC 3377.

R.K. Sharma with Rakesh Parashar, for the appellant.

B.D. Mahore, Dy.G.A., for the respondent/State.

J U D G M E N T

A.K. SHRIVASTAVA, J.:— Feeling aggrieved by the judgment of conviction and order of sentence dated 27/11/2001 passed by learned Special Judge, Gwalior in Special case No. 2/2001 convicting the appellant under Section 7, 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 (in short “the Act”) and sentencing him to suffer Rigorous Imprisonment of 1 year and fine of Rs. 2,500/- in default further Rigorous Imprisonment of six months, on first count and rigorous Imprisonment of 1 year with a fine of Rs. 2,500/- in default further Rigorous Imprisonment of 6 months, on second count with a further stipulations that both the sentences shall run concurrently, the appellant has knocked the doors of this Court by preferring the appeal under Section 374 (2) of the Code of Criminal Procedure, 1973.

2. In brief the case of the prosecution is that Dashrath Singh Rawat (hereinafter referred to as “complainant”) was having an electric connection provided by Madhya Pradesh Electricity Board in his flour mill. The electric meter became disordered as a result of which vide Ex. P/4 dated 1/8/2000, he submitted an application to change the electric meter, since, the new electric meter was not available in the market. This application was addressed to Assistant Engineer of M.P. Electricity Board. In order to install a new meter, complainant met to the appellant on 2/8/2000. It is said that appellant made a demand of illegal gratification of Rs. 1,500/- from the complainant. Since the complainant was not desirous to give illegal gratification and was keen enough to get the appellant caught red handed, he submitted an application before the Special Police Establishment, Lokayukt. Gwalior which is Ex. P/5 making complainant in it that appellant is making demand of illegal gratification of Rs. 1,500/- in order to replace the electric meter.

3. On the basis of written complainant Ex. P/5, the law and the procedure envisaged under the Act as well as under Criminal Procedure Code set in motion. A tape-recorder was provided to the complainant by the Office of Special Police

Establishment in order to record the conversation of bribe, as a result of which according to the prosecution again the complainant approached the appellant, who made the demand of illegal gratification from him. The transcript of tape-recorded conversation is Ex. P/8. Thereafter, complainant again submitted another complaint Ex. P/9 and on the basis of which, a Dehati Nalish Ex. P/10 was registered against the appellant.

4. The Panch witnesses B.L. Karare (not examined) and Narayan Prasad Kori (PW/8) were called in the Office of the Special Police Establishment and before them the complaint was read over. Thereafter, a demonstration of the change of colour of phenolphthalein powder test was conducted in presence of these Panch witnesses and on submitting the two currency notes having denomination of Rs. 500/- each and five currency notes having denomination of Rs. 100/- each by the complainant, they were treated by phenolphthalein powder. The treated currency notes were kept in the pocket of the shirt of the complainant and he was specifically directed that before the demand of bribe is made by the appellant, he should not touch the treated currency notes.

5. According to the case of prosecution, the trap party proceeded to the Office of the appellant. The complainant was directed to go inside the Office and to give the treated currency notes to the appellant when he makes demand of bribe. The complainant was also accompanied by two Police Constables viz., Siyaram Sharma (PW/7) and Ummaid Singh (not examined) to overhear what actually is being transpired between the complainant and the appellant at the time of transaction of giving and taking of the bribe.

6. It is the further case of the prosecution that complainant went inside the chamber of appellant but he was not found there and the complainant was informed that appellant is sitting in the chamber of Assistant Engineer viz., Mohan Babu Jain (PW/3). The complainant thereafter, entered inside the chamber of the Assistant Engineer and called the appellant outside. It is said that when appellant made the demand of bribe, the complainant took out the treated currency notes from his pocket and tried to handover the same to the appellant, but, the appellant directed complainant to give the same to acquitted co-accused Assistant Lineman Naresh Savita. On the direction of the appellant, the treated currency notes were given by the complainant to acquitted co-accused Naresh Savita.

7. Thereafter, on completion of the transaction of bribe, a signal was given by the complainant to the members of the trap party and immediately thereafter, the above said two constables viz., Siyaram Sharma (PW/7) and Ummaid Singh (not examined) caught hold the hands of the acquitted co-accused Naresh Savita. It is said, that Naresh Savita told to the members of the trap party that at the instance of the appellant, he has accepted the amount. The hands of the acquitted co-accused were subjected to phenolphthalein powder test and on dipping the fingers of the accused in the solution of Sodium Carbonate the colour of the solution

turned to pink. The tinted hand wash of the acquitted co-accused was collected in a separate sealed bottle.

8. After the investigation was over and requisite sanction to prosecute the appellant was obtained, a charge-sheet was submitted before the learned Special Judge, who on going through the averments made in the charge-sheet framed charges punishable under Section 7, 13 (1) (d) read with Section 13 (2) of the Act against the appellant. Similar charges were also framed against the acquitted co-accused Naresh Savita. Needless to emphasis that both the accused persons abjured their guilt and pleaded complete innocence. The defence of the appellant is that neither he made any demand of bribe nor accepted the same. The further defence, which has been set-forth during the cross-examination of the prosecution witnesses is that the amount of Rs. 1,500/- was being demanded by the appellant towards the meter charges because the old meter of the complainant was burnt.

9. The learned Special Judge on the basis of the oral and documentary evidence placed on record came to hold that the charges framed against Assistant Lineman Naresh Savita are not proved and eventually, acquitted him from all the charges. However, on the basis of the evidence placed on record, learned Special Judge came to hold that the appellant did commit the offences for which he was charged and eventually convicted him and passed the sentences, which I have already mentioned hereinabove.

10. In this manner the present appeal has been filed.

11. The contention of Shri Rakesh Sharma, learned counsel for the appellant is that in the present case there is no clinching evidence of the prosecution that appellant ever made any demand of bribe and accepted the same. The contention of the learned counsel for the appellant is that in order to prove the charges under Section 7, 13(1) (d) and 13 (2) of the Act, it was incumbent upon the prosecution to prove that appellant ever made demand of bribe and accepted the same. Since this has not been proved by the prosecution, the learned Special Judge erred in convicting the appellant. It has also been contended by him that appellant was not having any domain over the supply of electric meter which was required to be installed and therefore, there was no occasion to make the demand of bribe. In support of his contention, learned counsel has placed heavy reliance on the decision of Supreme Court *Ram Prakash Arora vs. State of Punjab*, 1972 CAR 344 (SC). He has further placed reliance on the another judgment of the Supreme Court *State vs. K. Narasimhachary*, 2006 Cr.L.J., 518. Lastly, it has been submitted that since the defence which has been put-forth by the appellant during the cross-examination of the prosecution witnesses is probable, due weightage should be given to it. In this context he has placed reliance on the decision of Supreme Court *Punjabrao vs. State of Maharashtra*, AIR 2002 SC 486.

12. On the other hand Shri B.D. Mahore, learned Deputy Government

Advocate argued in support of the impugned judgment and has submitted that looking to the testimony of the complainant, it is proved that appellant made demand of illegal gratification and on his instance, the complainant handed over the amount of bribe to acquitted co-accused Naresh Savita and if this is the position, the learned trial Court did not err in passing the impugned judgment and therefore, it has been prayed that appeal be dismissed.

13. Having heard the learned counsel for the parties, I am of the view that the appeal deserves to be allowed.

14. The charge-sheet was submitted against the present appellant as well as Naresh Savita; however, learned Special Judge did not find the charges to be proved against Naresh Savita and eventually, he has been acquitted by the impugned judgment. I may further mention here that the evidence of tape recorded conversation of appellant and complainant has been disbelieved by learned Special Judge.

15. In order to convict the appellant for the charges framed against him, it was incumbent upon the prosecution to prove that any demand of bribe was made by the appellant at the time of acceptance of money. In this context, I may profitably place reliance on two decisions of the Supreme Court they are *Om Prakash vs. State of Haryana*, 2006 (2) SCC 250 and *V. Venkata Subbarao vs. State* represented by Inspector of Police, A.P., AIR 2007 SC 489. On the basis of law laid down by the Supreme Court in the aforesaid two decisions I shall now examine the evidence of the complainant as well as the evidence of other prosecution witnesses. Before marshaling the evidence of the complainant it would be apposite to mention that Narayan Prasad Kori (PW/8) who is the trap witness has stated that what actually transpired between the appellant and the complainant when the appellant directed the complainant to give the treated currency notes to acquitted co-accused Naresh Savita, he could not hear. There is no other witness in order to corroborate the statement of the complainant in this regard. The contention of learned counsel for the appellant is that the testimony of complainant has not been corroborated by any independent witness and it would be highly unsafe to place reliance on the uncorroborated testimony of the complainant whose status is not better than that of an accomplice. In this context the decision of Supreme Court in case of *Panalal Damodar Rathi vs. State of Maharashtra*, AIR 1979 SC 1191 has been placed reliance. However, it is equally true that if the testimony of complainant inspire full confidence and is clear, cogent and trustworthy, the conviction cannot be said to be illegal, merely it proceeds upon the uncorroborated testimony of the accomplice. At this juncture, it will also be fruitful to read illustration (b) to Section 14 of the Evidence Act which says that "an accomplice is unworthy of credit, unless he is corroborated in material particulars." Thus, from the very beginning the law has developed that the corroboration of the evidence of an accomplice is a rule of prudence.

16. In the present case in order to take out the grain from the chaff, it is to be ascertained that what actually transpired between the complainant and the appellant when the complainant tried to handover the money to the appellant. In this context para 8 of the evidence of the complainant is very much material. On close scrutiny of this para it reveals that nowhere appellant made demand of illegal gratification from the complainant and this much only he has stated that he has managed the amount and requested appellant to accept the money which appellant directed to give it to acquitted co-accused Naresh Savita. Indeed there is no independent corroboration of the statement of the complainant and even if his statement is accepted to be true, it is difficult to hold that appellant made any demand of bribe from the complainant. The Supreme Court in the case of *Smt. Meena Balwant Hemke v. State of Maharashtra*, AIR 2000 SC 3377 in para 9 has categorically held as under :-

".....The corroboration essential in a case like this for what actually transpired at the time of the alleged occurrence and acceptance of bribe is very much wanting in this case....."

17. In the present case also there is no independent corroboration of the testimony of complainant in this regard that what actually transpired between the complainant and the appellant at the time when complainant tried to give the money to the appellant.

18. The defence of appellant is that the amount which was being demanded by appellant was towards the replacement of new electric meter since it was burnt. The Assistant Engineer Mohan Babu Jain (PW/3) has categorically stated in para 8 of his testimony that in case the meter is burnt, Rs. 1,500/- is required to be deposited and if the electric meter is not in working condition, the same is required to be replaced and in that situation no amount is taken from the subscriber. The Assistant Engineer (PW/3) has further admitted that since the electric meter of the complainant became short, therefore, it would come under the ambit and sweep of 'Burnt'. True, later on in para 9 he states that without holding any test he could not say whether the said meter was burnt or not. Thus, it is clear that this witness has not at all examined the impugned electric meter. The prosecution did not take any pains to submit any report of the expert whether the impugned electric meter was burnt or it was otherwise became unusable. This was very much essential because if the electric meter became unusable on account that it had burnt, Rs. 1,500/- was required to be deposited by the subscriber. At the cost of repetition I may again mention here that as per the case of prosecution a demand of illegal gratification of Rs. 1,500/- was made by the appellant, which is exactly equivalent to the cost of electric meter. Hence, it cannot be said that the amount which was being demanded by the appellant was for the bribe or the costs of the replacement of new electric meter, which was already burnt.

19. The Supreme Court in the case of *Bal Krishan Sayal vs. State of Punjab*,

AIR 1987, S.C. 689 has held that the amount of bribe alleged to have been offered, if it is almost equal to the amount which the complainant was required to deposit towards legal charges, it would be difficult to hold that the amount which was demanded by the accused was towards bribe. Thus, the defence which has been set-forth by the appellant appears to be probable. The Supreme Court in the case of *Punjabrao* (supra) has categorically held that if the defence is found probable, due weightage should have been given to it. In the case of *V. Venkata Subbarao* (supra) also the similar view has been taken by the Apex Court in para 25 that "the burden on an accused does not have to meet the same standard of proof, as is required to be made by the prosecution." In this case the Supreme Court placed reliance on its earlier decision *M.S. Narayana Menon @ Mani vs. State of Kerala & Anr.*, (2006) 6 SCC 39 wherein it has been held as under:-

"Moreover, the onus on an accused is not as heavy as that of the prosecution. It may be compared with a defendant in a civil proceeding."

20. In the complaint Ex. P/4 the complainant has stated that electric meter has become disordered and it has not been stated by him that it has been burnt. But it is equally true that complainant has not taken any opinion and report of any expert that the meter was not burnt. Apart from this, on bare perusal of complaint Ex. P/4 it is gathered that complainant was directed to purchase a new meter which would mean that meter was totally became unusable and therefore, inference could be drawn that it was burnt.

21. For the reasons stated hereinabove, I am of the view that the charges framed against the appellant are not proved. Eventually, this appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence passed against the appellant is hereby set aside and the appellant is acquitted from all the charges. The appellant is on bail. his bail bonds are discharged. The amount of fine, if deposited, be refunded to him.

Appeal allowed.

I.L.R. [2008] M. P., 2431

APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava

16 June, 2008*

AVINASH @ GUDDA

Vs.

STATE OF M.P.

... Appellant

... Respondent

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - *Dying Declaration* - Appellant had burnt his wife & son by pouring kerosene oil over them - Dying declaration of wife was recorded at Hospital by Executive Magistrate - Wife & son succumbed to burn injuries - Appellant

has been convicted for committing murder of his wife - Conviction challenged in appeal - Held - Presence of appellant on the scene at the time of occurrence is proved by reliable evidence - Magistrate & Doctor deposed that deceased remained fully conscious during her statement and was in a fit condition to give statement - No inconsistency in the timings of recording of dying declaration and medical examination - No inconsistency in dying declaration and Dehati Nalishi - No ground to suspect that magistrate would himself manipulate the dying declaration as he had no animus against appellant - Declaration is true and voluntarily - Conviction upheld - Appeal dismissed. (Paras 11 & 12)

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 32 - मृत्युकालिक कथन - अपीलार्थी ने अपनी पत्नी और पुत्र पर मिट्टी का तेल डालकर उन्हें जला दिया - कार्यपालिक मजिस्ट्रेट द्वारा पत्नी का मृत्युकालिक कथन अस्पताल में अभिलिखित किया गया - पत्नी और पुत्र की मृत्यु जलने से आई क्षतियों से हो गई - अपीलार्थी को उसकी पत्नी की हत्या के लिए दोषसिद्ध किया गया - दोषसिद्धि को अपील में चुनौती दी गई - अभिनिर्धारित - घटना के समय घटना स्थल पर अपीलार्थी की उपस्थिति विश्वसनीय साक्ष्य द्वारा सिद्ध - मजिस्ट्रेट और चिकित्सक ने बयान दिया कि मृतक कथन देते समय पूरी तरह होश में थी और कथन देने के लिए उपयुक्त अवस्था में थी - मृत्युकालिक कथन अभिलिखित करने और चिकित्सकीय परीक्षण के समय में कोई विसंगति नहीं - मृत्युकालिक कथन और देहाती नालिशी में कोई विसंगति नहीं - शंका करने का कोई आधार नहीं कि मजिस्ट्रेट ने स्वयं मृत्युकालिक कथन में हेरफेर किया होगा क्योंकि वह अपीलार्थी के विरुद्ध कोई विवेक नहीं रखता था - मृत्युकालिक कथन सही एवं स्पष्ट - दोषसिद्धि पुष्ट की गई - अपील खारिज।

Case referred :

(2005) 9 SCC 113.

Surendra Singh with Rajkamal Chaturvedi, for the appellant.

R.S. Patel, Addl.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by SUSHMA SHRIVASTAVA, J. :-Appellant has challenged his conviction and order of sentence passed by Additional Sessions Judge, Narsinghpur in S.T. No. 154/96 decided on 9.8.99.

2. Appellant has been convicted under Section 302 of IPC for committing murder of his wife Beena Bai and sentenced to imprisonment for life with fine of Rs. 500/-, in default rigorous imprisonment for three months, by impugned judgment.

3. According to prosecution, on 5.4.96 A.S.I. S.S. Khan received a telephonic information at Police Station Kareli from Sarpanch of village Mohad that appellant Avinash @ Gudda had burnt his wife and son by pouring kerosene oil over them. After recording this information in Rojnamcha, A.S.I. S.S. Khan reached the spot and found that Beena Bai and her son Manish aged about 2½ years were in burnt condition. The FIR of the incident in the form of Dehati Nalishi was recorded at

the instance of Beena Bai, on the basis of which an offence was registered against the appellant at Police Station Kareli and was investigated. Both Beena Bai and her son Manish were sent to the hospital. The dying declaration of Beena Bai was recorded at the hospital by Executive Magistrate-cum-Tahsildar Yashwant Singh. Beena Bai, however, succumbed to her burn injuries on 6.4.96 at 7.10 in the morning, whereas her son Manish succumbed to his burn injuries at 5 'O'clock in the morning on 6.4.96. Intimation of their death was sent to the Police by hospital authorities. Merg intimation was then recorded and merg inquest reports were prepared. The dead bodies of deceased Beena Bai and Manish were sent for postmortem examination. After other usual investigation, appellant was prosecuted under Section 302 of IPC for committing murder of his wife and son and was put to trial.

4. Appellant abjured the guilt and pleaded innocence and false implication.

5. After trial and upon appreciation of the evidence adduced in the case, learned trial judge acquitted the appellant of the charge of committing murder of his son Manish but found him guilty for committing murder of his wife Beena Bai by pouring kerosene oil over her body and setting her ablaze and convicted and sentenced him as aforesaid. Being aggrieved by the order of his conviction and sentence appellant has preferred this appeal.

6. We have heard the counsel for the parties and perused the evidence on record.

7. It was no longer disputed that deceased Beena Bai died of burn injuries. It is also reflected from the testimony of Dr. R.P. Faujdar (P.W-5), who had medically examined Beena Bai on 5.4.96, that Beena Bai had 90-95% superficial burns on her body and smell of kerosene oil was also present on her body. Dr. Rajesh (P.W-11), who conducted the autopsy on the dead body of deceased Beena Bai, also found 100% superficial ante mortem burns on her body. He also found Carbon particles in the trachea of deceased Beena Bai. In the opinion of Dr. Rajesh (P.W-11), the cause of death of Beena Bai was neurogenic shock as a result of burn injuries. The detailed postmortem report (Ex.P-24) prepared by Dr. Rajesh (P.W-11) is also placed on record.

