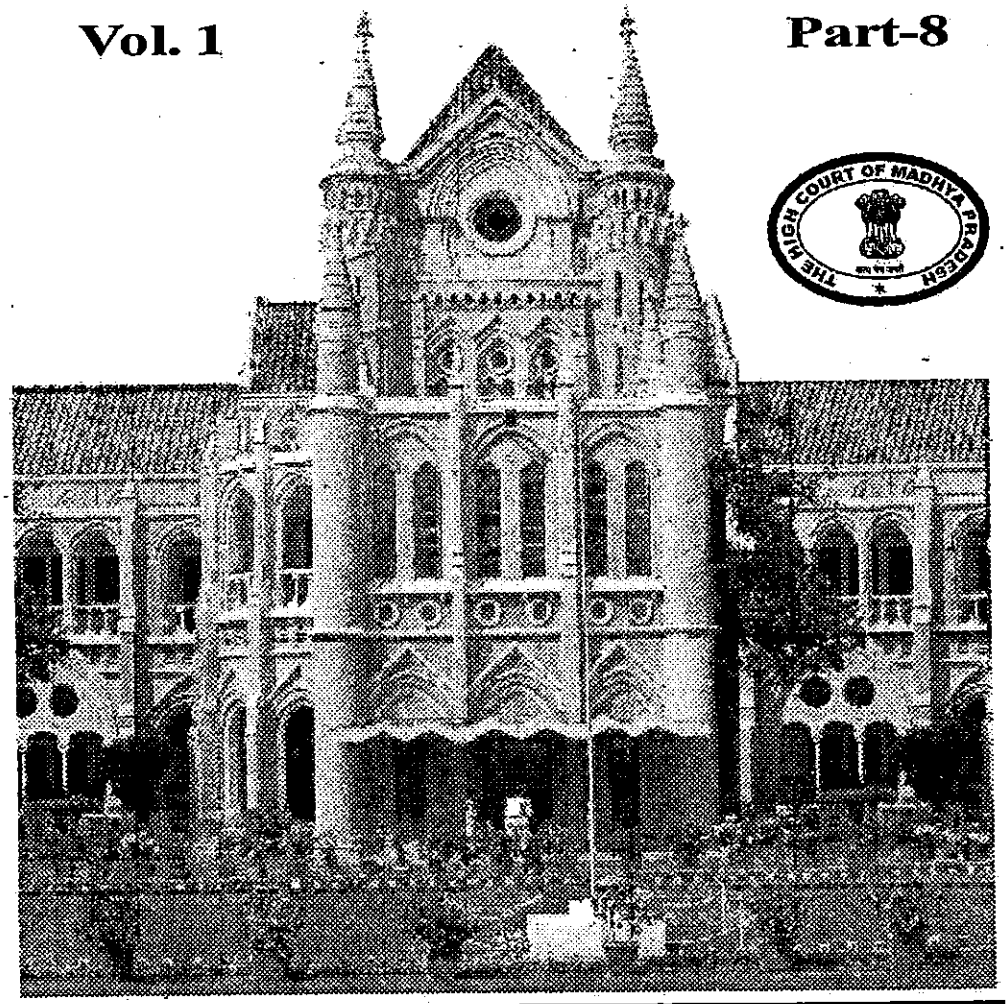
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Accommodation Control Act, M.P. (41 of 1961), Section 12, Transfer of Property Act, 1882, Section 111(d) - *Tenancy & determination of lease - A part of tenanted premises purchased by one of the legal heirs of tenant - Whether due to execution of sale deed, tenancy stood extinguished by merger as postulated u/s 111(d) of T.P. Act - Held - One of three legal heirs of tenant had purchased part of the property and not all the co-tenants, tenancy continues - Tenant continues to be tenant for the purpose of Act, 1961 and can be evicted only in accordance with Rent Act.* [Hameeda Begum (Smt.) v. Smt. Champa Bai Jain] ...2328

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) - ***Sub-letting*** *- Shop let out to partnership firm - 'S' inducted as partner later on - Partnership dissolved in 1986 and thereafter 'S' exclusively carrying on his business - Original partners started their own business at different places having no control over the business of 'S' - Plaintiff entitled for decree u/s 12(1)(b) of Act - Cross-objection allowed.* [Danpati Addhahat Bhandar v. Ganshyam Das Agrawal] ...2060

Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(e) & (f) - *Suit for eviction and arrears of rent - Plaintiff alleged that suit house was let out for residential purpose but tenant started using it for non-residential purpose - Suit house required for plaintiff's own residential and non-residential need - Defendant pleaded that house was let out for residential and non-residential purposes - Decree passed on the ground of bonafide requirement for residential and non-residential purposes - Appeal - Held - Through evidence, it is established that house was let out and required for both purposes - Even if the plaintiff's case was that the suit house was rented for residential purpose, decree could have been passed as plaintiff has been successful in proving his need for residential purpose also - Plaintiff became entitled to seek eviction from the entire house - Judgment and decree of trial court upheld - Appeal dismissed.* [Babulal Gupta (Dr.) v. Anoop Padliya] ...1367

Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(e) & (f) - *Suit house required by plaintiff for his own need - Plaintiff residing with his parents but due to dispute between his wife and mother require separate house - Held - Mother examined as witness and categorically stated about the dispute - No need for examination of wife - Merely because plaintiff is residing with his parents during pendency of suit, bonafide need for separate residence will not extinguish - Appeal dismissed.* [Babulal Gupta (Dr.) v. Anoop Padliya] ...1367

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - *Alternative accommodation - Plaintiff allowed his son to start business in a small shop which was unsuitable for wholesale business of plaintiff - Held -*

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(Note An asterisk (*) denotes Note number)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12, सम्पत्ति अंतरण अधिनियम, 1882, धारा 111(डी) – किरायेदारी और पट्टे का पर्यवसान – किरायेदारी वाले परिसर का एक हिस्सा किरायेदार के विधिक वारिसों में से एक के द्वारा क्रय किया गया – क्या विक्रय विलेख के निष्पादन के कारण किरायेदारी सम्पत्ति अंतरण अधिनियम की धारा 111(डी) के अधीन अपेक्षित विलयन द्वारा निर्वापित हो गयी – अभिनिर्धारित – किरायेदार के तीन विधिक वारिसों में से एक ने सम्पत्ति का हिस्सा क्रय किया था न कि सभी सह–किरायेदारों ने, किरायेदारी जारी रहती है – किरायेदार अधिनियम 1961 के प्रयोजन के लिए किरायेदार बना रहता है और केवल किराया अधिनियम के अनुसार ही बेदखल किया जा सकता है। (हमीदा बेगम (श्रीमति) वि श्रीमति चंपा बाई जैन) ...2328

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) – उपभाड़ेदारी – दुकान भागीदारी फर्म को किराये पर दी गई – बाद में 'स' को भागीदार के रूप में शामिल किया गया – भागीदारी वर्ष 1986 में विघटित हो गयी और उसके बाद 'स' अनन्य रूप से अपना कारोबार चलाता रहा – मूल भागीदारों का 'स' के कारोबार पर कोई नियंत्रण न होकर उन्होंने अपना कारोबार विभिन्न स्थानों पर प्रारम्भ कर लिया – वादी अधिनियम की धारा 12(1)(बी) के अधीन डिक्री का हकदार – प्रत्याक्षेप मंजूर। (दानपति आढ़त भंड़ार वि. घनश्याम दास अग्रवाल) ...2060

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ई) व (एफ) – बेदखली और बकाया भाड़े के लिए वाद – वादी ने अभिकथित किया कि वादग्रस्त गृह नैवासिक प्रयोजन के लिए किराये पर दिया गया था किन्तु किरायेदार ने इसका प्रयोग अनिवासिक प्रयोजन के लिए करना प्रारम्भ कर दिया – वादग्रस्त गृह वादी के स्वयं की नैवासिक एवं अनिवासिक आवश्यकता के लिए अपेक्षित – प्रतिवादी ने अभिवचन किया कि गृह नैवासिक एवं अनिवासिक प्रयोजनों के लिए किराये पर दिया गया था – नैवासिक एवं अनिवासिक प्रयोजनों के लिए वास्तविक आवश्यकता के आधार पर डिक्री पारित – अपील – अभिनिर्धारित – साक्ष्य से यह साबित हुआ कि गृह दोनों प्रयोजनों के लिए किराये पर दिया गया था और दोनों ही प्रयोजनों के लिए अपेक्षित है – यद्यपि वादी का मामला यह था कि वादग्रस्त गृह नैवासिक प्रयोजन के लिए किराये पर दिया गया था तथापि डिक्री पारित की जा सकती थी क्योंकि वादी नैवासिक प्रयोजन के लिए भी अपनी आवश्यकता साबित करने में सफल रहा – वादी सम्पूर्ण गृह से बेदखली की माँग करने का हकदार हो गया – विचारण न्यायालय के निर्णय व डिक्री की पुष्टि की गई – अपील खारिज। (बाबूलाल गुप्ता (डॉ.) वि अनूप पाडलिया) ...1367

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ई) व (एफ) – वादी द्वारा वादग्रस्त गृह स्वयं की आवश्यकता के लिए अपेक्षित – वादी अपने माता–पिता के साथ निवासरत, किन्तु उसकी पत्नी व माता के बीच विवाद के कारण पृथक गृह अपेक्षित – अभिनिर्धारित – माता की साक्षी के रूप में परीक्षा की गई और विवाद के बारे में सुस्पष्ट रूप से कथन किया – पत्नी की परीक्षा की कोई आवश्यकता नही – केवल इसलिए कि वादी वाद के लम्बित रहने के दौरान अपने माता–पिता के साथ निवास कर रहा है, पृथक निवास की वास्तविक आवश्यकता समाप्त नही होगी – अपील खारिज। (बाबूलाल गुप्ता (डॉ.) वि अनूप पाडलिया) ...1367

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वैकल्पिक स्थान – वादी ने अपने पुत्र को एक छोटी दुकान, जो वादी के थोक कारोबार के लिए अनुपयुक्त थी, में कारोबार प्रारम्भ करने की अनुमति दी – अभिनिर्धारित – अपने पुत्र को कारोबार प्रारम्भ करने

Permitting his own son to start business was a natural act of plaintiff in which no fault can be found - It is not a case that the plaintiff let out the shop to some other person. [Danpati Addhahat Bhandar v. Ganshyam Das Agrawal] ...2060

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - ***Bona fide requirement - Absence of pleading of non-availability of alternative accommodation - Sufficient evidence on record that plaintiff does not possess any other alternative suitable accommodation - Held - Absence of pleading would not be fatal - Appeal allowed.*** [Sujata Sarkar (Smt.) v. Anil Kumar Duttani] ...1374

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - ***Bona fide requirement - Plaintiff required entire building for establishing modern hospital - Requirement of son not satisfied with the part of accommodation which had fallan vacant - No accommodation available with him sufficient for the purposes of establishing hospital - Once bona fide requirement is proved by plaintiff, it is not open for Courts to decide sufficiency or insufficiency of accommodation.*** [Sujata Sarkar (Smt.) v. Anil Kumar Duttani] ...1374

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - ***Bona fide requirement - Suit was filed in the year 1976 for bona fide requirement for starting wholesale business of grain - Subsequently by amendment, nature of business was shown as Khali, Chuni, Bhusa and Kirana - Held - It cannot be said that there was some mala fide on the part of plaintiff or was not entitled to change the nature of business which was initially pleaded by him - Appeal dismissed.*** [Danpati Addhahat Bhandar v. Ganshyam Das Agrawal] ...2060

Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(f) & (h) - ***Suit for eviction - Non-residential accommodation required for major son and rebuilding - During pendency, son started business on the rear side of suit shop whose approach from a narrow lane - Held - Need of plaintiff has not come to an end as place of business is not suitable - Decree of eviction affirmed - Appeal dismissed.*** [Vijay Kumar Sen v. Govind Prasad] ...2369

Arbitration Act (10 of 1940), Section 2(a) & 20 - ***Arbitration Agreement - Dispute referred to one man committee - Committee authorized Chief Engineer to hear the dispute on his behalf and decision of committee was described as report and placed before the MPEB for final decision - Held - Arbitration clause contained in the agreement is found to have neither substituted nor replaced by the correspondence - In terms of agreement, the dispute intended to be referred should be determined in quasi judicial manner - Member of committee was not appointed as arbitrator - Dispute was not decided by committee in a quasi judicial manner - Reference of dispute to***

के लिए अनुमति देना वादी का स्वाभाविक कृत्य था जिसमें कोई त्रुटि नही पायी जा सकती – यह मामला नही है कि वादी ने दुकान किसी अन्य व्यक्ति को किराये पर दी। (दानपति आढ़त भंड़ार वि. घनश्याम दास अग्रवाल) ...2060

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वैकल्पिक स्थान की अनुपलब्धता के अभिवचन का अभाव – अभिलेख पर पर्याप्त साक्ष्य कि वादी के पास अन्य कोई वैकल्पिक उपयुक्त स्थान उपलब्ध नही है – अभिनिर्धारित – अभिवचन का अभाव घातक नही – अपील मंजूर। (सुजाता सरकार (श्रीमति) वि. अनिल कुमार दत्तानी) ...1374

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वादी को आधुनिक अस्पताल स्थापित करने के लिए सम्पूर्ण भवन की आवश्यकता – पुत्र की आवश्यकता स्थान के भाग से पूरी नही होती जो रिक्त पड़ा था – उसके पास अस्पताल स्थापित करने के प्रयोजनों के लिए पर्याप्त स्थान उपलब्ध नही – जब एक बार वादी द्वारा वास्तविक आवश्यकता साबित कर दी जाती है, न्यायालय को यह अधिकार नही है कि स्थान की पर्याप्तता या अपर्याप्तता विनिश्चित करे। (सुजाता सरकार (श्रीमति) वि. अनिल कुमार दत्तानी) ...1374

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वाद अनाज का थोक कारोबार प्रारम्भ करने की वास्तविक आवश्यकता के लिए वर्ष 1976 में पेश किया गया – तत्पश्चात् संशोधन द्वारा कारोबार की प्रकृति खली, चुनी, भूसा और किराना दर्शायी गई – अभिनिर्धारित – यह नही कहा जा सकता कि वादी की ओर से कोई असद्भाव था या वह कारोबार की प्रकृति बदलने का हकदार नही था जिसका उसके द्वारा प्रारम्भ में अभिवचन किया गया था – अपील खारिज। (दानपति आढ़त भंड़ार वि. घनश्याम दास अग्रवाल) ...2060

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(एफ) व (एच) – बेदखली का वाद – वयस्क पुत्र और पुनर्निर्माण के लिए अनिवासिक स्थान की आवश्यकता – लम्बित रहने के दौरान पुत्र ने वादग्रस्त दुकान के पीछे की ओर कारोबार प्रारम्भ किया जिसका प्रवेश मार्ग एक संकरी गली से – अभिनिर्धारित – वादी की आवश्यकता समाप्त नही हुई क्योंकि कारोबार का स्थान उपयुक्त नही है – बेदखली की डिक्री की पुष्टि – अपील खारिज। (विजय कुमार सेन वि. गोविंद प्रसाद) ...2369

माध्यस्थम् अधिनियम (1940 का 10), धारा 2(ए) व 20 – माध्यस्थम् अनुबन्ध – विवाद एक सदस्यीय समिति को संदर्भित किया गया – समिति ने उसकी ओर से मामला सुनने के लिए मुख्य अभियंता को प्राधिकृत किया और समिति का विनिश्चय रिपोर्ट के रूप में वर्णित किया गया और अंतिम विनिश्चय के लिए म.प्र.वि.मं. के समक्ष रखा गया – अभिनिर्धारित – अनुबंध में अन्तर्विष्ट माध्यस्थम् खण्ड को पत्राचार द्वारा न तो प्रतिस्थापित किया जाना और न ही बदला जाना पाया गया – अनुबंध के निबंधनों के अनुसार संदर्भित किये जाने के लिए आशयित विवाद अर्द्धन्यायिक ढंग से अवधारित किया जाना चाहिए – समिति के सदस्य को मध्यस्थ नियुक्त नही किया गया – समिति द्वारा विवाद का विनिश्चय अर्द्धन्यायिक ढंग से नही किया गया – विचारण न्यायालय द्वारा अनुबंध

arbitration in terms of agreement by trial Court valid - Appeal dismissed. [M.P. Electricity Board, Rampur, Jabalpur v. Bhandari Builders Pvt. Ltd.]... 1726

Arbitration Act (10 of 1940), Section 30 - ***Arbitrtor - Misconduct*** - *Award challenged on the ground that appellant not afforded proper opportunity of hearing in violation of principles of Natural Justice by the Arbitrator and thus he committed misconduct by ignoring the terms of the contract - Held - Arbitrator in his award recorded finding on the basis of documents filed by parties - Appellant failed to point out as to how Arbitrator misconducted - Reason assigned by the Arbitrator and the view taken by the Arbitrator is a possible view - Appeal dismissed.* [State of M.P. v. M/s Shukla Construction Company] ...1717

Arbitration and Conciliation Act (26 of 1996), Section 2(e) - *Court - Only a principal civil court of original jurisdiction and a High Court which exercises ordinary original civil jurisdiction falls within the purview of Court - Chief Justice or his nominee exercising power u/s 11(6) do not fall in the category of Court.* [Lalit Oswal v. A.K. Trivedi] 1825

Arbitration and Conciliation Act (26 of 1996), Section 11(6) - ***Arbitration clause - Excepted matter*** - *By invoking clause of agreement, S.E. imposed penalty on contractor due to delay of execution of work - Request for appointment of Arbitrator - Held - Clause 2 of agreement provides a detailed process and machinery for adjudication of dispute with regard to compensation for delay in execution of contract - Arbitration clause excludes excepted matter like adjudication under clause 2 from it's purview - Dispute not arbitrable being excepted matter - Application dismissed.* [Pawan Kumar Jain v. Union of India] ...2464

Arbitration and Conciliation Act (26 of 1996), Sections 12, 14 & 15 - *Appeal - Any person aggrieved by failure to challenge made u/s 12, is required to wait till award is pronounced and can challenge the rejection of his challenge only after the final award is made u/s 13(4).* [Lalit Oswal v. A.K. Trivedi] ...1825

Arbitration and Conciliation Act (26 of 1996), Section 25(a) - ***Termination of arbitration proceedings in default*** - *Petitioner despite several opportunities failed to submit statement of claims before Arbitral Tribunal - Held - Termination of proceeding by Arbitral Tribunal valid - Petition dismissed.* [Balmukund Pandey v. V.K. Singh] ...2179

Ayurveda/Homeopathy/Unani Medical Cadre Contract Service (Appointment and Conditions of Service) Rules, M.P. 2006, Rule 5 - *Appointment of Medical Officers - Scrutiny for interview on the basis of marks obtained in Graduate level - Held - Valid - Rule 5 provides minimum qualification as Bachelor degree - It further provides that in case large number of applications are received, the selection committee will reserve the*

के निबंधनों के अनुसार माध्यस्थम् को विवाद संदर्भित करना विधिमान्य – अपील खारिज। (म.प्र. इलेक्ट्रिसिटी बोर्ड, रामपुर, जबलपुर वि. भंडारी बिल्डर्स प्रा.लि.) ...1726

माध्यस्थम् अधिनियम (1940 का 10), धारा 30 – मध्यस्थ – कदाचार – अधिनिर्णय को इस आधार पर चुनौती दी गई कि मध्यस्थ द्वारा अपीलार्थी को नैसर्गिक न्याय के सिद्धांतों के उल्लंघन में सुनवाई का उचित अवसर नही दिया गया और इस प्रकार उसने संविदा के निबंधनों की उपेक्षा करते हुए कदाचार किया – अभिनिर्धारित – मध्यस्थ ने अपने अधिनिर्णय में पक्षकारों द्वारा पेश दस्तावेजों के आधार पर निष्कर्ष अभिलिखित किये – अपीलार्थी यह बताने में असफल रहा कि किस प्रकार मध्यस्थ ने कदाचार किया – मध्यस्थ द्वारा दिये गये कारण और मध्यस्थ द्वारा अपनाया गया दृष्टिकोण संभाव्य दृष्टिकोण है – अपील खारिज। (म.प्र. राज्य वि. मे. शुक्ला कंस्ट्रक्शन कं.)...1717

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 2(ई) – न्यायालय – केवल आरम्भिक अधिकारिता वाला प्रधान सिविल न्यायालय और उच्च न्यायालय जो मामूली आरम्भिक सिविल अधिकारिता का प्रयोग करता है न्यायालय के क्षेत्र में आते हैं – धारा 11(6) के अधीन शक्तियों का प्रयोग कर रहे मुख्य न्यायाधीश या उनके नामित व्यक्ति न्यायालय की श्रेणी में नही आते हैं। (ललित ओसवाल वि. ए.के. त्रिवेदी) ...1825

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – माध्यस्थम् खण्ड – आपवादिक मामला – अनुबन्ध के खण्ड का अवलंब लेकर एस.ई. ने ठेकेदार पर कार्य के निष्पादन में विलम्ब के कारण शास्ति अधिरोपित की – मध्यस्थ की नियुक्ति के लिए प्रार्थना – अभिनिर्धारित – अनुबन्ध का खण्ड 2 संविदा के निष्पादन में विलम्ब के लिए प्रतिकर के सम्बन्ध में विवाद के न्यायनिर्णयन के लिए विस्तृत प्रक्रिया और तंत्र उपबंधित करता है – माध्यस्थम् खण्ड, खण्ड 2 के अधीन न्यायनिर्णयन के समान आपवादिक मामले को उसके कार्यक्षेत्र से अपवर्जित करता है – विवाद आपवादिक मामला होने से मध्यस्थता योग्य नही – आवेदन खारिज। (पवन कुमार जैन वि. यूनियन ऑफ इंडिया) ...2464

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 12, 14 व 15 – अपील – कोई व्यक्ति, जो धारा 12 के अधीन चुनौती देने में विफल रहने के कारण व्यथित है, को अधिनिर्णय सुनाये जाने तक प्रतीक्षा करना अपेक्षित है और उसकी चुनौती की खारिजी को धारा 13(4) के अन्तर्गत किये गये अंतिम अधिनिर्णय के बाद चुनौती दे सकता है। (ललित ओसवाल वि. ए.के. त्रिवेदी) ...1825

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 25(ए) – व्यतिक्रम में माध्यस्थम् कार्यवाहियों की समाप्ति – याची अनेक अवसरों के बावजूद माध्यस्थम् अधिकरण के समक्ष दावों का विवरण पेश करने में असफल रहा – अभिनिर्धारित – माध्यस्थम् अधिकरण द्वारा कार्यवाही की समाप्ति विधिमान्य – याचिका खारिज। (बालमुकुन्द पाण्डे वि. व्ही.के. सिंह) ...2179

आयुर्वेद/होम्योपैथी/यूनानी चिकित्सा संवर्ग संविदा सेवा (नियुक्ति और सेवा की शर्तें) नियम, म.प्र. 2006, नियम 5 – चिकित्साधिकारी की नियुक्ति – स्नातक स्तर पर प्राप्त अंकों के आधार पर साक्षात्कार के लिए संवीक्षा – अभिनिर्धारित – वैध – नियम 5 न्यूनतम अर्हता स्नातक उपाधि उपबंधित करता है – यह आगे उपबंधित करता है कि अधिक संख्या में आवेदन प्राप्त होने की दशा में चयन समिति योग्य अभ्यर्थियों के आधार पर उपलब्ध पदों के तीन गुना तक अभ्यर्थियों की संख्या को कम करने का अधिकार सुरक्षित रखती है – योग्य अभ्यर्थियों की मेरिट का

right to reduce the number of candidates three times the available post on the basis of eligible candidates - Assessment of merit of eligible candidates would only be possible by considering the marks obtained in Graduate level and not by considering the marks of some of the candidates who had obtain Post Graduate degree or diploma - Petition dismissed. [Sunil Kumar Mishra (Dr.) v. State of M.P.] ...1675

Back wages - *No averment in the application filed u/s 31(3) of MPIR Act and no issue was framed by Labour Court that employees were not gainfully employed else where - Held - Mere bald statement of the employees cannot be accepted - Labour Court and Industrial Court have exercised the discretion not to award the back wages due to aforesaid lacuna - In the facts and circumstances, back wages have been rightly declined by the Labour Court.* [M.P. Urja Vikas Nigam Ltd. v. Santosh Kumar Dubey] ...1928

Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, (27 of 1996), Section 2(1)(d) - **See** - *Building and Other Construction Workers' Welfare Cess Act, 1996, Section 2(d).* [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act (27 of 1996), Sections 2(1)(d) & 2(1)(i)(iii) - **See** - *Building and Other Construction Workers' Welfare Cess Act, 1996, Sections 3, 4 & 5,* [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act (27 of 1996), Section 2(1)(i), Building and Other Construction Workers' Welfare Cess Rules, 1998, Rule 4(3) - *Whether company liable to pay cess - Held - Government or public sector undertaking are bound to deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works and in the context of rule 4(3), the Company is liable to realize the cess from the bills of the contractors and account for the same.* [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Section 2(d), Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996, Section 2(1)(d) - *Whether applicability of Factories Act would exclude the contractors from applicability of Construction Workers' Act, 1996 and Cess Act, 1996 - Held - Merely because the provisions of Factories Act has been made applicable besides other labour laws would not exclude the applicability of Construction Workers Act, 1996 & Cess Act, 1996.* [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Building and Other Construction Workers' Welfare Cess Rules, 1998, Rule 4(3) - **See** - *Building and Other Construction Workers' (Regulation*

निर्धारण स्नातक स्तर में प्राप्त अंकों को विचार में लेकर किया जाएगा न कि उन अभ्यर्थियों के अंकों को विचार में लेकर जिन्होंने स्नातकोत्तर उपाधि या डिप्लोमा अभिप्राप्त किया था – याचिका खारिज। (सुनील कुमार मिश्रा (डॉ) वि. म.प्र. राज्य) ...1675

पिछला वेतन – म.प्र. औद्योगिक संबंध अधिनियम की धारा 31(3) के अधीन पेश आवेदन में कोई प्रकथन नही और श्रम न्यायालय द्वारा कोई विवाद्यक विरचित नही किया गया कि कर्मचारियों को अर्जक रूप से अन्यत्र नियोजित नही किया गया – अभिनिर्धारित – कर्मचारियों का केवल सादा कथन स्वीकार नही किया जा सकता – श्रम न्यायालय और औद्योगिक न्यायालय ने उपर्युक्त कमी के कारण पिछला वेतन अधिनिर्णीत न करके विवेकाधिकार का प्रयोग किया – तथ्यों और परिस्थितियों में श्रम न्यायालय द्वारा पिछला वेतन उचित रूप से अस्वीकार किया गया। (एम.पी. ऊर्जा विकास निगम लि. वि. संतोष कुमार दुबे) ...1928

भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, (1996 का 27), धारा 2(1)(डी) – देखें – भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम, 1996, धारा 2(डी), (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य) ...1280

भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, (1996 का 27), धाराएँ 2(1)(डी) व 2(1)(i)(iii) – देखें – भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम 1996, धाराएँ 3, 4 व 5, (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य) ...1280

भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, 1996, धारा 2(1)(i), भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर नियम, 1998, नियम 4(3) – क्या कम्पनी उपकर अदा करने के लिए दायी है – अभिनिर्धारित – सरकार या सार्वजनिक उपक्रम ऐसे कार्यों के लिए संदत्त बिलों से अधिसूचित दरों से देय उपकर की कटौती करने या कटौती करवाने के लिए बाध्य है और नियम 4(3) के संदर्भ में कम्पनी ठेकेदारों के बिलों से उपकर वसूल करने और उसका लेखा देने के लिए दायी है। (गन्नोन डंकरले एंड कं. लि. वि. म.प्र. राज्य) ...1280

भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम (1996 का 28), धारा 2(डी), भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, 1996, धारा 2(1)(डी) – क्या कारखाना अधिनियम की प्रयोज्यता ठेकेदारों को संनिर्माण कर्मकार अधिनियम, 1996 एवं उपकर अधिनियम, 1996 की प्रयोज्यता से अपवर्जित करेगी – अभिनिर्धारित – केवल इस कारण कि अन्य श्रमिक विधियों के अतिरिक्त कारखाना अधिनियम के उपबंध लागू किये गये हैं, संनिर्माण कर्मकार अधिनियम, 1996 एवं उपकर अधिनियम, 1996 की प्रयोज्यता अवर्जित नही होगी। (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य) ...1280

भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर नियम, 1998, नियम 4(3) – देखें – भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, 1996, धारा 2(1)(i), (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य) ...1280

of Employment and Conditions of Service) Act, 1996), Section 2(1)(i) [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Building and Other Construction Workers' Welfare Cess Rules, 1998, Rule 6 - See - *Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Sections 3, 4 & 5* [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Sections 3, 4 & 5, Building and Other Construction Workers' Welfare Cess Rules, 1998, Rule 6, Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996, Sections 2(1)(d) & 2(1)(i)(iii) - ***Levy and collection of cess - Whether*** *contractor is an employer who would be required to pay cess - Held - Contractors who carries out the work of building or other construction work is an employer for the purpose of the Construction Workers Act, 1996 and the Cess Act, 1996.* [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Section 5 - ***Determination of cess to access tax - Held - Rate at*** *which cess is levied is 1% of the cost of construction incurred by an employer and thus there exist no ambiguity in the determination of cess.* [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ...1280

Cantonments Act (41 of 2006), Section 15, Cantonment Electoral Rules, 2007, Rule 20 - ***Notification for election of Cantonment Board - On*** *recommendations of Presidents of Cantonment Board, Central Government twice changed date of election of Board on the ground of assembly election - Held - Central Government while issuing the notification for change of date of election of Board had valid and justifiable reasons for postponing date of election.* [Azmatullah v. Union of India] ...1311

Cantonment Electoral Rules, 2007, Rules 12, 13 & 28, Constitution, Article 226 - ***Locus standi - Petitioner did not raise any objection to any*** *entry in preliminary electoral roll - Held - He cannot raise contention that even persons making flying visit or casually staying have been included in final electoral rolls.* [Manu Bhai Tripathi v. Union of India] ...1225

Cantonment Electoral Rules, 2007, Rule 20 - See - *Cantonments Act, 2006, Section 15* [Azmatullah v. Union of India] ...1311

Cantonment Electoral Rules, 2007, Rule 28(1) - ***Qualification of electorals - Resident and Resided - A person is resident of a particular place*** *only if he maintains a house or portion of house - A person can physically reside in a particular place without maintaining a house or a portion of house - Section 28(1) does not use the word resident - Held - Once a person has temporarily resided in cantonment for a period of six months immediately*

भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर नियम, 1998, नियम 6 – देखें – भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम, 1996, धाराएँ 3, 4 व 5 (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य) ...1280

भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम (1996 का 28), धाराएँ 3, 4 व 5, भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर नियम, 1998, नियम 6, भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, 1996, धाराएँ 2(1)(डी) व 2(1)(i)(iii) – उपकर का उद्ग्रहण एवं संग्रहण – क्या ठेकेदार एक नियोक्ता है जिसे उपकर अदा करना आवश्यक होगा – अभिनिर्धारित – ठेकेदार जो भवन या अन्य संनिर्माण कार्य का निष्पादन करता है संनिर्माण कर्मकार अधिनियम, 1996 एवं उपकर अधिनियम, 1996 के प्रयोजनों के लिए एक नियोक्ता है। (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य) ...1280

भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम (1996 का 28), धारा 5 – प्रवेश कर के उपकर का अवधारण – अभिनिर्धारित – दर जिस पर उपकर उद्ग्रहीत किया जाता है नियोक्ता द्वारा उपगत संनिर्माण की लागत का 1 प्रतिशत है और इस प्रकार उपकर अवधारण में कोई संदिग्धता विद्यमान नही है। (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य)...1280

छावनी अधिनियम (2006 का 41), धारा 15, छावनी निर्वाचन नियम, 2007, नियम 20 – छावनी बोर्ड के चुनाव की अधिसूचना – छावनी बोर्डों के अध्यक्षों की अनुशंसाओं पर केन्द्र सरकार ने विधानसभा चुनाव के आधार पर बोर्ड के चुनाव की तारीख दो बार परिवर्तित की – अभिनिर्धारित – केन्द्र सरकार के पास बोर्ड के चुनाव की तारीख परिवर्तित करने के लिए अधिसूचना जारी करते समय चुनाव की तारीख मुल्तवी करने के लिए वैध और न्यायसंगत कारण थे। (अजमतउल्ला वि. यूनियन ऑफ इंडिया) ...1311

छावनी निर्वाचन नियम, 2007, नियम 12, 13 व 28, संविधान, अनुच्छेद 226 – सुने जाने का अधिकार – याची ने प्राथमिक निर्वाचक नामावली में किसी प्रविष्टि के बारे में कोई आपत्ति नही उठाई – अभिनिर्धारित – वह यह प्रतिविरोध नही कर सकता कि त्वरित मुलाकात करने वालों या आकस्मिक रूप से ठहरने वालों को अंतिम निर्वाचक नामावली में सम्मिलित किया गया हैं। (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) ...1225

छावनी निर्वाचन नियम, 2007, नियम 20 – देखें – छावनी अधिनियम, 2006, धारा 15, (अजमतउल्ला वि. यूनियन ऑफ इंडिया) ...1311

छावनी निर्वाचन नियम, 2007, नियम 28(1) – निर्वाचकों की अर्हता – निवासी और निवास किया – कोई व्यक्ति केवल तब किसी विशिष्ट स्थान का निवासी है यदि वह कोई गृह या गृह का भाग रखता है – व्यक्ति कोई गृह या गृह का भाग रखे बिना शारीरिक रूप से किसी विशिष्ट स्थान में निवास कर सकता है – धारा 28(1) शब्द निवासी प्रयुक्त नही करती है – अभिनिर्धारित – जब किसी व्यक्ति ने छावनी में अर्हकारी तारीख के ठीक पूर्व की छः माह की कालावधि तक अस्थायी रूप से निवास कर लिया हो और अन्यथा अनर्ह नही है तो निर्वाचक के रूप में नामांकित

preceding the qualifying date and is not otherwise disqualified is entitled to be enrolled as electoral - Persons making flying visit are not entitled to be included in electoral rolls. [Manu Bhai Tripathi v. Union of India] ...1225

Central Excise Act (1 of 1944), Section 2(f) - See - *Finance Act, 1994, Section 65(76b) [As amended by Finance Act, 2005]* [Maa Sharda Wine Traders (M/s), Garhakota, Sagar v. Union of India] FB...1568

Chartered Accountants Act (38 of 1949), Sections 2(d), 24, 24A, 26 & 28, Criminal Procedure Code, 1973, Sections 4, 5 & 190 - *Applicant lodged the report against accused alleging that he without being registered Chartered Accountant, was practicing before Income Tax and Sales Tax department as a representative of assessee, preparing reports and issuing certificates as Chartered Accountant - Police took cognizance, registered crime and filed charge sheet - Magistrate framed charges - Revisional court allowed the revision and remanded the case - Revision before High Court - Held - Prima facie case against accused u/ss. 24, 24A & 26 of the Act is made out - Since specific provisions are made for breach of provisions of Act, the accused can be prosecuted under specific provisions of the Act and not under provisions of I.P.C. - U/s 2(d) of the Act, complaint does not include police report - U/s 28 of the Act, Chartered Accountant's Institute or under order of council or by Central Government can file complaint - Filing of complaint under the Act by the police not proper - Revision dismissed.* [Institute of Chartered Accountants of India v. Vimal Kumar Surana] ...1477

Chartered Accountants Act (38 of 1949), Section 22-A(2), Second Schedule Part I Clause 4 & 5, Chartered Accountants Regulation, 1988, Regulation 12(11)(i) - *Misconduct - Speaking order - While taking a decision by Council on a complaint regarding professional misconduct, the principle of recording of reasons for arriving at a finding of guilt shall also equally apply to a case where a member is not found to be guilty - High Court while exercising revisional jurisdiction has power u/s 22A(2) of the Act to reverse or modify the order or pass any other order, as it deemed fit in the circumstances of the case.* [Ratilal Lad v. Rasik Lal] ...1798

Chartered Accountants Regulation, 1988, Regulation 12(11)(i) - See - *Chartered Accountants Act, 1949, Section 22-A(2), Second Schedule Part I Clause 4 & 5* [Ratilal Lad v. Rasik Lal] ...1798

Circumstantial Evidence - *Held - Circumstance put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused - Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved - In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it*

किये जाने का हकदार है – त्वरित मुलाकात करने वाले व्यक्ति निर्वाचक नामावली में अन्तर्विष्ट किये जाने के हकदार नही हैं। (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) ...1225

केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 2(एफ) – देखें – वित्त अधिनियम, 1994, धारा 65(76बी) {वित्त अधिनियम, 2005 द्वारा यथासंशोधित} (मॉ शारदा वाइन ट्रेडर्स (मे.) गढ़ाकोटा, सागर वि. यूनियन ऑफ इंडिया) FB...1568

चार्टर्ड अकाउंटेंट अधिनियम (1949 का 38), धाराएँ 2(डी), 24, 24ए, 26 व 28, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 4, 5 व 190 – आवेदक ने अभियुक्त के विरुद्ध रिपोर्ट दर्ज करायी कि उसने रजिस्ट्रीकृत चार्टर्ड अकाउंटेंट हुए बिना आयकर और विक्रयकर विभाग के समक्ष निर्धारिती के प्रतिनिधि के रूप में कार्य किया, रिपोर्टें तैयार कीं और चार्टर्ड अकाउंटेंट के रूप में प्रमाण पत्र जारी किये – पुलिस ने संज्ञान लिया, अपराध पंजीबद्ध किया और आरोप पत्र पेश किया – मजिस्ट्रेट ने आरोप विरचित किये – पुनरीक्षण न्यायालय ने पुनरीक्षण मंजूर की और मामला प्रतिप्रेषित किया – उच्च न्यायालय के समक्ष पुनरीक्षण – अभिनिर्धारित – अभियुक्त के विरुद्ध अधिनियम की धारा 24, 24ए व 26 के अधीन प्रथम दृष्ट्या मामला बनता है – चूंकि अधिनियम के उपबंधों के उल्लंघन के लिए विनिर्दिष्ट उपबंध निर्मित किये गये हैं इसलिए अभियुक्त को अधिनियम के विनिर्दिष्ट उपबंधों के अधीन अभियोजित किया जा सकता है न कि भा.द.सं. के उपबंधों के अधीन – अधिनियम की धारा 2(डी) के अधीन परिवाद में पुलिस रिपोर्ट सम्मिलित नही है – अधिनियम की धारा 28 के अधीन चार्टर्ड अकाउंटेंट संस्थान या परिषद के आदेश के अधीन या केन्द्र सरकार द्वारा परिवाद पेश किया जा सकता है – पुलिस द्वारा अधिनियम के अधीन परिवाद पेश करना उचित नही – पुनरीक्षण खारिज। (इंस्टीट्यूट ऑफ चार्टर्ड एकांउंटेंट्स ऑफ इंडिया वि. विमल कुमार सुराना) ...1477

चार्टर्ड अकाउंटेंट अधिनियम (1949 का 38), धारा 22–ए(2), द्वितीय अनुसूची भाग I खण्ड 4 व 5, चार्टर्ड अकाउंटेंट विनियम, 1988, विनियम 12(11)(i) – कदाचार – सकारण आदेश – जब परिषद् द्वारा वृत्तिक कदाचार संबंधी किसी शिकायत का विनिश्चय किया जा रहा हो, दोष के किसी निष्कर्ष पर पहुँचने के लिए कारण अभिलिखित करने का सिद्धांत उस मामले को भी समान रूप से लागू होगा जहाँ कोई सदस्य दोषी नही पाया गया हो – उच्च न्यायालय को अपनी पुनरीक्षण अधिकारिता का प्रयोग करते समय अधिनियम की धारा 22ए(2) के अधीन आदेश को उलटने या परिवर्तित करने या अन्य कोई आदेश पारित करने की शक्ति है, जैसा कि वह मामले की परिस्थितियों में उचित समझे। (रतीलाल लाड वि. रसिक लाल) ...1798

चार्टर्ड अकाउंटेंट विनियम, 1988, विनियम 12(11)(i) – देखें – चार्टर्ड अकाउंटेंट अधिनियम, 1949, धारा 22–ए(2), द्वितीय अनुसूची भाग I खण्ड 4 व 5 (रतीलाल लाड वि. रसिक लाल) ...1798

परिस्थितिजन्य साक्ष्य – अभिनिर्धारित – प्रस्तावित परिस्थिति समाधानप्रद रूप से साबित की जानी चाहिए और वे परिस्थितियाँ केवल अभियुक्त के दोष की परिकल्पना से संगत होनी चाहिए – वे परिस्थितियाँ पुनः निश्चायक प्रकृति और प्रवृत्ति की होनी चाहिए तथा वे ऐसी होनी चाहिए कि एक प्रस्तावित को साबित करने के अतिरिक्त प्रत्येक परिकल्पना को अवपर्जित करे – अन्य शब्दों में, साक्ष्य की एक पूर्ण श्रृंखला होनी चाहिए कि अभियुक्त की निर्दोषिता से संगत निष्कर्ष के लिए कोई युक्तियुक्त आधार न रह जाए और इससे यह दर्शित होना ही चाहिए कि सभी

must be such as to show that within all human probability the act must have been done by the accused. [Babloo v. State of M.P.] ...1780

Civil Court Rules, M.P. 1961, Rule 372 - *Rule 372 provides that which cases can be registered as M.J.C. - There is no such enabling provision under the Rules for registration of application simplicitor - Application u/s 94 CPC cannot be registered as M.J.C. under the Rules.* [Surendra Rathore v. Vishwanath Bhasin] ...1697

Civil Procedure Code (5 of 1908) (As amended by Act 22 of 2002 w.e.f. 01.07.2002), Section 102 - *Second appeal - Right to appeal is always accrued by the parties on the very date of initiation of suit, claim or the proceeding in the trial court - This vested right of appeal can be taken away only by a subsequent enactment - Second appeal was filed on 14.02.1994 and was admitted on 22.07.1994 long before introducing the new provision of S. 102 CPC - Bar created u/s 102 CPC is not applicable to the present appeal although the valuation of this appeal is below Rs.25000.* [Western Coalfields Ltd. v. Pradeep Kumar Soni] ...2047

Civil Procedure Code (5 of 1908), Section 9 - ***Challenge as to validity of sale deed*** - *In life time of owner of property, his probable heirs do not have any right or title in his property - Owner sold his property and never challenged such transaction in his life time - Appellant had no authority to challenge the same.* [Bipta Bai (Smt.) v. Smt. Shipra Bai] ...1402

Civil Procedure Code (5 of 1908), Section 9, Sahkari Bhumi Vikas Bank Adhiniyam, M.P. 1966, Sections 27, 64 & 82 - ***Bar of jurisdiction of Courts*** - *Appellant purchased land after obtaining NOC from Bank - Land was auctioned for recovery of dues from other persons without issuing notice to appellant - Held - Even if jurisdiction of civil court is excluded, the civil court has jurisdiction to examine into cases where the provisions of the Act were complied with or the statutory tribunal had not acted in conformity with fundamental principles of judicial procedure - Civil suit as framed and filed was maintainable - Matter remitted back.* [Sitaram v. Cooperative Bhumi Vikas (Land Mortgage) Bank Ltd., Khandwa] ...1707

Civil Procedure Code (5 of 1908), Section 11 - ***Res judicata - Conditions*** - *Law discussed. [Hameeda Begum (Smt.) v. Smt. Champa Jain]* ...2328

Civil Procedure Code (5 of 1908), Section 11 - ***Res judicata*** - *First order of transfer from Municipal Council to DUDA quashed by High Court - In subsequent writ petition challenging the order of transfer from Municipal Council to DUDA it was directed that Transfer Grievances Cell shall reconsider the case of petitioner - Held - Petitioner ought to have insisted for quashment of the subsequent transfer order - Instead petitioner subjected himself to the decision of State Government - Petitioner deemed to have waived the plea of res judicata.* [S.B. Singh v. State of M.P.] ...1266

मानवीय संभाव्यताओं के भीतर कार्य अभियुक्त द्वारा ही किया जाना चाहिए था। (बबलू वि. म.प्र. राज्य) ...1780

सिविल न्यायालय नियम, म.प्र. 1961, नियम 372 – नियम 372 उपबंधित करता है कि कौन से मामले एम.जे.सी. के रूप में पंजीबद्ध किये जाएँगे – केवल आवेदन के पंजीयन के लिए कोई सामर्थ्यकारी उपबंध नियमों के अन्तर्गत नहीं है – नियमों के अन्तर्गत सि.प्र.सं. की धारा 94 का आवेदन एम.जे.सी. के रूप में पंजीबद्ध नही किया जा सकता। (सुरेन्द्र राठौर वि. विश्वनाथ भसीन) ...1697

सिविल प्रक्रिया संहिता (1908 का 5) (2002 के अधिनियम 22 द्वारा यथासंशोधित 01.07.2002 से प्रभावी), धारा 102 – द्वितीय अपील – पक्षकारों द्वारा वाद, दावा या कार्यवाही विचारण न्यायालय में संस्थित करने की तारीख को सदा ही अपील का अधिकार उपार्जित कर लिया जाता है – अपील का यह निहित अधिकार केवल पश्चात्वर्ती अधिनियम द्वारा ही वापस लिया जा सकता है – द्वितीय अपील सि.प्र.सं. की धारा 102 के नये उपबंध पुरःस्थापित किये जाने के काफी पूर्व तारीख 14.02.1994 को पेश की गई और 22.07.1994 को ग्राह्य की गई – सि.प्र.सं. की धारा 102 के अधीन सृष्ट वर्जन वर्तमान अपील को लागू नही होता, यद्यपि इस अपील का मूल्यांकन 25000 रुपये से कम है। (वेस्टर्न कोलफील्डस् लि. वि प्रदीप कुमार सोनी) ...2047

सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 – विक्रयपत्र की वैधता को चुनौती – सम्पत्ति के स्वामी के जीवनकाल में उसके संभाव्य वारिसों को उसकी सम्पत्ति में कोई अधिकार या स्वत्व नही होता – स्वामी ने सम्पत्ति विक्रय कर दी और उसके जीवनकाल में ऐसे संव्यवहार को कभी भी चुनौती नही दी – अपीलार्थी को उसे चुनौती देने का कोई प्राधिकार नही था। (बिपता बाई (श्रीमति) वि. शिप्रा बाई) ...1402

सिविल प्रक्रिया संहिता (1908 का 5), धारा 9, सहकारी भूमि विकास बैंक अधिनियम, म.प्र. 1966, धाराएँ 27, 64 व 82 – न्यायालयों की अधिकारिता का वर्जन – अपीलार्थी ने बैंक से अनापत्ति प्रमाण पत्र प्राप्त करने के बाद भूमि क्रय की – भूमि अपीलार्थी को सूचना पत्र जारी किये बिना अन्य व्यक्तियों से शोध्यों की वसूली के लिए नीलाम की गई – अभिनिर्धारित – यद्यपि सिविल न्यायालय की अधिकारिता अपवर्जित है तथापि सिविल न्यायालय को उन मामलों में परीक्षा करने की अधिकारिता है जहाँ अधिनियम के उपबंधों का अनुपालन कर दिया गया था या कानूनी अधिकरण ने न्यायिक प्रक्रिया के मूलभूत सिद्धांतों के अनुरूप कार्य नही किया था – सिविल वाद जैसा कि विरचित और पेश किया गया पोषणीय – मामला विप्रेषित। (सीताराम वि. को–ऑपरेटिव भूमि विकास (लेंड मॉर्टगेज) बैंक लि., खण्डवा) ...1707

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – शर्तें – विधि विवेचित। (हमीदा बेगम (श्रीमति) वि. श्रीमति चंपा बाई जैन) ...2328

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – नगर पालिका परिषद से डीयूडीए में स्थानांतरण का प्रथम आदेश उच्च न्यायालय द्वारा अभिखण्डित – नगर पालिका परिषद से डीयूडीए में स्थानांतरण के आदेश को चुनौती देने वाली पश्चात्वर्ती रिट याचिका में यह निदेशित किया गया कि स्थानांतरण शिकायत प्रकोष्ठ याची के मामले पर पुनर्विचार करे – अभिनिर्धारित – याची को पश्चात्वर्ती स्थानांतरण आदेश को अभिखण्डित करने के लिए आग्रह करना चाहिए था – इसके स्थान पर याची ने स्वयं को राज्य सरकार के निर्णय के अधीन रखा – याची द्वारा पूर्व न्याय के अभिवचन को अधित्यक्त कर दिया समझा गया। (एस.बी. सिंह वि. म.प्र. राज्य) ...1266

Civil Procedure Code (5 of 1908), Section 11 - *Res judicata - Principle of res judicata will not apply when the entire matter was still in appeal and the matter had not attained finality.* [Hameeda Begum (Smt.) v. Smt. Champa Jain] ...2328

Civil Procedure Code (5 of 1908), Section 11 - *Res judicata - Where there is a fresh cause of action, interpretation of law in previous suit cannot operate as res judicata - A statutory direction cannot be overridden or defeated by a previous judgment between parties.* [Hameeda Begum (Smt.) v. Smt. Champa Jain] ...2328

Civil Procedure Code (5 of 1908), Section 20 - *Cause of action - Part of cause of action - Jurisdiction - Held - U/s 20(c) a suit can also be instituted at a place where the cause of action, wholly or in part, arises - Part of cause of action has arisen within the territorial jurisdiction of Gwalior Bench -Writ petition maintainable at Gwalior.* [Vishnu Agrawal v. State of M.P.] ...1615

Civil Procedure Code (5 of 1908), Section 94 - *Power u/s 94 is not in derogation to the other provision of CPC, it is supplemental - It empowers the Court to grant temporary injunction in order to prevent the ends of justice from being defeated, if it is so prescribed.* [Surendra Rathore v. Vishwanath Bhasin] ...1697

Civil Procedure Code (5 of 1908), Sections 94 & 151 - *Application u/s 94 r/w Section 151 CPC for grant of injunction filed without filing the suit and waiting for amicable settlement out of Court - Rejection - Held - There is no power under CPC, even inherent power cannot be exercised by the Court to grant injunction particularly in view of the fact that there is no legal impediment in filing the suit - Merely on the ground that some talks are going on between the parties, would not clothe the applicant with right to invoke Section 94 r/w Section 151 CPC to claim interim injunction - Application not maintainable - Petition dismissed.* [Surendra Rathore v. Vishwanath Bhasin] ...1697

Civil Procedure Code (5 of 1908), Section 100 - *Second appeal - Suit for refund of earnest money - Contract provides for forfeiture of earnest money on failure to perform work - Plaintiff himself admitted that he has requested for refund of earnest money on account of failure to perform work - Held - Plaintiff is not entitled for refund of earnest money in view of his admission and terms of contract - Appeal allowed - Suit dismissed.* [Western Coalfields Ltd. v. Pradeep Kumar Soni] ...2047

Civil Procedure Code (5 of 1908), Section 100 - *Substantial question of law - "Whether the lower appellate court erred in law in reversing the judgment & decree passed by the Trial Court" - Held - Framed question of law could not be treated to be substantial question of law u/s 100.* [Bipta Bai (Smt.) v. Smt. Shipra Bai] ...1402

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – पूर्व–न्याय का सिद्धांत लागू नही होगा जब सम्पूर्ण मामला अपील में हो और मामले ने अंतिमता प्राप्त नही की हो। (हमीदा बेगम (श्रीमति) वि. श्रीमति चंपा बाई जैन) ...2328

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – जहाँ कोई नया वाद कारण हो, पूर्ववर्ती वाद में विधि का निर्वचन पूर्व–न्याय के रूप में प्रवर्तित नही हो सकता – कोई कानूनी निदेश पक्षकारों के मध्य किसी पूर्ववर्ती निर्णय द्वारा अधिमावी या विफल नही किया जा सकता। (हमीदा बेगम (श्रीमति) वि. श्रीमति चंपा बाई जैन) ...2328

सिविल प्रक्रिया संहिता (1908 का 5), धारा 20 – वादकारण – वादकारण का भाग – अधिकारिता – अभिनिर्धारित – धारा 20(सी) के अन्तर्गत कोई वाद उस स्थान पर भी संस्थित किया जा सकता है जहाँ वादकारण, पूर्णतः या भागतः, उत्पन्न हुआ है – वादकारण भागतः ग्वालियर खण्डपीठ की क्षेत्रीय अधिकारिता के भीतर उत्पन्न हुआ – रिट याचिका ग्वालियर में पोषणीय। (विष्णु अग्रवाल वि. म.प्र. राज्य) ...1615

सिविल प्रक्रिया संहिता (1908 का 5), धारा 94 – धारा 94 के अधीन शक्ति संहिता के अन्य उपबंध के अल्पीकरण में नही है; यह अनुपूरक है – यह न्यायालय को न्याय के उद्देश्य को विफल होने से निवारित करने के लिए अस्थायी व्यादेश अनुदत्त करने के लिए संशक्त करती है, यदि ऐसा विहित किया गया हो। (सुरेन्द्र राठौर वि. विश्वनाथ मसीन) ...1697

सिविल प्रक्रिया संहिता (1908 का 5), धाराएँ 94 व 151 – वाद पेश किये बिना और न्यायालय के बाहर आपसी समझौता होने की प्रतीक्षा करते हुए सि.प्र.सं. की धारा 94 सहपठित धारा 151 के अधीन व्यादेश प्रदान करने का आवेदन पेश किया – जो नामंजूर – अभिनिर्धारित – सि. प्र.सं. के अधीन ऐसी कोई शक्ति नही है, न्यायालय द्वारा अन्तर्निहित शक्तियों का प्रयोग भी व्यादेश प्रदान करने के लिए नही किया जा सकता विशेष रूप से इस तथ्य को दृष्टिगत रखते हुए कि वाद पेश किये जाने में कोई विधिक बाधा नही है – पक्षकारों के बीच समझौते की बातचीत चल रही है, केवल इस आधार पर आवेदक को सि.प्र.सं. की धारा 94 सहपठित धारा 151 के अन्तर्गत अंतरिम व्यादेश का दावा करने का अधिकार नही मिलता है – आवेदन पोषणीय नहीं – याचिका खारिज। (सुरेन्द्र राठौर वि. विश्वनाथ मसीन) ...1697

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – अग्रिम धन की वापसी के लिए वाद – संविदा में कार्य संपादित करने में असफल रहने पर अग्रिम धन को समपृहत करने का उपबंध – वादी ने स्वयं स्वीकार किया कि कार्य संपादित करने में असफल रहने के कारण उसने अग्रिम धन वापसी के लिए निवेदन किया है – अभिनिर्धारित – वादी की स्वीकारोक्ति और संविदा की शर्तों को दृष्टिगत रखते हुए वादी अग्रिम धन वापसी का हकदार नहीं – अपील मंजूर – वाद खारिज। (वेस्टर्न कोलफील्डस् लि. वि प्रदीप कुमार सोनी) ...2047

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का सारवान प्रश्न – "क्या निम्न अपीलीय न्यायालय ने विचारण न्यायालय द्वारा पारित निर्णय व डिक्री को उलटने में विधि की त्रुटि की" – विरचित विधि का प्रश्न धारा 100 के अन्तर्गत विधि का सारवान प्रश्न होना नही माना जा सकता। (बिपता बाई (श्रीमति) वि. शिप्रा बाई) ...1402

Civil Procedure Code (5 of 1908), Section 100 - *Suit to declare sale deed executed by father void as executed without consideration and legal necessity - Defendant pleaded partition - Held - Variation in pleading and evidence in regard to time of partition - After alleged partition one sale deed jointly executed - Partition by metes and bounds not established - Appellate Court erred in revising findings of trial Court - Appeal allowed.* [Ramawtar v. Mangilal (Deceased) Through L.Rs.] ...2360

Civil Procedure Code (5 of 1908), Section 100(4) - ***Substantial question of law*** - *If a relief is granted to a party which was not the case of either of the parties, contrary to record and under violation of existing laws then such question is not a question of fact but purely a substantial question of law covered u/s 100(4) of CPC.* [Phula Bai (Smt.) v. Krishna] ...1721

Civil Procedure Code (5 of 1908), Section 115, Specific Relief Act, 1963, Section 6(3) - *Writ petition challenging final decision in case u/s 6 of the Specific Relief Act - Held - Writ petition not maintainable - Revision would be maintainable against final decision as no appeal is provided u/s 6 of Specific Relief Act - Petition dismissed.* [Doma v. Saya Bai] ...*30

Civil Procedure Code (5 of 1908), Section 151 - *Inherent powers can be exercised to grant relief in case the case does not fall under any of the rules prescribed.* [Surendra Rathore v. Vishwanath Bhasin] ...1697

Civil Procedure Code (5 of 1908), Section 151, Order 7 Rule 7 - **See** - *Hindu Marriage Act, 1955, Section 27* [Manish Nema v. Sandhya Nema]...2057

Civil Procedure Code (5 of 1908), Section 151, Order 23 Rule 3 - ***Decree obtained fraudulently*** - *Aggrieved party can file civil suit or appeal or application in the same court to assail it.* [Gulam Husain v. Arshad Iqbal] ...1642

Civil Procedure Code (5 of 1908), Section 151, Order 23 Rule 3 - *When one cannot challenge compromise decree u/s 151 CPC - Compromise decree directing specific performance of agreement to sell the land - Decree challenged by way of application u/s 151 CPC on the ground that petitioners have purchased the land vide registered sale deed and are in possession of land but not impleaded as party in the suit - Application rejected - Held - Prima facie from sale deed it appears that under the sale deed the amount of loan was secured - Petitioners did not take step for getting their names mutated for a period of 29 to 30 years - Untill & unless it is proved that it was not executed as collateral security for loan it cannot be said that fraud has been played in obtaining compromise decree - It would be appropriate to relegate petitioners to file a civil suit.* [Gulam Husain v. Arshad Iqbal] ...1642

Civil Procedure Code (5 of 1908), Order 1 Rule 10, Transfer of Property Act, 1882, Sections 53A & 54 - ***Suit for eviction*** - *Application for*

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – पिता द्वारा निष्पादित विक्रय विलेख बिना प्रतिफल और विधिक आवश्यकता के निष्पादित किये जाने के कारण शून्य घोषित किये जाने के लिए वाद – प्रतिवादी ने विभाजन का अभिवचन किया – अभिनिर्धारित – विभाजन के समय के सम्बन्ध में अभिवचन और साक्ष्य में अंतर – कथित विभाजन के बाद संयुक्त रूप से एक विक्रय विलेख निष्पादित – माप और सीमांकन करके विभाजन साबित नही – अपीलीय न्यायालय ने विचारण न्यायालय के निष्कर्षों को उलटने में त्रुटि की – अपील मंजूर। (राम अवतार वि. मांगी लाल (मृतक) द्वारा विधिक प्रतिनिधि) ...2360

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100(4) – विधि का सारवान प्रश्न – यदि किसी पक्षकार को अभिलेख के प्रतिकूल और विद्यमान विधि के उल्लंघन के अधीन वह अनुतोष प्रदान किया जाता है जो किसी भी पक्षकार का मामला नही था, तब ऐसा प्रश्न तथ्य का प्रश्न नही है बल्कि विशुद्ध रूप से सि.प्र.सं. की धारा 100(4) के अन्तर्गत आने वाला विधि का सारवान प्रश्न है। (फूला बाई (श्रीमति) वि. कृष्णा) ...1721

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115, विनिर्दिष्ट अनुतोष अधिनियम, 1963, धारा 6(3) – विनिर्दिष्ट अनुतोष अधिनियम की धारा 6 के अधीन मामले में हुए अंतिम विनिश्चय को रिट याचिका में चुनौती – अभिनिर्धारित – रिट याचिका पोषणीय नही – अंतिम विनिश्चय के विरुद्ध पुनरीक्षण पोषणीय होगी क्योंकि विनिर्दिष्ट अनुतोष अधिनियम की धारा 6 के अधीन कोई अपील उपबंधित नही है – याचिका खारिज। (डोमा वि. साया बाई) ---*30

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151 – अन्तर्निहित शक्तियों का प्रयोग उस दशा में अनुतोष प्रदान करने के लिए किया जा सकता है जब मामला किसी विहित नियम के अन्तर्गत नही आता हो। (सुरेन्द्र राठौर वि. विश्वनाथ मसीन) ...1697

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151, आदेश 7 नियम 7 – देखें – हिन्दू विवाह अधिनियम, 1955, धारा 27 (मनीष नेमा वि. संध्या नेमा) ...2057

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151, आदेश 23 नियम 3 – डिक्री कपटपूर्वक अभिप्राप्त – पीड़ित पक्ष इसे चुनौती देते हुए सिविल वाद या अपील या उसी न्यायालय में आवेदन पेश कर सकता है। (गुलाम हुसैन वि. अरशद इकबाल) ...1642

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151, आदेश 23 नियम 3 – कब कोई व्यक्ति समझौता डिक्री को सि.प्र.सं. की धारा 151 के अधीन चुनौती नही दे सकता – समझौता डिक्री में भूमि विक्रय करने के अनुबन्ध के विनिर्दिष्ट पालन का निदेश दिया गया – डिक्री को सि.प्र.सं. की धारा 151 के अधीन आवेदन पेश कर इस आधार पर चुनौती दी गई कि याचियों ने भूमि रजिस्ट्रीकृत विक्रयपत्र द्वारा क्रय की है और भूमि के कब्जे में हैं किन्तु वाद में पक्षकार नही बनाया गया – आवेदन खारिज – अभिनिर्धारित – विक्रयपत्र से प्रथम दृष्ट्या यह प्रतीत होता है कि विक्रयपत्र के अधीन ऋण की रकम को प्रतिभूत किया गया था – याचियों ने 29 से 30 वर्ष की अवधि तक अपना नाम नामांतरित कराने के लिए कोई कदम नही उठाया – जब तक यह साबित नही किया जाता कि विक्रयपत्र ऋण की अनुषंगिक प्रतिभूति के रूप में निष्पादित नही किया गया, यह नही कहा जा सकता है कि समझौता डिक्री उपाप्त करने के लिए कपट किया गया – यह समुचित होगा कि याचियों को सिविल वाद पेश करने के लिए कहा जाए। (गुलाम हुसैन वि. अरशद इकबाल) ...1642

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10, सम्पत्ति अन्तरण अधिनियम, 1882, धाराएँ 53ए व 54 – बेदखली के लिए वाद – विक्रय के मौखिक अनुबन्ध के बल

impleading as defendant on the strength of oral agreement of sale - Rejection - Writ Petition - Held - To claim plea of part performance, written contract is essential - The contract for sale of immovable property by itself does not create any interest or charge in property - No interest created in property - Petitioner not entitled to be impleaded as party - Petition dismissed. [Govind Prasad Dubey v. Chandra Mohan Agnihotri] ...2228

Civil Procedure Code (5 of 1908), Order 6 Rule 2, Easements Act, 1882, Section 13(a) - *Pleading - Suit for perpetual injunction that plaintiff is the exclusive owner of the wall adjoining with the defendants house - Trial Court held that the wall is a common wall - Lower appellate Court held that defendant No.4 had acquired an easement right of necessity of such wall - Held - No case of easement right was put forth by defendant No.4 before the Court below - In absence of pleadings even if evidence is adduced on record then such evidence cannot be looked into for giving relief to either of the parties - Finding given by the lower appellate Court set-aside - Appeal allowed.* [Phula Bai (Smt.) v. Krishna] ...1721

Civil Procedure Code (5 of 1908), Order 8 Rule 6-A - *Counterclaim - Counterclaim is maintainable by defendants against the claim of plaintiff not inter se defendants - However if justice demands, it can be treated as cross suit and it would be open to a Court to convert or treat the counterclaim as a plaint in a cross suit.* [Mukund Lal v. Ghanshyam] ...2023

Civil Procedure Code (5 of 1908), Order 14 Rule 1 - See - *Wakf Act, 1995, Sections 6-A (As amended by M.P. Amendment) & 54* [Asif Ansari v. Waqf Mahal Umrao Jehan] ...1319

Civil Procedure Code (5 of 1908), Order 21 Rule 29, Transfer of property Act, 1882, Section 52 - *Stay of execution pending suit between decree holder and judgment debtor - Applicability of the rule to transferee lis pendente lite - Held - Rule 29 of Order 21 CPC deals with cases wherein a suit has been instituted by the judgment debtor against the decree holder and has no relevance to cases of lis pendens wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of the proceedings.* [Dilip Kumar v. Vijay Bahadur Singh] ...1408

Civil Procedure Code (5 of 1908), Order 21 Rules 98, 100, 101 & 102, Transfer of property Act, 1882, Section 52 - *Rules not applicable to transferee pendente lite - Whether purchaser pendente lite has a right to cause obstruction in a decree - Held - A purchaser pendente lite has no right to offer resistance or cause obstruction and as his rights have not been crystallized in a decree, Rule 102 of Order 21 of the Code comes into operation and hence, he cannot resist execution during the pendency of the proceedings.* [Dilip Kumar v. Vijay Bahadur Singh] ...1408

Civil Procedure Code (5 of 1908), Order 26 Rule 1 - *Order allowing*

पर प्रतिवादी के रूप में पक्षकार बनाये जाने का आवेदन – खारिजी – रिट याचिका – अभिनिर्धारित – भागिक पालन के अभिवचन का दावा करने के लिए लिखित संविदा आवश्यक है – स्थावर सम्पत्ति के विक्रय की संविदा स्वमेव सम्पत्ति में कोई हित या भार सृष्ट नही करती – सम्पत्ति में कोई हित सृष्ट नही – याची पक्षकार बनाये जाने का हकदार नही – याचिका खारिज। (गोविंद प्रसाद दुबे वि. चंद्रमोहन अग्निहोत्री) ...2228

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 2, सुखाचार अधिनियम, 1882, धारा 13(ए) – अभिवचन – शाश्वत व्यादेश के लिए वाद कि वादी प्रतिवादियों से लगी हुई दीवार का अनन्य स्वामी है – विचारण न्यायालय ने अभिनिर्धारित किया कि दीवार सामूहिक दीवार है – निम्न अपीलीय न्यायालय ने अभिनिर्धारित किया कि प्रतिवादी क्रमांक 4 ने ऐसी दीवार की आवश्यकता का सुखाधिकार अर्जित कर लिया था – अभिनिर्धारित – प्रतिवादी क्रमांक 4 द्वारा नीचे के न्यायालय के समक्ष सुखाधिकार का कोई मामला उपवर्णित नही किया गया – अभिवचनों के अभाव में यद्यपि अभिलेख पर साक्ष्य पेश की गई हो तब भी किसी पक्षकार को अनुतोष देने के लिए ऐसी साक्ष्य की जाँच पड़ताल नही की जा सकती – निम्न अपीलीय न्यायालय द्वारा दिया गया निष्कर्ष अपास्त – अपील मंजूर। (फूला बाई (श्रीमति) वि. कृष्णा) ...1721

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6–ए – प्रतिदावा – प्रतिदावा प्रतिवादियों द्वारा वादी के दावे के विरुद्ध पोषणीय है प्रतिवादियों में आपस में नही – तथापि यदि न्याय की यह माँग हो तो इसे प्रतिपवाद के रूप में माना जा सकता है और न्यायालय इस बात के लिए स्वतंत्र होगा कि प्रतिदावा को प्रतिपवाद में वादपत्र के रूप में परिवर्तित करे या माने। (मुकुंद लाल वि. घनश्याम) ...2023

सिविल प्रक्रिया संहिता, (1908 का 5), आदेश 14 नियम 1 – देखें – वक्फ अधिनियम, 1995, धाराएँ 6–ए (म.प्र. संशोधन द्वारा यथा संशोधित) व 54, (असिफ अंसारी वि. वक्फ महल उमराव जेहान) ...1319

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 29, सम्पत्ति अन्तरण अधिनियम, 1882, धारा 52 – डिक्रीदार और निर्णीत ऋणी के मध्य वाद के लम्बित रहते निष्पादन पर रोक – वादकालीन अंतरिती को नियम की प्रयोज्यता – अभिनिर्धारित – सि.प्र.सं. के आदेश 21 का नियम 29 उन मामलों के लिए है जिनमें निर्णीत ऋणी द्वारा डिक्रीदार के विरुद्ध कोई वाद संस्थित किया गया है और विचाराधीन वाद के उन मामलों से कोई सम्बद्धता नही रखता जिनमें निर्णीत ऋणी द्वारा कार्यवाहियों के लम्बित रहने के दौरान तृतीय पक्ष को सम्पत्ति का अंतरण किया गया है। (दिलीप कुमार वि. विजय बहादुर सिंह) ...1408

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 98, 100, 101 व 102, सम्पत्ति अन्तरण अधिनियम, 1882, धारा 52 – वादकालीन अंतरिती को लागू न होने वाले नियम – क्या वादकालीन क्रेता को डिक्री में बाधा उत्पन्न करने का अधिकार है – अभिनिर्धारित – वादकालीन क्रेता को प्रतिरोध करने या बाधा कारित करने का कोई अधिकार नही है और चूंकि उसके अधिकार किसी डिक्री में स्फटित नही किये गये हैं इसलिए संहिता के आदेश 21 का नियम 102 प्रवृत्त होता है और इसलिए वह कार्यवाहियों के लम्बित रहने के दौरान निष्पादन का प्रतिरोध नही कर सकता। (दिलीप कुमार वि. विजय बहादुर सिंह) ...1408

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 1 – सि.प्र.सं. के आदेश 26

or disallowing an application u/O 26 R 1 CPC is a discretionary order, but if a judge proceeds on a wrong principle in a matter within its jurisdiction, his order may be set-aside by an appellate Court. [Annapurna Dubey (Smt.) v. Champalal @ Chaua] ...*28

Civil Procedure Code (5 of 1908), Order 26 Rule 1 - *Plaintiff 80 years old lady patient of heart and arthritis diseases - Application for examination on commission filed supported by affidavit and certificate of Doctor that she is a patient of arthritis and is unable to walk - No reply to the application and counter affidavit has been filed by defendant - Trial Court rejected the application only on the ground that it cannot be inferred that plaintiff is seriously ill - Held - Court may permit any party to examine on commission if he or she is sick or infirm and is unable to attend the Court - Explanation to Rule 1 of Order 26 empowers a Court to accept a certificate purporting to be signed by Registered Medical Practitioner as a evidence of the sickness or infirmity without calling the medical practitioner as a witness - Trial Court adopted a wrong approach of law and in arbitrary manner dismissed the application - High Court set-aside the order and remanded the matter to trial Court.* [Annapurna Dubey (Smt.) v. Champalal @ Chaua]...*28

Civil Procedure Code (5 of 1908), Order 39 & Section 94(c) - *Order 39 CPC deals with the temporary injunction and exercise of powers u/s 94(c) CPC - Thus, it is clear that Section 94(c) and Order 39 are not the two alternative sources of powers.* [Surendra Rathore v. Vishwanath Bhasin]...1697

Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 10 - See - *Service Law* [M.P. Housing Board v. K.V. Shrivastava]...1589

Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 14(22) - ***First D.E. against petitioner cancelled*** *- After appointment of Inquiry Officer afresh enquiry started - Despite restrain order of HC, D.E. completed and order of dismissal passed - Held - Succeeding Inquiry Officer had no power to totally disregard the evidence already recorded by previous Inquiry Officer unless and until he expresses an opinion that further examination of witness already examined is necessary in the interest of justice - Order of dismissal set-aside - Matter remanded back for continuing enquiry from the stage it was left by previous Inquiry Officer - Petition allowed.* [Anirudh Dwivedi v. State Chief Commissioner, Bharat Scout & Guide] ...2191

Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 29(iii) - See - *Police Regulations, M.P., Regulation 270* [Angad Singh Rathore v. State of M.P.] ...2310

Civil Services (Conducts) Rules, M.P. 1965, Rule 3(i) & (ii) - See - *Service Law* [M.P. Housing Board v. K.V. Shrivastava] ...1589

Coal Bearing Areas (Acquisition and Development) Act (20 of

नियम 1 के अन्तर्गत किसी आवेदन को स्वीकार या अस्वीकार करने का आदेश एक विवेकाधीन आदेश है, किन्तु यदि एक न्यायाधीश उसकी अधिकारिता के किसी मामले में गलत सिद्धांत पर कार्यवाही करता है तो अपीलीय न्यायालय द्वारा उसका आदेश अपास्त किया जा सकता है। (अन्नपूर्णा दुबे (श्रीमति) वि. चम्पालाल उर्फ छौंआ) ---*28

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 1 – वादी, 80 वर्ष की महिला हृदय और गठिया रोग की रोगी – कमीशन पर परीक्षा के लिए शपथपत्र और चिकित्सक के प्रमाणपत्र से समर्थित आवेदन पेश किया गया कि वह गठिया की रोगी है और चलने–फिरने में असमर्थ है – प्रतिवादी द्वारा आवेदन का कोई जवाब और प्रति–शपथपत्र पेश नही किया गया – विचारण न्यायालय ने केवल इस आधार पर आवेदन खारिज किया कि यह निष्कर्ष नही निकाला जा सकता कि वादी गम्भीर रूप से बीमार है – अभिनिर्धारित – न्यायालय किसी पक्षकार को कमीशन पर परीक्षा करने के लिए अनुज्ञात कर सकता है यदि वह बीमार या अशक्त है और न्यायालय में उपस्थित होने में असमर्थ है – आदेश 26 के नियम 1 का स्पष्टीकरण न्यायालय को रजिस्ट्रीत चिकित्सा व्यवसायी द्वारा हस्ताक्षरित होना तात्पर्यित किसी प्रमाणपत्र को चिकित्सा व्यवसायी को साक्षी के रूप में बुलाये बिना बीमारी या अशक्तता के साक्ष्य के रूप में ग्रहण करने के लिए सशक्त करता है – विचारण न्यायालय ने विधि का गलत दृष्टिकोण अपनाया और मनमाने ढंग से आवेदन खारिज किया – उच्च न्यायालय ने आदेश अपास्त किया और मामला विचारण न्यायालय को प्रतिप्रेषित किया। (अन्नपूर्णा दुबे (श्रीमति) वि. चम्पालाल उर्फ छौआ) ---*28

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 व धारा 94(सी) – सि.प्र.सं. का आदेश 39 अस्थायी व्यादेश और सि.प्र.सं. की धारा 94(सी) के अन्तर्गत शक्तियों के प्रयोग के बारे में कार्यवाही करता है – इस प्रकार यह स्पष्ट है कि धारा 94(सी) और आदेश 39 शक्तियों के दो वैकल्पिक स्रोत नही हैं। (सुरेन्द्र राठौर वि. विश्वनाथ भसीन) ...1697

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियमा 10, देखें – सेवा विधि, (एम.पी. हाउसिंग बोर्ड वि. के.व्ही. श्रीवास्तव) ...1589

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14(22) – याची के विरुद्ध प्रथम विभागीय जाँच रद्द की गई – जाँच अधिकारी की नियुक्ति के बाद पुनः जाँच प्रारम्भ की गई – उच्च न्यायालय के रोक के आदेश के बावजूद विभागीय जाँच पूर्ण की गई और बर्खास्तगी का आदेश पारित किया गया – अभिनिर्धारित – उत्तरवर्ती जाँच अधिकारी को पूर्ववर्ती जाँच अधिकारी द्वारा पहले से अभिलिखित साक्ष्य की पूर्णतः उपेक्षा करने की कोई शक्ति नही थी जब तक वह यह राय अभिव्यक्त न करता हो कि साक्षी जिसकी पूर्व में परीक्षा की जा चुकी है, की अतिरिक्त परीक्षा न्यायहित में आवश्यक है – बर्खास्तगी का आदेश अपास्त – मामला उस प्रक्रम से जाँच जारी रखने के लिए प्रतिप्रेषित किया गया जिस पर पूर्ववर्ती जाँच अधिकारी द्वारा छोड़ी गयी थी – याचिका मंजूर। (अनिरूद्ध द्विवेदी वि. स्टेट चीफ कमिश्नर, भारत स्काउट एण्ड गाइड) ...2191

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29(iii) – देखें –पुलिस विनियम, म.प्र., विनियम 270, (अंगद सिंह राठौर वि. म.प्र. राज्य) ...2310

सिविल सेवा (आचरण) नियम, म.प्र. 1965, नियम 3(i) व (ii) . देखें – सेवा विधि (एम.पी. हाउसिंग बोर्ड वि. के.व्ही. श्रीवास्तव) ...1589

कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम (1957 का 20), धाराएँ 10 व

1957), Sections 10 & 11; Stamp Act, 1899, Section 2(14) - *Central Government has ordered u/s 11(1) of Act of 1957 for vesting of lands in favour of Government Company - Such an order would not be an instrument - Governmet was unjustified in demanding the stamp duty in view of a direction/order issued by Central Government.* [State of M.P. v. Western Coalfields Ltd.] ...1887

Constitution, Articles 14, 16 & 309 - ***Contingency Paid Employees - Time Bound Promotion*** - *Contingency paid and work charged employees are considered to be forming a common class - The benefit of time bound promotion which is extended to work charged employees is also to be extended to contingency paid employee - Petition allowed.* [Tejulal Yadav v. State of M.P.] ...1326

Constitution, Articles 14 & 21 - See - *Labour Laws (Amendment) and Miscellaneous Provisions Act, M.P. 2002* [Labour Bar Association, Satna v. State of M.P.] ...1207

Constitution, Articles 19 & 226 - See - *Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P., 2007, Sections 3(d), 6 & 7,* [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Constitution, Article 21 - ***Illegal detention - Compensation*** - *Petitioner convicted u/s 18 of N.D.P.S. Act and sentenced to 10 years R.I. - Period of sentence reduced to 5 years in appeal - Copy of judgment sent to jail authorities as well as to Court - However, petitioner was released after completion of 10 years of sentence - Held - Defence of sovereign immunity is not available where fundamental right under Article 21 is violated - State directed to pay compensation of Rs.3 lacs.* [Pooran Singh v. State of M.P.] ...1978

Constitution, Article 21, Municipal Corporation Act, M.P. 1956, Sections 66 & 220 - ***Provision of pollution free water to residents*** - *Municipal Corporation is under an obligation to supply sufficient quantity of water for its residents - Right to pollution free water is fundamental right - Municipal Corporation directed to procure water in sufficient quantities if necessary through railway or motor vehicle tanker for supply for public and private purposes - Petition disposed of.* [Manoj Rajani v. State of M.P.] ...2210

Constitution, Article 226 - *Agreement for supply of water between Municipal Corporation, Indore and Dewas - Municipal Corporation, Indore able to meet only 50% of the requirement of water for its residents - Held - Municipal Corporation, Indore cannot be compelled to supply agreed quantity of water to Municipal Corporation, Dewas.* [Manoj Rajani v. State of M.P.] ...2210

Constitution, Article 226 - ***Allotment of dealership*** - *Appellant was*

11, स्टाम्प अधिनियम, 1899, धारा 2(14) – केन्द्र सरकार ने 1957 के अधिनियम की धारा 11(1) के अधीन सरकारी कम्पनी के पक्ष में भूमियाँ निहित करने का आदेश दिया – ऐसा आदेश लिखत नही होगा – केन्द्र सरकार द्वारा जारी निदेश/आदेश को देखते हुए सरकार स्टाम्प शुल्क की माँग करने में अन्यायपूर्ण थी। (म.प्र. राज्य विं. वेस्टर्न कोलफील्डस् लि.) ...1887

संविधान, अनुच्छेद 14, 16 व 309 – आकस्मिकता निधि से वेतन पाने वाले कर्मचारी – समयबद्ध पदोन्नति – आकस्मिकता निधि से वेतन पाने वाले और कार्यभारित कर्मचारियों को समान वर्ग निर्मित करने के लिए विचार में लिया गया – समयबद्ध पदोन्नति का लाभ, जो कार्यभारित कर्मचारियों तक विस्तारित है, आकस्मिकता निधि से वेतन पाने वाले कर्मचारी तक भी विस्तारित किया गया है – याचिका मंजूर। (तेजूलाल यादव वि. म.प्र. राज्य) 1326

संविधान, अनुच्छेद 14 व 21 – देखें – श्रमिक विधियाँ (संशोधन) और विविध उपबंध अधिनियम, म.प्र. 2002 (लेबर बार एसोशियेशन, सतना वि. म.प्र. राज्य) ...1207

संविधान, अनुच्छेद 19 व 226 – देखें – निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र., 2007, धाराएँ 3(डी), 6 व 7, (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य) ...2269

संविधान, अनुच्छेद 21 – अवैध निरोध – प्रतिकर – याची को स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम की धारा 18 के अधीन दोषसिद्ध किया गया और 10 वर्ष के सश्रम कारावास से दण्डित किया – अपील में दण्डादेश की अवधि घटाकर 5 वर्ष कर दी गई – निर्णय की प्रतिलिपि जेल प्राधिकारियों और साथ ही साथ न्यायालय को भेजी गयी – तथापि, याची को 10 वर्ष का दण्डादेश पूर्ण करने के बाद ही छोड़ा गया – अभिनिर्धारित – जहाँ अनुच्छेद 21 के अन्तर्गत मूलभूत अधिकार का उल्लंघन हो वहाँ प्रभुतासम्पन्न उन्मुक्ति की प्रतिरक्षा उपलब्ध नही होती है – राज्य को 3 लाख रुपये प्रतिकर संदाय करने का निदेश दिया। (पूरन सिंह वि. म.प्र. राज्य)...1978

संविधान, अनुच्छेद 21, नगर पालिक निगम अधिनियम, म.प्र. 1956, धाराएँ 66 व 220 – निवासियों के लिए प्रदूषण मुक्त जल का उपबंध – नगर पालिक निगम उसके निवासियों के लिए जल की पर्याप्त मात्रा की आपूर्ति करने के दायित्व के अधीन है – प्रदूषण मुक्त जल का अधिकार मूलभूत अधिकार है – नगर पालिक निगम को लोक और निजी प्रयोजनों की आपूर्ति के लिए, यदि आवश्यक हो तो, रेलवे या मोटर वाहन टेंकरों द्वारा पर्याप्त मात्रा में जल उपाप्त करने के लिए निदेशित किया गया – याचिका निपटाई गई। (मनोज राजानी वि. म.प्र. राज्य) ...2210

संविधान, अनुच्छेद 226 – नगर पालिक निगम इन्दौर और देवास के मध्य जल की आपूर्ति का करार – नगर पालिक निगम, इन्दौर अपने निवासियों के लिए जल की केवल 50 प्रतिशत आवश्यकता की पूर्ति करने में सक्षम – अभिनिर्धारित – नगर पालिक निगम, इन्दौर को जल की अनुबंधित मात्रा की पूर्ति नगर पालिक निगम, देवास को करने के लिए बाध्य नही किया जा सकता। (मनोज राजानी वि. म.प्र. राज्य) ...2210

संविधान, अनुच्छेद 226 – डीलरशिप का आबंटन – प्रत्यर्थी कॉर्पोरेशन द्वारा अपीलार्थी

appointed ad-hoc dealer by respondent Corporation for one year - He provided land on lease for 30 years, spent amount and obtained license - Termination of dealership - Held - Clause 12 of guidelines for selection of retail outlet provides that advertisement has to be issued for allotment and preference can be given while awarding marks under the head "Land and infrastructure" - Letter of intent issued also provides that allotment in favour of appellant was purely a stopgap and temporary arrangement - In the matter of distribution of public largesse, if outlet is given to appellant without selection process, it would be violative of concept of fair play - Appellant has no right to continue with outlet - Appeal dismissed. [Mohan Auto Supply Centre (M/s.) v. (M/s.) Hindustan Petroleum Corporation Ltd.] ...1898

Constitution, Article 226 - *Bharat Scout and Guide, a society registered under Society Registrikaran Adhiniyam - Whether State within meaning of Article 12 and amenable to writ jurisdiction - Held - However, society is not State within meaning of Article 12 - Society has been established for non-political educational movement of young people and imparting education in different way - Society is seeking to achieve collective benefit and is participating in social affairs in public interest and thus performing public function - Society is receiving Grant-in-Aid and grant is spent for educational movement - Society is amenable to writ jurisdiction.* [Anirudh Dwivedi v. State Chief Commissioner, Bharat Scout & Guide] ...2191

Constitution, Article 226 - ***Contract*** - *After termination of contract without issuance of show cause notice or making any enquiry into damages or into the cause which led to cancellation of contract, Railway issued demand notice - Held - Matter was not referred to the arbitrator nor any competent and authorized person has ever adjudicated upon the dispute - Respondent Railway would not be entitled to recover the money on their lopsided calculation - Order of withholding amount quashed - Petition disposed of.* [Bridge and Roof Infrastructures (M/s.) v. Union of India] ...1952

Constitution, Article 226 - ***Contract*** - ***Notice inviting tender*** - *Notice inviting tender mentioned that the earnest money in the form of FDR in favour of Municipal Corporation has to be deposited one day prior to the opening of the tender - Petitioner's tender was not opened as he deposited the earnest money in the form of FDR in favour of Municipal Corporation along with his tender and not one day prior - Held - Notice inviting tender did not clearly or expressly state that the FDR receipt towards the earnest money deposit should be furnished to the Municipal Corporation one day prior to the date of opening of the tender - That Fixed Deposit was infact made in favour of the Municipal Corporation one day prior to the date of opening of the tender, but Fixed Deposit Receipt was not furnished to the Municipal Corporation one day prior to the date of opening of the tender, but was*

को एक वर्ष के लिए तदर्थ डीलर नियुक्त किया गया – उसने 30 वर्ष के पट्टे पर भूमि उपलब्ध करायी, रकम खर्च की और लायसेंस प्राप्त किया – डीलरशिप की समाप्ति – अभिनिर्धारित – रिटेल आउटलेट के चयन के लिए मार्गदर्शक सिद्धांत का खण्ड 12 उपबंधित करता है कि आबंटन के लिए विज्ञापन जारी करना होगा और "भूमि और अवसंरचना" शीर्ष के अन्तर्गत अंक प्रदान करते समय वरीयता दी जा सकती है – जारी किया गया आशय पत्र (स्मजजमत वि प्दजमदज) भी उपबंधित करता है कि अपीलार्थी के पक्ष में आबंटन पूर्णतः स्थानापन्न और अस्थायी व्यवस्था थी – सार्वजनिक उदार दान के वितरण के मामले में यदि अपीलार्थी को चयन प्रक्रिया के बिना आउटलेट दिया जाता है तो यह निष्पक्ष व्यवहार की परिकल्पना का उल्लंघनकारी होगा – अपीलार्थी को आउटलेट जारी रखने का कोई अधिकार नही है – अपील खारिज। (मोहन ऑटो सप्लाई सेंटर (मे.) वि मे. हिन्दुस्तान पेट्रोलियम कारपोरेशन लि.) ...1898

संविधान, अनुच्छेद 226 – भारत स्काउट एण्ड गाइड सोसायटी रजिस्ट्रीकरण अधिनियम के अन्तर्गत रजिस्ट्रीकृत सोसायटी – क्या अनुच्छेद 12 के अर्थ के अन्तर्गत राज्य है और रिट अधिकारिता के अध्यधीन है – अभिनिर्धारित – सोसायटी अनुच्छेद 12 के अर्थ के अन्तर्गत राज्य नही है – सोसायटी युवा लोगों के गैर राजनीतिक शैक्षिक गतिविधि के लिए स्थापित की गई है और भिन्न तरीके से शिक्षा प्रदान करती है – सोसायटी सामूहिक लाभ प्राप्त करना चाह रही है और लोक हित में सामाजिक कार्यों में भाग ले रही हैं इस प्रकार लोक कार्य का निष्पादन कर रही है – सोसायटी सहायता अनुदान प्राप्त कर रही है और अनुदान शैक्षिक गतिविधि के लिए खर्च किया जाता है – सोसायटी रिट अधिकारिता के अध्यधीन है। (अनिरूद्ध द्विवेदी वि. स्टेट चीफ कमिश्नर, भारत स्काउट एण्ड गाइड) ...2191

संविधान, अनुच्छेद 226 – संविदा – संविदा के पर्यवसान के बाद कारण बताओ सूचना पत्र जारी किये बिना या हरजाने के संबंध में या संविदा निरस्त किये जाने के लिए जो कारण था, उसकी कोई जाँच किये बिना रेलवे ने मांग का सूचना पत्र जारी किया – अभिनिर्धारित – मामला आर्बीट्रेटर को संदर्भित नहीं और न ही किसी सक्षम और अधिकृत व्यक्ति ने कभी विवाद का विनिश्चय किया – प्रत्यर्थी रेल्वे को उनकी एक तरफा गणना के अनुसार रूपया वसूल करने का अधिकार नहीं – राशि रोकने का आदेश अपास्त – याचिका निराकृत। (ब्रिज एन्ड रूफ इन्फास्ट्रक्चर्स (मे.) वि. यूनियन ऑफ इंडिया) ...1952

संविधान, अनुच्छेद 226 – संविदा – निविदा आमंत्रण की सूचना – निविदा आमंत्रण की सूचना में उल्लिखित किया गया कि नगरपालिक निगम के हक में एफ.डी.आर. के रूप में अग्रिम धन निविदा खुलने के एक दिन पूर्व जमा करना होगा – याची की निविदा नही खोली गई क्योंकि उसने नगरपालिक निगम के हक में अग्रिम धन एफ.डी.आर. के रूप में अपनी निविदा के साथ जमा किया न कि एक दिन पूर्व – अभिनिर्धारित – निविदा आमंत्रण की सूचना स्पष्टतः या प्रत्यक्षतः कथित नही करती कि अग्रिम धन जमा के लिए एफ.डी.आर. रसीद निविदा खुलने की तारीख से एक दिन पूर्व नगरपालिक निगम में प्रस्तुत करनी चाहिए – वह सावधि जमा वास्तव में निविदा खुलने की तारीख के एक दिन पूर्व नगरपालिक निगम के हक में की गई थी, किन्तु सावधि जमा रसीद निविदा खुलने की तारीख के एक दिन पूर्व नगरपालिक निगम को प्रस्तुत नही की गई, बल्कि याची की निविदा के साथ निविदा खुलने की तारीख को नगरपालिक निगम को प्रस्तुत की गई – न्याय की यह माँग है कि नगरपालिक निगम द्वारा याची की निविदा पर विचार किया जाए। (गौरव टेक्निका इंडिया प्रा. लि. वि. म्यूनिसिपल कारपोरेशन, कटनी) ...1647

submitted alongwith the tender of the petitioner to the Municipal Corporation on the date of opening of tender - Fairness demands that the tender of the petitioner be considered by the Municipal Corporation. [Gaurav Technica India Pvt. Ltd. v. Municipal Corporation, Katni] ...1647

Constitution, Article 226 - *Contract - Tender for purchase of minerals - Petitioner despite extension of time failed to lift quantity of mineral allotted - Other joint venture companies were offered to carry out the work and one of the offer being appropriate one was accepted - Except petitioner no offeree challenged the action - Held - It can not be said that without calling any offer from other companies which were ready to work in joint venture work was allotted - Action of allotment not arbitrary - Petition dismissed.* [Devendra Minerals (M/s.) v. State of M.P.] ...2251

Constitution, Article 226 - *Departmental Enquiry - Findings of Disciplinary Authority are perverse and not supported by evidence on record - It would be open for the High Court to interfere in the said findings - Petition allowed.* [Nilu (Smt.) v. M.P. State Electricity Board] ...1959

Constitution, Article 226 - *Dispensation of court fee on regular writ petition filed as Public Interest Litigation - View taken by Full Bench in ILR [2008] MP 2172 that court fee are payable on PIL filed as Writ Petition under Article 226 of 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 to be a fit case for registering case even though no court fee is paid on such letter or document is correct - Review dismissed.* [Satya Pal Anand v. Registrar General, High Court of M.P.] FB...1586

Constitution, Article 226 - *Disputed questions of fact - Mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining disputed question of fact.* [Somnath (Dr.) v. State of M.P.]...1306

Constitution, Article 226 - *Locus standi - Respondents selected for the post of Notary - However, no appointment order issued so far - Held - If the report sent by competent authority is vitiated, then any action taken in pursuance to that report would be vitiated - Petition maintainable.* [Ayaz Ahmad Khan v. State of M.P.] ...1623

Constitution, Article 226 - *Maintainability - Territorial jurisdiction of High Court in its Benches - Original order passed by Collector of Stamps, Satna, which was challenged before Commissioner, Rewa and thereafter before Board of Revenue, Gwalior - Writ Petition filed in Gwalior Bench of High Court - Dismissed for want of territorial jurisdiction - Writ Appeal - Held - Board of Revenue is within the territorial jurisdiction of Gwalior Bench - Therefore, the part of cause of action also arose within the territorial jurisdiction of Gwalior Bench, and merely because the original order was*

संविधान, अनुच्छेद 226 – संविदा – खनिजों के क्रय के लिए निविदा – याची समय बढ़ाए जाने के बावजूद आवंटित खनिज की मात्रा उठाने में विफल रहा – अन्य सहउद्यम कम्पनियों को कार्य के निष्पादन का प्रस्ताव दिया गया और उनमें से एक प्रस्ताव समुचित होने से स्वीकार किया गया – याची के सिवाय अन्य किसी प्रस्तावगृहीता ने कार्यवाही को चुनौती नही दी – अभिनिर्धारित – यह नही कहा जा सकता कि अन्य कम्पनियों से कोई प्रस्ताव आमंत्रित किये बिना, जो सहउद्यम में कार्य करने को तैयार थीं, कार्य आवंटित किया गया – आवंटन की कार्यवाही मनमानी नही – याचिका खारिज। (देवेन्द्र मिनिरल्स (मे.) वि. म.प्र. राज्य) ...2251

संविधान, अनुच्छेद 226 – विभागीय जाँच – अनुशासनिक प्राधिकारी के निष्कर्ष विपर्यस्त और अभिलेख पर उपलब्ध साक्ष्य से समर्थित नही – उच्च न्यायालय ऐसे निष्कर्षों में हस्तक्षेप कर सकता है – याचिका मंजूर। (नीलू (श्रीमति) वि. एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड) ...1959

संविधान, अनुच्छेद 226 – लोक हित वाद के रूप में पेश नियमित रिट याचिका पर न्याय शुल्क की अभिमुक्ति – पूर्ण न्यायपीठ द्वारा ILR [2008] MP 2172 में लिया गया दृष्टिकोण सही है कि संविधान के अनुच्छेद 226 के अधीन रिट याचिका के रूप में पेश लोक हित वाद पर न्याय शुल्क देय है सिवाय वहाँ के जहाँ मुख्य न्यायाधिपति या नामनिर्दिष्ट न्यायाधीश किसी पत्र या अन्य किसी दस्तावेज में प्राप्त सूचना के आधार पर निदेशित करें और मामला रजिस्टर करने के लिए उसे उपयुक्त मामला होना विचारित करें यद्यपि ऐसे पत्र या दस्तावेज पर कोई न्याय शुल्क अदा नही किया गया हो – पुनर्विलोकन खारिज। (सत्यपाल आनंद वि. रजिस्ट्रार जनरल, हाई कोर्ट ऑफ एम.पी.) FB...1586

संविधान, अनुच्छेद 226 – तथ्य के विवादित प्रश्न – केवल तथ्य के विवादित प्रश्नों का अस्तित्व स्वयमेव ही रिट न्यायालय को तथ्य के विवादित प्रश्न का अवधारण करने से निवारित नही करता। (सोमनाथ (डॉ.) वि. म.प्र. राज्य) 1306

संविधान, अनुच्छेद 226 – सुने जाने का अधिकार – प्रत्यर्थियों का चयन नोटरी के पद के लिए किया गया – तथापि, अब तक कोई नियुक्ति आदेश जारी नही किया गया – अभिनिर्धारित – यदि सक्षम प्राधिकारी द्वारा भेजी गयी रिपोर्ट दूषित है तब उस रिपोर्ट के अनुसरण की गई कोई कार्यवाही दूषित हो जायेगी – याचिका पोषणीय। (अयाज अहमद खान वि. म.प्र. राज्य) ...1623

संविधान, अनुच्छेद 226 – पोषणीयता – उच्च न्यायालय की अपनी खण्डपीठों में क्षेत्रीय अधिकारिता – मूल आदेश कलेक्टर ऑफ स्टाम्स, सतना द्वारा पारित किया गया जिसे कमिश्नर, रीवा के समक्ष चुनौती दी गई और उसके बाद राजस्व मण्डल, ग्वालियर के समक्ष चुनौती दी गई – उच्च न्यायालय की ग्वालियर खण्डपीठ में रिट याचिका पेश – क्षेत्रीय अधिकारिता के अभाव में खारिज – रिट अपील – अभिनिर्धारित – राजस्व मण्डल ग्वालियर खण्डपीठ की क्षेत्रीय अधिकारिता के भीतर है – इसलिए वादकारण भागतः ग्वालियर खण्डपीठ की क्षेत्रीय अधिकारिता के भीतर भी उत्पन्न हुआ और केवल इसलिए कि मूल आदेश कलेक्टर ऑफ स्टाम्पस्, सतना द्वारा पारित किया गया, जो ग्वालियर खण्डपीठ की क्षेत्रीय अधिकारिता से बाहर है, यह अभिनिर्धारित करने के लिए अपने आप

passed by Collector of Stamps, Satna, which is outside the territorial jurisdiction of Gwalior Bench, would in itself is no ground to hold that Gwalior Bench is not having the territorial jurisdiction over the matter. [Vishnu Agrawal v. State of M.P.] ...1615

Constitution, Article 226 - See - *Cantonment Electoral Rules, 2007, Rules 12, 13 & 28* [Manu Bhai Tripathi v. Union of India] ...1225

Constitution, Article 226 - ***Suppression of material fact*** - *First W.A. withdrawn stating that Service Tax due already deposited so it become infructuous - Court permitted for withdrawal with liberty to approach appropriate forum - Second W.A. filed in a quite different manner suppressing that order was challenged previously in W.P. and order of CESTAT was modified and appellant was directed to deposit amount - Held - Liberty to approach appropriate forum would not include filing second W.A. - Effort has been made to reiterate the grievance in different manner unknown to law and the same is nothing but abuse of process of Court - Since second W.A. is not maintainable - Reference need not be answered - W.A. dismissed.* [Great Galleon Ltd. v. Union of India] FB...1869

Constitution, Article 226/227 - *Petitions under Article 226/227 of the Constitution challenging vires of any Act or statute or any order or rule or regulation made under any Act or statute shall be heard at Principal Seat at Jabalpur as per order of Chief Justice - Chief Justice has ordered in exercise of powers conferred on him in pursuance of notification issued by the President.* [State of M.P. v. Shyam Sunder Savita] ...2168

Constitution, Article 235 - See - *Service Law* [Ramakant Choudhary v. District & Sessions Judge, Guna] ...1666

Constitution, Articles 235 & 309 - ***Subsequent correction of number of reserved vacancies*** - *One post each reserved for SC and OBC in advertisement issued for recruitment of Process Writer - Interview was held as per the advertisement - However on recalculation it was found that no post of SC or OBC is available - Merely because advertisement speaks about availability of vacancy in SC and OBC category, that does not mean that respondent is estopped from re-examining the matter.* [Ramakant Choudhary v. District & Sessions Judge, Guna] ...1666

Constitution, Article 243-U, Municipalities Act, M.P. (37 of 1961) (Amending Act No.17 of 1994 and 18 of 1994), Sections 36, 45, 47 & 49 - ***Recalling of President of Municipal Council*** - *Initiation of the process of recalling within span of two year from the date of first meeting - Held - Process of recalling can not be initated within 2 years from the date on which President was elected - The term shall commence from the date of election as notified u/s 45 of the Act and not from the date of first meeting.* [Mangilal v. State of M.P.] 1903

में कोई आधार नही होगा कि ग्वालियर खण्डपीठ मामले पर क्षेत्रीय अधिकारिता नही रखती है। (विष्णु अग्रवाल वि. म.प्र. राज्य) 1615

संविधान, अनुच्छेद 226 – देखें – छावनी निर्वाचन नियम, 2007, नियम 12, 13 व 28 (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) ...1225

संविधान, अनुच्छेद 226 – तात्विक तथ्य को छिपाना – प्रथम रिट अपील यह कथन करते हुए वापस ली गई कि देय सेवा कर पूर्व में जमा कर दिया इसलिए यह व्यर्थ हो गयी है – न्यायालय ने समुचित फोरम से निवेदन करने की स्वतंत्रता के साथ वापस लेना अनुज्ञात किया – द्वितीय रिट अपील बिल्कुल भिन्न ढंग से यह छिपाते हुए पेश की गई कि आदेश को पूर्व में रिट याचिका में चुनौती दी गई और सी.ई.एस.टी.ए.टी. का आदेश उपांतरित किया गया और अपीलार्थी को धनराशि जमा करने का निदेश दिया गया – अभिनिर्धारित – समुचित फोरम से निवेदन करने की स्वतंत्रता में द्वितीय रिट अपील पेश करना शामिल नही होगा – विधि के लिए अज्ञात भिन्न ढंग से शिकायत दोहराने का प्रयास किया गया है और यह कुछ और नही बल्कि न्यायालय की प्रक्रिया का दुरुपयोग है – चूंकि द्वितीय रिट अपील पोषणीय नही – निर्देश उत्तरित किये जाने की आवश्यकता नही – रिट अपील खारिज। (ग्रेट गेलन लिं. वि. यूनियन ऑफ इंडिया) FB...1869

संविधान, अनुच्छेद 226/227 – मुख्य न्यायाधीश के आदेशानुसार संविधान के अनुच्छेद 226/227 के अन्तर्गत किसी अधिनियम या कानून के अन्तर्गत किये गये किसी आदेश या बनाये गये नियम या विनियम की शक्तिमत्ता को चुनौती देने वाली याचिकाएँ जबलपुर में मुख्यपीठ में सुनी जायेंगी – मुख्य न्यायाधीश ने राष्ट्रपति द्वारा जारी अधिसूचना के अनुसरण में उन्हें प्रदत्त शक्तियों के प्रयोग में आदेश दिया। (म.प्र. राज्य वि. श्याम सुंदर सविता) ...2168

संविधान, अनुच्छेद 235 – देखें – सेवा विधि (रमाकांत चौधरी वि. जिला एवं सत्र न्यायाधीश, गुना) ...1666

संविधान, अनुच्छेद 235 व 309 – आरक्षित रिक्तियों की संख्या का पश्चात्वर्ती संशोधन – आदेशिका लेखक की भर्ती के लिए जारी विज्ञापन में अनुसूचित जाति और अन्य पिछड़ा वर्ग प्रत्येक के लिए एक पद आरक्षित – विज्ञापन के अनुसार साक्षात्कार लिया गया – तथापि पुनर्गणना पर यह पाया गया कि अनुसूचित जाति या अन्य पिछड़ा वर्ग का कोई पद उपलब्ध नही है – केवल इसलिए कि विज्ञापन में अनुसूचित जाति और पिछड़ा वर्ग की श्रेणी में रिक्ति की उपलब्धता बताई गई है, उसका यह अर्थ नही है कि प्रत्यर्थी मामले की पुनःपरीक्षा करने से विबंधित है। (रमाकांत चौधरी वि. जिला एवं सत्र न्यायाधीश, गुना) ...1666

संविधान, अनुच्छेद 243–यू, नगरपालिका अधिनियम, म.प्र. (1961 का 37) (संशोधन अधिनियम 1994 का 17 और 1994 का 18), धाराएँ 36, 45, 47 व 49 – नगरपालिका के अध्यक्ष को पुनः बुलाया जाना – पुनः बुलाये जाने की प्रक्रिया का आरम्भ प्रथम बैठक की तारीख से दो वर्ष की अवधि के भीतर – अभिनिर्धारित – पुनः बुलाये जाने की प्रक्रिया उस तारीख से 2 वर्ष के भीतर जिसको अध्यक्ष का चुनाव किया गया आरम्भ नही की जा सकती है – अवधि अधिनियम की धारा 45 के अन्तर्गत अधिसूचित निर्वाचन की तारीख से प्रारम्भ होगी न कि प्रथम बैठक की तारीख से। (मांगीलाल वि. म.प्र. राज्य) ...1903

Constitution, Article 309 - *Empanelment - Mere empanelment of petitioners does not confer upon them any legal right to seek appointment.* [Ramakant Choudhary v. District & Sessions Judge, Guna] ...1666

Constitution, Article 311 - *Departmental Enquiry and Discrimination - Allegations against the petitioner are not similar to the other two employees - No case of discrimination made out.* [Shambhunath Mishra v. State of M.P.] ...1335

Constitution, Article 311 - *Departmental Enquiry and Judicial Review - Merely because certain persons were punished by imposing minor penalty and others have been punished with major penalty then that would not be a ground for judicial review.* [Shambhunath Mishra v. State of M.P.] ...1335

Consumer Protection Act (68 of 1986), Section 16(1)(b)(iii) - *Composition of State Commission - Eligibility Criteria - Public Affairs or Administration - Respondent No.4 had worked for 14 years as an executive in Informatics Computer System - Term 'administration' is of wide expanse and indubitably includes administration of an institution or organization which basically relates to supervision of management or performance of executive duties of institution, business or the like.* [Akhil Bhartiya Upbhokta Congress, Bhopal v. State of M.P.] ...2233

Contempt of Courts Act (70 of 1971), Section 15(3) - *Criminal Contempt - Contemnor, S.H.O. Police Station came in Court and dragged away three persons who were waiting for the delivery of judgment in their criminal case, took them in custody and thereafter registered a false case against them - Matter referred by lower Court to High Court - Held - Contemnor has unable to satisfy why without permission of the Court he dragged away three persons from the Court - He did not care for the personal liberty of these persons, violated the human right and registered a false case against them - He committed contempt of lawful authority of the Court and had also created false reports and false documents to cover up his illegalities - High Court found him guilty.* [In Reference v. Kailash Nahta] ...1342

Contempt of Courts Act (70 of 1971), Section 15(3) - *Criminal Contempt - Sentence - Contemnor tendering unconditional apology and seeking mercy - Held - Present is not a case where after committing the wrong, the wrong doer had come to the Court seeking mercy of the Court but present is a case where after committing misconduct and misdeed, the contemnor to cover his misconduct, has created false documents, registered a false case and took the innocent persons in the custody - Act is not pardonable - 3 months sentence awarded.* [In Reference v. Kailash Nahta] ...1342

Court Fees Act (7 of 1870), Section 7(iv)(c) - *Suit for declaring sale deed as void - Plaintiffs are parties to the documents - Held - Consequential relief of cancelling sale deed is necessary - Plaintiffs are required to pay ad*

संविधान, अनुच्छेद 309 – सूची में सम्मिलित करना – याचियों का केवल सूची में सम्मिलित किया जाना उन्हें नियुक्ति की माँग करने का कोई विधिक अधिकार प्रदान नही करता है। (रमाकांत चौधरी वि. जिला एवं सत्र न्यायाधीश, गुना) ...1666

संविधान, अनुच्छेद 311 – विभागीय जाँच एवं विभेद – याची के विरुद्ध आरोप अन्य दो कर्मचारियों के समान नही हैं – विभेद का कोई मामला नही। (शम्भूनाथ मिश्रा वि. म.प्र. राज्य) ...1335

संविधान, अनुच्छेद 311 – विभागीय जाँच एवं न्यायिक पुनर्विलोकन – केवल इसलिए कि कुछ व्यक्तियों को लघु शास्ति अधिरोपित करते हुए दण्डित किया गया और अन्य व्यक्तियों को गुरुतर शास्ति से दण्डित किया गया तब न्यायिक पुनर्विलोकन के लिए यह कोई आधार नही होगा। (शम्भूनाथ मिश्रा वि. म.प्र. राज्य) ...1335

उपभोक्ता संरक्षण अधिनियम (1986 का 68), धारा 16(1)(बी)(iii) – राज्य आयोग की संरचना – पात्रता मापदण्ड – लोक कार्य या प्रशासन – प्रत्यर्थी क्र. 4 ने इन्फोर्मेटिक्स कम्प्यूटर सिस्टम में कार्यकारी के रूप में 14 वर्ष कार्य किया – शब्द 'प्रशासन' व्यापक विस्तार का है और असंदिग्ध रूप से किसी संस्थान या संगठन के प्रशासन को भी सम्मिलित करता है जो मौलिक रूप से प्रबन्ध के पर्यवेक्षण या संस्थान, कारोबार या इसी प्रकार के किसी अन्य के कार्यकारी कर्तव्यों के पालन से सम्बंधित है। (अखिल भारतीय उपभोक्ता कांग्रेस, भोपाल वि. म.प्र. राज्य) ...2233

न्यायालय अवमान अधिनियम (1971 का 70), धारा 15(3) – दाण्डिक अवमानना – अवमाननाकर्ता थाना प्रभारी न्यायालय में आया और तीन व्यक्तियों, जो अपने दाण्डिक मामले में निर्णय घोषित किये जाने की प्रतीक्षा कर रहे थे, को घसीटकर बाहर ले गया, उन्हें अभिरक्षा में रखा और उसके बाद उनके विरुद्ध मिथ्या मामला पंजीबद्ध किया – निम्न न्यायालय द्वारा मामला उच्च न्यायालय को सुपुर्द किया गया – अभिनिर्धारित – अवमाननाकर्ता यह समाधान करने में असमर्थ रहा कि क्यों न्यायालय की अनुमति के बिना वह न्यायालय से तीन व्यक्तियों को घसीटकर बाहर ले गया – उसने इन तीन व्यक्तियों की व्यक्तिगत स्वतंत्रता की परवाह नही की, मानवाधिकार का हनन किया और उनके विरुद्ध मिथ्या मामला पंजीबद्ध किया – उसने न्यायालय के विधिपूर्ण प्राधिकार की अवमानना की और अपनी अवैधानिकताओं को छिपाने के लिए मिथ्या रिपोर्टों और मिथ्या दस्तावेजों की रचना की – उच्च न्यायालय ने उसे दोषी पाया। (इन रेफरेन्स वि. कैलाश नाहटा) ...1342

न्यायालय अवमान अधिनियम (1971 का 70), धारा 15(3) – दाण्डिक अवमानना – दण्डादेश – अवमाननाकर्ता ने शर्तरहित क्षमायाचना निविदत्त की और दया की माँग की – अभिनिर्धारित – वर्तमान मामला ऐसा नही है जहाँ गलती करने के बाद दोषकर्ता न्यायालय की दया की माँग करते हुए न्यायालय के पास आया हो बल्कि वर्तमान मामला ऐसा मामला है जहाँ अवचार और अपकर्म करने के बाद अवमाननाकर्ता ने अपने अवचार को छिपाने के लिए मिथ्या दस्तावेजों की रचना की, मिथ्या मामला पंजीबद्ध किया और निर्दोष व्यक्तियों को अभिरक्षा में लिया – कृत्य क्षमनीय नही – 3 माह का कारावास अधिनिर्णीत किया। (इन रेफरेन्स वि. कैलाश नाहटा) ...1342

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – विक्रय पत्र को शून्य घोषित किये जाने के लिए वाद – वादी दस्तावेजों के पक्षकार हैं – अभिनिर्धारित – विक्रय पत्र को रद्द करने का पारिणामिक अनुतोष आवश्यक है – वादियों को एडवेलोरेम न्यायशुल्क अदा करना आवश्यक है – अपील खारिज। (श्यामाचरण पॉल वि. में. रूपाली प्रोमोटर्स एन्ड कंस्ट्रक्शन)...1595

valorem court fees - Appeal dismissed. [Shyamacharan Paul v. M/s. Roopali Promoters & Construction] ...1595

Court Fees (Madhya Pradesh Amendment) Act (6 of 2008), Schedule I Clause 1-A - *Prospective in nature - Amendment Act is prospective in nature - Reference u/s 18 of Land Acquisition Act made on 05.01.2007 - Appellant liable to make payment of ad valorem court fee on appeal as was applicable on 05.01.2007 - Cannot take advantage of amendment which provided maximum court fee - Appellant directed to pay deficit court fee.* [Fatehchand v. Land Acquisition & Rehabilitation Officer] ...2073

Criminal Procedure Code, 1973 (2 of 1974), Sections 4, 5 & 190 - See - *Chartered Accountants Act, 1949, Sections 2(d), 24, 24A, 26 & 28* [Institute of Chartered Accountants of India v. Vimal Kumar Surana] ...1477

Criminal Procedure Code, 1973 (2 of 1974), Section 125, Evidence Act, 1872, Section 112 - *Non-applicant No.1 living with paramour applicant and son non-applicant No.2 has been born - Claim of maintenance by non-applicant No.2 from applicant - Held - Whether non-applicant No.2 is legitimate or illegitimate son of applicant - Presumption is that non-applicant No.2 is legitimate son of non-applicant No.1's husband - Presumption could have been rebutted by evidence that husband had no access at the time when non-applicant No.2 have been begotten - Non-applicant No.1 was living with paramour applicant is no evidence of non-access of husband - Case remanded for recording evidence of both the parties on this aspect after framing of point of determination.* [Premlal v. Leelabai] ...2129

Criminal Procedure Code, 1973 (2 of 1974), Section 125, Hindu Marriage Act, 1955, Section 9 - ***Maintenance*** - *Wife did not join her husband in spite of decree for restitution of conjugal rights - It is on record that husband is having illicit relations with another woman - There are grounds of cruelty also - Prima facie these are just grounds to refuse wife to live with her husband - Wife entitled for maintenance - Revision dismissed.* [Rewalal v. Smt. Urmila] ...2111

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - ***Maintenance - Illegitimate child*** - *Illegitimate child born out of illicit relationship of applicant and non-applicant No.1, is entitled for maintenance till she attains majority.* [Pawan Kumar v. Mamta] ...2446

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - See - *Muslim Women (Protection of Rights on Divorce) Act, 1986, Sections 3 & 4* [Irshad Khan v. Smt. Rani] ...*31

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - See - *Protection of Women from Domestic Violence Act, 2005, Sections 12 & 28* [Madhusudan Bhardwaj v. Mamta Bhardwaj] ...1506

न्यायालय फीस (मध्य प्रदेश संशोधन) अधिनियम (2008 का 6), अनुसूची I, खण्ड 1–ए – प्रकृति भविष्यलक्षी – संशोधन अधिनियम की प्रकृति भविष्यलक्षी है – भूमि अर्जन अधिनियम की धारा 18 के अन्तर्गत निर्देश 05.01.2007 को किया गया – अपीलार्थी अपील पर एडवेलोरेम न्यायालय फीस जो 05.01.2007 को लागू थी, अदा करने का दायी – संशोधन का लाभ नही ले सकता जो अधिकतम न्यायालय फीस का उपबंध करता है – अपीलार्थी को न्यायालय फीस में कमी की पूर्ति करने का निदेश दिया गया। (फतेह चंद वि. लेण्ड एक्वीजीशन एण्ड रीहैबलिटेशन ऑफिसर) ...2073

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 4, 5 व 190 – देखें – चार्टर्ड अकाउंटेंट अधिनियम, 1949, धाराएँ 2(डी), 24, 24ए, 26 व 28, (इंस्टीट्यूट ऑफ चार्टर्ड एकांउटेंट्स ऑफ इंडिया वि. विमल कुमार सुराना) ...1477

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125, साक्ष्य अधिनियम 1872, धारा 112 – अनावेदक क्रमांक 1 उपपति आवेदक के साथ निवासरत और पुत्र अनावेदक क्रमांक 2 का जन्म हुआ – अनावेदक क्रमांक 2 द्वारा आवेदक से भरण–पोषण का दावा – अभिनिर्धारित – क्या अनावेदक क्रमांक 2 आवेदक का धर्मज पुत्र है या अधर्मज – उपधारणा यह है कि अनावेदक क्रमांक 2 अनावेदक क्रमांक 1 के पति का धर्मज पुत्र है – उपधारणा का इस साक्ष्य द्वारा खण्डन किया जा सकता था कि पति की उस समय कोई पहुँच नही थी जब अनावेदक क्रमांक 2 का गर्भाधान किया गया – अनावेदक क्रमांक 1 उपपति आवेदक के साथ रह रही थी पति की पहुँच न होने का कोई साक्ष्य नही है – मामला अवधारण का बिन्दु विरचित करने के बाद इस पहलू पर दोनों पक्षकारों की साक्ष्य अभिलिखित किये जाने हेतु प्रतिप्रेषित किया गया। (प्रेमलाल वि. लीलाबाई) ...2129

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125, हिन्दू विवाह अधिनियम, 1955, धारा 9 – भरण–पोषण – पत्नी दाम्पत्य अधिकारों के पुनर्स्थापन की डिक्री के बावजूद अपने पति के साथ नही रही – अभिलेख पर यह मौजूद है कि पति के अन्य महिला से अवैध सम्बन्ध हैं – क्रूरता के आधार भी हैं – प्रथम दृष्ट्या ये आधार पत्नी के अपने पति के साथ रहने से इंकार करने के लिए न्यायसंगत आधार हैं – पत्नी भरण–पोषण की हकदार – पुनरीक्षण खारिज। (रेवालाल वि. श्रीमति उर्मिला) ...2111

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – अधर्मज शिशु – आवेदक और अनावेदक क्रमांक 1 के अवैध सम्बन्धों से उत्पन्न अधर्मज शिशु उसके वयस्कता प्राप्त करने तक भरण–पोषण की हकदार है। (पवन कुमार वि. ममता) ...2446

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – देखें – मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986, धाराएँ 3 व 4, (इरशाद खान वि. श्रीमति रानी) ---*31

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – देखें – घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 12 व 28 (मधुसूदन भारद्वाज वि. ममता भारद्वाज) ...1506

Criminal Procedure Code, 1973 (2 of 1974), Section 156 - *Delay in forwarding the FIR to the Magistrate - Effect - Held - Mere delay in dispatch of FIR to the Magistrate was not sufficient to throw out the prosecution case in its entirety simply because the veracity of the incident was not disputed - At the most, it could be taken as an infirmity in the investigation.* [Sheikh Sultan v. State of M.P.] ...1769

Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3) & 190 - *Private complaint and application u/s 156(3) filed against applicant - Magistrate directed police to investigate and register FIR - Revision - Held - Section 156(3) mandates that any Magistrate being empowered u/s 190 may order investigation - After receiving the report of investigation, two options are available to Magistrate either to register offence or not - Merely issuing process u/s 156(3) would not amount to take cognizance u/s 190 - Seeking quashment or setting-aside impugned order would be challenging an interlocutory order - Revision not maintainable - Revision dismissed.* [Ayyub Ahmad v. State of M.P.] ...1484

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - *Confessional statement - Confessional statement against co-accused can be used as corroborative evidence - It can be made even during trial and evidence already recorded may be used to corroborate it.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - *Confessional statement - Taking statement of accused on oath prohibited.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - *Recording of statement of accused - Non-consideration of the same merely on the ground that some police personnels were standing outside the Court - Approach of Court not correct - Court ought to independently examine the kind of threat or pressure on the accused/witness - Even if endorsement of certificate by Magistrate below statement is not in proper form, it does not necessarily mean that any threat was given to witness.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - *Warning - It is necessary to warn accused that it was not necessary for him to make statement and it could used against him - If warning is not given, such confession cannot be acted upon.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164(3) - *Failure to comply with Section 164(3) will not make the confession inadmissible in evidence.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 195 - *Allegation*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156 – मजिस्ट्रेट को एफ.आई. आर. अग्रेषित करने में विलम्ब – प्रभाव – अभिनिर्धारित – मजिस्ट्रेट को एफ.आई.आर. भेजने में केवल विलम्ब अभियोजन के मामले को पूर्णतः बाहर फेंकने के लिए पर्याप्त नही था सिर्फ इसलिए कि घटना की सत्यवादिता विवादित नही थी – अधिक से अधिक इसे अन्वेषण में दुर्बलता के रूप में लिया जा सकता था। (शेख सुलतान वि. म.प्र. राज्य) ...1769

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3) व 190 – आवेदक के विरुद्ध प्राइवेट परिवाद और आवेदन अन्तर्गत धारा 156(3) पेश – मजिस्ट्रेट ने पुलिस को अन्वेषण करने और एफ.आई.आर. पंजीबद्ध करने के निदेश दिये – पुनरीक्षण – अभिनिर्धारित – धारा 156(3) यह आदेश देती है कि कोई मजिस्ट्रेट धारा 190 के अधीन सशक्त किये जाने से अन्वेषण का आदेश दे सकता है – अन्वेषण की रिपोर्ट प्राप्त करने के बाद मजिस्ट्रेट के पास दो विकल्प हैं या तो अपराध पंजीबद्ध करे या न करे – केवल धारा 156(3) के अधीन आदेशिका जारी करना धारा 190 के अधीन संज्ञान लेने की कोटि में नही आयेगा – आक्षेपित आदेश के अभिखण्डन या अपास्त करने की मांग करना एक अन्तर्वर्ती आदेश को चुनौती देना होगा – पुनरीक्षण पोषणीय नही – पुनरीक्षण खारिज। (अयूब अहमद वि. म.प्र. राज्य) ...1484

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 – संस्वीकृति कथन – सह–अभियुक्त के विरुद्ध संस्वीकृति कथन संपोषक साक्ष्य के रूप में प्रयुक्त किया जा सकता है – यह विचारण के दौरान भी किया जा सकता है और पूर्व में अभिलिखित साक्ष्य इसकी सम्पुष्टि करने के लिए प्रयुक्त की जा सकती हैं। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 – संस्वीकृति कथन – शपथ पर अभियुक्त का कथन लेना निषिद्ध है। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 – अभियुक्त का कथन अभिलिखित करना – उसे केवल इस आधार पर विचार में न लेना कि कुछ पुलिस कर्मचारी न्यायालय के बाहर खड़े हुए थे – न्यायालय का दृष्टिकोण उचित नही – न्यायालय को स्वतंत्र रूप से अभियुक्त/साक्षी पर भय या दवाब के प्रकार की जाँच करनी चाहिए – यद्यपि मजिस्ट्रेट द्वारा कथन के नीचे किया गया प्रमाण पत्र का पृष्ठांकन उचित प्ररूप में नही है, तथापि इसका अनिवार्य रूप से यह अर्थ नही होता कि साक्षी को कोई धमकी दी गयी थी। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 – चेतावनी – अभियुक्त को यह चेतावनी देना आवश्यक है कि उसके लिए यह आवश्यक नही है कि कथन करे और यह उसके विरुद्ध प्रयुक्त नही किया जा सकता – यदि चेतावनी नही दी गई है, तो ऐसी संस्वीकृति पर कोई कार्यवाही नही की जा सकती। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164(3) – धारा 164(3) का अनुपालन करने में विफलता संस्वीकृति को साक्ष्य में अग्राह्य नही बनायेगी। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 – अभिकथन कि अभियुक्त

that accused without being registered Chartered Accountant appeared before Income Tax, Sales Tax Authority, submitted documents as Chartered Accountant and cheated authorities - Held - Income Tax or Sales Tax department has not filed complaint - Cognizance of offence can be taken only on the complaint filed by the Income Tax / Sales Tax Authoriies who are falling within category of "Court" as per provision u/s 195 - Revision dismissed. [Institute of Chartered Accountants of India v. Vimal Kumar Surana] ...1477

Criminal Procedure Code, 1973 (2 of 1974), Sections 195, 211 & 340 - *Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence - Enquiry - Trial Court except recording the finding that prosecution witnesses gave false evidence did not go into the question whether it was expedient that they should be prosecuted - It must be a case of deliberate falsehood and the Court must be satisfied that there is reasonable foundation for charge - Appeal allowed - Court directed to withdraw complaint.* [Meera Bai v. State of M.P.] ...2443

Criminal Procedure Code, 1973 (2 of 1974), Sections 204 & 397 - *Complaint u/ss 420 & 468 IPC filed against accused - Magistrate after satisfaction directed registration of offence u/s 420 IPC - Revisional Court allowed the revision and acquitted the accused - Revision before High Court - Held - Magistrate having taken cognizance, it was not within the jurisdiction of revisional Court to have assessed the probative value of the material before the trial Court - The mens-rea was there or not has to be decided by the trial Court and not the revisional Court - Impugned order set-aside - Revision allowed.* [Ajay Kumar v. Vijay Kumar] ...1493

Criminal Procedure Code, 1973 (2 of 1974), Section 227 - *Framing of charges - If allegations in FIR are accepted in its entirety and in its face value, do not constitute offence - Where it constitutes offence but there is no legal evidence, High Court is justified in quashing criminal proceedings.* [State of M.P. v. Dr. Ramlakhan Singh] ...2455

Criminal Procedure Code, 1973 (2 of 1974), Section 311 - *Complaint u/s 138 Negotiable Instruments Act, 1881 filed by non-applicant through power of attorney - Application u/s 311 filed after recording of evidence for permission to examine herself as complainant - Allowed - Held - Trial has yet to complete - To permit non-applicant to adduce evidence cannot be treated as permission to fill up lacuna - No prejudice caused to applicant as he will have right to cross-examine witness - Petition dismissed.* [Nirmal Enterprises (M/s) v. Smt. Nargis Kapadiya] ...*33

Criminal Procedure Code, 1973 (2 of 1974), Section 313, Prevention of Corruption Act, 1947, Section 5(1)(d) r/w Section 5(2) - *Case of prosecution that Rs.200 was demanded by accused towards bribe and the*

ने रजिस्ट्रीकृत चार्टर्ड अकाउंटेंट हुए बिना आयकर, विक्रयकर प्राधिकारी के समक्ष उपस्थित हुआ, चार्टर्ड अकाउंटेंट के रूप में दस्तावेज पेश किये और प्राधिकारियों के साथ छल किया – अभिनिर्धारित – आयकर या विक्रयकर विभाग ने परिवाद पेश नही किया – अपराध का संज्ञान केवल आयकर/विक्रयकर प्राधिकारियों द्वारा पेश परिवाद पर लिया जा सकता है जो धारा 195 के उपबंधानुसार "न्यायालय" की श्रेणी में आते हैं – पुनरीक्षण खारिज। (इंस्टीट्यूट ऑफ चार्टर्ड एकांउंटेंट्स ऑफ इंडिया वि. विमल कुमार सुराना) ...1477

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 195, 211 व 340 – लोक सेवकों के विधिपूर्ण प्राधिकार के अवमान के लिए, लोक न्याय के विरुद्ध अपराधों के लिए और साक्ष्य में दिये गये दस्तावेजों से सम्बन्धित अपराधों के लिए अभियोजन – जाँच – विचारण न्यायालय सिवाय यह निष्कर्ष अभिलिखित करने के कि अभियोजन साक्षियों ने मिथ्या साक्ष्य दी, इस प्रश्न पर विचार नही कर सकता कि क्या यह उचित था कि उन्हें अभियोजित किया जाना चाहिए – इसे अवश्य ही जानबूझकर किये गये असत्य का मामला होना चाहिए और न्यायालय का यह समाधान अवश्य ही होना चाहिए कि आरोप के लिए युक्तियुक्त आधार है – अपील मंजूर – न्यायालय को परिवाद वापस लेने का निदेश दिया गया। (मीरा बाई वि. म.प्र. राज्य) ...2443

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 204 व 397 – अभियुक्त के विरुद्ध भा.द.सं. की धारा 420 व 468 के अन्तर्गत परिवाद पेश किया गया – मजिस्ट्रेट ने समाधान हो जाने के बाद भा.द.सं. की धारा 420 के अन्तर्गत अपराध पंजीबद्ध करने का निदेश दिया – पुनरीक्षण न्यायालय ने पुनरीक्षण मंजूर की और अभियुक्त को दोषमुक्त किया – उच्च न्यायालय के समक्ष पुनरीक्षण – अभिनिर्धारित – मजिस्ट्रेट के संज्ञान लेने के बाद विचारण न्यायालय के समक्ष की सामग्री के प्रमाणक महत्व का मूल्यांकन करने के लिए यह पुनरीक्षण न्यायालय की अधिकारिता में नही था – आपराधिक मनःस्थिति थी या नही इसका विनिश्चय विचारण न्यायालय द्वारा किया जाना चाहिए न कि पुनरीक्षण न्यायालय द्वारा – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर। (अजय कुमार वि. विजय कुमार) ...1493

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – आरोपों की विरचना – यदि एफ.आई.आर. के अभिकथन पूर्णतः और प्रत्यक्षतः स्वीकार कर लिये जाते हैं, अपराध गठित नही करते – जहाँ यह अपराध गठित करता है किन्तु कोई विधिक साक्ष्य नही है, उच्च न्यायालय दाण्डिक कार्यवाहियाँ अभिखण्डित करने में न्यायोचित। (म.प्र. राज्य वि. डॉ. रामलखन सिंह) ...2455

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – अनावेदक द्वारा मुख्त्यारनामे के माध्यम से परक्राम्य लिखत अधिनियम, 1881 की धारा 138 के अधीन परिवाद पेश किया – साक्ष्य अभिलिखित किये जाने के बाद परिवादी के रूप में स्वयं की परीक्षा कराने की अनुमति के लिए धारा 311 के अधीन आवेदन पेश किया गया – मंजूर – अभिनिर्धारित – विचारण अभी पूर्ण होना है – अनावेदक को साक्ष्य पेश करने के लिए अनुज्ञात करने को कमी पूरा करने की अनुज्ञा के रूप में नही माना जा सकता – आवेदक को कोई पूर्वाग्रह कारित नही हुआ क्योंकि उसे साक्षी की प्रतिपरीक्षा करने का अधिकार होगा – याचिका खारिज। (निर्मल इंटरप्राईजेस् (मे.) वि. श्रीमति नरगिस कपाड़िया)---*33

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313, भ्रष्टाचार निवारण अधिनियम, 1947, धारा 5(1)(डी) सहपठित धारा 5(2) – अभियोजन का मामला कि अभियुक्त द्वारा 200 रुपये रिश्वत की माँग की गई और परिवादी द्वारा 200 रुपये की राशि दी गई

amount of Rs.200 was given by complainant - Defence of accused is that complainant took Rs.150 towards loan from him and Rs.200 were given for repayment of loan - Rs.50 was returned by accused immediately - Trap witness stated that accused was saying that he has taken money towards re-payment of loan, Rs.50 received from complainant - The defence appears to be probable and due weightage should be given. [Hifazatullah @ Nasirullah v. State of M.P.] ...1755

Criminal Procedure Code, 1973 (2 of 1974), Section 313 - *Probable defence taken by accused should not be compared with that of prosecution where the prosecution is obliged to prove its case beyond doubt.* [Hifazatullah @ Nasirullah v. State of M.P.] ...1755

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - *Proceeding under M.P. Excise Act for illegal transportation of liquor initiated against non-applicants - Application for impleading applicant alleging that he was in charge and posted at the distillery and has issued permit - Application allowed - Order challenged - Held - Order of impleading applicant as accused is passed after 9 years of offence - Trial court allowed the application on the ground of role of applicant appears to be doubtful - Not enough for impleading a person as accused who is none else but the witness of the prosecution - Order set-aside.* [Abdul Rauf v. State of M.P.] ...1534

Criminal Procedure Code, 1973 (2 of 1974), Section 354, Penal Code, 1860, Section 302 - ***Death Penalty*** - *Rarest of Rare - Appellant No.1 along with other appellants killed his father and two step brothers on a land dispute - Although act of appellant No.1 was apparently quite brutal and heinous but was not committed for satisfying any kind of lust, greed or in pursuance of any antisocial activity - Appellant No.1 cannot be described as menace to society - Case does not fall in the category of rarest of rare case - Death penalty set-aside and sentenced to imprisonment for life u/s 302 IPC on all three counts - Reference answered accordingly.* [In Reference v. Sheikh Arif] ...1807

Criminal Procedure Code, 1973 (2 of 1974), Sections 362 & 482, Penal Code, 1860, Sections 68 & 69 - ***Inherent powers of High Court*** - *Can the Court after pronouncing the final judgment alter, reopen or modify it in exercise of inherent powers for extending the time for deposit of the fine amount - Held -Stipulated period to deposit the amount of fine in a final order can not be extended with the aid of Section 482 of Cr.P.C. - Appropriate remedy is to avail the provision of Section 68 of I.P.C.* [Prahlad Singh v. State of M.P.] ...1537

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - ***Criminal Revision*** - *Criminal revision filed by co-accused dismissed by Court without considering facts and by making general observation - Held - Said order has no binding effect.* [Gyanendra Tripathi v. State of M.P.] ...1515

– अभियुक्त का बचाव यह है कि परिवादी ने उससे 150 रुपये ऋण लिया और 200 रुपये ऋण के प्रतिसंदाय के लिए दिये गये थे – अभियुक्त द्वारा 50 रुपये तुरन्त वापस कर दिए – पकड़ने के साक्षी ने कथित किया कि अभियुक्त यह कह रहा था कि उसने ऋण के प्रतिसंदाय के लिए रुपये लिए हैं, परिवादी से 50 रुपये प्राप्त किये – प्रतिरक्षा अधिसंभाव्य प्रतीत होती है और सम्यक् वरीयता दी जानी चाहिए। (हिफाजतउल्हा उर्फ नसीरूल्हा वि. म.प्र. राज्य) ...1755

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – अभियुक्त द्वारा ली गई अधिसंभाव्य प्रतिरक्षा की तुलना अभियोजन से नही की जानी चाहिए जहाँ अभियोजन अपना मामला संदेह से परे साबित करने के लिए बाध्य है। (हिफाजतउल्हा उर्फ नसीरूल्हा वि. म.प्र. राज्य)...1755

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अनावेदकों के विरुद्ध शराब के अवैध परिवहन के लिए म.प्र. आबकारी अधिनियम के अन्तर्गत कार्यवाही प्रारम्भ की गई – आवेदक को पक्षकार बनाने के लिए आवेदन यह अभिकथन करते हुए पेश किया गया कि वह प्रभारी था और डिस्टलरी में पदस्थ था एवं परमिट जारी किया – आवेदन मंजूर – आदेश को चुनौती – अभिनिर्धारित – आवेदक को अभियुक्त के रूप में पक्षकार बनाने का आदेश अपराध के 9 वर्ष बाद पारित किया गया – विचारण न्यायालय ने आवेदन इस आधार पर मंजूर किया कि आवेदक का आचरण शंकास्पद प्रतीत होता है – किसी व्यक्ति को अभियुक्त के रूप में पक्षकार बनाने के लिए पर्याप्त नही जो और कोई नही बल्कि अभियोजन साक्षी है – आदेश अपास्त। (अब्दुल रउफ वि. म.प्र. राज्य) ...1534

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 354, दण्ड संहिता, 1860, धारा 302 – मृत्यु दण्ड – विरल से विरलतम – अपीलार्थी क्रमांक 1 ने भूमि के विवाद पर अन्य अपीलार्थियों के साथ अपने पिता और दो सौतेले भाईयों की हत्या की – यद्यपि अपीलार्थी क्रमांक 1 का त्य प्रकट रूप से नितान्त नृशंस और जघन्य था किन्तु किसी प्रकार की काम–तृष्णा, लोभ की पूर्ति करने के लिए या किसी असामाजिक क्रियाकलाप के अनुसरण में नही किया गया – अपीलार्थी क्रमांक 1 को समाज के लिए खतरे के रूप में वर्णित नहीं किया जा सकता – मामला विरल से विरलतम मामले की श्रेणी में नहीं आता – मृत्यु दण्डादेश अपास्त और तीनों आरोप पर भा.द.सं. की धारा 302 के अधीन आजीवन कारावास का दण्डादेश दिया गया – रिफरेंस तदनुसार उत्तरित किया गया। (इन रेफरेन्स वि. शेख आरिफ) ...1807

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 362 व 482, दण्ड संहिता, 1860, धाराएँ 68 व 69 – उच्च न्यायालय की अन्तर्निहित शक्तियाँ – क्या न्यायालय अंतिम निर्णय सुनाये जाने के बाद जुर्माना राशि जमा करने के लिए समय बढ़ाने के लिए अन्तर्निहित शक्तियों के प्रयोग में उसे परिवर्तित, पुनर्विचारित या उपांतरित कर सकता है – अभिनिर्धारित – अंतिम आदेश में जुर्माने की राशि जमा करने के लिए नियत अवधि द.प्र.सं. की धारा 482 की सहायता से नही बढ़ायी जा सकती – समुचित उपचार भा.द.सं. की धारा 68 के उपबंध का उपयोग करना है। (प्रहलाद सिंह वि. म.प्र. राज्य) ...1537

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 – दाण्डिक पुनरीक्षण – सह–अभियुक्त द्वारा पेश दाण्डिक पुनरीक्षण न्यायालय द्वारा तथ्यों को विचार में लिये बिना और साधारण प्रेक्षण करते हुए खारिज की गई – अभिनिर्धारित – कथित आदेश कोई बंधनकारी प्रभाव नही रखता है। (ज्ञानेन्द्र त्रिपाठी वि. म.प्र. राज्य) ...1515

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - *Scope of Revision - Interference - Where material evidence has been overlooked by trial Court, interference can be made in exceptional cases - However, where findings lead to acquittal do not suffer from infirmity and another view on the prosecution was possible, an evidence will not be sufficient ground to warrant interference.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code (2 of 1974), Section 427 - *Applicant convicted in two complaints u/s 138 of Negotiable Instruments Act, 1881 - Appeals also decided simultaneously - Application for direction to run sentences concurrently - Held - Two complaints were filed by non-applicants against applicant - Trial and appeals were decided simultaneously - Sentence awarded in both the cases should run concurrently - Petition allowed.* [Shafiq v. State of M.P.] ...1840

Criminal Procedure Code, 1973 (2 of 1974), Sections 427 & 428 - *Applicant was undergoing sentence for another offence and was convicted for offence u/s 5/14 of M.P. Security Act - In appeal against conviction under M.P. Security Act he claimed set off period under detention during investigation and trial - Rejection - Revision - Held - The words "same case" in Section 428 do not suggest that set off would be available only if the period undergone as an undertrial prisoner in connection with the same case in which he was later convicted and sentenced to a term imprisonment - Period of set off is available irrespective of whether the period of imprisonment was undergone by accused in connection with that case or any other case - Applicant entitled to set off - Revision allowed.* [Basu @ Basantsingh v. State of M.P.] ...1489

Criminal Procedure Code, 1973 (2 of 1974), Sections 427 & 482 - *Sentence on offender already sentenced for another offence - Inherent powers of the High Court - Applicant convicted in two cases u/s 8/18 of the N.D.P.S. Act and was awarded identical sentences by the trial Court which was confirmed by the High Court in appeal - Thereafter, the prayer made u/s 482 Cr.P.C. before High Court for the sentence to run concurrently - Held - High Court is competent to issue such direction in appropriate cases u/s 482 of Cr.P.C. by invoking its inherent powers at any time subsequent to the decision in a given case even if the trial Court, appellate or revisional Court has failed to exercise its discretion u/s 427(1) of Cr.P.C.* [Jagdish v. State of M.P.] ...2126

Criminal Procedure Code, 1973 (2 of 1974), Sections 427(2) - *Sentence on offender already sentence for another offence - A person already undergoing a sentence of imprisonment for life - Subsequently, sentenced to imprisonment for a term or imprisonment for life - There is no requirement for any direction of the Court as subsequent sentence will automatically run concurrently with previous sentence.* [Sanjeev Meena v. State of M.P.]...1531

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 – पुनरीक्षण का विषयक्षेत्र – हस्तक्षेप – जहाँ विचारण न्यायालय द्वारा तात्विक साक्ष्य को अनदेखा कर दिया गया है, वहाँ आपवादिक मामलों में हस्तक्षेप किया जा सकता है – तथापि जहाँ दोषमुक्ति के निष्कर्ष दुर्बलता से ग्रस्त नही हैं और अभियोजन पर दूसरा दृष्टिकोण संभव है, वहाँ साक्ष्य हस्तक्षेप करने के लिए पर्याप्त आधार नही होगी। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 427 – आवेदक को परक्राम्य लिखत अधिनियम, 1881 की धारा 138 के अधीन दो परिवादों में दोषसिद्ध किया गया – अपीलें भी साथ–साथ विनिश्चित की गईं – दण्डादेश साथ–साथ चलाने के निदेश के लिए आवेदन – अभिनिर्धारित – अनावेदकों द्वारा आवेदक के विरुद्ध दो परिवाद पेश किये गये – विचारण और अपीलें साथ–साथ विनिश्चित की गईं – दोनों मामलों में अधिनिर्णीत दण्डादेश साथ–साथ चलना चाहिए – याचिका मंजूर। (शफीक वि. म.प्र. राज्य) ...1840

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427 व 428 – आवेदक भिन्न अपराध के लिए दण्डादेश भुगत रहा था और म.प्र. सुरक्षा अधिनियम की धारा 5/14 के अधीन अपराध के लिए दोषसिद्ध किया गया – म.प्र. सुरक्षा अधिनियम के अधीन दोषसिद्धि के विरुद्ध अपील में उसने अन्वेषण और विचारण के दौरान निरोध की कालावधि मुजरा करने का दावा किया – नामंजूर – पुनरीक्षण – अभिनिर्धारित – धारा 428 में शब्द "वही मामला" यह सुझाव नही देता है कि मुजरा केवल तभी उपलब्ध होगा यदि उसी मामले के सम्बन्ध में विचाराधीन कैदी के रूप में भुगती गयी कालावधि जिसमें वह बाद में किसी अवधि के कारावास के लिए दोषसिद्ध और दण्डादिष्ट किया गया था – मुजरा की कालावधि उपलब्ध है इस पर विचार किये बिना कि क्या कारावास की अवधि अभियुक्त द्वारा उस मामले के सम्बन्ध में भुगती गयी या अन्य किसी मामले के सम्बन्ध में – आवेदक मुजरा का हकदार – पुनरीक्षण मंजूर। (बासू उर्फ बसंत सिंह वि. म.प्र. राज्य) ...1489