8. Learned counsel for the appellant, however, submitted that trial court gravely erred in convicting the appellant by placing implicit reliance on the dying declaration of the deceased and unreliable testimony of P.W-2 Shyamlal, whereas learned counsel for the State supported the finding recorded by the court below that appellant intentionally burnt his wife Beena Bai and thereby caused her death.

9. The dying declaration (Ex.P-11) was recorded by Executive Magistrate Yashwant Singh (P.W-12) on 5.4.96 at Community Health Centre Kareli. Yashwant Singh (P.W-12) categorically deposed in his evidence that he had recorded the dying declaration of Beena Bai on 5.4.96 at 9.15 PM, after obtaining the certification from the doctor on duty that Beena Bai was fit to give statement. he recorded her

statement as per Ex.P-11 and obtained her thumb impression. According to P.W-12 Yashwant Singh, Beena Bai remained fully conscious during her statement and she had stated before him that her husband Avinash had poured kerosene oil over her and lit fire by matchstick.

10. Dr. R.P. Faujdar (P.W-5) also testified that before recording of the dying declaration of deceased Beena Bai he had examined her and she was fit to give statement and he had also made an endorsement to this effect on the dying declaration (Ex.P-11) and also affixed his signature. He also testified that the dying declaration of deceased Beena Bai was recorded in his presence and he also appended certificate on Ex.P-11 at the foot that Beena Bai remained conscious during her statement.

11. There are no reasons to disbelieve the evidence of Executive Magistrate Yashwant Singh (P.W-12) and Dr. R.P. Faujdar (P.W-5) that deceased Beena Bai remained fully conscious during her statement and she was in a fit condition to give statement. There is also no inconsistency in the timings of recording of the dying declaration and the medical examination of Beena Bai. Dr. R.P. Faujdar (P.W-5) categorically deposed in his evidence that he had examined Beena Bai at 9.15 PM before recording of her dying declaration. There are also no reasons to disbelieve the testimony of P.W-12 Yashwant Singh that he had recorded the statement of Beena Bai as per Ex.P-11. There are also no grounds to suspect that P.W-12 Yashwant Singh would himself manipulate the dying declaration (Ex. P-11) as he had no animus against the appellant.

12. There is also no inconsistency in the dying declaration (Ex.P-11) and Dehati Nalishi (Ex.P-15) recorded by A.S.I. S.S. Khan (P.W-10) at the instance of Beena Bai, which was to be treated as dying declaration after her death. The substratum of both the declarations remained the same that the appellant had poured kerosene oil over the body of Beena Bai and lit fire by matchstick. There is nothing on record to indicate that dying declaration (Ex.P-11) made by deceased Beena Bai was the result of any tutoring or prompting or product of imagination. In fact, there are no reasons to doubt or suspect that dying declaration (Ex.P-11) is not true or voluntary statement made by the deceased.

13. The law relating to the dying declaration has been summed up by the Apex Court in the case of *Muttu Kutty and another Vs. State by Inspector of Police, Tamilnadu* reported in 2005(9) SCC page 113 and it has been reiterated that dying declaration can form the sole basis for conviction, if the Court is satisfied that declaration is true and voluntary.

14. In face of the dying declaration (Ex.P-11) and in absence of any such evidence, the plea taken by the appellant that he was not present on the scene at the time of occurrence is not acceptable, while his presence on the scene was also witnessed by P.W-2 Shyamlal.

15. In view of the aforesaid discussion, we are of the considered opinion, that

the trial court committed no error in placing reliance on the dying declaration (Ex.P-11) of the deceased and in holding appellant guilty for intentionally causing death of his wife Beena Bai by pouring kerosene oil over her and setting her ablaze. Therefore, the conviction of the appellant as recorded by trial court under Section 302 of IPC and life sentence awarded to him with fine of Rs.500/- do not warrant any interference in this appeal.

16. Thus, we find no merit and substance in this appeal. We uphold the conviction of the appellant and sentence passed on him under Section 302 of I.P.C.

Appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2008] M. P., 2435

APPELLATE CRIMINAL

Before Mr. Justice A.K. Saxena

20 August, 2008*

ANNU alias ANOOP KUMAR

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Juvenile Justice Act (53 of 1986), Section 2(h), Juvenile Justice (Care and Protection of Children) Act, 2000, Section 2(k) - Juvenile - Appellant failed to raise any objection about his age before the committal court or the trial court - The fact of age cannot be considered at the appellate stage because the objection in respect of age, is raised for the first in appellate court - This argument is not tenable that appellant was juvenile on the date of incident and juvenile court was competent to try case. (Para 10)

क. किशोर न्याय अधिनियम (1986 का 53), धारा 2(एच), किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम, 2000, धारा 2(के) - किशोर - अपीलार्थी उसकी उम्र के संबंध में कोई आपत्ति सुपुर्द करने वाले न्यायालय या विचारण न्यायालय के समक्ष उठाने में असफल रहा - उम्र का तथ्य अपील के प्रक्रम पर विचारित नहीं किया जा सकता क्योंकि उम्र के संबंध में आपत्ति प्रथम बार अपील न्यायालय में उठाई गई - यह तर्क मान्य नहीं है कि अपीलार्थी घटना की तारीख को किशोर था और किशोर न्यायालय मामले का विचारण करने के लिए सक्षम था।

B. Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Rape - "Mere Sath Usne Galat Kam Kiya" - In dying declaration prosecutrix disclosed that when she went to answer call of nature, appellant caught hold of her from behind and swathe her mouth and then "Mere Sath Usne Galat Kam Kiya" - Held - If the words used by prosecutrix are considered coupled with other circumstances, it becomes clear that prosecutrix wanted to say that accused ravished her. (Para 26)

ख. दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 — बलात्संग — “मेरे साथ उसने गलत काम किया” — मृत्युकालिक कथन में अभियोक्त्री ने बताया कि जब वह शौच के लिए गई, अपीलार्थी ने उसे पीछे से पकड़ लिया और उसके मुह पर पट्टी लपेट दी और तब “मेरे साथ उसने गलत काम किया” — अभिनिर्धारित — यदि अभियोक्त्री द्वारा प्रयुक्त शब्दों को अन्य परिस्थितियों के साथ विचार में लिया जाता है, यह स्पष्ट हो जाता है कि अभियोक्त्री कहना चाहती थी कि अभियुक्त ने उसके साथ बलात्संग किया।

C. Penal Code (45 of 1860), Section 376 - Rape - Appellant committed rape with girl of 13 years who became disgusted and committed suicide - Dying declarations made by prosecutrix found reliable - Appellant guilty of committing rape -- Offence of appellant in these circumstances becomes more heinous - Trial Court awarded rigorous imprisonment of 10 years - No adequate or special reason for reducing the jail sentence - Appeal dismissed. (Para 31)

ग. दण्ड संहिता (1860 का 45), धारा 376 — बलात्संग — अपीलार्थी ने 13 वर्ष की बालिका के साथ बलात्संग किया जिससे उसे ग्लानि हो गई और उसने आत्महत्या कर ली — अभियोक्त्री द्वारा किये गये मृत्युकालिक कथन विश्वसनीय पाये — अपीलार्थी बलात्संग करने का दोषी — इन परिस्थितियों में अपीलार्थी का अपराध अधिक जघन्य हो जाता है — विचारण न्यायालय ने 10 वर्ष का कठोर कारावास दिया — कारावास के दण्डादेश को कम करने के लिए कोई पर्याप्त या विशिष्ट कारण नहीं — अपील खारिज।

Cases referred :

1997(1) MPLJ 136, 1995 CrLJ 2021 (MP), 1998(1) JIJ 290, 2003 CrLJ 268 (MP).

S.P. Tripathi, for the appellant.

G.S. Thakur, P.L., for the respondent/State.

J U D G M E N T

A.K. SAXENA, J. :-The appellant Annu alias Anoop Kumar has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 against the judgment dated 1.6.94 passed by Ist Additional Sessions Judge, Katni in Sessions Trial No.549/93 whereby, the appellant/accused has been convicted under Section 376(1) of I.P.C. and sentenced to 10 years rigorous imprisonment.

2. The prosecution story in short is that the prosecutrix, aged about 13 years, was residing with her mother PW-9 Noor Jahan. On 4.2.93, the mother of the prosecutrix went to sell the bangles. Thereafter, at about 8.00 a.m., the prosecutrix went behind the Amirganj school to answer the call of nature. When she was ready to come back, the appellant/accused Annu @ Anoop Kumar caught hold of her from behind. The prosecutrix tried to raise an alarm, but the appellant tied up the mouth of the prosecutrix with the help of handkerchief. He also threatened her and thereafter, he ravished the prosecutrix. After committing the offence of rape, the appellant fled away from there.

3. The prosecutrix felt insulted because of the act done by the appellant and came back to her house. She poured kerosene and ablazed herself. Thereafter, PW-1 Alam Khan, his wife PW-16 Samina Bee and other persons reached at the house of the prosecutrix as soon as they heard the cry of the prosecutrix. They extinguished the fire. Thereafter, the prosecutrix told the facts of the incident to them. PW-1 Alam Khan informed PW-2 Wali Mohommad about the incident, who went in search of mother of the prosecutrix. He informed Noor Jahan about the incident. The mother of the prosecutrix reached at her house and thereafter, the prosecutrix was sent to hospital in an auto-rickshaw.

4. PW-19 Dr. (Ku.) Shahsi Saravgi examined the prosecutrix and she informed the police vide memorandum Ex.P/23 with a request that the dying declaration may be recorded. This information was noted down in rojnamcha-sahna and its copy is Ex.P/22-A.

5. PW-17 P.D. Mishra left the police station to reach the hospital as soon as he received the information Ex.P/14-A from police station Katni on telephone. After reaching the hospital, this Investigating Officer recorded the dehati-nalishi Ex.P/15. PW-5 Ku. Nahida Khaton, Naib Tahsildar and Executive Magistrate recorded the dying declaration Ex.P/2 of the prosecutrix. PW-15 K.S. Shekhawat also investigated the matter. After the death of the prosecutrix, he prepared the panchnama after service of notice on the witnesses. PW-6 Dr. T.N. Khare conducted the post-mortem. PW-15 K.S. Shekhawat prepared the site plan Ex.P/1-A on 5.2.93 and on the same day, various articles were seized from the place of incident and seizure memo Ex.P/12 was prepared. PW-14 Sukhdev Prasad also prepared the map Ex.P/3 of the place of incident. The appellant/ accused was arrested by him on 15.2.93 and he prepared the arrest memo Ex.P/13. The memorandum Ex.P/14 of the appellant was recorded. The appellant was sent for medical examination and PW-11 Dr. Naresh Saravgi examined him. After completion of investigation, the charge-sheet was filed.

6. The trial Court framed the charges under Sections 376(1) and 306 of I.P.C., but it was found that the offence punishable under Section 306 of I.P.C. was not proved beyond reasonable doubt and the appellant/accused was acquitted of this charge, but he was convicted under Section 376(1) of I.P.C.

7. The appellant has preferred this appeal on the grounds that on the date of incident, the appellant was less than 18 years of age and his case could have been tried by the Juvenile Court. There is no believable evidence in favour of the prosecution story. There were not external injuries on the person of the prosecutrix. It was not possible for the prosecutrix to speak anything before the witnesses, as she sustained 70% to 80% burn injuries and, therefore, the statements of witnesses are not believable. No specific act of the appellant was disclosed by the prosecutrix about the rape, therefore, no offence was made out under Section 376 of I.P.C. against the appellant. There are lot of contradictions in the statements of witnesses.

The FIR Ex.P/15 is not believable evidence. The dying declaration is also not believable piece of evidence. Therefore, the judgment of the trial Court is against the evidence and law.

8. The learned counsel for the appellant vehemently argued on these points that the appellant was less than 18 years of age and, therefore, his case could have been tried by the Juvenile Court. In the dying declaration, nothing has been disclosed about the fact of rape, therefore, the offence under Section 376(1) of I.P.C. could not be proved. The statements of witnesses cannot be believed in view of contradictions-came in their statements and dehati-nalishi. The dying declaration recorded by the police officer is not believable and for this, he placed his reliance on the case of *Rajesh @ Raja v. State of Madhya Pradesh*, 1997(1) M.P.L.J. 136.

9. Firstly, I shall consider this argument that the appellant was less than 18 years of age on the date of incident, therefore, the trial Court has committed an error as the trial Court had no jurisdiction to try the case of the appellant. The charge-sheet was filed against the appellant/accused showing his age 19 years. It is apparent from the order sheets of the committal Court as well as the trial Court that the appellant failed to raise any objection about his age and the competency of the trial Court of holding the trial. He never claimed before the committal Court and the trial Court that he was a juvenile offender. No evidence was produced during the trial about the age by the appellant. At the time of considering the question of sentence by Court, the learned counsel for the accused argued for the first time that the appellant was aged about 17 years on the date of incident, therefore, the sentence of lesser period may be awarded. At that time also, it was not argued on behalf of the accused that the accused was a juvenile offender on the date of incident, therefore, the trial Court cannot pass any sentence against him. It appears that only to get lesser sentence, the learned counsel of the accused argued before the trial Court that the accused was 17 years old on the date of incident. But the bare argument advanced by learned counsel of the appellant in this appeal, is not sufficient to come to this conclusion that the appellant/accused was juvenile offender on the date of the incident and because of that, he could have been tried by the Juvenile Court and not by the Sessions Court. According to Section 2(h) of the Juvenile Justice Act, 1986, in case of a boy, if he has not attained the age of sixteen years, he shall be a juvenile but in the Juvenile Justice (Care and Protection of Children) Act, 2000, it has been provided under Section 2(k) that where a person has not completed the age of eighteen years, he will be called as juvenile. In the instant case, the date of offence is 4.2.93. During this period, the Act of 1986 was applicable. It means while raising the point of age of the appellant, the provisions of this Act of 1986 were ignored.

10. The objection that the appellant was a juvenile offender on the date of incident, is raised in the appeal for the first time, but it cannot be considered at the

appellate stage. If a document has been filed to show the age of the appellant for the first time in the appellate Court, it has got no importance because the appellant failed to prove any document in the trial Court. Apart from that, only filing of a document in appellate Court, is not sufficient to prove the document. The appellant cannot be allowed to raise a new plea in defence at the appellate stage. In such circumstances, the school transfer certificate, filed in this appeal by the appellant, cannot be taken into consideration. The crux of this point is that when the appellant failed to raise any objection about his age before the committal Court or the trial Court, the fact of age cannot be considered at the appellate stage because the objection in respect of age, is raised for the first time in the appellate Court. In these circumstances, this argument is not tenable that the appellant was a juvenile offender on the date of incident and the Juvenile Court was competent to try the case, therefore, the trial was illegally held by the Sessions Court. Since, the appellant was 19 years old on the date of incident, therefore, he was not a juvenile offender and the trial was rightly held in the Sessions Court.

11. Now the other points, involved in this case, may be considered. PW-17 P.D. Mishra deposed that on 4.2.93, after receiving the information that the prosecutrix has been admitted in the hospital, he left the police station and the fact of his leaving the police station, was disclosed in rojnamcha-sahna Ex.P/14-A. In this rojnamcha-sahna, it was disclosed that Constable No.1352 Brij Mohan of police station, Katni informed the police station, Tikuri on telephone that the prosecutrix was burnt while preparing the food and she has been admitted in Government Hospital, Katni. It is not clear in this case as to from where Brij Mohan received the above information and on what basis he sent the information to police station, Tikuri. No witness has been cross-examined by the defence counsel on this point. There is no other evidence to show that the prosecutrix received burn injuries when she was preparing the food. It is apparent from further investigation including the site plan Ex.P/1-A and Ex.P/13 that the incident had taken place far from the residence of the prosecutrix. In these circumstances, on the basis of sahna report Ex.P/14-A, it cannot be believed that the prosecutrix sustained burn injuries when she was preparing the food. This fact is totally against the prosecution story and it appears that somebody, who was interested in the appellant, might have informed Brij Mohan and he sent the information to police station, Tikuri, accordingly. In these circumstances, on the basis of rojnamcha-sahna Ex.P/14-A, the prosecution story cannot be disbelieved at all.

12. Before coming to the statements of witnesses, I am of the opinion that the dying declaration Ex.P/2, the statement of PW-5 Ku. Nahida Khatoon and the statement of PW-19 Dr.(Ku.) Shashi Saravgi may be considered. PW-5 Ku. Nahida Khatoon was Executive Magistrate and on 4.2.93, she recorded the dying declaration Ex.P/2 of the prosecutrix and she repeated different facts of the dying declaration in her statement, which were disclosed by the deceased during recording of the dying declaration. This witness was cross-examined by the defence counsel

within two lines only and in the cross-examination, this witness has further deposed that whatever the prosecutrix had disclosed, she noted down those facts in the dying declaration. Therefore, considering the whole statement of this witness, I found that the dying declaration Ex.P/2 is believable piece of evidence.

13. PW-19 Dr.(Ku.) Shashi Saravgi deposed that on 4.2.93, she examined the prosecutrix and found superficial burn injuries on different parts of her body. She has also stated that she requested the In-charge, Police Station, Katni vide memo Ex.P/23 to record the dying declaration. She has further stated that PW-5 Ku. Nahida Khatoon came to hospital for recording the dying declaration of the prosecutrix and she certified on Ex.P/2 that the prosecutrix is fully conscious to give her statement and after completion of recording of dying declaration, she put a note that the prosecutrix was fully conscious during recording of statement in her presence. She has also stated that she remained present during recording of dying declaration. In cross-examination, this witness has disclosed that after sustaining the burn injuries, it is not necessary that the patient will go in coma, because there was no injury on the brain and even after sustaining 75% burn injuries, the patient may remain conscious.

14. Considering the statements of these two witnesses, it becomes clear that the dying declaration Ex.P/2 was properly recorded by the Executive Magistrate in presence of the doctor and, therefore, the dying declaration Ex.P/2 must be believed in this case.

15. The learned counsel for the appellant placed his reliance on the case of Rajesh (supra) wherein, it has been laid down that the dying declaration should not be recorded in presence of any Investigating Officer because the Investigating Officer may prompt the injured to give a particular statement. But it could not be established in this case that the dying declaration Ex.P/2 was recorded in presence of the Investigating Officer. The dehati-nalishi Ex.P/15 was lodged on 4.2.93 at 16.20 hours whereas, the dying declaration Ex.P/2 was recorded at 4.00 p.m. on the same day. It is nowhere stated by PW-5 Ku. Nahida Khatoon that the police officer was also present at the time of recording of dying declaration and not a single question was put to this witness or to PW-19 Dr.(Ku.) Shashi Saravgi about the presence of Investigating Officer in their cross-examination. Therefore, the principle laid down in above case law is not applicable in respect of the dying declaration Ex.P/2.

16. PW-17 P.D. Mishra deposed that he reached at the Government Hospital, Katni where the prosecutrix lodged the dehati-nalishi Ex.P/15 and thereafter, he registered the crime vide report Ex.P/17. It is apparent that after recording of dehati nalishi Ex.P/15, the prosecutrix expired and, therefore, this dehati-nalishi becomes the dying declaration in this case.

17. The dehati-nalishi Ex.P/14 was recorded as a first information report and not as a dying declaration. Since, it was the first information report of this case

and obviously, it should have been recorded by the police officer. Apart from that, there is no law that the dying declaration cannot be recorded by the police officer. If a person is dying and nobody is available to the police officer then certainly, the police officer is capable of recording of the dying declaration of that person. Though, the parameters for consideration of dying declaration, recorded by the police officer, may be more strict, but certainly, the dying declaration cannot be discarded merely because it was recorded by the police officer. In the instant case, the position is much better because the dying declaration was recorded by an Executive Magistrate and thereafter, the dehati-nalishi Ex.P/15 was recorded by police officer, which became another dying declaration in this case. This piece of evidence is also believable in this case.

18. Before coming to the point as to what was stated by the prosecutrix in her dying declaration about the incident, this Court will consider the statements of witnesses. PW-1 Alam Khan deposed that after reaching at his house, he heard the noise then, he went to the house of the prosecutrix along with his wife and he saw that the prosecutrix was burning and then he extinguished the fire. Thereafter, he asked about the incident and then the prosecutrix told that Annu @ Anoop Kumar ravished her and because of that, she ablazed herself. PW-16 Samina Bee has also corroborated the several facts. On a perusal of statements of both these witnesses, I found that there is no material contradiction and it is apparent from the statements of these witnesses that the prosecutrix disclosed them that the accused ravished her and because of that, she ablazed herself.

19. PW-2 Wali Mohammad deposed that he went in search of mother of the prosecutrix and met Noor Jahan. He informed her and then they came to the house. PW-9 Noor Jahan also corroborated this fact. This witness has stated that her daughter told that 'Anooplal ne meri izzat le liya hai, isliye maine aag laga liya hai'. It means, according to her daughter, Anooplal committed rape with her and because of that, she ablazed herself.

20. PW-2 Wali Mohammad has stated that the prosecutrix told on the way to hospital that Annu closed her mouth and ravished her. This witness was cross-examined at length and what he failed to disclose in examination-in-chief, was disclosed in his cross-examination that the prosecutrix told that she went behind the school to answer the call of nature and Annu @ Anooplal caught hold of her. Though, the above fact has been disclosed by the witness only when the statement, recorded under Section 161 of Cr.P.C., was read over, but even though the above fact came in the statement of this witness and it is quite believable part of evidence in this case. Thereafter, this witness has further repeated in cross-examination that according to prosecutrix, Annu ravished her. The statement of this witness as well as the statement of PW-9 Noor Jahan are believable.

21. PW-3 Nafiza, PW-4 Zaheer and PW-10 Shahida Begum failed to corroborate a part of prosecution story and they have been declared hostile, but it

is apparent from the statements of these witnesses that an incident had taken place and the prosecutrix sustained burn injuries. If these witnesses failed to corroborate this fact that the prosecutrix disclosed the facts against the appellant, it does not mean that the statements of other witnesses should be disbelieved. As earlier discussed, the dying declaration Ex.P/2 and the dehati-nalishi Ex.P/15, are believable documents, therefore, the prosecution has proved beyond reasonable doubt that the appellant caught hold of the prosecutrix and ravished her and because of this, the prosecutrix poured the kerosene and ablazed herself. In these circumstances, the statements of above mentioned three witnesses who have been declared hostile, cannot be believed and on the basis of their statements, the prosecution story does not become doubtful.

22. It has been argued by the learned counsel for the appellant that in the dying declaration Ex.P/2, the prosecutrix disclosed that 'Mere Sath Usne Galat Kam Kiya' but it does not mean that the appellant raped the prosecutrix, therefore, no offence under Section 376(1) of I.P.C. was proved beyond reasonable doubt. Though, the learned counsel for the appellant did not cite any case law in support of his contention, but I considered the principles laid down in the cases of *Mahesh Kumar Bherulal Chawada v. State of M.P.*, 1995 Cri.L.J. 2021 (MP), *Wahid Khan v. State of M.P.*, 1998(1) J.L.J. 290 and *Narayan v. State of Madhya Pradesh*, 2003 Cri.L.J., 268 (MP). In the case of *Mahesh Kumar* (supra), the Court found as follows:-

'31. Further more, it is important to note that Ex.P/3 and the said alleged statement of Sunita made to Kusumkant does not indicate that the accused had committed sexual intercourse with her when the prosecution has to prove a charge for commission of offence punishable under Section 376, I.P.C. Prosecution is bound to prove all ingredients of the said crime and the section. It cannot be done by using words 'Galat Kam' 'Bura Kam'. It is to be noted that insulting a person by words, gestures or indecent behaviour is also 'Galat Kam' or 'Bura Kam' such terms did not make the prosecution to prove offence which is punishable under Section 376, I.P.C.'

23. In the case of *Narayan* (supra), it was held that if the words 'MERE SATH ULTA KAM KIYA', have not been explained by the prosecutrix or prosecution by adducing reasonable evidence to understand that in the local parlance of that area, 'ULTA KAM' means sexual intercourse then in absence of evidence, the words 'ULTA KAM' would not amount to sexual intercourse. But, in the case of *Wahid Khan* (supra), it was held that where the prosecutrix states that after removing her clothes, 'BURA KAM KIYA', it means nothing than committing the sexual intercourse. This Court referred the case of *Wahid Khan* in the case of *Narayan* (supra) and came to this conclusion that it was not disclosed by the prosecutrix that the clothes were removed and thereafter, 'BURA KAM

KIYA', therefore, it means the expression 'BURA KAM KIYA', would not amount to committing rape.

24. First of all, this Court is of the opinion that where a case of rape has been filed in the Court with the allegations that the accused committed rape and for the fact of sexual intercourse, certain expressions were used such as 'Galat Kam Kiya', 'Bura Kam Kiya' or 'Ulta Kam Kiya', then prima facie, these expressions would amount to sexual intercourse. It is not necessary at all in each and every case that the prosecutrix must express categorically all the details of rape or in other words, we cannot expect of a lady that she shall disclose all the acts of the accused, when he ravished her. In the Courts, obscenity must be avoided. Normally, the ladies are shy of disclosing the facts of rape in specific terms in presence of the accused, Advocates, Judge and the deposition writer. It is very easy for a lady to disclose the words spoken to her, gestures or indecent behaviour shown to her by the accused, but certainly, it is not expected of a lady that she shall disclose facts of sexual intercourse in detail. Therefore, if a lady says in the Court that the accused had committed 'Galat Kam' or 'Bura Kam' or 'Ulta Kam', or any other such type of expression is disclosed by her and if there is any direct or indirect evidence in the statement of the prosecutrix or she discloses any other circumstance in support of her above expressions, this certainly amounts to committing rape. It is not necessary at all for that lady to disclose a particular circumstance or any other vulgar details. Even if a particular fact or circumstance has not been disclosed by the prosecutrix in support of a phrase, it does not mean that in absence of a particular circumstance, the offence of rape shall not be proved. It has been held in the case of *Wahid Khan* (supra), that -

"..... in different parts of the country, a particular act is described in many ways and different expressions are used for the purpose of same act. In my opinion, evidence of a witness has to be understood from the language of the people of that area. It is not expected of a witness to use in deposition the words mentioned in codified law. A Judge is under an obligation to understand what a witness desires to convey."

25. In a case of rape, if the prosecutrix discloses the words - 'Mere Sath Galat Kam Kiya' or 'Ulta Kam Kiya' or 'Bura Kam Kiya', and she also discloses any or different circumstances in corroboration of the story such as the accused caught hold of her or removed the clothes or entered in the house or dragged her towards a particular place and so on and so forth and then she uses any expression to describe the fact of sexual intercourse, then certainly, it would mean that the prosecutrix wants to disclose the fact of rape committed by the accused. We cannot restrict ourselves to a particular situation. The facts, situations and expressions differ from case to case and the Courts have to find out the exact meaning of the expression from the evidence adduced in that particular case.

26. In the present case, the prosecutrix disclosed in the dying declaration Ex.P/2

that when she went to answer the call of nature, Annu caught hold of her from behind and swathe her mouth and then, as per her expression, 'Mere Sath Usne Galat Kam Kiya'. If the phrase 'Mere Sath Usne Galat Kam Kiya', coupled with above facts, is considered, then it becomes clear that the prosecutrix wanted to say that the accused ravished her.

27. The dehati-nalishi Ex.P/15 is also very important piece of evidence in this case in which the prosecutrix had disclosed that the accused Annu @ Anoop caught hold of her, threw her, opened the untwisted thread of her Salwar and then committed sexual intercourse. These facts are very important in this case.

28. The witnesses have also stated that the fact of rape committed by the accused, was also disclosed to them by the prosecutrix. In these circumstances, what the prosecutrix has stated in the dying declaration Ex.P/2 about the rape, finds support from other evidence in this case. This Court is still of the opinion that in absence of evidence of dehati-nalishi or the statements of witnesses about the information given by the deceased, the appellant could have been convicted for the offence of rape on the basis of dying declaration Ex.P/2 only because, there are supportive facts to the phrase 'Mere Sath Galat Kam Kiya', and this phrase was sufficient to prove that the appellant raped the prosecutrix.

29. In view of the above discussion, since the other statements are of formal nature, therefore, it is not necessary to consider here because, those statements are in respect of seizure of slide, duty certificate of constable, seizure of various articles from the place of incident, etc. PW-6 Dr. T.N. Khare conducted the post-mortem of the deceased and found that the deceased died because of shock as a result of extensive burn. This witness has given the post-mortem report Ex.P/4 and no definite opinion could be given by him regarding rape due to burn injuries. PW-19 Dr.(Ku.) Shashi Saravgi also did not disclose anything about the fact of rape. But, this medical evidence is not sufficient to disbelieve the prosecution story because, if the doctor was not able to give any opinion about the commission of rape because of burn injuries or for any other cause, it does not mean that no rape was committed with the girl. In view of the dying declarations and other evidence, this fact was proved beyond reasonable doubt that the appellant committed rape on the prosecutrix, therefore, if the medical evidence does not support the fact of rape, the prosecution story does not become doubtful.

30. The trial Court has not committed any error in believing the prosecution story and coming to this conclusion that the offence punishable under Section 376(1) of I.P.C. was proved beyond reasonable doubt. Since, it appears that no appeal has been preferred by the State against the acquittal of the appellant under Section 306 of I.P.C., therefore, it would not be proper for this Court to consider this aspect of the case. But, considering all the facts and evidence, this Court is of the opinion that the offence under Section 376(1) of I.P.C. was proved beyond reasonable doubt against the appellant/accused.

31. The appellant was 19 years old at the time of incident. He committed rape with a girl aged about 13 years and because of this incident, the prosecutrix became disgusted and committed suicide. In these circumstances, the offence of the appellant becomes more heinous. The appellant has been sentenced to ten years rigorous imprisonment and there is no adequate or special reason for reducing the jail sentence. Considering the nature of crime and result of this offence that the prosecutrix committed suicide, this Court is of the opinion that the jail sentence of ten years rigorous imprisonment was proper.

32. In view of above discussion, this Court finds that there is no merit in this appeal. Hence, it is dismissed. The bail bonds of the appellant are cancelled. The appellant Annu @ Anoop Kumar shall surrender before the Court below immediately to serve the remaining part of sentence failing which, the Court below is directed to issue non-bailable warrant against the appellant. The appellant shall be entitled to set off under Section 428 of Cr.P.C. The property shall be disposed of in accordance with the orders of the trial Court.

Appeal dismissed.

I.L.R. [2008] M. P., 2445

CIVIL REVISION

Before Mr. Justice J.K. Maheshwari

24 June, 2008*

CHARANJIT KAUR (SMT.)

... Applicant

Vs.

S.R. CABLE

... Non-applicant

Civil Procedure Code (5 of 1908), Section 115, Arbitration and Conciliation Act, 1996, Section 8 - Arbitration Clause - Applicant filed suit for declaration & injunction - Counterclaim by defendant - Applicant permitted to withdraw suit - Counterclaim entertained as suit - On first date of that suit objection for referring dispute to arbitration filed - Rejection - Objection qualifies the expression "the first statement on the substance of dispute" of Section 8 of the Act - Held - Rejection of objection not sustainable - Dispute referred to arbitration - Revision allowed. (Paras 13 & 14)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115, माध्यस्थम् और सुलह अधिनियम, 1996, धारा 8 - माध्यस्थम् खण्ड - आवेदक ने घोषणा एवं व्यादेश हेतु वाद पेश किया - प्रतिवादी द्वारा प्रतिदावा - आवेदक को वाद वापस लेने की अनुमति दी गई - प्रतिदावा, वाद के रूप में ग्रहण किया गया - उस वाद की प्रथम तिथि पर विवाद माध्यस्थम् के लिए निर्दिष्ट करने के लिए आपत्ति पेश की गई - नामांजूर - आपत्ति अधिनियम की धारा 8 के पद "विवाद के सार पर प्रथम कथन" को विशेषित करती है - अभिनिर्धारित - आपत्ति का नामांजूर किया जाना स्थिर रखे जाने योग्य नहीं - विवाद माध्यस्थम् के लिए निर्दिष्ट - पुनरीक्षण मंजूर।

Cases referred :

AIR 2002 SC 404, (2006) 7 SCC 275, (2000) 4 SCC 539, AIR 2003 Karn 502, AIR 2002 P&H 232.

B.L. Pavecha with Amit Agrawal, for the applicant.

A.K. Sethi with Rahul Sethi, for the non-applicant.

ORDER

J.K. MAHESHWARI, J.:—This order shall also govern disposal of Civil Revision No. 136 of 2008.

Both the revision are filed under Section 115 of the Code of Civil Procedure, 1908 assailing the orders passed by the learned XI Civil Judge, Class-1, Indore rejecting the application of Section 8 of the Arbitration and Conciliation Act, 1996 read with Order VII Rule 11 of C.P.C., filed by the applicant.

2. The facts which are not in dispute that petitioner, a multi-media system operator, has entered into an agreement with non-petitioner on 1.6.2006, whereby the cable lines belongs to them had taken by non-petitioner for operation for the period of three years with effect from 1.4.2006 as per the terms and conditions specified in the agreement. Clause 14 of the said agreement provides for arbitration to a dispute, if any, arises between the parties, which may be decided in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or by the Arbitrator Mahilpalji and Manish Dixitji, and their decision shall be agreeable to the both parties.

3. On arising some dispute of title, petitioner had filed a suit on 4.2.2008 for declaration and permanent injunction, wherein the relief for temporary injunction was refused by the trial Court and the appeal against the said order was also dismissed. However, the plaintiff has moved an application under Order 23 Rule 1 of C.P.C. for withdrawal of the suit on 31.3.2008, but on the same date non-petitioner/defendant has filed the counter claim against plaintiff; the trial Court has passed the order and permitted to withdraw the suit filed by plaintiff-petitioner, however, the counter claim filed by defendant/non-petitioner remain pending. On the next date i.e. 9.4.2008 petitioner has moved an application under Section 8 of the Arbitration and Conciliation Act, 1996 read with Section 7 and II of the C.P.C., inter alia contended that as per Clause 14 of the agreement, the counter claim cannot be continued and the parties may be directed to refer under the Arbitration and Conciliation Act for settlement of their dispute. The reply to the said application was filed on 22.4.2008 stating that because the petitioner had withdrawn his suit remaining unsuccessful in getting injunction even on having the knowledge of the arbitration clause, however, on behest of petitioner such an application is not entertainable. It is further stated that once the plaintiff has filed his statement of substance and filed the suit, on objecting by defendant, the injunction was refused, *ex consequentia* the said suit was withdrawn by them. Now while trying counter claim of defendant, application under Section 8 of the Act, to refer the parties for

arbitration, is not entertainable, because it is amounting to approbate and reprobate the relief, which is not permissible, and the plaintiff is now estopped to take such plea.

4. By passing the order impugned on 5.5.2008, learned trial Court has rejected the application of petitioner filed under Section 8 of the Arbitration and Conciliation Act, and recorded the finding that he has waived his right to raise the objection to refer the parties to resolve the dispute as per arbitration clause specified in arbitration agreement. It is further held that because his application for temporary injunction was rejected by the trial Court in his suit, however, on withdrawal of the said suit and on entertaining the counter claim such objection is not entertainable.

5. Shri B.L.Pavecha, learned senior counsel has argued that the compliance of Section 8 is peremptory to a judicial authority before whom action is brought to challenge, in a case, if it is the subject matter of the arbitration agreement. It is further argued by him that the counter claim was filed by the non-applicant on 31.3.2008 i.e. the date of withdrawal of the suit and the said counter claim is required to be tried as suit. Thus, on the next date i.e. 9.4.2008 the application under Section 8 of Arbitration and Conciliation Act was filed by him referring Clause 14 of the agreement and put forth that the dispute is arbitrable. Thus, petitioner had submitted the statement on the substance of the dispute, in the first instance on filing the counter claim, therefore, the judicial authority before whom the lis is pending is mandatorily required to refer the parties for arbitration, departure on the plea of waiver or on the ground of approbate or reprobate the relief is not permissible. Reliance has been placed on a judgment of the Apex Court in the case of *Smt. Kalpana Kothari Vs. Smt. Sudha Yadava and others*, reported in AIR 2002 SC 404. While advancing the argument it is submitted that the Arbitration and Conciliation Act, 1996 was introduced after repealing the Arbitration and Conciliation Act, 1940. In the old Act Section 34 gives powers to stay the legal proceedings, while Section 8 of new Act confers powers to refer the parties to Arbitration, terminating the proceedings pending before the judicial authority. Under Section 34 it was a discretion vested with the Court to stay the legal proceedings if the Court is having, reason to believe after satisfying himself. While in the Act of 1996 it is mandatory to the judicial authority to refer the parties to arbitration where there is an arbitration agreement, and if party so applies, on submitting his first statement on the substance of the dispute. In the present case on the first instance after entertaining the counter claim petitioner has applied under Section 8 of the new Act to refer the parties for arbitration under agreement, however, the Court is having no option, except to refer the parties to take recourse under Arbitration and Conciliation Act. It is peremptory on the Court to refer the parties for arbitration without having any departure from the statutory provisions, however, learned trial Court has committed an error much less jurisdictional, while rejecting the application.