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427 व 482 – अन्य अपराध के लिए पूर्व से दण्डादिष्ट अपराधी को दण्डादेश – उच्च न्यायालय की अन्तर्निहित शक्तियाँ – विचारण न्यायालय द्वारा आवेदक को स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम की धारा 8/18 के अन्तर्गत दो मामलों में दोषसिद्ध किया गया और समान दण्डादेश दिये गये जिसकी उच्च न्यायालय द्वारा पुष्टि की गई – तत्पश्चात् द.प्र.सं. की धारा 482 के अधीन उच्च न्यायालय के समक्ष दण्डादेश साथ–साथ चलाने के लिए प्रार्थना की गई – अभिनिर्धारित – उच्च न्यायालय समुचित मामलों में द.प्र.सं. की धारा 482 के अधीन उसकी अन्तर्निहित शक्तियों का अवलंब लेकर किसी मामले में विनिश्चय के पश्चात् किसी भी समय ऐसा निदेश जारी करने के लिए सक्षम है, यद्यपि विचारण न्यायालय, अपीलीय या पुनरीक्षण न्यायालय द.प्र.सं. की धारा 427(1) के अधीन अपने विवेकाधिकार का प्रयोग करने में विफल हो गये हों। (जगदीश वि. म.प्र. राज्य) ...2126

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427(2) – किसी अन्य अपराध के लिए पूर्व में दण्डादिष्ट अपराधी को दण्डादेश – कोई व्यक्ति पूर्व से आजीवन कारावास का दण्डादेश भुगत रहा हो – उसे बाद में किसी अवधि के कारावास या आजीवन कारावास के दण्डादेश से दण्डित किया गया – तब न्यायालय के किसी निदेश की आवश्यकता नही है क्योंकि पश्चात्वर्ती दण्डादेश स्वतः पूर्ववर्ती दण्डादेश के साथ–साथ चलेगा। (संजीव मीना वि. म.प्र. राज्य) 1531

Criminal Procedure Code, 1973 (2 of 1974), Section 437(6), Unlawful Activities (Prevention) Act, 1967, Sections 3(10) & 13 - *Unless for reasons to be recorded in writing, the Magistrate otherwise directs - Application u/s 437(6) of the Code dismissed by the Magistrate - Against the order revision also dismissed - Application u/s 482 of the Code before High Court - Held - Applicant was not produced on the fixed date by the jail authority - This can hardly be a reason for rejecting the application filed u/s 437(6) of the Code - Direction to release the applicant on furnishing bail bond of Rs.50,000 with surety - Application allowed.* [Aman Khan v. State of M.P.] ...2477

Criminal Procedure Code, 1973 (2 of 1974), Section 438 - ***Anticipatory Bail - Maintainability*** - *Applicant granted bail - Bail bonds cancelled and non-bailable warrant of arrest issued as he failed to appear before trial Court - Held - Anticipatory bail application not maintainable - He has remedy to approach the Court for recalling the order.* [Bheem Singh Bhadoriya v. State of M.P.] ...1843

Criminal Procedure Code, 1973 (2 of 1974), Section 439 - ***Bail - Delay in trial*** - *Delay in trial is not sole ground to grant bail - Other relevant facts and circumstances are also required to be seen - Application rejected.* [Mithla Kachhi v. State of M.P.] ...2480

Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - ***Cancellation of bail*** - *Bail cancelled on the ground that co-accused did not oppose application for cancellation - Could not have been a ground to cancel bail granted to appellant - Matter remanded back.* [Ram Babu Tiwari v. State of M.P.] SC...1861

Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - ***Cancellation of bail - Considerations*** - *Re-appreciation of evidence as done by Court granting bail is to be avoided, the Court dealing with application for cancellation of bail can consider whether irrelevant materials of a substantial nature were taken into consideration.* [Ram Babu Tiwari v. State of M.P.] SC...1861

Criminal Procedure Code, 1973 (2 of 1974), Sections 446(3) & 362 - *Provision of S. 362 imposing restriction to alter or review the judgment or final order disposing of a case would not apply in passing of the order u/s 446(3) of the Code - Because the provision u/s 362 starts with a saving clause and the order, under sub-section (1), (2) or (3) of S. 446 of the Code is not a final order disposing a case.* [Roop Singh v. State of M.P.] ...2472

Criminal Procedure Code, 1973 (2 of 1974), Section 463 - *Apply to Courts of appeal, reference and revision.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437(6), विधिविरुद्ध क्रियाकलाप (निवारण) अधिनियम, 1967, धाराएँ 3(10) व 13 – जब तक ऐसे कारणों से जो लेखबद्ध किये जायेंगे मजिस्ट्रेट अन्यथा निदेशित न करे – मजिस्ट्रेट द्वारा संहिता की धारा 437(6) के अन्तर्गत आवेदन खारिज – आदेश के विरुद्ध पुनरीक्षण भी खारिज – उच्च न्यायालय के समक्ष संहिता की धारा 482 के अन्तर्गत आवेदन – अभिनिर्धारित – जेल प्राधिकारी द्वारा आवेदक को नियत तारीख को पेश नही किया गया – यह संहिता की धारा 437(6) के अन्तर्गत पेश आवेदन को नामंजूर करने का मुश्किल से एक कारण हो सकता है – प्रतिभू सहित 50,000 रुपये का जमानत बन्धपत्र पेश करने पर आवेदक को मुक्त करने का निदेश – आवेदन मंजूर। (अमान खान वि. म.प्र. राज्य) ...2477

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – पोषणीयता – आवेदक को जमानत दी गई – जमानत पत्र रद्द किये गये और गिरतारी का गैर जमानतीय वारण्ट जारी किया गया क्योंकि वह विचारण न्यायालय के समक्ष उपस्थित होने में विफल हो गया था – अभिनिर्धारित – अग्रिम जमानत का आवेदन पोषणीय नही – उसके पास आदेश को वापस मंगाने के लिए न्यायालय की शरण में जाने का उपचार है। (भीम सिंह भदौरिया वि. म.प्र. राज्य)...1843

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – विचारण में विलम्ब – विचारण में विलम्ब जमानत दिये जाने का एकमात्र आधार नही है – अन्य सुसंगत तथ्यों और परिस्थितियाँ को भी देखा जाना आवश्यक है – आवेदन नामंजूर। (मिथला काछी वि. म.प्र. राज्य) ...2480

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत का रद्दकरण – जमानत इस आधार पर रद्द की गई कि सह–अभियुक्त ने रद्दकरण के आवेदन का विरोध नही किया – अपीलार्थी को प्रदत्त जमानत को रद्द करने का आधार नही हो सकता था – मामला प्रतिप्रेषित। (राम बाबू तिवारी वि. म.प्र. राज्य) SC...1861

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत का रद्दकरण – विचार – जमानत के रद्दकरण के आवेदन पर कार्यवाही कर रहा न्यायालय यह विचार कर सकता है कि क्या तात्विक प्रकृति की असंगत सामग्री को विचार में लेना था, न्यायालय द्वारा जमानत देते समय जैसा साक्ष्य का पुर्नमूल्यांकन किया गया उसे टाला जाना चाहिए। (राम बाबू तिवारी वि. म.प्र. राज्य) SC...1861

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 446(3) व 362 – किसी मामले का निपटारा करने वाले किसी निर्णय या अंतिम आदेश को परिवर्तित करने या उसका पुनर्विलोकन करने पर रोक लगाने वाला धारा 362 का उपबंध संहिता की धारा 446(3) के अंतर्गत आदेश पारित करने में लागू नही होगा – क्योंकि धारा 362 का उपबंध व्यावृत्ति खण्ड से प्रारम्भ होता है और संहिता की धारा 446 की उपधारा (1), (2) या (3) के अन्तर्गत आदेश किसी मामले का निपटारा करने वाला अंतिम आदेश नही है। (रूप सिंह वि. म.प्र. राज्य) ...2472

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 463 – अपील, निर्देश और पुनरीक्षण. न्यायालयों को लागू होती है। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 463 - *Non-compliance fatal.* [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 464 - *Effect of omission to frame charge - Appellants convicted u/s 304-B of IPC by trial Court - Cruelty because of dowry demand established but necessary and important ingredients of Sec. 304-B not established - Held - No failure of justice has occasioned by non-framing of charge u/s 498-A of IPC - Appellants convicted u/s 498-A instead of Sec. 304-B of IPC.* [Chandan v. State of M.P.] ...2083

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - See - *Penal Code, 1860, Section 307* [Ratan Singh v. State of M.P.] SC...1866

Easements Act (5 of 1882), Section 13(a) - See - *Civil Procedure Code, 1908, Order 6 Rule 2* [Phula Bai (Smt.) v. Krishna] ...1721

Electricity Act (36 of 2003), Sections 37 & 42, Municipalities Act, M.P. 1961, Section 5 - *Supply of electricity to Bheraghat - By order, State Government directed different schedules for supply of electricity for urban and rural areas - Notification u/s 14 of Electricity Act provides that smaller urban area or transitioned area specified u/s 5 of Municipalities Act is not a rural area for the purpose of Electricity Act - Bheraghat being transitional area u/s 5 of Municipalities Act notified as Nagar Panchayat - Bheraghat has to be treated as urban area and has to be supplied electricity subject to regulations in urban areas - Petition allowed.* [Siyabai Thakur (Smt.) v. M.P. State Electricity Board] ...1947

Essential Commodities Act (10 of 1955), Section 6-A - *Confiscation of essential commodity - Held - U/s 6-A of the Act, before passing any order of confiscation, Collector has to give an option to the owner of the vehicle to pay, in lieu of its confiscation, a fine not exceeding the market price of the essential commodity sought to be carried by said vehicle and not to the price of the vehicle concerned.* [Rajmohan Kapoor v. State of M.P.] ...1497

Essential Commodities Act (10 of 1955), Section 6-B - *Issue of show-cause notice before confiscation of essential commodity - Held - U/s 6-B of the Act, no order for confiscation of vehicle etc. can be passed by the Collector, if the owner of the vehicle etc. proves to the satisfaction of the Collector that vehicle etc. was used in carrying the essential commodity without his knowledge or connivance by his agent.* [Rajmohan Kapoor v. State of M.P.] ...1497

Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence - Conflict between ocular evidence and medical evidence - Reliability - Held - If there is a conflict between ocular evidence of the eye witness and the medical evidence, then ocular evidence prevails over medical evidence as*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 463 – अननुपालन घातक है। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 464 – आरोप विरचित करने में लोप का प्रभाव – विचारण न्यायालय द्वारा अपीलार्थियों को भा.द.सं. की धारा 304–बी के अधीन दोषसिद्ध किया गया – दहेज की माँग के कारण क्रूरता साबित हुई किन्तु धारा 304–बी के आवश्यक और महत्वपूर्ण घटक साबित नही हुए – अभिनिर्धारित – भा.द.सं. की धारा 498–ए का आरोप विरचित न करने के कारण न्याय की कोई विफलता नही हुई – अपीलार्थियों को भा.द.सं. की धारा 304–बी के स्थान पर धारा 498–ए के अधीन दोषसिद्ध किया गया। (चंदन वि. म.प्र. राज्य) ...2083

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – देखें – दण्ड संहिता, 1860, धारा 307, (रतन सिंह वि. म.प्र. राज्य) SC...1866

सुखाचार अधिनियम (1882 का 5), धारा 13(ए) – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 6 नियम 2, (फूलाबाई (श्रीमति) वि. कृष्णा) 1721

विद्युत अधिनियम (2003 का 36), धाराएँ 37 व 42, नगरपालिका अधिनियम, म.प्र. 1961, धारा 5 – भेड़ाघाट को विद्युत प्रदाय – राज्य सरकार ने आदेश द्वारा नगरीय और ग्रामीण क्षेत्रों के लिए विद्युत प्रदाय के लिए भिन्न–भिन्न समय सारणियों का निदेश दिया – विद्युत अधिनियम की धारा 14 के अन्तर्गत अधिसूचना उपबंधित करती है कि नगरपालिका अधिनियम की धारा 5 के अन्तर्गत विनिर्दिष्ट अतिलघु नगरीय क्षेत्र या संक्रमित क्षेत्र विद्युत अधिनियम के प्रयोजन के लिए ग्रामीण क्षेत्र नही है – भेड़ाघाट नगरपालिका अधिनियम की धारा 5 के अधीन संक्रमणकालीन क्षेत्र होने से नगर पंचायत के रूप में अधिसूचित किया गया – भेड़ाघाट को नगरीय क्षेत्र माना जाए और नगरीय क्षेत्र अनुसार विनियमों के अध्यधीन विद्युत प्रदाय की जाए – याचिका मंजूर। (सियाबाई ठाकुर (श्रीमति) वि. एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड) 1947

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6–ए – आवश्यक वस्तु का अधिहरण – अभिनिर्धारित – धारा 6–ए के अधीन, अधिहरण का कोई आदेश पारित करने के पूर्व कलेक्टर को वाहन के स्वामी को उसके अधिहरण के बदले में आवश्यक वस्तु, जिसका उक्त वाहन द्वारा वहन किया गया, के बाजार मूल्य से और न कि संबंधित वाहन के मूल्य से अनधिक जुर्माना अदा करने का विकल्प देना चाहिए। (राजमोहन कपूर वि. म.प्र. राज्य) ...1497

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6–बी – आवश्यक वस्तु के राज्यसात्करण के पूर्व कारण बताओ सूचना पत्र जारी करना – अभिनिर्धारित – अधिनियम की धारा 6–बी के अधीन कलेक्टर द्वारा वाहन इत्यादि के अधिहरण का कोई आदेश पारित नही किया जायेगा, यदि वाहन इत्यादि का स्वामी कलेक्टर को यह समाधानपूर्वक साबित कर देता है कि वाहन इत्यादि का प्रयोग उसके अभिकर्ता द्वारा आवश्यक वस्तु को ले जाने में उसके ज्ञान अथवा मौनानुकूलता के बिना किया गया। (राजमोहन कपूर वि. म.प्र. राज्य) ...1497

साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – दृष्टि साक्ष्य और चिकित्सीय साक्ष्य में अन्तर्विरोध – विश्वसनीयता – अभिनिर्धारित – यदि प्रत्यक्षदर्शी साक्षी के दृष्टि साक्ष्य और चिकित्सीय साक्ष्य में कोई अन्तर्विरोध हो तब दृष्टि साक्ष्य चिकित्सीय साक्ष्य पर अभिभावी

the medical evidence is only as an expert evidence, while the deposition of the eye witness speaks about the real incident. [Jamuna v. State of M.P.]...2425

Evidence Act (1 of 1872), Section 3 - ***Appreciation of evidence - Relative witnesses - Reliability*** - *Appellants convicted on the testimony of wife and son of the deceased - Ground of near relationship of the eye witnesses with the victim or the deceased could not be a sole ground to discard their testimonies, if the same appear to be reliable in other circumstances of the case - Court is under obligation to scrutinize such evidence carefully and cautiously.* [Jamuna v. State of M.P.] ...2425

Evidence Act (1 of 1872), Section 3 - ***Appreciation of evidence*** - *Three eye witnesses reached the place of occurrence together after getting the information regarding quarrel - Their presence on the scene of occurrence is not reflected in the FIR lodged soon after the occurrence - Held - It becomes highly doubtful and unnatural that by the time these witnesses reached the place of occurrence they would have seen the 4 accused still assaulting the deceased - Statement of these eye witnesses cannot be believed and deserves to be discarded.* [Shyam Singh v. State of M.P.] ...2415

Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Sections 294, 323 & 34 - ***Appreciation of evidence*** - *Complainant deposed against the applicants but having contradictions and omissions in his statement - His statement not supported by any independent witness - Medical evidence stating that injuries may come by falling - Held - As the ocular evidence not reliable, therefore, the applicants cannot be held guilty as the prosecution could not prove the case beyond reasonable doubt - Applicants acquitted - Revision allowed.* [Indu v. State of M.P.] ...*34

Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Sections 326, 304 Part I, 34 - ***Appreciation of evidence - Partisan witness - Reliability*** - *Testimony of an injured witness to the incident has its own efficacy and relevancy - His presence at the spot could not be doubted as, in the same transaction he had also sustained grievous injuries - His statement recorded after a month when he became conscious - No motive to falsely implicate the appellants was alleged against him - His straight forward deposition drew ample support from the recovery of bloodstained earth from the place of occurrence - The infirmities in the statement of the first informant and the eye witnesses also had no bearing on the credence of his testimony.* [Sheikh Sultan v. State of M.P.] ...1769

Evidence Act (1 of 1872), Section 3 - ***Testimony of interested and partisan witness*** - *Testimony of an injured eye witness was not supported by independent witnesses and independent witnesses were declared hostile - Held - Various injuries were found on the person of injured eye witness - His presence on the scene of occurrence not doubted - Merely because*

होगी क्योंकि चिकित्सीय साक्ष्य केवल विशेषज्ञ साक्ष्य के रूप में है जबकि प्रत्यक्षदर्शी साक्षी का अभिसाक्ष्य वास्तविक घटना के बारे में बताता है। (जमुना वि. म.प्र. राज्य) ...2425

साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – नातेदार साक्षी – विश्वसनीयता – अपीलार्थियों को मृतक की पत्नी और पुत्र के परिसाक्ष्य पर दोषसिद्ध किया गया – प्रत्यक्षदर्शी साक्षियों की पीड़ित या मृतक से निकट नातेदारी का आधार उनके परिसाक्ष्य को अमान्य करने का एकमात्र आधार नही हो सकता, यदि वह मामले की अन्य परिस्थितियों में विश्वसनीय प्रतीत होती हो – न्यायालय ऐसी साक्ष्य की सावधानीपूर्वक और सतर्कतापूर्वक जाँच करने के दायित्वाधीन है। (जमुना वि. म.प्र. राज्य) ...2425

साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – तीन प्रत्यक्षदर्शी साक्षी झगड़े की जानकारी मिलने पर घटनास्थल पर एक साथ पहुँचे – घटनास्थल पर उनकी उपस्थिति घटना के तुरन्त बाद दर्ज एफ.आई.आर. में प्रतिबिम्बित नहीं होती – अभिनिर्धारित – यह अत्यंत शंकास्पद और अस्वाभाविक है कि जब ये साक्षी घटनास्थल पहुँचे हों उस समय उन्होंने 4 अभियुक्तों को मृतक पर हमला करते हुए देखा हो – इन प्रत्यक्षदर्शी साक्षियों के कथनों पर विश्वास नही किया जा सकता और अमान्य किये जाने योग्य हैं। (श्याम सिंह वि. म.प्र. राज्य) ...2415

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धाराएँ 294, 323 व 34 – साक्ष्य का अधिमूल्यन – परिवादी ने आवेदकों के विरुद्ध अभिसाक्ष्य दिया किन्तु उसके कथनों में अन्तर्विरोध और लोप रखते हुए – उसके कथन का किसी स्वतंत्र साक्षी द्वारा समर्थन नही किया गया – चिकित्सीय साक्ष्य यह बताती है कि क्षतियाँ गिरने से आ सकती हैं – अभिनिर्धारित – चूंकि दृष्टि साक्ष्य विश्वसनीय नही है, इसलिए आवेदकों को दोषी नही ठहराया जा सकता क्योंकि अभियोजन युक्तियुक्त शंका से परे मामला साबित नही कर सका – आवेदक दोषमुक्त – पुनरीक्षण मंजूर। (इन्दू वि. म.प्र. राज्य) ---*34

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धाराएँ 326, 304 भाग प्प 34 – साक्ष्य का अधिमूल्यन – पक्षपाती साक्षी – विश्वसनीयता – घटना के बारे में क्षतिग्रस्त साक्षी का परिसाक्ष्य अपना स्वयं का प्रभाव और सुसंगतता रखता है – उसकी घटना स्थल पर उपस्थिति पर शंका नही की जा सकती है क्योंकि उसी संव्यवहार में उसे घोर उपहतियां आयीं – उसका कथन एक माह बाद जब वह सचेतन हुआ, अभिलिखित किया गया – अपीलार्थियों को मिथ्या रूप से आलिप्त करने का कोई हेतु भी उसके विरुद्ध अभिकथित नही किया गया – उसके सीधे–सरल अभिसाक्ष्य को घटना स्थल से रक्तरंजित मिट्टी की बरामदगी से पर्याप्त समर्थन मिलता है – प्रथम सूचनादाता और प्रत्यक्षदर्शी साक्षियों के कथन में दुर्बलता का भी उसके परिसाक्ष्य की विश्वसनीयता पर कोई प्रभाव नही। (शेख सुलतान वि. म.प्र. राज्य) ...1769

साक्ष्य अधिनियम (1872 का 1), धारा 3 – हितबद्ध और समर्थक साक्षी का परिसाक्ष्य – स्वतंत्र साक्षियों द्वारा क्षतिग्रस्त प्रत्यक्षदर्शी साक्षी के परिसाक्ष्य का समर्थन नही किया गया और स्वतंत्र साक्षियों को पक्षद्रोही घोषित किया गया – अभिनिर्धारित – क्षतिग्रस्त प्रत्यक्षदर्शी साक्षी के शरीर पर विभिन्न क्षतियाँ पायी गयीं – घटनास्थल पर उसकी उपस्थिति शंकास्पद नही – केवल इसलिए कि स्वतंत्र साक्षी पक्षद्रोही हो गये, क्षतिग्रस्त प्रत्यक्षदर्शी साक्षी के परिसाक्ष्य के विश्वसनीय

independent witnesses have turned hostile cannot be a ground to reject the reliable portion of the testimony of an injured eye witness - Such evidence cannot be wipeded out in the absence of corroboration. [Shyam Singh v. State of M.P.] ...2415

Evidence Act (1 of 1872), Section 9 - ***Identification parade after 11 months of incident*** - *Held - Accused were arrested after lapse of 9-10 months and after arrest within reasonable period identification parade was held - No question was put to I.O. for giving explanation for delay - Delay simplicitor is not sufficient to discard the evidence led by any party and same can be taken into consideration only after affording opportunity to explain.* [Shakir v. State of M.P.] ...2409

Evidence Act (1 of 1872), Section 9 - ***Relevant fact - Identification in Court for first time*** - *Police did not conduct test identification parade of assailant - Evidence as to identification of accused for first time in Court is not totally irrelevant and inadmissible - Witness who is a well qualified Doctor received number of injuries - Looking to number and situs of injuries it was not expected that she would forgot faces of the assailants - Identification in Court relevant.* [Ganesh Singh v. State of M.P.] ...2101

Evidence Act (1 of 1872), Section 9 - ***Test identification parade*** - *Accused not kept Baparda - Delay in conducting test identification parade - Effect - Held - Identification by witness is doubtful because there is no evidence to indicate that the accused was kept Baparda and there is delay of nine months in conducting the said identification parade.* [Babloo v. State of M.P.] ...1780

Evidence Act (1 of 1872), Section 27 - *Recovery of the body and other material at the behest of accused - Effect - Held - Evidence about recovery of dead body at the instance of appellants as well as recovery of ornaments is doubtful because the police was already aware of the fact that the dead body is lying in the well - At the same time, the witness to the recovery of the ornaments has not supported the case of the prosecution.* [Babloo v. State of M.P.] ...1780

Evidence Act (1 of 1872), Section 32 - ***Dying declaration - Absence of certificate of Doctor*** - *Naib Tahsildar admitted that declarant was fully conscious and fit to give statement - Doctor also certified at the foot of declaration that declarant remained fully conscious during his statement - It cannot be said that dying declaration cannot be accepted.* [Dayaram v. State of M.P.] ...1422

Evidence Act (1 of 1872), Section 32 - ***Dying declaration - Absence of signature or thumb impression of deceased*** - *Deceased suffering lacerated wounds with multiple fractures in his both hands - Naib Tahsildar who recorded dying declaration could not obtain signature or thumb impression*

भाग को अस्वीकृत करने का आधार नही हो सकता – ऐसा साक्ष्य सम्पुष्टि के अभाव में विलोपित नही किया जा सकता। (श्याम सिंह वि. म.प्र. राज्य) ...2415

साक्ष्य अधिनियम (1872 का 1), धारा 9 – घटना के 11 माह बाद शिनाख्त परेड – अभिनिर्धारित – अभियुक्त को 9–10 माह बीत जाने के बाद गिरतार किया गया और गिरतारी के बाद युक्तियुक्त कालावधि के भीतर शिनाख्त परेड करायी गई – विलम्ब का स्पष्टीकरण देने के लिए अनुसंधानकर्ता अधिकारी के समक्ष कोई प्रश्न नही रखा गया – साधारण विलम्ब किसी पक्षकार द्वारा पेश साक्ष्य को अमान्य करने के लिए पर्याप्त नही है और केवल स्पष्ट करने का अवसर देने के बाद उसे विचार में लिया जा सकता है। (शकिर वि. म.प्र. राज्य) ...2409

साक्ष्य अधिनियम (1872 का 1), धारा 9 – सुसंगत तथ्य – न्यायालय में प्रथम बार शिनाख्त – पुलिस ने हमलावर की शिनाख्त परेड नही करवाई – अभियुक्त की न्यायालय में प्रथम बार शिनाख्त सम्बन्धी साक्ष्य पूर्णतः असंगत या अग्राह्य नही है – साक्षी जो एक अच्छी योग्यता प्राप्त चिकित्सक है को कई क्षतियाँ आयीं – क्षतियों की संख्या और अवस्थान को देखते हुए यह अपेक्षित नही था कि वह हमलावरों के चेहरों को भूल गयी होगी – न्यायालय में शिनाख्त सुसंगत। (गणेश सिंह वि. म.प्र. राज्य) ...2101

साक्ष्य अधिनियम (1872 का 1), धारा 9 – शिनाख्त परेड – अभियुक्त को बापर्दा नही रखा गया – शिनाख्त परेड करने में विलम्ब – प्रभाव – अभिनिर्धारित – साक्षी द्वारा शिनाख्त भी शंकास्पद क्योंकि यह दर्शित करने के लिए कोई साक्ष्य नही है कि अभियुक्त को बापर्दा रखा गया और उक्त शिनाख्त परेड करने में नौ माह का विलम्ब है। (बबलू वि. म.प्र. राज्य) ...1780

साक्ष्य अधिनियम (1872 का 1), धारा 27 – अभियुक्त के बताने पर शरीर और अन्य सामग्री की बरामदगी – प्रभाव – अभिनिर्धारित – अपीलार्थियों की प्रेरणा पर शव की बरामदगी का साक्ष्य और आभूषणों की बरामदगी शंकास्पद है क्योंकि पुलिस पूर्व से ही इस तथ्य से अवगत थी कि शव कुएँ में पड़ा हुआ है – साथ ही आभूषणों की बरामदगी के साक्षी ने अभियोजन के मामले का समर्थन नही किया। (बबलू वि. म.प्र. राज्य) ...1780

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – चिकित्सक के प्रमाण पत्र का अभाव – नायब तहसीलदार ने यह स्वीकार किया कि घोषणाकर्ता बयान देने के लिए पूर्णतः सचेतन और स्वस्थ था – चिकित्सक ने भी घोषणा के निचले भाग में प्रमाणित किया कि घोषणाकर्ता उसके बयान के दौरान पूर्णतः संचेतन रहा – यह नही कहा जा सकता कि मृत्युकालिक कथन स्वीकार नही किया जा सकता। (दयाराम वि. म.प्र. राज्य) ...1422

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृतक के हस्ताक्षर या अंगुष्ठ चिह्न का अभाव – मृतक के दोनों हाथों में कई फ्रेक्चर सहित कटे–फटे घाव हुए – नायब तहसीलदार, जिसने मृत्युकालिक कथन अभिलिखित किया, फ्रेक्चर के कारण हस्ताक्षर या अंगुष्ठ चिह्न अभिप्राप्त नही कर सका – अभिनिर्धारित – नायब तहसीलदार का

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due to fractures - Held - No animus or ill-will of Naib Tahsildar towards the appellants - Dying declaration could not be discarded. [Dayaram v. State of M.P.] ...1422

Evidence Act (1 of 1872), Section 32 - *Dying declaration - More than one dying declaration - If some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of inconsistencies, namely whether they are material or not.* [Bharat Singh v. State of M.P.] ...1427

Evidence Act (1 of 1872), Section 32 - *Dying declaration - On the basis of a reliable dying declaration, conviction can be based.* [Basantlal v. State of M.P.] ...1431

Evidence Act (1 of 1872), Section 32 - See - *Penal Code, 1860, Section 302* [Dayaram v. State of M.P.] ...1422

Evidence Act (1 of 1872), Section 32 - See - *Penal Code, 1860, Sections 302, 323* [Aslam v. State of M.P.] ...1764

Evidence Act (1 of 1872), Sections 32 & 114(g) - *Dying declaration - Dying declaration implicating appellant recorded by Naib Tahsildar - However, written suicide note recovered from the pocket of the deceased not produced by prosecution - It must have to be held that suicide note was unfavourable to prosecution - Investigating agency found two sets of contradictory evidence during investigation - Evidence or interpretation favouring accused must relied upon - Dying declaration not relied - Appeal allowed - Appellant acquitted of charge u/s 302 IPC.* [Mukesh v. State of M.P.] ...1774

Evidence Act (1 of 1872), Section 43 - *Judgment - Appellant was convicted on his pleading guilty in criminal case - Appellant admitted in civil proceedings that he had made admission in criminal proceedings - Held - Judgment in a criminal case was not relevant for the purpose of proving civil liability but his admission in civil suit was admissible.* [Seth Ramdayal Jat v. Laxmi Prasad] SC...1847

Evidence Act (1 of 1872), Section 43 - *Judgment passed in criminal case - Judgment passed in a criminal case is admissible for a limited purpose - Relying on the basis thereof, civil proceeding cannot be determined, but that would not mean that it is not admissible for any purpose whatsoever.* [Seth Ramdayal Jat v. Laxmi Prasad] SC...1847

Evidence Act (1 of 1872), Section 60 - *Hearsay evidence - PW-2 stated that he was informed by PW-7 that deceased was seen in the company of appellants - PW-7 has nowhere stated that he gave information to PW-2 - Statement of PW-2 hit by Sec. 60 of Act.* [Nasir v. State of M.P.] ...2078

Evidence Act (1 of 1872), Section 67 - *Proof of signature and*

अपीलार्थियों के प्रति कोई विद्वेष या दुर्भावना नही – मृत्युकालिक कथन को अमान्य नही किया जा सकता। (दयाराम वि. म.प्र. राज्य) ...1422

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – एक से अधिक मृत्युकालिक कथन – यदि एक मृत्युकालिक कथन और दूसरे मृत्युकालिक कथन में कुछ असंगतियाँ हैं तो न्यायालय को असंगतियों की प्रकृति की जाँच करनी होगी अर्थात् क्या वे तात्विक हैं अथवा नही। (भारत सिंह वि. म.प्र. राज्य) ...1427

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – विश्वसनीय मृत्युकालिक कथन के आधार पर दोषसिद्धि आधारित हो सकती है। (बसंतलाल वि. म.प्र. राज्य) ...1431

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धारा 302 (दयाराम वि. म.प्र. राज्य) ...1422

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धाराएँ 302, 323, (असलम वि. म.प्र. राज्य) ...1764

साक्ष्य अधिनियम (1872 का 1), धाराएँ 32 व 114(जी) – मृत्युकालिक कथन – अपीलार्थी को आलिप्त करने वाला मृत्युकालिक कथन नायब तहसीलदार द्वारा अभिलिखित किया गया – तथापि, मृतक की जेब से बरामद लिखित सुसाइड नोट अभियोजन द्वारा पेश नही किया गया – यह धारित किया जाना चाहिए था कि सुसाइड नोट अभियोजन के पक्ष में नही था – अनुसंधानकर्ता एजेंसी ने अन्वेषण के दौरान परस्पर विरोधी साक्ष्य के दो समूह पाये – अभियुक्त का समर्थन करने वाली साक्ष्य या निर्वचन पर विश्वास किया जाना चाहिए – मृत्युकालिक कथन पर विश्वास नही किया गया – अपील मंजूर – अपीलार्थी को भा.द.सं. की धारा 302 के आरोप से दोषमुक्त किया गया। (मुकेश वि. म.प्र. राज्य) ...1774

साक्ष्य अधिनियम (1872 का 1), धारा 43 – निर्णय – अपीलार्थी को उसके दाण्डिक मामले में दोष का अभिवचन करने पर दोषसिद्ध किया गया – अपीलार्थी ने सिविल कार्यवाही में स्वीकार किया कि उसने दाण्डिक कार्यवाही में स्वीकारोक्ति की थी – अभिनिर्धारित – दाण्डिक मामले में निर्णय सिविल दायित्व साबित करने के प्रयोजन के लिए सुसंगत नही था किन्तु सिविल वाद में उसकी स्वीकारोक्ति ग्राह्य थी। (सेठ रामदयाल जाट वि. लक्ष्मी प्रसाद) SC ...1847

साक्ष्य अधिनियम (1872 का 1), धारा 43 – दाण्डिक मामले में पारित निर्णय – किसी दाण्डिक मामले में पारित निर्णय सीमित प्रयोजन के लिए ग्राह्य है – उसके आधार पर विश्वास करके सिविल कार्यवाही अवधारित नही की जा सकती, किन्तु इसका यह अर्थ नही होगा कि यह किसी भी प्रयोजन के लिए ग्राह्य नही है। (सेठ रामदयाल जाट वि. लक्ष्मी प्रसाद) SC...1847

साक्ष्य अधिनियम (1872 का 1), धारा 60 – अनुश्रुत साक्ष्य – अ.सा.–2 ने कथन किया कि उसे अ.सा.–7 द्वारा जानकारी दी गई कि मृतक अपीलार्थियों के साथ देखा गया – अ.सा.–7 ने यह कहीं भी कथित नही किया कि उसने अ.सा.–2 को जानकारी दी थी – अ.सा.–2 का कथन, अधिनियम की धारा 60 से बाधित है। (नासिर वि. म.प्र. राज्य) ...2078

साक्ष्य अधिनियम (1872 का 1), धारा 67 – हस्ताक्षर और हस्तलेख का साक्ष्य –

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handwriting - Inquest report written and signed by SDOP - Neither SDOP examined before Court nor signature and handwriting proved by witnesses acquainted with his handwriting and signature - Held - Contents of that inquest report can not be looked into. [Chandan v. State of M.P.] ...2083

Evidence Act (1 of 1872), Section 112 - ***Presumption of legitimacy of child born during continuance of marriage*** - *Application for conduction of DNA test of child allowed by trial Court - Held - Documents show that child was born in 1992 and wife has allegedly deserted husband in 1992 - Section raises a conclusive presumption regarding paternity and the presumption is yet to be rebutted in the case by leading evidence - Trial Court erred in allowing application for conducting DNA test - Petition allowed.* [Geeta Mishra (Smt.) v. Krishna Mohan Mishra] ...1638

Evidence Act (1 of 1872), Section 112 - See - *Criminal Procedure Code, 1973, Section 125,* [Premlal v. Leelabai] ...2129

Evidence Act (1 of 1872), Section 113-B - *Prosecution failed to show that soon before her death deceased had been subjected to cruelty or harassment for or in connection with any demand for dowry by the husband - Provisions of S. 113-B cannot be attracted.* [Baddu @ Jham Singh v. State of M.P.] ...2437

Evidence Act (1 of 1872), Section 114 - ***Presumption*** - *Suit filed for bonafide requirement of son - Son examined as witness - Plaintiff could not examine herself on account of her old age and ill-health - Held - Extensive evidence has been brought on record through oral and documentary evidence - No withholding of evidence - Non-examination of plaintiff not fatal.* [Sujata Sarkar (Smt.) v. Anil Kumar Duttani] ...1374

Evidence Act (1 of 1872), Section 115 - ***Estoppel*** - *There can be no estoppel on a pure question of law and question of jurisdiction is pure question of law.* [Hameeda Begum (Smt.) v. Smt. Champa Bai Jain] ...2328

Family Courts Act (66 of 1984), Section 7(1) Explanation (g) - ***Guardianship of a minor girl*** - *Child staying with her grandmother after death of her father - Child on being asked declined to go with her mother - Mother did not have good marital relationship with her husband - FIR was lodged in connection with demand of dowry - During serious ailment of husband, respondent did not come to see him - Grandmother has good financial status - Child looks healthy and happy - She would suffer immense depression and there may be emotional setback if she is taken away from her grandmother - Grandmother appointed as custodian of child - However, mother is at liberty to visit the child at the house of Grandmother - Appeal allowed.* [Chhoti Bai (Smt.) v. Smt. Sunita Kushwah] ...2388

Family Courts Act (66 of 1984), Section 7(1) Explanation (g) -

मृत्यु–समीक्षा रिपोर्ट एस.डी.ओ.पी. द्वारा लिखित और हस्ताक्षरित की गई –एस.डी.ओ.पी. की न तो न्यायालय के समक्ष परीक्षा करायी गई और न ही उसके हस्ताक्षर और हस्तलेख से परिचित साक्षियों द्वारा हस्ताक्षर और हस्तलेख साबित किये गये – अभिनिर्धारित – उस मृत्यु–समीक्षा रिर्पोट की अन्तर्वस्तु की जाँच–पड़ताल नहीं की जा सकती। (चंदन वि. म.प्र. राज्य) ...2083

साक्ष्य अधिनियम (1872 का 1), धारा 112 – विवाह के जारी रहने के दौरान उत्पन्न हुई संतान के धर्मजत्व की उपधारणा – विचारण न्यायालय द्वारा संतान का डीएनए परीक्षण कराने का आवेदन स्वीकार किया गया – अभिनिर्धारित – दस्तावेज दर्शित करते हैं कि संतान 1992 में उत्पन्न हुई और पत्नी ने पति को कथित रूप से 1992 में अभित्यक्त किया – धारा पैतृत्व के संबंध में निश्चायक उपधारणा करती है और उपधारणा का मामले में साक्ष्य पेश करके खण्डन किया जाना है – विचारण न्यायालय ने डीएनए परीक्षण कराने का आवेदन मंजूर करने में त्रुटि की – याचिका मंजूर। (गीता मिश्रा (श्रीमति) वि. कृष्णा मोहन मिश्रा) ...1638

साक्ष्य अधिनियम (1872 का 1), धारा 112 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 125; (प्रेमलाल वि. लीला बाई) ...2129

साक्ष्य अधिनियम (1872 का 1), धारा 113–बी – अभियोजन यह दर्शित करने में विफल रहा कि पति द्वारा मृतक के साथ उसकी मृत्यु के ठीक पूर्व दहेज की किसी माँग के लिए या के सम्बन्ध में क्रूरता की गई या तंग किया गया – धारा 113–बी के उपबंध आकृष्ट नहीं किये जा सकते। (बड्डू उर्फ झाम सिंह वि. म.प्र. राज्य) ...2437

साक्ष्य अधिनियम (1872 का 1), धारा 114 – उपधारणा – पुत्र की वास्तविक आवश्यकता के आधार पर वाद पेश – पुत्र की साक्षी के रूप में परीक्षा की गई – वादी की स्वयं की परीक्षा उसकी वृद्धावस्था और अस्वस्थता के कारण नहीं की जा सकी – अभिनिर्धारित – मौखिक और दस्तावेजी साक्ष्य के द्वारा विस्तृत साक्ष्य अभिलेख पर लायी गई – कोई साक्ष्य नहीं रोका गया – वादी की परीक्षा न कराना घातक नहीं। (सुजाता सरकार (श्रीमति) वि. अनिल कुमार दत्तानी) ...1374

साक्ष्य अधिनियम (1872 का 1), धारा 115 – विबंध – विधि के शुद्ध प्रश्न पर कोई विबंध नहीं हो सकता और अधिकारिता का प्रश्न शुद्ध विधि का प्रश्न है। (हमीदा बेगम (श्रीमति) वि. श्रीमति चंपा बाई जैन) ...2328

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 7(1) स्पष्टीकरण (जी) – अवयस्क बालिका की संरक्षकता – संतान उसके पिता की मृत्यु के बाद अपनी दादी के साथ रह रही थी – संतान से पूछे जाने पर उसने अपनी माता के साथ जाने से इंकार कर दिया – माता के अपने पति के साथ अच्छे वैवाहिक सम्बन्ध नहीं थे – दहेज की माँग के सम्बन्ध में एफ.आई.आर. दर्ज करायी गई – पति की गम्भीर बीमारी के दौरान प्रत्यर्थी उसे देखने नहीं आयी – दादी की अच्छी वित्तीय स्थिति है – संतान स्वस्थ और खुश दिखाई देती है – यदि उसे उसकी दादी के पास से दूर ले जाया जाता है तो उसे अत्यधिक अवसाद होगा और भावनात्मक धक्का लग सकता है – दादी को संतान के अभिरक्षक के रूप में नियुक्त किया गया – तथापि, माता को दादी के घर पर संतान से मिलने की स्वतंत्रता दी गई – अपील मंजूर। (छोटी बाई (श्रीमति) वि. श्रीमति सुनीता कुशवाह) ...2388

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 7(1) स्पष्टीकरण (जी) –

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Guardianship of a minor girl - Mother is a natural guardian and minor child ordinarily should be in custody of mother - However, while dealing with facet of custody of child, welfare of child is of paramount consideration. [Chhoti Bai (Smt.) v. Smt. Sunita Kushwah] ...2388

Finance Act (32 of 1994), Section 65(76b) [As amended by Finance Act, 2005], Central Excise Act, 1944, Section 2(f) - *Manufacture - Service Tax - Packaging and bottling of liquor come within the ambit and sweep of manufacture - There can be no levy of service tax on manufacture in view of clear postulate u/s. 65(76b) of Act, 1994 - Decision rendered in M/s Vindhyachal Distilleries does not state law correctly - Decision rendered in Som Distilleries upheld.* [Maa Sharda Wine Traders (M/s.) Garahakota, Sagar v. Union of India] FB...1568

Forest Act (16 of 1927), Section 52-B - *Appellate authority remanding the matter by reversing the order of confiscation of vehicle with a direction to pass a fresh order - Order challenged in revision - Revisional Court ordered to release the vehicle on furnishing bank guarantee - Order challenged - Held - After passing the order by the appellate authority, no order of confiscation was in existence - In the facts & circumstances, order of release of the vehicle was proper and revisional Court did not exceed its jurisdiction.* [State of M.P. v. Bhanu Pratap Singh] ...1249

Forest Act (16 of 1927), Sections 52, 52-A & 52-B - *In exercise of power u/s 52-A(6), appellate authority remanding the matter by reversing the order of confiscation with a direction to the authorized officer to pass a fresh order - Held - Order would tantamount to attaching finality to the proceedings before appellate authority - Therefore, against the order revision u/s 52-B is maintainable.* [State of M.P. v. Bhanu Pratap Singh] ...1249

General Clauses Act (10 of 1897), Section 14 - *Power conferred to be exercisable from time to time - Once the Central Government has power to postpone the elections for a period of 40 days under the proviso to Rule and there is no prohibition decipherable from the Rule, therefore, the power may be exercised by Central Government on repeated occasions, from time to time, if condition enumerated in the proviso exists.* [Azmatullah v. Union of India] ...1311

Hindu Marriage Act (25 of 1955), Section 9 - **See** - *Criminal Procedure Code, 1973, Section 125* [Rewalal v. Smt. Urmila] ...2111

Hindu Marriage Act (25 of 1955), Section 13(1)(i) - *Divorce - Decree of divorce on the ground that after the solemnization of the marriage appellant had voluntary sexual intercourse with any person other than her spouse - Held - Satisfactory and convincing circumstantial evidence that appellant indulged in illicit sexual relationship with other than husband - She went to Surat along with him and they stayed there together in one room for more*

अवयस्क बालिका की संरक्षकता – माता प्राकृतिक संरक्षक है और अवयस्क संतान साधारणतः माता की अभिरक्षा में होना चाहिए – तथापि, संतान की अभिरक्षा के पहलू पर कार्यवाही करते समय संतान का कल्याण सर्वोपरि विचार है। (छोटी बाई (श्रीमति) वि. श्रीमति सुनीता कुशवाह) ...2388

वित्त अधिनियम (1994 का 32), धारा 65(76बी) [वित्त अधिनियम, 2005 द्वारा यथासंशोधित], केंद्रीय उत्पाद–शुल्क अधिनियम, 1944, धारा 2(एफ) – विनिर्माण – सेवा कर – शराब की पैकेजिंग और बोटलिंग विनिर्माण की परिधि और क्षेत्र के भीतर आती है – अधिनियम, 1994 की धारा 65(76बी) के अधीन स्पष्ट अभिधारणा को देखते हुए विनिर्माण पर कोई सेवा कर उद्गृहीत नही किया जा सकता – मेसर्स विंध्याचल डिस्टलरीज् में दिया गया विनिश्चय विधि को सही रूप में कथित नही करता – सोम डिस्टलरीज् में दिये विनिश्चय की पुष्टि की गई। (मॉ शारदा वाइन ट्रेडर्स (मे.) गढ़ाकोटा, सागर वि. यूनियन ऑफ इंडिया) FB...1568

वन अधिनियम (1927 का 16), धारा 52–बी – अपीलीय प्राधिकारी ने वाहन के अधिहरण का आदेश उलटते हुए नवीन आदेश पारित करने के निदेश के साथ मामला प्रतिप्रेषित किया – आदेश को पुनरीक्षण में चुनौती दी गई – पुनरीक्षण न्यायालय ने बैंक गारंटी प्रस्तुत किये जाने पर वाहन निर्मुक्त करने का आदेश दिया – आदेश को चुनौती – अभिनिर्धारित – अपीलीय प्राधिकारी द्वारा आदेश पारित किये जाने के बाद अधिहरण का कोई आदेश अस्तित्व में नही था – तथ्यों और परिस्थितियों में वाहन निर्मुक्त करने का आदेश उचित था और पुनरीक्षण न्यायालय ने अपनी अधिकारिता का अतिक्रमण नही किया। (म.प्र. राज्य वि. भानू प्रताप सिंह) ...1249

वन अधिनियम (1927 का 16), धाराएँ 52, 52–ए व 52–बी – धारा 52–ए(6) के अधीन शक्तियों के प्रयोग में अपीलीय प्राधिकारी ने अधिहरण का आदेश उलटते हुए प्राधि.त अधिकारी को नवीन आदेश पारित करने के निदेश के साथ मामला प्रतिप्रेषित किया – अभिनिर्धारित – आदेश अपीलीय प्राधिकारी के समक्ष कार्यवाहियों से अंतिमता संलग्न करने के तुल्य होगा – इसलिए आदेश के विरुद्ध धारा 52–बी के अधीन पुनरीक्षण पोषणीय है। (म.प्र. राज्य वि. भानू प्रताप सिंह) ...1249

साधारण खण्ड अधिनियम (1897 का 10), धारा 14 – समय–समय पर प्रयोग किये जाने के लिए प्रदत्त शक्ति – एक बार जब केन्द्र सरकार के पास नियम के परन्तुक के अधीन चुनावों को 40 दिन की कालावधि के लिए मुल्तवी करने की शक्ति है और नियम से सांकेतिक अर्थ निकालने योग्य कोई प्रतिषेध नही है, इसलिए केन्द्र सरकार द्वारा समय–समय पर पुनरावृत्त अवसरों पर शक्ति का प्रयोग किया जा सकता है यदि परन्तुक में बतायी गई शर्त अस्तित्व में है। (अजमतउल्ला वि. यूनियन ऑफ इंडिया) ...1311

हिन्दू विवाह अधिनियम (1955 का 25), धारा 9 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 125, (रेवालाल वि. श्रीमति उर्मिला) ...2111

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i) – विवाह विच्छेद – विवाह विच्छेद की डिक्री इस आधार पर कि विवाह के अनुष्ठापन के बाद अपीलार्थी ने अपने पति से भिन्न किसी व्यक्ति के साथ स्वेच्छया मैथुन किया था – अभिनिर्धारित – समाधानप्रद और विश्वास दिलाने वाली परिस्थितिजन्य साक्ष्य कि अपीलार्थी पति से भिन्न व्यक्ति के साथ अवैध लैंगिक सम्बन्ध में आसक्त हुई – वह उसके साथ सूरत गयी और वे वहाँ एक साथ एक ही कमरे में एक माह से अधिक रुके

than one month - Decree of divorce u/s 13(1)(i) justified. [Neelam Tiwari v. Sunil Tiwari] ...2382

Hindu Marriage Act (25 of 1955), Section 13(1)(i) - *Necessary party - Divorce - Adultery - Whether the person with whom allegation of adultery are made is a necessary party - Held - No - There is no provision in the Act or rules framed by the High Court for impleading such person as a party.* [Neelam Tiwari v. Sunil Tiwari] ...2382

Hindu Marriage Act (25 of 1955), Section 13(1)(i) - *Standard of proof - Petition on ground u/s 13(1)(i) - Held - The general standard and degree of proof required in such cases need not reach certainty but it must carry a high degree of probability because of gravity of the issue.* [Neelam Tiwari v. Sunil Tiwari] ...2382

Hindu Marriage Act (25 of 1955), Section 27, Civil Procedure Code, 1908, Section 151, Order 7 Rule 7 - *Suit for return of Stridhan - Decree of divorce granted - Thereafter, respondent instituted suit for return of Stridhan u/s 27 of the Act & O. 7 R. 7 r/w S. 151 CPC - Submissions put forth that such powers can be exercised by the matrimonial Court and not in a proceeding subsequently initiated - Held - O.7 R. 7 r/w S. 151 CPC permits a Court in passing a decree in favour of wife or husband as the case may be for return of the property, which may exclusively belong to either of them - There is no provision under the Act which bars the application of O.7 R. 7 CPC - Suit maintainable - Appeal dismissed.* [Manish Nema v. Sandhya Nema] ...2057

Hindu Succession Act (30 of 1956) [As amended by Hindu Succession (Amendment) Act, 2005 w.e.f. 09.09.2005], Sections 6 & 23, General Clauses Act, 1897, Section 6 - *Amendment Act 2005 does not contain the saving clause which would mean that omitted Section 23 of the Act of 1956 is not saved for pending cases - In view of the decision of S.C. in* ***Kolhapur Canesugar Works Ltd*** *[AIR 2000 SC 811], Section 6 of the General Clauses Act has no application - Appeal is a continuance of the suit, therefore, amended Section 6 would be applicable - Plaintiff is also entitled to sue for partition in respect of a dwelling house of a Joint Hindu Family being a coparcener.* [Prabhudayal (Dead) through LRs. v. Smt. Ramsiya] ...1351

Hindu Succession Act (30 of 1956) [As amended by Hindu Succession (Amendment) Act, 2005 w.e.f. 09.09.2005], Sections 6 & 23 - *Section 23 of the Act has been omitted by Section 4 of the Amendment Act of 2005 - From the date of enforcement of amended provision to the Act the female heir of a coparcener can ask for partition of the dwelling house because according to Section 6 of the Act her status is also that of a coparcener.* [Prabhudayal (Dead) through LRs. v. Smt. Ramsiya] ...1351

Hostel Rules, 1966-67, Rule 17 - *Expulsion from Hostel - Natural Justice - Appellants were expelled from hostel - Collector was directed to*

– धारा 13(1)(प) के अन्तर्गत विवाह विच्छेद की डिक्री न्यायोचित ठहराई गयी। (नीलम तिवारी वि. सुनील तिवारी) ...2382

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i) – आवश्यक पक्षकार – विवाह विच्छेद – जारता – क्या व्यक्ति, जिसके साथ जारता के अभिकथन किये गये हैं, आवश्यक पक्षकार है – अभिनिर्धारित – नहीं – अधिनियम या उच्च न्यायालय द्वारा बनाये गये नियमों में ऐसे व्यक्ति को पक्षकार बनाने का कोई उपबंध नही है। (नीलम तिवारी वि. सुनील तिवारी) ...2382

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i) – सबूत के मानक – धारा 13(1)(i) के आधार पर याचिका – अभिनिर्धारित – ऐसे मामलों में अपेक्षित सबूत के सामान्य मानक और कोटि को निश्चितता पर पहुँचने की आवश्यकता नही है बल्कि उसे विषय की गंभीरता के कारण संभाव्यता की उच्च कोटि वहन करना चाहिए। (नीलम तिवारी वि. सुनील तिवारी) ...2382

हिन्दू विवाह अधिनियम (1955 का 25), धारा 27, सिविल प्रक्रिया संहिता, 1908, धारा 151, आदेश 7 नियम 7 – स्त्रीधन की वापसी के लिए वाद – विवाह विच्छेद की डिक्री प्रदान की गई – तत्पश्चात् प्रत्यर्थी ने अधिनियम की धारा 27 व सि.प्र.सं. के आदेश 7 नियम 7 सहपठित धारा 151 के अधीन स्त्रीधन लौटाने के लिए वाद संस्थित किया – निवेदन से उपवर्णित होता है कि ऐसी शक्तियों का प्रयोग विवाह न्यायालय द्वारा किया जा सकता है न कि बाद में प्रारम्भ कार्यवाही में – अभिनिर्धारित – सि.प्र.सं. का आदेश 7 नियम 7 सहपठित धारा 151 न्यायालय को यथास्थिति पति या पत्नी के पक्ष में, ऐसी सम्पत्ति की वापसी के लिए जो अनन्यतः उनमें से किसी एक की हो सकती है, डिक्री पारित करने के लिए अनुज्ञात करता है – अधिनियम में ऐसा कोई उपबंध नही है जो सि.प्र.सं. के आदेश 7 नियम 7 के लागू होने का वर्जन करता हो – वाद पोषणीय – अपील खारिज। (मनीष नेमा वि. संध्या नेमा) ...2057

हिन्दू उत्तराधिकार अधिनियम (1956 का 30) [हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 द्वारा यथासंशोधित 09.09.2005 से प्रभावी], धाराएँ 6 व 23, साधारण खण्ड अधिनियम, 1897 धारा 6 – संशोधन अधिनियम 2005 में व्यावृत्ति खण्ड अन्तर्विष्ट नही है जिसका अर्थ यह होगा कि 1956 के अधिनियम की विलोपित धारा 23 लम्बित मामलों के लिए व्यावृत्त नही की गई है – उच्चतम न्यायालय के कोल्हापुर केनसुगर वर्क्स लि. [AIR 2000 SC 811] में दिये गये निर्णय को दृष्टिगत रखते हुए साधारण खण्ड अधिनियम की धारा 6 लागू नही होती – अपील वाद की निरंतरता है इसलिए संशोधित धारा 6 लागू होगी – वादी भी एक सहदायिक होने से संयुक्त हिन्दू परिवार के निवास गृह के सम्बन्ध में विभाजन का वाद लाने की हकदार है। (प्रभूदयाल (मृतक) द्वारा विधिक प्रतिनिधि वि. श्रीमति रामसिया) ...1351

हिन्दू उत्तराधिकार अधिनियम (1956 का 30) [हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 द्वारा यथासंशोधित 09.09.2005 से प्रभावी], धाराएँ 6 व 23 – अधिनियम की धारा 23 संशोधन अधिनियम 2005 की धारा 4 द्वारा विलोपित कर दी गई है – अधिनियम के संशोधित उपबंध के प्रवर्तन की तारीख से किसी सहदायिक की महिला वारिस निवास गृह के विभाजन की माँग कर सकती क्योंकि अधिनियम की धारा 6 के अनुसार उसकी प्रास्थिति भी एक सहदायिक की है। (प्रभूदयाल (मृतक) द्वारा विधिक प्रतिनिधि वि. श्रीमति रामसिया) ...1351

छात्रावास नियम, 1966–67, नियम 17 – छात्रावास से निष्कासन – नैसर्गिक न्याय – अपीलार्थियों को छात्रावास से निष्कासित किया गया – कलेक्टर को नया आदेश पारित

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pass fresh order - Collector after hearing appellants passed fresh orders of expulsion - Held - Elaborate enquiry is not necessitous - Mere non-recording of independent opinion that if appellants stay in hostel, it will be objectionable from the point of discipline or harmful effect to other students of hostel will not vitiate order - Appeal dismissed. [Lalita Jharia (Ku.) v. State of M.P.] ...1913

Income Tax Act (43 of 1961), Section 260A, Limitation Act, 1963, Sections 4 to 24 - *Applicability of provisions of Limitation Act - Whether High Court can condone the delay in filing appeal u/s 260A of Act, 1961 - Held - Act, 1961 is a self contained Code - There need not be mandatory exclusion of applicability of provisions of Limitation Act - There can be necessary exclusion by language in which provision is couched and intention of legislature - Section 260A does not allow High Court to condone delay - High Court has no power to condone the delay - Appeal dismissed as barred by time.* [Assistant Commissioner of Income Tax v. M/s. Shubhash Traders] ...2395

Income Tax Act (43 of 1961), Sections 271(1)(c), 246(1)(L) & 273A - *Penalty - Alternative remedy of appeal - Against the order of penalty, petitioner has alternative remedy of filing appeal but has also remedy of filing application u/s 273A.* [Shrinath Caramics (M/s.) v. Commissioner Income Tax-II, Indore] ...1984

Income Tax Act (43 of 1961), Sections 271(1)(c) & 273A - *Waiver of penalty - Survey of business premises of petitioner was carried out on 06.10.1995 - Petitioner filed revised returns of income for assessment years 1992-93, 1993-94 and 1994-95 - Penalty was imposed as revised returns were filed after survey and they were not voluntary - Held - Revision of return was for the assessment years 1992-93, 1993-94 and 1994-95 and not for the assessment year 1995-96 - Order passed by Commissioner suffers from non-application of mind - Matter remanded back to reconsider application u/s 273A and pass fresh orders.* [Shrinath Caramics (M/s.) v. Commissioner Income Tax-II, Indore] ...1984

Industrial Disputes Act (14 of 1947), Sections 2(oo) & 25-F - *Retrenchment - Employees worked for more than 240 days continuously and that too continuously for more than nine years - Services terminated without complying with the provisions of the Act - Employer alleged that it was a contractual appointment and contract was extended from time to time and on the conclusion of the project, it cannot be said to be a case of retrenchment - Held - For a long period of ten years the services were taken which goes to show that need was continuous - Work was not of temporary duration - It has not been established that project has come to an end - Thus, it amounted to unfair labour practice, to retrench the services of employees - Employees were entitled for protection of Sec. 25-F of Act.* [M.P. Urja Vikas Nigam Ltd. v. Satosh Kumar Dubey] ...1928

करने का निदेश दिया गया – कलेक्टर ने अपीलार्थियों को सुनने के बाद निष्कासन के नये आदेश पारित किये – अभिनिर्धारित – विस्तृत जाँच आवश्यक नही है – केवल इस स्वतंत्र राय का अभिलिखित न किया जाना कि यदि अपीलार्थी छात्रावास में रहे, तो यह अनुशासन के बिन्दु से आपत्तिजनक होगा या छात्रावास के अन्य छात्रों पर हानिकारक प्रभाव पड़ेगा, आदेश को दूषित नही करेगा – अपील खारिज। (लालिता झारिया (कु.) वि. म.प्र. राज्य) ...1913

आयकर अधिनियम (1961 का 43), धारा 260ए, परिसीमा अधिनियम, 1963,धाराएँ 4 से 24 – आयकर अधिनियम के उपबंधों की प्रयोज्यनीयता – क्या उच्च न्यायालय अधिनियम 1961 की धारा 260ए के अधीन अपील पेश करने में हुआ विलम्ब क्षमा कर सकता है – अभिनिर्धारित – अधिनियम 1961 एक स्वतः पूर्ण संहिता है – परिसीमा अधिनियम के उपबंधों की प्रयोज्यनीता का आज्ञापक अपवर्जन होने की आवश्यकता नही है – भाषा जिसमें उपबंध विवक्षित है और विधायिका के आशय द्वारा आवश्यक अपवर्जन हो सकता है – धारा 260ए उच्च न्यायालय को विलम्ब क्षमा करने की अनुमति नही देती – उच्च न्यायालय को विलम्ब क्षमा करने की कोई शक्ति नही है – अपील समयवर्जित होने के आधार पर खारिज। (अस्सिटेंट कमिश्नर ऑफ इनकम टैक्स वि मे. सुभाष ट्रेडर्स) ...2395

आयकर अधिनियम (1961 का 43), धाराएँ 271(1)(सी), 246(1)(एल) व 273ए – शास्ति – अपील का वैकल्पिक उपचार – शास्ति के आदेश के विरुद्ध याची को अपील पेश करने का वैकल्पिक उपचार है किन्तु धारा 273ए के अधीन आवेदन पेश करने का उपचार भी है। (श्रीनाथ सेरेमिक्स (मे.) वि. कमिश्नर इनकम टैक्स–II] इंदौर) ...1984

आयकर अधिनियम (1961 का 43), धाराएँ 271(1)(सी) व 273ए – शास्ति का अधित्यजन – याची के कारोबारी स्थल का सर्वेक्षण 06.10.1995 को किया गया – याची ने निर्धारण वर्ष 1992–93, 1993–94 व 1994–95 के लिए आय के पुनरीक्षित रिटर्न पेश किये – शास्ति अधिरोपित की गई क्योंकि पुनरीक्षित रिटर्न सर्वेक्षण के बाद पेश किये गये और वे स्वैच्छिक नही थे – अभिनिर्धारित – रिटर्न का पुनरीक्षण निर्धारण वर्ष 1992–93, 1993–94 व 1994–95 के लिए था न कि निर्धारण वर्ष 1995–96 के लिए – कमिश्नर द्वारा आदेश पारित करने में मस्तिष्क का प्रयोग नही किया गया – मामला धारा 273ए के आवेदन पर विचार करने और नवीन आदेश पारित करने के लिए वापस प्रतिप्रेषित किया गया। (श्रीनाथ सेरेमिक्स (मे.) वि. कमिश्नर इनकम टैक्स–II] इंदौर) ...1984

औद्योगिक विवाद अधिनियम (1947 का 14), धाराएँ 2(ओओ) व 25–एफ – छंटनी – कर्मचारियों ने निरंतर 240 दिनों से अधिक और निरंतर नौ वर्षों से भी अधिक कार्य किया – सेवाएँ अधिनियम के उपबंधों का अनुपालन किये बिना समाप्त की गईं – नियोक्ता ने अभिकथित किया कि यह एक संविदात्मक नियुक्ति थी और संविदा समय–समय पर बढ़ायी गई और परियोजना की समाप्ति पर इसे छंटनी का मामला नही कहा जा सकता – अभिनिर्धारित – दस वर्ष की लम्बी कालावधि के लिए सेवाएँ ली गईं जिससे दर्शित होता है कि आवश्यकता निरंतर थी – कार्य अस्थायी अवधि का नही था – यह साबित नही किया गया कि परियोजना समाप्त होने वाली है – इसलिए यह कर्मचारियों की सेवाओं की छंटनी करने के लिए अनुचित श्रम–व्यवहार की कोटि में आता है – कर्मचारी अधिनियम की धारा 25–एफ के संरक्षण के हकदार थे। (एम.पी. ऊर्जा विकास निगम लि. वि. संतोष कुमार दुबे) ...1928

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Industrial Relations Act, M.P. (27 of 1960), Entry 16 - *Engineering Industry - Food Processing Industry - Engineering cannot be confined to be an industry which produces plants and machinery - Food processing is also a process of engineering and industry is covered within entry 16.* [Godrej Beverajes & Foods Limited v. Ramashankar Yadav] ...2027

Industrial Relations Act, M.P. (27 of 1960), Entry 16, Industries (Development and Regulation) Act, 1951, Schedule - *Food processing industry separately defined in entry 27 of the Act of 1951 - Entries of the Act of 1951 cannot be relevant for interpreting entries of the Act of 1960 - Act of 1951 cannot control the expression engineering which finds place in entry 16 of the Act of 1960.* [Godrej Beverajes & Foods Limited v. Ramashankar Yadav] ...2027

Industries (Development and Regulation) Act (of 1951), Schedule - See *-Industrial Relations Act, M.P., 1960, Entry 16,* [Godrej Beverajes & Foods Limited v. Ramashankar Yadav] ...2027

Interpretation of Statutes - Comma (,) - *Comma (,) used between two words has to have its signification and each word has to be treated as separate word and thereby a separate category.* [Akhil Bhartiya Upbhokta Congress, Bhopal v. State of M.P.] ...2233

Interpretation of Statutes - *Word should be construed so as to best attain the purposes of statute.* [Godrej Beverajes & Foods Limited v. Ramashankar Yadav] ...2027

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 2(k) & 4(2) - *JMFC has passed the order that applicant is not juvenile - Order challenged - Held - As per Section 4(2) of the Act a Board consist of a Metropolitan Magistrate or a Judicial Magistrate First Class and two social workers of whom atleast one shall be a woman forming a bench and such bench shall have the powers conferred by the Cr.P.C. - Order passed by JMFC not by the Board - Order set-aside.* [Lakhan v. State of M.P.] ...2116

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 49 - *Enquiry - School certificate reveals that applicant was more than 18 years of age - Applicant in counter case disclosed his age as 19 years in deposition - Ossification test shows that applicant was 17 years & 6 months of age - Held - School record has been maintained in regular course of business - Ossification test is merely opinion of radiologist and not conclusive proof of age - Two years margin can be given in either side - Applicant was not juvenile on the date of incident - Revision dismissed.* [Narendra Yadav @ Mantoo v. State of M.P.] ...2450

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 52 & 53 - *Criminal cases were pending against the applicant before Sessions Court - It was alleged that applicant was juvenile on the date of*

औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), प्रविष्टि 16 – इंजीनियरिंग उद्योग – खाद्य प्रसंस्करण उद्योग – इंजीनियरिंग को उस उद्योग तक सीमित नही किया जा सकता जो संयंत्र और मशीनरी का उत्पादन करता हैं – खाद्य प्रसंस्करण भी इंजीनियरिंग की एक प्रक्रिया है और उद्योग प्रविष्टि 16 के अन्तर्गत आता है। (गोदरेज बैवरिजेस् एण्ड फुड्स लि. वि. रमाशंकर यादव) ...2027

औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), प्रविष्टि 16, उद्योग (विकास और विनियमन) अधिनियम, 1951, अनुसूची – खाद्य प्रसंस्करण उद्योग को 1951 के अधिनियम की प्रविष्टि 27 में पृथक से परिभाषित किया गया है – 1960 के अधिनियम की प्रविष्टियों का निर्वचन करने के लिए 1951 के अधिनियम की प्रविष्टियाँ सुसंगत नही हो सकती हैं – 1951 का अधिनियम शब्द इंजीनियरिंग को नियंत्रित नही कर सकता जो 1960 के अधिनियम की प्रविष्टि 16 में दिया है। (गोदरेज बैवरिजेस् एण्ड फुड्स लि. वि. रमाशंकर यादव) ...2027

उद्योग (विकास और विनियमन) अधिनियम (1951 का), अनुसूची – देखें – औद्योगिक संबंध अधिनियम, म.प्र., 1960, प्रविष्टि 16, (गोदरेज बैवरिजेस् एण्ड फुड्स लि. वि. रमाशंकर यादव) ...2027

कानूनों का निर्वचन – अल्पविराम (,) – दो शब्दों के बीच प्रयुक्त अल्पविराम (,) को अपना अर्थ रखना चाहिए और प्रत्येक शब्द को पृथक शब्द और तद्द्वारा पृथक वर्ग मानना चाहिए। (अखिल भारतीय उपभोक्ता कांग्रेस, भोपाल वि. म.प्र. राज्य) ...2233

कानूनों का निर्वचन – शब्द का ऐसा अर्थ लगाया जाना चाहिए ताकि कानून का सर्वोत्तम प्रयोजन प्राप्त किया जाए। (गोदरेज बैवरिजेस् एण्ड फुड्स लि. वि. रमाशंकर यादव) ...2027

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 2(के) व 4(2) – न्यायिक मजिस्ट्रेट प्रथम श्रेणी ने आदेश पारित किया कि आवेदक किशोर नही है – आदेश को चुनौती – अभिनिर्धारित – अधिनियम की धारा 4(2) के अनुसार गठित बोर्ड में महानगर मजिस्ट्रेट या न्यायिक मजिस्ट्रेट प्रथम श्रेणी और दो सामाजिक कार्यकर्ताओं जिनमें से एक महिला होगी, होंगे, जो न्यायपीठ बनायेंगे और ऐसी न्यायपीठ को द.प्र.सं. द्वारा प्रदत्त शक्तियाँ होंगी – आदेश न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा पारित किया गया न कि बोर्ड द्वारा – आदेश अपास्त। (लाखन वि. म.प्र. राज्य) ...2116

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 49 – जाँच – विद्यालय प्रमाण पत्र प्रकट करता है कि आवेदक 18 वर्ष से अधिक उम्र का था – आवेदक ने प्रति–मामले में अभिसाक्ष्य में अपनी उम्र 19 वर्ष प्रकट की – ऑसीफिकेशन टेस्ट दर्शाता है कि आवेदक की उम्र 17 वर्ष 6 माह थी – अभिनिर्धारित – विद्यालयीन अभिलेख कारबार के नियमित अनुक्रम में रखा गया है – ऑसीफिकेशन टेस्ट मात्र रेडियोलॉजिस्ट की राय है न कि उम्र का निश्चायक सबूत – दो वर्ष का अंतर दोनों ओर दिया जा सकता है – आवेदक घटना की तारीख को किशोर नही था – पुनरीक्षण खारिज। (नरेन्द्र यादव उर्फ मंटू वि. म.प्र. राज्य) ...2450

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 52 व 53 – आवेदक के विरुद्ध सेशन न्यायालय के समक्ष दाण्डिक मामले लम्बित थे – यह अभिकथित किया गया कि आवेदक अपराध की तारीख को किशोर था – मामला किशोर न्याय

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offence - Matter referred to Juvenile Justice Board - After inquiry Board held that the age of applicant is more than 18 years - Order challenged before High Court - Held - No opportunity was given to the applicant to cross-examine medical evidence which was adduced and also no opportunity given to adduce further evidence to prove his date of birth - Orders set-aside with certain directions. [Lakhan v. State of M.P.] ...2116

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 52 & 53 - *JMFC after holding the inquiry passed the order that applicant is not juvenile - Order challenged before High Court by way of revision - Objection about maintainability - Held - Though appeal u/s 52 of the Act is maintainable - However, an aggrieved person can approach High Court direct as well by challenging the propriety of any order - Objection relating to maintainability of revision overruled.* [Lakhan v. State of M.P.] ...2116

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 19, Krishi Upaj Mandi (Payment of Market Fees) Rules, M.P. 1990, Rule 3 - *Petitioner purchased notified agriculture produce from other market area - On the basis of requisite permit required for dispatching and removing agriculture produce claimed exemption of market fees - Subsequently, permits were found forged - Levy of market fees on five times value of agriculture produce - Held - It is imperative for a trader seeking exemption to pay market fees to be sure that at first instance the agriculture produce had suffered market fees - Merely because the trader has been permitted to take the agriculture produce from market area in itself will not be a prove that market fees has been paid - Petitioner held liable to pay market fees - Petition dismissed.* [Shyam Trading Co., Itarsi v. State of M.P.] ...2219

Krishi Upaj Mandi (Payment of Market Fees) Rules, M.P. 1990, Rule 3 - See - *Krishi Upaj Mandi Adhiniyam, M.P., 1972, Section 19,* [Shyam Trading Co., Itarsi v. State of M.P.] ...2219

Labour Laws (Amendment) and Miscellaneous Provisions Act, M.P. 2002 (26 of 2003), Constitution, Articles 14 & 21 - ***Power to try offences under Labour Laws*** - *By amendment, power to try offences under labour laws was taken away from Labour Court and conferred on regular Courts - Held - Provisions of Act 2002 struck down being ultra-vires as it failed to achieve purpose - They are arbitrary and rather defeats the provisions of existing enactment - Petition allowed.* [Labour Bar Association, Satna v. State of M.P.] ...1207