6. Shri Pavecha, senior counsel has further placed reliance on a judgment in the case of *Rashtriya Ispat Nigam Ltd. and another Vs. Verma Transport Co.*, reported in (2006) 7 SCC 275, and argued that petitioner has never waived his right to invoke the arbitration clause, and on entertaining the counter claim on the first statement of the substance an objection under Section 8 of the Arbitration and Conciliation Act was before the judicial authority. So far as filing of the plaint and denial of injunction is concerned, it was the action on the suit filed by him and the said suit is not in existence due to withdrawal on 31.3.2008, now the counter claim of defendant has to be treated as suit, therefore, at the first instance application was filed, in terms of the agreement dated 1.6.2006 referring the arbitration clause which cannot be rejected applying the principle of waiver. Shri Pavecha has further relied upon the judgment of Apex Court in the case of *P. Anand Gajapathi Raju and others Vs. P.V.G. Raju (Dead) and others*, reported in (2000) 4 SCC 539 and argued that as per Section 8(1) of the Arbitration and Conciliation Act the power of the Court can be exercised, if there is an arbitration agreement, and a party to the agreement brings an action in a Court against the other party, which is a subject matter of the arbitration agreement. On applying by other party for referring the parties to arbitration, on submitting his first statement on the substance of the dispute; the Court is mandatorily required to refer them for arbitration without departure. Thus, the Court must peremptorily require to comply the provisions of Section 8 of the Arbitration and Conciliation Act. In view of the judgments of the Apex Court it is prayed that the impugned order is liable to be set aside.

7. On the other hand Shri A.K. Sethi, learned senior counsel appearing for non-petitioner, has placed reliance on a judgment of Karnataka High Court in the case of *Ramkrishna Theatre Ltd. Vs. M/s General Investments & Commerce Corpn. Ltd.* reported in AIR 2003 Karnataka 502 and argued that on due consideration of the judgment of *P. Anand Gajapathi Raju* (supra) and on availability of arbitration agreement, when a party has waived his right by filing the plaint now on entertaining the counter claim as per his objection he cannot be permitted to approbate or reprobate the relief, under the guise of objection under Section 8 of the Arbitration and Conciliation Act. In support of the said contention he has further placed reliance on the judgment of Punjab & Haryana High Court in the case of *Mukta Sharma Vs. U.P. Industrial Corporation Association Ltd. And another*, reported in AIR 2002 P&H 232. On the basis of those judgments it is argued that once the petitioner has opted to invoke the jurisdiction of the civil Court by filing the suit, on filing the counter claim by the non-petitioner-defendant, the application under Section 8 Arbitration and Conciliation Act is not entertainable and the Court below has rightly rejected the said application. Shri Sethi has also referred the provisions of Section 34 of the old arbitration act, whereby the discretion is vested with the Court to stay the proceedings and to refer the parties to arbitration on recording its satisfaction. He has further argued that by reading

sub-section (1) and (3) of Section 8 of the New Act, the word "shall" cannot be used in mandatory sense, he argues that even under the New Act the discretion is vested in a Court to refer the parties for arbitration if so applies, at the first instance by submitting statement of claim, therefore, it is not always mandatory to the Court to refer the parties for arbitration. The finding recorded by the trial Court of waiving the right by petitioner to invoke arbitration clause, as per agreement cannot be said to be unreasonable in the facts and circumstances of the present case, accordingly prayed for dismissal of revision petitions by upholding the order under challenge.

8. After having heard learned counsel appearing for the parties and to appreciate the arguments as advanced relying on the provisions of Section 34 of Arbitration and Conciliation Act, 1940 (old Act) and Arbitration and Conciliation Act, 1996 (new Act) and to find out the legislative intent, it is necessary to quote those provisions, which reads as under :-

**Arbitration and Conciliation Act
1940 (Old Act)**

Section 34. Power to stay legal proceedings where there is an arbitration agreement,

Where any party to an arbitration; agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending; and if, satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

**Arbitration and Conciliation
Ordinance, 1996. (New Act)**

Section 8. Power to refer parties to arbitration where there is an arbitration agreement.

- (1) A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
- (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
- (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

9. The comparative reading impliedly draw the distinction and scope of the both Sections. Section 34 of old Act gives power of staying of the legal proceedings, while Section 8 of new Act gives power to the Court to refer the parties for arbitration as an imperative, if there is an arbitration agreement. Under Section 34 either party may file an application to stay the legal proceedings before filing of the written statement or taking any other step in the proceedings. It further confer discretion to the court for recording its satisfaction to stay the legal proceedings, but at the same time under Section 8 if there is an arbitration agreement, and a party at his first instance submits his statement on the substance of dispute, the Court is duty bound to refer the parties for arbitration. Thus, in the new Act, in place of staying the legal proceedings; the court has to terminate proceedings by referring the parties to arbitration and the said award shall remain unhampered as specified under sub-section (3) of Section 8 of the Act. In the aforesaid contingencies, the Court is bound to enforce the spirit of Section 8 mandatorily without any exception. In the said context the authorities cited by learned senior counsel appearing for the parties required to be appreciated. The Apex Court while dealing the issue in the case of *P. Anand Gajapathi Raju and others* (supra) in the year 2000 has observed that the language of Section 8 is peremptory, therefore, it is obligatory for the Court to refer the parties to arbitration in terms of the arbitration agreement, if there is an arbitration agreement; and a party to the agreement brings an action in the Court for reference, as the subject matter of the action is the same as the subject matter of the arbitration agreement; and applies at first instance to submit his statement on the substance of the dispute.

10. In the case of *Smt. Kalpana* (supra) Hon'ble the Supreme Court while dealing with the scope of Section 34 of the old Act and Section 8 of the new Act observed that the old Act provides for filing of an application to stay legal proceedings initiated by any party and arbitration agreement against any other party to such agreement, in derogation of the arbitration clause and attempts of settlement of the dispute otherwise then in accordance with the arbitration clause by constituting the existence of arbitration clause, thereon the authority concerned may stay such proceedings on being satisfied that there is no sufficient reason as to why the matter should not be referred to for decision in accordance with the arbitration agreement but the applicant, who applies for stay is ready and willing to do for things necessary to the proper conduct of arbitration. The said proceedings having nothing to do with actual reference of the arbitration of the disputes because it was left to be taken care of under Section 8 and 20 of the old Act. It is further observed that striking the contrast to the said scheme underlying the provisions of the old Act, in the new Act, 1996 there is no provision corresponding to Section 34 of the old Act. Section 8 of the new Act mandates judicial authority before which an action has been brought in respect of the matter, which is the subject matter of an arbitration agreement. In such a case it shall refer the parties to arbitration if a party to such an agreement applies not later

when submitting his first statement. The provisions of the new Act do not envisaged the specific obtaining of any stay as under the old Act. For the reason that not only the discretion to make reference is mandatory but notwithstanding pending of the proceedings before the judicial authority or making of an application under Section 8(1) of the new Act, the arbitration proceedings are enabled under Section 8(3), to remain continue unhampered by pendency of proceedings. The Apex Court has further observed that the new Act constitutes a recourse and to avail the avenues to go into arbitration under the arbitration agreement. The plea of estoppel having no application to deprive the applicant of the legitimate right to invoke comprehensive provisions of the mandatory character of Section 8 of the New Act and if the matter relating to the dispute referred to arbitration in terms of the arbitration agreement.

11. In an another case of *Rushtriya Ispat Nigam Ltd.* (supra) the Supreme Court has dealt with the issue of waiver of right to invoke the arbitration clause in the context of the expression "the first statement of substance of the dispute" contra distinguished to "written statement". It was held that if an application is filed before actually filing the first statement on the substance of the dispute the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the Court, however, it may be gathered from the material, whether the party moving an application under Section 8 has filed its first statement on the substance of the dispute or not, if not the application is not maintainable. The Court has further held that merely disclosure of the defence while praying for injunction would not necessarily mean to waiver: which relates to the supplemental and incidental proceedings. The waiver to opt for under the arbitration agreement on the part of the defendant to the lis can be gathered from the facts and situation obtaining in each case.

12. The judgments relied upon by other side of Karnataka High Court in the case of *Ramkrishna Theatre* (supra) as well as the judgment of Punjab & Haryana High Court in the case of *Mukta Sharma* (supra), having no application to the facts of the present case. In those cases, the dispute was of ejectment, where under by issuing notice, as per the arbitration agreement plaintiff/landlord had made a request to defendant/tenant to go into arbitration, which was not acceded to and refused in reply to the notice, but on filing the suit by the landlord an objection was raised by tenant to refer the dispute for arbitration and the suit may be dismissed. In the said context the principle of waiver was uphold by the High Court. But in the present case there is no refusal by petitioner to refer the dispute to arbitration, thus, the factual scenario of the case in hand is entirely different.

13. In view of the foregoing, it is apparent that Section 8 of the New Act have some departure from Section 34 of the old Act. Section 34 gives power to stay the legal proceedings where there is an arbitration agreement by vesting a discretion to the judicial authority: while Section 8 mandates the judicial authority under the statute to refer the matter for arbitration if it is covered by the arbitration agreement

and applied for at the first instance submitting the statement on the substance of the dispute. Thus, on commencement of the new Act the judicial authority is mandatorily required to refer the dispute in terms of the arbitration agreement, and such award shall remain unhampered by any proceedings in the Court under Section 8(3) of the new Act. Therefore, the hallmark of the difference of Section 34 of the old Act and Section 8 of the new Act is of vesting the discretion to the judicial authority for stay, but under the new Act it is mandatory to refer the parties as per agreement. Under the old Act it is a stay of the proceedings but under the new Act the proceedings shall be terminated and the award shall remain unhampered.

-14. In the context of the said legal position the facts of the present case required to be appreciated. It is undisputed that an arbitration agreement dated 1.6.2006 was entered in between the parties, wherein Clause 14 provides for arbitration, as per the provisions of Arbitration and Conciliation Act, 1996. Undisputedly, applicant had filed a suit for declaration and permanent injunction on 4.2.2008, wherein the relief of temporary injunction was refused, later on 31.3.2008 the suit was permitted to be withdrawn by the Court. But because on the same date counter claim was filed by the defendant/non-petitioner, which was entertained treating it as suit, therefore, on the first date i.e. 9.4.2008 petitioner has applied under Section 8 of the Arbitration and Conciliation Act to refer the parties for arbitration. The said application was rejected by the order impugned upholding the plea of waiver and presuming that the action of petitioner is amounting to approbate or reprobate the relief. In the present case the suit filed by applicant was withdrawn on 31.3.2008 in view of an arbitration agreement entered between the parties. When the counter claim of the defendant was entertained by the Court, then immediately on the next date i.e. 9.4.2008, petitioner has filed an application under Section 8 of the New Act showing his unequivocal intention questioning the maintainability which was rejected by the order impugned. So far as refusal of the application of temporary injunction is concerned, it is suffice to say those are supplemental or incidental proceedings and the part of the main suit, which was already withdrawn and not the part of the present proceedings, therefore, on such basis, wherein no written statement was filed till withdrawal, the plea of defendant of waiver can not be accepted. It is the trite law that merely withdrawal of the suit without decision on merit, the subject matter on the pretext does not debar the plaintiff to take defence for the subject matter. The principle of *res judicata* applies to bring a fresh suit for the same cause of action, thus. in view of the foregoing it is clear that immediate on the next date of entertaining the counter claim of the defendant, petitioner has submitted his objection under Section 8 of the New Act to refer the parties for arbitration under the Arbitration agreement. Therefore, it qualifies the expression specified under Section 8 i.e. "first statement on the substance of the dispute". However, in the facts and circumstances of the present case, the rejection of objection of the petitioner. upholding, the plea of

waiver cannot be sustained and the findings recorded by the learned trial Court in the order impugned is liable to be set-aside.

15. Accordingly and in view of the discussion as made herein above the order impugned dated 5.5.2008 passed in both the cases rejecting the application under Section 8 of the Arbitration and Conciliation Act is set aside, and the dispute, if any between the parties is hereby referred in terms of arbitration agreement. In consequence thereto the suit or the counter claim of defendant pending in the trial Court be treated as consigned to record. In the facts and circumstances of the case, parties to bear their own costs.

Order accordingly.

I.L.R. [2008] M. P., 2453

CRIMINAL REVISION

Before Mr. Justice Rakesh Saxena

15 November, 2007*

ANIL KUMAR GUPTA

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 464 - *Effect of omission to frame, or absence of, or error in, charge - Finding of conviction cannot be held to be invalid as omission to frame, or absence of, or error in, charge did not result in any prejudice to accused nor it occasioned failure of justice.* (Para 15)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 464 - आरोप विरचित न करने या उसके अभाव या उसमें गलती का प्रभाव - दोषसिद्धि का निष्कर्ष अविधिमन्य अभिनिर्धारित नहीं किया जा सकता क्योंकि आरोप विरचित न करने, या उसके अभाव, या उसमें गलती, के परिणामस्वरूप अभियुक्त पर कोई प्रतिकूल प्रभाव नहीं पड़ा और न इसके कारण न्याय की विफलता हुई।

B. Penal Code (45 of 1860), Sections 467 & 468 - *Forgery - Applicant dishonestly obtained money from complainants and issued cheques to them which were not encashed - No allegation that cheques were false or fabricated - It cannot be said that cheques were forged with intent to defraud complainants - Conviction of applicant for offence u/s 467 & 468 set-aside - Revision partly allowed.* (Para 17)

ख. दण्ड संहिता (1860 का 45), धाराएँ 467 व 468 - कूटरचना - आवेदक ने बेईमानीपूर्वक परिवादियों से धन प्राप्त किया और उन्हें चेक जारी किये जिनका भुगतान नहीं हुआ - कोई अभिकथन नहीं कि चेक मिथ्या या गढ़े हुए थे - यह नहीं कहा जा सकता कि चेक परिवादियों को धोखा देने के आशय से कूट रचित किये गए - धारा 467 व 468 के अधीन अपराध के लिए आवेदक की दोषसिद्धि अपास्त - पुनरीक्षण अंशतः मंजूर।

Chhotelal Mishra with B.R. Koshta, for the applicant.

J.K. Jain, G.A., for the non-applicant/State.

ORDER

RAKESH SAKSENA, J.:—Applicant has filed this revision against the order dated 24.3.2007, passed by Additional Sessions Judge (Fast Track Court), Amarpatan, District Satna, in Criminal Appeal No. 35/07, affirming the judgment and order dated 3.7.2006, passed by Judicial Magistrate First Class, Amarpatan, in Criminal Case No. 384/06, convicting the applicant under Section 420, 467 and 468 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for two years with fine of Rs. 1000/-, rigorous imprisonment for two years with fine of Rs. 2000/- and rigorous imprisonment for with fine of Rs. 2000/-, on each count respectively. Sentences directed to run consecutively.

2. In short, the prosecution case is that applicant/accused since before 3.2.1999 dishonestly induced and deceived people of village Dihiya Kala viz Vishwanath Kol, Surjdeen, Bhagwandeem, Ram Sushil, Ram Pratap, Ramhet, Dayali, Samaylal, Pachai, Samay Lal, Ram Khelawan, Balli, Parasi, Chhotelal, Ram Krapal, Balmik, Ganpat, Gorelal, Chavilal and Kanhai to deliver money to him on the assurance that he would return them by making it double. On their demanding back their money, he issued cheques to them, which could not be encashed. He also did not repay their money. Some of these persons, when went to Bank, they were informed that there was no money in the account of accused. A report was submitted to police by 21 persons. Police registered the case under Section 420 and 467 of Indian Penal Code finding that applicant had cheated the complainants by dishonestly inducing them to deliver money. During investigation, it was found that there was no money in the bank account of applicant.

3. After investigation, a charge sheet was filed before the Court.

4. Learned Magistrate framed the charge under Section 420, 467 and 468 of Indian Penal Code.

5. Applicant abjured the guilt and claimed to be tried.

6. During trial, prosecution examined 23 witnesses and produced 25 documents including the cheques issued by applicant to complainants.

7. Learned Magistrate, relying upon the evidence adduced by the prosecution, convicted the applicant/accused and sentenced him as mentioned above.

8. Aggrieved applicant preferred appeal before the Court of Sessions. His appeal was dismissed by Additional Sessions Judge, Satna.

9. Learned counsel for the applicant submits that the evidence adduced by the prosecution is not sufficient for bringing home the charge under Section 420 as well as under Sections 467 and 468 IPC. He submits that on the basis of adduced evidence, it cannot be held that the cheques, alleged to have been issued by the applicant, were forged or that he had forged any document. Therefore, the

conviction of applicant for the offence under Section 467 and 468 of Indian Penal Code is illegal and deserves to be set aside. Counsel further submits that the charge framed by the Magistrate was defective on account of not giving particulars and the specific dates of each transaction with respect to particular complainant. Because no specific period of commission of offence was mentioned, therefore, he submits, that conviction of the applicant under Section 420 of IPC is also liable to be set aside.

10. Per contra, learned counsel for the State submits that there is overwhelming evidence on record. All the witnesses who are said to have been cheated by the applicant have been examined before the court and they have categorically deposed that applicant had dishonestly induced them to deliver money to him on assurance that he will return their money with interest more than which Banks give, but ultimately no money was returned to them and it was found that there was no money in the account of the applicant in the Bank. He had criminal intent of cheating from the very beginning when he had induced complainants to deliver money to him.

11. On perusal of evidence of Ram Sushil (PW-1), it is found that he has categorically stated that accused had demanded money from him on the pretext of investing it in the business of Hay. He had given him Rs. 20,000/-. He had assured that he would get back his money from Allahabad Bank, where his money was deposited. He had issued him a cheque on 22nd February 2001 (Ex. P/1) for Rs. 35,000/-. When he went to Bank, he was informed by the Bank officials that there was no money in the account of accused. He admitted in the cross-examination that he had not submitted cheque in the Bank, but when he had gone to submit it, the Bank officials had informed him that there was no money in the account of accused. He had, therefore, given a complaint to local MLA. Ram Krapal (PW-2) stated that accused had obtained Rs. 25,000/- from him on the pretext that he would return the same after three months. Accused had given him a cheque of Allahabad Bank, but he came to know that there was no money in the Bank account of applicant. Similarly Smt. Jhalli (PW-3) stated that accused had obtained Rs. 20,000/- from her and had given a cheque of Rs. 24,000/- to her. When she went to Bank to encash it, there was no money in the Bank account of accused. She had complained to police. She had put her thumb impression on the complaint (Ex. P/2). Similarly, Ram Pratap Mishra (PW-4), Kandhai (PW-5), Ram Khelawan (PW-6), Vishwanath (PW-7), Balmik (PW-8), Lakhani (PW-9), Samay Lal (PW-10), Padasari Kol (PW-11), Bhagwandeem Yadav (PW-12), Ganpat (PW-13), Samay Lal, s/o Pachai (PW-14), Arjun Prasad Soni (PW-15), Gorelal (PW-16), Chhotelal (PW-17), Surijdeem (PW-18), Vrandawan (PW-20) and Pachai Kol (PW-21) testified that applicant had obtained money from them assuring that he would return money giving more interest on the money, but the cheques, given by the accused to them, were not encashed and the money was not returned to them.

12. S. Pal Sethi (PW-22), Senior Manager, Allahabad Bank, Ram Nagar, testified that he was Senior Manager in the Bank since 15th September 2003. He stated that there was an account of accused in the Bank which was Savings Account No. 1996. He deposed that on 10.2.1994 there was only balance of Rs. 17.00 in the account of accused. On 13.10.1998 the balance was Rs. 296/- only. On 26.6.1996 Rs. 7108/- were deposited, but on 6.7.1999, Rs. 7150/- were withdrawn. He gave description of various cheques issued by the accused. He stated that there was no sufficient money in the account of accused for clearing the cheques. It is apparent that the testimony of prosecution witnesses, who had been deprived of their money on false assurance made by the accused, is corroborated by the testimony of S. Pal Sethi (PW-22). Kamlesh Prasad Pandey (PW-23), Branch Manager, Shahdol, also testified that accused Anil had opened an account in Shahdol Kshetriya Gramin Bank, Branch Papaid, Shahdol. The cheque book was issued to him. Only Rs. 500/- were deposited in the account of accused. Total balance in the account was Rs. 575/-.

13. On due consideration of the above evidence, it is established that applicant had dishonestly induced the complainants/witnesses to deliver money to him, which in total comes about to Rs. 6,81,090/-, with the intention to cause wrongful loss to them. Thus, it is clearly established that applicant committed offence of cheating punishable under Section 420 of Indian Penal Code.

14. On going through the impugned judgments of the courts below, I do not find any error or illegality in the appreciation of evidence done by them and holding accused guilty for the said offence. Accordingly, the finding of conviction of the accused under Section 420 of Indian Penal Code is affirmed.

15. So far as the contention made by the learned counsel for the applicant that trial Court committed error in framing charge and that the charge was defective on account of not giving particulars and the specific dates of each transaction with respect to particular complainant, I am of the opinion that it did not result in any prejudice to accused nor it occasioned failure of justice to him. As such, merely on that ground the finding of conviction recorded by the Court of Magistrate, cannot be held to be invalid. In this regard, provisions of Section 464 of Code of Criminal Procedure are relevant, which are reproduced hereunder:

"464. Effect of omission to frame, or absence of, or error in, charge.- (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity, in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."

Thus, the aforesaid argument advanced by the learned counsel for the applicant is not acceptable.

16. So far as the conviction of accused under Section 467 and 468 of Indian Penal Code is concerned, for bringing home the charge of forgery, it is necessary that a false document or record should have been made with intent to cause damage or injury to any person or to cause any person damage in person or to part property with intent to commit fraud. The definition of offence of forgery is provided under Section 463 of Indian Penal Code, which reads as under:-

"463. Forgery.-[whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

In section 464 of the Indian Penal Code, making of false document has been defined. Section 464 reads as under:

"464. Making a false document.-[A person is said to make a false document of false electronic record-

First-who dishonestly or fraudulently-

(a) Makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any digital signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature,

with the intention of causing it to be believed that such document or part of document, electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly-Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly-who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.] "

17. On perusal of the prosecution evidence and the accusation in the present case, it is abundantly clear that the allegation is that accused had dishonestly obtained money from the complainants and had issued cheques to them which were not encashed. There is no allegation that the said cheques were false or fabricated. There is no dispute that the cheques bore the signatures of applicant. Thus, it cannot be held that the aforesaid cheques were forged with intent to defraud the complainants. Since the necessary ingredient of making false document has not been established by the prosecution, the conviction of accused/applicant for the offence under Section 467 and 468 of Indian Penal Code is not warranted and deserves to be set aside.

18. In the result, this revision is partly allowed. The conviction and sentence awarded to applicant for the offence under Section 420 of Indian Penal Code, by the courts below, is affirmed. However, conviction and sentences awarded to applicant under Sections 467 and 468 of Indian Penal Code are set aside. The amount of fine, if deposited, on conviction under Sections 467 and 468 of Indian Penal Code, shall be refunded to applicant.

Revision partly allowed.

I.L.R. [2008] M. P., 2458

CRIMINAL REVISION

Before Mrs. Justice Sushma Shrivastava

20 June, 2008*

CHHOTELAL

Vs.

STATE OF M.P.

... Applicant

... Non-applicant

Prevention of Food Adulteration Act (37 of 1954), Section 13(2) - Presumption of service of notice sent by registered post - Notice alongwith report of Public Analyst was sent to applicant's address by registered post - Held - There would be presumption of service of notice sent by registered post - Mere fact that A.D. receipt was not filed was not sufficient to rebut or dislodge the presumption of service of notice in absence of any evidence to the contrary.

(Para 12)

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2) - रजिस्टर्ड डाक द्वारा भेजे गये सूचनापत्र की तामील की उपधारणा - लोक विश्लेषक की रिपोर्ट के साथ सूचनापत्र आवेदक के पते पर रजिस्टर्ड डाक द्वारा भेजा गया - अभिनिर्धारित - रजिस्टर्ड डाक द्वारा भेजे गये सूचनापत्र की तामील की उपधारणा की जाएगी - केवल यह तथ्य कि ए.डी. रसीद पेश नहीं की गई, किसी प्रतिकूल साक्ष्य के अभाव में, सूचनापत्र की तामील की उपधारणा का खण्डन या विस्थापन करने के लिए पर्याप्त नहीं।

Abhinav Dubey, for the applicant.

S.S. Bisen, G.A., for the non-applicant/State.

ORDER

SUSHMA SHRIVASTAVA, J. :- Applicant has preferred this revision against the appellate judgment dated 8.1.99 passed by Sessions Judge, Raizen in Criminal Appeal No. 80/98, whereby the conviction of the applicant under Section 7(i)/16(1)(a)(i) of Prevention of Food Adulteration Act, 1954 (hereinafter to be referred as 'Act') recorded by Chief Judicial Magistrate, Raizen and sentence passed on him are upheld.

2. Applicant was tried for the offence under Section 7(i)/16(1)(a)(i) of the Act before Chief Judicial Magistrate, Raizen on the basis of complaint instituted by Food Inspector R.K. Singh. It is alleged that on 25.12.90 at about 8 'O'clock in the morning at Barna Colony, Badi, during checking by the Food Inspector R.K. Singh, applicant was found carrying 8 liters of mixed milk (cow and buffalo milk) for sale. Food Inspector R.K. Singh then introduced himself to the applicant and purchased 750ml of mixed milk from the applicant for analysis in presence of panch witnesses and gave him a notice in writing in Form No. VI to have it analyzed. The Food Inspector then divided the sample of mixed milk collected from the applicant into three equal parts and filled each part in three clean and dried bottles, added prescribed quantity of Formalin in each bottle and duly packed and sealed them, sent one of its parts to the Public Analyst for analysis and the remaining two parts to the Local Health Authority. Upon analysis, the sample of milk taken from the applicant was found to be adulterated. After obtaining necessary sanction, applicant was prosecuted under section 7(i)/16(1)(a)(i) of the Act. After the institution of the prosecution, notice under section 13(2) of the Act alongwith the report of the Public Analyst was sent to the applicant by registered post.

3. After trial, Chief Judicial Magistrate, Raizen, found the applicant guilty for selling adulterated mixed milk of cow and buffalo and convicted him under section 7(i)/16(1)(a)(i) of the Act and sentenced him to rigorous imprisonment for six months with fine of Rs. 1,000/- by judgment dated 29.7.98 passed in Criminal Case No. 269/91.

4. In criminal appeal preferred by the applicant against the aforesaid order of his conviction and sentence, the appellate Court, after considering the evidence on record and the other legal aspects of the case, affirmed the conviction and sentence passed on the applicant under Section 7(1)/16(1)(a)(i) of the Act by the impugned judgment, which has been assailed in this revision.

5. Learned counsel for the applicant submitted that the courts below gravely erred in law and facts in convicting and sentencing the applicant on the basis of sole testimony of the Food Inspector without any independent corroboration and failed to consider that notice under Section 13(2) of the Act was not served on the applicant and the applicant was thus deprived of valuable right under Section 13(2) of the Act.

6. Learned counsel for the State, on the other hand, justified and supported the impugned judgment.

7. Impugned judgment and records of the lower courts perused.
8. There is a concurrent finding of the fact of two courts below that Food Inspector R.K. Singh had duly purchased a sample of 750ml of mixed milk (cow and buffalo milk) from the applicant, which was found to be adulterated after analysis. The aforesaid finding of fact does not suffer from any infirmity in view of the evidence of Food Inspector R.K. Singh (P.W.-1) and the documents (Ex.P-4 to Ex.P-11) placed on record.
9. Although, the panch witnesses, namely, Jamuna Prasad (P.W-2) and Ashok Dixit (P.W-3) did not support the version of the Food Inspector (P.W-1), they admitted their signatures on the papers evidencing the sampling of milk from the applicant. There were no reasons to disbelieve the testimony of the Food Inspector R.K. Singh (P.W-1) that he had checked the applicant at Barna Colony while he was selling milk and had purchased 750ml of mixed milk from him for analysis after following the procedure prescribed by law. It is well settled, as reiterated by the Apex Court in the case of *Food Inspector Vs. G. Satyanarayana* reported in AIR 2004 SC page 1236 that corroboration of main witness by independent witness is a rule of prudence and not the requirement of law and the testimony of Food Inspector cannot be rejected for want of corroboration by independent witness. The courts below, therefore, did not err in relying upon the sole testimony of the Food Inspector (P.W-1).
10. The evidence of Food Inspector R.K. Singh (P.W-1) and the documents prepared by him on the spot clearly indicate that he had purchased the sample of mixed milk of cow and buffalo in prescribed quantity from the applicant in presence of panch witnesses, gave him a notice in writing to have it analyzed and divided the sample then and there into three equal parts, added necessary quantity of Formalin into each part, duly sealed them and sent one of its parts to the Public Analyst for analysis, and remaining two parts to the Local Health Authority and had followed the procedure prescribed under the Act for taking sample of article of food. As per report of Public Analyst (Ex.P-11), the sample of mixed milk of cow and buffalo was found to be adulterated, as it did not conform to the standard prescribed for mixed milk under the Act. No infirmity in the procedure in collecting the sample of milk from the applicant was urged or pointed out.
11. Learned counsel for the applicant, however, emphatically submitted that for want of postal and A/D receipts the notice under section 13(2) of the Act could not be held to be served on the applicant and the applicant was deprived of his right under Section 13(2) of the Act.
12. Again there is a concurrent finding of two courts below that the copy of the notice (Ex.-15) alongwith report of Public Analyst was sent to the applicant by registered post and thus, there would be a presumption of service of said notice sent by registered post. The evidence of Shyam Babu Gupta (P.W-2) employed in the office of Local Health Authority coupled with the extract of the relevant

entries in the register maintained in the office also indicated that the notice under Section 13(2) of the Act alongwith report of the Public Analyst was sent to the applicant by registered post on the address mentioned in his evidence. The aforesaid testimony of Shyam Babu Gupta (P.W-2) made on oath remained virtually uncontroverted or unrebutted during his cross-examination. There was also no such suggestion in his cross-examination that the address on which notice under Section 13(2) of the Act was sent was not the correct address of the applicant. The uncontroverted testimony of Shyam Babu Gupta (P.W-2) could not be discarded merely for want of postal receipt, particularly when the testimony of P.W-2 on oath was supported by the extract of the register maintained in the office of Local Health Authority regarding dispatch of the notice under Section 13(2) of the Act by registered post. Thus, courts below rightly held that there would be a presumption of service of notice sent by registered post. The mere fact, that A/D receipt was not filed or received back, was not sufficient to rebut or dislodge the presumption of service of notice sent by registered post in absence of any evidence to the contrary. It is a known fact that A/D receipt is sent back by ordinary post and could also be misplaced.

13. The citation referred to by learned counsel for the applicant reported in Cr.L.J. 2005 page 4722 (M.P.) (*Anil Kumar Jain Vs. State of M.P.*) turned on different set of facts and is of no avail to the applicant in the facts of the instant case.

14. In the wake of aforesaid, the submission of learned counsel for the applicant that the notice under Section 13(2) of the Act was not served on the applicant and he was deprived of the right under Section 13(2) of the Act has no merit. Moreover, the applicant never applied to have the other part of the sample analyzed by the Director Central Food Laboratory.

15. Thus, no infirmity or error of jurisdiction is found in the impugned judgment affirming the conviction of the applicant under Section 7(i)/16(1)(a)(i) of the Act so as to call for any interference in revision.

16. As regards the sentence, applicant has been awarded minimum prescribed sentence for six months with fine of Rs.1,000/- in accordance with mandatory provisions of Section 16(1)(a)(i) of the Act, which also needs no interference.

17. Revision fails and is dismissed. Applicant is on bail. He shall surrender to his bail bonds to serve out the remaining part of his sentence.

Revision dismissed.

I.L.R. [2008] M. P., 2462

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

24 July, 2008*

TULSIRAM

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

A. Prevention of Food Adulteration Act (37 of 1954), Section 20(1) - Notification dated 31.12.59 & 19.10.83 authorising Food Inspector to institute prosecution - Food Inspector was competent to file complaint. (Para 7)

क. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 20(1) - अधिसूचना दिनांकित 31.12.59 और 19.10.83 खाद्य निरीक्षक को अभियोजन संस्थित करने के लिए अधिकृत करती हैं - खाद्य निरीक्षक परिवाद पेश करने के लिए सक्षम था।

B. Prevention of Food Adulteration Act (37 of 1954), Section 16(1)(a) r/w Section 7(1), Criminal Procedure Code, 1973, Section 433 - Reduction of minimum sentence in the domain of the State Government - Conviction u/s 16(1)(a) of the Act upheld by High Court - Provisions mandate that 6 months' minimum imprisonment to be imposed for such offence - Applicant aged 63 years and more than 17 years elapsed since incident - Applicant had suffered 37 days of imprisonment - Looking to the agony and mental harassment already faced - High Court directed applicant to deposit Rs.10,000/- as fine in commutation of the sentence of 6 months imprisonment and State Government to consider such commutation u/s 433(d) of Code. (Paras 13 & 15)

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 16(1)(ए) सहपठित धारा 7(1), दण्ड प्रक्रिया संहिता, 1973, धारा 433 - न्यूनतम दण्डादेश में कमी करना राज्य सरकार के अधिकार क्षेत्र में - अधिनियम की धारा 16(1)(ए) के अधीन दोषसिद्धि उच्च न्यायालय द्वारा पुष्ट की गई - उपबंध आदेशित करते हैं कि ऐसे अपराध के लिए कम से कम 6 माह का कारावास अधिरोपित किया जाना चाहिए - आवेदक की उम्र 63 वर्ष और घटना को 17 वर्ष से अधिक का समय व्यतीत - आवेदक 37 दिन का कारावास भुगत चुका था - कष्ट और मानसिक परेशानी, जिसका पहले ही सामना किया जा चुका है, को देखते हुए - उच्च न्यायालय ने आवेदक को छः माह के कारावास के दण्डादेश के लघुकरण में 10,000/- रुपये जुर्माने के रूप में जमा करने और राज्य सरकार को संहिता की धारा 433(डी) के अधीन ऐसे लघुकरण पर विचार करने के निदेश दिये।

Cases referred :

1991 MPLJ 960, 1994(1) MPJR SN 4, 2004(1) MPJR 190, 2003(1) ANJ 117, 2008(1) FAC 264, AIR 1988 SC 1789, 2007 CrLJ 3733, (1997) 9 SCC 101, (2000) 9 SCC 151.

Jai Singh with Ravi Verma, for the applicant.

Manish Joshi, P.L. for the non-applicant/State.

ORDER

S. R. WAGHMARE, J.:—By this revision filed under section 397 read with Section 401 of the Cr.P.C, the petitioner has challenged order dated 25/11/04 passed by the 12th Additional Sessions Judge, Indore in Criminal Appeal no. 485/03 convicting the accused under section 16(1)(a) read with 7(1) of the Prevention of Food Adulteration Act (herein after referred to as “the Act” for brevity) and sentencing the accused for six months rigorous imprisonment with fine of Rs.1000/-, in default of payment of fine, an additional rigorous imprisonment for one month.

2. Brief facts as alleged by the prosecution are that on the date of incident i.e. 12/08/91 at about 9.15 am., the Food Inspector of Municipal Corporation, Indore Shri M. J. Ansari [P.W.-1] inspected the shop named Sitaram Dhudh Dahi Bhandar at Janta Quarter, Nanda Nagar, Indore doubting that the owner of the shop did not possess valid and legal licence under the Prevention of Food Adulteration Act; took a sample of the curd after filling in form no. 6 and giving notice to the shop owner, the Food Inspector purchased 600 gms of curd prepared from the cow milk by payment of Rs. 7.20/- and obtaining proper receipt, the sample was then divided into three equal parts and filled into three dry and clean bottles. After adding 15-16 drops of formalin into each, the bottles were duly sealed and thereafter, a panchanama was prepared in front of the witnesses and the signatures of the accused and witnesses were obtained and a copy of form no. 7 was sent (along with) to the public analyst at Bhopal and another copy of form no. 7 along with seal impression were deposited with the Local Public Health Authority, Indore and after obtaining the report of the Public Analyst and finding that curd was adulterated, the prosecution was launched. After obtaining sanction from the Dy. Director, Food and Medicine Administration, the complaint was lodged before the competent court.

3. The accused Tulsiram abjured his guilt and also denied that he did not possess a proper licence, the Trial Court, however, on consideration came to a conclusion that the accused Tulsiram was guilty as charged and sentenced him as herein above stated. The Appellate Court also upheld the conviction as well as the sentence passed by the Trial Court and hence, the present revision.