Land Acquisition Act (1 of 1894), ***Rehabilitation package*** - *Parts of 2007 rehabilitation package and those parts of rehabilitation package prepared by respondent company that are most beneficial to persons whose land is acquired must be implemented - Company gave undertaking to provide employment to one of family based on their skill and eligibility.* [Ramdin v. State of M.P.] ...1994

बोर्ड को संदर्भित – जाँच करने के बाद बोर्ड ने अभिनिर्धारित किया कि आवेदक की आयु 18 वर्ष से अधिक है – आदेश को उच्च न्यायालय के समक्ष चुनौती – अभिनिर्धारित – आवेदक को जो चिकित्सीय साक्ष्य पेश किया गया था उसके प्रतिपरीक्षण का अवसर नही दिया और उसकी जन्मतिथि को सिद्ध करने के लिए भी कोई साक्ष्य पेश करने का अवसर नही दिया – आदेश कतिपय निदेशों के साथ अपास्त। (लाखन वि. म.प्र. राज्य) ...2116

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 52 व 53 – न्यायिक मजिस्ट्रेट प्रथम श्रेणी ने जाँच करने के बाद आदेश पारित किया कि आवेदक किशोर नही है – आदेश को उच्च न्यायालय के समक्ष पुनरीक्षण में चुनौती दी गई – पोषणीयता के बारे में आक्षेप – अभिनिर्धारित – यद्यपि अधिनियम की धारा 52 के अधीन अपील पोषणीय है – तथापि, एक व्यथित व्यक्ति किसी आदेश के औचित्य को चुनौती देते हुए सीधे उच्च न्यायालय की शरण में भी जा सकता है – पुनरीक्षण की पोषणीयता से सम्बन्धित आक्षेप नामंजूर। (लाखन वि. म.प्र. राज्य) ...2116

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 19, कृषि उपज मण्डी (मण्डी फीस का भुगतान) नियम, म.प्र. 1990, नियम 3 – याची ने अधिसूचित कृषि उपज अन्य मण्डी क्षेत्र से क्रय की – कृषि उपज को भेजने और हटाने के लिए आवश्यक अपेक्षित अनुज्ञापत्र के आधार पर मण्डी फीस की छूट का दावा किया – तत्पश्चात् अनुज्ञापत्र कूटरचित पाये गये – कृषि उपज के पाँच गुना मूल्य पर मण्डी फ़ीस का उद्ग्रहण – अभिनिर्धारित – मण्डी फीस का भुगतान करने से छूट चाहने वाले व्यापारी के लिए यह अनिवार्य है कि यह सुनिश्चित करे कि प्रथम अवसर पर कृषि उपज ने मण्डी फीस सहन कर ली थी – केवल इसलिए कि व्यापारी को मण्डी क्षेत्र से कृषि उपज ले जाने के लिए अनुज्ञात किया गया है, अपने आप में यह सबूत नही होगा कि मण्डी फीस का भुगतान कर दिया गया है – याची को मण्डी फीस अदा करने के लिए दायी ठहराया गया – याचिका खारिज। (श्याम ट्रेडिंग कं., इटारसी वि. म.प्र. राज्य) ...2219

कृषि उपज मण्डी (मण्डी फीस का भुगतान) नियम, म.प्र. 1990, नियम 3 – देखें – कृषि उपज मण्डी अधिनियम, म.प्र., 1972, धारा 19, (श्याम ट्रेडिंग कं., इटारसी वि. म.प्र. राज्य) ...2219

श्रमिक विधियाँ (संशोधन) और विविध उपबंध अधिनियम, म.प्र. 2002 (2003 का 26), संविधान, अनुच्छेद 14 व 21 – श्रमिक विधियों के अन्तर्गत अपराधों का विचारण करने की शक्ति – संशोधन द्वारा श्रमिक विधियों के अन्तर्गत अपराधों का विचारण करने की शक्ति श्रम न्यायालयों से ले ली गई और नियमित न्यायालयों को प्रदत्त कर दी गई – अभिनिर्धारित – अधिनियम 2002 के उपबंध अधिकारातीत होने से अभिखण्डित किये गये क्योंकि ये प्रयोजन पूरा करने में असफल रहे – वे मनमाने हैं और मौजूदा अधिनियमिती के उपबंधों को विफल करते हैं – याचिका मंजूर। (लेबर बार एसोशियेशन, सतना वि. म.प्र. राज्य) ...1207

भूमि अर्जन अधिनियम (1894 का 1), पुनर्वास पैकेज – वर्ष 2007 के पुनर्वास पैकेज का भाग और पुनर्वास पैकेज के वे भाग जो प्रत्यर्थी कम्पनी द्वारा तैयार किये गये जो उन व्यक्तियों के लिए अत्यंत लाभदायक हैं जिनकी भूमि अर्जित की गई है, लागू किये जाने चाहिए – कम्पनी ने परिवार के एक सदस्य को उनकी योग्यता और कौशल के आधार पर रोजगार देने का वचन दिया। (रामदीन वि. म.प्र. राज्य) ...1994

Land Acquisition Act (1 of 1894), Section 4 - *Mention of locality - Mentioning of the name of village in which the land is situated is sufficient indication of locality.* [Ramdin v. State of M.P.] ...1994

Land Acquisition Act (1 of 1894), Sections 4 & 6 - *Delay and laches - Notifications issued on 08.08.2006 and 06.08.2007 - Petitions filed in the year 2008 & 2009 - Petitioners were aware of the notifications - They had participated in the acquisition proceedings - Most of the compensation has been disbursed - Out of 3289 acres of acquired land, only 25 acres of land belong to petitioners - Rest of the owners have accepted the acquisition - Petition suffers from delay and latches - Petition dismissed.* [Ramdin v. State of M.P.] ...1994

Land Acquisition Act (1 of 1894), Section 6 - *Public purpose - Petitioners were aware of the fact that land is being acquired for the purposes of setting up Sasan Ultra Mega Power Project through respondent Company - Agreement has also been executed by Company which is also published - No prejudice caused to petitioners if notifications u/s 4 & 6 did not mention specifically that acquisition was being undertaken for a named Company but stated that it was for a public purpose of Electricity Generation and its residential colony.* [Ramdin v. State of M.P.] ...1994

Land Acquisition Act (1 of 1894), Sections 23(1A) & 34 - *Distinction - Held - Section 23(1A) directs payment of compensation from the date of notification upto the date of the award or of dispossession while on the other hand Section 34 directs for payment of interest on the amount of compensation from the date of dispossession till the amount of compensation is paid.* [State of M.P. v. Shobha Bai Singh] ...1603

Land Revenue Code, M.P. (20 of 1959), Sections 32 & 43 - *Inherent powers of Revenue Court - Powers can be exercised within Code itself and not beyond the Code - Revenue authority does not have the power to grant injunction - Petition allowed.* [Maya Lalchandani (Mrs.) v. Board of Revenue] ...2249

Law of Torts - *Compensation - Determination - Held - Under the tort, the Acts do not provide the principle on which damages are to be assessed - The English Act merely say that "damages may be awarded as are proportioned to the injury resulting from the death to the dependants respectively" - The Indian Act similarly says that "the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively."* [Chairman, M.P.S.E.B., Jabalpur v. Mulu @ Moolchandra] ...1415

Law of Torts - *Death by negligence - Deceased died due to electrocution - Appellants stated that a squirrel came in contact with wires resulting to a short circuit due which wire snapped from the pole and fell on*

भूमि अर्जन अधिनियम (1894 का 1), धारा 4 – परिक्षेत्र का उल्लेख – गाँव के नाम का उल्लेख करना जिसमें भूमि स्थित है परिक्षेत्र का पर्याप्त निर्देश/उपदर्शन है। (रामदीन वि. म.प्र. राज्य) ...1994

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4 व 6 – विलम्ब और गफलत – अधिसूचनाएँ तारीख 08.08.2006 व 06.08.2007 को जारी – याचिकाएँ वर्ष 2008 व 2009 में पेश – याची अधिसूचनाओं से अवगत थे – उन्होंने अर्जन कार्यवाहियों में हिस्सा लिया – अधिकांश प्रतिकर का भुगतान कर दिया गया – 3289 एकड़ अर्जित भूमि में से केवल 25 एकड़ भूमि याचियों से सम्बन्धित – शेष स्वामियों ने अर्जन स्वीकार कर लिया – याचिका विलम्ब और गफलत से ग्रस्त – याचिका खारिज। (रामदीन वि. म.प्र. राज्य) ...1994

भूमि अर्जन अधिनियम (1894 का 1), धारा 6 – लोक प्रयोजन – याची इस तथ्य से अवगत थे कि भूमि प्रत्यर्थी कम्पनी के द्वारा सासन अल्ट्रा पावर प्रोजेक्ट स्थापित करने के प्रयोजन के लिए अर्जित की जा रही है – कम्पनी द्वारा अनुबन्ध भी निष्पादित किया गया जो प्रकाशित भी किया गया – याचियों को कोई पूर्वाग्रह कारित नही हुआ यदि धारा 4 व 6 के अधीन अधिसूचनाओं में विनिर्दिष्ट रूप से यह उल्लिखित नही था कि अर्जन का दायित्व किसी नामित कम्पनी के लिए लिया जा रहा था बल्कि यह कथित किया कि यह विद्युत उत्पन्न करने के लोक प्रयोजन और उसकी आवासीय कॉलोनी के लिए था। (रामदीन वि. म.प्र. राज्य) ...1994

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 23(1ए) व 34 – अंतर – अभिनिर्धारित – धारा 23(1ए) अधिसूचना की तारीख से अधिनिर्णय या बेदखली की तारीख तक प्रतिकर के संदाय का निदेश देती है जबकि दूसरी ओर धारा 34 बेदखली की तारीख से प्रतिकर की राशि अदा करने की तारीख तक प्रतिकर की राशि पर ब्याज के संदाय का निदेश देती है। (म.प्र. राज्य वि. शोमा बाई सिंह) ...1603

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 32 व 43 – राजस्व न्यायालय की अन्तर्निहित शक्तियाँ – शक्तियों का प्रयोग स्वयं संहिता के अन्तर्गत ही किया जा सकता है न कि संहिता के परे – राजस्व प्राधिकारी को व्यादेश अनुदत्त करने की शक्ति नही है – याचिका मंजूर। (माया लालचंदानी (श्रीमति) वि. बोर्ड ऑफ रेवेन्यु) ...2249

अपकृत्य विधि – प्रतिकर – अवधारण – अभिनिर्धारित – अपकृत्य के अधीन अधिनियम सिद्धांत का उपबंध नही करते हैं जिस पर क्षतिपूर्ति निर्धारित की जानी है – अंग्रेजी अधिनियम केवल यह कहता है कि "क्षतिपूर्ति क्रमशः आश्रितों को मृत्यु के परिणामस्वरूप हुई क्षति के अनुपात में अधिनिर्णीत की जा सकती है" – इसी प्रकार भारतीय अधिनियम कहता है कि "न्यायालय ऐसी क्षतिपूर्ति दे सकेगा जितनी वह ऐसी मृत्यु से क्रमशः पक्षकारों को हुई हानि के अनुपाती समझे। (चेयरमेन, एम. पी.एस.ई.बी., जबलपुर वि. मुलु उर्फ मूलचंद्र) ...1415

अपकृत्य विधि – उपेक्षा से मृत्यु – मृतक की मृत्यु विद्युत करेंट से हुई – अपीलार्थी ने कथन किया कि एक गिलहरी तार के सम्पर्क में आयी जिसके परिणामस्वरूप शॉर्ट सर्किट हुआ जिसके कारण तार खम्बे से टूटकर जमीन पर गिर गया – अभिनिर्धारित – अपीलार्थी द्वारा लिया गया आधार लिखित कथन में उल्लिखित होना नही पाया गया और साक्षी ने कथन किया कि उसने

the ground - Held - Stand taken by the appellant does not find mention in the written statement and witness states that he made statement on the basis of his experience - Parties cannot deviate from the pleadings - Maintenance of the lines were also done 5 months prior to incident - Appellants did not adduce any satisfactory evidence that safety measures were taken. [Chairman, M.P.S.E.B., Jabalpur v. Mulu @ Moolchandra] ...1415

Legal Services Authorities Act (39 of 1987), Section 21 - *Void Award - Remedy - Any order obtained by parties by playing fraud is a nullity and it can be challenged in any collateral proceedings even at the stage of execution and appeal is maintainable u/s 96 of CPC against void order of Lok Adalat.* [Mahila Bhanwari Bai v. Kashmir Singh] ...1747

Limitation Act (36 of 1963), Section 3 - *Bar of limitation - Sale deed executed on 05.06.1972 - Suit challenging sale deed filed on 15.12.1986 i.e., after more than 14 years - Held - Case is barred by limitation.* [Bipta Bai (Smt.) v. Smt. Shipra Bai] ...1402

Limitation Act (36 of 1963), Sections 4 to 24 - **See** - *Income Tax Act, 1961, Section 260A,.* [Assistant Commissioner of Income Tax v. M/s. Shubhash Traders] ...2395

Limitation Act (36 of 1963), Section 27, Article 65 - *Sale deed - No suit for partition filed by purchaser within 12 years - Purchaser admittedly in possession as tenants - It cannot be said that plaintiff has perfected title by virtue of adverse possession - Sale deed could not be said to be void and ineffective.* [Hameeda Begum (Smt.) v. Smt. Champa Bai Jain] ...2328

Limitation Act (36 of 1963), Articles 19 & 28 - *By agreement, money was lent for one year and was to be repaid within one year with interest - Held - Article 28 will be applicable for suit for recovery - Cause of action to file suit accrued after expiry of one year of money lent - Suit could be filed within 3 years of cause of action - Judgment and decree dismissing suit as barred by limitation set-aside - Revision allowed.* [Omprakash v. Krishnalal] ...1794

Limitation Act (36 of 1963), Article 70 - *Suit for recovery of jewellery pledged - Jewellery pledged on 02.12.1987 - Notice to return of pledged jewellery received by appellant on 14.05.1998 - Suit filed on 26.06.1998 - Suit within limitation - Appeal dismissed.* [Seth Ramdayal Jat v. Laxmi Prasad] SC...1847

Lokayukt Tatha Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Sections 10, 11 & 12 - *Allotment of plot to petitioner trust by Indore Development Authority (IDA) following the due process - On complaint being made, without hearing petitioner Lokayukt directed IDA to cancel allotment - IDA treating the direction of Lokayukt binding cancelled allotment - Held - Inquiry conducted by the Lokayukt only by issuing show cause notice to Chairman of IDA, and after taking explanation and perusal of record of*

अपने अनुभव के आधार पर कथन किया – पक्षकार अभिवचनों से विचलित नही हो सकते हैं – विद्युत लाईन का सुधार भी घटना के 5 माह पूर्व किया गया – अपीलार्थियों ने कोई समाधानप्रद साक्ष्य पेश नही की कि सुरक्षा उपाय किये गये थे। (चेयरमेन, एम.पी.एस.ई.बी., जबलपुर वि. मुलु उर्फ मूलचंद्र) ...1415

विधिक सेवा प्राधिकरण अधिनियम (1987 का 39), धारा 21 – शून्य अधिनिर्णय – उपचार – पक्षकारों द्वारा कपट द्वारा अभिप्राप्त कोई आदेश अकृतता है और इसे किसी सांपार्श्विक कार्यवाही में और निष्पादन के प्रक्रम पर भी चुनौती दी जा सकती है और लोक अदालत के शून्य आदेश के विरुद्ध सि.प्र.सं. की धारा 96 के अधीन अपील पोषणीय है। (महिला भंवरी बाई वि. कश्मीर सिंह) ...1747

परिसीमा अधिनियम (1963 का 36), धारा 3 – परिसीमा का वर्जन – विक्रयपत्र दिनांक 05.06.1972 को सम्पादित – विक्रयपत्र को चुनौती देते हुए वाद 15.12.1986 को अर्थात् 14 वर्ष से अधिक समय बाद पेश – अभिनिर्धारित – मामला परिसीमा से वर्जित है। (बिपता बाई (श्रीमति) वि. श्रीमति शिप्रा बाई) ...1402

परिसीमा अधिनियम (1963 का 36), धाराएँ 4 से 24 – देखें – आयकर अधिनियम, 1961, धारा 260ए, (असिस्टेंट कमिश्नर ऑफ इनकम टैक्स वि मे. सुभाष ट्रेडर्स) ...2395

परिसीमा अधिनियम (1963 का 36), धारा 27, अनुच्छेद 65 – विक्रय विलेख – क्रेता द्वारा 12 वर्ष के भीतर विभाजन का कोई वाद पेश नही किया गया – क्रेता स्वीकृत रूप से किरायेदार के रूप में कब्जे में – यह नही कहा जा सकता कि वादी ने प्रतिकूल कब्जे द्वारा पूर्ण हक प्राप्त कर लिया है – विक्रय विलेख शून्य और निष्प्रभावी नही कहा जा सकता। (हमीदा बेगम (श्रीमति) वि श्रीमति चंपा बाई जैन) ...2328

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 19 व 28 – अनुबंध द्वारा रकम एक वर्ष के लिए उधार दी गई और ब्याज सहित एक वर्ष के भीतर वापस की जाना थी – अभिनिर्धारित – वसूली के वाद को अनुच्छेद 28 लागू होगा – वाद पेश करने का वादकारण रकम उधार देने से एक वर्ष व्यतीत हो जाने के बाद उत्पन्न हुआ – वाद वादकारण उत्पन्न होने के 3 वर्ष के भीतर पेश किया जा सकता था – परिसीमा से वर्जित होने के कारण वाद खारिज करने वाला निर्णय व डिक्री अपास्त – पुनरीक्षण मंजूर। (ओमप्रकाश वि. कृष्णलाल) ...1794

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 70 – गिरवी रखे जेवरातों की वापसी के लिए वाद – जेवरात 02.12.1987 को गिरवी रखे गये – गिरवी रखे जेवरातों की वापसी का सूचनापत्र अपीलार्थी द्वारा 14.05.1998 को प्राप्त किया गया – वाद 26.06.1998 को पेश किया – वाद परिसीमा के भीतर – अपील खारिज। (सेठ रामदयाल जाट वि. लक्ष्मी प्रसाद) SC...1847

लोकायुक्त तथा उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 11 व 12 – इन्दौर विकास प्राधिकरण द्वारा सम्यक प्रक्रिया का पालन कर याची ट्रस्ट को भूखण्ड का आबंटन – शिकायत किये जाने पर, याची को सुने बिना लोकायुक्त ने इन्दौर विकास प्राधिकरण को आबंटन रद्द करने का निदेश दिया – इन्दौर विकास प्राधिकरण ने लोकायुक्त का निदेश बाध्यकारी मानकर आबंटन रद्द किया – अभिनिर्धारित – लोकायुक्त द्वारा केवल इन्दौर विकास प्राधिकरण के अध्यक्ष को कारण बताओ सूचनापत्र जारी कर और स्पष्टीकरण लेने तथा इन्दौर विकास प्राधिकरण के अभिलेख का परिशीलन

IDA - Entire exercise has been done behind the back of petitioner - Although formal proof as required in Evidence Act and Cr.P.C. may not be required for proceeding before the Lokayukt, still adherence of principles of natural justice is required - Order of IDA cancelling allotment quashed - Lokayukt directed to look into complaint afresh after affording opportunity to all affected parties. [Guruji Sewa Nyas (Shri) v. State of M.P.] ...2315

Lok Parisar (Bedakhali) Adhiniyam, M.P. (46 of 1974), Sections 3 & 17 - *Delegation of powers by the State Government to Collectors u/s 17 of the Act - Notification issued on 05.02.1975 and published in Official Gazette on 16.04.1976 - Collector issued the order dated 26.08.1975 appointing S.D.O. as competent authority and it was published in Official Gazette on 19.09.1975 - Validity of appointment of competent authority challenged - Held - Actions taken by the Collector were in anticipation of the order of delegation - Order of Collector appointing competent authority become operative from 16.04.1976 - Therefore order passed by competent authority on 10.02.2000 is a valid order.* [Karan Singh v. State of M.P.] ...1235

Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 7 - See - *Service Law* [Arun Singh Bhadouriya v. State of M.P.] ...1939

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.2(d) - ***In service candidate - Discrimination*** - *Medical Officers / Assistant Surgeons working under Employees State Insurance Directorate of State of M.P. denied benefit of quota allocated to in-service candidates as they are not working in the department of Public Health and Family Welfare - Held - Nature of work and duties of two categories are same - Doctors of both categories need to be given opportunity to upgrade their qualifications and skills - Classification is discriminatory and violative of Article 14 - Writ Petition allowed.* [Shailu Mangal v. State of M.P.] ...1988

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.8(4) - ***Horizontal reservation*** - *Horizontal reservation of seats in favour of disabled persons is not ultra vires.* [Rakhi Mangal (Dr.) v. State of M.P.] ...1260

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.20(11), Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Section 39 - *Ultra vires - Rules of 2008 are ultra vires the Act of 1995 in as much as they do not earmark seats in Post Graduate Diploma and Degree Courses in the table annexed to the Rules. [Rakhi Mangal (Dr.) v. State of* M.P.] ...1260

Medical & Dental Post Graduate Entrance (Conduct of Examination and Admission) Rules, 2008, Rule 1.20(8) - ***Counselling, unavoidable***

करने के बाद जाँच की गई – सम्पूर्ण कवायद याची के पीछे की गई – यद्यपि साक्ष्य अधिनियम और द. प्र.सं. में अपेक्षित औपचारिक सबूत लोकायुक्त के समक्ष कार्यवाही के लिए अपेक्षित नही हो सकता तब भी नैसर्गिक न्याय के सिद्धांतों का अनुसरण आवश्यक है – इन्दौर विकास प्राधिकरण का आबंटन रद्द करने का आदेश अभिखण्डित – लोकायुक्त को सभी प्रभावित पक्षकारों को अवसर देने के बाद शिकायत की पुनः जाँच पड़ताल करने का निदेश दिया गया। (गुरूजी सेवा न्यास (श्री) वि. म.प्र. राज्य) ...2315

लोक परिसर (बेदखली) अधिनियम, म.प्र. (1974 का 46), धाराएँ 3 व 17 – राज्य सरकार द्वारा कलेक्टरों को अधिनियम की धारा 17 के अधीन शक्तियों का प्रत्यायोजन – अधिसूचना तारीख 05.02.1975 को जारी की गई एवं तारीख 16.04.1976 को शासकीय राजपत्र में प्रकाशित की गई – कलेक्टर ने एस.डी.ओ. को सक्षम प्राधिकारी के रूप में नियुक्त करते हुए आदेश तारीख 26.08.1975 जारी किया और इसे तारीख 19.09.1975 को शासकीय राजपत्र में प्रकाशित किया गया – सक्षम प्राधिकारी की नियुक्ति को चुनौती दी गई – अभिनिर्धारित – कलेक्टर द्वारा किये गये कार्य प्रत्यायोजन के आदेश की प्रत्याशा में थे – कलेक्टर का सक्षम प्राधिकारी की नियुक्ती का आदेश 16.04.1976 से प्रवृत्त हुआ – इसलिए सक्षम प्राधिकारी द्वारा तारीख 10.02.2000 को पारित आदेश विधिमान्य आदेश है। (करन सिंह वि. म.प्र. राज्य) ...1235

निम्नतर न्यायिक सेवा (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1994, नियम 7 – देखें – सेवा विधि (अरूण सिंह भदौरिया वि. म.प्र. राज्य) ...1939

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008, नियम 1.2(डी) – सेवाकालीन अभ्यर्थी – विभेद – म.प्र. राज्य के कर्मचारी राज्य बीमा संचालनालय के अधीन कार्यरत चिकित्सा अधिकारियों/सहायक सर्जनों ने सेवाकालीन अभ्यर्थियों को आबंटित कोटे के लाभ से इंकार किया क्योंकि वे लोक स्वास्थ्य एवं परिवार कल्याण विभाग में कार्यरत नही हैं – अभिनिर्धारित – दो श्रेणियों के कार्य और कर्तव्यों की प्रकृति समान है – दोनों श्रेणियों के चिकित्सकों को उनकी अर्हताओं और कौशल को उन्नत करने का अवसर देने की आवश्यकता है वर्गीकरण विभेदकारी और अनुच्छेद 14 के उल्लंघनकारी है – रिट याचिका मंजूर। (शैलू मंगल वि. म.प्र. राज्य) ...1988

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008, नियम 1.8(4) – क्षैतिज आरक्षण – निःशक्त व्यक्तियों के पक्ष में सीटों का क्षैतिज आरक्षण अधिकारातीत नही है। (राखी मंगल (डॉ.) वि. म.प्र. राज्य) ...1260

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008, नियम 1.20(11), निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995, धारा 39 – अधिकारातीत – 2008 के नियम 1995 के अधिनियम के उस सीमा तक अधिकारातीत हैं जिस तक वे नियमों के साथ संलग्न सारणी में स्नातकोत्तर डिप्लोमा या डिग्री पाठ्यक्रमों में सीटों को निश्चित नही करते हैं। (राखी मंगल (डॉ.) वि. म.प्र. राज्य) ...1260

चिकित्सा और दंत स्नातकोत्तर प्रवेश (परीक्षा का संचालन एवं प्रवेश) नियम, म.प्र. 2008, नियम 1.20(8) – काउंसिलिंग, अपरिहार्य परिस्थितियाँ – चिकित्सक के रूप

circumstances - Petitioner working as doctor appeared in PG Entrance Examination - Petitioner declared eligible but did not appear in counselling as he was not aware of his result - Held - Petitioner was either careless or callous to find out his result - Carelessness, callouseness or negligence cannot be equated with unavoidable circumstances - Petition dismissed. [Somnath (Dr.) v. State of M.P.] ...1306

Medical and Dental Post-Graduate Entrance Test Rules, 2005, Rule 17(5) - *Validity - Discrimination - Seat reserved for Assistant Professor, Govt. Dental College, Indore - Seat liable to be allotted to eligible non-service (open) candidate if eligible candidate is not available - Held - Classification has been made between a Government College and other Colleges - Private College cannot be equated with Government College - Reservation is not in absolute terms - It is, in a way, preference - As said Rule has been withdrawn on subsequent year, it means it was meant to meet out a particular special circumstance - Rule does not offend Article 14.* [Kaluram Khande (Dr.) v. State of M.P.] ...1296

Medical Dental Postgraduate Entrance Examination Rules, M.P. 2007, Rule 2(f) - *Rural area - Petitioner posted in Agar which has been notified as municipal area - Definition of rural area is clear and unambiguous - Agar cannot be construed as rural area u/R 2(f) of Rules as departure from categorical, unambiguous definition would cause violence to Rules - Petition dismissed.* [Shashank Saxena (Dr) v. The Principal Secretary, Public Health & Family Welfare Department Government of M.P] ...1651

Mineral Concession Rules, 1960, Rules 22, 26 & 31 - See - *Mines and Minerals (Development and Regulation) Act, 1957, Sections 10 & 24-A* [Jitendra Singh v. State of M.P.] ...1683

Mineral Concession Rules, 1960, Rules 72 & 73 - See - *Mines and Minerals (Development and Regulation) Act, 1957, Section 24-A,* [Jitendra Singh v. State of M.P.] ...1683

Mines and Minerals (Development and Regulation) Act (67 of 1957), Sections 10 & 24-A, Mineral Concession Rules, 1960, Rules 22, 26 & 31 - *Constitutional validity - Consent of owner of land or opportunity of hearing to owner of land - Opportunity of hearing to occupier of the surface of land before grant of reconnaissance permit, prospecting licence or mining lease must be held as impliedly excluded - Constitutional validity upheld.* [Jitendra Singh v. State of M.P.] ...1683

Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 24-A, Mineral Concession Rules, 1960, Rules 72 & 73 - *Determination of compensation - Opportunity of hearing to occupier of surface of land before determination of compensation has to be granted - Principles of Natural Justice are implicit in Section 24-A(2) & (3) of Act, 1957and Rules 72 & 73 of Rules, 1960.* [Jitendra Singh v. State of M.P.]...1683

में कार्यरत याची स्नातकोत्तर प्रवेश परीक्षा में बैठा – याची को अर्ह घोषित किया गया किन्तु काउंसिलिंग में इसलिए उपस्थित नही हुआ क्योंकि वह अपने परीक्षा परिणाम से अवगत नही था – अभिनिर्धारित – याची अपने परीक्षा परिणाम का पता लगाने में या तो लापरवाह या निश्चिंत था – लापरवाही, निश्चिंतता या उपेक्षा अपरिहार्य परिस्थितियों के तुल्य नही मानी जा सकती – याचिका खारिज। (सोमनाथ (डॉ.) वि. म.प्र. राज्य) ...1306

चिकित्सा और दंत स्नातकोत्तर प्रवेश परीक्षा नियम, 2005, नियम 17(5) – विधिमान्यता – विभेद – सहायक प्राध्यापक, शासकीय दंत महाविद्यालय, इन्दौर के लिए सीट आरक्षित – सीट पात्र सेवातिरिक्त (मुक्त) अभ्यर्थी को आबंटित किये जाने योग्य, यदि पात्र अभ्यर्थी उपलब्ध नही है – अभिनिर्धारित – वर्गीकरण शासकीय महाविद्यालय एवं अन्य महाविद्यालयों के मध्य किया गया है – प्रायवेट महाविद्यालय को शासकीय महाविद्यालय के बराबर नही माना जा सकता – आरक्षण आत्यंतिक निबंधनों में नही है – यह एक तरीके से अधिमान है – चूंकि उक्त नियम पश्चात्वर्ती वर्ष में वापस ले लिया गया, इसका अर्थ यह है कि यह विशिष्ट विशेष परिस्थिति का सामना करने के लिए अभिप्रेत था – नियम अनुच्छेद 14 का उल्लंघन नही करता है। (कालूराम खांडे (डॉ.) वि. म.प्र. राज्य) ...1296

चिकित्सा दंत स्नातकोत्तर प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 2(एफ) – ग्रामीण क्षेत्र – याची आगर में पदस्थ जो नगरपालिका क्षेत्र के रूप में अधिसूचित किया गया – ग्रामीण क्षेत्र की परिभाषा स्पष्ट और असंदिग्ध है – नियम 2(एफ) के अधीन आगर को ग्रामीण क्षेत्र के रूप में नही माना जा सकता क्योंकि सुस्पष्ट, असंदिग्ध परिभाषा से विचलन नियमों का उल्लंघन होगा – याचिका खारिज। (शशांक सक्सेना (डॉ) वि. द प्रिंसिपल सेक्रेटरी, पब्लिक हेल्थ एंड फेमली वेलफेयर डिपार्टमेन्ट, गव्हरमेंट ऑफ एम.पी.) ...1651

खनिज रियायत नियम, 1960, नियम 22, 26 व 31 – देखें – खान और खनिज (विकास और विनियमन) अधिनियम, 1957, धाराएँ 10 व 24–ए, (जितेन्द्र सिंह वि. म.प्र. राज्य) ...1683

खनिज रियायत नियम, 1960, नियम 72 व 73 – देखें – खान और खनिज (विकास और विनियमन) अधिनियम, 1957, धारा 24–ए, (जितेन्द्र सिंह वि. म.प्र. राज्य) ...1683

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धाराएँ 10 व 24–ए, खनिज रियायत नियम, 1960, नियम 22, 26 व 31 – संवैधानिक विधिमान्यता – भूमि के स्वामी की सम्मति या भूमि के स्वामी को सुनवाई का अवसर – वीक्षण अनुज्ञा, पूर्वेक्षण अनुज्ञप्ति या खनन पट्टा देने के पूर्व भूमि की सतह के अधिभोगी को सुनवाई का अवसर विवक्षित रूप से अपवर्जित के रूप में धारित किया जाना चाहिए – संवैधानिक विधिमान्यता की पुष्टि की गई। (जितेन्द्र सिंह वि. म.प्र. राज्य) ...1683

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 24–ए, खनिज रियायत नियम, 1960, नियम 72 व 73 – प्रतिकर का अवधारण – प्रतिकर के अवधारण के पूर्व भूमि की सतह के अधिभोगी को सुनवाई का अवसर दिया जाना चाहिए – अधिनियम 1957 की धारा 24–ए(2) व (3) और नियम, 1960 के नियम 72 व 73 में नैसर्गिक न्याय के सिद्धांत अंतर्निहित हैं। (जितेन्द्र सिंह वि. म.प्र. राज्य) ...1683

Motor Vehicles Act (59 of 1988), Sections 2(21), 3 & 10 - *Driving License - Light Motor Vehicle and Transport Vehicle - Driver of offending vehicle was having Light Motor Vehicle driving license and was driving goods vehicle - Transport vehicle may be light motor vehicle but a distinct licence is required for driving the same - Driver was not holding valid and effective licence at the time of accident - However, Insurance Company liable to deposit compensation amount with liberty to recover the same from the owner and driver.* [Oriental Insurance Co. Ltd. v. Angad Kol] SC...1561

Motor Vehicles Act (59 of 1988), Sections 2(28), 165 & 166 - *Motor accident - Claims tribunal dismissed the claim due to absence of registration number of offending motorcycle - Held - Absence of registration on the offending vehicle does not immunize offending vehicle or driver - Claimant was hit by motorcycle driven by respondent could be well established by oral evidence - Claim petition maintainable - Appeal allowed.* [Gajrani (Smt.) v. Manoj Jain] ...2044

Motor Vehicle Act (59 of 1988), Sections 165 & 166 - *Motor accident - Exchange of hot talks between driver and cleaner of truck during travelling - Driver was found dead in truck - Alleged murder by cleaner - Claim petition dismissed without recording evidence - Held - Death of driver was due to accidental murder which arose out of use of motor vehicle or murder simplicitor - This could have been examined only after recording evidence - Order set-aside - Case remanded to decide it afresh after recording evidence.* [Shamim Bano v. Rajesh Kumar] ...2041

Motor Vehicles Act (59 of 1988), Section 166, Rules of the Road Regulations, 1989, Rules 8 & 9 - *Compensation - Contributory negligence - Burden of proof - Precaution so as to avoid accident at the intersection of roads - Deceased was going on a motorcycle dashed by a truck at intersection of roads - Tribunal found 50% contributory negligence of deceased - Held - Respondents failed to examine any witness to disprove version of eye witness - Respondents failed to discharge burden to prove that deceased was himself negligent - No presumption of negligence of deceased can be drawn merely because accident occurred at the intersection of roads - Finding of tribunal that deceased was contributory negligent erroneous - Appeal allowed.* [Usha (Smt.) v. Rajesh] ...1390

Motor Vehicles Act (59 of 1988), Section 166 - *Second Schedule - Applicability - Second Schedule is applicable only in respect of claim petitions filed u/s 163A but the same provides for some guidelines while determining compensation u/s 166 - Deceased aged above 30 years but not exceeding 35 years - Multiplier of 17 in terms of Second Schedule is rightly applied by High Court - Appeal dismissed.* [Mohan Singh v. Kashi Bai] SC...1545

मोटर यान अधिनियम (1988 का 59), धाराएँ 2(21), 3 व 10 – ड्रायविंग लायसेंस – हल्के मोटर यान और परिवहन यान – उल्लंघनकारी वाहन के ड्रायवर के पास हल्के मोटर यान का लायसेंस था और माल वाहन चला रहा था – परिवहन वाहन हल्का मोटर यान हो सकता है किन्तु उसे चलाने के लिए एक सुभिन्न लायसेंस अपेक्षित है – दुर्घटना के समय ड्रायवर विधिमान्य और प्रभावी लायसेंस धारी नही था – तथापि, बीमा कम्पनी प्रतिकर की राशि स्वामी और ड्रायवर से वसूल करने की स्वतंत्रता के साथ उसे जमा करने के लिए दायी है। (ओरिएंटल इंशोरेन्स कं. लि. वि. अंगद कोल) SC...1561

मोटर यान अधिनियम (1988 का 59), धाराएँ 2(28), 165 व 166 – मोटर दुर्घटना – दावा अधिकरण ने दोषी मोटरसायकिल के रजिस्ट्रेशन नम्बर के अभाव के कारण दावा खारिज किया – अभिनिर्धारित – दोषी वाहन पर रजिस्ट्रेशन का अभाव दोषी वाहन या ड्रायवर को उन्मुक्त नही करता है – प्रत्यर्थी द्वारा चलाई जा रही मोटरसायकिल द्वारा दावेदार को टक्कर मारा जाना मौखिक साक्ष्य से सुस्थापित किया जा सकता था – दावा याचिका पोषणीय – अपील मंजूर। (गजरानी (श्रीमति) वि. मनोज जैन) ...2044

मोटर यान अधिनियम (1988 का 59), धाराएँ 165 व 166 – मोटर दुर्घटना – यात्रा के दौरान ट्रक के ड्रायवर और क्लीनर के बीच उग्र वार्तालाप का आदान–प्रदान – ड्रायवर ट्रक में मृत पाया गया – कथित रूप से हत्या क्लीनर द्वारा की गई – दावा याचिका साक्ष्य अभिलिखित किये बिना खारिज – अभिनिर्धारित – ड्रायवर की मृत्यु मोटर यान के प्रयोग के दौरान हुई दुर्घटनावश हत्या थी या केवल हत्या थी – इसकी जाँच केवल साक्ष्य अभिलिखित किये जाने के बाद ही की जा सकती थी – आदेश अपास्त – मामला साक्ष्य अभिलिखित करने के बाद नये सिरे से विनिश्चय करने के लिए प्रतिप्रेषित। (शमीम बानो वि. म.प्र. राज्य) ...2041

मोटर यान अधिनियम (1988 का 59), धारा 166, सड़क विनियमन के नियम, 1989, नियम 8 व 9 – प्रतिकर – योगदायी उपेक्षा – सबूत का भार – पूर्वावधानियाँ ताकि सड़कों के चौराहे पर दुर्घटनाओं से बचा जा सके – मृतक जो एक मोटरसायकल पर जा रहा था, को सड़कों के चौराहे पर ट्रक द्वारा टक्कर मारी गई – अधिकरण ने मृतक की 50 प्रतिशत योगदायी उपेक्षा पायी – अभिनिर्धारित – प्रत्यर्थी प्रत्यक्षदर्शी साक्षियों के बयानों को नासाबित करने के लिए किसी साक्षी की परीक्षा कराने में विफल रहे – प्रत्यर्थी यह साबित करने का भार उन्मोचित करने में विफल रहे कि मृतक स्वयं उपेक्षावान था – केवल इस कारण कि दुर्घटना सड़कों के चौराहे पर घटित हुई, मृतक की उपेक्षा की कोई उपधारणा नही की जा सकती – अधिकरण का निष्कर्ष कि मृतक योगदायी उपेक्षावान था, त्रुटिपूर्ण – अपील मंजूर। (उषा (श्रीमति) वि. राजेश) ...1390

मोटर यान अधिनियम (1988 का 59), धारा 166 – द्वितीय अनुसूची – लागू होना – द्वितीय अनुसूची केवल धारा 163ए के अन्तर्गत पेश क्लेम याचिकाओं के सम्बन्ध में लागू होती है किन्तु यह धारा 166 के अन्तर्गत प्रतिकर अवधारित करते समय गाईडलाइनों का उपबंध करती है – मृतक की उम्र 30 वर्ष के ऊपर किन्तु 35 वर्ष अधिक नही – उच्च न्यायालय द्वारा द्वितीय अनुसूची के निबंधनों के अनुसार 17 का गुणक उचित रूप से लागू किया गया – अपील खारिज। (मोहन सिंह वि. काशी बाई) SC...1545

Motor Vehicles Act (59 of 1988), Sections 166, 168 & 149 - *Liability of Insurance Company - Driver of tractor took the tractor for tilling agricultural field accompanied by deceased - Driver of tractor during course or the master's agent in the course of that agency negligently left the tractor with ignition key inserted in ignition lock - Deceased turn on the key and started the tractor - Tractor turned turtle resulting in death of deceased - 50% liability rightly fastened on driver, owner and insurance company - Appeal dismissed.* [New India Assurance Company Ltd. v. Lalita Devi]...2373

Motor Vehicles Act (59 of 1988), Section 173 - *Appeal amicably settled in Lok Adalat - Application for withdrawal of amount in cash - Rejection - Held - Applicant being an adult person in need of money awarded to him as compensation for injuries sustained by him - Appeal settled in Lok Adalat without imposing any condition about deposit of amount in fixed deposit - Tribunal should have allowed the application for withdrawal of amount instead of ordering to keep it in the fixed deposit - Order of tribunal set-aside - Revision allowed.* [Mangilal v. Haider Ali] ...*32

Municipal Corporation Act, M.P. (23 of 1956), Sections 66 & 220 - See - *Constitution, Article 21,* [Manoj Rajani v. State of M.P.] ...2210

Municipal Corporation Act, M.P. (23 of 1956), Sections 134 & 141 - *Recovery of Property Tax - Shops in possession of tenants - Corporation put lock to ensure recovery of Property Tax - Held - Recovery of Property Tax, if it is to be effected on an occupier who happens to be a tenant which can only be made by attachment of rent due in respect of the said property - Corporation cannot recover tax by putting lock over the property in occupation of a tenant.* [Saleem Mansoori v. Municipal Corporation] ...1935

Municipalities Act, M.P. (37 of 1961) (Amending Act No.17 of 1994 and 18 of 1994), Sections 36, 45, 47 & 49 - See - *Constitution, Article 243-U.* [Mangilal v. State of M.P.] ...1903

Municipalities Act, M.P. (37 of 1961), Section 5 - See - *Electricity Act, 2003, Sections 37 & 42* [Siyabai Thakur (Smt.) v. M.P. State Electricity Board]..1947

Municipalities Act, M.P. (37 of 1961), Section 41-A - *Removal of President or Chairman of a Committee - Opportunity of hearing - Petitioner removed from the post of President on the ground that he does not belong to OBC and yet got elected on the basis of temporary caste certificate - Petitioner withdrew the application for grant of permanent caste certificate - Temporary caste certificate expired as there was no permanent caste certificate - Held - Petitioner appeared before authority and presented his case - Onus to prove that he belonged to OBC was on petitioner - Petitioner has failed to discharge the onus - Any amount of reasonable opportunity will not mitigate the factor that he does not belong to OBC - Petition dismissed.* [Naveen Kumar Sood v. State of M.P.] ...2264

मोटर यान अधिनियम (1988 का 59), धाराएँ 166, 168 व 149 – बीमा कम्पनी का दायित्व – ट्रेक्टर का ड्रायवर मृतक के साथ खेत जोतने के लिए ट्रेक्टर ले गया – ट्रेक्टर के ड्रायवर ने उस दौरान या मालिक के अभिकर्ता ने उस अभिकरण के दौरान ट्रेक्टर को उपेक्षापूर्वक ज्वलन चाबी के साथ ज्वलन ताले में लगा हुआ छोड़ा – मृतक ने चाबी को घुमाया और ट्रेक्टर चालू किया – ट्रेक्टर उलट गया जिसके परिणामस्वरूप मृतक की मृत्यु हुई – ड्रायवर, मालिक और बीमा कम्पनी पर 50 प्रतिशत दायित्व उचित रूप से डाला गया – अपील खारिज। (न्यू इंडिया एश्योरेंस कम्पनी लि. वि. ललिता देवी) ...2373

मोटर यान अधिनियम (1988 का 59), धारा 173 – अपील लोक अदालत में आपसी समझौते से निपटाई गई – राशि नगद रूप से निकालने के लिए आवेदन – खारिज – अभिनिर्धारित – आवेदक एक वयस्क व्यक्ति होकर उसे आई क्षतियों के लिए प्रतिकर के रूप में दिलाई गई राशि की आवश्यकता थी – अपील राशि सावधि जमा में जमा करने के बारे में कोई शर्त अधिरोपित किये बिना लोक अदालत में निपटाई गई – अधिकरण को राशि सावधि जमा में रखने का आदेश देने के स्थान पर उसकी निकासी का आवेदन मंजूर करना चाहिए था – अधिकरण का आदेश अपास्त – पुनरीक्षण मंजूर। (मांगी लाल वि. हेदर अली) ---*32

नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 66 व 220 – देखें – संविधान, अनुच्छेद 21, (मनोज राजानी वि. म.प्र. राज्य) ...2210

नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 134 व 141 – सम्पत्ति कर की वसूली – दुकानें किरायेदारों के कब्जे में – निगम ने सम्पत्ति कर की वसूली सुनिश्चित करने के लिए ताला लगाया – अभिनिर्धारित – सम्पत्ति कर की वसूली, यदि यह अधिभोगी से की जानी है जो किरायेदार है जो केवल उस सम्पत्ति के सम्बन्ध में देय किराये की कुर्की द्वारा हो सकती है – निगम किरायेदार के अधिभोग की सम्पत्ति पर ताला लगाकर कर वसूल नही कर सकती। (सलीम मंसूरी वि. म्युनिसिपल कारपोरेशन) ...1935

नगरपालिका अधिनियम, म.प्र. (1961 का 37) (संशोधन अधिनियम 1994 का 17 और 1994 का 18), धाराएँ 36, 45, 47 व 49 – देखें – संविधान, अनुच्छेद 243–यू (मांगीलाल वि. म.प्र. राज्य) 1903

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5 – देखें – विद्युत अधिनियम, 2003, धाराएँ 37 व 42, (सियाबाई ठाकुर (श्रीमति) वि. एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड) ...1947

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41–ए – किसी समिति के अध्यक्ष या चेयरमेन का हटाया जाना – सुनवाई का अवसर – याची को अध्यक्ष के पद से इस आधार पर हटाया गया कि वह ओबीसी से सम्बद्ध नही है और अभी तक अस्थायी जाति प्रमाण पत्र के आधार पर चुना गया – याची ने स्थायी जाति प्रमाण पत्र प्रदान किये जाने का आवेदन वापस ले लिया – अस्थायी जाति प्रमाण पत्र समाप्त हो गया क्योंकि कोई स्थायी जाति प्रमाण पत्र नही था – अभिनिर्धारित – याची प्राधिकारी के समक्ष उपस्थित हुआ और अपना मामला पेश किया – यह साबित करने का भार कि वह ओबीसी से सम्बद्ध था याची पर था – याची भार उन्मोचित करने में असफल रहा – युक्तियुक्त अवसर की कोई मात्रा इस कारक में कमी नही करेगी कि वह ओबीसी से सम्बद्ध नही है – याचिका खारिज। (नवीन कुमार सूद वि. म.प्र. राज्य) ...2264

Municipalities Act, M.P. (37 of 1961), Section 47 - *Recalling of President - Second proposal for recalling rejected by Collector on the ground that earlier proposal had been moved - Held - There is difference between submission of proposal and initiation of process of recall - Earlier proposal was not put to the voting, as such, it could not be said that process was initiated - Collector committed gross illegality in rejecting the second proposal for recall - Order quashed - Petition allowed.* [Shyamlal Kol v. State of M.P.]...2215

Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Sections 3 & 4, Criminal Procedure Code, 1973, Section 125 - *Maintenance - Applicant failed to prove that divorce was effected between the parties - Husband under obligation to maintain his wife - Grant of Rs.700 per month to wife and Rs.200 to child reasonable - Revision dismissed.* [Irshad Khan v. Smt. Rani] ...*31

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) [As amended by Nagar Tatha Gram Nivesh (Sanshodhan) Adhiniyam, M.P. 2004], Section 50(4) Proviso - *Preparation of Town Development Schemes - Lapse of Scheme - Proviso to Sec. 50(4) provides that draft scheme shall be deemed to have lapsed if final publication of draft scheme is not notified within a year of publication of draft notification - Held - Objects and reasons for introducing proviso is to remove hardship caused to citizens and individual landowners - Proviso applies to pending actions also - The Scheme cannot be in perpetuity and it can lapse if action is not contemplated as provided in proviso - The doctrine of delay and laches gets attracted.* [Indore Development Authority v. M/s. Shriram Builders] FB...2136

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) [As amended by Nagar Tatha Gram Nivesh (Sanshodhan) Adhiniyam, M.P. 2004], Section 50(4) Proviso - *Preparation of Town Development Schemes - Lapse of Scheme - Scheme floated earlier stood lapsed in view of proviso to Sec.50(4) - Authority can proceed to take appropriate steps afresh to float a fresh scheme.* [Indore Development Authority v. M/s. Shriram Builders] FB...2136

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 27 - *Accused convicted u/s 20 of the Act for illegal possession of 100 gm Ganja - Appeal before High Court - Held - Accused is not bound by his pleadings - He can prove his defence even from the admission made by the prosecution witnesses - Detecting Officer admitted that accused explained the possession of contraband by saying that it was meant for his personal consumption - In the light of circumstances surrouding seizure of only 100 gm Ganja, favoured the defence that the contraband was not meant for sale or distribution - It ought to have been inferred that Ganja was possessed for personal consumption - Impugned conviction & consequent sentences set-aside - Instead, appellant is convicted u/s 27 of the Act and sentence to*

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 47 – अध्यक्ष का पुनः बुलाया जाना – पुनः बुलाये जाने का द्वितीय प्रस्ताव कलेक्टर द्वारा इस आधार पर अस्वी.त कर दिया गया कि पूर्ववर्ती प्रस्ताव प्रस्तावित किया गया था.– अभिनिर्धारित – प्रस्ताव के प्रस्तुतीकरण और पुनः बुलाये जाने की प्रक्रिया के प्रारम्भ में अंतर है – पूर्ववर्ती प्रस्ताव इस रूप में मतदान के लिए नही रखा गया, यह नही कहा जा सकता कि प्रक्रिया प्रारम्भ की गई – कलेक्टर ने पुनः बुलाये जाने का द्वितीय प्रस्ताव अस्वी.त करने में घोर अवैधता की – आदेश अभिखण्डित – याचिका मंजूर। (श्यामलाल कोल वि. म.प्र. राज्य) ...2215

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धाराएँ 3 व 4, दण्ड प्रक्रिया संहिता, 1973, धारा 125 – भरण–पोषण – आवेदक यह साबित करने में असफल रहा कि पक्षकारों के मध्य विवाह विच्छेद हो गया था – पति अपनी पत्नी का भरण–पोषण करने की बाध्यता के अधीन – पत्नी को 700 रुपये प्रतिमाह और बच्चे को 200 रुपये प्रतिमाह का अनुदान युक्तियुक्त – पुनरीक्षण खारिज। (इरसद खान वि. श्रीमति रानी) ---*31

नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23) {नगर तथा ग्राम निवेश (संशोधन) अधिनियम, म.प्र. 2004 द्वारा यथासंशोधित}, धारा 50(4) परन्तुक – नगर विकास योजना की निर्मिति – योजना रद्द होना – धारा 50(4) का परन्तुक उपबंधित करता है कि यदि योजना के प्रारूप का अंतिम प्रकाशन प्रारूप अधिसूचना के प्रकाशन के एक वर्ष के भीतर अधिसूचित नही किया जाता तो योजना का प्रारूप रद्द हुआ समझा जायेगा – अभिनिर्धारित – परन्तुक को पुरःस्थापित करने का उद्देश्य और कारण नागरिकों और व्यक्तिगत भूमिस्वामियों को कारित कष्ट का निवारण करना है – परन्तुक लम्बित कार्यों को भी लागू होता है – योजना शाश्वत नही हो सकती और यदि कार्य पर ध्यान नही दिया जाता तो यह रद्द हो सकती है, जैसा कि परन्तुक में उपबंधित किया गया है – विलम्ब और उपेक्षा का सिद्धांत आ.ष्ट कराया गया। (इंदौर डेप्व्हेलपमेंट अथॉरिटी वि. मे. श्रीराम बिल्डर्स) FB ...2136

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स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 27 – अभियुक्त को 100 ग्राम गांजे के अवैध कब्जे के लिए अधिनियम की धारा 20 के अधीन दोषसिद्ध किया गया – उच्च न्यायालय के समक्ष अपील – अभिनिर्धारित – अभियुक्त अपने अभिवचनों से विबंधित नही है – वह अभियोजन साक्षियों द्वारा की गई स्वीकृति से भी अपनी प्रतिरक्षा साबित कर सकता है – खोजी अधिकारी ने स्वीकार किया कि अभियुक्त ने विनिषिद्ध के कब्जे को यह कहते हुए स्पष्ट किया कि वह उसके निजी उपभोग के लिए अभिप्रेत था – केवल 100 ग्राम गांजे के अभिग्रहण के आसपास की परिस्थितियों के प्रकाश में प्रतिरक्षा का समर्थन किया कि विनिषिद्ध विक्रय या वितरण के लिए अभिप्रेत नही थी – यह निष्कर्ष निकाला जाना चाहिए था गांजा निजी उपभोग के लिए कब्जे में रखा गया – आक्षेपित दोषसिद्धि और पारिणामिक दण्डादेश अपास्त किये गये – इसके स्थान पर,

undergo R.I. for six months - Appeal partly allowed. [Khanchedilal v. State of M.P.] ...2093

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 50 - *100 gm Ganja recovered at public place from plastic bag being carried by accused - Section 50 does not apply to search of bag carried by person searched at public place.* [Khanchedilal v. State of M.P.] ...2093

Narcotics Drugs and Psychotropic Substances Rules, 1985, Rule 2(c) - *Application for re-examination of drugs sample at different laboratory - Rejection - Revision - Held - Rule 2(c) defines Chemical Examiner - Authorized Government Laboratory of Opium & Alkaloid Works has given report - Adequate provisions have been made under the Act - General provisions of Cr.P.C. for re-examination would not be necessary to call in aid - Application not maintainable - Application filed after five years of incident when sample may not be in proper condition - More so, allowing the application would lead to spate in litigation by similarly situated accused - Rejection of application proper - Revision dismissed.* [Muzafar Ali v. Central Narcotic Bureau, Neemuch] ...1502

National Security Act (65 of 1980), Section 3 - *Order of detention - Out of 17 grounds of detention, 9 incidents were old - Last incident mentioned in the ground of detention shows that appellants along with companions shot fire at deceased in busy market area in the afternoon - Held - Old incidents cannot constitute the basis of the order of detention but can at best suggest the criminal antecedents of appellant - Order of acquittal in such old cases have little relevance over order of detention of year 2008 - Act of shooting in market area and public place in afternoon seriously affecting the peace and tranquility of locality - Alleged act of appellant affected public order - Order of detention can not be said to be vitiated for non-application of mind - Appeal dismissed.* [Santosh Sharma v. State of M.P.] ...1597

National Security Act (65 of 1980), Section 3 - *Preventive Detention - Offences committed in the years 1987-2004 have no proximity to impugned order of detention passed in the year 2008.* [Sunil Tiwari v. State of M.P.] ...1679

National Security Act (65 of 1980), Section 3 - *Preventive Detention - Public Order - Order of detention - Three alleged offending acts of petitioner - Staged riotous demonstration by blocking the road - Kidnapped one person and brutally murdered him in the Jungle - Abused and threatened to kill the family of a person - No narration in the grounds of detention that the alleged acts committed by the petitioner created any terror in the locality - Incident cannot also be said to have affected even tempo of life of any locality - Incident has no nexus with public order - Order of detetion quashed.* [Sunil Tiwari v. State of M.P.] ...1679

अपीलार्थी को अधिनियम की धारा 27 के अन्तर्गत दोषसिद्ध किया गया और 6 माह का सश्रम कारावास भोगने का दण्डादेश दिया गया – अपील अंशतः मंजूर। (कन्छेदी लाल वि. म.प्र. राज्य) ...2093

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स्वापक औषधि और मनःप्रभावी पदार्थ नियम, 1985, नियम 2(सी) – औषधि के नमूने की भिन्न प्रयोगशाला में पुनः जाँच कराने के लिए आवेदन – नामंजूर – पुनरीक्षण – अभिनिर्धारित – नियम 2(सी) रासायनिक परीक्षक को परिभाषित करता है – प्राधिकृत शासकीय अफीम और एल्केलॉयड वर्क्स प्रयोगशाला ने रिपोर्ट दी – अधिनियम के अधीन पर्याप्त उपबंध किये गये हैं – पुनः जाँच के लिए द.प्र.सं. के सामान्य उपबंधों की सहायता लेना आवश्यक नही होगा – आवेदन पोषणीय नही – आवेदन घटना के पाँच वर्ष बाद पेश किया गया जब नमूना उचित अवस्था में नही हो सकता है – इसके अतिरिक्त आवेदन मंजूर करना समान परिस्थितियों वाले अभियुक्त द्वारा वादों में वृद्धि करेगा – आवेदन की खारिजी उचित – पुनरीक्षण खारिज। (मुजफर अली वि. सेंट्रल नारकोटिक ब्यूरो, नीमच) ...1502

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 – निरोध का आदेश – निरोध के 17 आधारों में से 9 घटनाएँ पुरानी थीं – निरोध के आधार में उल्लिखित अंतिम घटना दर्शाती है कि अपीलार्थियों ने साथियों के साथ व्यस्त बाजार क्षेत्र में दोपहर में गोली चलाई – अभिनिर्धारित – पुरानी घटनाएँ निरोध के आदेश का आधार गठित नही कर सकती किन्तु अपीलार्थी के आपराधिक पूर्ववृत्त के बारे में उत्तम सुझाव दे सकती हैं – ऐसे पुराने मामलों में दोषमुक्ति का आदेश वर्ष 2008 के निरोध के आदेश पर सूक्ष्म सुसंगति रखता है – बाजार क्षेत्र और लोक स्थल में दोपहर में गोली चलाने का कृत्य इलाके की शांति और अमन चैन को गम्भीर रूप से प्रभावित करने वाला कृत्य है – अपीलार्थी के कथित कृत्य ने लोक व्यवस्था को प्रभावित किया – निरोध का आदेश मस्तिष्क के अप्रयोग के निमित्त दूषित होना नही कहा जा सकता – अपील खारिज। (संतोष शर्मा वि. म.प्र. राज्य) ...1597

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 – निवारक निरोध – वर्ष 1987–2004 में किये गये अपराधों का वर्ष 2008 में पारित किये गये निरोध के आक्षेपित आदेश से कोई सामीप्य नही है। (सुनील तिवारी वि. म.प्र. राज्य) 1679

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 – निवारक निरोध – लोक व्यवस्था – निरोध का आदेश – याची के तीन कथित आपराधिक कृत्य – मार्ग अवरुद्ध करके नाटकीय बलवात्मक प्रदर्शन – एक व्यक्ति का व्यपहरण किया और जंगल में उसकी नृशंस हत्या की – गाली गलौज की और एक व्यक्ति के परिवार की हत्या करने की धमकी दी – निरोध के आधारों में कोई वर्णन नही कि याची द्वारा किये गये कथित कृत्य से इलाके में कोई आतंक फैला – घटना किसी इलाके की जीवन की गति को भी प्रभावित करने वाली भी नही कही जा सकती – घटना का लोक व्यवस्था से कोई सम्बन्ध नही – निरोध का आदेश अभिखण्डित। (सुनील तिवारी वि. म.प्र. राज्य) 1679

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Negotiable Instruments Act (26 of 1881), Section 138 - *Offence against the Company and its Directors - For launching a prosecution against the Directors, there must be a specific allegation in the complaint as to the part played by them in the transaction - The allegation should be clear and unambiguious as to how the Directors were incharge and responsible for the conduct of the business of the Company - Nowhere in the complaint it was mentioned who had signed the cheque and how all the Directors were incharge and responsible for the transaction - It is not sufficient to allege that all the Directors were involved in the affairs of the Company - Order of taking cognizance is quashed with the direction to pass a fresh order after hearing the applicants - Application allowed.* [Maya Spinners Ltd. v. Shri Shankar Cotton Corporation through Narendra Kumar] ...2123

Negotiable Instruments Act (26 of 1881), Sections 138 & 142 - *Dishonor of cheque - Complaint filed before expiry of 15 days of receipt of demand notice - Held - Cognizance of the offence is taken after mandatory period prescribed u/s 142 and accused failed to make payment - Complaint maintainable - Order dismissing complaint as not maintainable and premature set-aside - Revision allowed.* [Chouradiya Trading Company v. Sushil Kumar]...*29

Negotiable Instruments Act (26 of 1881), Sections 138 & 145 - *Complaint for dishonor of cheque - On the basis of evidence of complainant on affidavit, cognizance was taken by the Court - Petition for quashment of criminal case on the ground that statement of complainant was not recorded and against which liability cheque was issued not mentioned in complaint - Held - U/s 145 evidence of complainant can be recorded on affidavit and Court can on the application of the prosecution or the accused summon and examine any person giving evidence on affidavit - Since cheque was issued and the amount was unpaid despite demand notice, no illegality has been committed by the Court in taking cognizance against applicant on the ground that complainant failed to mention in the complaint that cheque was against which liability - Complaint can not be dismissed - Petition dismissed.* [Abhilasha Agnihotri v. Dilip] ...1836

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 3(a) & 5, Private Medical and Dental Postgraduate Course Entrance Examination Rules, M.P. 2009, Rule 10 - *Eligibility - Permanent registration by M.P. Medical / Dental Council - Rule 10(2)(iii) ultra vires to Ss. 5 & 3 of Act.* [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Section 3(d) - *Legislature in its wisdom thought that responsibility of conducting common entrance test should be entrusted to State Government or agency authorized by State*

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – कम्पनी और उसके निदेशकों के विरुद्ध अपराध – निदेशकों के विरुद्ध अभियोजन आरम्भ करने के लिए परिवाद में उनके द्वारा संव्यवहार में निभायी गयी भूमिका के सम्बन्ध में विनिर्दिष्ट अभिकथन होना चाहिए – अभिकथन असंदिग्ध और स्पष्ट होने चाहिए कि किस प्रकार निदेशक कम्पनी के कारोबार के संचालन के लिए प्रभारी और उत्तरदायी थे – परिवाद में यह कहीं भी उल्लिखित नही था कि चेक किसने हस्ताक्षरित किया और सभी निदेशक संव्यवहार के लिए कैसे प्रभारी और उत्तरदायी थे – यह अभिकथित करने के लिए यह पर्याप्त नही है कि सभी निदेशक कम्पनी के कामकाज में अन्तर्ग्रस्त थे – संज्ञान लेने का आदेश आवेदकों को सुनने के बाद नया आदेश पारित करने के निदेश के साथ अभिखंडित किया गया – आवेदन मंजूर। (माया स्पिनर्स लि. वि. श्री शंकर कॉटन कारपोरेशन द्वारा नरेन्द्र कुमार) ...2123

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 138 व 142 – चेक का अनादरण – परिवाद माँग के सूचनापत्र की प्राप्ति के 15 दिन की समाप्ति के पूर्व पेश किया गया – अभिनिर्धारित – अपराध का संज्ञान धारा 142 के अधीन विहित आज्ञापक कालावधि और अभियुक्त के संदाय करने में विफल रहने के बाद लिया गया – परिवाद पोषणीय – परिवाद को अपोषणीय और समयपूर्व मानकर खारिज करने का आदेश अपास्त – पुनरीक्षण मंजूर। (चौरडिया ट्रेडिंग कम्पनी वि. सुशील कुमार) ---*29

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 138 व 145 – चेक के अनादरण के लिए परिवाद – न्यायालय द्वारा शपथ पत्र पर परिवादी की साक्ष्य के आधार पर संज्ञान लिया गया – दाण्डिक मामले को अभिखण्डित किये जाने हेतु याचिका इस आधार पर कि परिवादी का कथन अभिलिखित नही किया गया और किस दायित्व के विरुद्ध चेक जारी किया गया था परिवाद में उल्लिखित नही किया गया – अभिनिर्धारित – धारा 145 के अधीन परिवादी की साक्ष्य शपथ पत्र पर अभिलिखित की जा सकती है और न्यायालय अभियोजन या अभियुक्त के आवेदन पर शपथ पत्र पर साक्ष्य देने वाले किसी व्यक्ति को समन कर सकता है और उसकी परीक्षा कर सकता है – चूंकि चेक जारी किये गये और सूचना पत्र के बावजूद राशि असंदत्त थी, न्यायालय द्वारा आवेदक के विरुद्ध संज्ञान लेने में इस आधार पर कोई अवैधानिकता नही की गई कि परिवादी परिवाद में यह उल्लिखित करने में असफल रहा कि चेक किस दायित्व के विरुद्ध था – परिवाद खारिज नही किया जा सकता – याचिका खारिज। (अभिलाषा अग्नीहोत्री वि. दिलीप) ...1836

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 3(ए) व 5, निजी चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2009, नियम 10 – पात्रता – म.प्र. चिकित्सा/दंत परिषद द्वारा स्थायी पंजीयन – नियम 10(2)(पपप) अधिनियम की धारा 5 व 3 के अधिकारातीत है। (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य) ...2269

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धारा 3(डी) – विधायिका ने अपने विवेक से विचार किया कि सामान्य प्रवेश परीक्षा संचालित करने की जिम्मेदारी राज्य सरकार या राज्य द्वारा प्राधिकृत एजेंसी को सौंपनी चाहिए – अभिनिर्धारित – व्यावसायिक पाठ्यक्रमों में प्रवेश के लिए सामान्य प्रवेश परीक्षा

Held - State Government's order authorizing VYAPAM to conduct common entrance test for admission to professional courses, not open to challenge. [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 3(d), 6 & 7, Constitution, Articles 19 & 226 - *Constitutional validity - Admission in private unaided professional educational institution on the basis of common entrance test to be conducted by State or by any agency authorized by State - Held - Provisions do not violate fundamental right under Article 19 or interfere with autonomy of private unaided professional educational institutions.* [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 4 & 9 - *Right to charge its own fee - Factors to be taken into consideration by committee while determining fee - Provisions of Ss. 4 & 9 do not violate this right.* [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Section 8, Admission Rules, 2008, Rule 4(2), Private Medical and Dental Postgraduate Course Entrance Examination Rules, M.P. 2009, Rules 7 & 15(9) - *There is no reverse discrimination against the unreserved category candidates - Object of sequence of counselling is to ensure that unreserved category candidates participate in counselling at the end not only for the unreserved seats but also for those reserved seats which could not be filled up on account of non-availability of reserved candidates.* [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Notary Rules, 1956, Rule 7 - *Recommendation of Competent Authority - Report sent by competent authority merely contains factual details and no recommendation has been made - Held - Competent authority is required to consider knowledge and experience of commercial law and nature of obligations and also to the extent of practice and record a conclusion - No findings as regards fitness of candidate for being appointed as Notary has been recorded - Report not in accordance with Rule 7 - Selection of respondents is in contravention of Rule 7 - Selection quashed - Matter remitted back.* [Ayaz Ahmad Khan v. State of M.P.] ...1623

Panchayats (Appeal and Revision) Rules, M.P. 1995, Rule 9 - *Power of appellate or revisional authority - Preponement of date of hearing - Revisional authority without notice to appellant preponed the date of hearing and allowed application for condonation of delay and decided revision - Held - Authority without extending an opportunity to the appellant decided the matter - Such order is not sustainable under law - Matter remanded for*

संचालित करने के लिए व्यापम को अधिकृत करने वाले राज्य सरकार के आदेश को चुनौती नही दी जा सकती। (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य)...2269

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 3(डी), 6 व 7, संविधान, अनुच्छेद 19 व 226 – संवैधानिक विधिमान्यता – राज्य द्वारा या राज्य द्वारा प्राधिकृत किसी एजेंसी द्वारा संचालित की जाने वाली सामान्य प्रवेश परीक्षा के आधार पर निजी गैर सहायता प्राप्त व्यावसायिक शैक्षणिक संस्थान में प्रवेश – अभिनिर्धारित – उपबंध अनुच्छेद 19 के अधीन मूलभूत अधिकार का अतिक्रमण या निजी गैर सहायता प्राप्त व्यावसायिक शैक्षणिक संस्थान की स्वायत्तता में हस्तक्षेप नही करते। (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य) ...2269

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 4 व 9 – अपना स्वयं का शुल्क प्रभारित करने का अधिकार – शुल्क का निर्धारण करते समय समिति द्वारा विचार में लिये जाने वाले कारक – धारा 4 व 9 के उपबंध इस अधिकार का अतिक्रमण नही करते। (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य) ...2269

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धारा 8, प्रवेश नियम, 2008, नियम 4(2), निजी चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2009, नियम 7 व 15(9) – अनारक्षित वर्ग के अभ्यर्थी के विरुद्ध कोई विपरीत विभेद नही – काउंसिलिंग के अनुक्रम का उद्देश्य यह सुनिश्चित करना है कि अनारक्षित वर्ग के अभ्यर्थी न केवल अनारक्षित सीटों के लिए बल्कि उन आरक्षित सीटों के लिए भी जो आरक्षित अभ्यर्थियों की अनुपलब्धता के कारण नही भरी जा सकीं, काउंसिलिंग में अंत में हिस्सा लें। (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य) ...2269

नोटरी नियम, 1956, नियम 7 – सक्षम प्राधिकारी की अनुशंसा – सक्षम प्राधिकारी द्वारा भेजी गयी रिपोर्ट में केवल तथ्यात्मक विवरण अन्तर्विष्ट और कोई अनुशंसा नही की गई – अभिनिर्धारित – सक्षम प्राधिकारी के लिए यह अपेक्षित है कि वाणिज्यिक विधि के ज्ञान और अनुभव तथा बाध्यताओं की प्र.ति एवं व्यवसाय के विस्तार को भी विचार में ले और निष्कर्ष अभिलिखित करे – नोटरी के रूप में नियुक्त किये जाने के लिए अभ्यर्थी की उपयुक्तता के सम्बन्ध में कोई निष्कर्ष अभिलिखित नही किये गये – रिपोर्ट नियम 7 के अनुसार नही – अभ्यर्थियों का चयन नियम 7 के उल्लंघन में है – चयन अभिखण्डित – मामला विप्रेषित। (अयाज अहमद खान वि. म.प्र. राज्य) ...1623

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 9 – अपीलीय या पुनरीक्षण प्राधिकारी की शक्ति – निर्धारित तारीख से पूर्व सुनवाई करना – पुनरीक्षण प्राधिकारी ने अपीलार्थी को सूचना दिये बिना निर्धारित तारीख से पूर्व सुनवाई की और विलम्ब माफी का आवेदन मंजूर किया और पुनरीक्षण का विनिश्चय किया – अभिनिर्धारित – प्राधिकारी ने अपीलार्थी को सुनवाई का अवसर दिये बिना मामले का विनिश्चय किया – ऐसा आदेश विधि के अन्तर्गत कायम रखे जाने

fresh adjudication - Appeal allowed. [Gram Panchayat, Banchhora v. State of M.P.] ...2164

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 38 - ***Filling up of vacancies*** - *Petitioner officiating as Sarpanch as a no confidence was passed against the Sarpanch - Election programme for filling of the post of Sarpanch declared - Action challenged on ground that once a Sarpanch is nominated to officiate in such casual vacancy, the same cannot be construed as vacancy as would call for fresh election - Held - Section 38(1)(a) provides for filling up of such casual vacancy as soon as may be vacant in accordance with the provisions of the Act and the Rules made there under - Temporary filling up of the post of a Sarpanch u/s 38(1)(b) does not create a right in favour of such Officiating Sarpanch to claim that no election can be held u/s 38(1)(a) till the entire term expires.* [Phoolabai v. State of M.P.] ...1293

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 40 - ***Removal of Sarpanch*** - *Petitioner's application to cross-examine the Enquiry Officer was allowed but Enquiry Officer did not appear and petitioner's right to cross-examine was closed - Held - Prescribed authority heavily relied upon the findings of Enquiry Officer - Not affording of an opportunity to cross-examine the Enquiry Officer resulted in miscarriage of justice and denial of opportunity of hearing - Order of removal quashed - Petition allowed.* [Phool Bai v. State of M.P.] ...1631

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P., 1993 (1 of 1994), Section 69(1) - See - *Service Law* [Lallu Kol v. State of M.P.] ...1607

Panchayat (Resignation by Office Bearer) Rules, M.P. 1995, Rules 3 & 4 - See - *Service Law* [Lallu Kol v. State of M.P.] ...1607

Panchayat Samvida Shala Shikshak (Recruitment and Conditions of Contract) Rules, M.P. 2005, Rules 10, 12, 12(a) & 12(h) - See - *Service Law* [Arun Singh Bhadouriya v. State of M.P.] ...1939

Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 20 - See - *Service Law* [Bharat Bhusan Sharma v. State of M.P.] ...1204

Penal Code (45 of 1860), Section 34 - ***Common intention*** - *Section is only a rule of evidence and does not create a substantive offence - The distinctive feature is element of participation in action.* [Daya Shankar v. State of M.P.] SC..1197

Penal Code (45 of 1860), Section 34 - ***Common Intention*** - *Section 34 is only a rule of evidence and does not create a substantive offence - Distinct feature is the element of participation in action - Direct proof of intention is seldom available and such intention can only be inferred from the circumstances appearing from the proved facts and circumstances of the case.* [Komal v. State of M.P.] SC...1557

योग्य नही – मामला नये सिरे से न्यायनिर्णयन के लिए प्रतिप्रेषित – अपील मंजूर। (ग्राम पंचायत, बॅछोरा वि. म.प्र. राज्य) ...2164

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 38 – पदों को भरा जाना – याची सरपंच के रूप में स्थानापन्न रूप से कार्यरत क्योंकि सरपंच के विरुद्ध अविश्वास प्रस्ताव पारित किया गया – सरपंच का पद भरने के लिए निर्वाचन कार्यक्रम घोषित किया गया – त्य को इस आधार पर चुनौती दी गई कि जब एक बार ऐसी आकस्मिक रिक्ति में सरपंच को स्थानापन्न रूप से कार्य करने के लिए नामित कर दिया जाता है तो इसे पद की रिक्ति के रूप में नही माना जाएगा और उसकी पूर्ति के लिए नये चुनाव कराने की आवश्यकता नही रहेगी – अभिनिर्धारित – धारा 38(1)(ए) ऐसी आकस्मिक रिक्तियों की पूर्ति के लिए उपबंध करती है कि जैसे ही रिक्तियाँ हों अधिनियम और उसके अधीन बनाये गये नियमों के अनुसार उनकी पूर्ति की जाए – धारा 38(1)(बी) के अधीन अस्थायी रूप से सरपंच का पद भरा जाना यह दावा करने के लिए कि पूरी अवधि व्यतीत हो जाने तक धारा 38(1)(ए) के अधीन कोई चुनाव नही हो सकता, ऐसे स्थानापन्न सरपंच के हित में कोई अधिकार सृष्ट नही करता है। (फूलाबाई वि. म.प्र. राज्य) ...1293

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 40 – सरपंच का हटाया जाना – जाँच अधिकारी की प्रतिपरीक्षा करने का याची का आवेदन मंजूर किया गया किन्तु जाँच अधिकारी उपस्थित नही हुआ और याची का प्रतिपरीक्षा करने का अधिकार समाप्त कर दिया गया – अभिनिर्धारित – विहित प्राधिकारी ने जाँच अधिकारी के निष्कर्षों पर बहुत अधिक विश्वास किया – जाँच अधिकारी की प्रतिपरीक्षा करने का अवसर न दिये जाने के परिणामस्वरूप न्याय की विफलता और सुनवाई के अवसर की इंकारी हुई – हटाये जाने का आदेश अभिखण्डित – याचिका मंजूर। (फूल बाई वि. म.प्र. राज्य) ...1631

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69(1) – देखें – सेवा विधि (लल्लू कोल वि. म.प्र. राज्य) ...1607

पंचायत (पदाधिकारी द्वारा त्यागपत्र) नियम, म.प्र. 1995, नियम 3 व 4 – देखें – सेवा विधि (लल्लू कोल वि. म.प्र. राज्य) ...1607

पंचायत संविदा शाला शिक्षक (भर्ती तथा संविदा की शर्तें) नियम, म.प्र. 2005, नियम 10, 12, 12(ए) व 12(एच) – देखें – सेवा विधि (अरूण सिंह भदौरिया वि. म.प्र. राज्य) ...1939

पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 20 – देखें – सेवा विधि (भारत भूषण शर्मा वि. म.प्र. राज्य) ...1204

दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – धारा केवल साक्ष्य का नियम है और कोई वास्तविक अपराध सृष्ट नही करती – विशिष्ट लक्षण कार्य में हिस्सेदारी का तत्व है। (दया शंकर वि. म.प्र. राज्य) SC...1197

दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – धारा 34 केवल साक्ष्य का नियम है और कोई सारवान अपराध सृष्ट नही करती – सुस्पष्ट विशेषता कार्य में भाग लेने का तत्व है – आशय का प्रत्यक्ष सबूत यदा–कदा ही उपलब्ध होता है और ऐसे आशय का अनुमान केवल मामले के साबित तथ्यों और परिस्थितियों से प्रकट होने वाली परिस्थितियों से निकाला जा सकता है। (कोमल वि. म.प्र. राज्य) SC...1557

Penal Code (45 of 1860), Sections 34, 302 - *Murder and common intention - No overt act attributed to appellant - Mere fact that he was in company of accused who were armed would not sufficient to attract Section 34 - Appellant neither armed nor having any animosity with deceased - Appellant acquitted - Appeal allowed.* [Daya Shankar v. State of M.P.]SC... 1197

Penal Code (45 of 1860), Sections 68 & 69 - See - *Criminal Procedure Code, 1973, Sections 362 & 482* [Prahlad Singh v. State of M.P.] ...1537

Penal Code (45 of 1860), Section 97 - ***Right of private defence of the body and of property - Injury to the accused*** - *Held - Mere fact that some of the accused persons had sustained simple injuries would not ipso facto mean that they acted in exercise of right of private defense - It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved.* [Shyam Singh v. State of M.P.]...2415

Penal Code (45 of 1860), Section 161, Prevention of Corruption Act, 1947, Section 5(1)(d) r/w Section 5(2) - *Accused was not having any motive to make any demand of bribe - Offence not made out.* [Hifazatullah @ Nasirullah v. State of M.P.] ...1755

Penal Code (45 of 1860), Section 194 - *Giving or fabricating false evidence with intent to procure conviction of capital offence - Appellant, a Sub-Inspector fabricated false evidence by surreptitiously inserting timings in various documents prepared during investigation - Appellant admitted in cross-examination that timing was mentioned later on - P.W. 2 also deposed that he had seen appellant making corrections in original documents during the pendency of trial - Held - Purpose was to get the accused persons convicted - Accusations found proved by both the Courts - Appeal dismissed.* [Suresh Chandra Sharma v. State of M.P.] SC...2133

Penal Code (45 of 1860), Sections 294, 323 & 34 - See - *Evidence Act, 1872, Section 3* [Indu v. State of M.P.] ...*34

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - ***Dying declaration*** - *Dying declaration can form the sole basis for conviction, if it is found to be true and voluntary.* [Dayaram v. State of M.P.] ...1422

Penal Code (45 of 1860), Section 302 - ***Last seen together*** - *PW-7 stated that he had seen appellants along with one boy - He has not stated that he was able to identify the boy - Dead body of boy was not got identified by this witness - Statement of witness not sufficient to establish circumstance of last seen together.* [Nasir v. State of M.P.] ...2078

Penal Code (45 of 1860), Section 302 - *Murder - Homicidal death - Held - Until the prosecution proves that a person dies of a homicidal death,*

दण्ड संहिता (1860 का 45), धाराएँ 34, 302 – हत्या और सामान्य आशय – अपीलार्थी पर कोई प्रत्यक्ष कार्य उपरोपित नही – केवल तथ्य कि वह अभियुक्त के साथ था जो सशस्त्र थे, धारा 34 को आ.ष्ट करने के लिए पर्याप्त नही होगा – अपीलार्थी न तो सशस्त्र था और न मृतक से कोई शत्रुता रखता था – अपीलार्थी दोषमुक्त – अपील मंजूर। (दया शंकर वि. म.प्र. राज्य)SC...1197

दण्ड संहिता (1860 का 45), धाराएँ 68 व 69 – देखें – दण्ड प्रक्रिया संहिता, 1973, धाराएँ 362 व 482 (प्रहलाद सिंह वि. म.प्र. राज्य) ...1537

दण्ड संहिता (1986 का 45), धारा 97 – शरीर और सम्पत्ति की प्राइवेट प्रतिरक्षा का अधिकार – अभियुक्त को क्षति – अभिनिर्धारित – केवल तथ्य कि अभियुक्तों में से कुछ को साधारण क्षति आयी, का स्वयमेव ही यह अर्थ नही होगा कि उन्होंने प्राइवेट प्रतिरक्षा के अधिकार के प्रयोग में कार्य किया – विधि की .ष्टि में या अपरिवर्तनीय नियम के रूप में यह अभिनिर्धारित नही किया जा सकता कि जब कभी अभियुक्त को उसी घटना में कोई क्षति आती है तो अभियोजन क्षति का स्पष्टीकरण देने के दायित्वाधीन है और अभियोजन के ऐसा करने में असफल रहने पर अभियोजन के मामले पर विश्वास नही किया जाना चाहिए। (श्याम सिंह वि. म.प्र. राज्य) ...2415

दण्ड संहिता (1860 का 45), धारा 161, भ्रष्टाचार निवारण अधिनियम, 1947, धारा 5(1)(डी) सहपठित धारा 5(2) – अभियुक्त का रिश्वत की कोई माँग करने का कोई हेतु नही था – अपराध नही बनता। (हिफाजतउल्हा उर्फ नसीरूल्हा वि. म.प्र. राज्य) ...1755

दण्ड संहिता (1860 का 45), धारा 194 – मृत्यु से दण्डनीय अपराध की दोषसिद्धि उपाप्त करने के आशय से मिथ्या साक्ष्य देना या गढ़ना – अपीलार्थी उपनिरीक्षक ने अन्वेषण के दौरान तैयार किये गये विभिन्न दस्तावेजों में गुप्त रूप से समय अंकित कर मिथ्या साक्ष्य गढ़ी – अपीलार्थी ने प्रतिपरीक्षण में स्वीकार किया कि समय बाद में उल्लिखित किया गया – अ.सा. 2 ने भी अभिसाक्ष्य दिया कि उसने विचारण के दौरान अपीलार्थी को मूल दस्तावेजों में सुधार करते हुए देखा था – अभिनिर्धारित – प्रयोजन अभियुक्त व्यक्तियों को दोषसिद्ध करवाना था – दोनों न्यायालयों द्वारा अभियोग साबित पाये गये – अपील खारिज। (सुरेश चंद्र शर्मा वि. म.प्र. राज्य) SC...2133

दण्ड संहिता (1860 का 45), धाराएँ 294, 323 व 34 – देखें – साक्ष्य अधिनियम, 1872, धारा 3 (इन्दू वि. म.प्र. राज्य) ---*34

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 32 – मृत्युकालिक कथन – मृत्युकालिक कथन दोषसिद्धि का एकमात्र आधार बन सकता है यदि यह सत्य और स्वेच्छया होना पाया जाए। (दयाराम वि. म.प्र. राज्य) ...1422

दण्ड संहिता (1860 का 45), धारा 302 – अंतिमतः साथ–साथ देखा गया – अ.सा.–7 ने कथन किया कि उसने अपीलार्थियों को एक लड़के के साथ देखा था – उसने यह कथन नही किया कि उसने लड़के को पहचाना था – इस साक्षी द्वारा लड़के के शव की शिनाख्त नही करवाई गई – साक्षी का कथन अंतिमतः साथ–साथ देखे जाने की परिस्थिति को साबित करने के लिए पर्याप्त नही। (नासिर वि. म.प्र. राज्य) ...2078

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मानव वध संबंधी मृत्यु – अभिनिर्धारित – जब तक अभियोजन यह साबित नही कर देता कि व्यक्ति की मृत्यु मानव वध संबंधी मृत्यु से हुई, धारा 302 के अधीन कोई अपराध नही बनता, किन्तु केवल यह, अभियुक्त की दोषमुक्ति का

an offence u/s 302 cannot be made out, but that alone cannot be a ground for acquittal of the accused and High Court will have to consider other aspects of the matter. [Babloo v. State of M.P.] ...1780

Penal Code (45 of 1860), Section 302 - *Murder - Nature of death -* *Prosecution had to prove that death was homicidal in nature - Doctor found the death as accidental - Trial Court relied upon one passage from Modi's Medical Jurisprudence - Said passage was not put to Doctor to explain the same - Said passage cannot be relied upon - For conviction u/s 302, prosecution is required to prove that death was homicidal - Appeal allowed.* [Nasir v. State of M.P.] ...2078

Penal Code (45 of 1860), Section 302 - See - *Criminal Procedure Code, 1973 (2 of 1974), Section 354* [In Reference v. Sheikh Arif] ...1807

Penal Code (45 of 1860), Sections 302/34, 342 - *Murder or Wrongful confinement* - *Appellant No.2 caught hold of deceased and appellant No.1 caused knife injuries - Appellant No.1 did not utter a single word before dealing knife blows - He also did not exhorted to appellant No.2 to catch hold the deceased - Held - It can be held that appellant No.2 was not having knowledge that suddenly appellant No.1 would cause knife blows - No circumstance to hold that appellant No.2 was sharing common intention - He is guilty of wrongfully confining the deceased - Acquitted u/s 302/34 and convicted u/s 342 of IPC.* [Basantlal v. State of M.P.] ...1431

Penal Code (45 of 1860), Sections 302, 304 Part I - *Culpable homicide not amounting to murder -* *Incident occurred on the spur of moment in sudden quarrel in the heat of passion without any premeditation - Held - Sentence u/s 302 of IPC converted to that of 304 Part I of IPC.* [Shyam Singh v. State of M.P.] ...2415

Penal Code (45 of 1860), Sections 302, 304 Part II - *Murder or culpable homicide not amounting to murder -* *Accused travelling in a bus and deceased was driver of bus - Accused insisted that he will pay the concessional fare - Deceased on hearing altercation reached there and asked accused to pay full fare - Accused took out a knife and assaulted the deceased - Held - Accused in impulse inflicted a blow of knife on his chest - Intention for the offence cannot be attributed to accused - Accused guilty under Section 304 Part II as he had knowledge that he was likely to cause injury which likely to cause death - Accused sentenced to 5 years rigorous imprisonment - Appeal partly allowed.* [Ashok Mehra v. State of M.P.] ...1789

Penal Code (45 of 1860), Sections 302, 323, Evidence Act, 1872, Section 32 - *Dying declaration -* *In FIR and report of doctor, no statement was given by the deceased in regard to cause of his death or as to any of the circumstances which resulted in his death - Statement not admissible as dying declaration - Conviction and sentence u/s 302 IPC set-aside and u/s 323, 324 maintained - Appeal partly allowed.* [Aslam v. State of M.P.] ...1764

आधार नही हो सकता और उच्च न्यायालय को मामले के अन्य पहलूओं पर विचार करना होगा। (बबलू वि. म.प्र. राज्य) ...1780

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृत्यु की प्रकृति – अभियोजन को यह साबित करना था कि मृत्यु मानव वध की प्रकृति की थी – चिकित्सक ने मृत्यु दुर्घटनावश होना पाया – विचारण न्यायालय ने मोदी के मेडीकल ज्युरिसप्रूडेंस के एक पैसेज पर विश्वास किया – उक्त पैसेज चिकित्सक के समक्ष उसे स्पष्ट करने के लिए नही रखा गया – ऐसे पैसेज पर विश्वास नही किया जा सकता – धारा 302 के अन्तर्गत दोषसिद्धि के लिए अभियोजन को यह साबित करना आवश्यक है कि मृत्यु मानव वध थी – अपील मंजूर। (नासिर वि. म.प्र. राज्य) ...2078

दण्ड संहिता, (1860 का 45), धारा 302 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 354 (इन रेफरेन्स वि. शेख आरिफ) ...1807

दण्ड संहिता (1860 का 45), धाराएँ 302/34, 342 – हत्या या सदोष परिरोध – अपीलार्थी क्रमांक 2 ने मृतक को पकड़ा और अपीलार्थी क्रमांक 1 ने चाकू से क्षतियाँ कारित कीं – अपीलार्थी क्रमांक 1 ने चाकू के प्रहार करने के पूर्व एक भी शब्द नही कहा – उसने मृतक को पकड़ने के लिए अपीलार्थी क्रमांक 2 को प्रेरित भी नही किया – अभिनिर्धारित – यह अभिनिर्धारित किया जा सकता है कि अपीलार्थी क्रमांक 2 को यह ज्ञान नही था कि अपीलार्थी क्रमांक 1 अचानक चाकू के प्रहार कारित करेगा – यह अभिनिर्धारित करने के लिए कोई परिस्थिति नही कि अपीलार्थी क्रमांक 2 सामान्य आशय में भागीदार था – वह मृतक का सदोष परिरोध करने का दोषी है – धारा 302/34 के अधीन दोषमुक्त और भा.द.सं. की धारा 342 के अधीन दोषसिद्ध। (बसंतलाल वि. म.प्र. राज्य) ...1431

दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – घटना बिना किसी पूर्वचिन्तन के क्षण की प्रेरणा पर अचानक झगड़े में आवेश की तीव्रता में घटित हुई – अभिनिर्धारित – भा.द.सं. की धारा 302 का दण्डादेश भा.द.सं. की धारा 304 भाग I में परिवर्तित किया गया। (श्याम सिंह वि. म.प्र. राज्य) ...2415

दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग II – हत्या या हत्या की कोटि में न आने वाला सदोष मानव वध – अभियुक्त एक बस में यात्रा कर रहा था और मृतक उस बस का ड्रायवर था – अभियुक्त ने जोर दिया कि वह रियायती किराया अदा करेगा – मृतक कहा–सुनी सुनकर वहाँ पहुंचा और अभियुक्त से पूरा किराया अदा करने को कहा – अभियुक्त ने एक चाकू बाहर निकाला और मृतक पर हमला किया – अभिनिर्धारित – अभियुक्त ने आवेग में उसकी छाती पर चाकू का प्रहार किया – अपराध का आशय अभियुक्त पर उपरोपित नही किया जा सकता – अभियुक्त धारा 304 भाग II के अधीन दोषी क्योंकि उसे ज्ञान था कि वह ऐसी क्षति कारित करने वाला था जिससे मृत्यु कारित होना संभाव्य है – अभियुक्त को 5 वर्ष के सश्रम कारावास का दण्डादेश दिया गया – अपील अंशतः मंजूर। (अशोक मेहरा वि. म.प्र. राज्य) ...1789

दण्ड संहिता (1860 का 45), धाराएँ 302, 323, साक्ष्य अधिनियम, 1872, धारा 32 – मृत्युकालिक कथन – एफ.आई.आर. और चिकित्सक की रिपोर्ट में मृतक द्वारा अपनी मृत्यु के सम्बन्ध में या ऐसी परिस्थितियों के सम्बन्ध में जिसके परिणामस्वरूप उसकी मृत्यु हुई, कोई कथन नही दिया – कथन मृत्युकालिक कथन के रूप में ग्राह्य नही – भा.द.सं. की धारा 302 के अधीन दोषसिद्धि और दण्डादेश अपास्त किया गया और धारा 323, 324 के अधीन कायम रखा गया – अपील अंशतः मंजूर। (असलम वि. म.प्र. राज्य) ...1764

August-09 (First)

Penal Code (45 of 1860), Sections 302, 394 & 460 - *Appellants alleged to have committed loot and murder - FIR lodged by eye witness who identified four accused in identification parade held after 11 months of incident - Looted material seized from all four accused - Held - Eye witness admitted that she has not seen fourth accused at the time of incident but identified him in identification parade on the basis of his conduct - In absence of reliable test identification parade, conviction of fourth accused converted to S. 411 of IPC - Appeal partly allowed.* [Shakir v. State of M.P.] ...2409

Penal Code (45 of 1860), Section 304A - *Causing death by negligence - Non-applicant No.1 put mask at the face of patient attached with cylinder containing no oxygen - Looking to the condition of patient, doctor checked and found cylinder to be empty - After some time patient died - Held - In absence of postmortem, cause of death remained unknown - Doctor cannot be held responsible for such criminal negligence.* [State of M.P. v. Dr. Ram Lakhan Singh] ...2455

Penal Code (45 of 1860), Section 304-B - *Dowry death - "Soon before her death" - Evidence indicated that the deceased was subjected to cruelty before her death - Held - What would constitute the period of "soon before the occurrence" - Depending upon the facts and circumstances of each case - There appears lack of existence of a proximate and live link between the effect of cruelty based on dowry demand and the death of deceased - Conviction & sentence u/s 304-B of the Code set-aside.* [Baddu @ Jham Singh v. State of M.P.] ...2437

Penal Code (45 of 1860), Section 304 Part-II r/w Sections 149 - *Culpable homicide not amounting to murder - Sentence - Incident occurred in order to save the theft of motor pump and also in the heat of passion - Appellants are the bread winners of their family - Held - Jail sentence of 10 years reduced to a period of 5 year.* [Jamuna v. State of M.P.] ...2425

Penal Code (45 of 1860), Sections 304-B & 498-A - *Dowry death - Wife of accused found dead allegedly by hanging within 4½ months of marriage - No ligature mark found on the person of deceased - No ecchymosis or fracture found - However, cruelty because of dowry demand established through evidence - Held - Prosecution has failed to rule out natural or accidental death of deceased - Necessary and important ingredient of Sec.304-B not established -Accused convicted u/s 498-A - Appeal partly allowed.* [Chandan v. State of M.P.] ...2083

Penal Code (45 of 1860), Sections 304-B & 498-A - *Husband or relative of husband of a woman subjecting her to cruelty - No charge u/s 498-A was framed - Appellant acquitted of charge u/s 304-B and convicted u/s 498-A - Held - No impediment in convicting appellant u/s. 498-A, who was charged with and acquitted of the offence u/s 304-B.* [Bharat Singh v. State of M.P.] 1427

दण्ड संहिता (1860 का 45); धाराएँ 302, 394 व 460 – अपीलार्थी ने कथित रूप से लूट और हत्या की – प्रत्यक्षदर्शी साक्षी द्वारा एफ.आई.आर. दर्ज करायी गई जिसने घटना के 11 माह बाद की गई शिनाख्त परेड में चार अभियुक्तों की शिनाख्त की – लूटी गई सामग्री सभी चारों अभियुक्तों से अभिग्रहीत की गई – अभिनिर्धारित – प्रत्यक्षदर्शी साक्षी ने स्वीकार किया कि उसने घटना के समय चौथे अभियुक्त को नही देखा किन्तु शिनाख्त परेड में उसकी शिनाख्त उसके आचरण के आधार पर की – विश्वसनीय शिनाख्त परेड के अभाव में चौथे अभियुक्त की दोषसिद्धि भा.द.सं. की धारा 411 में परिवर्तित – अपील अंशतः मंजूर। (शकिर वि. म.प्र. राज्य) ...2409

दण्ड संहिता (1860 का 45), धारा 304ए – उपेक्षा द्वारा मृत्यु कारित करना – अनावेदक क्र. 1 ने मरीज के मुँह पर ऐसे सिलिण्डर से जुड़ा हुआ मास्क रखा जिसमें ऑक्सीजन नही थी – मरीज की दशा को देखते हुए चिकित्सक ने जाँच की और सिलिण्डर को खाली होना पाया – कुछ समय बाद मरीज की मृत्यु हो गई – अभिनिर्धारित – शव परीक्षा के अभाव में मृत्यु का कारण अज्ञात रहा – चिकित्सक को ऐसी दाण्डिक उपेक्षा के लिए उत्तरदायी नही ठहराया जा सकता। (म.प्र. राज्य वि. डॉ. रामलखन सिंह) ...2455

दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – "उसकी मृत्यु से ठीक पूर्व" – साक्ष्य से उपदर्शित होता है कि मृतक के साथ उसकी मृत्यु के पूर्व क्रूरता की गई – अभिनिर्धारित – "घटना के ठीक पूर्व" की कालावधि कैसे गठित होगी – यह प्रत्येक मामले के तथ्यों और परिस्थितियों पर निर्भर करता है – दहेज की माँग पर आधारित क्रूरता के प्रभाव और मृतक की मृत्यु के मध्य निकटवर्ती और सीधे सम्बन्ध के अस्तित्व का आभाव प्रतीत होता है – संहिता की धारा 304–बी के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त। (बड्डू उर्फ झाम सिंह वि. म.प्र. राज्य)...2437

दण्ड संहिता (1860 का 45), धारा 304 भाग–II सहपठित धारा 149 – हत्या की कोटि में न आने वाला आपराधिक मानव वध – दण्डादेश – घटना मोटर पम्प की चोरी को बचाने के लिए और आवेश की तीव्रता में घटित हुई – अपीलार्थी उनके परिवार के कमाने वाले व्यक्ति हैं – अभिनिर्धारित – 10 वर्ष का जेल दण्डादेश 5 वर्ष की कालावधि में बदला गया। (जमुना वि. म.प्र. राज्य) ...2425

दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए – दहेज मृत्यु– अभियुक्त की पत्नी की मृत्यु विवाह के 4) माह के भीतर कथित रूप से फाँसी लगाकर हुई – मृतक के शरीर पर कोई बाँधने के निशान नही पाये गये – कोई एकीमोसिसि या अस्थि–भंग नही पाया गया – तथापि, दहेज की माँग के कारण क्रूरता साक्ष्य से साबित हुई – अभिनिर्धारित – अभियोजन मृतक की प्रा. तिक या दुर्घटनावश हुई मृत्यु की आशंका का वर्जन करने में असफल रहा – धारा 304–बी के आवश्यक और महत्वपूर्ण घटक साबित नही – अभियुक्त को धारा 498–ए के अधीन दोषसिद्ध किया गया – अपील अंशतः मंजूर। (चंदन वि. म.प्र. राज्य) ...2083

दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए – किसी स्त्री के पति या पति के नातेदार ने उसके साथ क्रूरता की – धारा 498–ए के अधीन कोई आरोप विरचित नही किया गया – अपीलार्थी को धारा 304–बी के आरोप से दोषमुक्त किया और धारा 498–ए के अधीन दोषसिद्ध किया – अभिनिर्धारित – अपीलार्थी को धारा 498–ए के अधीन दोषसिद्ध करने में कोई बाधा नही, जिस पर धारा 304–बी के अपराध का आरोप लगाया गया और दोषमुक्त किया गया। (भारत सिंह वि. म.प्र. राज्य)...1427

August-09 (First)

Penal Code (45 of 1860), Section 307 - *Attempt to murder - Sentence - Undue sympathy to impose inadequate sentence would do more harm to the judicial system to undermine public confidence in the efficacy of law and society could not long endure under such serious threats - Aggravating and mitigating factors and circumstances in which crime has been committed are to be delicately balanced - Object should be to protect society and deter criminals - Appeal allowed.* [State of M.P. v. Kashiram] SC...1552

Penal Code (45 of 1860), Section 307, Criminal Procedure Code, 1973, Section 482 - *Attempt to murder - Quashing of charge - To justify conviction u/s 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted - Court has to see whether the act, irrespective of its result, was done with intention or knowledge and under circumstances mentioned in Section - Intention to kill or knowledge that death will be caused is a question of fact - Injury caused by accused was simple or minor will not by itself rule out application of Sec.307 - Order quashing charge not sustainable - Appeal allowed.* [Ratan Singh v. State of M.P.] SC...1866

Penal Code (45 of 1860), Sections 307 & 326 - *Attempt to murder - 1/3 of the leg of the injured chopped off below the knee - Trial Court convicted respondents u/s 307 whereas High Court altered the conviction u/s 326 - Held - To justify conviction u/s 307, if there is present an intent coupled with some overt act in execution thereof - Determinative question is intention or knowledge and not nature of injury - Respondents conviction and sentences u/s 307 IPC awarded by trial Court restored - Appeal allowed.* [State of M.P. v. Kashiram] SC...1552

Penal Code (45 of 1860), Section 316 - *Causing death of quick unborn child by act amounting to culpable homicide - If a person strikes a pregnant woman and thereby causes death of her quick unborn child, he would be guilty of the offence u/s 316 provided the blow was intended by him to cause woman's death or was one which he knew or had reason to believe to be likely to cause it - Appellant alleged to have given thrusts with a lathi on side of womb - Doctor had not found any injury on the dead fetus - Prosecution failed to prove essential ingredients of offence - Conviction and sentences set-aside - Appeal allowed.* [Bhaskar Prasad v. State of M.P.]...2098

Penal Code (45 of 1860), Sections 323 & 34 - *Simple hurt - Sentence - Appellants convicted for offence punishable u/s 323/34 IPC and sentenced to three months simple imprisonment - Ample evidence on record that the appellants caused simple injuries to the complainant - Appellants have served a jail sentence of one day - They are rustic villagers having no criminal background - Held - The incidence is of the year 1998 - So, the conviction set-aside to already undergone with a fine of Rs.750 each and failure to deposit fine simple imprisonment of two months.* [Kanhaiyalal v. State of M.P.] ...*35

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयास – दण्डादेश – अपर्याप्त दण्डादेश अधिरोपित करने के लिए अनुचित सहानुभूति विधि की प्रभावकारिता में लोक विश्वास को दुर्बल करने के लिए न्यायिक तंत्र को अधिक हानि करेगी और समाज ऐसे गंभीर खतरों को लम्बे समय तक सहन नही कर सकता – अपवर्धक और कमी करने वाले कारक और परिस्थितियाँ जिनमें अपराध किया गया है बारीकी से संतुलित करनी होंगी – उद्देश्य समाज की रक्षा करना और अपराधियों को भयोपरत करना होना चाहिए – अपील मंजूर।(म.प्र. राज्य वि. काशीराम) SC ...1552

दण्ड संहिता (1860 का 45), धारा 307, दण्ड प्रक्रिया संहिता, 1973, धारा 482 – हत्या का प्रयत्न – आरोप का अभिखंडन – भा.द.सं. की धारा 307 के अन्तर्गत दोषसिद्धि को न्यायसंगत ठहराये जाने के लिए यह आवश्यक नही है कि मृत्यु कारित करने में समर्थ शारीरिक क्षति पहुंचानी चाहिए थी – न्यायालय को यह देखना होगा कि क्या कार्य उसके परिणाम का विचार किये बिना आशय या ज्ञान के साथ और धारा में उल्लिखित परिस्थितियों के अधीन किया गया – हत्या करने का आशय या यह ज्ञान कि मृत्यु कारित हो जायेगी तथ्य का प्रश्न है – अभियुक्त द्वारा कारित क्षति साधारण या लघु थी, स्वयमेव ही धारा 307 के लागू होने को वर्जित नही करेगी – आरोप अभिखंडित करने का आदेश कायम रखने योग्य नही – अपील मंजूर। (रतन सिंह वि. म.प्र. राज्य) SC...1866

दण्ड संहिता (1860 का 45), धारा 307 व 326 – हत्या का प्रयास – क्षतिग्रस्त के पैर का 1/3 भाग घुटने के नीचे काटा गया – विचारण न्यायालय ने प्रत्यर्थियों को धारा 307 के अन्तर्गत दोषसिद्ध किया जबकि उच्च न्यायालय ने दोषसिद्धि को धारा 326 में परिवर्तित किया – अभिनिर्धारित – धारा 307 के अन्तर्गत दोषसिद्धि को उचित ठहराने के लिए यदि किसी प्रत्यक्ष कार्य के साथ उसके निष्पादन में कोई आशय उपस्थित है – अवधारक प्रश्न आशय या ज्ञान है न कि घटना की प्रकृति – विचारण न्यायालय द्वारा अधिनिर्णीत प्रत्यर्थियों की भा.द.सं. की धारा 307 के अधीन दोषसिद्धि व दण्डादेश पुनःस्थापित – अपील मंजूर। (म.प्र. राज्य वि. काशीराम) SC ...1552

दण्ड संहिता (1860 का 45), धारा 316 – ऐसे कार्य द्वारा, जो सदोष मानव वध की कोटि में आता है, किसी सजीव अजात शिशु की मृत्यु कारित करना – यदि कोई व्यक्ति किसी गर्भवती स्त्री पर आघात करता है और तद्द्वारा उसके सजीव अजात शिशु की मृत्यु कारित करता है, तो वह धारा 316 के अधीन अपराध का दोषी होगा परन्तु उसके द्वारा प्रहार स्त्री की मृत्यु कारित करने लिए आशयित था या ऐसा था जिसे वह जानता था या ऐसा कारित करना संभाव्य होने का विश्वास करने का कारण रखता था – अपीलार्थी ने कथित रूप से गर्भाशय के बगल में लाठी से प्रहार किया – चिकित्सक ने मृत भ्रूण पर कोई क्षति नही पायी – अभियोजन अपराध के आवश्यक तत्व साबित करने में विफल – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर। (भास्कर प्रसाद वि. म.प्र. राज्य) ...2098

दण्ड संहिता (1860 का 45), धाराएँ 324 व 34 – साधारण उपहति – दण्डादेश – अपीलार्थियों को भा.द.सं. की धारा 323/34 के अधीन दण्डनीय अपराध के लिए दोषसिद्ध किया गया और 3 माह के सादा कारावास का दण्डादेश दिया गया – अभिलेख पर व्यापक साक्ष्य कि अपीलार्थियों ने परिवादी को साधारण क्षतियाँ कारित कीं – अपीलार्थियों ने एक दिन की जेल की सजा काट ली – अभिनिर्धारित – घटना वर्ष 1998 की – इसलिए, दोषसिद्धि 750 रुपये प्रत्येक के जुर्माने के साथ पूर्व में भुगते जा चुके तक और जुर्माना जमा करने में असफल रहने पर दो माह के सादा कारावास तक अपास्त की गई। (कन्हैया लाल वि. म.प्र. राज्य) ---*35

Penal Code (45 of 1860), Section 325 - *Sentence - Incident took on a sudden quarrel over collection of Mahua flowers - Nothing on record that applicant is a habitual offender - Applicant already undergone imprisonment of 4 months - Held - Applicant sentenced to period already undergone and sentence of fine affirmed - Revision partly allowed.* [Amar Singh v. State of M.P.] ...1476

Penal Code (45 of 1860), Sections 326, 304 Part I, 34 - See - *Evidence Act, 1872, Section 3,* [Sheikh Sultan v. State of M.P.] ...1769

Penal Code (45 of 1860), Sections 366 & 376 - *Rape - Appreciation of evidence - Conviction based on sole testimony of prosecutrix - Reliability - Prosecutrix making major omission and contradictions in her statements before the Court - She went to the Court for getting affidavit notarised and signing marriage papers - She nowhere disclosing her acts to be under threat to her life -Doctor opined she was habitual to sexual intercourse - Held - It is not justifiable to convict the appellant on the basis of sole evidence of the prosecutrix - Evidence of prosecutrix is not of that quality on which the conviction could be sustained solely on the basis of her testimony.* [Karu @ Samar Singh v. State of M.P.] ...1435

Penal Code (45 of 1860), Section 376 - *Rape - Conviction on the sole testimony of the prosecutrix challenged in appeal - Held - Prosecutrix had tried to resist the act of the appellant and also shouted for help and had a scuffle with him - Some of her bangles had broken, but she did not sustain any injury - Mere fact, that prosecutrix did not sustain any injury in the incident would not ipso facto mean that she did not resist or was a consenting party - Evidence of the prosecutrix is found to be cogent, natural and trustworthy, which also stood corroborated by the promptly lodged FIR as well as by the evidence of a witness to whom the incident was narrated by her - It was thus established beyond periphery of doubt that appellant committed rape - Appeal dismissed.* [Harakh Chand v. State of M.P.] ...1760

Penal Code (45 of 1860), Section 376 - *Rape - Whether conviction can be awarded in case the prosecutrix has not been examined - Held - Merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned.* [Bhola Prasad Raidas v. State of M.P.] ...2433

Penal Code (45 of 1860), Sections 376 & 506 - See - *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(xii)* [State of M.P. v. Chunnilal @ Chunni Singh] SC...1857

Penal Code (45 of 1860), Section 394 - *Voluntarily causing hurt in committing robbery - Constructive liability - One accused assaulted the injured - Other two accused persons, who did not cause injury to Doctor, are constructively liable to be convicted for offence u/s 394.* [Ganesh Singh v. State of M.P.] ...2101

दण्ड संहिता (1860 का 45), धारा 325 – दण्डादेश – घटना महुआ के फूलों के संग्रहण पर हुए आकस्मिक झगड़े पर हुई – अभिलेख पर ऐसा कुछ नहीं कि आवेदक आदतन अपराधी है – आवेदक ने 4 माह का कारावास पूर्व में ही भोग लिया – अभिनिर्धारित – आवेदक को पूर्व में भोगे गये कारावास का दण्डादेश दिया गया और जुर्माने के दण्डादेश की पुष्टि की गई – पुनरीक्षण अंशतः मंजूर। (अमर सिंह वि. म.प्र. राज्य) ...1476

दण्ड संहिता (1860 का 45), धाराएँ 326, 304 भाग I, 34 – देखें – साक्ष्य अधिनियम, 1872, धारा 3, (शेख सुलतान वि. म.प्र. राज्य) ...1769

दण्ड संहिता (1860 का 45), धाराएँ 366 व 376 – बलात्संग – साक्ष्य का अधिमूल्यन – दोषसिद्धि एकमात्र अभियोक्त्री के परिसाक्ष्य पर आधारित – विश्वसनीयता – अभियोक्त्री ने न्यायालय के समक्ष अपने बयानों में मुख्य लोप और खण्डन किये – वह न्यायालय में शपथ पत्र को नोटरी.त करवाने गयी और विवाह के कागजातों पर हस्ताक्षर किये – उसने यह कहीं भी प्रकट नही किया कि उसका कार्य उसके जीवन की धमकी देकर कराया गया – चिकित्सक ने राय दी कि वह मैथुन की अभ्यस्थ थी – अभिनिर्धारित – यह न्यायसंगत नही है कि अपीलार्थी को अभियोक्त्री के एकमात्र साक्ष्य के आधार पर दोषसिद्ध किया जाए – अभियोक्त्री की साक्ष्य इस कोटि की नही है जिस पर एकमात्र रूप से उसके परिसाक्ष्य के आधार पर दोषसिद्धि कायम रखी जा सके। (कारू उर्फ समर सिंह वि. म.प्र. राज्य) ...1435

दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – अभियोक्त्री के एकमात्र परिसाक्ष्य पर की गई दोषसिद्धि को अपील में चुनौती दी गई – अभिनिर्धारित – अभियोक्त्री ने अपीलार्थी के कृत्य का प्रतिरोध किया था और मदद के लिए चिल्लाई थी और उसके साथ हाथापाई भी की थी – उसकी कुछ चूड़ियाँ टूट गयीं, किन्तु उसे कोई क्षति नही आई – केवल यह तथ्य कि अभियोक्त्री को घटना में कोई क्षति नही आयी, का स्वयमेव ही यह अर्थ नही होगा कि उसने प्रतिरोध नही किया अथवा वह एक सहमत पक्षकार थी – अभियोक्त्री की साक्ष्य अकाट्य, प्राकृतिक और विश्वसनीय पायी गयी; जिसकी तत्काल दर्ज एफ.आई.आर. और एक साक्षी, जिसे अभियोक्त्री द्वारा घटना बताई गई, के साक्ष्य से भी सम्पुष्टि होती है – इस प्रकार यह शंका की परिधि से परे साबित हुआ कि अपीलार्थी ने बलात्संग किया – अपील खारिज। (हरख चंद वि. म.प्र. राज्य) ...1760

दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – क्या अभियोक्त्री की परीक्षा न किये जाने की दशा में दोषसिद्धि अधिनिर्णीत की जा सकती है – अभिनिर्धारित – केवल इसलिए कि पीड़ित की मृत्यु हो गयी और परिणामतः उसकी परीक्षा नही की जा सकी, अभियुक्त को दोषमुक्त करने का आधार कभी नही हो सकता यदि सम्बन्धित अभियुक्त के दाण्डिक कृत्य को साबित करने के लिए अन्यथा साक्ष्य उपलब्ध हो। (भोला प्रसाद रैदास वि. म.प्र. राज्य) ...2433

दण्ड संहिता (1860 का 45), धाराएँ 376 व 506 – अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989, धारा 3(1)(xii) (म.प्र. राज्य वि. चुन्नीलाल उर्फ चुन्नी सिंह) SC...1857

दण्ड संहिता (1860 का 45), धारा 394 – लूट करने में स्वेच्छया उपहति कारित करना – आन्वयिक दायित्व – एक अभियुक्त ने क्षतिग्रस्त पर हमला किया – दो अन्य अभियुक्त, जिन्होंने चिकित्सक को क्षति कारित नही की, धारा 394 के अपराध के लिए दोषसिद्ध किये जाने के लिए आन्वयिक रूप से दायी हैं। (गणेश सिंह वि. म.प्र. राज्य) ...2101

Penal Code (45 of 1860), Section 397 - *Robbery with attempt to cause death or grievous hurt - Appellants guilty of attempt to commit robbery by demanding key of almirah and ornaments from injured witness - Section 397 had no application to the case where robbery was not actually completed.* [Ganesh Singh v. State of M.P.] ...2101

Penal Code (45 of 1860), Sections 420, 120-B, 467, 468 & 471 - *Civil or Criminal Dispute - Criminal prosecution should not be used as an instrument of harassment - Tendency is growing to convert purely civil disputes into criminal cases - Charges quashed.* [Gyanendra Tripathi v. State of M.P.]... 1515

Police Regulations, M.P., Regulation 241 - See - *Service Law* [H.R. Kaurav v. State of M.P.] ...1233

Police Regulations, M.P., Regulation 270, Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 29(iii) - *Petitioner, Inspector of Police - In departmental proceeding, punishment of penalty of Rs.1000/- inflicted by I.G.P. - Show cause notice by D.G.P. exercising suo-moto revisional power –Held - Power of review could not be exercised after six months of order of punishment - Order quashed - Petition allowed.* [Angad Singh Rathore v. State of M.P.] ...2310

Precedent - *Conflict between two decisions of the Apex Court - Judgment of 2 Judges Bench in National Insurance Co. Ltd. Vs. Mubasir Ahmed & anr. [2007 LIC 1452] not noticing the earlier judgment of 4 Judge Bench of Pratap Narain Singh Deo Vs. Shrinivas Sabata & anr [AIR 1976 SC 222] - Judgment of the Larger Bench will have to be followed.* [Suraj Prasad v. Executive Engineer (Supply/Maintenance) M.P. State Electricity Board, Shajapur] ...1385

Prevention of Corruption Act (2 of 1947), Section 5(1)(d) r/w Section 5(2) - *Complainant died before he could be examined - Charge can be proved by other evidence.* [Hifazatullah @ Nasirullah v. State of M.P.] ...1755

Prevention of Corruption Act (2 of 1947), Section 5(1)(d) r/w Section 5(2) - *Evidence of complainant about making demand of bribe and its acceptance should be corroborated by independent evidence in order to ascertain what actually transpired between complainant and accused at the time of handing over the money.* [Hifazatullah @ Nasirullah v. State of M.P.] ...1755

Prevention of Corruption Act (2 of 1947), Section 5(1)(d) r/w Section 5(2) - See - *Criminal Procedure Code, 1973, Section 313* [Hifazatullah @ Nasirullah v. State of M.P.] ...1755

Prevention of Corruption Act (2 of 1947), Section 5(1)(d) r/w Section 5(2) - See - *Penal Code, 1860, Section 161* [Hifazatullah @ Nasirullah v. State of M.P.] ...1755

Prisoners' Release on Probation Act, M.P. (16 of 1954), Section 9,

दण्ड संहिता (1860 का 45), धारा 397 – मृत्यु या घोर उपहति कारित करने के प्रयत्न के साथ लूट – अपीलार्थी क्षतिग्रस्त साक्षी से अल्मारी की चाबी और आभूषणों की माँगकर लूट करने के प्रयत्न के दोषी – धारा 397 उस मामले में कोई प्रयोज्यनीयता नही रखती जहाँ वास्तविक रूप से लूट पूर्ण नही हुई। (गणेश सिंह वि. म.प्र. राज्य) ...2101

दण्ड संहिता (1860 का 45), धाराएँ 420, 120–बी, 467, 468 व 471 – सिविल या दाण्डिक विवाद – दाण्डिक अभियोजन को तंग करने के साधन के रूप में प्रयुक्त नही किया जाना चाहिए – शुद्ध रूप से सिविल विवादों को दाण्डिक मामलों में परिवर्तित करने की प्रवृत्ति बढ़ रही है – आरोप अभिखण्डित। (ज्ञानेंद्र त्रिपाठी वि. म.प्र. राज्य) ...1515

पुलिस विनियम, म.प्र., विनियम 241 – देखें – सेवा विधि (एच.आर. कौरव वि. म.प्र. राज्य) ...1233

पुलिस विनियम, म.प्र., विनियम 270, सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29(iii) – याची पुलिस निरीक्षक – विभागीय कार्यवाही में पुलिस महानिरीक्षक द्वारा 1000/– रुपये की शास्ति का दण्ड अधिरोपित किया गया – पुलिस महानिदेशक द्वारा स्वप्रेरणाधीन पुनरीक्षण शक्ति का प्रयोग करते हुए कारण बताओ सूचना पत्र – अभिनिर्धारित – दण्ड के आदेश के छः माह बाद पुनर्विलोकन की शक्ति का प्रयोग नही किया जा सकता था – आदेश अभिखण्डित – याचिका मंजूर। (अंगद सिंह राठौर वि. म.प्र. राज्य) ...2310

पूर्वनिर्णय – शीर्ष न्यायालय के दो निर्णयों में अन्तर्विरोध – दो न्यायाधीशों की न्यायपीठ द्वारा नेशनल इंश्योरेंश कं. लि. विरुद्ध मुबासिर अहमद व अन्य [2007 LIC 1452] में दिये गये निर्णय में 4 न्यायाधीशों की न्यायपीठ के प्रताप नारायण सिंह देव विरुद्ध श्रीनिवास सबाता व अन्य [AIR 1976 SC 222] के पूर्ववर्ती निर्णय को ध्यान में नही रखा – वृहत्तर न्यायपीठ के निर्णय का अनुसरण करना होगा। (सूरज प्रसाद वि. एग्जीक्यूटिव इंजीनियर (सप्लाई/मेन्टेनेन्स) एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड, शाजापुर) ...1385

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बंदियों का परिवीक्षा पर छोड़ा जाना अधिनियम, म.प्र. (1954 का 16), धारा 9,

Prisoners' Release on Probation Rules, M.P. 1964, Rule 4 - *Eligibility for release - Constitutional validity of notification dated 24.03.2008 making 14 years of actual imprisonment for becoming eligibile for release challenged - Rule 4 not ultra vires to Section 433-A of Cr.P.C. or any of the provisions of the Act.* [Gori Shankar v. State of M.P.] 1966

Prisoners' Release on Probation Rules, M.P. 1964, Rule 4 - *Eligibility for release - Judgment passed in State of Haryana Vs. Mahender Singh and others [(2008 CrLJ 444(SC)] has no application as Supreme Court was dealing with validity of policy decision vis-à-vis rules.* [Gori Shankar v. State of M.P.] ...1966

Private Medical and Dental Postgraduate Course Entrance Examination Rules, M.P. 2009, Rules 7 & 15(9) - See - *Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P., 2007, Section 8,* [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Private Medical and Dental Postgraduate Course Entrance Examination Rules, M.P. 2009, Rule 10 - See - *Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P., 2007, Sections 3(a) & 5,* [Association of Private Dental & Medical Colleges v. State of M.P.] ...2269

Protection of Women from Domestic Violence Act (43 of 2005), Sections 9 & 37 - *Applicants were alleged to have committed offence under the Act between 12.11.2005 to 06.06.2006 - Act come into force on 26.10.2006 - Trial Court considering the offence to be of continuous nature held the applicants guilty - Held - It is nowhere stated that the non-applicant was subjected to violence after 06.06.2006 - Act has having no retrospective effect - Applicants can not be prosecuted for the period prior to the enforcement of the Act - Criminal proceeding stands dropped.* [Naveen v. Rajni] ...2120

Protection of Women from Domestic Violence Act (43 of 2005), Sections 12 & 28, Protection of Women from Domestic Violence Rules 2006, Rule 6(5), Criminal Procedure Code, 1973, Section 125 - *Application to Magistrate - Procedure - As provided by Section 28(1) of the Act r/w Rule 6(5), the application u/s 12 of the Act shall be dealt with and the order enforced in the same manner as laid down u/s 125 of Cr.P.C., for which providing opportunity of leading their evidence to the parties is required.* [Madhusudan Bhardwaj v. Mamta Bhardwaj] ...1506

Protection of Women from Domestic Violence Rules 2006, Rule 6(5) - See - *Protection of Women from Domestic Violence Act, 2005, Sections 12 & 28* [Madhusudan Bhardwaj v. Mamta Bhardwaj] ...1506

बंदियों का परिवीक्षा पर छोड़ा जाना नियम, म.प्र. 1964, नियम 4 – छोड़े जाने के लिए पात्रता – छोड़े जाने के लिए पात्र होने के लिए वास्तविक कारावास को 14 वर्ष करने वाली अधिसूचना तारीख 24.03.2008 की संवैधानिक विधिमान्यता को चुनौती दी गई – नियम 4 द.प्र.सं. की धारा 433–ए या अधिनियम के किसी उपबंध के अधिकारातीत नहीं। (गौरी शंकर वि. म.प्र. राज्य) ...1966

बंदियों का परिवीक्षा पर छोड़ा जाना नियम, म.प्र. 1964, नियम 4 – छोड़े जाने के लिए पात्रता – स्टेट ऑफ हरियाणा बनाम् महेन्द्र सिंह व अन्य [(2008 CrLJ 444(SC)] में पारित निर्णय लागू नहीं होता है क्योंकि उच्चतम न्यायालय नियमों के मुकाबले में पॉलिसी विषयक विनिश्चय की विधिमान्यता पर कार्यवाही कर रहा था। (गौरी शंकर वि. म.प्र. राज्य) ...1966

निजी चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2009, नियम 7 व 15(9) – देखें – निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र., 2007, धारा 8, (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य) ...2269

निजी चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2009, नियम 10 – देखें –निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र., 2007, धाराएँ 3(ए) व 5, (एसोसिएशन ऑफ प्राइवेट डेन्टल एण्ड मेडिकल कॉलेजेस वि. म.प्र. राज्य) ...2269

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घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 12 व 28, घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006, नियम 6(5), दण्ड प्रक्रिया संहिता, 1973, धारा 125 – मजिस्ट्रेट को आवेदन – प्रक्रिया – जैसा कि अधिनियम की धारा 28(1) सहपठित नियम 6(5) द्वारा उपबंधित किया गया है, अधिनियम की धारा 12 के अधीन आवेदन उसी तरह निपटाया जायेगा और आदेश उसी तरीके से प्रवर्तित किया जाएगा जैसा कि द.प्र.सं. की धारा 125 के अधीन अधिकथित किया गया है, जिसके लिए पक्षकारों को उनकी साक्ष्य पेश करने का अवसर दिया जाना अपेक्षित है। (मधुसूदन भारद्वाज वि. ममता भारद्वाज) ...1506

घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006, नियम 6(5), दण्ड प्रक्रिया संहिता, 1973, धारा 125 – देखें –घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005, धाराएँ 12 व 28 (मधुसूदन भारद्वाज वि. ममता भारद्वाज) ...1506

Railways Act (24 of 1989), Sections 85, 95, 103 & 110 - *Damages for delayed delivery - Delay in transit - Appellant claimed negligence on part of railways in handing over consignment of lemon - Consignment handed over to appellant in damaged condition and after scheduled date - No objection raised by appellant at the time of delivery - Undated Panchnama not proved in accordance with law - Appellant did not specify the cost of purchase and also not established prevailing market price - No evidence as to how many pieces of lemon were in each consignment - Order dismissing claim of appellant proper - Appeal dismissed.* [Krishna Kumar Sethi v. Union of India] ...2376

Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 5 - *Order of externment - Delay of more than 2 years in passing order - Held - Delay establishes that the order of externment was not warranted during the said period.* [Naresh Bilwar v. State of M.P.] ...2173

Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 5 - *Order of externment - Order passed on the basis of old and stale cases in which petitioner was already acquitted - Held - There was no material before the District Magistrate which could satisfy the condition mentioned in Section - Order of externment set-aside - Petition allowed.* [Naresh Bilwar v. State of M.P.] ...2173

Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 8 - *Petitioner served with show cause notice of externment on the basis of report of police - In the proceeding, the District Magistrate after preponing the date of hearing and without informing the petitioner of preponed date examined the independent witnesses and fixed the case for final decision - Held - Right of hearing to arrive at a finding that the stay of petitioner would not be in larger public interest - Right of hearing under the Act can not be stretched to cross-examine witnesses, otherwise, the very purpose of the Act to provide security and maintenance of public order would be defeated - Noticee under the Act has no right to cross-examination - Petition dismissed.* [Guddu @ Amit Sahu v. State of M.P.] ...1917

Registration Act (16 of 1908), Section 17 - *Instrument is an unregistered agreement of sale which, as per stipulations contained u/s 17 of the Act requires a compulsory registration and unless the document is compulsory registered the same cannot be taken on evidence in any manner.* [Narbada Prasad Agrawal v. Tarun Bhawasar] ...1255

Rules of the Road Regulations, 1989, Rules 8 & 9 - **See** - *Motor Vehicles Act, 1988, Section 166* [Usha (Smt.) v. Rajesh] ...1390

Sahkari Bhumi Vikas Bank Adhiniyam, M.P., (28 of 1966), Sections 27, 64 & 82 - **See** - *Civil Procedure Code, 1908, Section 9 [Sitaram v. Cooperative Bhumi Vikas* (Land Mortgage) Bank Ltd, Khandwa] ...1707

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राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5 – निष्कासन का आदेश – आदेश पारित करने में दो वर्ष से अधिक का विलम्ब – अभिनिर्धारित – विलम्ब साबित करता है कि उक्त कालावधि के दौरान निष्कासन का आदेश आवश्यक नही था। (नरेश बिलवार वि. म.प्र. राज्य) ...2173

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राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 8 – याची पर पुलिस की रिपोर्ट के आधार पर निष्कासन का कारण बताओ सूचनापत्र तामील किया गया – कार्यवाही में जिला मजिस्ट्रेट ने सुनवाई की तारीख प्रस्तावित करने के बाद और याचियों को प्रस्तावित तारीख की सूचना दिये बिना स्वतंत्र साक्षियों की परीक्षा की और मामला अंतिम विनिश्चय के लिए नियत किया – अभिनिर्धारित – सुनवाई का अधिकार इस निष्कर्ष पर पहुँचने के लिए कि याची की रोक व्यापक लोक हित में नहीं होगी – अधिनियम के अन्तर्गत सुनवाई का अधिकार साक्षियों की प्रतिपरीक्षा तक विस्तारित नही किया जा सकता, अन्यथा सुरक्षा करने और लोक व्यवस्था का अनुरक्षण करने का अधिनियम का वास्तविक प्रयोजन विफल हो जायेगा – अधिनियम के अन्तर्गत सूचनागृहीता को प्रतिपरीक्षा करने का कोई अधिकार नही है – याचिका खारिज। (गुड्डू उर्फ अमित साहू वि. म.प्र. राज्य) ...1917

रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17 – लिखत विक्रय का अरजिस्ट्रीकृत अनुबंध है जो अधिनियम की धारा 17 के अन्तर्गत अन्तर्विष्ट शर्तों के अनुसार अनिवार्य रजिस्ट्रेशन अपेक्षित करता है और जब तक अनिवार्य रूप से रजिस्ट्रीकृत न हो वह किसी भी ढंग से साक्ष्य में नही लिया जा सकता। (नरबदा प्रसाद अग्रवाल वि. तरूण भावसार) ...1255

सड़क विनियमन के नियम, 1989, नियम 8 व 9 – देखें – मोटर यान अधिनियम, 1988, धारा 166 (उषा (श्रीमति) वि. राजेश) ...1390

सहकारी भूमि विकास बैंक अधिनियम, म.प्र. (1966 का 28), धाराएँ 27, 64 व 82 – देखें – सिविल प्रक्रिया संहिता, 1908, धारा 9, (सीताराम वि. को–ऑपरेटिव भूमि विकास (लेंड मॉर्टगेज) बैंक लि., खण्डवा) ...1707

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xii), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 7 - *Investigating Officer* - *Investigation to an offence u/s 3 of Act, 1989 by an officer not appointed in terms of Rule 7 is illegal.* [State of M.P. v. Chunnilal @ Chunni Singh] SC...1857

**Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xii), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 7, Penal Code, 1860, Sections 376 & 506 - *Investigating Officer* - *Order framing charge quashed by High Court on the ground that offence under Act, 1989 was not investigated by Dy.S.P., but by Sub-Inspector - Held - Offences complained are both under IPC and any of offence enumerated in Section 3 of Act, 1989 - Investigation made by competent police officer in accordance with provisions of Cr.P.C. cannot be quashed for non-investigation of offence u/s 3 of Act, 1989 by a competent police officer - Proceedings shall proceed in appropriate Court for offences punishable under IPC - Appeal allowed.* [State of M.P. v. Chunnilal @ Chunni Singh] SC...1857

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 7 - See - *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(xii)* [State of M.P. v. Chunnilal @ Chunni Singh] SC...1857

Service Law - *Casual or Daily Wage Employee* - *A casual or a daily wage employee is not entitled to pay in the pay scale but is entitled to receive the minimum wages as prescribed by the State Government - Petitioner, a Semi Skilled Daily Wager is not entitled to get minimum of the pay scale and daily allowance total Rs.4055/-, but was entitled minimum wage i.e. Rs.2438/- prescribed by the Collector for a Semi Skilled labour.* [Janki Prasad Garg v. State of M.P.] ...1942

Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 10, Civil Services (Conducts) Rules, M.P. 1965, Rule 3(i) & (ii) - *Misconduct - Dismissal from service* - *Disciplinary authority found respondent gross negligent and of doubtful integrity and passed order of dismissal - Learned Single Judge quashed the order of dismissal - Writ Appeal - Held - Gross negligence towards duty, even without involvement of mens rea, can constitute misconduct - Single Judge was not correct in holding that respondent can not be held guilty of misconduct - Since no reliable material had been placed on record to establish that respondent had wrongfully gained anything by his conduct, merely on the basis of presumption, the disciplinary authority could not have held respondent of doubtful integrity - Case remitted to the disciplinary authority to decide quantum of punishment on the charge of misconduct - Appeal allowed.* [M.P. Housing Board v. K.V. Shrivastava] ...1589

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xii), अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) नियम, 1995, नियम 7 – अन्वेषण अधिकारी – अधिनियम, 1989 की धारा 3 के अन्तर्गत किसी अपराध का ऐसे अधिकारी द्वारा अन्वेषण, जो नियम 7 के निबंधनों के अनुसार नियुक्त नही किया गया है, अवैध है। (म.प्र. राज्य वि. चुन्नीलाल उर्फ चुन्नी सिंह) SC...1857

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xii), अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) नियम, 1995, नियम 7, दण्ड संहिता, 1860, धाराएँ 376 व 506 – अन्वेषण अधिकारी – अरोप की विरचना का आदेश उच्च न्यायालय द्वारा इस आधार पर अभिखंडित किया गया कि 1989 के अधिनियम के अन्तर्गत अपराध का अन्वेषण उप पुलिस अधीक्षक द्वारा नही किया गया बल्कि उपनिरीक्षक द्वारा किया गया – अभिनिर्धारित – परिवादित दोनों अपराध भा.द.सं. के अन्तर्गत हैं और कोई भी अपराध अधिनियम, 1989 की धारा 3 में वर्णित है – सक्षम पुलिस अधिकारी द्वारा द.प्र.सं. के उपबंधों के अनुसार किया गया अन्वेषण, सक्षम पुलिस अधिकारी द्वारा 1989 के अधिनियम की धारा 3 के अन्तर्गत अन्वेषण न करने के कारण अभिखंडित नही किया जा सकता – भा.द.सं. के अन्तर्गत दण्डनीय अपराधों के लिए कार्यवाहियाँ समुचित न्यायालय में की जायेंगी – अपील मंजूर। (म.प्र. राज्य वि. चुन्नीलाल उर्फ चुन्नी सिंह) SC...1857

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) नियम, 1995, नियम 7 – देखें – अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989, धारा 3(1)(गपप), (म.प्र. राज्य वि. चुन्नीलाल उर्फ चुन्नी सिंह) SC...1857

सेवा विधि – आकस्मिक या दैनिक मजदूरी कर्मचारी – कोई आकस्मिक या दैनिक मजदूरी कर्मचारी वेतनमान में वेतन का हकदार नही है बल्कि राज्य सरकार द्वारा विहित न्यूनतम मजदूरी प्राप्त करने का हकदार है – याची, एक अर्द्धकुशल दैनिक मजदूर न्यूनतम वेतनमान और दैनिक भत्ता कुल 4055/– रुपये पाने का हकदार नही है बल्कि अर्द्धकुशल श्रमिक के लिए कलेक्टर द्वारा विहित न्यूनतम मजदूरी अर्थात् 2438/– रुपये का हकदार था। (जानकी प्रसाद गर्ग वि. म. प्र. राज्य) ...1942

सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10, सिविल सेवा (आचरण) नियम, म.प्र. 1965, नियम 3(i) o (ii) – दुराचरण – सेवा से बर्खास्तगी – अनुशासनिक प्राधिकारी ने प्रत्यर्थी को घोर उपेक्षावान और शंकास्पद सत्यनिष्ठा का पाया और बर्खास्तगी का आदेश पारित किया – विद्वान एकल न्यायाधीश ने बर्खास्तगी का आदेश अभिखण्डित किया – रिट अपील – अभिनिर्धारित – आपराधिक मनःस्थिति के अन्तर्वलित हुए बिना भी कर्तव्य के प्रति घोर उपेक्षा दुराचरण गठित करती है – एकल न्यायाधीश यह अभिनिर्धारित करने में सही नही थे कि प्रत्यर्थी को दुराचरण का दोषी नही ठहराया जा सकता – चूंकि यह साबित करने के लिए अभिलेख पर कोई विश्वसनीय सामग्री नही थी कि प्रत्यर्थी ने अपने आचरण से अनुचित ढंग से कोई लाभ अर्जित किया था, केवल उपधारणा के आधार पर, अनुशासनिक प्राधिकारी प्रत्यर्थी को शंकास्पद सत्यनिष्ठ नही ठहरा सकता था – मामला दुराचरण के आरोप पर दण्ड की मात्रा का विनिश्चय करने के लिए अनुशासनिक प्राधिकारी को भेजा गया – अपील मंजूर। (एम.पी. हाउसिंग बोर्ड वि. के.व्ही. श्रीवास्तव) ...1589

Service Law - *Concurrent finding of fact by Disciplinary Authority and Appellate Authority - Held - Cannot be interfered with when dealing with the charge both the authorities applied their mind and no document was produced by the petitioner in support of his case in respect of a particular charge before the Disciplinary Authority.* [Nathuram v. Food Corporation of India] ...1658

Service Law - *Constitution, Articles 14 & 16 - Recruitment - Advertisement for recruitment to the post of Constable - Condition in advertisement that the candidates must have passed Higher Secondary or obtained Bachelor degree from school/college situated in M.P. - Name of appellant deleted from select list as he had not obtained educational qualification from any school situated in M.P. - Held - Condition is discriminatory and violative of Articles 14 & 16 in as much as it denies equality of opportunity in the matters of public employment in M.P. to persons who have passed Higher Secondary from other State - Respondents directed to appoint appellant - Appeal allowed.* [Saurabh Singh v. State of M.P.] ...1893

Service Law - *Constitution, Article 226, Gram Tatha Raksha Samiti Niyam, M.P. 2003 - Petitioner, a Tahsil Organizer appointed under Niyam, 2003 - Claimed relief that a policy for creating promotional post be formulated with specific time frame - Learned Single Judge allowed petition and directed the State to provide two channels of promotion - Writ Appeal - Held -Court cannot exercise the powers under Article 226 of the Constitution for creating promotional avenues by way of issuance of writ of mandamus - Order passed by learned Single Judge set-aside - Appeal allowed.* [State of M.P. v. Shyam Sunder Savita] ...2168

Service Law - *Constitution, Article 235 - Appointing authority - Control over subordinate Courts - Control on subordinate courts conferred to High Court under Article 235 of Constitution is not confined only to matters pertaining to District Judge or subordinate Judges but also expands to ministerial officers and servants of establishment of subordinate Courts - Although District Judge is appointing authority, however, if control exercised by High Court with regard to functioning by District Courts in the matter of recruitment and appointment, it cannot be said that the same is unsustainable or illegal.* [Ramakant Choudhary v. District & Sessions Judge, Guna] ... 1666

Service Law - *Departmental Enquiry - Enquiry Officer after recording of evidence found employee to be not guilty of any charge - Disciplinary authority on the basis of final finding recorded by the Board holding employee to be guilty of charge, issued show cause notice - Held - Since show cause notice issued was containing final decision taken by the Board holding employee guilty - An opportunity of hearing should have been provided to employee so that there may still be some room left for convincing the*

सेवा विधि – अनुशासनिक प्राधिकारी और अपीलीय प्राधिकारी द्वारा तथ्य के समवर्ती निष्कर्ष – अभिनिर्धारित – हस्तक्षेप नही किया जा सकता जब आरोप पर कार्यवाही करते समय दोनों प्राधिकारियों ने अपने मस्तिष्क का प्रयोग किया हो और याची द्वारा अनुशासनिक प्राधिकारी के समक्ष किसी विशिष्ट आरोप के सम्बन्ध में अपने मामले के समर्थन में कोई दस्तावेज पेश नही किया गया हो। (नाथूराम वि. फूड कारपोरेशन ऑफ इंडिया) ...1658

सेवा विधि – संविधान, अनुच्छेद 14 व 16 – भर्ती – आरक्षक के पद पर भर्ती के लिए विज्ञापन – विज्ञापन में यह शर्त कि अभ्यर्थियों को म.प्र. में स्थित विद्यालय/महाविद्यालय से हायर सेकेण्ड्री उत्तीर्ण करना या स्नातक उपाधि अभिप्राप्त करनी चाहिए थी – अपीलार्थी का नाम चयन सूची से हटाया गया क्योंकि उसने म.प्र. में स्थित किसी विद्यालय से शैक्षिक अर्हता अभिप्राप्त नही की थी – अभिनिर्धारित – शर्त विभेदकारी और अनुच्छेद 14 व 16 के उल्लंघनकारी है क्योंकि यह म.प्र. में लोक नियोजन के मामलों में उन व्यक्तियों को जिन्होंने अन्य राज्य से हायर सेकेण्ड्री उत्तीर्ण की है अवसर की समानता से इंकार करती है – प्रत्यर्थियों को अपीलार्थी को नियुक्त करने का निदेश दिया गया – अपील मंजूर। (सौरभ सिंह वि. म. प्र. राज्य) ...1893

सेवा विधि – संविधान, अनुच्छेद 226, ग्राम तथा रक्षा समिति नियम, म.प्र. 2003 – याची, एक तहसील संगठक, नियम, 2003 के अन्तर्गत नियुक्त – इस अनुतोष का दावा किया कि पदोन्नत पद को सृष्ट करने के लिए पॉलिसी विनिर्दिष्ट समय सीमा में बनायी जाए – विद्वान एकल न्यायाधीश ने याचिका मंजूर की और राज्य को पदोन्नति के दो मार्ग देने का निदेश दिया – रिट अपील – अभिनिर्धारित – न्यायालय पदोन्नति का मार्ग सृष्ट करने के लिए परमादेश की रिट जारी करके संविधान के अनुच्छेद 226 के अन्तर्गत शक्तियों का प्रयोग नही कर सकता – विद्वान एकल न्यायाधीश द्वारा पारित आदेश अपास्त – अपील मंजूर। (म.प्र. राज्य वि. श्याम सुंदर सविता)...2168

सेवा विधि – संविधान, अनुच्छेद 235 – नियुक्ति प्राधिकारी – अधीनस्थ न्यायालयों पर नियंत्रण – संविधान के अनुच्छेद 235 के अधीन उच्च न्यायालय को प्रदत्त अधीनस्थ न्यायालयों पर नियंत्रण केवल जिला न्यायाधीश या अधीनस्थ न्यायाधीशों से सम्बन्धित मामलों तक सीमित नही है बल्कि अधीनस्थ न्यायालयों की स्थापना के अनुसचिवीय अधिकारियों और कर्मचारियों तक विस्तृत है – यद्यपि जिला न्यायाधीश नियुक्ति प्राधिकारी है, तथापि यदि भर्ती और नियुक्ति के मामले में जिला न्यायालयों द्वारा कार्य करने के सम्बन्ध में उच्च न्यायालय द्वारा नियंत्रण का प्रयोग किया गया, तो यह नही कहा जा सकता कि वह न टिक सकने वाला या अवैध है। (रमाकांत चौधरी वि. जिला एवं सत्र न्यायाधीश, गुना) ...1666

सेवा विधि – विभागीय जाँच – जाँच अधिकारी ने साक्ष्य अभिलिखित करने के बाद कर्मचारी को किसी भी आरोप का दोषी नही पाया – अनुशासनिक प्राधिकारी ने बोर्ड द्वारा अभिलिखित अंतिम निष्कर्ष के आधार पर कर्मचारी को आरोप का दोषी ठहराया, कारण बताओ सूचना पत्र जारी किया – अभिनिर्धारित – चूंकि जारी कारण बताओ सूचना पत्र में बोर्ड द्वारा कर्मचारी को दोषी ठहराते हुए लिया गया अंतिम निर्णय अन्तर्विष्ट था – कर्मचारी को सुनवाई का एक अवसर दिया जाना चाहिए था ताकि अनुशासनिक प्राधिकारी को विश्वास दिलाने की कोई गुंजाइश बची रह सकती कि जाँच

Disciplinary Authority that findings recorded by the enquiry officer were just and proper - Findings of Board and Disciplinary Authority are perverse - Impugned order imposing penalty quashed - Petition allowed. [Nilu (Smt.) v. M.P. State Electricity Board] ...1959