4. The main contention of the Counsel for the applicant was that the Food Inspector was not authorized to file the complaint or undertake investigation, since according to the notification of 19/10/1983, the power had not been conferred on the Food Inspector. Counsel stated that the entire prosecution was without the authority of law and prayed for setting aside of both the impugned orders. Besides, Counsel for the applicant also raised the usual objections that the curd was not stirred into homogeneous mixture, there was variance between the State Public Analyst's Report and the Report by the Central Laboratory and this also went on a large extent to prove that the prosecution was not conducted in accordance with law. Counsel has also submitted that both the Courts below had erred in

placing reliance on the sole testimony of the Food Inspector and it was not supported by any independent witness and the judgment of conviction ought to be set aside on this ground alone. Contending that the sample was not obtained in front of witnesses and the sample was not representative sample in accordance with law, the Counsel prayed for setting aside the conviction.

5. Counsel for the respondent-State, on the other hand, has placed his reliance on *Gopal Ramniranjan Vs. State of M.P.* [1991 M.P.L.J. 960], whereby this Court had held that the notification no 7770 XVII dated 31st December, 1959 had neither been amended nor modified and in view of this fact, the Food Inspector was competent to file complaint even without sanction of the Assistant Public Prosecutor, Food and Medicine or without prior approval of the Local Authority, and therefore, the complaint had been legally and validly filed.

6. To bolster his submissions, he also relied on *Kaliram Vs. State of M.P.* [1994 (1) M.P.J.R. SN 4] whereby the same principle had been upheld by the Court by stating that where there is general authorization of Food Inspector to institute or give consent for prosecution then under the circumstances complaint filed by the Food Inspector is competent, stating that the evidence of the Food Inspector was corroborated by the public analyst report Ex. P/7 as well as the central laboratory report. Counsel also stated, the Food Inspector was duly authorized vide Ex. - P/1 & P/2 and granted sanction vide Ex. P/8 for prosecution under the Prevention of Food Adulteration Act, had been duly filed vide Ex. P/8 by the prosecution. And since there was no doubt having found the sample to be adulterated, minimum sentence had been imposed by the Trial Court which was upheld by the Appellate Court and the revision did not require any interference.

7. On considering the said submissions, the record and the impugned judgment, I find that the judgment of the Appellate Court is quite detailed and based on cogent and valid reasons. The first objection raised by the Counsel regarding competency of the Food Inspector to file complaint has been more than adequately answered by relying on several authorities by the Appellate Court and detailed analysis of the empowerment of the Food Inspector under the law has been duly considered. Referring to para no. 6 of the impugned judgment, I find that the Appellate Court has placed proper reliance on the judgment of this Court in the matter of *Shivprasad Vs. State of M.P.* [2004(1) M.P.J.R., 190] and *Ramprasad Vs. State of M.P.* [2003(1) A.N.J. 117] whereby the competency of the Food Inspector has been considered and the same controversy was raised and duly answered and the Food Inspector has been found to be competent to file the said complaint. Both the notifications were under consideration before the Apex Court as well as in the present dispute and hence, I do not find any ground for interference on this finding by the Appellate Court as well as the Trial Court that M. J. Ansari, the Food Inspector PW-1 was quite competent to file complaint. Due sanction has been obtained from the department and is on record as Ex. P/8.

8. The other ground regarding stirring of the curd into homogeneous mixture was also set as naught by the deposition of the Food Inspector, who has stated that the curd was stirred by the measure itself before putting them into three sample bottles and hence, the objection is demolished. The matter of variance between the State Public Analyst Report Ex. P/ 7 and that of the Central Laboratory Report has been properly answered by the Counsel for the State, who has also urged that the sample was sent to the Central Laboratory at the instance of the accused himself and the Central laboratory report would prevail as has been held by this Court time and again.

9. The judgment of the Appellate Court is based on sound and cogent reasons. This being a criminal revision, the constraint of jurisdiction are only limited to questions of law or error apparent on face of record that may arise. Evidence cannot be re-appreciated in exercise of revisional jurisdiction nor the findings of fact assailable. I do not find any infirmity in the judgment of conviction by both the Courts below.

10. However, considering the sentence, the Counsel for the applicant has prayed that the applicant is now at advanced age of 63 years and more than 17 years have elapsed since the incident and the Counsel for the petitioner has vehemently argued and prayed that the petitioner was facing a protracted trial right from 12/08/91 at the time when he was barely 46 years of age; now more than 18 years have been elapsed and hence the petitioner would be entitled to reduction in the sentence to meet the ends of justice, the sentence could be reduced to one already undergone.

11. However, considering the prayer, since the provisions of section 16 is quite strict in its applicability and it mandates that minimum sentence to be imposed for offence under section 16(1)(a) of the Act shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years with fine which shall not be less than Rs. 1,000/-, even then when the trial has been protracted for number of years and the actual sentence undergone by the accused is barely 37 days then sending back the accused to jail would not be in keeping the principles of natural justice since the petitioner has already faced agony and suffered mental harassment of long period of 17 years. Hence the jail sentence could be reduced to the period already undergone.

12. I find support in my conclusion when under similar circumstances for offence under section 7 & 16(1)(a) of the P.F.A Act, the Learned Single Judge of Punjab and Haryana High Court in the matter of *Narinder Kumar Vs. State of Haryana* [2008 (1) FAC 264] held that 24 years of protracted trial in itself entitled the petitioner to vary and reduce the sentence and the sentence of the petitioner was reduced to the period of already undergone. The sentence of fine, however, was enhanced to Rs. 10,000/- to be deposited within three months. Learned Single Judge has relied on a judgment of the Supreme Court in the matter of *Braham Dass Vs. State of Himachal Pradesh* [1998(2) FAC 13 equivalent to AIR 1988 SC 1789

13. Considering the ratio of this case, however, I feel that it will be profitable to rely on a more recent case of the Apex Court in the matter of *Satya narayan Agarwal Vs. State of Assam* [2007Cr. L.J. 3733] where for an offence under section 7 read with section 16 (1) of the P.F.A. Act, the Apex Court while considering the sentence of six months imprisonment with fine of Rs. 1000/- imposed by the Trial Court and the same was enhanced by the High Court to fine of Rs. 5000/- and the High Court had permitted the accused to move the State Government under section 433 of the Cr.P.C. for commutation of the sentence. The Apex Court while considering the validity had although dismissed the appeal filed by the accused, however, granted liberty to the accused to challenge the order passed by the State Government rejecting the application for commutation made under section 433 of the Cr.P.C. The Apex Court has relied on *N. Sukumaran Nair Vs. Good Inhspector, Mavelikara* [1997(9) SCC 101 and *Santosh Kumar Vs. Municipal Corporation and Another* [2000(9) SCC 151].

14. Upholding the power of the State Government to commute the sentence, the Apex Court had clearly directed that it would be within the domain of the State Government to consider such commutation since the imposition of the minimum sentence would be unduly harsh under the circumstances, considering that in the present case, the accused has only undergone actual sentence of 15 days approximately and is facing protracted trial for 17 years.

15. Thus, under the circumstances in the light of *Santosh Kumar* (supra) I uphold the conviction of the accused for offence under section 7 & 16 (a) (i) of the P.F.A Act, however, direct the accused to deposit in the Trial Court a sum of Rs. 10,000/- as fine in commutation of the sentence of six months imprisonment within a period of six weeks from today and intimate to the appropriate Government that such fine has been deposited. On deposit of the fine, the State Government may formalize the matter by passing appropriate order under clause(d) of section 433 of the Code of Criminal Procedure. In the meanwhile the applicant will remain on bail. Thus, the petition stands partly allowed.

Revision partly allowed.

I.L.R. [2008] M. P., 2466

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

30 July, 2008*

PRAMOD

Vs.

STATE OF M.P.

... Applicant

... Non-applicant

A. Evidence Act (1 of 1872), Section 63(2) - *Whether conviction can be based on secondary evidence (photocopy of original complementary*

pass) to hold that the original pass was forged - Held - Yes, as original complementary pass is being in possession of the applicant (accused) and complementary pass was handed over by the applicant himself to the conductor who got the photocopy made. (Paras 9 & 10)

क. साक्ष्य अधिनियम (1872 का 1), धारा 63(2) - क्या द्वितीयक साक्ष्य (मूल कम्पलीमेंटरी पास की फोटो प्रति) पर, यह अभिनिर्धारित करते हुए कि मूल पास कूटरचित था, दोषसिद्धि आधारित की जा सकती है - अभिनिर्धारित - हाँ, चूँकि मूल कम्पलीमेंटरी पास आवेदक (अभियुक्त) के कब्जे में है और कम्पलीमेंटरी पास स्वयं आवेदक द्वारा कंडक्टर को दिया गया जिसने फोटो प्रति तैयार करवायी।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401, Penal Code, 1860, Section 420 - Applicant was found travelling on complementary pass - On investigation pass was found to be forged - Offence of forgery established - However, applicant being government servant and incident being 18 years old, applicant deserves benefit of probation. (Paras 10 & 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 401, दण्ड संहिता, 1860, धारा 420 - आवेदक कम्पलीमेंटरी पास पर यात्रा करता हुआ पाया गया - अनुसंधान में पास कूटरचित होना पाया गया - कूटरचना का अपराध सिद्ध - तथापि आवेदक शासकीय सेवक होने और घटना 18 वर्ष पुरानी होने से आवेदक परीवीक्षा का लाभ पाने का पात्र।

Vivek Singh, for the applicant.

Mukesh Parwal, P.L., for the non-applicant/State.

ORDER

S.R. WAGHARE, J. :-By the present petition, the petitioner has challenged order dated 03/11/04 passed by the Additional Sessions Judge, (Fast Track) Indore in Criminal Appeal no. 426/03 convicting the accused for offence under section 420 of the IPC and sentencing him to six months rigorous imprisonment with fine of Rs. 2000/-; in case of failure to pay the same, the accused was to undergo an additional sentence of six months rigorous imprisonment.

2. Brief facts of the prosecution as alleged are that on the date of incident i.e. 19/11/92, the accused was travelling from Udaipur in Rajasthan to Indore in the bus bearing registration no. 01174 of M.P.S.R.T.C when the conductor of the bus Chandrashekhar PW-2 found that the accused was travelling on a complimentary pass issued by the corporation and prayed for dispensing with payment of the fare regarding two passengers. On being questioned as to how the accused was making such a demand since a complimentary pass is issued only for free travel of a single person, the accused had countered that the pass was issued for two individuals as was evident from the pass itself. Being compelled to take along with these persons, the conductor took them to Indore Depot to the authority concerned. The Officials of the transport corporation suspected the pass to be fraudulent and taking the original got the photocopy made and thereafter returned the original pass to the accused. Thereafter, the copy of the pass was sent for verification;

the details of the pass stated therein that the holder of the pass was one resident of Agar Malva and Assistant Editor of a news paper and it also indicated that he was a social worker. However, on investigation, the pass was found to be forged, the conductor Chandrashekhar PW-2 filed an FIR at police station, Chhatripura, Indore after a period of six months on 25/05/93; on the basis of which, the offence was registered and the investigation launched by the Investigating Agency of the State. The accused was arrested; the statement of the witnesses were recorded and the documents were seized. On completion of the investigation, the offence under section 420 of the IPC was registered against the accused and the accused was duly charged and committed to trial.

3. The accused abjured his guilt and stated he was falsely implicated in the matter. The Trial Court, on consideration of evidence came to a conclusion that the accused was guilty as charged and convicted him for offence under section 420 of the IPC and sentenced him to two years rigorous imprisonment with fine of Rs. 2000/-. Being aggrieved, the accused filed an appeal before the Sessions Court. The Appellate Court upheld the conviction, however, reduced the sentence from two years rigorous imprisonment to six months rigorous imprisonment. Being aggrieved, the accused petitioner has filed the present revision.

4. The basic objection raised by the Counsel for the petitioner in this petition that requires to be adjudicated is that whether the conviction of the accused for offence under section 420 of the IPC can be based on a piece of secondary evidence i.e. forged pass being a photocopy and the original never been produced in the Court. The photocopy has not been compared to the original as required under section 63 (2) of the Evidence Act according to Counsel. The Counsel stated that the prosecution had miserably failed to prove its case, since neither was the accused properly identified during the test identification in Court, nor defence of alibi considered in proper perspective by both the Courts below.

5. Relying on AIR 1939 Madras 340, the Counsel stated that a copy of the original cannot be accepted in secondary evidence, if the contents have not been compared with the original. Further also stressing the point that the evidence of the defence plea of alibi have also been disregarded by the Trial Court, the accused had in his defence produced the register of attendance of Narmda Vikas Division No. 13, Khandwa, i.e. D/1-A and daily diary D/2-A, which clearly indicate that he was present at his place of work. Finally, Counsel stated that the most important fact which has been disregarded by both the Courts below was that the accused was a govt. servant and was not a habitual offender and the benefit of Probation of Offenders Act should be extended to him. Drawing my attention to section 3 of the Probation of Offenders Act, Counsel stated that for offence punishable under section 420 of the IPC or where the offence is punishable with imprisonment for not more than two years or with fine or with both, there was no previous conviction against the accused, even if, the person is found to be guilty having regard to the

circumstances of the case and the nature of the offence, if the Court thinks it expedient to do so, release the accused on probation of good conduct under section 4 of the Probation of Offenders Act after due admonition. Counsel stated that undoubtedly if the pass has been forged and misused by the accused, it was a single incident and the protracted trial is also affecting his service. He has undergone a period of 13 days of actual jail sentence during his release on bail and has not indulged in any other mis-conduct and deserves the benefit of the Probation of Offenders Act and prayed for relief.

6. Counsel for the respondent- State, on the other hand has opposed the submissions of the Counsel for the petitioner stating that under section 63(2) of the Evidence Act, there is a provision that if the copy is made by an automatic and mechanical process from the original, then such secondary evidence can be accepted and from the testimony of PW- 2 Chandrashekhar and PW1 Haribhai Patel, it is evident that the original pass was handed over by the accused at the bus depot at Indore and the photocopy of the same was prepared by the corporation officials, then there is no getting away from the fact that the copy of the pass made from the original as observed by both the Courts below and hence admissible in evidence. Counsel stated that there is tendency of the govt. employee to avail of free transport and the accused has gone to the extreme length of using a forged document for travelling without fare. Moreover, the Counsel has stated that the offence was completely established on the basis of documentary evidence. The pass was said to have number 1300 whereas only 232 passes had been issued in the year 1991 and the pass was issued on 31/12/91 which is evident from the testimony of PW- 6 Shri Raj Verma, the Public Relation Officer of the Corporation and thus there is no getting away from the fact that the accused petitioner was guilty as charged. Counsel for the State Govt urged that the Appellate Court has also taken a sympathetic view and reduced the sentence from two years rigorous imprisonment to six months rigorous imprisonment and the petitioner accused did not require any further sympathy; prayed for dismissal of the revision.

7. On considering the above submissions, the evidence on record and the impugned judgment, I find that on the basis of the submissions made by the Counsel for the respondent, the conviction is duly supported and based on valid and cogent evidence.

8. The basic question for decision is whether the conviction can be based on secondary evidence; (the photocopy Ex.-P/8 of the original complimentary pass) to hold that the original pass was forged. The question has been more than adequately answered by the Counsel for the respondent-State. On perusal of section 63(2) of the Evidence Act reads as under :

" 63 Secondary evidence : Secondary evidence means and includes-

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies"

9. Then, the matter has also been dealt with detail by the Trial Court that the automatic and mechanical process utilized for deriving a copy of the original can be accepted as secondary evidence and there is no need to compare the original for there are minimal chances of interpolation and thus objections raised by the Counsel for the petitioner are demolished and the conviction can be based on such secondary evidence.

10. Moreover, the prosecution has established the fact that the complementary pass issued by the corporation was handed over in front of the conductor Chandrashekhar PW-2 and corroborated by PW-1 Haribhai Patel, who had got the photocopy made, then under the circumstances, I find that there is no need to doubt the veracity of Ex.-P/8, which was used as secondary evidence to establish the offence of forgery, since it was natural under the circumstances that the original being in possession of the accused would never see the light of the day. The impugned judgment is based on cogent and valid reasons. There is proper marshalling of evidence and no fault can be found with the conviction of the accused for offence under section 420 of the IPC

11. However, considering the circumstances of the case, the incident is almost 18 years old and also considering the fact that the accused is a government employee and in my humble opinion, he definitely deserves the benefit of section 3 and 4 of the Probation of Offenders Act as pointed by the petitioner. Thus, it is directed that the Trial Court shall release the accused petitioner on probation of his entering into a bond for good behaviour for one year before the Trial Court and also a personal bond for Rs. 10,000/- with one surety to the like amount to appear and receive the sentence when called upon during the period of one year from today. It is further directed that under section 5-b of the Probation of Offenders Act the accused shall pay costs of Rs. 3,000/-, which can be recovered as fine in case of default within a period of two months from today. It is also made clear that the conviction and the probation granted herein shall not act as a disqualification for the purposes of government service of the accused petitioner under section 12 of the Probation of Offenders Act.

12. Thus, the petition is partly allowed.

Petition partly allowed.

I.L.R. [2008] M. P., 2471
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice K.S. Chauhan

18 January, 2008*

ARVIND KUMAR BHARGAVA & ors.

... Applicants

Vs.

LALIT PARASHAR & anr.

... Non-applicants

A. Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999 (20 of 2000), Section 50(2), Penal Code, 1860, Sections 294, 452, 392, 500, 506 r/w Section 34, Criminal Procedure Code, 1973 Sections 190 & 197 - Applicants working in Sahkari Bank seeking quashment of criminal proceedings on the ground of protection given u/s 197(1) Cr.P.C. - Held - The applicants are not removable by the Government, therefore, protection given u/s 197(1) Cr.P.C. is not available to them - Petition dismissed. (Para 13)

क. सहकारी कृषि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999 (2000 का 20), धारा 50(2), दण्ड संहिता, 1860, धाराएँ 294, 452, 392, 500, 506 सहपठित धारा 34, दण्ड प्रक्रिया संहिता, 1973 धाराएँ 190 व 197 - सहकारी बैंक में कार्यरत आवेदकों ने द.प्र.सं. की धारा 197(1) के अन्तर्गत दिये संरक्षण के आधार पर आपराधिक कार्यवाहियों का अभिखण्डन चाहा - अभिनिर्धारित - आवेदकों को सरकार द्वारा नहीं हटाया जा सकता, इसलिए द.प्र.सं. की धारा 197(1) के अन्तर्गत दिया गया संरक्षण उन्हें उपलब्ध नहीं है।

B. Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, M.P., 1999 (20 of 2000), Section 50(2), Penal Code, 1860, Sections 52, 294, 452, 392, 500, 506 r/w 34, General Clauses Act, 1897, Section 3 Clause 22 - Good Faith - Defined & Explained - Without serving the notice on non-applicants and in pressing them to pay the entire amount on the same date and taking the steps to recover such amount forcibly can not be said to be justified. Apart from this, committing house trespass, abusing filthy languages, criminally intimidating, insulting and lowering down the prestige of the non-applicants can not be said to be done in good faith and can not form the part of their duties. (Para 20)

ख. सहकारी कृषि और ग्रामीण विकास बैंक अधिनियम, म.प्र., 1999 (2000 का 20), धारा 50(2), दण्ड संहिता, 1860, धाराएँ 52, 294, 452, 392, 500, 506 सहपठित धारा 34, साधारण खंड अधिनियम, 1897, धारा 6 खंड 22 - सद्भाव - परिभाषित एवं स्पष्ट करना - अनावेदकों पर सूचनापत्र की तामील किये बिना और उन पर सम्पूर्ण राशि उसी दिन अदा करने के लिए दबाव डालने में और ऐसी राशि की बलपूर्वक वसूली करने के लिए कदम उठाना न्यायसंगत नहीं कहा जा सकता है - इसके अलावा गृह अतिचार करना, गंदी गालीयुक्त भाषा का प्रयोग करना, आपराधिक रूप से अभिन्नस्त करना, अपमानित करना और अनावेदकों की प्रतिष्ठा को निम्नतर करना सद्भाव में किया गया नहीं कहा जा सकता और उनके कर्तव्यों का भाग नहीं बन सकता।

Cases referred :

(2004) 8 SCC 40, AIR 2006 SC 2407, AIR 1983 SC 610, AIR 1985 SC 1655, AIR 1987 SC 722, 1990(1) MPWN SN 21, 1986 J LJ 499.

Harpreet Ruprah, for the applicants.

A.K. Pare, for the non-applicants.

ORDER

K.S. CHAUHAN, J. :- This petition has been filed under Section 482 of the Code of Criminal Procedure by petitioners/accused persons being aggrieved by the order dated 17.01.2005 passed by Judicial Magistrate First Class, Gadarwara in Complaint Case No.770/2000, whereby the application preferred by them under Section 50(2) of the M.P. Sahkari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999 has been rejected and also against taking of cognizance under Section 294, 452, 392, 500 and 506/34 of IPC against them on 14.12.2000.

2. The facts of the petition are that the petitioners No.1, 2 and 3 are the Manager, Recovery Officer (retired) and Supervisor of Bhumi Vikas Bank, Kareli, District Narsinghpur. At the relevant time, the petitioners No.1 and 3 were posted at Kareli whereas the applicant No.2 was posted at Narsinghpur. In the year 2000, there was immense pressure from the Chairman and Registrar of Cooperative Societies and Collector for initiating recovery proceedings in all the cases pending under Section 23 and 26 of the M.P.Sahkari Krishi Aur Gramin Vikas Bank, Adhiniyam, 1999. One letter was written on 09.05.2000 by Commissioner, Cooperative Societies, Bhopal to Deputy Registrar, Cooperative Societies informing that within 30 days from the receipt of the letter all the legal cases pending in the Bank should be completed. In pursuance of this letter the Registrar-Cooperative Societies, Madhya Pradesh vide his letter dated 24.11.2000 appointed various public servants of the Bank to act as a Sales Officer under the provisions of Section 35 of Adhiniyam, 1999. In delegation of the powers, Manager of Jila Sahkari Krishi Aur Gramin Vikas Bank Maryadit, Narsinghpur, in the month of June 2000 constituted a team to go to Kareli for the recoveries. This fact is clear from the certificate given by the Manager on 08.09.2004 that the Respondent No.2 Smt.Sumanlata Parashar took a loan to purchased a tractor from the Bank. She could not pay the installments, therefore, the notices were given to her in spite of she did not pay an amount of Rs.18,730/-. Therefore, under the provisions of Section 15 of the M.P. Sahkari Krishi Avam Gramin Vikas Bank, Adhiniyam, 1966 (of the old Act) a distraint order dated 01.06.2000 was issued against her. In furtherance of this distraint order, the Sales Officers also issued last warning to her either to pay the amount of Rs.19,292/- or to face the distraint proceedings. Thereafter the applicants went to the house of respondent No.2 and asked to deposit the amount due but the respondents refused to pay and threatened them for dire consequences. The members of the team gave warning to them not to interfere with the confiscation proceedings. After following the procedure they seized a sofa set from the verandah of the house of the respondents on 28.06.2000. Village Kotwar duly signed the seizure memo. Information regarding the seizure of the property was also given to Station House

Officer, Aamgaon on the same date. The respondents became annoyed by the action taken by the petitioners. They made the false complaint to police and to Collector, Narsinghpur which were found false. They also raised the dispute under Section 64 of the Societies Act, 1960 which was dismissed by Deputy Registrar, Cooperative Societies vide order dated 04.12.2000 the appeal was also dismissed on 05.12.2000 then they lodged a criminal complaint before Judicial Magistrate First Class, Gadarwara under Section 294, 452, 392, 500 and 506/34 of the IPC. A criminal case was registered against them on 14.12.2000 and notices were issued. Upon receiving the same, the petitioners moved an application under Section 197 Cr.P.C. as well as under Section 50(2) of the M.P. Sahakari Krishi Aur Gramin Vikas Bank, Adhiniyam, 1999 praying that they being public servants can not be prosecuted unless prior sanction is obtained from the Government. This application was dismissed on 05.03.2001. The petitioners preferred a revision against this order but the same was dismissed on 22.11.2001 by Additional Sessions Judge, Gadarwara. Thereafter they preferred M.Cr.C.No.1006/02 under Section 482 of the Code of Criminal Procedure which was dismissed for want of prosecution on 22.10.2002. Thereafter they also filed M.Cr.C.2926/03 but the same was dismissed as withdrawn with liberty to file a fresh petition. Thereafter they preferred M.Cr.C.No.5570/03 under Section 482 of Cr.P.C.. This M.Cr.C. was decided on 20.07.2004 whereby petition was dismissed as withdrawn with the liberty to raise plea of acting in good faith in bonafide discharge of their duties. In compliance of this order, the petitioners moved an appropriate application before the trial Court but the same was dismissed vide order dated 17.01.2005. Being aggrieved by that order, this petition has been filed on the grounds mentioned in it.

3. On perusal of record it reveals that respondents No.1 and 2 lodged complaint against petitioners to the effect that respondent No.2 Smt. Sumanlata Parashar took loan of Rs.1,49,000/- for purchasing a tractor in the year 1993 from Bhumi Vikas Bank, Branch Kareli. This loan was to be repaid in 9 equal installments in 9 years. Each installment being of Rs.32,700/-. Most of the amount was paid upto 25.04.2000. The amount of Rs.16,297/- was outstanding which was to be deposited upto April, 2002. Even then the petitioners came at their house on 28.06.2000 and without giving any notice carried away T.V., sofa set etc also used filthy languages, extended threats and defamed them by lowering down their prestige.

4. The evidence adduced by complainants in support of their complaint were recorded and the cognizance under section 294, 452, 392, 500 and 506/34 of the IPC was taken against them on 14.12.2000. The petitioners appeared on 30.01.2001 and were released on bail. On the same date, they filed an application under Section 197 of Cr.P.C. which was dismissed on 05.03.2001. The revision was filed against this which was also dismissed. Miscellaneous petitions were also filed as detailed in para 2 and ultimately by order dated 17.01.2005 the application under Section 50(2) of the M.P. Sahakari Krishi Aur Gramin Vikas Bank, Adhiniyam, 1999 was rejected by the trial Court. Being aggrieved by that order this M.Cr.C. has been preferred to quash the order dated 14.12.2000 and 17.01.2005.

5. Shri Harpreet Singh, learned counsel for the petitioners argued at length on the basis of documents annexed with the petition mainly contending that the petitioners were public servants and they were bonafidely discharging their duties at the time of incident. They were recovering the public dues. There was no any personal interest. After being annoyed the respondents have lodged this complaint malafidely against them and the trial Court has committed a grave error in taking cognizance without prior sanction and rejecting their applications under Section 197 of Cr.P.C. and Section 50(2) of the M.P. Sahakari Krishi Aur Gramin Vikas Bank, Adhiniyam, 1999.

6. On the other hand, Shri A.K.Pare, learned counsel for the respondents has submitted that the protection of Section 197 of Cr.P.C. can not be extended to the petitioners as they were not removable from the service by the Government. They were Bank employees and hence such protection can not be provided to them. He has further submitted that the petitioners have not acted bonafidely because as per agreement the loan was to be repaid in the installments and they have seized the property before 3 years of the last installment to be paid. They committed house trespass, used filthy languages, extended threats, lowered down their prestige and thus acted malafidely. Learned counsel further submitted that some M.Cr.Cs. have already been dismissed previously. The Court has rightly taken the cognizance against them and, therefore, it does not call for any interference.

7. The main point for consideration in this petition is that whether the trial Court has committed any illegality in rejecting the applications under Section 197 of Cr.P.C. and 50(2) of the M.P. Sahakari Krishi Aur Gramin Vikas Bank, Adhiniyam, 1999 and in taking cognizance of offence against the petitioners.

8. The provisions of Section 190 of Cr.P.C. are as follows:-

"(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class especially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

9. The provisions of Section 197 of Cr.P.C. are as follows:-

"(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union whole acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, whenever they may be serving, and thereupon the provisions of that sub-section will apply as if lot the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the court before which the trial is to be held."

10. Learned counsel for the petitioners submitted that the trial Court ought to have taken the sanction prior to taking cognizance of offences against the petitioners. He has relied on the following decisions rendered by Apex Court:-

(i) *State of Orissa v. Ganesh Chandra Jew*, (2004) 8 SCC 40.

(ii) *Jaysingh v. K.K. Velayutham and another*, AIR 2006 SC 2407

11. The learned counsel of respondents has submitted that the provisions of Section 197 Cr.P.C. is applicable to the public servants removable by the Government. Since the petitioners were not such employees, therefore, the protection provided under section 197 Cr.P.C. is not available to them. He has placed reliance on the following decisions rendered by Apex Court:-

(i) *Manohar Nath Kaul v. State of Jammu & Kashmir*, AIR 1983 SC 610;

(ii) *Ramesh Balkrishna Kulkarni v. State of Maharashtra*, AIR 1985 SC 1655;

(iii) *K.Ch. Prasad v. Smt. J. Vanalata Devi and others*, AIR 1987 SC 722;

(iv) *Kailashchandra v. Harbans Singh Chhabra & others*, 1986 111 J.L.J. 499.

(v) *Rakesh Kumar Sharma v. Central Bank of India*, 1990(1) MPWN S.N. 21.

12. It is manifestly clear that before invoking Section 197 of Cr.P.C. two conditions must be satisfied:

(i) The public servant is removable from the Office either by the Union of India or by the State Government and not by any lesser authority; and

(ii) He is accused of offence alleged to have been committed while acting or purporting to act in the discharge of his official duty.

13. So far as the present case is concerned, the petitioners are not removable by the Government therefore the protection given under Section 197 of Cr.P.C. is not available to them. The petitioners themselves have frankly admitted in M.Cr.C.No.5570/03 on 20.07.2004 that they do not come in the category of the employees removable from their office, save by or with sanction of the Government. That petition was dismissed as withdrawn therefore the order of the trial Court dated 05.03.2001 and of revisional court dated 22.11.2001 have become final. Thus, the petitioners are not entitled for the prosecution of Section 197 Cr.P.C.

14. The learned counsel for the petitioners further submitted that the petitioners are public servants and, therefore, protected from launching any prosecution against them for the thing done by them in discharging their duties in good faith.

15. On the other hand, learned counsel for the respondents submitted that the petitioners have not acted in good faith. They have illegally seized their properties, committed house trespass, abused them, criminally intimidated and insulted them, therefore, these acts of the petitioners can not be said to be in the discharge of their public duties.

16. Section 50 of the M.P. Sahakari Krishi Aur Gramin Vikas Bank, Adhiniyam, 1999 runs as follows:-

"(1) Every Officer, employee or person of the State Development Bank or a District Development Bank or an authority exercising or authorized to exercise the powers under this Act or the Rules made thereunder or under the Co-operative Societies Act, 1960 (No. 17 of 1961) or the Rules or Bye-laws made thereunder shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860 (45 of 1860).

(2) No suit, prosecution or other legal proceedings shall lie against any such officer, employee, person or authority for anything which is in good faith done or intended to be done under this Act."

17. The term "good faith" has been defined in clause 22 of Section 3 of General Clauses Act, 1897 as follows:

"A thing shall be deemed to be done in "good faith" where it is in fact done honestly whether it is done negligently or not."

18. Section 52 of I.P.C. defines the term good faith as follows:-

"Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention."

19. In the light of the aforesaid definitions of good faith, it is to be seen that whether the petitioners acted in good faith or not?

20. It is evidently clear that respondent No.2 took loan of Rs.1,49,000/- for purchasing tractor in the month of March, 1993. The loan was to be repaid in 9 equal installments, each installment being of Rs.32,700/-. The amount of Rs.16,287/- was due which was to be repaid upto April, 2002 but on 28.06.2000 the petitioners went there to recover the entire amount felling which the movable properties of the petitioner were seized. Therefore, in such circumstances without serving the notice on respondents and in pressing them to pay the entire amount on the same date and taking the steps to recover such amount forcibly can not be said to be justified. Apart from this, committing house trespass, abusing filthy languages, criminally intimidating, insulting and lowering down the prestige of the respondents can not be said to be done in good faith and can not form the part of their duties.

Thus, they did not act in good faith and hence they can not get the protection of Section 50(2) of the M.P. Sahakari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999. The trial Court has rightly taken the cognizance against them and dismissed their applications under Section 197 Cr.P.C. and 50(2) of the M.P. Sahakari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999, therefore, no interference is called for. This petition deserves to be dismissed.

21. Consequently, the petition fails and is dismissed accordingly.

Petition dismissed.

I.L.R. [2008] M. P., 2478
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Abhay Gohil
 25 April, 2008*

RAJKUMAR

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

Penal Code (45 of 1860), Sections 147, 149, 294, 341, 323, 506-B, 307, Criminal Procedure Code, 1973, Sections 169 & 482, Constitution, Article 20(2) - Powers of magistrate when Final Report is in favour of the accused persons - It is true that the Final Report is not binding on the magistrate and if the magistrate differs from the opinion of the I.O., he can take cognizance or order for further investigation, but that action of magistrate is judicial action and at that stage while taking decision on the Final Report the magistrate has to act judicially as a court - When a final report is submitted in favour of the accused persons and the investigation agency is of the view that no case is made out for prosecuting the accused and prima facie, evidence is defiance, if the magistrate wants to hear complainant it is obligatory on the part of the magistrate to also hear the accused person. If any protest petition is filed it has to be treated as a complaint and law requires magistrate to record statement of complainant and his witnesses. (Paras 7 & 8)

दण्ड संहिता (1860 का 45), धाराएँ 147, 149, 294, 341, 323, 506-बी, 307, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 169 व 482, संविधान, अनुच्छेद 20(2) - मजिस्ट्रेट की शक्तियाँ जब अंतिम रिपोर्ट अभियुक्त व्यक्तियों के पक्ष में हो - यह सही है कि अंतिम रिपोर्ट मजिस्ट्रेट पर बंधनकारी नहीं है और यदि मजिस्ट्रेट का अनुसंधान अधिकारी से भिन्न मत है तो वह संज्ञान ले सकता है या आगे और अनुसंधान के लिए आदेश दे सकता है, किन्तु मजिस्ट्रेट का वह कृत्य न्यायिक कृत्य हो और अंतिम रिपोर्ट पर निर्णय लेते समय मजिस्ट्रेट को न्यायालय के रूप में न्यायिकता: कार्य करना होता है - जब अंतिम रिपोर्ट अभियुक्त व्यक्तियों के पक्ष में दी जाती है और अनुसंधान एजेंसी का मत है कि अभियुक्त को अभियोजित करने के लिए कोई मामला नहीं बनता है और प्रथम दृष्टया साक्ष्य उपेक्षित है, यदि मजिस्ट्रेट परिवादी को सुनना चाहता है तो मजिस्ट्रेट के लिए यह आवश्यक है कि अभियुक्त को

भी सुने। यदि कोई अभ्यापत्ति याचिका पेश की जाती है तो उसे परिवाद के रूप में मानना पड़ता है और विधि मजिस्ट्रेट से अपेक्षा करती है कि परिवादी और उसके साक्षियों के कथन अभिलिखित करे।

Cases referred :

1979 CrLJ DB. All. 1988 CrLJ (Raj) 128, 1979 CrLJ 1515, 1995 CrLJ 3483 All, 1986(3) Crimes 559 Bombay, AIR 1960 SC 12, AIR 1968 SC 117.

Atul Gupta, for the applicant.

Mohd. Irshad, for the non-applicant/State.

ORDER

ABHAY GOHIL, J. :—Petitioner has filed this petition under Section 482 Cr.P.C. for quashing the proceedings pending before JMFC Ganjbasoda as R.T.No.1526/06 in connection with Crime No.194/92.

2. The brief facts of the case are that on 1.4.2005 at about 9.30 p.m. Akhil Jain and Anil Jain were returning on their motor cycle from their shop. In front of the Police Station, two known criminals and history sheeteer of the town of Ganjbasoda namely Ajay Pahelwan and Durgesh Yadav, who were in drunken condition, stopped their motorcycle. There was altercation in which they took away Akhil's golden chain. They went to lodge the police report. A.S.I. K.S.Chandel was posted at Police Station and he was avoiding to lodge the report because he was having friendly relation with aforesaid two criminals. On the intervention of Additional S.P.Vidisha F.I.R. was written at No.192/05 against Durgesh Yadav and Ajay Pehlwan under Section 294, 341, 323, 506(B) of IPC but did not mention the fact of snatching of gold chain. In the meantime, ASI Chandel informed the criminals on Mobile Phone and they came at the police station and just to counter the case a cross FIR was lodged at Crime No.193/05 against the complainant. In the meantime, some persons including Kanchhedi Lal Jain, Kamal Singh, Banarsi Lal, Vaibhav, Akhil, Rajkumar and other persons came to know that some quarrel took place at police station and they came at the police station to enquire facts. It is stated that some altercation took place between the parties. On that with a view to falsely implicate the members of the complainant party, ASI Chandel himself lodged one FIR at Crime No.194/05 against the aforesaid five persons that Kanchhedral fired on him by his revolver which hit on the left side of his stomach and the second fire was made by Banarasilal, Vaibhav, Akhil, Rajkumar, which hit his mobile phone and another FIR of Ajay Singh was written as Crime No.195/05 that these persons caused some injuries to him. ASI Chandel at his own got himself medically examined and Doctor recorded one lacerated wound and thereafter he was examined by Medical Board of three doctors and it was found that the injury sustained by the injured does not seem to be of any firearm. In both the cases Crime No.194/05 and 195/05, the matter was investigated and in crime No.195/05 charge sheet has been filed under Sections 147, 148, 149, 323 & 506 IPC against petitioners and others, but in the Crime No.194/05, registered under Sections 307, 294, 506, 147 & 149 IPC the matter was referred to CID for enquiry.