Service Law - *Disciplinary Authority - Competence - Punishment - Petitioner removed from service by an order of Senior Regional Manager - He filed an appeal before the Zonal Manager which was entertained - Prior to passing of the order Regulations were amended and Regional Manager was made the Disciplinary Authority - Action challenged on the ground that the order of punishment was passed by an authority senior to the Disciplinary Authority and his right of appeal was prejudiced - Held - Order of removal was passed by an authority higher than the one prescribed in the Regulations as on the date the order was issued, no prejudice or discrimination resulted therefrom as the petitioner successfully availed of the remedy of appeal and even though the remedy of review was also available to him, he chose not to avail the same.* [Nathuram v. Food Corporation of India] ...1658

Service Law - *In earlier W.P. in the light of decision of HC in W.P. 3838/05(S) (Daddi Lal's case) it was ordered that petitioner Semi Skilled Daily Wager is entitled for the salary at the lowest grade - But, subsequently Daddi Lal's case has been overruled by DB of HC in W.A. 491/07 - DB held that grant of minimum pay in the scale is contrary to the judgment of SC in Uma Devi's case [(2006) 4 SCC 1] - Subsequent W.P. claiming minimum of the scale dismissed.* [Janki Prasad Garg v. State of M.P.] ...1942

Service Law - Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 7, Panchayat Samvida Shala Shikshak (Recruitment and Conditions of Contract) Rules, M.P. 2005, Rules 10, 12, 12(a) & 12(h) - *Age relaxation - Petitioner working as Samvida Shala Shikshak Class-II in the Government School - He applied for the post of Civil Judge claiming relaxation of 3 years on the ground that he is a Government Servant - Held - Appointing authority of the petitioner is Janpad Panchayat and thus he is not a Government Servant and cannot be granted age relaxation.* [Arun Singh Bhadouriya v. State of M.P.] ...1939

Service Law - Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69(1), Panchayat (Resignation by Office Bearer) Rules, M.P. 1995, Rules 3 & 4 - *Appointment of Panchayat Secretary challenged on the ground that his brother was working as Panch in the Gram Panchayat - Panch resigned before the meeting in which the resolution for appointment of Panchayat Secretary was passed - Held - In absence of acceptance of resignation, brother of Panchayat Secretary continued to be a Panch and Panchayat Secretary being his near relative could not be selected as Panchayat Secretary.* [Lallu Kol v. State of M.P.] ...1607

अधिकारी द्वारा अभिलिखित निष्कर्ष न्यायसंगत और उचित थे – बोर्ड और अनुशासनिक प्राधिकारी के निष्कर्ष विपर्यस्त – शास्ति अधिरोपित करने वाला आक्षेपित आदेश अभिखण्डित – याचिका मंजूर। (नीलू (श्रीमति) वि. एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड) ...1959

सेवा विधि – अनुशासनिक प्राधिकारी – सक्षमता – दण्ड – याची को वरिष्ठ क्षेत्रीय प्रबंधक के आदेश द्वारा सेवा से हटाया गया – उसने आंचलिक प्रबंधक के समक्ष अपील पेश की जो ग्रहण की गई – आदेश पारित करने के पूर्व विनियमों में संशोधन किया गया और क्षेत्रीय प्रबंधक को अनुशासनिक प्राधिकारी बनाया गया – .त्य को इस आधार पर चुनौती दी गई कि दण्ड का आदेश अनुशासनिक प्राधिकारी से वरिष्ठ प्राधिकारी द्वारा पारित किया गया और उसके अपील के अधिकार पर प्रतिकूल प्रभाव पड़ा – अभिनिर्धारित – हटाने का आदेश उस तारीख को जिसको आदेश जारी किया गया विनियमों में विहित प्राधिकारी से उच्चतर प्राधिकारी द्वारा पारित किया गया, उससे कोई प्रतिकूल प्रभाव या विभेद नही हुआ क्योंकि याची ने अपील के उपचार का सफलतापूर्वक लाभ उठाया और यद्यपि उसे पुनर्विलोकन का उपचार भी उपलब्ध था, उसने उसका लाभ न उठाने का चयन किया। (नाथूराम वि. फूड कारपोरेशन ऑफ इंडिया) ...1658

सेवा विधि – रिट याचिका 3838/05(एस) (दद्दी लाल का मामला) में उच्च न्यायालय के विनिश्चय के प्रकाश में पूर्ववर्ती रिट याचिका में यह आदेशित किया गया कि याची अर्द्धकुशल दैनिक मजदूर निम्नतम श्रेणी पर वेतन का हकदार है – किन्तु तत्पश्चात् दद्दी लाल का मामला उच्च न्यायालय की खण्ड न्यायपीठ द्वारा रिट अपील 491/07 में उलट दिया गया – खण्ड न्यायपीठ ने अभिनिर्धारित किया कि मान में न्यूनतम वेतन दिया जाना उच्चतम न्यायालय के उमा देवी {(2006) 4 एससीसी 1} के मामले में निर्णय के प्रतिकूल है – न्यूनतम मान का दावा करने वाली पश्चात्वर्ती रिट याचिका खारिज। (जानकी प्रसाद गर्ग वि. म.प्र. राज्य) ...1942

सेवा विधि – निम्नतर न्यायिक सेवा (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1994, नियम 7, पंचायत संविदा शाला शिक्षक (भर्ती तथा संविदा की शर्तें) नियम, म.प्र. 2005, नियम 10, 12, 12(ए) व 12(एच) – आयु–सीमा में छूट – याची संविदा शाला शिक्षक वर्ग–2 के रूप में शासकीय विद्यालय में कार्यरत – उसने इस आधार पर कि वह एक शासकीय सेवक है, 3 वर्ष की छूट का दावा करते हुए सिविल न्यायाधीश के पद के लिए आवेदन किया – अभिनिर्धारित – याची का नियुक्ति प्राधिकारी जनपद पंचायत है और इस प्रकार वह शासकीय सेवक नही है तथा उसे आयुसीमा में छूट प्रदान नही की जा सकती। (अरूण सिंह भदौरिया वि. म.प्र. राज्य) ...1939

सेवा विधि – पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69(1), पंचायत (पदाधिकारी द्वारा त्यागपत्र) नियम, म.प्र. 1995, नियम 3 व 4 – पंचायत सचिव की नियुक्ति को इस आधार पर चुनौती दी गई कि उसका भाई ग्राम पंचायत में पंच के रूप में कार्यरत था – पंच ने उस बैठक के पूर्व त्यागपत्र दे दिया जिसमें पंचायत सचिव की नियुक्ति का प्रस्ताव पारित किया गया – अभिनिर्धारित – त्यागपत्र की स्वीकृति के अभाव में पंचायत सचिव का भाई पंच बना रहा और पंचायत सचिव उसका नजदीकी रिश्तेदार होने से पंचायत सचिव के रूप में चयनित नही किया जा सकता था। (लल्लू कोल वि. म.प्र. राज्य) ...1607

Service Law - Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 20 - *Promotion - Seniority-cum-fitness - Criterion explained - Held - While promoting an employee on the basis of seniority-cum-fitness, there is no requirement of assessment of comparative merit and an employee is to be promoted if he fulfills the minimum merit of satisfying a benchmark fixed by the DPC.* [Bharat Bhusan Sharma v. State of M.P.] ...1204

Service Law - *Police Regulations, M.P., Regulation 241 - Petitioner acquitted in criminal case - Petitioner prayed for quashing the charge-sheet and not to proceed further in D.E. initiated against him - Held - Petitioner has been acquitted by the criminal Court on the same charges on which the D.E. was instituted - Petitioner is entitled to reinstatement in accordance with the provisions of Regulation 241 of Police Regulations - Charge-sheet quashed - Petition allowed.* [H.R. Kaurav v. State of M.P.] ...1233

Service Law - *Transfer - Competence to transfer - Appellant working as compounder in Autonomous Government Ayurved College, Ujjain - He made an application to the Government for being transfered to Autonomous Government Ayurved College, Rewa - Appellant was transferred to Rewa - After joining at Rewa, he was again transferred to Ujjain for the reason that the Government has no power to transfer an employee of autonomous college from one college to another - Held - Government cannot control the service conditions of employees of autonomous college as autonomous colleges are governed by specific rules framed/adopted by such colleges and cannot transfer such employees from one college to another.* [Pramod Kumar Shukla v. State of M.P.] ...1200

Service Law - *Transfer - Petitioner an employee of Municipal Council - Transferred to District Urban Development Agency (DUDA) - Order of transfer quashed by High Court holding that transfer was not a transfer from one Municipal Council to another - Petitioner was again transferred to DUDA - Writ petition challenging the order was disposed of with direction to Transfer Grievance Cell for reconsideration - Consequently, petitioner was posted in Municipal Council but was again transferred to DUDA - Petition against - Held - In other case Division Bench of High Court held that DUDA is a body fully controlled by State Government and, therefore, the State employee can be transferred to DUDA - Record pertaining to the proceedings leading to the subject transfer also do not reveal any factor having effect of vitiating transfer - Transfer can not be said to be illegal - Petition dismissed.* [S.B. Singh v. State of M.P.] ...1266

Service Law - *Transfer - Petitioner, a Reserve Inspector (R.I.) of Police Department posted as Inspector (Traffic) - Send back as R.I. on account of administrative exigency - Held - Clause 2 of the circular dated 14.02.2007*

सेवा विधि – पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 20 – पदोन्नति – वरिष्ठता सह योग्यता – मानदण्ड स्पष्ट किये गये – अभिनिर्धारित – जब किसी कर्मचारी को वरिष्ठता सह योग्यता के आधार पर पदोन्नत किया जा रहा हो तो तुलनात्मक योग्यता के निर्धारण की कोई आवश्यकता नही है और एक कर्मचारी को पदोन्नत करना होगा यदि वह विभागीय पदोन्नति समिति द्वारा नियत मानक पूरा करने की न्यूनतम योग्यता पूरी करता है। (भारत भूषण शर्मा वि. म.प्र. राज्य) ...1204

सेवा विधि – पुलिस विनियम, म.प्र., विनियम 241 – याची दाण्डिक मामले में दोषमुक्त – याची ने उसके विरुद्ध प्रारम्भ की गई विभागीय जाँच में आरोप पत्र अभिखण्डित करने और आगे कार्यवाही न करने की प्रार्थना की – अभिनिर्धारित – दाण्डिक न्यायालय द्वारा याची को उन्ही आरोपों पर दोषमुक्त किया गया जिन पर विभागीय जाँच संस्थित की गई थी – याची पुलिस विनियम के विनियम 241 के उपबंधानुसार पुनर्नियुक्ति का हकदार – आरोप पत्र अभिखण्डित – याचिका मंजूर। (एच.आर.कौरव वि. म.प्र. राज्य) ...1233

सेवा विधि – स्थानांतरण – स्थानांतरण की सक्षमता – अपीलार्थी स्वशासी शासकीय आयुर्वेद महाविद्यालय, उज्जैन में कम्पाउण्डर के रूप में कार्यरत – उसने स्वशासी शासकीय आयुर्वेद महाविद्यालय, रीवा में स्थानांतरित किये जाने के लिए सरकार को आवेदन किया – अपीलार्थी को रीवा स्थानांतरित किया गया – रीवा में कार्यभार ग्रहण करने के बाद उसे इस कारण पुनः उज्जैन स्थानांतरित किया गया कि सरकार को स्वशासी महाविद्यालय के किसी कर्मचारी को एक महाविद्यालय से दूसरे में स्थानांतरित करने की शक्ति नही है – अभिनिर्धारित – सरकार स्वशासी महाविद्यालय के कर्मचारियों की सेवा शर्तों को नियंत्रित नही कर सकती क्योंकि स्वशासी महाविद्यालय ऐसे महाविद्यालयों द्वारा विरचित/अपनाये गये विनिर्दिष्ट नियमों से शासित होते हैं और ऐसे कर्मचारियों का एक महाविद्यालय से दूसरे में स्थानांतरण नही कर सकती। (प्रमोद कुमार शुक्ला वि. म.प्र. राज्य) ...1200

सेवा विधि – स्थानांतरण – याची नगर पालिका परिषद का कर्मचारी – जिला नगरीय विकास अभिकरण (डीयूडीए) में स्थानांतरित किया गया – स्थानांतरण का आदेश उच्च न्यायालय द्वारा यह अभिनिर्धारित करते हुए अभिखण्डित किया गया कि स्थानांतरण एक नगर पालिका परिषद से दूसरी में स्थानांतरण नही था – याची को पुनः डीयूडीए में स्थानांतरित किया गया – आदेश को चुनौती देने वाली रिट याचिका स्थानांतरण शिकायत प्रकोष्ठ को पुनर्विचार के निदेश के साथ निपटाई गयी – परिणामस्वरूप, याची को नगर पालिका परिषद में पदस्थ किया गया किन्तु पुनः डीयूडीए में स्थानांतरित कर दिया गया – उसके विरुद्ध याचिका – अभिनिर्धारित – अन्य मामले में उच्च न्यायालय की खण्ड न्यायपीठ ने यह अभिनिर्धारित किया कि डीयूडीए राज्य सरकार द्वारा पूर्णतः नियंत्रित एक निकाय है इसलिए राज्य सरकार का कर्मचारी डीयूडीए में स्थानांतरित किया जा सकता है – विषयांकित स्थानांतरण की कार्यवाहियों से सम्बन्धित अभिलेख भी स्थानांतरण को दूषित करने का प्रभाव रखने वाला कोई कारक प्रकट नही करता – स्थानांतरण अवैध नही कहा जा सकता – याचिका खारिज। (एस.बी. सिंह वि. म.प्र. राज्य) ...1266

सेवा विधि – स्थानांतरण – याची, पुलिस विभाग का आरक्षित निरीक्षक, की नियुक्ति निरीक्षक (यातायात) के पद पर की गई – प्रशासनिक अत्यावश्यकता के कारण आरक्षित निरीक्षक के रूप में वापस भेजा गया – अभिनिर्धारित – परिपत्र तारीख 14.02.2007 का खण्ड 2 थाना प्रभारी सहित

providing the minimum period of 2 years at one place in respect of various officers including S.H.O. is not applicable to the Inspector (Traffic) - Clause 3(2) of the circular empower the Board for transfer and posting of D.S.P. and officers subordinate - It further provides that decision of transfer taken by the Board shall be sent to State Government before execution - After taking the decision to transfer the petitioner, a copy of transfer order was sent by the Board to the State Government -Petitioner's transfer order not violative of the any clause of the circular - Order of transfer was passed taking into consideration the vacant post of R.I., past experience of petitioner and forthcoming election - No mala fide in issuance of impugned transfer order - Petition dismissed. [Arvind Tiwari v. State of M.P.] ...1331

Service Law - ***Whether employees of autonomous college are Government Servants*** - *Held - No, the Government has no role to play at the time of their appointment, the salary/wages are not paid by the Government and it is not the disciplinary authority - Such persons cannot be held to be Government Servant.* [Pramod Kumar Shukla v. State of M.P.] ...1200

Specific Relief Act (47 of 1963), Section 6(3) - **See** - *Civil Procedure Code, 1908, Section 115* [Doma v. Saya Bai] ...*30

Stamp Act (2 of 1899), Section 2(14) - **See** - *Coal Bearing Areas (Acquisition and Development) Act, 1957, Sections 10 & 11* [State of M.P. v. Western Coalfields Ltd.] ...1887

Stamp Act (2 of 1899), Section 3 - *Assuming that the vesting order is to be understood to be an instrument then the proviso to Section 3 of Stamp Act would protect the Central Government so also the State Government - In any case, the vesting would have its own effect and cannot be treated to be a lease executed by the Central Government in favour of Government Company.* [State of M.P. v. Western Coalfields Ltd.] ...1887

Stamp Act (2 of 1899), Section 35 - ***Agreement to sell suit property on a plain paper*** - *Unless a duty is paid on an instrument it shall not be admitted in evidence for any purpose, which will include a collateral purpose.* [Narbada Prasad Agrawal v. Tarun Bhawasar] ...1255

Stamp Act (2 of 1899), Article 35(a)(ii) - *Petitioner granted right to extract 8400 cubic meter of sand in lieu of payment of fixed amount of Rs.5,04,000 - Lessor is parting right to extract fixed quantity of numeral for a fixed period of time - Amount required to be paid in instalments is not a periodical payment of enjoyment of benefits of lease - Premium though payable in instalments cannot be said to be rent - Petition dismissed.* [Rakesh Singare v. State of M.P.] ...1922

Succession Act (39 of 1925), Sections 276 & 263 - ***Ex parte probate of will*** - *Application to set-aside u/O. 9 R. 13 CPC filed - Alleged that*

विभिन्न अधिकारियों के सम्बन्ध में एक स्थान पर 2 वर्ष की न्यूनतम कालावधि का उपबंध करता है, निरीक्षक (यातायात) को लागू नही होता – परिपत्र का खण्ड 3(2) डी.एस.पी. और उसके अधीनस्थ अधिकारियों के स्थानांतरण और पदस्थापना के लिए बोर्ड को सशक्त करता है – यह भी उपबंधित करता है कि बोर्ड द्वारा स्थानांतरण का निर्णय लेने के बाद उसे निष्पादन के पूर्व राज्य सरकार को भेजा जायेगा – याची को स्थानांतरित करने का निर्णय लेने के बाद स्थानांतरण आदेश की प्रतिलिपि बोर्ड द्वारा राज्य सरकार को भेजी गई थी – याची का स्थानांतरण आदेश परिपत्र के किसी खण्ड का उल्लंघन नही करता – स्थानांतरण का आदेश आरक्षित निरीक्षक के रिक्त पद, याची के पूर्व अनुभव एवं आसन्न चुनाव को विचार में लेते हुए पारित किया गया – विवादित स्थानांतरण आदेश जारी करने में कोई असद्भाव नही – याचिका खारिज। (अरविंद तिवारी वि. म.प्र. राज्य) ...1331

सेवा विधि – क्या स्वशासी महाविद्यालय के कर्मचारी शासकीय कर्मचारी हैं – अभिनिर्धारित – नही, सरकार उनकी नियुक्ति के समय कोई भूमिका नही निभाती, तनख्वाह/वेतन का सरकार द्वारा भुगतान नही किया जाता और यह अनुशासनिक प्राधिकारी नही है – ऐसे व्यक्ति शासकीय कर्मचारी होना अभिनिर्धारित नही किये जा सकते। (प्रमोद कुमार शुक्ला वि. म.प्र. राज्य) ...1200

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6(3) – देखें –सिविल प्रक्रिया संहिता, 1908, धारा 115, (डोमा वि. साया बाई) ---*30

स्टाम्प अधिनियम (1899 का 2), धारा 2(14) – देखें – कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम, 1957, धाराएँ 10 व 11 (म.प्र. राज्य वि. वेस्टर्न कोलफील्डस् लि) ...1887

स्टाम्प अधिनियम (1899 का 2), धारा 3 – यह मानते हुए कि निहित करने वाला आदेश लिखत होना समझा जाने वाला है तब स्टाम्प अधिनियम की धारा 3 का परन्तुक केन्द्र सरकार और राज्य सरकार का भी संरक्षण करेगा – किसी भी दशा में निहित करना अपना स्वयं का प्रभाव रखेगा और केन्द्र सरकार द्वारा राज्य सरकार के पक्ष में निष्पादित पट्टा होना नही माना जा सकता। (म.प्र. राज्य वि. वेस्टर्न कोलफील्डस् लि) ...1887

स्टाम्प अधिनियम (1899 का 2), धारा 35 – वादग्रस्त सम्पत्ति विक्रय करने का अनुबन्ध सादा कागज पर – जब तक किसी लिखत पर कोई शुल्क अदा नही किया जाता, वह किसी भी प्रयोजन के लिए साक्ष्य में ग्राह्य नही होगा, जिसमें आनुषंगिक प्रयोजन भी शामिल है। (नरबदा प्रसाद अग्रवाल वि. तरूण भावसार) ...1255

स्टाम्प अधिनियम (1899 का 2), अनुच्छेद 35(ए)(ii) – याची को 5,04,000 रुपये की निश्चित राशि के संदाय के बदले 8400 घन मीटर रेत निकालने का अधिकार प्रदान किया गया – पट्टाकर्ता संख्या की निश्चित मात्रा निकालने का अधिकार निश्चित कालावधि के लिए अलग कर रहा है – किस्तों में अदा करने के लिए अपेक्षित राशि पट्टे के लाभों के उपभोग का कालिक संदाय नही है – प्रीमियम यद्यपि किस्तों में देय है तथापि किराया नही कहा जा सकता – याचिका खारिज। (राकेश सिंगारे वि. म.प्र. राज्य) ...1922

उत्तराधिकार अधिनियम (1925 का 39), धाराएँ 276 व 263 – वसीयत का एकपक्षीय प्रोबेट – अपास्त कराने के लिए सि.प्र.सं. के आदेश 9 नियम 13 के अधीन आवेदन पेश – यह अभिकथित किया गया कि वसीयत का मृत वसीयतकर्ता ब्लड केंसर से पीड़ित था और निष्पादन

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deceased testator of will was suffering from blood cancer and admitted in hospital one day before the alleged date of execution and died on the next day - Application for amendment so as to treat it as application for revocation of probate also filed - Rejection holding that no case for setting-aside ex-parte order is made - Appeal - Held - Aspect of admitting deceased testator in hospital and death on the very next day of execution of will was not disclosed by respondent - Non-disclosure of these facts would amount to concealment from Court something material to the case so as to invoke jurisdiction of revocation of grant of probate for just cause - Powers of the court u/s 263 are wide enough to revoke or annual the grant of probate for just cause - Case remanded for fresh decision - Appeal allowed. [Leelawati (Smt.) v. Emanueal] ...1394

Transfer of Property Act (4 of 1882), Section 52 - ***Doctrine of lis pendence*** *- Decree for specific performance of contract passed against defendant No.4 in the year 1961 and decree was executed in 1967 - Defendant No.4 took loan in the year 1966 and mortgaged the land - Land auctioned in recovery proceedings and was purchased by defendant No.10 - Held - No right or title is acquired by defendant No.10 - Doctrine of lis pendence would apply - Section 52 places complete embargo on transfer of immovable property, right to which is directly and specifically in question in a pending litigation - Appeal allowed.* [Shakuntaladevi v. Shivpuri Sahkari Bhumi Vikas Bank Maryadit, Shivpuri] ...1356

Transfer of property Act (4 of 1882), Section 52 - See - *Civil Procedure Code, 1908, Order 21 Rule 29* [Dilip Kumar v. Vijay Bhadur Singh] ...1408

Transfer of property Act (4 of 1882), Section 52 - See - *Civil Procedure Code, 1908, Order 21 Rules 98, 100, 101 & 102* [Dilip Kumar v. Vijay Bhadur Singh] ...1408

Transfer of Property Act (4 of 1882), Sections 53A & 54 - See - *Civil Procedure Code, 1908, Order 1 Rule 10,* [Govind Prasad Dubey v. Chandra Mohan Agnihotri] ...2228

Transfer of Property Act (4 of 1882), Section 58(c) - *Whether transaction is outright sale or mortgage by conditional sale - Registered sale deed not containing any condition regarding conditional sale - Alleged unregistered agreement of reconveyance executed after five months of sale - Held - Sale deed can not be held to be a mortgage by conditional sale - Suit dismissed - Appeal allowed.* [Jama v. Khalil] ...1732

Transfer of Property Act (4 of 1882), Section 111(d) - See - *Accommodation Control Act, M.P., 1961, Section 12,* [Hameeda Begum (Smt.) v. Smt. Champa Bai Jain] ...2328

Transposing of parties - *Suit by Bheroji against his father Dallaji - During pendency Dallaji died and his daughter Devi Bai impleaded - Plaintiff*

की कथित तारीख के एक दिन पूर्व अस्पताल में भर्ती किया गया और अगले दिन मृत्यु हो गयी – संशोधन के लिए आवेदन भी पेश किया गया ताकि इसे प्रोबेट के प्रतिसंहरण के लिए आवेदन माना जाए – यह अभिनिर्धारित करते हुए खारिज किया गया कि एकपक्षीय आदेश अपास्त करने के लिए कोई मामला नही बनता – अपील – अभिनिर्धारित – मृतक वसीयतकर्ता को अस्पताल में भर्ती करने और वसीयत के निष्पादन के अगले ही दिन मृत्यु होने का तथ्य प्रत्यर्थी द्वारा प्रकट नही किया गया – इन तथ्यों का अप्रकटीकरण मामले की तात्विक जानकारी को न्यायालय से छुपाने की कोटि में आयेगा ताकि प्रोबेट के प्रतिसंहरण की अधिकारिता का न्यायसंगत कारण के लिए अवलंब लिया जाए – धारा 263 के अधीन न्यायालय को न्यायसंगत कारण के लिए प्रोबेट प्रदान करने को प्रतिसंहृत या रद्द करने की व्यापक शक्तियाँ हैं – मामला पुनः विनिश्चय के लिए प्रतिप्रेषित – अपील मंजूर। (लीलावती (श्रीमति) वि. इमेनुअल) ...1394

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 – लम्बित वाद का सिद्धांत – प्रतिवादी क्रमांक 4 के विरुद्ध वर्ष 1961 में संविदा के विनिर्दिष्ट पालन की डिक्री पारित की गई और डिक्री 1967 में निष्पादित की गई – प्रतिवादी क्रमांक 4 ने वर्ष 1966 में ऋण लिया और भूमि बंधक की – वसूली कार्यवाहियों में भूमि की नीलामी की गई और प्रतिवादी क्रमांक 10 द्वारा क्रय की गई – अभिनिर्धारित – प्रतिवादी क्रमांक 10 द्वारा कोई अधिकार और स्वत्व अर्जित नही – लम्बित वाद का सिद्धांत लागू होगा – धारा 52 स्थावर सम्पत्ति के अंतरण पर पूर्ण रोक लगाती है, जिसका अधिकार प्रत्यक्षतः और विनिर्दिष्टतः किसी लम्बित वाद में प्रश्नगत हो – अपील मंजूर। (शकुनतलादेवी वि. शिवपुरी सहकारी भूमि विकास बैंक मर्यादित, शिवपुरी) ...1356

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 21 नियम 29 (दिलीप कुमार वि. विजय बहादुर सिंह) ...1408

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 21 नियम 98, 100, 101 व 102, (दिलीप कुमार वि. विजय बहादुर सिंह) ...1408

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धाराएँ 53ए व 54 – देखें – सिविल प्रक्रिया संहिता 1908, आदेश 1 नियम 10, (गोविंद प्रसाद दुबे वि. चंद्र मोहन अग्निहोत्री) ...2228

सम्पत्ति अंतरण अधिनियम (1882 का 4), धारा 58(सी) – क्या संव्यवहार सम्पूर्ण विक्रय है या सशर्त विक्रय द्वारा बंधक – रजिस्ट्री.त विक्रयपत्र में सशर्त विक्रय के सम्बन्ध में कोई शर्त अन्तर्विष्ट नही – प्रतिहस्तांतरण का कथित अरजिस्ट्री.त अनुबन्ध विक्रय के पाँच माह बाद निष्पादित किया गया – अभिनिर्धारित – विक्रय पत्र सशर्त विक्रय द्वारा बंधक होना नही ठहराया जा सकता – वाद खारिज – अपील मंजूर। (जामा वि. खलील) ...1732

सम्पत्ति अंतरण अधिनियम (1882 का 4), धारा 111(डी) – देखें – स्थान नियंत्रण अधिनियम, म.प्र., 1961, धारा 12, (हमीदा बेगम (श्रीमति) वि. श्रीमति चंपा बाई जैन) 2328

पक्षकारों का पक्षांतरण – भैरोजी द्वारा अपने पिता दल्लाजी के विरुद्ध वाद – लम्बित रहने के दौरान दल्लाजी की मृत्यु हो गयी और उसकी पुत्री देवी बाई को पक्षकार बनाया गया – वादी

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Bheoroji died issueless and Devi Bai transposed as plaintiff - Held - Devi Bai being sister of plaintiff entitled to succeed the property of Bheroji as she was Class-II heir - In absence of partition between Bheroji and Dallaji, Devi Bai was entitled for share in properties of Dallaji - Her transposition as plaintiff was valid. [Ramawtar v. Mangi Lal (Deceased) Through L.Rs.]...2360

University Act, M.P. (22 of 1973), Sections 6(12) & 24 - *Power to withdraw degree - Section 6(12) of Act empowers University to withdraw degree of Ph.D. - It is not a legal proposition that if a manner for performing an act is not provided, the same cannot be performed despite empowerment for the same under the substantive provision - Authorities are well within their powers to exercise said powers in a reasonable and rational manner which is not prohibited by law.* [K.S. Gaharwar v. Barkatullah Vishwavidyalaya] ...1241

University Act, M.P. (22 of 1973), Section 24(xxx) - *Natural Justice - Certain portion of thesis found to be copied - Executive Council directed petitioner to resubmit thesis after removal of copied portion - Held - No show cause notice issued to petitioner with regard to allegation about copying - Order quashed - However, University and Executive Council shall have liberty to take up the matter afresh in accordance with law.* [K.S. Gaharwar v. Barkatullah Vishwavidyalaya] ...1241

University Act, M.P. (22 of 1973), Section 24(xxx) - *Powers and Duties of Executive Council - Withdrawal of degree - Power to withdraw degree is exercisable by Executive Council.* [K.S. Gaharwar v. Barkatullah Vishwavidyalaya] ...1241

Unlawful Activities (Prevention) Act (of 1967), Sections 3(10) & 13 - See - *Criminal Procedure Code, 1973, Section 437(6)* [Aman Khan v. State of M.P.] ...2477

Waiver - *Fundamental right of appellant Sto equality of opportunity in matter relating to public employment has been violated - There could be no waiver of any fundamental right guaranteed by part III of Constitution - Relief cannot be denied to appellant only on the ground that pursuant to advertisement which contains a condition that requisite educational qualification should have been obtained from school situated in M.P., the appellant participated in recruitment process.* [Saurabh Singh v. State of M.P.] ...1893

Wakf Act (43 of 1995), Sections 6-A (As amended by M.P. Amendment) & 54, Wakf Rules, M.P. 2000, Rule 15, Civil Procedure Code, 1908, Order 14 Rule 1 - *Manner of Inquiry to be held by Chief Executive Officer - Non-framing of issues - Summary procedure has been provided before C.E.O. whereas full-fledged enquiry has been provided before Tribunal - Scope of enquiry before C.E.O. is limited one and has to determine only encroachment on Wakf property - No fault can be found if C.E.O. has not framed issues - Petition dismissed.* [Asif Ansari v. Waqf Mahal Umrao Jehan] ...1319

भैरोजी की संतानहीन मृत्यु हुई और देवी बाई वादी के रूप में पक्षांतरित हुई – अभिनिर्धारित – देवी बाई वादी की बहिन होने से भैरोजी की सम्पत्ति की उत्तराधिकारी होने की हकदार क्योंकि वह द्वितीय श्रेणी की वारिस थी – भैरोजी और दल्लाजी के मध्य विभाजन के अभाव में देवी बाई दल्लाजी की सम्पत्तियों में हिस्से की हकदार थी – उसका वादी के रूप में पक्षांतरण विधिमान्य। (राम अवतार वि. मांगी लाल (मृतक) द्वारा विधिक प्रतिनिधि) ...2360

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 6(12) व 24 – डिग्री वापस लेने की शक्ति – अधिनियम की धारा 6(12) विश्वविद्यालय को पीएच.डी. की डिग्री वापस लेने के लिए सशक्त करती है – यह विधिक प्रतिपादना नही है कि यदि किसी कार्य को करने का कोई ढंग उपबंधित नही है तो वह मूल उपबंध के अधीन उसके लिए सशक्त होते हुए भी नही किया जा सकता – प्राधिकारी युक्तियुक्त और युक्तिसंगत ढंग, जो विधि द्वारा प्रतिषिद्ध नही है, से उक्त शक्तियों का प्रयोग करने के लिए उनकी शक्तियों के भीतर हैं । (के.एस.गहरवार वि. बरकतउल्ला विश्वविद्यालय) ...1241

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 24(xxx) – प्राकृतिक न्याय – थीसिस का कुछ भाग नकल किया हुआ पाया गया – कार्यकारी परिषद् ने याची को निदेशित किया कि नकल किया हुआ भाग हटाने के बाद थीसिस पुनः प्रस्तुत करे – अभिनिर्धारित – नकल के आरोप के संबंध में याची को कोई कारण बताओ सूचना पत्र जारी नही किया गया – आदेश अभिखण्डित – तथापि, विश्वविद्यालय और कार्यकारी परिषद् को स्वतंत्रता दी गई कि विधि अनुसार मामले की पुनः सुनवाई करे। (के.एस.गहरवार वि. बरकतउल्ला विश्वविद्यालय) ...1241

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 24(xxx) – कार्यकारी परिषद् की शक्तियाँ और कर्तव्य – डिग्री का वापस लिया जाना – डिग्री वापस लेने की शक्ति कार्यकारी परिषद् द्वारा प्रयोग की जा सकती है। (के.एस.गहरवार वि. बरकतउल्ला विश्वविद्यालय) ...1241

विधिविरुद्ध क्रियाकलाप (निवारण) अधिनियम, (1967 का), धाराएँ 3(10) व 13 – देखें –दण्ड प्रक्रिया संहिता, 1973, धारा 437(6), (अमान खान वि. म.प्र. राज्य) ...2477

अधित्यजन – लोक नियोजन से सम्बन्धित मामले में अवसर की समानता के याची के मूलभूत अधिकार का उल्लंघन किया गया – संविधान के भाग ण्ण् द्वारा प्रत्याभूत किसी मूलभूत अधिकार का कोई अधित्यजन नही हो सकता – अपीलार्थी को केवल इस आधार पर अनुतोष से इंकार नही किया जा सकता कि अपीलार्थी ने उस विज्ञापन के अनुसरण में जिसमें यह शर्त अंतर्विष्ट है कि अपेक्षित शैक्षिक अर्हता म.प्र. में स्थित विद्यालय से अभिप्राप्त की जानी चाहिए थी, भर्ती प्रक्रिया में भाग लिया। (सौरभ सिंह वि. म.प्र. राज्य) ...1893

वक्फ अधिनियम (1995 का 43), धाराएँ 6–ए (म.प्र. संशोधन द्वारा यथा संशोधित) व 54, वक्फ नियम, म.प्र. 2000, नियम 15, सिविल प्रक्रिया संहिता, 1908, आदेश 14 नियम 1 – मुख्य कार्यपालक अधिकारी द्वारा की जाने वाली जाँच का ढंग – विवाद्यकों की विरचना न करना – मुख्य कार्यपालक अधिकारी के समक्ष संक्षिप्त प्रक्रिया का उपबंध किया गया है जबकि अधिकरण के समक्ष पूर्ण विकसित जाँच का उपबंध किया गया है – मुख्य कार्यपालक अधिकारी के समक्ष जाँच का विषयक्षेत्र सीमित है और केवल वक्फ सम्पत्ति पर अतिक्रमण का अवधारण करता है – कोई त्रुटि नही पायी जा सकती यदि मुख्य कार्यपालक अधिकारी ने विवाद्यकों की विरचना नही की – याचिका खारिज। (असिफ अंसारी वि. वक्फ महल उमराव जेहान) ...1319

Wakf Act (43 of 1995), Section 85 - *Bar of jurisdiction of Civil Courts - Whether the suit filed by Wakf for ejectment of tenant is maintainable before Civil Court - Held - Sec. 85 ousts the jurisdiction of Civil Court to try such cases of ejectment of tenant - Such dispute is to be adjudicated upon by Wakf Tribunal.* [Wakf Imambara Imlipur, Khandwa v. Smt. Khursheeda Bi] ...2182

Wakf Rules, M.P. 2000, Rule 15 - See - *Wakf Act, 1995, Sections 6-A (As amended by M.P. Amendment) & 54* [Asif Ansari v. Waqf Mahal Umrao Jehan] ...1319

WORDS AND PHRASES :–

Premium and Rent - *When interest of lessor in immovable property is parted for the price, the price paid is premium - Where periodical payments are made for continous enjoyment of benefits under the lease are in nature of rent.* [Rakesh Singare v. State of M.P.] ...1922

Reside - *Includes not only permanent residence but also temporary residence but does not include flying visit.* [Manu Bhai Tripathi v. Union of India] ...1225

Will - *Facts required to be taken into consideration by the Court for the purposes of proof of Will - Law reiterated.* [Vimal Mishra (Smt.) v. Krishna Gopal Sharma] ...1737

Workmen's Compensation Act (8 of 1923), Section 4A - *Workman suffered grievous injuries by an accident which arises out of act in the course of employment - Commissioner awarded compensation and directed that in case employer failed to deposit compensation within 30 days, workman shall be entitled for interest @ 12% p.a. - Held - Under the provisions of Act, compensation shall be paid as soon as it falls due - Amount of compensation fell due on the date of accident itself - Employer failed to deposit compensation after the accident - Workman entitled for interest @ 12% p.a. from the date of accident till payment - Appeal allowed.* [Suraj Prasad v. Executive Engineer (Supply/Maintenance) M.P. State Electricity Board, Shajapur] ...1385

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वक्फ अधिनियम (1995 का 43), धारा 85 – सिविल न्यायालयों की अधिकारिता का वर्जन – क्या वक्फ द्वारा किरायेदार की बेदखली के लिए पेश वाद सिविल न्यायालय के समक्ष पोषणीय है – अभिनिर्धारित – धारा 85 किरायेदार की बेदखली के ऐसे मामलों का विचारण करने की सिविल न्यायालय की अधिकारिता को बाहर करती है (वक्फ इमामबाड़ा इमलीपुरा, खण्डवा वि. श्रीमति खुर्शीदा बी) ...2182

वक्फ नियम, म.प्र. 2000, नियम 15 – देखें – वक्फ अधिनियम, 1995, धाराएँ 6–ए (म.प्र. संशोधन द्वारा यथा संशोधित) व 54 (असिफ अंसारी वि. वक्फ महल उमराव जेहान)...1319

शब्द और वाक्यांश :

प्रीमियम और किराया – जब स्थावर सम्पत्ति में पट्टाकर्ता का हित मूल्य के लिए अलग किया जाता है तब दिया गया मूल्य प्रीमियम है – जहाँ पट्टे के अधीन लाभों के निरंतर उपभोग के लिए कालिक संदाय किया जाता है तो उसकी प्रति किराये की होती है। (राकेश सिंगारे वि. म.प्र. राज्य) ...1922

निवास करना – में न केवल स्थायी निवास बल्कि अस्थायी निवास भी सम्मिलित है किन्तु त्वरित मुलाकात सम्मिलित नही है। (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) ...1225

वसीयत – तथ्य जिन्हें वसीयत के सबूत के प्रयोजन के लिए न्यायालय द्वारा विचार में लिया जाना आवश्यक है – विधि दोहराई गई। (विमल मिश्रा (श्रीमति) वि. कृष्णा गोपाल शर्मा) ...1737

कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 4ए – कर्मकार नियोजन के अनुक्रम में कार्य से हुई दुर्घटना से गंभीर क्षतियों से पीड़ित हुआ – कमिश्नर ने प्रतिकर अधिनिर्णीत किया और निदेशित किया कि यदि नियोक्ता 30 दिनों के भीतर प्रतिकर जमा करने में विफल रहता है तो कर्मकार 12 प्रतिशत प्रतिवर्ष की दर से ब्याज का हकदार होगा – अभिनिर्धारित – अधिनियम के उपबंधों के अधीन प्रतिकर अदा करना होगा जैसे ही वह देय हो जाता है – प्रतिकर की राशि दुर्घटना दिनांक को ही देय हो गयी – नियोक्ता दुर्घटना के बाद प्रतिकर जमा करने में विफल रहा – कर्मकार दुर्घटना दिनांक से अदायगी तक 12 प्रतिशत प्रतिवर्ष की दर से ब्याज का हकदार – अपील मंजूर। (सूरज प्रसाद वि. एग्जीक्यूटिव इंजीनियर (सप्लाई/मेन्टेनेन्स) एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड, शाजापुर) ...1385

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I.L.R. [2009] M. P., 2133

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat, Mr. Justice Lokeshwar Singh Panta & Mr. Justice P. Sathasivam

15 April, 2009*

SURESH CHANDRA SHARMA ... Appellant

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 194 - *Giving or fabricating false evidence with intent to procure conviction of capital offence - Appellant, a Sub-Inspector fabricated false evidence by surreptitiously inserting timings in various documents prepared during investigation - Appellant admitted in cross-examination that timing was mentioned later on - P.W. 2 also deposed that he had seen appellant making corrections in original documents during the pendency of trial - Held - Purpose was to get the accused persons convicted - Accusations found proved by both the Courts - Appeal dismissed.* (Para 10)

दण्ड संहिता (1860 का 45), धारा 194 – मृत्यु से दण्डनीय अपराध की दोषसिद्धि उपाप्त करने के आशय से मिथ्या साक्ष्य देना या गढ़ना – अपीलार्थी उपनिरीक्षक ने अन्वेषण के दौरान तैयार किये गये विभिन्न दस्तावेजों में गुप्त रूप से समय अंकित कर मिथ्या साक्ष्य गढ़ी – अपीलार्थी ने प्रतिपरीक्षण में स्वीकार किया कि समय बाद में उल्लिखित किया गया – अ.सा. 2 ने भी अभिसाक्ष्य दिया कि उसने विचारण के दौरान अपीलार्थी को मूल दस्तावेजों में सुधार करते हुए देखा था – अभिनिर्धारित – प्रयोजन अभियुक्त व्यक्तियों को दोषसिद्ध करवाना था – दोनों न्यायालयों द्वारा अभियोग साबित पाये गये – अपील खारिज।

JUDGMENT

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT, J. :– Challenge in this appeal is to the judgment of a learned Single Judge of the Madhya Pradesh High Court upholding the conviction of the appellant for offence punishable under Section 194 of the Indian Penal Code, 1860 (in short the 'IPC'). However, the sentence of three years rigorous imprisonment as was awarded by learned III Additional Sessions Judge, Sagar, was reduced to one year and the fine of Rs.500/- as was imposed was enhanced to Rs.5,000/- with default stipulation.

2. Background facts which led to the trial and subsequent conviction of the appellant are as follows:

The appellant was a Sub-Inspector of Police. During the trial of Sessions Trial No.118/90, the Sessions Judge came to a prima facie conclusion that the appellant who was the Investigating Officer in that case in the course of trial fabricated false evidence by surreptitiously inserting the timings in various

*Cr.A. No.42/2004.

documents prepared during investigation and that he thereby committed an offence punishable under Section 194 IPC. He filed a complaint before the competent Magistrate who received the same on file and in due course committed the case to the Sessions Court for trial. To the complaint were annexed documents in which timings were inserted by the appellant and the copy of his evidence recorded in Sessions Trial No.118/90. In the said Sessions Trial No.118/90 four accused persons were tried for commission of offences punishable under Sections 302, 302 read with Section 34, 394 and 397 IPC. But they were acquitted.

The documents in which the appellant was found to have surreptitiously inserted the timings are memorandum, (Exs.P14, P20, P23 and P25), spot map (Ex.P11), Panchnama (Ex.P12 and P13) and Seizure Memo Exs. (P16, P19 and P20).

The trial Court as noted above found the accused appellant guilty and directed his conviction. In appeal, the stand before the High Court was that there was no evidence to show that the appellant had done any interpolation in any of the aforesaid documents during the course of trial as he had already mentioned timings in those documents before he had submitted the challan papers in the Court and if the timings were left out in the carbon copies which were supplied to the accused persons it was a bona fide mistake on his part. It was also his stand that the appellant did not give or fabricate false evidence with an intention to procure conviction of the accused persons in the concerned case who were being tried for murder and robbery. The High Court with reference to evidence of PWs 4 and 5 and the statement of the appellant while being examined under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') held that the conviction was in order.

3. The stand taken before the High Court was reiterated by learned counsel for the appellant.

4. It was submitted that PW-2's evidence is not acceptable because he had at no earlier point of time stated that the manipulation was done in his presence.

5. Learned counsel for the respondent-State on the other hand supported the judgment of the trial Court as affirmed by the High Court.

6. The learned Sessions Judge found subsequent insertion of the timing with different ink in Exs. P11, P12, P13, P16, P19 and P20. He has deposed that after appreciating the evidence in paragraph 26 of the judgment had observed that in the interest of justice, a show cause notice was to be issued and thereafter challan for the prosecution of appellant for an offence under Section 194 IPC was to be served on him.

7. PW-2 has deposed that he was the defence counsel for accused Mangal and Mohan in Sessions No.118/90 and had cross examined the appellant. He also

deposed that he had already obtained the certified copies, Exs.D1 and D4 of the memorandum statements of Mangal and Mohan on 1.3.1990 and had confronted the appellant with their originals Exs.P14 and P21. He further deposed that in the certified copies, (Exs.Dl and D4), timings are not mentioned as mentioned in their originals, i.e. Exs.P14 and P21, and he had requested the court to enquire as to when the timings were inserted in the originals. Chotelal (P.W.2) deposed in his cross-examination that he had actually seen the appellant making corrections in the original documents on 18.1.1991 though he did not complain to anyone.

8. The appellant in his examination as an accused in the present case under Sections 313 of the Code has admitted that his evidence was recorded before Shri N.S. Azad (P.W.5) and it was certified by his signature. The appellant, as a witness (P.W.16) in Sessions Trial No. 118/90 in paragraph 22 of his evidence, also admitted that in Ex.P14 time 9:20 a.m. was written by him. Ex.Dl, which is certified copy of Ex.P14, was obtained by Chotelal (P.W.2) on 1.3.1990 in which no such time is mentioned. Ex.D1, certified copy of Ex.P14 was obtained after the filing of challan papers.

9. It is to be noted that during cross-examination the appellant had admitted that the timing was mentioned later on.

10. Section 194 appears in Chapter 11 of IPC under the heading "Of False Evidence and Offences against Public Justice". Section 194 makes punishable the act of giving or fabricating false evidence with intent to procure conviction of capital offence. Both Sections 194 and 195 provide for aggravated forms of giving or fabricating false evidence. The stress on these provisions is on giving or fabricating false evidence intending thereby to cause or knowing it to be likely that he will thereby cause any person to be convicted of an offence which is not capital by the law for the time being in force in India. On the facts of the case it has been established that there was fabrication of official records by manipulating the records in large number of documents. The appellant was the investigating officer. The obvious purpose was to get the accused persons convicted. The purpose could have been achieved had the fabrication gone unnoticed. Additionally, the defence lawyer himself had deposed to have seen manipulation. Though, his conduct in not reporting the same to anybody is not certainly to be appreciated yet the evidentiary value thereof, and the evidence of the then Presiding Officer who was examined as PW-5 clearly established the accusations. That being so, the trial Court and the High Court were justified in holding the appellant guilty.

11. That being so, the appeal deserves to be dismissed, which we direct.

Appeal dismissed.

I.L.R. [2009] M. P., 2136
FULL BENCH
Before Mr. Justice Dipak Misra, Mr. Justice K.K. Lahoti & Mr. Justice Rajendra Menon
24 April, 2009*

INDORE DEVELOPMENT AUTHORITY ... Appellant
Vs.
M/S SHRI RAM BUILDERS & ors. ... Respondents

A. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) [As amended by Nagar Tatha Gram Nivesh (Sanshodhan) Adhiniyam, M.P. 2004], Section 50(4) Proviso - ***Preparation of Town Development Schemes - Lapse of Scheme*** - *Proviso to Sec. 50(4) provides that draft scheme shall be deemed to have lapsed if final publication of draft scheme is not notified within a year of publication of draft notification* - **Held** - *Objects and reasons for introducing proviso is to remove hardship caused to citizens and individual landowners - Proviso applies to pending actions also - The Scheme cannot be in perpetuity and it can lapse if action is not contemplated as provided in proviso - The doctrine of delay and laches gets attracted.* (Para 53)

क. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23) {नगर तथा ग्राम निवेश (संशोधन) अधिनियम, म.प्र. 2004 द्वारा यथासंशोधित}, धारा 50(4) परन्तुक – नगर विकास योजना की निर्मिति – योजना रद्द होना – धारा 50(4) का परन्तुक उपबंधित करता है कि यदि योजना के प्रारूप का अंतिम प्रकाशन प्रारूप अधिसूचना के प्रकाशन के एक वर्ष के भीतर अधिसूचित नही किया जाता तो योजना का प्रारूप रद्द हुआ समझा जायेगा – अभिनिर्धारित – परन्तुक को पुरःस्थापित करने का उद्देश्य और कारण नागरिकों और व्यक्तिगत भूमिस्वामियों को कारित कष्ट का निवारण करना है – परन्तुक लम्बित कार्यों को भी लागू होता है – योजना शाश्वत नही हो सकती और यदि कार्य पर ध्यान नही दिया जाता तो यह रद्द हो सकती है, जैसा कि परन्तुक में उपबंधित किया गया है – विलम्ब और उपेक्षा का सिद्धांत आकृष्ट कराया गया।

B. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) [As amended by Nagar Tatha Gram Nivesh (Sanshodhan) Adhiniyam, M.P. 2004], Section 50(4) Proviso - ***Preparation of Town Development Schemes - Lapse of Scheme*** - *Scheme floated earlier stood lapsed in view of proviso to Sec. 50(4) - Authority can proceed to take appropriate steps afresh to float a fresh scheme.* (Para 53)

ख. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23) {नगर तथा ग्राम निवेश (संशोधन) अधिनियम, म.प्र. 2004 द्वारा यथासंशोधित}, धारा 50(4) परन्तुक – नगर विकास योजना की निर्मिति – योजना रद्द होना – पूर्व में चालू की गई योजना धारा 50(4) के परन्तुक को देखते हुए रद्द हो गयी – प्राधिकरण नयी योजना चालू करने के लिए पुनः समुचित कदम उठाने के लिए अग्रसर हो सकता है।

*W.A. No.1455/2007 (Jabalpur)

Cases referred :

AIR 1982 SC 1413, (1986) 2 SCC 644, (1987) 1 SCC 424, (2003) 1 SCC 692, AIR 1983 SC 1143, AIR 1941 PC 110, AIR 1957 SC 540, AIR 1995 SC 1012, (2006) 2 SCC 740, AIR 1965 SC 1970, AIR 1972 SC 1781, (1997) 3 SCC 472, (2004) 1 SCC 663, (2004) 8 SCC 1, (2004) 6 SCC 455, (2007) 9 SCC 109, AIR 1993 SC 1367, 1952 AC 15, 1881 (17) Ch.D. 746, AIR 1991 SC 1099, (2007) 8 SCC 669, (1985) 3 SCC 169, AIR 1992 SC 1546, AIR 2003 SC 4493, (2002) 5 SCC 44, (2004) 11 SCC 360, (2003) 11 SCC 146, AIR 1990 SC 1143, (2007) 8 SCC 705.

A.M. Mathur, Ashutosh Upadhyay & Sanjay Agrawal, for the appellant.
S.C. Bagadiya & Satish Agrawal, for the respondent No.1.
P.N. Dubey, Dy.A.G., for the respondent Nos.2 to 4.
Meena Chaphekar, Vishal Verma & Praveen Chouhan, for the interveners.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J. :–** Questioning the defensibility and substantiality of the order dated 14.8.2007 passed by the learned single Judge in Writ Petition No.14605/2006, the present intra-Court appeal has been preferred under Section 2 (1) of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005. The writ appeal was heard by a Division Bench which referred to the facts in issue, the provisions contained in the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short 'the Act') especially Section 50 of the said enactment, the stand and stance taken by the contesting parties and the interveners, the view expressed by the learned single Judge and the interpretation placed by him on the proviso added to Sub-section (4) of Section 50 of the Act by the M.P. Nagar Tatha Gram Nivesh (Sansodhan) Adhiniyam, 2004 on 29.12.2004, the interpretation sought to be placed by the learned senior counsel appearing for the Indore Development Authority (in short 'the Authority') and the proponement advanced by the learned counsel for the respondents in support of the order of the learned single Judge and also to substantiate and justify how the Scheme No.132 that was prepared under Section 50 of the Act had lapsed as a consequence of which the land owners acquired the right to get their plans approved for development of the land and thereafter expressed the opinion thus:

> *"Having heard the learned counsel for the parties and regard being had to the nature of controversy involved, we are of the considered opinion, that the determination of interpretation of the provision that has been incorporated by way of amendment will have enormous impact on many a scheme. True it is, a citizen has the right to know where he exactly stands but simultaneously the has also a statutory right. The same has to be determined on apposite interpretation of the proviso. What is warranted in this appeal is to really weigh the competing rights between a statutory*

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authority on one hand the land owners on the other. Regard being had to the signification and importance of the matter we are disposed to think that the controversy should be authoritatively put to rest as far as this Court is concerned, and hence, we think it condign that the matter should be heard by a larger Bench. We are absolutely conscious that there is no conflicting judgment in the field but existence of earlier conflicting decisions on the same point is not a condition precedent to make a reference for a decision on question by a larger Bench. This has been so stated by a Full Bench in Abdul Taiyab Abbasbhai Malik and Others v. The Union of India and Others, AIR 1977 MP 116 and Balkishandas v. Har Narayan and Others, AIR 1980 MP 43."

Because of the aforesaid development, the matter has been placed before the Full Bench.

2. The expose' of facts are that the respondent No.1 invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India prayed for issue of a writ of certiorari for quashment of the orders dated 5.10.2006, and Annexures P-11, P-11A, and P-11B passed by the State Government in exercise of suo motu power of revision whereby it set aside the orders dated 7.7.2006 contained in Annexures P-5, P-6 and P-7 to the writ petition passed by the third respondent therein, the Joint Director, Town and Country Planning, Indore by which the said Authority approved the layout of the proposed development sought by the petitioner in respect of the land in question. It was contended in the writ petition that the petitioner, a partnership firm, is involved in construction business. He is the owner in possession of the land bearing survey Nos. 73/4/2, 74, 75/3 admeasuring 1.237 Hectares, Survey Nos. 83/2, 84/2 admeasuring an area of 1.237 Hectares and Survey No 66/2 admeasuring an area of 0.720 Hectare situated at village Khajrana, District – Indore. On 14.5.1993, the Authority had passed a resolution under Section 50(1) of the Act declaring its intention to prepare a town development scheme which came to be numbered as Scheme No.132. The Scheme included the lands of the petitioner. On 28.5.1993, the Authority issued a communique/ announcement for publication of its declaration of intention of the Scheme as contemplated under Section 50(2) of the Act. The Authority, as set forth, took steps for publication and eventually, the Scheme was published in the gazette on 18.6.1993. The survey of the lands comprised in the Scheme was carried out and the development of the Scheme in a draft form was prepared. The draft form of the Scheme was published in the official gazette on 26.5.1995 as envisaged under Section 50(3) of the Act inviting objections and suggestions from the public at large as regards the draft development scheme. After considering the objections and suggestions and also hearing the objectors, the Authority passed an order on 15.2.2005. There was correspondence between the Authority and the Department of Madhya

Pradesh Housing and Environment and as the facts would unfold, a resolution dated 29.7.2006 was passed to the effect that no clarification was required from the Department concerned. Ultimately, a final order was passed by the Authority on 1.8.2006 regarding approval of the draft scheme which was published in the gazette dated 4.8.2006 under Section 50(7) of the Act. After the said Scheme was published, the State Government, on the basis of the request made by the Authority, issued a notification dated 8.8.2006 which was published in the Gazette dated 18.8.2006 under Section 4 of the Land Acquisition Act for acquisition of land.

3. When the matter has been proceeding in this manner, certain land-owners filed applications under Section 29 of the Act before the Joint Director, Town and Country Planning Department who summoned a reply from the appellant and eventually, in the case of the respondent-writ petitioner, passed an order holding that the applicants were entitled for permission for development under Section 29 of the Act as the scheme had lapsed. The respondent No.2, the Principal Secretary, Housing and Environment Department, in exercise of suo motu power of revision conferred on him under Section 32 of the Act, suspended the permission for development and ultimately set aside the order on 7.7.2006. Being dissatisfied with the same, the writ petition was filed by the fourth respondent before the learned single Judge who quashed the order on the foundation that after insertion of the proviso to sub-section (4) of Section 50 of the Act, the Authority was required to act fairly and within a reasonable span of time and not sit over the matter without finalizing the same; that it was not the intention of the Legislature to give unlimited time to the Authority to act as provided under Section 50 of the Act; that the intention is clear that all pending draft schemes were to be completed within a period of one year from the date of the introduction of the proviso, otherwise they would lapse; that even after the introduction of the proviso, the Authority had taken one and a half years to finalise the scheme;and that the doctrine of delay and laches would irrefragably come into play.

4. The learned single Judge also opined that no opportunity of hearing was afforded to the writ petitioner before passing of the impugned order contained in Annexure P-11, P-11A and P-11B despite the proviso to Section 32 which clearly stipulates that the State Government is required to pass an order after giving a reasonable opportunity of hearing to the persons affected. The learned single Judge, analyzing the material brought on record, came to hold that the writ petitioner was not extended the opportunity of hearing in total disregard of the proviso to Section 32 of the Act and , therefore, the same is vulnerable in law. Be it noted, the learned single Judge scanned the order passed by the State Government which had pointed out certain irregularities committed by the Joint Director, the fourth respondent herein, and enumerated the irregularities and expressed the opinion that the application for approval of the development plan of the writ petitioner was placed before the competent authority in June, 2006 and notices were issued

to the Authority which, in its reply, stated that since the lands had already been included in the Scheme No.132, no permission could be granted. The said objection was rejected on 22.6.2006 by the fourth respondent holding that the said Scheme had already lapsed on 29.12.2005 in view of the proviso to sub-section (4) of Section 50 of the Act. The learned single Judge opined that the approval of the development plan was done in utter haste and without examining the matter. As is demonstrable from the order of the learned single Judge, he has adverted to the facts in detail which also related to the Authority and jurisdiction of the respondent No.3 (the fourth respondent herein) and concluded that he had not committed any illegality. Being of this view, he allowed the writ petition and quashed the orders passed by the State Government and as a sequitur, he also quashed the Gazette Notification dated 18.8.2006 contained in Annexure P-21 issued by the State Government.

5. We have heard Mr. A.M. Mathur, learned senior counsel, along with Mr. Ashutosh Upadhyay and Mr. Sanjay Agrawal for the petitioner, Mr. S.C. Bagadiya, learned senior counsel, along with Mr. Satish Agrawal for the respondent No.1, Mr. P.N. Dubey, learned Deputy Adv. General for the respondents 2 to 4 and Mrs. Meena Chapekar, Mr.Vishal Verma and Mr. Praveen Chouhan, learned counsel for the Interveners.

6. Mr. A.M. Mathur,learned senior counsel appearing for the Authority, questioning the sustainability of the order of the learned single Judge, has raised the following contentions:

(a) The learned single Judge has failed to appreciate the objects and reasons for introduction of the proviso to Section 50 (4) since the principal and primary purpose was to enable the Authority to deal with the objections and suggestions in an appropriate manner.

(b) The learned single Judge has totally flawed by holding that the proviso was added to obviate the difficulties faced by the citizens by requiring the Authority to make the final publication of the Scheme within a period of one year from the date of publication of the draft scheme and hence, the proviso is retrospective in nature.

(c) The language employed in the proviso has to be given prospective effect and would not destroy the right of the Authority to get the Scheme published under sub-section (7) of Section 50 inasmuch as its right cannot be curtailed, the same being a vested right.

(d) The proviso is a substantive provision and, therefore, it should be prospective in nature and cannot mar or destroy action

that has commenced under Section 50 of the Act prior to incorporation of the said proviso in the statute book and, therefore, the period of limitation provided therein would not be attracted to a progressive scheme as Section 50 is a complete code in itself and it has to have full play from the beginning to the end and cannot be conditioned by imposition of new conditions.

(e) The learned single Judge has completely erred by expressing the view that the doctrine of delay and laches would come into play in a case of this nature inasmuch as the land-owners have their expectations and the Authority cannot act in an unreasonable or arbitrary manner.

(f) As the Scheme relates to town development, even assuming that the proviso is attracted, the writ Court should not have quashed the gazette notification since the entire procedure under Section 50 of the Act had been completed, and it serves a larger public interest which has to be kept on a higher platform than larger public interest or individual interest.

(g) The order passed by the State Government in exercise of suo motu power cannot be found fault with as number of factors were taken into consideration.

7. The learned counsel for the respondents as well as the interveners in support of the order passed by the learned single Judge has raised the following contentions:

(i) The construction on Section 50 which is sought to be placed by the learned counsel for the appellant to the effect that the proviso added to Section 50(4) with effect from 29.12.2004 is totally prospective and does not affect action which has been initiated at earlier point of time is absolutely fallacious inasmuch as the language of the said proviso is clear and unambiguous, so there is nothing like a vested right in a case of this nature.

(ii) The finding recorded by the learned single Judge that the proviso was introduced to ameliorate the difficulty of the citizens is in consonance with the object and reason as well as the language employed in the statute and hence, no fault can be found with it.

(iii) The period under the proviso providing a definite period for publication of the draft scheme with a condition that it would lapse, by no stretch of imagination, can save the action taken under the Town Development Scheme solely on the foundation that it had already commenced as such an interpretation would lead to

an absurd result which is neither the warrant of the provision nor does common sense give consent to it. If the said action is saved, the Authority can take its own time and engage in preparing the scheme till eternity by which the rights of the citizens are destroyed beyond repairs which would lead to an irretrievable situation.

(iv) The analysis made by the learned single Judge applying the doctrine of delay and laches cannot be treated to be faulty and, in fact, it is in accord with the scheme of things and also in consonance with the decided authorities.

(v) The proponement that larger public interest should be given priority over individual or citizenry rights has no legs to stand upon and is bound to founder. To get the said doctrine attracted, there has to be sanction and support of law but in the case at hand, the so called larger public interest is sans legality and, therefore, has to pale into insignificance.

8. To appreciate the rivalised submissions, it is apropos to reproduce Section 50 of the Act:

"50. Preparation of town development schemes. - (1) The Town and Country Development Authority may, at any time, declare its intention to prepare a town development scheme.

(2) Not later than thirty days from the date of such declaration of intention to make a scheme, the Town and Country Development Authority shall publish the declaration in the Gazette and in such other manner as may be prescribed.

(3) Not later than two years from the date of publication of the declaration under sub-section (2) the Town and Country Development Authority shall prepare a town development scheme in draft form and publish it in such form and manner as may be prescribed together with a notice inviting objections and suggestions from any person with respect to the said draft development scheme before such date as may be specified therein, such date being not earlier than thirty days from the date of publication of such notice.

(4) The Town and Country Development Authority shall consider all the objections and suggestions as may be received within the period specified in the notice under sub-section (3) and shall, after giving a reasonable opportunity to such persons affected thereby as are desirous of being heard, or after considering the report of the committee constituted under

sub-section (5) approve the draft scheme as published or make such modifications therein as it may deem fit.

Provided that the final publication of such draft scheme shall be notified not later than one year from the date of publication of the draft scheme failing which the draft scheme shall be deemed to have lapsed.

(5) Where the town development scheme relates to reconstitution of plots, the Town and Country Development Authority shall, notwithstanding anything contained in sub-section (4), constitute a committee consisting of the Chief Executive Officer of the said Authority and two other members of whom one shall be representative of the Madhya Pradesh Housing Board and the other shall be an officer of the Public Works Department not below the rank of an Executive Engineer nominated by the Chief Engineer, Public Works Department for the purpose of hearing of objections and suggestions received under sub-section (3).

(6) The Committee constituted under subsection (5) shall consider the objections and suggestions and give hearing to such persons as are desirous of being heard and shall submit its report to the Town and Country Development Authority within such time as it may fix along with proposals to -

(i) define and demarcate the areas allotted to or reserved for public purpose.

(ii) demarcate the reconstituted plots;

(iii) evaluate the value of the original and the reconstituted plots;

(iv) determine whether the areas reserved for public purpose are wholly or partially beneficial to the residents within the area of the scheme;

(v) estimate and apportion the compensation to or contribution from the beneficiaries of the scheme on account of the reconstitution of the plot and reservation of portions of public purpose;

(vi) evaluate the increment in value of each reconstituted plot and assess the development contribution leviable on the plot holder:

Provided that the contribution shall not exceed half the accrued increment in value;

(vii) evaluate the reduction in value of any reconstituted plot and assess the compensation payable therefor.

(7) Immediately after the town and development scheme is approved under sub-section (4) with or without modifications the Town and Country Development Authority shall publish in the Gazette and in such other manner as may be prescribed a final town development scheme and specify the date on which it shall come into operation." (Emphasis supplied)

9. As is evident from the said provision, the proviso was added by way of amendment. Immense emphasis has been laid on the said proviso. The learned counsel for both the sides while laying emphasis on the same have invited our attention to the objects and reasons for introduction of the proviso to buttress their respective stand. To understand the purport of the amendment, we think it appropriate to reproduce the objects and reasons of the aforesaid amendment:

"In sub-section (4) of Section 50 of the aforesaid Act, no time limit prescribed to consider objections and suggestions received in respect of town development scheme in draft terms and for its final publication. This is causing great hardship to persons whose lands come under the purview of the scheme. In order to obviate these difficulties, it is proposed to amend the aforesaid Act suitably."

10. Keeping in view the provision, it is apposite on our part to address how the objects and reasons are to be understood for the purpose of understanding the statutory provisions. In *Lt. Col. Prithi Pal Singh Bedi Vs. Union of India and others*, AIR 1982 SC 1413, the Apex Court has expressed the view as follows:

"The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognized canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision the Court should adopt literal construction if it does not lead to an absurdity. The first question to be posed is whether there is any ambiguity in the language used in Rule 40. If there is none, it would mean the language used speaks the mind of Parliament and there is no need to look somewhere else to discover the intention or meaning. If the literal construction leads to an absurdity, external aids to construction can be resorted to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object

which it is required to subserve and the authority by which the rule is framed. This necessitates examination of the broad features of the Act."

11. In *Bharat Singh v. Management of New Delhi Tuberculosis Centre,* (1986) 2 SCC 644, the Apex Court while dealing with the applicability of Section 17B of the Industrial Disputes Act, 1947 discussed how the objects and reasons are to be appreciated. In that context, their Lordships expressed thus:

"10. The Objects and Reasons give an insight into the background why this Section was introduced. Though Objects and Reasons cannot be the ultimate guide in interpretation of statutes, it often times aids in finding out what really persuaded the legislature to enact a particular provision. The Objects and Reasons here clearly spell out that delay in the implementation of the awards is due to the contests by the employer which consequently cause hardship to the workmen. If this is the object, then would it be in keeping with this object and consistent with the progressive social philosophy of our laws to deny to the workmen the benefits of this Section simply because the award was passed, for example just a day before the Section came into force. In our view it would be not only defeating the rights of the workman. but going against the spirit of the enactment. A rigid interpretation of this Section as is attempted by the learned counsel for the respondents would be rendering the workman worse off after the coming into force of this Section. This section has in effect only codified the rights of the workmen to get their wages which they could not get in time because of the long drawn out process caused by the methods employed by the Management. This Section, in other words, gives a mandate to the Courts to award wages if the conditions in the Section are satisfied.

11. In interpretation of statutes, Courts have steered clear of the rigid stand of looking into the words of the Section alone but have attempted to make the object of the enactment effective and to render its benefits into the person in whose favour it is made. The legislators are entrusted with the task of only making laws. Interpretation has to come from the Courts."

12. In this regard, we may refer with profit to the decision rendered in *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and others,* (1987) 1 SCC 424 wherein it has been held as follows:

"Interpretation must depend on the text and the context.

They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statue is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its schemes, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place..... .....".

13. In *Bhaiji v. Sub-divisional Officer, Thandla and Others*, (2003) 1 SCC 692, it has been laid down as under:

> *"11. Reference to the Statement of Objects and Reasons is permissible for understanding the background, ... antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. The weight of judicial authority leans in favour of the view that Statement of Objects and Reasons cannot be utilized for the purpose of restricting and controlling the plain meaning of the language employed by the Legislature in drafting statute and excluding from its operation such transactions which it plainly covers. (See Principles of Statutory Interpretation by Justice G.P. Singh, Eighth Edition 2001; pp.206-209)."*

14. The submission of Mr. Mathur, learned senior counsel, is that if the object and reasons of the amendment are appreciated, it would convey that the evil that was really sought to be remedied was that no time limit was prescribed to consider the suggestion received in respect of the draft scheme. On a reading of the unamended provision, we find that no time limit was prescribed to consider the objections and suggestions received in respect of the town development scheme in draft terms and also for its final publication. This has been causing great hardship to persons whose lands come under the purview of the scheme. In order to obviate these difficulties, it was proposed to amend the aforesaid Act suitably.

15. On a careful and purposive reading of the said proviso, it is clear as crystal that the amendment was sought to be introduced to remove the hardship caused to the citizens and to provide time limit to consider the objections and suggestions and to provide a deeming clause so that the Authority would act in quite promptitude. That being the simon pure reason, the same tilts in favour of the respondents and not in favour of the Authority. Hence, we repel the submission of Mr. Mathur on this score.

16. The next plank of submission of Mr. Mathur, learned senior counsel, is that if the anatomy of Section 50 is scrutinised in a proper perspective, it would be luminescent that the said Section is a complete Code in itself and the preparation of the final development scheme is an integral process as is evincible from sub-section (7) of Section 50 and no amendment in mid way would affect the preparation as well as the completion. In essentiality, the submission is that the said amendment should not affect the right that has accrued in favour of the Authority. The learned counsel, to bolster his submissions, has placed reliance on the decision in *A.A. Calton v. Director,* AIR 1983 SC 1143 wherein it has been held as under:

> *"The process of selection under Section 16F of the Act commencing from stage of calling applications for post up to date on which the Director should make a section under Section 16F (4) (as it stood then) is an integrated one. Section 16F of the Act cannot therefore be construed as a merely procedural provision."*

17. As regards the retrospective applicability of the amendment to the pending proceeding, the learned senior counsel has placed reliance on the decision rendered in *State of U.P. v. Atique Begam,* AIR 1941 PC 110 wherein it has been held thus:

> *"Courts have undoubtedly lean very strongly against applying a new Act to pending actions, when language of the statute does not compel them to do so."*

18. The learned senior counsel has also placed reliance on the decision in *Garikapati Veeraya v. N. Subiah Choudhry and Others,* AIR 1957 SC 540 wherein it has been held as under:

> *"(23) From the decisions cited above the following principles clearly emerge:*
>
> *(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

19. Emphasis has also been laid on the decision rendered in *K.S. Paripoornan v. State of Kerala,* AIR 1995 SC 1012 wherein the majority has expressed the view that the Amending Act 68 of 1984, the payment of additional amount under Section 23 (1-A) would be restricted to matters referred to in Clauses (a) and (b) of Sub-section (1) of Section 30 of the said Act. In the said case, it was further held that under Section 23 (1-A), an obligation has been imposed to pay an additional amount which did not exist prior to the Amending Act. If the said provision is applied to the acquisition proceedings which commenced prior to its enactment and an additional obligation in the matter of payment of compensation is imposed for such acquisition, the effect would be that the said provision would be operating retrospectively in respect of transaction already past. The Parliament has given a clear indication of its intention in Section 30(1) of the amending Act regarding the extent of retrospective operation that S. 23(1A) will have since express provision is contained in S. 30(1) of the Amending Act indicating the intention of the Parliament as to the extent to which the provision of Section 23(1-A) would apply to pending proceedings and thus, there is no scope for speculating about the said intention of the Parliament by reading Section 23(1-A) in isolation without reference to S. 30(1) of the amending Act.

20. In *S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India and Another,* (2006) 2 SCC 740, a two-Judge Bench of the Apex Court referred to the decision rendered in *Amireddi Rajagopala Rao v. Amireddi Sitharamamma,* AIR 1965 SC 1970, wherein the Apex Court had quoted the observations made by Lopes,L.J., which reads as under:

"which takes away or impairs vested rights acquired

under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect."

Thereafter, their Lordships expressed the view that close attention must be paid to the language of the statutory provisions for determining the scope of retrospectivity intended by the Parliament.

21. The learned senior counsel has laid emphasis on the aforesaid decisions to pyramid the proposition that by incorporation of an amendment of this nature, the vested right does not get affected. It is also urged by him that when the provision is procedural, it has to have prospective application and would not affect the vested right unless it has been expressly made retrospective.

22. In this context, the learned counsel for the respondents and interveners have commended us to certain decisions. We think it apt to note a few. It is canvassed by them that the provisions apply to pending cases and the question of any kind of retrospective application does not arise. It is their submission that the concept of vested right as has been laid down by the Apex Court has no application to the present scheme of things. In this regard, they have invited our attention to the decision rendered in *State of Tamil Nadu v. Lateef Hamid and Co.*, AIR 1972 SC 1781 wherein it has been held thus:

"13.....No assessee has any vested right in the procedure prescribed under the 1939 Act. So long as the new procedure laid down in the 1959 Act does not interfere with any of his vested rights, an assessee has no right to claim that his case must be dealt with under the provisions of the repealed Act. It is well settled that the new procedure prescribed by law governs all pending cases. As seen earlier, the assessee filed its appeal under Section 31 of the 1959 Act and not under Section 11 of the 1939 Act. But that is a minor aspect. What is of the essence is that his right of appeal under the 1959 Act does not take away in any manner any of his vested rights under the 1939 Act."

23. In *Bharat Singh* (supra), while dealing with the concept of Section 17B of the Industrial Disputes Act, 1947 to pending cases, after referring to the objects and reasons, the Apex Court held thus:

".....Section 17B on its terms does not say that it would bind awards passed before the date when it came into force. The respondents' contention is that a Section which imposes an obligation for the first time cannot be made retrospective. Such sections should always be considered prospective. In our

view, if this submission is accepted, we will be defeating the very purpose for which this Section has been enacted. It is here that the Court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the Court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the Courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the Court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided. This Section was intended to benefit the workmen in certain cases. It would be doing injustice to the Section if we were to say that it would not apply to awards passed a day or two before it came into force."

24. In *Allied Motors (P) Ltd. v. Commissioner of Income Tax, Delhi,* (1997) 3 SCC 472, it has been ruled thus:

"8. Section 43-B was, therefore, clearly aimed at curbing the activities of those tax payers who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund etc. for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that Section 43-B was inserted. It was clearly not realised that the language in which Section 43-B was worded would cause hardship to those tax payers who had paid sales tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales tax

collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the Income-tax return, these assessee were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by Section 43-B. Hence the first proviso was inserted in Section 43-B. The Amendment which was made by the Finance Act of 1987 in Section 43-B by inserting, inter alia, the first proviso, was remedial in nature. designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation."

25. In *Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others,* (2004) 1 SCC 663, it has been held as follows:

"This Court, thus, has taken a view that the Building Rules or Regulations prevailing at the time of sanction would govern the subject of sanction and not the Rules and Regulations existing on the date of application for sanction. This Court has envisaged a reverse situation that is subsequent to the making of the application for sanction, Building Rules, on the date of sanction, have been amended more favourably in favour of the person or party seeking sanction, would it then be possible for the Corporation to say that because the more favourable Rules containing conditions came into force subsequent to the submission of application for sanction, it would not be available to the person or party applying."

26. In *Jile Singh v. State of Haryana and Others,* (2004) 8 SCC 1, a three-Judge Bench of the Apex Court expressed the view as under:

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only - "nova constitutio futuris formam imponere debet non

praeteritis" - a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole."

27. In *Ramji Purshottam (Dead) by Lrs. and Others v. Laxmanbhai D. Kurlawala (Dead) by Lrs.*, (2004) 6 SCC 455, the Apex Court addressed itself with regard to the retrospective application of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In that context, their Lordships expressed the view as under:

"13. Strictly speaking, in the present case, the application of the amendment brought in by the statute to the pending proceedings does not have the effect of retrospectivity. The rent is alleged to have fallen in arrears for the period 1-6-1969 to 31-10-1970. Some payment of water charges is said to have been made referrable to the same period. Thus, both the events are referrable to a period anterior to the coming into force of Act No. 51 of 1975. The law com-ing into force during the pendency of the proceedings is being applied on the date of judgment to the pre-existing facts for the purpose of giving benefit to the tenant in the pending proceedings. This is not retroactivity.

14. Justice G. P. Singh states in Principles of Statutory Interpretation (Ninth Edition, 2004, at page 462) - "the fact that a prospective benefit under a statutory provision is in certain cases to be measured by or depends on antecedent facts does not necessarily make the provision retrospective. The rule against retrospective construction is not always applicable to a statute merely because a part of the requisites for its action is drawn from time antecedent to its passing." In Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, the Constitution Bench held that the Bombay Act No. 57 of 1947 is a piece of legislation passed to protect the tenants against the evil of eviction. And the benefit of the provisions of the Act ought to be extended to the tenants against whom the proceedings are pending on the date of coming into force of the legislation."

28. In *Dharappa v. Bijapur Coop. Milk Producers Society Union Ltd.*, (2007) 9 SCC 109, the Apex Court ruled that the legislative intendment should be ascertained keeping in view the provisions of the amendment, the nature of the remedy provided and the need for the same. In this context, their Lordships have stated thus:

> *"The legislative intent should be ascertained by keeping in view the position before the amendment, the nature of remedy provided, and the need therefor. It is also necessary to keep in view the general principles relating to limitation. Statutes relating to limitation are said to be retrospective in nature in the sense that they apply to all proceedings brought after they came into force, even for enforcing causes of action which had accrued prior to the date when such statutes came into force. But they are also prospective in the sense that do not have the effect of reviving a right of action which was already barred on the date of its coming into operation. Therefore, where the right to file an action had come to an end on expiry of period of limitation prescribed under law relating to limitation and thus becomes barred by limitation, the right is not revived by a later limitation Act, even if it provides a longer period of limitation."*

29. The respondents have also invited our attention to *Union of India v. Harnam Singh*, AIR 1993 SC 1367 wherein the Apex Court was dealing with the controversy wherein a question was put with regard to the rights of a government employee to get change in his date of birth in the service record. Note 5 of FR- 56 (m) was incorporated in the year 1979 providing for a request to be made by an employee for correction of the date of birth within five years from the date of entry into service. Their Lordships expressed the view that it was done with a view to avoid any artificial classification and it would be appropriate to interpret the said rule as providing of the date of birth for even such a government servant who had entered the service prior to the said enactment. We think it apt to reproduce a relevant paragraph from the said judgment:

> *"11. The approach of the Tribunal does not commend to us as it tends to create an invidious discrimination, unstainable in law, by creating two artificial classes of Government Servants between those who joined service before and after 1979. It is a too simplistic way of looking at the issue, by ignoring the ground realities and the intention of the rule making authority to discourage stale claims and non-suit such government servants who seek the alteration of their recorded date of birth belatedly and mostly on the eve of their*

superannuation. To say that the respondent, even though he signed the service book at a number of places at different times and saw the seniority lists, may not have still come to know as to what his recorded date of birth was, is to ignore the normal human conduct and put premium on negligence. The observations of CAT quoted above are neither logical nor sound. Of course, Note 5 to FR 56 (m) was incorporated only in 1979 and it provides for request to be made for correction of date of birth within five years from the date of entry into service but what is necessary to be examined is the intention of the rule making authority in providing the period of limitation for seeking the correction of the date of birth of the Government Servant viz. to discourage stale claims and belated applications for alteration of date of birth recorded in the service book at the time of initial entry. It is the duty of the courts and tribunals to promote that intention by an intelligible and harmonious interpretation of the rule rather than choke its operation. The interpretation has to be the one which advances the intention and not the one which frustrates it. It could not be the intention of the rule making authority to give unlimited time to seek correction of date of birth, after 1979, to those government servants who had joined the service prior to 1979 but restrict it to the five year period for those who enter service after 1979. Indeed, if a government servant, already in service for a long time, had applied for correction of date of birth before 1979, it would not be permissible to non-suit him on the ground that he had not applied for correction within five years of his entry into service, but the case of government servant who applied for correction of date of birth only after 1979 stands on a different footing. It would be appropriate and in tune with harmonious construction of the provision to hold that in the case of those government servants who were already in service before 1979, for a period of more than five years, and who intended to have their date of birth corrected after 1979, may seek the correction of date of birth within a reasonable time after 1979 but in any event not later than five years after the coming into force of the amendment in 1979. This view would be in consonance with the intention of the rule making authority."

30. In view of the aforesaid enunciations of law and keeping in view the objects and reasons of the enactment and the hardship sought to be remedied, it is difficult

to accept the submission of Mr. Mathur that once the process of preparation of the scheme had commenced, it is a vested right in favour of the Authority and could not have been impaired by introducing the proviso.

31. The submission of the learned counsel for the respondents is that if the provision is accepted as prospective, it would still have its own impact as the Scheme No.132 had never been notified under Section 50 (7) of the Act and framed as a draft scheme on the date of coming into force of the proviso. It is urged that the edifice which has been sought to be built by the appellant Authority that the right has accrued in favour of the Authority as it had commenced the preparation of the scheme is sans substratum as the provision has been introduced with a purpose and the said purpose cannot be allowed to be frustrated. In our considered opinion, the proviso is not retrospective, that is to say, if the scheme has been already finalised, it would not lapse and if it is in process, the proviso would have applicability in full force and it has to be completed within the time span provided therein. In the present case, the same has not been done and hence, the proviso comes into play.

32. In this context, we may refer with profit to Section 54 of the Act:

> *"54. Lapse of Scheme.- If the Town and Country Development Authority fails to commence implementation of the Town Development Scheme within a period of two years or complete its implementation within a period of five years from the date of notification of the final scheme under section 50, it shall, on expiration of the said period of two years or five years, as the case may be, lapse:*
>
> *Provided that, if a dispute between the authority and parties, if any, aggrieved by such scheme, is brought before a Court or tribunal of competent jurisdiction, for consideration, the period for which such dispute pending before such court or tribunal shall not be reckoned for determination of the lapse of the scheme."*

33. We have referred to the same as it has been pressed into service to highlight by the learned counsel for the respondents that the scheme is not a scheme in perpetuity. The legislative intendment is quite clear that the scheme, if it does not commence implementation within two years and complete within five years from the date of the notification of the final scheme, would be treated to have been lapsed. Since the provision was made to avoid hardship to the land owners, therefore, it is to be construed that the proviso added to Section 50 (4) is in furtherance of the scheme of the Act.

34. At this juncture, it would not be inapposite to understand the proviso in another manner. It is worth noting that the proviso uses the term "shall be deemed

to have lapsed". A deeming proviso has its own purpose. In *St.Aubyn v. Attorney General,* 1952 AC 15 at Page 53, Lord Radcliffe stated that the term is used a great deal in modern legislation in different senses. In various authorities, it is noticed that it is used to impose for the purposes of a statute an artificial construction. Sometimes, it is used to put a particular construction that might otherwise be uncertain. Sometimes, it is used to give a comprehensive description that includes what is obvious.

35. Lord Justice James had observed in *Ex Parte Salton. In re. Levy,* 1881 (17) Ch.D. 746 as follows:-

> *"When a statute enacts that something shall be deemed to have been done, which, in fact and truth was not done, the Court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."*
>
> *Lord Asquith, in East end Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 had expressed his opinions as follows:*
>
> *"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and instances, which, if the putative state of affairs had in fact existed, must inevitably have followed from or companied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit or imagine to boggle when it comes to the inevitable corollaries of that state of affairs."*

36. In view of the aforesaid pronouncement of law, there can be no scintilla of doubt that the term "shall be deemed" does convey that the scheme gets automatically lapsed and it makes the same obvious and clear and avoids any kind of uncertainty.

37. Mr. Mathur, learned senior counsel, further submitted that the proviso is full of anomaly, confusion and suffers from unworkability. It is contended by him that there is no provision that the draft scheme is no longer in existence after the approved scheme and hence, there is no question of its lapsing and what can lapse will be the approved scheme and not the draft scheme. It is contended by him that the proviso should have been worded differently. The learned counsel has put forth how the proviso should have been worded. We quote from the written note of submissions:

"Development Authority shall consider the objections and suggestions within a period of 1 year from the publication of notice under Sub-section (3) of Section 50 and approve the scheme for final publication under Sub-section (7) of Section 50."

38. The learned senior counsel further submitted that the aforesaid proposed amendment should have been placed/added as sub-section (8) after sub-section (7) as a substantive provision. In this regard, he has commended us to the decision rendered in *U.P. S.R.T.C. v. Mohd. Israni*, AIR 1991 SC 1099.

39. In this context, we may refer with profit to the decision rendered in *Municipal Committee, Patiala Vs. Model Town Residents Association and others*, (2007) 8 SCC 669. In paragraph 20, His Lordship, S.H. Kapadia,J. has expressed thus:-

"20. Before concluding, we have serious objections to the manner in which direction has been given by the Division Bench of the High Court to the legislature. In this connection, we quote the last paragraph of the impugned judgment, which is as follows:

".... Sections 3(1) (b) and 3 (8-aa) of the Act are declared unconstitutional and struck down.... The State shall be free to suitably amend Section 3(1) to provide for levy of house tax by adopting a uniform criteria for determination of annual value of similarly situated properties. The State shall also be free to amend Section 3(1) and lay down a uniform criteria for determination of annual value of properties occupied by the tenants as well as the owners in the light of the judgment of the Supreme Court in Sachchidanand Kishore Prasad Sinha case and observations made in this order. It is, however, made clear that any such enactment shall not affect the assessments made prior to the amendment of Section 3 by Punjab Act 11 of 1994 and the old cases, if any pending shall be decided in accordance with the unamended provision....."

(Emphasis supplied)

In the above judgment, the High Court directs the State Legislature to amend the law relating to determination of annual value by clarifying that any such amendment shall not be retrospective. We have serious reservations regarding such a direction. It is not open to the High Court under Article 226 of the Constitution, particularly in the matter of taxation directing it not to amend the law retrospectively. Such a

direction is unsustainable, particularly in a taxing statute. It is always open to the State Legislature, particularly in tax matters, to enact validation laws which apply retrospectively. The High Court cannot take away the power of the State Legislature to amend the tax law retrospectively. The basis of the law can always be altered retrospectively.

40. In the said case, Hon'ble B.Sudershan Reddy, J., in his concurring opinion, has opined thus:-

"24. The Constitution is filled with provisions that grant Parliament or to the State Legislatures specific power to legislate in certain areas. These granted powers are of course subject to constitutional limitations that they may not be exercised in a way that violates other specific provisions of the Constitution. Nothing in the text, history or structure of the Constitution remotely suggests that the High Court's jurisdiction under Article 226 of the Constitution should differ in this respect- that invocation of such power should magically give the High Court a free ride through the rest of the constitutional document. If such magic were available the High Court could structure, restructure legislative enactments. The possibilities are endless. The Constitution-makers cannot be charged with having left open a path to such total obliteration of constitutional enterprise."

41. His Lordship, in paragraph 28, has referred to the decision rendered in *State of H.P. v. Parent of a Student of Medical College,* (1985) 3 SCC 169, wherein it has been held as under:-

"But at the same time the Court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law-making activities of the executive and the legislature."

42. In this context, we may refer with profit to the decision rendered in *State of J&K v. A.R.Zakki,* AIR 1992 SC 1546 wherein their Lordships have held that writ of mandamus under Article 226 of the Constitution of India cannot be issued to the Legislature or Executive to exercise rule making power or to make rules or to incorporate any kind of amendment.

43. In the case of *Common Cause v. Union of India,* AIR 2003 SC 4493= (2003) 8 SCC 250, it has been held that no mandamus can be issued to the Central Government to notify the date to bring an enactment into force. Similar view was

expressed in *Union of India v. Shree Gajanan Maharaj Sansthan,* (2002) 5 SCC 44.

44. In *Networking of Rivers : In re,* (2004) 11 SCC 360, their Lordships have expressed the view that it was not open to the Supreme Court to issue any direction to the Parliament to legislate.

45. In *Saurabh Chaudri v. Union of India,* (2003) 11 SCC 146, it has been ruled that writ of mandamus is not normally issued to the government for making law.

46. In view of the aforesaid pronouncement of law, the aforesaid submission of Mr. Mathur is sans any substance and accordingly, we repel the same without any hesitation.

47. We would be failing in our duty if we do not refer to a decision cited by Mr. Mathur to bolster the proposition that Section 50 has its own sacrosanctity and the Authority is required to act with objectivity and responsibility having due care for the interest of the collective at large and cannot act in hurry and objectivity has to be given due regard and if it is done in a hurried manner, the concept of justice would be buried. To bolster the aforesaid submission, he has commended us to the decision rendered in *Indore Development Authority v. Madan Lal,* AIR 1990 SC 1143. We think it apposite to reproduce paragraphs 8 and 9 of the said decision:

> *"8. Section 50(2) provides for preparation of the draft Scheme and Section 50(3) provides for its publication inviting objections and suggestions from persons who are likely to be affected thereby. Section 50(4) requires the Development Authority to consider all the objections and suggestions as may be received within the specified period. After giving a reasonable opportunity to the objectors who are desirous of being heard or alter considering the report of the Committee constituted for that purpose, the Development Authority could approve the draft scheme with such modifications as it may deem fit. Section 50(7) provides for publication of the approved scheme in the Gazette specifying the date on which it shall come into force. Any development scheme thus prepared and published under Section 50(7) shall be in conformity with the Master Plan covering the area in question.*
>
> *9. It is not in dispute that the Development Authority did not follow the procedure prescribed under Section 50 of the Adhiniyam for preparation of scheme No. 72. A note dated 24 August 1977 prepared by the officers of the Development Authority indicates that the Scheme No. 72 was approved under*

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Section 50(4) of the Adhiniyam without inviting objections and without considering the same. It was, however, argued for the appellant that the Development Authority need not have invited fresh objections and subjections for consideration since that procedure has already been followed by the Improvement Trust under the Trust Act. The provisions of Section 87(1)(c)(ii) of the Adhiniyam were also relied upon to salvage the scheme."

48. On a careful perusal of the decision and the observations made by their Lordships, there is no shadow of doubt in our mind that the said decision was rendered in a different context and is not remotely applicable to the case at hand.

49. The learned senior counsel has submitted that the hardship which is caused to the Authority has to be taken note of. The learned senior counsel has commended us to a passage from Principles of Statutory Interpretation, 11th Edn. pg.128. It reads as under:

"If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results."

The said passage, as we are disposed to think, cannot have any applicability inasmuch as the learned author commenced the passage with *"If the language used is capable of bearing more than one construction"*, but, a pregnant one, the provision at hand being unequivocal, categorical and unambiguous, does not permit any other kind of construction but a singular one. Thus, the aforesaid submission of Mr. Mathur does not deserve acceptance and is hereby rejected.

50. A contention has been advanced that the Authority being a statutory one and the notification having been published, it should be saved as that subserves the public interest. There may be cases and instances where a larger public interest may override the lesser public interest or individual interest. But, a significant one, such a public interest must have legal sanction. In the case at hand, the Act has been amended, specially to save the interest of the citizens. The learned single Judge has applied the doctrine of delay and laches. A statutory authority is required to act in quite promptitude. At this juncture, we may refer to the decision in *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. and Others*, (2007) 8 SCC 705 wherein it has been held as under:

"46. Where, however, a scheme comes into force, although it may cause hardship to the individual owners as they may be prevented from making the most profitable use of their rights over property, having regard to the drastic consequences envisaged thereunder, the statute should be considered in such a manner as a result whereof greater hardship is not caused to the citizens than actually contemplated thereby. Whereas an attempt should be made to prevent unplanned and haphazard development but the same would not mean that the court would close its eyes to the blatant illegalities committed by the State and/or the statutory authorities in implementation thereof. Implementation of such land development as also building laws should be in consonance with public welfare and convenience. In United States of America zoning ordinances are enacted pursuant to the police power delegated by the State. Although in India the source of such power is not police power but if a zoning classification imposes unreasonable restriction, it cannot be sustained. The public authority may have general considerations, safety or general welfare in mind, but the same would become irrelevant, as thereby statutory rights of a party cannot be taken away. The courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other.

47. For the aforesamentioned purpose, an endeavour should be made to find out as to whether the statute takes care of public interest in the matter vis-a'-vis the private interest, on the one hand, and the effect of lapse and/or positive inaction on the part of the State and other planning authorities, on the other.

48. The courts cannot also be oblivious of the fact that the onwers who are subject to the embargos placed under the statute are deprived of their valuable rightful use of the property for a long time. Although ordinarily when a public authority is asked to perform statutory duties within the time stipulated it is directory in nature but when it involves valuable rights of the citizens and provides for the consequences therefor it would be construed to be mandatory in character."

In the said case, their Lordships in paragraphs 79 to 81 proceeded to hold as under:

"79. Section 50 of the Act no doubt uses the word "at any time". The question, however, is what that would imply. The town planning scheme, it would bear repetion to state, is made for the purpose of implementation of a development plan. Ordinarily, therefore, it would evnisage the time period for coming into force of the development plan and the expiry thereof. Unless such a construction is to be given to the words "at any time", it would lead to manifest injustice and aburdity which is not contemplated by the statute. For giving an effective meaning to the provisions of Section 50 of the Act, the same is required to be read in the context of other provisions of the statute and in particular the interpretation clause which we have noticed hereinbefore.

80. Section 50(1) of the Act provide for declaration of this intention to prepare town development scheme "at any time". The words "at any time" do not confer upon any statutory authority an unfettered discretion to frame the town development scheme whenever it so pleases. The words "at any time" are not charter for the exercise of an arbitrary decision as and when a scheme has to be framed. The words "at any time" have no exemption from all forms of limitation for unexplained and undue delay. Such an interpretation would not only result in the destruction of citizen's right but would also go contrary to the entire context in which the power has been given to the authority.

81. The words "at any time" have to be interpreted in the context in which they are used. Since a town development scheme in the context of the Act is intended to implement the development plan, the declaration of intention to prepare a scheme can only be in the context of a development plan. The starting of the declaration of the intention has to be upon the notification of the development plan and outer limit for the authority to frame such a scheme upon lapsing of the plan. That is the plausible interpretation of the words "at any time" used in Section 51 of the Act."

51. In view of the aforesaid, we are unable to accept the submission of Mr. Mathur, learned senior counsel for the appellant, which leans on the concept of larger public interest as last straw.

52. Though we have not accepted the submission of Mr. Mathur and we have concurred with the learned single Judge as far as the interpretation of the proviso

and upholding of the order passed by the State of Madhya Pradesh as really there is no fault or error in the same and concurred with the view as regards the applicability of the doctrine of delay and laches, yet we are disposed to modify the order to a certain extent. The learned senior counsel has submitted that the scheme is for the progression of the city of Indore. It involves a large chunk of land and if the scheme is not implemented, the development of the city would be immensely jeopardized. In view of the aforesaid, we grant liberty to the Authority to float a fresh scheme if so advised, within a period of three months within the parameters of Section 50 from today and thereafter proceed accordingly. Needless to emphasise that once a fresh scheme comes into play, all other statutory requirements and the provisions relating to compensation and such ancillary factors would come into play. In praesenti, the orders passed by the State Government granting permission to the respondents shall be kept in abeyance for a period of three months.

53. In view of our foregoing analysis, we proceed to enumerate our conclusions in seriatim:

(i) The objects and reasons for introducing the proviso to Section 50(4) was, in actuality, incorporated to remove the hardship caused to the citizens and individual landowners.

(ii) The submission of the learned counsel for the appellant that once the process of preparation of the scheme had commenced, it would not be affected by the introduction of the proviso is sans substance.

(iii) The proviso applies to pending action and hence, its applicability to the action in continuum shall be in full force.

(iv) In the scheme of the Act, inclusive of Section 54 , there is conception of lapsing of the scheme and, therefore, the scheme cannot be in perpetuity and it can lapse if the action is not completed as provided in the proviso.

(v) The deeming provision has its own purpose and plays its complete role, avoids uncertainty and, therefore, the proviso has to be allowed to have full play.

(vi) The contention that the drafting of the proviso is faulty and it has to be placed as the substantive provision as sub-section (8) to Section 50 is without substratum as this Court in exercise of power under Article 226 of the Constitution cannot legislate or give a direction to legislate or to make a particular rule and incorporate any kind of amendment in any manner. The said argument is fundamentally

fallacious and does not come even remotely within the ambit of ironing of creases.

(vii) The decision rendered in ***Madan Lal (supra),*** *which was a decision rendered before the proviso came into force, is distinguishable and further, the said decision was rendered, in substance, in favour of the land owners.*

(viii) The doctrine of delay and laches gets attracted in view of the law laid down by the Apex Court in ***Pure Industrial Coke & Chemicals Ltd. (supra)*** *and the doctrine of subserving larger public interest has no room whatsoever.*

(ix) The Authority can proceed to take appropriate action under Section 50 of the Act afresh within a period of three months to float a fresh scheme and once a fresh scheme comes into play, all other statutory requirement and the provisions relating to compensation and such ancillary factors would come into play.

(x) As liberty has been granted to take fresh steps under Section 50 of the Act, the orders passed in favour of the respondents by the State Government shall be kept in abeyance for a period of three months.

54. Consequently, the writ appeal is disposed of with the above modifications in the order passed by the learned Single Judge. There shall be no order as to costs.

Appeal disposed of.

I.L.R. [2009] M. P., 2164
WRIT APPEAL
Before Mr. Justice K.K. Lahoti & Mr. Justice Sanjay Yadav
19 March, 2009*

GRAM PANCHAYAT, BANCHHORA ... Appellant
Vs.
STATE OF M.P. & anr. ... Respondents

Panchayats (Appeal and Revision) Rules, M.P. 1995, Rule 9 - ***Power of appellate or revisional authority - Preponement of date of hearing -*** *Revisional authority without notice to appellant preponed the date of hearing and allowed application for condonation of delay and decided revision - Held - Authority without extending an opportunity to the appellant decided the matter - Such order is not sustainable under law - Matter remanded for fresh adjudication - Appeal allowed.* (Paras 8, 9, 11 & 12)

*W.A. No.239/2008 (Jabalpur).

GRAM PANCHAYAT, BANCHHORA Vs. STATE OF M. P.

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 9 – अपीलीय या पुनरीक्षण प्राधिकारी की शक्ति – निर्धारित तारीख से पूर्व सुनवाई करना – पुनरीक्षण प्राधिकारी ने अपीलार्थी को सूचना दिये बिना निर्धारित तारीख से पूर्व सुनवाई की और विलम्ब माफी का आवेदन मंजूर किया और पुनरीक्षण का विनिश्चय किया – अभिनिर्धारित – प्राधिकारी ने अपीलार्थी को सुनवाई का अवसर दिये बिना मामले का विनिश्चय किया – ऐसा आदेश विधि के अन्तर्गत कायम रखे जाने योग्य नहीं – मामला नये सिरे से न्यायनिर्णयन के लिए प्रतिप्रेषित – अपील मंजूर।

Vijay Nayak, for the appellant.

Deepak Awasthy, G.A., for the respondent No.1.

K.C. Ghildyal, for the respondent No.2.

JUDGMENT

The Judgment of the Court was delivered by **K.K. Lahoti, J.** :–This appeal is directed under section 2 of the M. P. Uchcha Nyayalaya Khand Nyayepeeth Ko Appeal Adhiniyam, 2005, assailing the order dated 17-1-2008 passed by the learned Single Judge in writ Petition No. 5692/2006 (s) by which the writ petition preferred by the petitioner challenging the order dated 27-03-2006 passed by Additional Commissioner, Sagar Division, Sagar, in Revision No. 595/A-89/2001-2002 was dismissed.

2. Learned counsel for petitioner submitted that before the Additional Commissioner, the date of hearing was fixed for 4-3-2006 on which date the Additional Commissioner fixed the case for hearing for 24-4-2006 as per Annexure-P/5 filed before the Writ Court. The respondent No.2, Jugal Kishore Pathak, filed an application on 24-3-2006 before the Additional Commissioner and Additional Commissioner on the same date preponed hearing of the case without notice to the appellant, heard the matter on the premises that both the parties had already filed written arguments and closed the case for orders. Thereafter on 27-3-2006 impugned order was passed. The appellant herein was never intimated preponement of the date or hearing of the case by the Additional Commissioner. The aforesaid act of the Commissioner was in violation of the principles of natural justice and Rule 9 of the M. P. Panchayats (Appeal and Revision) Rules, 1995.

3. That before the Commissioner, the revision itself was not maintainable under the M. P. Panchayats (Appeal and Revision) Rules, 1995, only one appeal has been provided before the Sub Divisional Officer, thereafter the order could have been challenged by filing a revision before the Collector and thereafter no second revision could have been filed in the matter. The respondent No. 2 preferred an appeal before the Sub Divisional officer, which was dismissed. Thereafter though a second appeal before the Collector, which was not maintainable, but the Collector considered the case on merits and dismissed the appeal, which can be treated as a revision before the Collector but thereafter no revision was maintainable before the Commissioner.

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4. That the revision preferred before the Commissioner itself was barred by limitation and even if the case was preponed for hearing on 24-3-2006, even then the Additional Commissioner ought to have extended opportunity to the petitioner cum appellant. After allowing the application under section 5 of the Limitation Act, the Additional Commissioner ought to have issued notice to the appellant herein for hearing of the case on merits. But all this was not considered by the Commissioner and it appears that in a hasty manner the case was decided by the Commissioner.

5. Resolution of Gram Panchayat dated 15-7-1999 reflects that there were present six panchas of the Gram Panchayat, who participated in the proceeding and passed the resolution for removal of respondent No. 2 from the post of Panchayat Karmi. These panchas were Moolchand, Rani Bai, Harbai, Munnalal, Maharaj Singh and Devi Singh. Before the Sub Divisional Officer, though 10 affidavits were filed but the Sub Divisional Officer examined only four panchas viz., Munnalal, Maharaj Singh, Harbai and Rani Bai. Munnalal in his statement though stated that he was not present in the meeting dated 15-7-1999 but he was not confronted with his signature which was appearing in the resolution of the Gram Panchayat. Apart from this, Maharaj Singh, Har Bai and Rani Bai specifically stated before the Sub Divisional Officer that meeting was convened and resolution regarding removal of respondent No. 2 was carried out in the same meeting. Apart from these 3 panchas, Moolchand was also opposing the appeal preferred by respondent No. 2 so out six, four panchas supported the action of Panchayat before the Sub Divisional Officer. Devi Singh, who was also present in the meeting dated 15-7-1999, was not examined by the Sub Divisional Officer though he filed an affidavit in support of the respondent No. 2 but these glaring facts were not considered by the Additional Commissioner while deciding the revision vide order dated 27-3-2006. It was submitted that these facts escaped from the notice of learned Single Judge while deciding the Writ Petition No. 5692/06(s).

6. It is submitted that this appeal be allowed, the order of the Additional Commissioner, Sagar Division, Sagar, dated 27-3-2006 and the order dated 17-1-2008 passed by learned Single Judge in Writ Petition No. 5692/06(s) may be quashed and that of Sub Divisional Officer and Collector, Chhatarpur, be maintained.

7. Shri K. C. Ghildyal, learned counsel appearing for the respondent No. 2 supported the orders passed by Additional Commissioner, Sagar Division, Sagar, and by the learned Single Judge confirming the aforesaid order and submitted that in fact no show cause notice was issued to the respondent No.2 by the Gram Panchayat. This fact was specifically raised before the Sub Divisional Officer, who without verifying the factual correctness of the issuance of notice to the respondent No.2 recorded a finding against the respondent No.2. He referred the

factual averments recorded by the Sub Divisional Officer in the order (Annexure-P/2) in which we find that this question was raised before the Sub Divisional Officer by respondent No.2. Apart from this 10 panchas filed their affidavits before the Sub Divisional Officer in support of the respondent No. 2 that in fact no such meeting was convened by Gram Panchayat and resolution was not correct.

8. To appreciate the rival contentions of the parties we perused the document Annexure-P/5 filed in the writ petition. This document is a certified copy of the order sheet dated 3-1-06, 4-3-2006 and 24-3-2006. On 3-1-06 the case was fixed to send for the record on 4-3-06. On 4-3-06 the Additional Commissioner recorded that the record was received and the case was fixed for arguments for 26-4-06. Thereafter on 24-3-06 an application filed by respondent No. 2 for early hearing was taken into consideration and was allowed. The Commissioner found that both the parties had already filed written arguments, the case was reserved for orders and thereafter on 27-3-06 the impugned order (Annexure-P/1) was passed.

9. On perusal of the order dated 27-3-06 we find that the revision preferred before the Commissioner was barred by limitation and the Additional Commissioner by the impugned order not only condoned the delay but also considered the case on merits, allowed the revision by setting aside the orders passed by the Sub Divisional Officer and the Collector, Chhatarpur. Principle of natural justice requires that both the parties should be given an opportunity of hearing and without hearing both the parties, the case should not have been decided. Apart from this when the case was already fixed for 26-4-2006, the Additional Commissioner before preponement of the date of hearing ought to have issued a notice to the appellant herein in respect of preponement of the date and only thereafter he was having jurisdiction to prepone the hearing of the case and to decide the matter, in the absence of which we find that the Additional Commissioner committed an error of jurisdiction in preponement of the case and decide it on merits. Apart from this, if the revision was barred by limitation then after condoning the delay in filing the revision, the Commissioner ought to have issued notice to the appellant/petitioner herein for hearing of the case on merits. Even this procedure was not adopted.

10. Rule 9 of the M. P. Panchayats (Appeal and Revision) Rules, 1995, provides an opportunity to the parties to be heard and it was the duty of the appellate or revisional authority to extend such an opportunity which is specifically envisaged in the aforesaid rule. For ready reference Rule 9 may be quoted which reads as under :-

> "9. **Power of appellate or revisional authority.**- The appellate or revisional authority after giving an opportunity to parties to be heard and after such further enquiry, if any, as it may deem necessary subject to the provisions of the Act and the rules made thereunder, may confirm, vary or set aside the order or decision appealed against."

11. In the aforesaid rule it is very specific, it is mandatory to the appellant or revisional authority to extend an opportunity to the parties to be heard. But in the present case we find that the Additional Commissioner without extending such an opportunity to the petitioner/appellant herein decided the matter and on this ground the order (Annexure-P/1) is not sustainable under the law. Though the learned counsel appearing for the parties raised their contention on merits of the case but we find that it would be appropriate if the matter is heard by the Commissioner, Sagar Division, Sagar, after extending both the parties an opportunity of hearing. All the questions in respect of maintainability of the revision before the Additional Commissioner and merits of the case shall be open and both the parties shall be free to raise their contentions before the Commissioner, who shall consider them and decide the matter.

12. In view of the aforesaid this writ appeal is allowed. The order passed by the Additional Commissioner, Sagar Division, Sagar, dated 27-3-2006 (Annexure-P/1) in Revision No. 595/A-89/2001-2002 and the order dated 17-1-2008 passed in Writ Petition No. 5692/06(s) are hereby set aside. The matter is remanded to The Commissioner, Sagar Division, Sagar. As both the parties are present herein are directed to remain present before the Commissioner, Sagar Division, Sagar, on 16-4-2009, on which date the Commissioner shall fix a date for hearing and thereafter after hearing both the parties shall adjudicate the matter afresh in accordance with law.

13. Considering the facts of the case the appellant is entitled for cost of the appeal and of the writ petition from the respondent No.2. Counsel fee Rs. 1,000/-.

Appeal allowed.

I.L.R. [2009] M. P., 2168
WRIT APPEAL
Before Mr. Justice S. Samvatsar & Mr. Justice A.P. Shrivastava
13 May, 2009*

STATE OF M.P. & ors. ... Appellants
Vs.
SHYAM SUNDER SAVITA ... Respondent

A. Service Law - Constitution, Article 226, Gram Tatha Raksha Samiti Niyam, M.P. 2003 - *Petitioner, a Tahsil Organizer appointed under Niyam, 2003 - Claimed relief that a policy for creating promotional post be formulated with specific time frame - Learned Single Judge allowed petition and directed the State to provide two channels of promotion - Writ Appeal - Held -Court cannot exercise the powers under Article 226 of the Constitution*

*W.A. No.3/2009 (Gwalior)

for creating promotional avenues by way of issuance of writ of mandamus - Order passed by learned Single Judge set-aside - Appeal allowed. (Para 11)

क. सेवा विधि – संविधान, अनुच्छेद 226, ग्राम तथा रक्षा समिति नियम, म.प्र. 2003 – याची, एक तहसील संगठक, नियम, 2003 के अन्तर्गत नियुक्त – इस अनुतोष का दावा किया कि पदोन्नत पद को सृष्ट करने के लिए पॉलिसी विनिर्दिष्ट समय सीमा में बनायी जाए – विद्वान एकल न्यायाधीश ने याचिका मंजूर की और राज्य को पदोन्नति के दो मार्ग देने का निदेश दिया – रिट अपील – अभिनिर्धारित – न्यायालय पदोन्नति का मार्ग सृष्ट करने के लिए परमादेश की रिट जारी करके संविधान के अनुच्छेद 226 के अन्तर्गत शक्तियों का प्रयोग नही कर सकता – विद्वान एकल न्यायाधीश द्वारा पारित आदेश अपास्त – अपील मंजूर।

B. **Constitution, Article 226/227** - *Petitions under Article 226/227 of the Constitution challenging vires of any Act or statute or any order or rule or regulation made under any Act or statute shall be heard at Principal Seat at Jabalpur as per order of Chief Justice - Chief Justice has ordered in exercise of powers conferred on him in pursuance of notification issued by the President.* (Para 12)

ख. संविधान, अनुच्छेद 226/227 – मुख्य न्यायाधीश के आदेशानुसार संविधान के अनुच्छेद 226/227 के अन्तर्गत किसी अधिनियम या कानून के अन्तर्गत किये गये किसी आदेश या बनाये गये नियम या विनियम की शक्तिमत्ता को चुनौती देने वाली याचिकाएँ जबलपुर में मुख्यपीठ में सुनी जायेंगी – मुख्य न्यायाधीश ने राष्ट्रपति द्वारा जारी अधिसूचना के अनुसरण में उन्हें प्रदत्त शक्तियों के प्रयोग में आदेश दिया।

Cases referred :

(2008) 5 SCC 100, 1990 (Supp) SCC 688, 1988 (Supp) SCC 519, (2004) 9 SCC 65.

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

Anil Mishra, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by S. SAMVATSAR, J. :--This writ appeal is preferred by the State being aggrieved by an order dated 13/3/08 passed by the learned single Judge of this court in W.P.No.5143/06 (S) thereby allowing the petition filed by the present petitioner.

2. Brief facts of the case are that the respondent was appointed on the post of Tahsil Organizer vide order dated 30/11/84 in the pay-scale of Rs.740-1180/-. This appointment was made in exercise of the powers conferred under the Adhiniyam known as Madhya Pradesh Gram Tatha Nagar Raksha Samiti Adhiniyam,1999 and the Rules were framed thereunder Section 21 known as Madhya Pradesh Gram Tatha Nagar Raksha Samiti Niyam, 2003. These rules govern the service condition of the respondent. As per the said Rules, no channel of promotion is provided from the post of Tahsil Organizer . However, the Govt.

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has prescribed a provision for grant of two higher pay-scales, firstly on completion of 12 years in service and secondly on completion of 24 years in service.

3. There is no dispute that the respondent was granted benefits of both these higher pay-scales. He filed the petition praying for relief that a policy for creating promotional posts be formulated with a specific time-frame so that the petitioner and other similarly situated persons met get the benefit of that policy. This petition is allowed by the impugned order. While allowing petition the writ court has held that non-providing channel of promotion is arbitrary and illegal and further directed the respondents/State to provide two channels of promotion to the petitioner after completion of 12 years and 24 years in service. The writ court also directed to comply with the aforesaid order within a period of three months. This order is assailed by the State Govt. in the present writ appeal.

4. The first contention of Shri Vivek Khedkar, learned Govt. Advocate appearing on behalf of the appellants/State is that the service conditions of the respondent are governed by the Statutory Rules namely, Madhya Pradesh Gram Tatha Nagar Raksha Samiti Niyam, 2003. He contended that the said Rules do not provide for channel of promotion from the post of Tahsil Organizer. He contended that the learned single Judge has no jurisdiction to direct for providing channel of promotion because the said direction will amount to amending the Rules. He pointed out that these Rules cannot be challenged by the respondent-employee before this bench as per the Notification of Hon'ble the Chief Justice of this Court. This Notification provides that all the matters challenging rules, notification and the Acts are to be filed at the principal seat at Jabalpur and shall be heard by the bench comprising of Hon. the Chief Justice. Thus, the Judge sitting at Gwalior has no jurisdiction to issue any such kind of direction for amending the rules. Learned counsel also contended that the rules were not challenged by the petitioner in the present petition and therefore the petition was heard by this bench otherwise the petition was not maintainable. This argument raised by the counsel for the State has substantial force.

5. As per Notification No.16/20/68-Judl.III, dated November 28,1968 issued by the President under Section 51(2) of the States Reorganization Act, 1956 (No.37 of 1956), Hon. the Chief Justice may order that any case or class of cases arising in any such district shall be heard at Jabalpur or at Gwalior. Thus, in exercise of such powers conferred by the Presidential order, Hon. the Chief Justice by orders dated 5/2/1976 directed that all the petitions under Articles 226/227 of the Constitution of India challenging the vires of any Act or statute or any order or rule or regulation made under any Act or statute shall be heard only at the principal seat at Jabalpur. Hence, in the light of the aforesaid Notification and in view of the orders passed by Hon. the Chief Justice in pursuance of the Notification, such type of petitions cannot be heard at Gwalior bench.

6. In reply to this argument, Shri Anil Mishra, learned counsel appearing on behalf of the respondent contended that this court can direct creation of avenues for promotion in the absence of rules. Learned counsel relied on the judgment of the Apex court in the case of *Food Corporation of India Vs. Parashotam Das Bansal* (2008)5 SCC 100. In that case, the petition was filed by the Engineer before Calcutta High court for creation of promotional avenue and for formulating schemes. The Calcutta High court dismissed the said petition. In para 13 of the judgment the Apex court has held that if there is no channel of promotion in respect of a particular group of officers resulting in stagnation over the years, the court although may not issue any direction as to in which manner a scheme should be formulated or by reasons thereof interfere with the operation of existing channel of promotion to the officers. Thus, the Apex court in para 13 of the judgment has held that the court should not issue direction in which manner, services rules should be framed. However, the Apex court in para 15 of the judgment has found that there were four promotional avenues available to the petitioner in that case namely, from Assistant Manager to Deputy Manager, from Deputy Manager to Joint Manager, from Joint Manager to Manager and from Manager to Executive Director. This fact was challenged by the Food Corporation of India in its return. It was also mentioned that 1/3rd of the officers in the cadre of Assistant Engineer are benefited by the said scheme.

7. Thus, the Apex court found that there was channel of promotion from the post of Assistant Engineer and ultimately directed the respondent-authority to grant benefit of selection grade. In this case also, the Apex court has not passed any direction for creating new channel of promotion.

8. The second case relied by the learned counsel for the respondent is in case of *O.Z. Hussain Vs. Union of India* 1990 (Supp)SCC 688. From perusal of the said judgment we find that in that case the Apex court has passed direction under Article 32 of the Constitution of India for framing scheme for promotion. This judgment is not at all applicable in the present case.

9. The next judgment cited by the learned counsel for the respondent is in the case of *Raghunath Prasad Singh Vs. Secretary, Home (Police)Department, Government of Bihar and others* 1988 (Supp)SCC 519. From perusal of the facts of this case it appears that in that case the petitioner claimed that he was entitled to exercise option and since option was not asked from him, he opted for Signal (Wireless) Wing which had a channel of promotion. When that was not accepted, he applied to the High court for issuance of direction. The Apex court held that the High court was right in finding against the petitioner therein that the option in terms of the instructions was available to those who came within the the ambit and the appellant being a recruit of 1972-73 not in the combined cadre and therefore is not entitled to the benefit of option. However, before parting the Apex Court has made observation that reasonable promotional opportunities should

be available in every wing of public service. That generates efficiency in service and fosters the appropriate attitude to grow for achieving excellence in service. In the absence of promotional prospects the service is bound to degenerate and stagnation kills the desire to serve properly and hence issued directions to the State of Bihar to provide at least two promotional opportunities to the officers of the State. Thus, this judgment is also distinguishable.

10. The last judgment relied by the learned counsel for the respondent is in the case of *State of Tripura and others Vs. K.K.Roy* (2004)9 SCC 65. From perusal of the aforesaid judgment we find that the Apex court in para 8 of the said judgment has held as under:-

> "The learned counsel appearing for the appellant, is, however, correct in his submission that the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India could not have issued a writ of or in the nature of mandamus directing the appellant herein to grant a scale of pay which would be equivalent to Grade II or Grade I of the judicial service of the State."

11. In that case, the Apex court has directed the respondent therein to be paid two promotions in the next Higher scale of pay upon his completion of 12 years and 24 years in service. Thus, in that case the Apex court has specifically laid down that the High court had no jurisdiction to issue a writ of or in the nature of mandamus for creating promotional avenues.

12. In the present case, the writ is filed at Gwalior bench. As already stated above, in exercise of the powers conferred on the Chief Justice in pursuance of the Notification issued by the President of India dated 28/11/1968, the Chief Justice by order dated 5/2/1976 has directed that all the petitions under Article 226/227 of the Constitution of India challenging the vires of any Act or statue or any order or rule or regulation made under any Act or statute shall be heard at the principal seat at Jabalpur. The said Notification reads as under:-

> " * * * * In exercise of the powers conferred on me by the proviso to the Notification No. 16/20/68-Judl. III, dated November 28, 1968 issued by the President under S.51(2) of the States Reorganization Act, 1956 (No. 37 of 1956) establishing a permanent Bench of the Madhya Pradesh High Court at Gwalior; and in supersession of all previous orders so far issued in exercise of the powers under the aforesaid proviso,
>
> I hereby order that with effect from February 5, 1976 till further orders only the following cases arising from the revenue districts of Gwalior, Shivpuri, Datia, Guna, Vidisha (Bhelsa), Bhind and Morena, except those cases for which I may otherwise order, shall be heard at Jabalpur:

(1) All petitions under Arts: 226/227 of the Constitution challenging the vires of any Act or statue or any order or rule or regulation made under any Act or statue,

(2) All individual cases which I may hereafter order to be heard at Jabalpur."

(Shiv Dayal)
Chief Justice.
5-2-1976

13. Apart from that, in the present case, the rules were not challenged by the petitioner which are statutory rules. In such circumstances, in absence of channel of promotion and in absence of jurisdiction to hear the matter challenging the rules, we hold that the writ court has committed grave error in directing to create channel of promotion for the petitioner. Hence, we allow this appeal and set aside the impugned order passed by the learned single Judge.

Appeal allowed.

I.L.R. [2009] M. P., 2173
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
5 January, 2009*

NARESH BILWAR ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. **Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 5 -** *Order of externment - Order passed on the basis of old and stale cases in which petitioner was already acquitted - Held - There was no material before the District Magistrate which could satisfy the condition mentioned in Section - Order of externment set-aside - Petition allowed.* (Paras 16 & 17)

क. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5 – निष्कासन का आदेश – आदेश पुराने और अतिकालिक मामलों के आधार पर पारित किया गया जिनमें याची पूर्व में ही दोषमुक्त हो गया था – अभिनिर्धारित – जिला मजिस्ट्रेट के समक्ष कोई सामग्री नही थी जो धारा में उल्लिखित शर्त पूरी कर सके – निष्कासन का आदेश अपास्त – याचिका मंजूर।

B. **Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 5 -** *Order of externment - Delay of more than 2 years in passing order - Held - Delay establishes that the order of externment was not warranted during the said period.* (Para 10)

ख. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5 – निष्कासन

*W.P. No.7395/2008 (Jabalpur)

का आदेश – आदेश पारित करने में दो वर्ष से अधिक का विलम्ब – अभिनिर्धारित – विलम्ब साबित करता है कि उक्त कालावधि के दौरान निष्कासन का आदेश आवश्यक नही था।

Cases referred :

2007(2) MPLJ 108, 2005(4) MPHT 102, 2006(3) MPLJ 592, 2007(3) MPLJ 115.

Yogendra Patel, for the petitioner.
Samdarshi Tiwari, for the respondents.

ORDER

PRAKASH SHRIVASTAVA, J. :–This writ petition is directed against the order dated 25.2.2008 passed by the District Magistrate / Collector in respect of externment of the petitioner from district Narsinghpur and its adjoining districts Chhindwara, Seoni, Jabalpur, Damoh, Sagar, Raisen and Hoshangabad for a period of one year under section 5 of the M.P. Rajya Suraksha Adhiniyam, 1998,(for short 'the State Security Act) and the order dated 13.5.2008 passed by the Commissioner rejecting the appeal against the order of externment.

2. The petitioner is a resident of Gotegaon, district Narsinghpur. The Superintendent of Police, Narsinghpur, vide memo dated 14.9.2005 had sent a report to the District Magistrate in respect of externment of the petitioner for a period of one year. The statement of only one witness was recorded in pursuance to the report and that witness stated that he did not know anything about the petitioner. Thereafter, a show cause notice dated 3.1.2006 was issued which was replied by the petitioner on 14.9.2005. The Collector then passed the order of externment dated 25.2.2008 which was challenged by the petitioner in appeal before the Commissioner and the Commissioner by the order dated 13.5.2008 dismissed the appeal. Aggrieved with these orders the petitioner filed the present writ petition.

3. Learned counsel appearing for the petitioner submitted that the proceedings remained pending before the Collector for more than 2 years which shows that the externment was not warranted and the order has been passed without proper application of mind. He further submitted that the order of externment has been passed on the basis of old and stale cases in which the petitioner was already acquitted.

4. Learned counsel appearing for the respondents submitted that the impugned orders have rightly been passed since there were as many as 16 cases registered against the petitioner, a list of which is filed herewith as Annexure R/1. He further submitted that the order has been passed after following the due process and considering the relevant material.

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

6. The State Security Act has been framed with an object to provide for the security of the State, maintenance of public order and other matters connected therewith. Section 5 of the Act contains the conditions on which the order of

externment can be passed by the District Magistrate and there need to be proper application of mind by the District Magistrate in respect of the conditions mentioned in section 5 of the Act which forms the basis for passing the order of externment.

7. The District Magistrate has passed the impugned order under section 5 of the State Security Act which reads as under :

> **5. Removal of persons about to commit offence** - Whenever it appears to the District Magistrate -
>
> (a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property; or
>
> (b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violation or an offence punishable under Chapter XII, XVI or XVII or under section 506 or 509 of the Indian Penal Code, 1860 (45 of 1860) or in the abetment of any such offence, and when in the opinion of the District Magistrate witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property; or
>
> (c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant; the District Magistrate, may by an order in writing duly served on him or by beat of drum or otherwise as the District Magistrate thinks fit, direct such person or immigrant -
>
> a) so as to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease; or
>
> b) to remove himself outside the district or any part thereof or such area and any district or districts, or any part thereof, contiguous thereto by such route within such time as the District Magistrate may specify and not to enter or return to the said district or part thereof or such area and such contiguous districts, or part thereof, as the case may be, from which he was directed to remove himself.

8. First challenge to the order of externment has been raised by the petitioner on the ground that report of the Superintendent of Police was submitted before the District Magistrate on 14.9.2005 whereas the impugned order has been passed on 25.2.2008 after a delay of more than 2 years which shows that such an order of externment was not warranted.

9. This court in the matter of *Dharmendra Singh V. State of M.P.*, 2007 (2) M.P.L.J. 108, while considering the issue of delay in taking the action by the District Magistrate took the view that :

> 7.....There is no explanation in the return as to why and in what circumstances the order was withheld for more than 2 years and 10 months and what caused the District Magistrate, Satna, to withhold the proceedings for more than 2 years and 10 months. Inaction for a period of 2 years and 10 months in a case of extemment clearly suggests that the order of externment was not warranted during the said period.

10. Coming to the facts of the case the respondents have produced the original record which shows that the report of the Superintendent of Police dated 14.9.2005 was received by the District Magistrate and the proceedings were initiated on 30.9.2005. The final order has been passed by the District Magistrate on 25.2.2008. Therefore, there is a gap of about 2 years and 5 months between initiation of the proceedings by the District Magistrate and passing of the final order. Though petitioner had taken adjournment on some dates between 20.2.2006 to 4.1.2007 but even after excluding the said period the order-sheets of the District Magistrate indicate that no urgency was shown in the matter. There is no explanation on record as to why the matter was delayed before the District Magistrate which establishes that the order of externment was not warranted during the said period.

11. The order of externment has also been challenged on the ground of non-application of mind by referring to in the list of cases relied upon by the District Magistrate and submitting that the order of externment has been passed on the basis of old and stale cases in which the petitioner was already acquitted.

12. This court in the matter of *Sanju @ Sanjay Ben V. State of M.P.* 2005(4) MPHT 102, referring to earlier judgments on this point held that:

> 8. It is also contended by him that old and stale activities cannot be grounds of externment, but in the case at hand, such cases have formed the base. Learned counsel has commended me to the decisions rendered in the cases of *Premchand V. Union of India and others*, AIR 1981 SC 613, *Ayubkhan V. State of M.P. and another*, 1994(1) Vibh 168, *Bala @ Iqbal V. Additional Collector, Indore*, 1995 Cr.LJ. (MP) 72, *Nyaju @ Niyas Modh. V. State of M.P.* 2000(1) JLJ 321, *Jokhu V. District Magistrate, Ujjain*, 2000(1) M.P.H.T. 554.
>
> 9. In the case of *Bala* (supra) this Court has laid down as under :
>
> "12. Perusal of the said provision establishes that activities on the basis of which an order of externment can be made against

any person must be those as existing at the time when the order is proposed to be made. The past activities must be related to the situation existing at the moment when the order is to be passed.

13. Though as many as 8 offences are alleged to have been committed by him starting from the period 23.6.1989 to 29.7.1993. The offences alleged to have been committed by him are under Sections 151, 107, 116(3), 110, 379 and 324 I.P.G. and 25 of the Arms Act. All these are petty offences which are still being investigated. No details of other offences have been given.

14. Thus, in view of this Court the externment order cannot be sustained on account of old and stale activities alleged to have been committed by the petitioner.

15. Since the mandate of the section is that a person must be involved in the activities committed in the present time, in the instant case there are no activities committed either at the time of the issuance of notice or during the enquiry on the basis of which externment order could have been passed. Thus, on this ground alone the petition deserves to be allowed.

16. It may also be pointed out that the respondents have failed to give details of the offences and the stage at which the same are pending against the petitioners."

In the case of Niyaju (supra), it has been observed that all opportunities should be given to person whose liberty is likely to be affected by the State.

13. This court in the matter *Asaf Ali, s/o Sheikh Mubarak V. State of M.P.* 2006(3) MPLJ 592, held that :

7. Thus, on the basis of such old and stale offences under the Indian Penal Code in which the petitioner has been acquitted and also the petty offences under sections 107, 110, 116(3), 151 of the Criminal Procedure Code, the order of externment under section 5(b) of the Adhiniyam cannot be sustained. See *Bala @ Iqbal V. Additional Collector, Indore*, 1997 Cr.L.R. MP 72. In case of *Ayub Khan V. State of M.P.*, 1994(1) VIBHA 168 a Division Bench of this Court has observed that the powers of externment are to be exercised sparingly with care and circumspection. They cannot be used for punishing a man for his past deeds. In view of the aforesaid legal position the petitioner's externment under section 5(b) of the Adhiniyam cannot be sustained and is quashed.

14. This court in the matter of *Pappu @ Dinesh Gupta V. State of M. P. and others*, 2007(3) M.P.L.J. 115, has held that :

11. Accordingly, conviction in seven criminal cases under section 4-A of the Public Gambling Act could not have provided material for passing an order of externment in exercise of powers under section 5(a) of the Rajya Suraksha Adhiniyam; unless the District Magistrate was satisfied on the basis of material before it that the movements or acts of the petitioner were causing or calculated to cause alarm, danger or harm to person or property.

12. The record made available to this Court contains the report of Superintendent of Police and the statement of Manoj Kumar Singh, Incharge Police Inspector of Police Station, Anooppur. There is no other material on record, wherefrom it may be inferred that the acts of the petitioner were causing or calculated to cause alarm, danger or harm to a person or property. In order to exercise power under section 5(a) of Rajya Suraksha Adhiniyam, learned District Magistrate was obliged to arrive at a categorical finding that the movements or acts of the petitioner were causing or calculated to cause alarm, danger or harm to person or property. Mere conviction in seven cases under section 4-A of the Public Gambling Act by itself is not sufficient to pass an order of externment. It is the reach effect and potentiality of the acts of the petitioner which it supports would cause or calculated to cause alarm, danger or harm to person or property, which could have provided a basis for externment. I may successfully refer for this preposition to the Supreme Court decision in the case of *State of Uttar Pradesh V. Kamal Kishore Saini*, AIR 1988 SC 208.

15. Thus, the powers of externment are to be exercised sparingly with care and circumspection. The activities on the basis of which an order of externment is made against any person should be those as existing at the time when the order was proposed to be made. The past activities should have nexus with the situation existing at the time when the order of externment was passed. The externment order cannot be sustained on the basis of old and stale activities. Mandate of the section is that the person concerned must be involved in the alleged activities in the present time.

16. The order of externment passed by the Collector indicates that while passing the said order he had relied upon 14 cases registered against the petitioner mentioned in the report of the S.P. and 4 cases registered after the submission of the report by the S.P. The State has filed the reply enclosing annexure R/1 giving the position in respect of 16 cases. This chart indicates that cases from s.no.1 to 13 were the cases registered prior to Jan. 2004. Out of these cases 11 cases are either closed, compromised or resulted into imposition of fine. Since the cases from s.no.1 to 13 were the cases registered against the petitioner more than 4 year

prior to the passing of the impugned order and when those cases were registered no action was taken, therefore, cases at s.no.1 to 13 cannot form basis for passing the impugned order. Case at s.no.14 was for the period August 2005 also ended with imposition of fine. The case at s.no-15 is of 10.8.05 which is under section 41(2) / 110 Cr.P.C. which is not in respect of commission of any offence but is in respect of taking the security for good behaviour from habitual offender. It is also worth noting that the case at item no. 15 was not registered when the Superintendent of Police had sent the report dated 14.9.2005. The case at s.no.16 is of 2007 but that had resulted into acquittal of the petitioner.

17. Thus, these cases could not have formed the basis for passing the impugned order of externment and, therefore, it is found that there was no material before the District Magistrate which could satisfy the conditions mentioned in section 5 of the State Security Act.

18. The fact that the report submitted by the S.P. remained pending before the District Magistrate for about two and half year also indicates that there was no such need or urgency to pass an order under section 5. The District Magistrate while passing the impugned order did not consider the fact that in the list of cases which were sent by the Superintendent of Police includes most of the cases were petty in nature, stale and either closed or resulted in compromise or imposition of penalty.

19. Considering the aforesaid analysis, impugned order of externment dated 25.2.2008 and the order dated 13.5.2008 passed in appeal affirming the order of externment can not be upheld and they are set aside.

20. The writ petition is allowed accordingly.

Petition allowed.

I.L.R. [2009] M. P., 2179
WRIT PETITION
Before Mr. Justice Ajit Singh
9 January, 2009*

BALMUKUND PANDEY ... Petitioner
Vs.
V.K. SINGH ... Respondent.

Arbitration and Conciliation Act (26 of 1996), Section 25(a) - *Termination of arbitration proceedings in default - Petitioner despite several opportunities failed to submit statement of claims before Arbitral Tribunal - Held - Termination of proceeding by Arbitral Tribunal valid - Petition dismissed.* (Para 6)

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*W.P. No.15466/2007 (Jabalpur)

BALMUKUND PANDEY Vs. V.K. SINGH

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 25(ए) – व्यतिक्रम में माध्यस्थम् कार्यवाहियों की समाप्ति – याची अनेक अवसरों के बावजूद माध्यस्थम् अधिकरण के समक्ष दावों का विवरण पेश करने में असफल रहा – अभिनिर्धारित – माध्यस्थम् अधिकरण द्वारा कार्यवाही की समाप्ति विधिमान्य – याचिका खारिज।

Cases referred :

(1998) 5 SCC 599.

Petitioner in Person.

Sheel Nagu, Amicus Curiae.

Vivek Rusia, for the respondent.

ORDER

AJIT SINGH, J. :–This petition, under Article 226/227 of the Constitution, is directed against the termination of arbitral proceedings and also for a direction against the respondent for payment of rupees one crore as damages to the petitioner.

2. The petitioner is a contractor by profession and he, despite having not much knowledge of law, himself wanted to plead his case. I, therefore, appointed Shri Sheel Nagu, Advocate, not only to assist this Court as Amicus Curiae but also the petitioner.

3. Briefly stated the facts giving rise to this petition are that during the period from 1987-88 to 1992-93 the petitioner was awarded the following five contract works by the Northern Coalfields Limited (in short, "the NCL") : (1) Construction of gas platform at Singrauli (2) jungle cutting in connection with Ministers visit (3) approach road for newly constructed shed at Singrauli (4) construction of pathway in all types of quarters at Jayant Project, and (5) cleaning of over head tank of residential and non-residential building and elevated reservoir at Jingurdah. Since a dispute arose between the petitioner and the NCL regarding the contract work the petitioner made various representations between 1988 to 1998 for the clearance of his pending bills. The record reveals that in none of these representations he made any prayer for the appointment of Arbitrator for resolving the dispute as per the Arbitration Clauses in the agreements. The petitioner, however, for the first time made a request for the appointment of an Arbitrator vide representation dated 21.10.1998 pursuant to which Chief Engineer (Civil) was appointed as the sole Arbitrator vide order dated 20.9.2004 under the provisions of the Arbitration And Conciliation Act, 1996 (in short, "the Act 1996").

4. On 24.9.2004 the Arbitrator issued notices to both the parties regarding commencement of the arbitral proceedings. On 4.10.2004 both the parties appeared before the Arbitral Tribunal on which date the petitioner made a request for conduction of proceedings in Hindi. On 18.10.2004 at the request of petitioner, the Arbitral Tribunal directed the NCL to produce the relevant record for inspection. On 11.1.2005 the NCL produced a copy of the measurement book available with

it concerning the work. The original measurement book could not be produced because it was in possession of the Vigilance Cell. As the petitioner had not filed any statement of claim, the Arbitral Tribunal directed him to state the facts supporting his claim, the points at issue and the relief sought, as required under section 23 of the Act 1996. On 16.3.2005 the petitioner was again reminded by the Arbitral Tribunal to submit his statement of claim positively by the next date to which he responded by submitting a representation dated 19.4.2005 in the name of Singrauli Vikas Sangharsh Morcha essentially to put pressure on the Arbitral Tribunal. This representation neither contained any statement of facts nor the quantitative demand was mentioned in it. Despite this, the Arbitral Tribunal gave further opportunities to the petitioner on 27.4.2005 and 11.2.2006 to submit his statement of claim by 25.2.2006 but to no avail. Instead he made a demand of rupees one hundred crore without giving any details. The Arbitral Tribunal terminated the arbitral proceedings on 8.5.2006 by invoking section 25(a) of the Act 1996 and directed the NCL to pay undisputed outstanding dues to the petitioner which amounted to Rs. 63,975/-. Aggrieved, the petitioner has filed this petition.

5. It is submitted by the petitioner that the Arbitral Tribunal committed an illegality in terminating the arbitral proceedings under the provisions of the Act 1996. According to him, his claim ought to have been decided under the provisions of the old Arbitration Act, 1940. The petitioner also submitted that the termination of arbitral proceedings was without any justification and it has resulted into grave miscarriage of justice to him. The petitioner lastly submitted that since his request for conduction of arbitral proceedings in Hindi was not opposed, the Arbitral Tribunal committed an illegality in conducting the same in English. The learned counsel for respondent, on the other hand, defended the termination of arbitral proceedings under the Act 1996.

6. The old Arbitration Act of 1940 was effective till 25.1.1996 and from that date the new Arbitration Act 1996 became operative. In *Shetty Company (P) Ltd. Vs. Konkan Railway Construction* 1998 (5) SCC 599 the Supreme Court has held that the law (the 1940 or 1996 Act), existing on the date of making of request by the petitioner for referring the dispute for arbitral proceedings, would apply to govern the arbitral proceedings. In the present case, the petitioner made a representation for the appointment of an Arbitrator on 21.10.1998 pursuant to which the sole Arbitrator was appointed. It is, thus, clear that on the date when the petitioner made a request for referring the dispute for arbitral proceedings, the Act 1940 had ceased to operate and the Act 1996 was in operation. The Arbitral Tribunal, therefore, acted rightly in taking up the claim of petitioner under the provisions of the Act 1996. Section 25 of the Act 1996 empowers the Arbitral Tribunal to terminate the arbitral proceedings where the claimant without showing sufficient cause fails to communicate his statement of claim in accordance with sub-section (1) of section 23. As already mentioned above the petitioner, despite

being given repeated opportunities by the Arbitral Tribunal, did not submit his statement of claim and that too without any sufficient cause. In this background, it cannot be held that the Arbitral Tribunal committed an illegality in terminating the arbitral proceedings.

7. It is true that the petitioner did make a prayer for the conduction of arbitral proceedings in Hindi but the fact remains that he did not file any statement of claim and as such the arbitral proceedings actually did not commence and were terminated in default. Further the Arbitral Tribunal has a discretion under section 22 of the Act 1996 to determine the language to be used in the proceedings.

8. For these reasons, I find no merit in the petition. However, before parting, I deem it proper to acknowledge the valuable assistance rendered by Shri Sheel Nagu, Advocate, to this Court which the petitioner also approved.

9. The petition fails and is dismissed but without any order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 2182
WRIT PETITION

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
23 January, 2009*

WAKF IMAMBARA IMLIPURA, KHANDWA ... Petitioner
Vs.
SMT. KHURSHEEDA BI ... Respondent

Wakf Act (43 of 1995), Section 85 - ***Bar of jurisdiction of Civil Courts*** - *Whether the suit filed by Wakf for ejectment of tenant is maintainable before Civil Court - Held - Sec. 85 ousts the jurisdiction of Civil Court to try such cases of ejectment of tenant - Such dispute is to be adjudicated upon by Wakf Tribunal.* (Para 21)

वक्फ अधिनियम (1995 का 43), धारा 85 – सिविल न्यायालयों की अधिकारिता का वर्जन – क्या वक्फ द्वारा किरायेदार की बेदखली के लिए पेश वाद सिविल न्यायालय के समक्ष पोषणीय है – अभिनिर्धारित – धारा 85 किरायेदार की बेदखली के ऐसे मामलों का विचारण करने की सिविल न्यायालय की अधिकारिता को बाहर करती है

Cases referred :

AIR 1997 MP 8, AIR 2006 All 115, AIR 2003 Kerala 366, AIR 2003 Kerala 84, AIR 2001 Madras 431, AIR 1988 SC 1888, AIR 1969 SC 78, AIR 1964 SC 322, AIR 1988 SC 752, AIR 1953 SC 83, AIR 1968 SC 1450, AIR 1986 SC 1162.

Imtiaz Hussein, for the Wakf.
Vivek Rusia, for the tenant.

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*W.P. No.8296/2006 (Jabalpur)

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–In the writ petitions common question is involved with respect to interpretation of provision of section 85 of the Wakf Act, 1995 whether the suit filed by the Wakf for ejectment of the tenant is maintainable before the Civil Court or such a dispute is to be adjudicated by Wakf Tribunal under the Wakf Act, 1995.

2. It is not in dispute that plaintiff in each of the case is a Wakf and suit has been filed for ejectment of tenant from Wakf property.

3. In WP No.8313/06 initially Civil Suit No. 30-A/2004 was filed on 13.2.2003 which was dismissed by the Civil Court on the ground that it had no jurisdiction to try the suit. It was triable by Wakf Tribunal, Bhopal under the provision of Wakf Act, 1995. Plaintiff filed civil appeal against the decision rendered. The appeal was decided on 6.10.2005 by the IInd Addl. Sessions Judge, East Nimar (Khandwa) in which plaint was ordered to be returned for presentation before the Wakf Tribunal. Judgment (P/2) was delivered. Accordingly the Civil Judge returned the plaint on 22.11.2005 for presentation before the Wakf Tribunal, Bhopal. However, the tribunal has held vide order (P/3) dated 7.3.2006 that jurisdiction lie with the Civil Court as such returned the plaint for presentation before the Civil Court. Again the plaint was presented by the plaintiff before the Civil Court. It has been returned for presentation by the Civil Court before the Tribunal vide order (P/1) dt.3.5.2006. Hence, the instant petition has been preferred. Prayer has been made to decide the question of jurisdiction of Civil Court /Wakf Tribunal to try the eviction suit between the landlord Wakf. and tenant.

4. Facts are similar in WP No.8296/06 and WP No.8305/06. The Civil Court has held that it has no jurisdiction. Wakf Tribunal has also held that it has no jurisdiction to try the suit.

5. W.P. No.1829/08 has been preferred by the tenant Mohd. Iqbal in which order dt. 20.2.2007 passed by the IInd Civil Judge, Class-I, East Nimar (Khandwa) in Civil Suit No.106-A/06 has been assailed. The trial Court has held vide order (P/2) dated 20.2.2007 that the Civil court has the jurisdiction to decide the civil suit. Aggrieved thereby an appeal was preferred. Same has been dismissed as not maintainable vide order dt. 10.12.2007 by the District Judge East Nimar, Khandwa. Consequently, the writ petition has been preferred.

6. Shri Imtiaz Hussein, learned counsel appearing on behalf of the petitioner/ Wakf in WP No.8296/06, WP8305/06 & WP No.8313/06 has submitted that the Tribunal as well as Civil Court have held that they do not have the jurisdiction. The plaintiff is not able to seek redressal either before the Civil Court or before the Wakf Tribunal. He has submitted that section 85 of the Wakf Act 1985 ousts the jurisdiction of the civil court only with respect to the matters which are required

by or under the Wakf Act to be determined by the Tribunal. He has submitted that the words dispute, question or other matter relating to any wakf, wakf property should be such which is required by or under the Wakf Act to be determined by the Tribunal. Counsel has placed reliance on the Single Bench decision of this Court in *Subhan Shah through LRs. Ramjan Khan and ors. Vs. M.P. Wakf Board and ors.*, AIR 1997 MP 8 and *Yashpal Lala Shiv Narain Vs. Allatala Tala Malik Waqf Ajakhan Mus,* AIR 2006 ALL 115. He has also referred to other decisions to be referred later.