3. During CID enquiry in Crime No.194/05, Investigation Officer recorded the

statement of various witnesses who are neighbours and having shops opposite the police station. Statement of Ayub Qureshi, Mohd. Ibrahim, Mohd. Aziz, Mohd. Ayub Jawahar Singh, Ajay Tiwari were recorded and they all have stated that Kanchhedilal was empty handed. He has gone to the police station just to enquire what had happened to Akhil and Amit. During enquiry CID found that there was no occasion for him to carry a revolver as he is a respected person of the city and is Ex-Chairman of the Municipal Council, Ganj Basoda. Investigation Officer also found that ASI Chandel was having close link with Durgesh Yadav and Ajay Pehalwan and he was using the SIM No.9893485117, which was in the name of Birju Yadav, brother of Durgesh Yadav. CID found that false Crime case No.194/05 was registered deliberately by ASI Chandel. The conduct of Chandel has created doubt as his clothes were shown to be seized but those clothes were not referred for examination to Medico Legal Institute and subsequently it was reported to have been lost. No pallets or empty cartridge was recovered from the spot and his version is belied by medical evidence as medical Board found that he had not received any firearm injury and during enquiry it was found that revolver of Kanchhedilal was under repair and was deposited at the repairing shop. With all the aforesaid facts, the CID submitted the Final Report dated 21.6.2006 that there is no evidence to prosecute them but the learned Magistrate rejected the F.R. Submitted by the CID took cognizance in the matter and directed to issue non bailable warrants against the accused persons, against which the petitioner has filed this petition under Section 482 Cr.P.C. for quashing the entire proceedings in RT No.1526/2006 in connection with Crime No.194/05.

4. Shri Atul Gupta, learned counsel for the petitioner submitted that the learned Magistrate has committed illegality in rejecting the Final Report filed by the CID after investigation, as it is a case of no evidence. Learned Magistrate has not recorded any reason for rejecting the report. During investigation CID found that both the incident of Crime No.194/05 and 195/05 took place at the same time out of the same incident, therefore there was no necessity to register two crimes. The story of Crime No.194/05 was fabricated by K.S.Chandel, ASI as he was in hand in gloves with two known criminals of the town i.e. Ajay Pahalwan and Durgesh Yadav. He submitted that Medical Board has not found any firearm injury as narrated by ASI Chandel, therefore the case is medically belied. Seized clothes were not referred for chemical examination and subsequently it was submitted that they have been lost. CID recorded the statement of various persons including the neighbours, those who were independent persons. Nobody supported the case of the prosecution. Use of revolver was also found doubtful as no pallet or empty cartridge was recovered from the spot. Therefore, he vehemently argued and submitted that the action of the learned Magistrate is totally illegal and he has wrongly rejected the FR and has wrongly taken the cognizance and directly issued the warrant of arrest. The action is malafide and liable to be quashed. Shri Gupta also submitted that for the same set of facts and incident two crimes can not be registered, as it is violation of Article 20(2) of the Constitution of India.

5. Shri Mohd.Irshad, learned Panel Lawyer for the respondent State and

complainant submitted that though the matter was investigated by CID and CID did not find any prima facie case against the petitioner and during the course of argument was unable to justify the action of the Magistrate. He admitted this position that CID report is binding on the State.

6. Having heard the learned counsel for the parties, I have perused the F.R. submitted by the CID as well as the impugned order of taking cognizance passed by the Magistrate. From the perusal of the CID report it is clear that both the Crime No.194/05 and 195/05 were registered out of the same incident as the incident took place at the same time and in the Crime No.195/05 charge sheet has been filed in the Court and the trial is pending In Crime No.194/05 I.O. has found that conduct of ASI Chandel was doubtful. He was having close relations with the two criminals of the town i.e. Ajay Panelwan and Durgesh Yadav. Number of criminal cases are pending against both of them and their details is also available on record. The report lodged by ASI Chandel is not supported by independent witness. It was also found medically belied by the Medical Board as the Medical Board did not find any firearm injury on his body. The clothes were not referred for examination and it was found that material evidence was suppressed and subsequently clothes were lost and therefore the medical evidence was destroyed. No pallet or empty cartridge was found from the spot. None of the independent witnesses supported that Kanchhedilal and other persons came on the spot with the fire arm. It was found that they have just gone to enquire about incident that why the report of the complainant was not lodged. ASI Chandel was using the SIM No.9893485117 of Birju Yadav, brother of Durgesh Yadav and it was found that it was a case of false implication and CID was of the view that there is no evidence and when the trial is pending in Crime No.195/05, then there can not be any second prosecution and no crime No.194/05 ought to have been registered.

7. Section 169 of the Code of Criminal Procedure enables the officer-in-charge of a police-station to release the accused, when there is no sufficient evidence, is found against him. This section also relates to cases in which it is found that there is no sufficient evidence for forwarding the accused to a Magistrate, the Final Report. can be submitted before the Magistrate. It is true that the Final Report is not binding on the Magistrate and if the Magistrate differs from the opinion of the I.O., he can take cognizance or order for further investigation, but that action of the Magistrate is a judicial action and at that stage while taking decision on Final Report the Magistrate has to act judicially as a Court (See : *Nirmal Singh Vs. State of U.P.* - 1979 Cr.L.J. DB Allh.). Magistrate is required to weigh the prima facie evidence and take a judicial decision. In one case, Rajasthan High Court was of the view that the notice to the accused is necessary before rejecting the F.R. and if no notice is given the order taking cognizance was liable to be quashed. [See 1988 Cr.L.R.(Raj)128].

8. In another case, the same High Court was of the view that if protest petition is lodged by the complainant, and the complainant wants to be heard on the question, whether report under Section 169 should be accepted or not, the accused should also be heard on the point. [See : *Hardev Singh Vs. State of Rajasthan* 1986 CrLJ 1515].

This appears to be logical because when a final report is submitted in favour of the accused persons and the investigation agency is of the view that no case is made out for prosecuting the accused and prima facie, evidence is defiance, if the Magistrate wants to hear the complainant it is obligatory on the part of the Magistrate to also hear the accused persons. If any protest petition is filed it has to be treated as complaint and law requires the Magistrate to record the statement of complainant and his witnesses [See : *Kallu Vs. Shahid Ali* - 1995 Cr.L.J. 3483 All] and Magistrate cannot call upon the police to submit charge-sheet [1986 (3) Crimes 559 (Bombay)].

9. In the case of *Amar Premchand Vs. The State* (AIR 1960 SC 12), the M.P. High Court was also of the view that under the law a Magistrate can take cognizance of a case even where the police was of opinion that there was no case against the accused, but law does not empower the Magistrate to order the Police to submit a charge-sheet against the accused.

10. In the case of *Abhinandan Jha Vs. Dinesh Mishra* (AIR 1968 SC 117), their Lordships of the Supreme Court have clearly held as under :-

“(18) We have already pointed out that the investigation, under the Code, takes in several aspects, and stages, ending ultimately with the formation of an opinion by the police as to whether, on the material covered and collected a case is made out to place the accused before the Magistrate for trial, and the submission of either a charge-sheet, or a final report is dependent on the nature of the opinion, so formed. The formation of the said opinion, by the police, as pointed out earlier, is the final step in the investigation, and that final step is to be taken only by the police and by no other authority.

(19) The question can also be considered from another point of view. Supposing the police send a report, viz., a charge-sheet under Section 170 of the Code. As we have already pointed out the Magistrate is not bound to accept that report, when he considers the matter judicially. But can he differ from the police and call upon them to submit a final report, under section 169 ? In our opinion, the Magistrate has no such power. If he has no such power, in law, it also follows that the Magistrate has no power to direct the police to submit a charge-sheet, when the police have submitted a final report that no case is made out for sending the accused for trial. The functions of the Magistracy and the police, are entirely different, and though, in the circumstances mentioned earlier, the Magistrate may or may not accept the report, and take suitable action, according to law, he can not certainly infringe (sin. Impinge) upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view.

(20) Therefore, to conclude, there is no power, expressly or implidely conferred, under the Code, on a Magistrate to call upon the police to submit a charge-sheet, when they have sent a report under Section 169 of the Code, that there is no case made out for sending up an accused for trial.

11. Admittedly, in this case the trial court has not passed any reasoned order rejecting the F.R., which was based on a detailed investigation. He simply rejected the F.R. Without considering it judicially on the protest petition and thereafter he has directly issued the coercive process and warrant of arrest against the accused persons without hearing them. It is also clear that while passing the impugned order, there was no material on record before the Magistrate against the accused person. He has not recorded the statement of complainant or witnesses and has also not considered this aspect of the matter that in the absence of any material, how a coercive process can be issued. As argued by the counsel for the parties, when only one incident took place at the one place at the same time and out of the same incident, naturally two crimes cannot be registered.

12. Thus, considering the totality of the facts and circumstances of the case including legal position, I am of the view that the learned Magistrate acted mechanically in issuing coercive process. He has wrongly rejected the F.R. without a reasoned order. If he was not satisfied with the Final Report, he could have recorded the statement of complainant and witnesses before issuing process, but the correct procedure laid down under law was not adopted. There was no application of mind and in the absence of any material or evidence, no case was made to take cognizance when the State itself was satisfied that the petitioners have been implicated falsely and there is no material against them to proceed further in the matter. There should be some material before the Magistrate to proceed further or to send him for trial but in the absence of such material, the Magistrate can not take any cognizance and can not issue any process. Therefore, the order passed by the learned Magistrate dt. 30.6.2007 is per se illegal and cannot be held to be a judicial order and can not be allowed to stand in law. Consequently, this petition is allowed. Order dt. 30.6.2007 is set aside and the Final Report filed by the CID is accepted and the proceeding of Crime No. 194/05 and R.T. No. 1526/06 are quashed.

Order accordingly.

I.L.R. [2008] M. P., 2483
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice B.M. Gupta
 26 June, 2008*

DIRECTOR OF INCOME TAX (INVESTIGATION)

... Applicant

Vs.

STATE OF M.P. & anr.

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 41(2), 102, 451, 457, Income Tax Act, 1961, Sections 132(A), 293 - Seizure - Rs. 14,50,000/- seized on the suspicion of theft but no crime registered - Warrant of authorization issued u/s 132(A) of the Act - Application u/ss 451 & 457 of the Code rejected by JFMC, but allowed by ASJ in revision - Order challenged before the High

Court - Held - After issuance of warrant of authorisation by the Income Tax Department, in absence of any crime having been registered - The magistrate or the police has no jurisdiction to deal with the money and the money has to handed over to the Income Tax Department for its disposal in accordance with Law - M.Cr.C. Allowed. (Para 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 41(2), 102, 451, 457, आयकर अधिनियम, 1961, धाराएँ 132(ए), 293 - अभिग्रहण - 14,50,000/- रुपये चोरी के संदेह में अभिग्रहीत किन्तु कोई अपराध पंजीबद्ध नहीं - अधिनियम की धारा 132(ए) के अधीन प्राधिकार का वारंट जारी - संहिता की धारा 451 व 457 के अधीन आवेदन प्रथम श्रेणी न्यायिक मजिस्ट्रेट द्वारा खारिज, किन्तु अपर सेशन न्यायाधीश द्वारा पुनरीक्षण में मंजूर - आदेश को उच्च न्यायालय के समक्ष चुनौती - अभिनिर्धारित - आयकर विभाग द्वारा प्राधिकार का वारंट जारी करने के बाद, किसी अपराध के पंजीबद्ध होने के अभाव में मजिस्ट्रेट या पुलिस रुपयों के बारे में कार्यवाही करने की कोई अधिकारिता नहीं रखते हैं और रुपया विधि अनुसार उसका निपटारा करने के लिए आयकर विभाग को सौंपना पड़ेगा - एम.सीआर.सी. मंजूर।

Cases referred :

1990 J LJ 734, Order dated 12.09.2005 passed by High Court of M.P. in case of *Biora Construction (P) Ltd. Vs. Director of Income Tax (Investigation) & ors.*

S.N. Seth, for the applicant.

B.D. Mahore, P.P., for the non-applicant No.1/State.

Rajiv Upadhyay, for the non-applicant No.2.

ORDER

B.M. GUPTA, J. :- This petition is for impugning the order dated 26/9/2003 passed by Fourth Additional Sessions Judge, Morena in Criminal Revision No. 128/2003, whereby the learned Judge has given the seized amount of Rs. 14,50,000/- in supurdagi to the respondent.

2. On perusal of the impugned order, it appears that on 19/6/2003 this amount was seized by the police, Morena from one Narendra Singh, who is an employee of the respondent, under Section 41(2) read with Section 102 of Cr.P.C. on the suspicion that it is an amount of theft. The application filed by the respondent under Section 451 and 457 of Cr.P.C., was rejected vide order 24/6/2003 by JMFC, Morena. This order has been set aside vide impugned order dated 26/9/2003. It is observed by the learned Judge that the amount prima facie belongs to the respondent, which was withdrawn by him from his bank account. Despite the objection raised on behalf of the petitioner under Section 132(A) of the Income Tax Act, 1961 (for brevity the Act), observing that the source has been explained sufficiently by the respondent, the impugned order has been passed. Feeling aggrieved this petition has been filed on behalf of the petitioner/ Director Income Tax.

3. It is submitted by Shri Seth that when the information was received by the petitioner, he issued warrant of authorization in favour of Deputy Commissioner Income Tax, under Section 132(A) of the Act as the amount is to be disbursed by

the Income Tax authorities. As provided by Section 293 of the Act, the jurisdiction of Civil Court is barred. In support, he has drawn attention at the judgment of the Division Bench of this Court in the case of *Union of India Vs. Incharge Police Station, Janakganj and others*, 1990 J.L.J. 734. With regard to an order dated 7/5/2007 (Annexure-A) passed by Commissioner of Income Tax (Appeals), Gwalior, Shri Seth has drawn attention at Second paragraph of its internal page-5 in which it is observed that the order passed by the Additional Sessions Court, Morena has become final, as no appeal against the order has been filed. This observation shows that pendency of this petition was concealed by the respondent before the aforesaid authority. Shri Seth has further submitted that before issuance of the authorization order, during an enquiry it was found that out of the amount alleged to be withdrawn from the bank, part of the amount was related to a cheque issued in the name of some other person and the denomination was not tallying with the amount withdrawn from the bank.

4. Countering the contention, Shri Upadhyay for the respondent has submitted that unless it is established that the amount seized is not disclosed amount and has not been properly explained, neither Section 132(A) nor Section 293 of the Act applies. After observing that the proper explanation has been given by the respondent with regard to the ownership and source of the amount, the impugned order has been passed, which deserves to be sustained. In support, he has drawn attention at an unreported judgment of another Single Bench of this Court in *Biaora Constructions (P) Ltd. Vs. Director of Income Tax (Investigation) and Others* dated 12/9/2005. In the light of this judgment, the amount is not required to be returned to the department, as the Appellate Authority is satisfied that proper explanation has been given and the amount has been entered in the account books.

5. Shri Mahore, for the State has opposed the impugned order and submitted that the order of the trial Court was justified rejecting the application of the respondent.

6. Upon perusal of the aforementioned judgment of Division Bench cited on behalf of the petitioner, it appears that this case is covered by that case. In that case also the amount was seized by the police. Thereafter authorization under Section 132(A) of the Act was issued and when ignoring the same, the learned Magistrate did not handover the amount to the petitioner, that order was set aside. The part of the observation of the Court in para-9 being relevant is reproduced hereinbelow:-

“According to us the police officer, who had seized the money from respondent No.3, on being served with the order of the Income Tax Authority and Warrant of Authorisation, and for that matter learned Magistrate also suffered statutory handicap to deal with the money in any other manner than as contemplated under the special law enacted as aforesaid. Be it noted in this connection that the police had not

registered any crime against respondent No.3 and the Income Tax Department on being apprised of the seizure had laid claim to that money and to custody thereof in accordance with provisions aforequoted. Neither S.H.O. Janakganj Police Station, nor learned Magistrate, had any jurisdiction to enquire into the validity of the Warrant of Authorisation for delivery, of that money, to the Income Tax Officer concerned namely, Shri Khanduja, nor of the competence of the Officer issuing that Warrant of Authorisation."

This case is covered by the observation of the Division Bench of this Court in the aforementioned order, which ought to be followed.

7. With regard to the observation of Single Bench of this Court in the case of *Biarora Constructions (P) Ltd.* (supra), it has been observed that if the amount has been duly accounted for in the assessee's account books, no case for requisition under Section 132(A) of the Act is made out. In the present case, as argued by Shri Seth, during enquiry conducted by an officer of the department it has been observed that the part of the amount withdrawn from the bank is related to a cheque issued to some another person and also the denomination of the currency notes is not tallied. At the time of passing of the impugned order this fact was not on the record that this transaction has been accounted for in the account books of the respondent. However, after passing of the impugned order in the year, 2007 in the order dated 7/5/2007 the Commissioner of Income Tax (Appeals), Gwalior has observed in the last paragraph that the amount has been included in the account books of the respondent. But as contended, upon perusal of this order as a whole, particularly the part of the paragraph 5 at its internal page no.5, it appears that pendency of this petition was concealed before the learned officer who has observed that no appeal against this order of Additional Sessions Judge is made by the Public Prosecutor/State and thus the order has become final. While admittedly, at that time this petition was pending before this Court. In the light of the observation of the Division Bench in the aforementioned order, this order of the officer is not required to be given much weight at this stage.

8. Consequently, the petition is allowed. The impugned order being erroneous and also an abuse of the process of the Court, is set aside. The amount shall be deposited by the respondent No.2-M.s. Tomar Builders and Contractor Pvt. Ltd. in the trial Court with the same denomination of currency notes, which shall be handed over to him for its disbursement in the light of the observation of the Division Bench in the aforementioned judgment.

Petition allowed.