7. Shri Vivek Rusia, learned counsel appearing on behalf of the tenant has also submitted that the Civil court has the jurisdiction to try the suit on proper interpretation of section 85.

8. Before dilating upon the submissions, we note that the Wakf Act 1995 has been enacted to bring a new comprehensive Act with respect to Wakf matter incorporating the features of 1954 Act and such provisions of 1954 Act with respect to which near reached consensus after holding wide discussion. Wakf Tribunal has been constituted so as to consider matters about Wakf property and Wakf. Wakf Tribunal has been defined in section 3(q) Tribunal in relation to any area, means the Tribunal constituted under sub-section (1) of section 83, having jurisdiction in relation to that area. Section 83 of the Wakf Act 1995 provides constitution of Tribunals for determination of any dispute, question or other matter relating to a wakf or wakf property. Sub-section(2) of section 83 provides that any mutawalli, person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application to the Tribunal. Sub-section (3) of section 83 deals with territorial jurisdiction of the Tribunal. Sub-section (4) of section 83 provides that every Tribunal shall consist of one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, and the appointment of every such person may be made either by name or by designation. Sub-section (5) of section 83 provides that the Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order. Sub-section (7) of section 83 provides that the decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court. Sub-section (8) of section 83 provides that the execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the code of Civil Procedure, 1908 (5 of 1908). Sub-section (9) of section 83 provides that no appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal, provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter

which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

9. Section 85 deals with the Bar of jurisdiction of Civil Courts. Section 85 reads thus :

> **"85. Bar of jurisdiction of Civil Courts.-** No suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal."

It is apparent from reading of section 85 that section is in two parts. First part provides no suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property. Second part provides that other matter which is required by or under this Act to be determined by a Tribunal. The words "other matter" has been used in the first part as well as in the second part. In the first part user of the words "any dispute, question or other matter" is vide enough to cover with its ken the suit for ejectment also filed by Wakf against a tenant. The second part deals with the other matter which is required by or under this Act to be determined by a Tribunal as provided in sections 6, 7, 32, 33, 35, 40, 51, 52, 54, 64, 67 and 69. We are unable to accept the submission raised by the counsel that we must read the section in such a way that only such other matter which is required by or under this Act to be determined by a Tribunal governs the bar of jurisdiction of Civil Court which other matters are mentioned in the aforesaid sections 6, 7, 32, 33, 35, 40, 51, 52, 54, 64, 67 and 69 of the Wakf Act, 1995. The Legislative intention is clear from reading of section 83 and 85 the Tribunal is deemed to be a Civil Court and exercises similar powers as may be exercised by the Civil Court under the C.P.C. while trying a suit, execute a decree or order. We can not confine the bar created by section 85 with respect to dispute as to title of the Wakf property or with respect possession based on title of the Wakf property as suggested by the learned counsel. The word 'any' qualifies the 'dispute' which would include suit for ejectment of a tenant from Wakf premises. In any view of the matter such a suit for ejectment would be covered under the phrase "other matter relating to Wakf property". In our opinion, even if status of the tenant is admitted one section 85 first part ousts the jurisdiction of Civil Court to entertain such a suit for ejectment to tenant, if it is held that in such a suit personal relationship of landlord and tenant is severed and relief for ejectment is held to be incidental the phrase other matter with respect to Wakf property would cover suit for ejectment from Wakf property. Such a proceeding for ejectment of the tenant has to be filed before the Tribunal. *The Subhan Singh Vs. MP Wakf Board* (supra) considering section 55 of Wakf Act, 1954 which is pari-materia to section 83 of Wakf Act, 1995, it has been held that :

"18. In other words, in my opinion, the validity of orders made under the provisions of the Act or any rule or order made thereunder can be challenged by aggrieved persons before the Tribunal for determination of the dispute relating to Wakf. However, the Mutawalli of a Wakf, or persons interested in a wakf are competent u/S. 55(2) of the Act to approach the (sic) other matters relating to the Wakf. According to me Section 55(2) of the Act confers discretion to aggrieved person to file an application to the Tribunal only in case he is aggrieved by any order made under this Act or any rule or order made thereunder. However, any Mutawalli of a Wakf and person interested in a Wakf can file application to the Tribunal for determination of any disputed question or other matters relating to the Wakf. Even in case of persons aggrieved, he can file an application to the Tribunal only in case the order passed under the Act, rule or order made thereunder is in relation to the Wakf Property. In my opinion, in case the power of the Tribunal is confined for determination of only those disputes which are required to be determined under the specific provision of the Act, Rule or Order, it will lead to rendering the provision of Section 55(2) of the Act superfluous. Legislature does not waste words and I do not have any compelling reason to adopt a course of interpretation to render the provisions of Sec. 55(2) of the Act, superfluous. As I have held earlier both operate in the different field.

19. Learned counsels for the plaintiffs have further submitted that relief sought for by them in the Civil Courts cannot be adjudicated by the Tribunal and in that view of the matter even if the Tribunal has got the power u/S. 5(1) and (2) of the Act the suits and the proceedings cannot be transferred. In the submission of the learned counsels when the Tribunal is not competent to grant relief sought for in the Civil Court the necessary corollary of the same, in their submission, shall be that the Tribunal shall have no power. The whole premises on which the learned counsels have proceeded is unfounded and they totally ignore the provisions of Section 55(5) of the Act as amended. Under Section 55(5) of the Act the Tribunal is deemed to be a Civil Court and has the same power as that of a Civil Court under the Code of Civil Procedure, while trying the suit or executing the decree or order. In view of the aforesaid specific provisions, I do not have slightest hesitation in holding that the relief which can be granted by the Civil Court can also be granted by the Tribunal."

10. In *Subhan Shah Vs. MP Wakf Baord* (supra) Single Judge of this Court has also opined that in a suit for grant of permanent induction restraining the defendants or their agents from dismantling the roof of the shop or cause any damage to it has held that the Tribunal is not competent to hear such a dispute as such relief sought for by the plaintiff cannot be granted by the Tribunal. Relief sought was for permanent injunction restraining the tenant from abolishing the shop. Plaintiff was a tenant in a shop which was wakf property. It was held by this Court that plaintiff was neither Mutwalli or person interested in the wakf and cannot come within the expression 'persons aggrieved by any order made under the Act or any rule or order made there under' as provided in section 83. Thus, cannot file an application before the tribunal for grant of relief sought for in the Civil Suit. Thus, it was held that the Civil Court was right in not transferring the suit in the Tribunal. Facts were different in the aforesaid decision. In the instant suit, the suit is for ejectment and such a suit, in our opinion, would lie before the Tribunal, even as per reasoning given with respect to interpretation of section 55 of the Act of 1954 in para 18 and 19 of the report (supra).

11. In *Yashpal Lala Shiv Narain Vs. Allatala Tala Malik Waqf Ajakhan Mus* (supra) a Single Bench of Allahabad High Court has held that in the suit for ejectment of tenant dispute is with respect to determining the tenancy such a suit is not a suit in respect of any dispute, question or other matter relating to any wakf , wakf property in the context in which such words have been used in section 85 of the Wakf Act 1995. Following discussion has been made in *Yashpal Lala Shiv Narain Vs. Allatala Tala Malik Waqf Ajakhan* (supra):

> "168. A perusal of Section 85 of the Wakf Act, 1995 shows that in case, there is any dispute, question or other matter "relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal" then no suit or other legal proceeding shall lie in any civil court in respect of such dispute, question or matter.
>
> 169. As noted above, the present suit is a suit for eviction of the tenant [i.e. petitioner (defendant)] from the disputed shop after determination of the tenancy/lease. Such a suit is not a suit "in respect of any dispute, question or other matter relating to" any wakf or wakf property in the contest in which the said words have been used in Section 85 of the Wakf Act, 1995.
>
> 170. Further, analysis of various provisions of the Wakf Act, 1995, particularly, Sections 6, 7, 32, 33, 35, 40, 51, 52, 54, 64, 67, 69 and 83 thereof, shows that such a suit for eviction of the tenant [i.e. petitioner (defendant)] after determination of the tenancy/ lease is also not covered within the purview of the words "other

matter which is required by or under this Act to be determined by a Tribunal."

171. In the circumstances, I am of the opinion that the bar created by Section 85 of the Wakf Act, 1995 does not apply in the present case, which pertains to a suit for eviction of the tenant from the disputed shop after determination of the tenancy/lease. As such, in my opinion, the submissions made by the learned counsel for the petitioner (defendant) in this regard, cannot be accepted."

We are unable to agree with the view propounded by learned Single Judge of the Allahabad High Court as in our opinion, section 85 is in two parts in the aforesaid decision the second part has been taken to govern even the first part, in our opinion, the words "any dispute, question or other matter" used in the first part of section 85 would cover the dispute of ejectment between the Wakf and its tenant.

11. A Division Bench of Kerala High Court in *Aliyathammada Beethathabiyyapura Pookoya Haji, Vs. Pattakkal Cehriyakoya and ors,* AIR 2003 Kerala 366 has laid down that :

"12. We are therefore, of the considered view that the words any dispute, question or other matters relating to Wakf or Wakf property under Section 85 are wide enough to take in within its sweep not only matters which are specifically conferred on the Tribunal by the various provisions of the Act but also any dispute, question or any other matter relating to any Wakf or Wakf property since those powers have also been conferred on the Tribunal by the Wakf Act itself. On examining the scheme of the Act and various provisions we are of the view that the intention of the legislature is to resolve all disputes by one machinery and forum provided in the Act itself, that is, the Wakf Tribunal and not by the civil Courts in the State.

15. .....

C.R.P. No.2315 of 2002

This revision petition is filed under Section 83(a) of the Wakf Act against the judgment in O.S. No.153 of 2001 granting a decree for eviction on the ground of arrears of rent. contention was raised that the suit was not maintainable. Plaintiff produced Exts. A1 to 16. A5 is the Wakf Board registration certificate showing registration in respect of the property. The Tribunal held that it has got jurisdiction and and granted a decree to the plaintiff to evict the defendant from the schedule property. We are of the

view Tribunal is justified in taking the view that it has got jurisdiction since the dispute is regarding a wakf property. In such circumstances we find no illegality, irregularity or impropriety in the order passed by the Tribunal to be interfered with under Section 83 of the Act. The revision petition would stand dismissed."

We agree with the view taken in *Aliyathammada Beethathabiyyapura Pookoya Haji, Vs. Pattakkal Cehriyakoya and ors.* (supra). In our opinion, besides the matter which are specifically required to be dealt with by the Tribunal under the Wakf Act, sections 83 and 85 provide that any other matter relating to wakf or wakf property has to be heard and decided by the Tribunal.

12. Another decision which has been relied upon by counsel in *Abdul Rahiman Musaliar Vs. T.K. Muhammed Sahib,* AIR 2003 KERALA 84 has been overruled by the Division Bench of the Kerala High Court in *Aliyathammada Beethathabiyyapura Pookoya Haji, Vs. Pattakkal Cehriyakoya and ors.* (supra), thus, the reliance placed on the decision is misplaced.

13. In *A.M. Ali Akbar Vs. Keelakarai South Street Jamath Masjid Paripalana Committee,* AIR 2001 MADRAS 431 the High Court has taken the view that the petition filed by the members of Jamath seeking permanent injunction restraining the opposite parties from interfering with management of Jamath and consequently granting temporary injunction restraining them from holding election cannot be entertained by the Tribunal. Facts and nature of dispute in the instant case are different, hence we refrain ourselves to express opinion as to aforesaid aspect.

14. The words and sections like men do not have their full significance when standing alone. Like men they are better understood by the company they keep, as laid down by the Apex Court in *Kehar Singh Vs. State,* AIR 1988 SC 1888 [1932]. When we consider the object, scope and intendment of the ouster of jurisdiction of Civil Court we are of the opinion that the Civil Court's jurisdiction is ousted with respect to the matter in question covered by section 85 and other provision mentioned in aforesaid section.

15. In *Dhula Bhai Vs. State of M.P.,* AIR 1969 SC 78, the Apex Court has laid down that :

"Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute

creates a special right or liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associate with actions in civil courts are prescribed by the said statute or not."

When the scheme of Wakf Act is considered it is clear that there is express ouster of jurisdiction of civil Court with respect to the matters covered u/s 85 of the Wakf Act, 1995.

16. In *Firm I.S. Chetty & Sons v. State of AP,* AIR 1964 SC 322 it has been laid down that there has to be express provision for exclusion of the jurisdiction of Civil Court to entertain civil causes. There is express provision in the instant case contained in section 85 when read with section 83 and other provisions it is apparent that there is ouster of the jurisdiction of the civil court with respect to matters covered under the aforesaid sections.

17. In *Raja Ram Kumar Vs. Union of India,* AIR 1988 SC 752 guiding considerations for determining whether Civil Court jurisdiction is excluded are that wherever a right, not pre-existing in common law is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy, having been created uno flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the Civil Court's jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognized by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the Civil Court's jurisdiction, then both the common law and the statutory remedies might become concurrent remedies leaving open an element of election to the persons of inherence. In the Wakf Act 1995 we find that remedies of Civil Court as well as Tribunal cannot be said to be concurrent in view of the express provision creating bar contained in section 85 of the Act.

18. In *Darshan Singh Vs. State of Punjab,* AIR 1953 SC 83 the Apex Court emphasized to the interpretation that the language by the Legislature is the true depository of the legislative intent, and that words and phrases occurring in a statute are to be taken not in an isolated or detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. Applying the aforesaid test we find that Civil Court's jurisdiction is ousted in such matters as instant one.

19. In *Ishwar Singh Vs. State of U.P.,* AIR 1968 SC 1450 it has been laid down that "And" has generally a ;cumulative sense, requiring the fulfillment of all the conditions that it joins together and herein it is the antithesis of 'or'. Sometimes, however, even in such a connection, it is, by force of a context, read as 'or'. Sometimes to carry out the intention of the legislature it is found necessary to

read the conjunctions 'or' and 'and' one for the other. The word used in section 85 of Wakf Act is 'or' and that separates the two parts of section. Second part cannot restrict the operation of first part of section 85.

20. In *M. Satyanarayana Vs. State of Karnataka,* AIR 1986 SC 1162 it has been laid down that a statute cannot be construed merely with reference to grammar. Statute whenever the language permits must be construed reasonably and rationally to give effect to the intention and purpose of the legislature. For giving effect to the intention and purpose of the Legislature the interpretation of ouster of Civil Court jurisdiction is a reasonable consideration as that is expressly provided by the statute.

21. In the circumstances, we hold that Section 85 of the Wakf Act ousts the jurisdiction of Civil Court to try such cases of ejectment of tenant, the Wakf Tribunal shall try such cases. The orders passed by the Civil Court and Wakf Tribunal to the contrary are set aside. The cases be made over/presented to the Wakf Tribunal to be tried in accordance with law.

Order accordingly.

I.L.R. [2009] M. P., 2191
WRIT PETITION
Before Mr. Justice R.S. Jha
29 January, 2009*

ANIRUDH DWIVEDI .... Petitioner
Vs.
STATE CHIEF COMMISSIONER,
BHARAT SCOUT & GUIDE & anr. ... Respondents

A. Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 14(22) - *First D.E. against petitioner cancelled - After appointment of Inquiry Officer afresh enquiry started - Despite restrain order of HC, D.E. completed and order of dismissal passed - Held - Succeeding Inquiry Officer had no power to totally disregard the evidence already recorded by previous Inquiry Officer unless and until he expresses an opinion that further examination of witness already examined is necessary in the interest of justice - Order of dismissal set-aside - Matter remanded back for continuing enquiry from the stage it was left by previous Inquiry Officer - Petition allowed.* (Paras 28 to 31 & 34)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14(22) – याची के विरुद्ध प्रथम विभागीय जाँच रद्द की गई – जाँच अधिकारी की नियुक्ति के बाद पुनः जाँच प्रारम्भ की गई – उच्च न्यायालय के रोक के आदेश के बावजूद विभागीय जाँच पूर्ण की

*W.P. No.4178/1999 (Jabalpur)

August-09 (First)

गई और बर्खास्तगी का आदेश पारित किया गया – अभिनिर्धारित – उत्तरवर्ती जाँच अधिकारी को पूर्ववर्ती जाँच अधिकारी द्वारा पहले से अभिलिखित साक्ष्य की पूर्णतः उपेक्षा करने की कोई शक्ति नही थी जब तक वह यह राय अभिव्यक्त न करता हो कि साक्षी जिसकी पूर्व में परीक्षा की जा चुकी है, की अतिरिक्त परीक्षा न्यायहित में आवश्यक है – बर्खास्तगी का आदेश अपास्त – मामला उस प्रक्रम से जाँच जारी रखने के लिए प्रतिप्रेषित किया गया जिस पर पूर्ववर्ती जाँच अधिकारी द्वारा छोड़ी गयी थी – याचिका मंजूर।

B. Constitution, Article 226 - *Bharat Scout and Guide, a society registered under Society Registrikaran Adhiniyam - Whether State within meaning of Article 12 and amenable to writ jurisdiction - Held - Society is not State within meaning of Article 12 -However society has been established for non-political educational movement of young people and imparting education in different way - Society is seeking to achieve collective benefit and is participating in social affairs in public interest and thus performing public function - Society is receiving Grant-in-Aid and grant is spent for educational movement - Society is amenable to writ jurisdiction.* (Paras 18 & 21 to 24)

ख. संविधान, अनुच्छेद 226 – भारत स्काउट एण्ड गाइड सोसायटी रजिस्ट्रीकरण अधिनियम के अन्तर्गत रजिस्ट्रीकृत सोसायटी – क्या अनुच्छेद 12 के अर्थ के अन्तर्गत राज्य है और रिट अधिकारिता के अध्यधीन है – अभिनिर्धारित – सोसायटी अनुच्छेद 12 के अर्थ के अन्तर्गत राज्य नही है – सोसायटी युवा लोगों के गैर राजनीतिक शैक्षिक गतिविधि के लिए स्थापित की गई है और भिन्न तरीके से शिक्षा प्रदान करती है – सोसायटी सामूहिक लाभ प्राप्त करना चाह रही है और लोक हित में सामाजिक कार्यों में भाग ले रही है इस प्रकार लोक कार्य का निष्पादन कर रही है – सोसायटी सहायता अनुदान प्राप्त कर रही है और अनुदान शैक्षिक गतिविधि के लिए खर्च किया जाता है – सोसायटी रिट अधिकारिता के अध्यधीन है।

Cases referred :

M.P. No.631/1994 *(Dr. Smt. Mradula Sharma Vs. State Chief Commissioner, M.P. Bharat Scouts and Guides & ors.)*, (2006) 7 SCC 680, (2003) 4 SCC 225, (2004) 2 MPLJ 125, 2008(4) MPLJ 611, M.P. No.656/1993 *(D.L. Sharma Vs. M.P. Bharat Scouts and Guides & ors.)*, (1989) 2 SCC 691, (2005) 6 SCC 657, AIR 1981 SC 487, AIR 1992 SC 67, (2002) 5 SCC 111, AIR 1989 SC 241, (1984) 3 SCC 384, (1997) 3 SCC 571, 1984 (Supp) SCC 540, 1989 (Supp) 3 SCC 598, W.P. No.4970/1997 *(Kamlesh Kumar Vs. Pansheel Siksha Samiti & anr.)*, W.P. No.4494/1997 *(Dr. Ram Shankar Dwivedi Vs. State of M.P. & ors.)*, AIR 1993 SC 2178 , 1994 MPLSR 174, (2002) 8 SCC 481.

Sujoy Paul, for the petitioner.
Sanjay Sanyal, for the respondents.

ORDER

R.S. JHA, J.:–The petitioner had initially filed this petition being aggrieved by order dated 30.6.1999 passed by the respondents rejecting the petitioner's

application claiming difference of pay during the period of suspension on the ground that the issue in that respect would be decided on completion of the departmental enquiry. However, during the pendency of the petition, as an order terminating the petitioner from service has been passed on 13.9.2002, the petitioner by way of amendment has also challenged the aforesaid order.

2. The facts, leading to the filing of the present petition, are that the petitioner was initially engaged by the respondents as an Assistant State Organizing Commissioner. A departmental enquiry was initiated against him by issuance of a charge-sheet on 26.10.1998. On 20.4.1999 and 26.4.1999, Annexures P-4 and P-5, the petitioner was informed that the departmental proceedings had been cancelled. The petitioner filed an application claiming difference of salary for the period under which he was placed under suspension, which was rejected by the impugned order dated 30.6.1999 and, thereafter a new Inquiry Officer was appointed by the respondents on 8.7.1999 who initiated fresh proceedings against the petitioner on 7.8.1999. This Court, by an interim order dated 4.10.1999, issued a direction to the effect that the departmental enquiry instituted against the petitioner shall continue but final orders therein shall not be passed. However, during the continuance of the aforesaid interim order, the respondents have passed a final order in the departmental enquiry on 13.9.2002 and dismissed the petitioner from service and ordered recovery of a sum of Rs.60,000/- with interest @ 10% per annum. The aforesaid order is also subject matter of the present petition.

3. At the very outset, the learned counsel for the respondents has raised a preliminary objection as to the maintainability of the petition on the ground that the respondents not being a State or its instrumentality and being a private body and the issue raised before this Court being of a private nature, a writ under Article 226 of the Constitution of India, as filed by the petitioner, is not maintainable and in support thereof has relied upon the judgment of this Court rendered in the case of *Dr. (Smt.) Mradula Sharma vs. State Chief Commissioner, M.P. Bharat Scouts and Guides and others*, Misc. Petition No.631/1994, wherein a Single Judge of this Court has held that the respondents Bharat Scouts and Guides is not a State within the meaning of Article 12 of the Constitution of India. The learned counsel for the respondents has also relied upon the decision of the Supreme Court in the cases of *Sushmita Basu and Others vs. Ballygunge Siksha Samity and Others*, 2006 (7) SCC 680, G. *Bassi Reddy vs. International Crops Research Institute and Another*, (2003) 4 SCC 225, *Serbjeet Bhatia vs. GOC-IN-HQ Central Command, Lucknow (UP) and Others*, 2004 (2) MPLJ 125 and *Yashwant Singh Sikarwar vs. Teresian Carmel Education Society and Others*, 2008 (4) MPLJ 611.

4. On the other hand, learned counsel for the petitioner has relied upon a judgment of this Court rendered in the case of *D. L. Sharma vs. M.P. Bharat Scouts and Guides and 3 Others*, M.P.656/1993 decided on 28.4.1995 wherein

it has been held that the respondent Bharat Scouts and Guide is amenable to the writ jurisdiction of this Court. The learned counsel for the petitioner has also relied upon the judgment of the Supreme Court in the cases of *Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others vs. V. R. Rudani and Others*, (1989) 2 SCC 691 and *Binny Ltd. and Another vs. V. Sadasivan and Others*, (2005) 6 SCC 657 in support of his submission.

5. From a perusal of the judgment of this Court rendered in the case of *Dr. (Smt.) Mradula Sharma* (supra) it is apparent that this Court by applying the test laid down by the Supreme Court in the case of *Ajay Hasia etc. vs. Khalid Mujib Sehravardi and Others*, etc., AIR 1981 SC 487 held that the respondent Society is not a State under Article 12 of the Constitution of India, and on that count dismissed the petition filed by the petitioner therein.

6. In the case of *D. L. Sharma* (supra), another Single Judge of this Court, while quoting a passage from the judgment of the Supreme Court in the case of *Chandra Mohan Khanna vs. The National Council of Education Research and Training and Others*, 1992 SC 76, has also taken a view that the respondent is not a State within the meaning of Article 12 of the Constitution of India, but thereafter has gone further to state that it may not be an instrumentality of the State but it is still regulated by certain norms prescribed by the State Government for grant-in-aid as well as regulating recruitment in the respondents' institution and after extensively referring to the M.P. Bharat Scouts and Guides Association Revised Assistance Grant-in-Aid Rules, 1980 (hereinafter referred to as 'the Rules of 1980') has held that as the respondents were bound to follow the service rules of the State Government applicable for the purposes of recruitment and termination of employees, the respondent Society could not be permitted to play fast and loose and act arbitrarily or whimsically with its employees by passing arbitrary or illegal orders and on this count entertained and allowed the petition by quashing the impugned order of termination.

7. It is an admitted fact that the respondent is a Society registered under the provisions of Society Regisrikaran Adhiniyam. It is also admitted by the learned counsel for both the parties that that the respondent/society is not a State within the meaning of Article 12 of the Constitution of India nor is it an instrumentality of the State or a statutory body being owned and controlled by the State Government. In view of the aforesaid facts and in the light of the tests laid down by the Supreme Court in the case of *Ajay Hasia* (supra) as elaborated in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biololgy and others*, (2002) 5 SCC 111, I am in full agreement to the conclusion recorded by this Court in the cases of *Dr. (Smt.) Mradula Sharma (supra) and D. L. Sharma* (supra) that the respondent/society is not a State within the meaning of Article 12 of the Constitution of India. However, in view of the extensive arguments made by the learned counsels appearing for

both the parties, I proceed to decide the issue as to whether the respondent is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India in spite of the fact that it is not the State within the meaning of Article 12 of the Constitution of India as was held by this court in the case of *D. L. Sharma* (supra).

8. I have carefully perused the documents filed by the petitioner including the Memorandum of Association of the respondent Society and the Rules of 1980. Clause 3(a) and 3(b) of the Memorandum of Association lay down the definition and purpose for which the respondent Society has been established, which reads as under:-

> "3(a) **Definition:** The Bharat Scouts and Guides is a voluntary non-political, educational movement for young people, open to all without distinction of origin, race or creed, in accordance with the purpose, principles and method conceived by the Founder Lord Baden-Powell in 1907.
>
> (b) **Purpose:** The purpose of the Movement is to contribute to the development of young people in achieving their full physical, intellectual, social and spiritual potentials as individuals, as responsible citizens and as members of the local, national and international communities."

9. A perusal of these clauses makes it clear that the object and purpose for which the respondent Society has been established is for the educational movement of the young people and to contribute to the development of young people in achieving their full physical, intellectual, social and spiritual potentials so that they become responsible citizens.

10. It is also an admitted fact that the respondents are receiving grant-in-aid from the State in accordance with the Rules of 1980. Under Rule 6 of the Rules of 1980, it is stipulated that the grant given to the respondents shall be utilized for the purposes of the aims and objects as stated in the Memorandum of Association; Rule 7 lays down that the grant given to the respondent Society would be of four types; maintenance grant, building grant, equipment grant and special grant; Rule 13 lays down that the conditions of appointment, qualification, pay, conditions of service, dismissal, termination, reversion, suspension and other punishments, disciplinary action, leave, allowances, etc, of the officers and employees of the respondent Society would be governed by the Rules framed by the State of M.P. applicable to Government employees; Rule 17 apply the rules of reservation to the respondents; Rule 24 lays down that the maintenance grant would be to the extent of 90% and in cases where expenditure is less, 100%; and Rule 37 lays down that the salary and other allowances to the employees of the respondents shall be paid through the grant. Other provisions of the rules extensively prescribe

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the manner, purpose and procedure in which the grant shall be utilized and further prescribes the kind of grants and for strict monitoring and auditing of the grant by the State.

11. In view of the aforesaid, it is clear and in fact not disputed that the respondent Society is an aided Society and is duty bound to follow and apply the service rules applicable to Government servants as framed by the State of M.P., specifically the M.P. Civil Service (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as the Service Rules of 1966) with which we are concerned in the present petition. Keeping in mind the aforesaid aspects, the preliminary objection raised by the respondents has to be adjudged.

12. In the case of *Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others* (supra) the issue of entitlement of terminal benefits to teachers of a college that was run by a private Trust traveled to the Supreme Court and the finding of the High Court regarding amenability of the Trust to the writ jurisdiction of the High Court under Article 226 of the Constitution of India, was assailed therein and the Supreme Court while deciding against the petitioner Trust held that a writ under Article 226 of the Constitution of India can be issued even to authorities who are not State under Article 12 of the Constitution of India, in case they are performing some public duty or function and went on further to hold that a writ of mandamus cannot be denied to a petitioner when public duty is cast upon an authority either by some statute, charter, common law, customs or even contract in the following terms in paras-17 to 22:-

> "17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statute — and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities.' But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to "any person or authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose".
>
> 18. Article 226 reads :
>
> **"226. Power of High Courts to issue certain writs.**—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including

in appropriate cases, any government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

* * *"

19. The scope of this article has been explained by *Subba Rao, J., in Dwarkanath v. ITO*[2]: (SCR pp. 540-41)

"This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person

or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied.

21. In *Praga Tools Corporation v. C.A. Imanual* this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body.

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities."

22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.

13. In the case of *Vidya Dhar Pande vs. Vidyut Grih Siksha Samiti and others*, AIR 1989 SC 341, a private educational institution receiving grant was held amenable to writ jurisdiction of the High Court even though it was not a 'State' on the ground that it was bound to follow the regulations framed by the Board of Secondary Education M.P. and as such the termination of its employee in breach of the regulations could be assailed by filing a writ petition before the High Court and while doing so the Supreme Court also followed its previous judgment rendered in the case of *Indra Pal Gupta vs. Managing Committee, Model Inter College Thora*, (1984) 3 SCC 384, in the following terms in paras 15 and 16:-

"15. In *Indra Pal Gupta v. Managing Committee, Model Inter College Thora,* (1984) 3 SCC 384 : (AIR 1984 SC 1110) the appellant was appointed on probation for one year as Principal of Model Inter College, Thora, District Bullandshah in accordance with the procedure prescribed by the Intermediate Education Act, 1921 (U.P. Act No. 2 of 1921) and the Regulations made thereunder. The period of probation was however, extended by the Managing Committee of the said Model Inter College for a further period of one year. On April 27, 1969 the Managing Committee adopted a resolution to terminate the services of the appellant in consideration of the report of the Manager of the College to the effect that due to his unsatisfactory services, it would not be in the interest of the Institution to permit him to continue as probationer any longer. The service of the appellant was thus terminated without complying with the mandatory procedure laid down in Regulations 35 to 38 which provided for forming a sub-committee to enquire into the allegations against the Principal and to frame definite charges against the Principal and to give him opportunity of hearing. It was held that the order of termination made in breach of the provisions of the said Regulations which were made in pursuance of the provisions of the said Act, is illegal and invalid and as such the same was quashed. The appellant was further declared to be in service of the College.

16. On a conspectus of these decisions the irresistible conclusion follows that the impugned order of termination of the appellant from the post of Principal of the Higher Secondary School in breach of the Regulation 79 framed under the said Act is illegal and as such the same is liable to be quashed as the Regulations have got statutory force. The appellant is liable to be re-instated in the service as Principal of the said College. We also hold that the Higher Secondary School in question though run by a private trust receives 100% grant from the Government as is evident from the affidavit sworn on behalf of the appellant and as such it is amenable to the writ jurisdiction for violation of the provisions of the said Regulations in passing the impugned order of termination of service of the appellant. We, therefore, set aside the order passed by the High Court which, in our opinion, is unsustainable and direct the respondents to re-instate the appellant in the service of the said College. Considering the facts and circumstances of the case we are of the opinion that the ends of justice would be met by directing the respondents to pay to the appellant a sum

equal to 50% of the salaries and allowances from the date of termination till his re-instatement in service as it appears that the appellant was not in employment during this period. The appeal is, therefore, allowed with costs."

14. Similarly in the case of *K. Krishnamacharyulu and Others vs. Sri Venkateswara Hindu College of Engineering and another,* (1997) 3 SCC 571 the Supreme Court held that a writ against a non-aided private educational institution which is not a "State" within the meaning of Article 12 of the Constitution of India was maintainable on the behest of its employees seeking parity in pay-scale with employees of a Government institution when such claim is based on government instructions thereby creating a enforceable right in them.

15. In the case of *Manmohan Singh Jaitla vs. Commissioner, Union Territory of Chandigarh and others,* 1984 (Supp) SCC 540, the Supreme Court held that an aided school receiving 95% of expenses by way of grant from the Government would fall within the expression of 'Other authorities' under Article 12 of the Constitution of India and in such circumstances if a teacher of the aided school is terminated by invoking terms of contract of service on the ground that his services are no more required in order to circumvent the mandatory statutory obligation of holding an inquiry before dismissing the teacher as required by the Punjab Aided Schools (Security of Service) Act, 1969, then the action would be amenable to the writ jurisdiction of the High Court.

16. In the case of *Francis John vs. Director of Education and Others,* 1989 Supp (3) SCC 598, the Supreme Court again reiterated that private schools which are receiving aid from the Government under the Grant-in-aid Code which is promulgated not merely for the benefit of the management but also for the benefit of the employees of the School for whose salary and allowances the Government was contributing from the public funds under the Grant-in-aid Code cannot escape from the consequences flowing from the breach of the code and in such circumstances is amenable to jurisdiction of the High Court under Article 226 of the Constitution of India.

17. In the case of *Kamlesh Kumar vs. Pansheel Shiksha Samiti and another,* W.P No.4970/1997 and *Dr. Ramshankar Dwivedi vs. The State of M.P. and 6 others,* W.P No.4494/1997, decided by a Division Bench of this Court on 9.7.1998 on the matter being referred to a Division Bench of this Court for deciding the question whether a writ petition would lie against a private unaided registered Society imparting education under Article 226 of the Constitution of India, this Court, after referring to the judgment of the Supreme Court in the case of *Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others* (supra) and the judgment in the case of *Unni Krishnan J.P. vs. State of A.P.,* AIR 1993 SC 2178, held as follows in paras 7 and 9:-

"7. Therefore, in view of the ratio laid down in the case of *Unni Krishnan J.P.* (supra) it is settled that the writ petition against private unaided bodies which are discharging public duty in imparting education is maintainable.

8. xxx xxx xxx

9. So far as writ petition against private institutions which are imparting education as a public duty is concerned, it has been held to be maintainable by this Court also in the case of *Ratan Prasad Kushwaha and others vs. North Coalfields Limited and others* (1994 M.P.L.S.R. 174) had the occasion to deal with this matter and their Lordships relying on the earlier judgment given by the Supreme Court in the case of *Unni Krishnan J.P.* (supra) has held that:

"Private unaided schools run by society registered under Societies Registration Act, whether amenable to writ jurisdiction of High Court and whether they are "State" within the meaning of Art. 12 of the Constitution of India. Held, Art.226 of the Constitution of India covers not only the obligation of this court to enforce fundamental rights in part III of the Constitution of India but also other legal rights or public duties.- High Court has jurisdiction U/Art.226 of the Constitution of India – Further held that imparting education is the function of the state which may be discharged either through state owned or recognized education institutions."

It is worth noting that though the judgment in the case of *Unni Krishnan J.P.* (supra) has been overruled, in part, by the Supreme Court in *T. M. A. Pai Foundation and Others vs. State of Karnataka and others*, (2002) 8 SCC 481, the aforesaid dictum of the Supreme Court in *Unni Krishnan J.P.* (supra) quoted and relied upon by this Court in the case of Kamlesh Kumar (supra) has not been disturbed or set aside.

18. What is immediately apparent from a perusal of the aforesaid judgments is that the High Court in exercise of powers under Article 226 of the Constitution of India, has power to issue any direction, order or writs to any person or authority, including in appropriate cases the State, for the enforcement of any of the fundamental rights or for any other purpose and that the term 'authority' used under Article 226 of the Constitution of India must receive a liberal meaning and cannot be confined only to mean the State, statutory authorities and instrumentalities of the State but would also include such a person or body who is performing any public duty or public function involving some public law element and if some duty or obligation by whatever means is also imposed upon it creating a positive right in

some effected party then a writ in the nature of mandamus cannot be refused to such an effected party. It has further been held that the positive obligation may be created or imposed by a statute, charter, common law, custom or even contract. It has also been held that the remedy under Article 226 of the Constitution of India is a public law remedy and can be used for the enforcement of various rights of the public or to compel authorities and even private bodies to discharge their duties and obligations and to act within their bounds and can be used to do justice when there is wrongful exercise of power or a refusal to perform duties imposed upon it. The only restriction on the invocation of the remedy is that it is generally not available against private wrongs or cases which are purely governed by private contracts. In other words, what has been laid down by the Supreme Court is that the nature or form of the person or authority is not material for the purposes of Article 226 of the Constitution of India but it is the function or duty that it is performing and the obligation or duty imposed upon it that is relevant and, therefore, any person or authority who is performing some public duty or public function involving some public law element is amenable to writ jurisdiction of the High Court and secondly, where any duty or responsibility is cast or conferred by whatever means i.e. by statute, charter, common law, custom or even contract, upon any person or authority creating a positive right in any individual to claim due performance thereof by seeking a writ of mandamus, the Court shall not deny the same under Article 226 of the Constitution of India only on the ground that the authority is a private body.

19. In the case of *Binny Ltd., and another v. Y.Sadasivan and others*, (2005) 6 SCC 657 though the writ petition filed by Binny, Ltd., which is a private company, was allowed holding that it was neither an authority or instrumentality of the State nor was it performing any public function or duty involving public law element nor was it bound by any rules or regulations, the Supreme Court had the occasion to elaborate on the meaning of the words "public function" and it was held therein that when a body seeks to achieve some collective benefit for the public and is accepted by the public as having authority to do so or where the body is intervening or participating in social or economic affairs in public interest it would be performing a public function in the following terms in paragraph 11 which reads as follows:-

> "11 Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and

companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (5th Edn.) by departmental enquiry Smith, Woolf I Jowell in Chapter 3, para 0.24, it is stated thus :

"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services from funds 3raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the State, Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to 'recognize the realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes

complexity of the way in which it can be exerted'. Non-governmental bodies such as these are just as capable of abusing their powers as is Government"

20. The Supreme Court, after summarizing the law in the aforesaid case also held that a writ of Mandamus under Article 226 can be used for enforcement of various rights of the public or to compel authorities to discharge the duties and to act within their bounds even if the authority concerned is a private body or person provided the private body is discharging some public function and the denial of any right is in connection with the public duty imposed upon such body even in cases where the duty cast on the body is statutory or otherwise and some public law element is involved in the action and the Supreme Court has further gone on to state that the question as to whether the authority is a public authority or is performing a public function has to be decided on the facts of each case and for this purpose in paragraph 29 of the aforesaid judgment which is profitably quoted as under :-

"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England, 3rd Edn., Vol. 30, 8. 682,

"1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory dues to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point."

21. In the instant case, the respondent Society is not engaged in any private business or enterprise but is involved in undertaking activities for the non-political educational movement of young people so as to contribute to their development in achieving their full physical, intellectual, social and spiritual potentials as individuals, as responsible citizens and as members of the local, national and international communities which incidentally is also the obligation and object of all State activities and, therefore, the activities of the respondents are infact supplementing the public obligations of the State. Though the respondent authority is not an educational institution in the usual sense but as is evident from its own aims and objects, it is involved in imparting education in a different way and its activities, which require extensive interaction and dialogue with the public at large, are in the public field and involve the public law element as they educate, train and motivate young people to achieve their full physical, intellectual, social and spiritual potential as individuals and as responsible citizens of the country and members of the local, national and international community. From the aforesaid it is clear that the respondent-authority is seeking to achieve some collective benefit for the public and is accepted by the public as having the authority to undertake the aforesaid activities by educating and training young persons and giving them certificates as scouts or guides and it is, therefore, seeking to achieve some collective benefit and is participating in the social affairs in public interest and in such circumstances, I have no hesitation in holding that the respondent-authority is performing a public function. In addition, the respondent is receiving full Grant-in-aid from the State Government under the provisions of the Rules of 1980 and the grant is spent for the purposes of effectively implementing and achieving their objects of furthering this educational movement as well as for maintaining and expanding their establishment and that under the Rules of 1980 they are duty bound to comply with, implement and apply the service rules and regulations framed by the Government of M.P. to its own employees. Infact it can be stated without any hesitation that a duty and obligation is cast upon it to implement these rules and a consequent right is created in its employees to claim implementation of these rules in case the respondent Society violates them.

22. In view of the aforesaid facts and circumstances of this case, the respondent Society which is performing public functions, is receiving full Grant-in-aid and is also bound to follow the provisions of the Service Rules of 1966 while taking action against its employees is, without any doubt, amenable to the jurisdiction of this Court under Article 226 of the Constitution of India and has rightly been dragged before this Court by the petitioner claiming a writ of mandamus for ensuring due compliance of the rules and in such circumstances it cannot be said that the writ, filed by him against the respondent Society, is not maintainable.

23. The reliance placed by the learned counsel for the respondents on the judgments of the Supreme Court, namely *Sushmita Basu and Others* (supra) and *G. Bassi Reddy* (supra) is in fact misconceived inasmuch as the aforesaid judgments dealt with unaided institutions who were not performing any public function or duty nor were they bound by any statutory provisions and in such circumstances it was held by the Supreme Court that the institutions therein were not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India, whereas in the present case it is an admitted fact that the respondent Society is an aided Society being given government grant under the Rules of 1980, is performing a public function and is also duty bound to follow and implement the rules relating to Government servants in respect of its employees. For the same reasons the judgments of this Court, relied upon by the learned counsel for the respondents namely *Serbjeet Bhatia* (supra) and *Yashwant Singh Sikarwar* (supra) are also not relevant for the purposes of the issue involved in the present petition.

24. In view of the aforesaid facts and circumstances, I am in respectful agreement with the view taken by this Court in the case of *D.L.Sharma* (supra) which is also in line with the subsequent judgments of the Supreme Court referred to in the preceding paragraphs and hereby conclude that the present writ petition filed by the petitioner for enforcing due compliance of the rules of 1966 against the respondent-society which is performing a public function involving public law element is maintainable. The preliminary objection, raised by the learned counsel for the respondents, is accordingly rejected. I now proceed to decide the petition on merits.

25. In the instant case, it is contended by the learned counsel for the petitioner that the respondent authorities, after having cancelled the departmental enquiry initiated against the petitioner by orders dated 20.4.1999 and 26.4.1999, could not have started an enquiry afresh as there is no such power or provision in the Service Rules of 1966. It is secondly contended by the learned counsel for the petitioner that even otherwise, in case the respondent authorities wish to continue the enquiry against the petitioner, they could have done so only from the stage it had been left by the previous Inquiry Officer, but the respondent authorities, after appointing a new Inquiry Officer by order dated 7.8.1999, re-examined the prosecution witnesses and conducted a de novo enquiry which is not permissible under the Service Rules of 1966. It is further contended that the impugned order of termination suffers from perversity and total non-application of mind inasmuch as the two witnesses namely; Shri Sudhakar Karmalkar and Shri Shiv Narayan Giri, who have been relied upon by the Disciplinary Authority for imposing penalty upon the petitioner, have given absolutely diverse statements in the departmental proceedings inasmuch as the previous statements given by them before the first Inquiry Officer in April 1999 are in absolute divergence with the statements given before the second Inquiry Officer in October 1999 and while the first statement

made by them were supporting the case of the petitioner, the second statement given by them were against the petitioner and the Disciplinary Authority relying on the two statements, imposed a punishment of dismissal upon the petitioner which smacks of total non-application of mind. Lastly, it is contended by the learned counsel for the petitioner that the impugned order of punishment dated 13.9.2002 deserves to be quashed inasmuch as this Court by interim order dated 4.10.1999 had injuncted the authorities from passing a final order, but the respondent authorities in total disregard and disobedience of the Court's order have passed final order dismissing the petitioner from service.

26. Per contra, it is submitted by the learned counsel for the respondents that the departmental proceedings has been conducted against the petitioner in accordance with the Service Rules of 1966 after giving him due and proper opportunity of hearing. It is submitted that due to clerical error in the order dated 20.4.1999 it was communicated that the inquiry stood cancelled whereas in fact the authorities had only cancelled the order dated 24.2.1999 appointing Shri Anirudh Dwivedi as Inquiry Officer and on noticing the mistake, the respondent authorities had issued a corrigendum letter on 8.7.1999 and, therefore, the contention of the petitioner that a departmental enquiry was conducted inspite of the fact that it had been cancelled is misplace and misconceived. It is further submitted that the respondent authorities appointed a different Inquiry Officer by order dated 7.8.1999 who gave notice to the petitioner and thereafter conducted the inquiry in accordance with the rules by examining the prosecution and defence witnesses and, therefore, as due opportunity was given to the petitioner, no fault can be found with the procedure adopted by the second Inquiry Officer nor can any fault be found with the impugned order of punishment issued by the Disciplinary Authority which is in accordance with the rules. Lastly, it is submitted by the learned counsel for the respondents that the impugned order of punishment dated 13.9.2002 was issued, after passing of the interim order by this Court in the present petition, as no hearing took place for a considerable period of time nor was the writ petition decided and the interim order passed by this Court had ceased to be operative by a flux of time in view of the provisions of Article 226(3) of the Constitution of India and, therefore, the contention of the learned counsel for the petitioner deserves to be rejected.

27. I have heard the learned counsel for the parties at length. It is apparent from a perusal of the orders dated 20.4.1999, 26.4.1999 and 7.8.1999 that the respondents had wrongly mentioned in the previous order that the departmental enquiry stood cancelled whereas the real intent and import was cancellation of the order of appointment of the Inquiry Officer and, therefore, I do not find any merit in the submission of the learned counsel for the petitioner that the respondents could not continue the enquiry as it had been cancelled by them. I also do not find any fault with the order of the respondents dated 7.8.1999 appointing a different Inquiry Officer.

August-09 (First)

28. However, as is apparent from a perusal of Rule 14 (22) of the Service Rules of 1966, a succeeding Inquiry Officer must act on the evidence recorded by his predecessor until and unless he records an opinion that further examination of any witness, who has already been examined, is necessary in the interest of justice and in that case he may recall, examine, cross-examine and re-examine such witnesses. In the instant case the succeeding Inquiry Officer totally ignored the evidence and proceedings recorded by his predecessor and started enquiry afresh by again examining all the witnesses without recording any opinion as required by Rule 14(22) of the Service Rules of 1966 that it was necessary in the interest of justice to recall or re-examine these witnesses.

29. It is also apparent from a perusal of Annexure P-14 which are the statements of Shri Sudhakar Karmalkar and Shri Shiv Narayan Giri recorded by the previous Inquiry Officer and their statements Annexure P-16 recorded by the succeeding Inquiry Officer that they are in diametrical opposition and it is, therefore, apparent that the respondent authorities with a view to nullify and wipe out the evidence recorded by the previous Inquiry Officer which was in favour of the petitioner, adopted the procedure of appointing a new Inquiry Officer and recording fresh evidence during the pendency of the enquiry which procedure is not contemplated under the Service Rules of 1966. The succeeding Inquiry Officer could only continue the enquiry from the stage it had been left of by his predecessor by recording further evidence, but could not have commenced the enquiry afresh by recording fresh statements of the witnesses who had already deposed before the previous Inquiry Officer in favour of the petitioner.

30. From a perusal of Rule 14 of the Service Rules of 1966 it is clear that the enquiry once initiated cannot be abandoned in between by adopting the procedure of appointing a new Inquiry Officer and, thereafter conducting a de novo enquiry only because the evidence recorded in the previous enquiry is not to the liking of the higher authority. What the Rule contemplates is that an Inquiry Officer once appointed shall record evidence and thereafter on the basis of the oral and documentary evidence on record, submit his report to the Disciplinary Authority. Rule 14(22) of the Service Rules of 1966 provides for a situation where the Inquiry Officer is succeeded by another Inquiry Officer during the course of enquiry and in such circumstances the succeeding Inquiry Officer is required to take up and proceed with the enquiry from the stage it was left by his predecessor unless and until he expresses an opinion that further examination of the witnesses already examined is necessary in the interest of justice. In any case, the Inquiry Officer or the Disciplinary Authority has no power or authority to totally disregard the evidence already recorded by the previous Inquiry Officer as has been done in the instant case.

31. In view of the aforesaid, I am of the considered opinion that the procedure adopted by the respondent authorities while conducting the enquiry against the

petitioner is in gross violation of the procedure prescribed under the Service Rules of 1966. Even on merits it is apparent that the two witnesses namely: Shri Sudhakar Karmalkar and Shri Shiv Narayan Giri had deposed in favour of the petitioner before the previous Inquiry Officer and it was only to nullify the aforesaid statements that the respondents adopted the procedure of appointing a new Inquiry Officer and conducted a fresh enquiry wherein both the witnesses recorded statements which were diametrically opposite to their previous statements. In my considered opinion he could not have done so as such a course of action is not permitted under the provisions of the Service Rules of 1966.

32. From a perusal of the record of the present petition it is also clear that this Court granted interim relief in favour of the petitioner on 4.10.1999 and the Process Fee for issuance of notice to the respondents was paid by the petitioner on 5.10.1999. On a perusal of the acknowledgement of the notice which is on record. it is also clear that the notice was received by the respondent Bharat Scouts and Guide through its Secretary, Shyamla Hills, Bhopal, on 13.10.1999. On receiving the notice, the respondents filed a return in December 1999 alongwith an application for urgent hearing, but chose not to file any application for vacating stay. In fact from a perusal of the record it is evident that the respondents have filed an application for vacating stay only on 24.3.2008 after receiving notice of initiation of contempt proceedings against them by this Court in respect of the violation of the interim order by finally disposing of the departmental proceedings by issuance of order dated 13.9.2002 dismissing the petitioner from service. In such circumstances, it is apparent that the interim order passed by this Court was still in operation on the date the impugned order of dismissal was passed by the respondent authorities and did not cease to exist with the passage of time as prescribed by Article 226(3) of the Constitution of India, as no application for vacating stay was filed by the respondents as required by the said Article, support of which has been taken by the respondents in para-5 of the impugned order dated 13.9.2002 and, therefore, the contention of the learned counsel for the respondents in this regard is totally misconceived and deserves to be rejected.

33. In view of the aforesaid facts and circumstances, I am of the considered opinion that the impugned order of punishment dated 13.9.2002 deserves to be and is hereby set aside on account of the fact that the enquiry conducted by the respondent authorities was not in accordance with and is in fact in violation of the procedure prescribed by Rule 14 of the Service Rules of 1966 and on account of the fact that it was passed inspite of the existence of interim orders passed by this Court.

34. As a result thereof, the matter is remitted back to the respondent authorities for continuing the enquiry from the stage it was left of by the previous Inquiry Officer and to further proceed thereunder in accordance with the Service Rules of 1966. It is clarified to avoid any conflict that the enquiry shall proceed as if the

witnesses examined by the previous Inquiry Officer had already been examined and thereafter the remaining witnesses, if any, shall be examined by the Inquiry Officer except in case the Inquiry Officer records an opinion as required by the proviso to Rule 14(22) of the Service Rules of 1966. To expedite the matter, it is directed that the authorities shall complete the enquiry with the co-operation of the petitioner, as far as possible, within a period of six months starting from 1st of March 2009.

35. To avoid any further litigation, it is clarified that as a result of the setting aside of the impugned order and remission of the matter back to the respondent authorities to enquire from the stage it was left of by the previous Inquiry Officer, the petitioner shall be entitled to the benefit of Rule 9(4) of the Service Rules of 1966 and the law laid down by the Division Bench Judgment of this Court in the case of *Gurmit Singh vs. Zonal Manager, Punjab and Sindh Bank, Bhopal and another,* (2008) 3 MPLJ 642.

36. The petition is, accordingly, allowed to the extent indicated above and is remitted back with the aforesaid observations. In the facts and circumstances of the case there shall be no order as to the costs.

Petition allowed.

I.L.R. [2009] M. P., 2210
WRIT PETITION
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh
12 February, 2009*

MANOJ RAJANI & ors. ... Petitioners
Vs.
STATE OF M.P. and ors. ... Respondents

A. Constitution, Article 21, Municipal Corporation Act, M.P. 1956, Sections 66 & 220 - *Provision of pollution free water to residents - Municipal Corporation is under an obligation to supply sufficient quantity of water for its residents - Right to pollution free water is fundamental right - Municipal Corporation directed to procure water in sufficient quantities if necessary through railway or motor vehicle tanker for supply for public and private purposes - Petition disposed of.* (Paras 9 & 11 to 13)

क. संविधान, अनुच्छेद 21, नगर पालिक निगम अधिनियम, म.प्र. 1956, धाराएँ 66 व 220 – निवासियों के लिए प्रदूषण मुक्त जल का उपबंध – नगर पालिक निगम उसके निवासियों के लिए जल की पर्याप्त मात्रा की आपूर्ति करने के दायित्व के अधीन है – प्रदूषण मुक्त जल का अधिकार मूलभूत अधिकार है – नगर पालिक निगम को लोक और निजी प्रयोजनों की आपूर्ति के लिए, यदि आवश्यक हो तो, रेलवे या मोटर वाहन टेंकरों द्वारा पर्याप्त मात्रा में जल उपाप्त करने के लिए निदेशित किया गया – याचिका निपटाई गई।

*W.P. No.6021/2008 (PIL) (Jabalpur)

B. **Constitution, Article 226** - *Agreement for supply of water between Municipal Corporation, Indore and Dewas - Municipal Corporation, Indore able to meet only 50% of the requirement of water for its residents - Held - Municipal Corporation, Indore cannot be compelled to supply agreed quantity of water to Municipal Corporation, Dewas.* (Paras 6 & 7)

ख. संविधान, अनुच्छेद 226 – नगर पालिक निगम इन्दौर और देवास के मध्य जल की आपूर्ति का करार – नगर पालिक निगम, इन्दौर अपने निवासियों के लिए जल की केवल 50 प्रतिशत आवश्यकता की पूर्ति करने में सक्षम – अभिनिर्धारित – नगर पालिक निगम, इन्दौर को जल की अनुबंधित मात्रा की पूर्ति नगर पालिक निगम, देवास को करने के लिए बाध्य नही किया जा सकता।

Cases referred :

AIR 1974 SC 1682.

Sanjay Agarwal, for the petitioners.
V. Awasthy, G.A., for the respondent No.1.
None, for the respondent Nos. 2 & 3.
Brain Da'Silva with *Gaurav Sharma,* for the respondent Nos.4 & 5.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :–The petitioners are all residents of Dewas town in the State of Madhya Pradesh and have filed this writ petition under Article 226 of the Constitution as a Public Interest Litigation praying for directions to the Municipal Corporation, Dewas, and the Municipal Corporation, Indore, to supply 13 Lac Gallons of water per day for the residents of Dewas town.

2. The facts briefly are that the Dewas town is situated on the banks of river Kshipra which dries up by the end of December every year and as a result the town faces acute shortage of water till the next rainy season. To take care of this shortage of water, the Municipal Corporation, Dewas, entered into an agreement with the Municipal Corporation, Indore, on 20.2.2002 whereunder the Municipal Corporation, Indore, was to supply 10 Lac gallons of water per day from the Narmada Water Supply Scheme, to the Municipal Corporation, Dewas, at the rate of Rs.1.75/- per thousand liters. By an order dated 22.2.2001 the State Government of Madhya Pradesh also directed the Municipal Corporation, Indore to supply 3 Lac gallons of water per day to the Municipal Corporation, Dewas.

3. The case of the petitioners in the writ petition is that in breach of the agreement dated 20.2.2002, and the order dated 22.2.2001, the Municipal Corporation, Indore, has supplied much lesser quantity of water to the Municipal Corporation, Dewas. The petitioners have annexed with the writ petition charts showing the supply of water during different months in the years 2005, 2006, 2007 and 2008 which show that the average water supplied in the months from January

August-09 (First)

to July, 2005, was 8.62, 8.59, 9.32, 10.50, 9.51, 7.80 and 5.82 Lac gallons per day respectively, in the months from December, 2005, to July, 2006, 7.40, 7.53, 7.00, 7.08, 6.17, 5.18, 4.85, 4.98 Lac gallons of water per day respectively, in the months from February to July, 2007, 4.25, 6.68, 5.59, 5.52, 5.30 and 5.05 Lac gallons per day respectively and in the months from February to May, 2008 (upto 5.5.2008) 4.95 to 4.23 Lac gallons per day respectively.

4. Mr.Sanjay Agarwal, learned counsel for the petitioners submitted that in Subhash Kumar V. State of Bihar and others, AIR 1991 SC 420, and in M.C.Mehta V. Union of India, AIR 2004 SC 4016, the Supreme Court has held that the right to live guaranteed under Article 21 of the Constitution includes the right to enjoyment of pollution free water and air for full enjoyment of life. He submitted that section 66(1)(k) of the M.P. Municipal Corporation Act, 1956, (for short 'the 1956 Act') casts an obligation on the Municipal Corporation to provide sufficient supply of suitable water for public and private purposes. He referred to section 220 of the 1956 Act which provides that for the purpose of providing supply of water, proper and sufficient for public and private purposes, the Commissioner may do any of the acts mentioned therein. He argued that considering these provisions of the Constitution as well as the 1956 Act and the provisions of the agreement between the Municipal Corporation, Indore, and the Municipal Corporation, Dewas, the court should direct the Municipal Corporation, Indore, and the Municipal Corporation, Dewas, to supply 13 Lac gallons of water per day for private and public use for the residents of Dewas town.

5. Mr.Brian Da'Silva and Mr.Gaurav Sharma, learned counsel appearing for the Municipal Corporation, Dewas, on the other hand, referred to the reply filed by the Municipal Corporation, Dewas, and submitted that for the present population of Dewas town there is a requirement of 45 Lac gallons of water per day against which approximately 22 Lac gallons water is drawn from river Kshipra during the months of July to December. They submitted that on 20.2.1992 an agreement was entered into between the Municipal Corporation, Dewas, and the Municipal Corporation, Indore, and under which the Municipal Corporation, Indore, agreed to supply 10 Lac gallons of water per day and on 20.2.2001 the State Government also directed the Municipal Corporation, Indore, to supply extra 3 Lac gallons of water per day to the Municipal Corporation, Dewas and, therefore, 13 Lac gallons water per day was required to be supplied by the Municipal Corporation, Indore, to the Municipal Corporation, Dewas. He submitted that despite the fact that the aforesaid agreement and order are still in force, the Municipal Corporation, Indore, has not supplied 13 Lac gallons of water to the Municipal Corporation, Dewas.

6. A reply has also been filed on behalf of the Municipal Corporation, Indore, in which it is stated that from its own sources of water the Municipal Corporation, Indore, is able to meet only the 50% of the requirement of water for the residents of Indore city and, therefore, it was not practically possible to supply 13 Lac

gallons of water per day to the Municipal Corporation, Dewas. The Municipal Corporation, Indore, has further stated in its reply that despite this difficult situation in Indore city with regard to supply of water, the Municipal Corporation, Indore, has been supplying as much water as possible to the Municipal Corporation, Dewas.

7. The law does not compel one to do that which one cannot possibly perform. This preposition of law finds place in the observations of *C.J.Ray in re. Presidential Election*, 1974, AIR 1974 SC 1682, to the following effect :

> "The maxim of law impotentia execusat legem is intimately connected with another maxim of law lex non cogit adimpossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him".

Since the Municipal Corporation, Indore, has taken a stand before us in its reply that out of its water sources it can only meet 50% requirement of water of the residents of Indore city and it is practically impossible on its part to supply 13 Lac gallons of water per day to the Municipal Corporation, Dewas, we cannot compel the Municipal Corporation, Indore, by a writ or direction to supply 13 Lac gallons of water to the Municipal Corporation, Dewas.

8. The Municipal Corporation, Dewas, on the other hand, has statutory obligations under section 66 of the 1956 Act to provide sufficient supply of suitable water for public and private purposes in the town of Dewas. This will be clear from section 66(1)(k) of the 1956 Act, which is quoted herein below :

> **"66. Matters to be provided for by Corporation.**-(1) The Corporation shall make adequate provision, by any means or measures which it may lawfully use or take, for each of the following matters, namely :-
>
> .....
>
> (k) the management and maintenance of all the Municipal water-works and the construction and maintenance of new work and means for providing a sufficient supply of suitable water for public and private purposes;

9. The Municipal Corporation, Dewas, has, however, contended before us, and this is also the case of petitioners, that during the months from January to June every year the river Kshipra, from which the town draws its water, dries up and hence the Municipal Corporation, Dewas, is unable to meet the requirements

of water of the residents of the town. Since the right to pollution free water is a fundamental right guaranteed under Article 21 of the Constitution, as has been held by the Supreme Court in *Subhash Kumar V. State of Bihar and M.C.Mehta V. Union of India* (supra), this plea of inability on the part of the Municipal Corporation, Dewas, cannot be accepted by the Court particularly when it is its statutory duty under Section 66 of the 1956 Act to supply such water. If the river source of water is not available to be drawn during the months of January to June every year, the Municipal Corporation, Dewas, is under an obligation to supply sufficient quantity of water for its residents both under Article 21 of the Constitution as well as under section 66 of the 1956 Act.

10. Moreover, we find that in section 220 of the Municipal Corporation, 1956, sufficient powers have been vested with the Commissioner of a Municipal Corporation to purchase any water or to enter into any arrangement with any person to supply water for the purpose of providing a supply of water, proper and sufficient, for public and private purposes. Section 220 of the Municipal Corporation Act, 1956, reads thus :

> **"220. General powers for supplying the city with water :-** For the purpose of providing a supply of water proper and sufficient for public and private purposes, the Commissioner may, either within or without the City-
>
> (a) construct and maintain waterworks and do all acts which may be necessary or expedient in connection with such construction or maintenance;
>
> (b) purchase or take on lease any waterwork or any water or right to store water or to take and convey water; or
>
> (c) enter into any arrangement with any person for the supply of water:
>
> Provided that if in the city any Government Department is administering and controlling water-supply, the Commissioner shall not make any such arrangement without prior approval of the Government and the arrangement shall be subject to the terms and conditions laid down by Government in this respect.

11. Considering the aforesaid provisions of Section 220 of the 1956 Act, by our order dated 9.2.2009, we called upon the Municipal Corporation, Dewas, to file an affidavit before the Court whether drinking water is being obtained from different places of the country in trains or in water tankers to meet the short fall of drinking water in Dewas town, and an affidavit has been filed by the Municipal Corporation, Dewas, saying that it was only in the financial year 1990-91 and in

the year 2001 that some supply of water was obtained through Railways but thereafter no water supply has been received through Railways.

12. We are of the considered opinion that the Municipal Corporation, Dewas, has to procure sufficient quantity of water on a regular basis for public and private purposes in Dewas town to discharge its constitutional obligations under Article 21 of the Constitution and statutory obligation under Section 66 of the 1956 Act.

13. We, therefore, direct the Municipal Corporation, Dewas, to procure water in sufficient quantities, if necessary, through Railways or through motor vehicle tankers for supply for public and private purposes. This direction will be complied with by the Municipal Corporation, Dewas, as early as possible and in any case within a period of one month from today. This order, however, will not be construed by the Municipal Corporation, Indore, to have absolved the Municipal Corporation, Indore, of its obligations under the agreement to supply water to the Municipal Corporation, Dewas.

14. With the aforesaid directions, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2009] M. P., 2215
WRIT PETITION

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
2 March, 2009*

SHYAMLAL KOL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Municipalities Act, M.P. (37 of 1961), Section 47 - *Recalling of President - Second proposal for recalling rejected by Collector on the ground that earlier proposal had been moved - Held - There is difference between submission of proposal and initiation of process of recall - Earlier proposal was not put to the voting, as such, it could not be said that process was initiated - Collector committed gross illegality in rejecting the second proposal for recall - Order quashed - Petition allowed.* (Paras 6 & 8)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 47 – अध्यक्ष का पुनः बुलाया जाना – पुनः बुलाये जाने का द्वितीय प्रस्ताव कलेक्टर द्वारा इस आधार पर अस्वीकृत कर दिया गया कि पूर्ववर्ती प्रस्ताव प्रस्तावित किया गया था – अभिनिर्धारित – प्रस्ताव के प्रस्तुतीकरण और पुनः बुलाये जाने की प्रक्रिया के प्रारम्भ में अंतर है – पूर्ववर्ती प्रस्ताव इस रूप में मतदान के लिए नही रखा गया, यह नही कहा जा सकता कि प्रक्रिया प्रारम्भ की गई – कलेक्टर ने पुनः बुलाये जाने का द्वितीय प्रस्ताव अस्वीकृत करने में घोर अवैधता की – आदेश अभिखण्डित – याचिका मंजूर।

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*W.P. No.13652/2008 (Jabalpur)

Cases referred :

2004(1) MPLJ 341, 2005(4) MPHT 185.

K.C. Ghildiyal, for the petitioner.

T.S. Ruprah, Addl.A.G., for the respondent Nos.1 to 3.

A.M. Trivedi with *A.D. Mishra,* for the respondent No.4.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :– Facts lie in a narrow compass. Respondent No.4 Smt Laltia Tamrakar is holding the post of President, Nagar Panchayat, Uchchara, District Satna. Earlier proposal (P-1) for her recall was moved. The Collector had sent the proposal to the State Government which was sent back to the Collector. Proceedings for recall against the respondent No.4 could not be initiated. Respondent No.4 had filed W.P. No. 10891/08, which was dismissed as withdrawn on 22.10.08, it is mentioned in the order that the proceedings against respondent No.4 were dropped, as such the petition was withdrawn. Again a fresh proposal was moved before the Collector as apparent from the order dated 13.10.08. It was moved under Section 47(2) of the Municipalities Act.

2. Collector while considering the fresh proposal for recall, moved under Section 47(2) of the Municipalities Act has held vide order dated 13.10.08 that earlier proposal for recall had been moved, as such it was not possible to initiate fresh proceedings for recall proposal has been rejected.

3. Petitioner's counsel Shri K.C. Ghildiyal has placed reliance on a Division Bench decision of this court in *Narayan Nagina Vs. State of M.P. and others* 2004(1) M.P.L.J. 341 to contend that earlier the Collector was not satisfied with the first proposal as the same had not been moved by the requisite number of Councillors. It could not be said that there was initiation of proceedings on the first proposal and the second proposal could not have been turned down to initiate process for recall on the ground that first proposal had been submitted.

4. Shri A.M. Trivedi, learned Senior counsel with Shri A.D. Mishra has submitted that earlier moving of the proposal for recall was initiation of process for recall as contemplated under Section 47 of the Municipalities Act. He has placed reliance on the Full Bench decision of this Court in *State of M.P. and another Vs. Mahendra Kumar Saraf and another* 2005(4) MPHT 185.

5. Section 47 of the Municipalities Act deals with the recalling of the President. The sub-Section 1 of Section 47 provides that a President can be recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area. The first proviso contains that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of total number of the elected Councillors and presented to the Collector. Second provisio to sub-section 1 of Section 47 makes it clear that no such process shall be

initiated within two years from the date on which such President is elected and enters his office and half of the period of tenure of the President elected in a by-election has not expired. Third proviso to sub-section 1 of Section 47 provides initiation of such a process for recall of the President once in his whole term.

6. Section 47 of the Municipalities Act is reproduced below:-

> **47. Recalling of President:** (1) Every President of a Council shall forthwith be deemed to have vacated his office is he is recalled through a secret ballot by a majority of more than half of the total number of the voters of the Municipal area casting the vote in accordance with the procedure as may be prescribed;
>
> Provided that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of the total number of the elected Councillors and presented by the Collector.
>
> Provided further that no such process shall be initiated :-
>
> (i) within a period of two years from the date on which such president is elected and enters his office;
>
> (ii) If half of the period of tenure of the President elected in a by-election has not expired:
>
> Provided also that process for recall of the President shall be initiated once in his whole term.
>
> (2) The collector, after satisfying himself and verifying that the three fourth of the councillors specifieid in sub-Section (1) have the proposal or recall, shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.
>
> (3) On receipt of the reference, the State Election Commission shall arrange for voting on the proposal of recall in such manner as may be prescribed.

Bare reading of sub-Section 1 of Section 47 makes it clear that there is a difference between submission of proposal and initiation of process of recall, the earlier proposal was not put to the voting, as such it could not be said that process was initiated as contemplated under Sub-Section 1 of Section 47, the secret ballet to be caste by the voters. In case, requisite number of Councillors had not sent the earlier proposal and it was not put to the secret ballet, it could not be said that process of recall was initiated and carried to its logical end. What is the meaning of the word initiation is clear from sub-Section 1 of Section 47 and the proviso explains it further.

7. Division Bench of this court in *Naravan Nagina Vs. State of M.P.*

and others (supra) has laid down what is the meaning of initiation. Para 9 of the decision reads thus:-

> 9. thus, the language is clear and specific. proceedings will be initiated only after three fourth of the Councillors have signed the proposal and verified by the Collector to his satisfaction. Until and unless the Collector has satisfied himself and verified that three fourth of the elected Councillors have signed the proposal, proceedings for recall cannot be said to be initiated. Mere submission of proposal is not sufficient unless the Collector has satisfied and verified that three fourth of the elected Councillors have signed the proposal for recall voluntarily and once the Collector is satisfied and has forwarded the proposal to the State government, then it will amount to initiating of process of recall.

8. Shri Trivedi, learned Senior counsel has placed reliance on Full Bench decision of this court in *State of M.P. and another Vs. Mahendra Kumar Saraf and another* (supra) in which section 47 has been explained thus:-

> 10- On analysis of Section 47 of the Act we find that following are the requirements for initiating the process of recall:
>
> (1) Proposal is to be signed by not less than 3/4th of the total number of elected Councillors.
>
> (2) The proposal must be presented to the Collector.
>
> (3) The process of recall can not be initiated :-
>
> (a) Within a period of 2 years from the date on which such President is elected and enters his/her office.
>
> (b) Unless half of the tenure of President elected in a by-election has not expired.
>
> (4) Process of recall of the President shall be initiated only once in his/her whole term.
>
> (5) The Collector shall satisfy and verify that 3/4th of the total number of the elected Councillors have signed the proposal of recall.
>
> (6) After such satisfaction and verification, the Collector shall send the proposal to the State Government.
>
> (7) The State Government shall make a reference to the State election Commission which shall arrange for voting on the proposal of recall in the prescribed manner.

In our opinion, the Collector was required to take into consideration the

aforesaid requirement of Section 47 of the Act, as laid down by Full Bench of this court. However, the Full bench has not dealt with the aspect what is the meaning of initiation, whether proposal which was not placed for consideration of the voters and was not carried through stage of sub-Section (1) of Section 47 could be said to create embargo for submitting second proposal to initiate process of recall. Thus the decision is of no help to respondent No.4.

Consequently, Collector committed gross illegality in rejecting the second proposal moved for the recall the initiation of the proceedings of the recalling. The order dated 13.10.08 by which the Collector did not apply the mind to the satisfaction contemplated under sub-section 2 of Section 47 and rejected the proposal as the same cannot be said to be proper. Same is liable to be quashed. Collector is directed to consider the proposal afresh as provided in sub section 2 of Section 47 and to take steps in accordance with law within a period of two weeks from the date of receipt of certified copy of the order. Petition is allowed. No costs.

C.C. as per rules.

Petition allowed.

I.L.R. [2009] M. P., 2219
WRIT PETITION
Before Mr. Justice Sanjay Yadav
3 March, 2009*

SHYAM TRADING CO., ITARSI .... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 19, Krishi Upaj Mandi (Payment of Market Fees) Rules, M.P. 1990, Rule 3 - *Petitioner purchased notified agriculture produce from other market area - On the basis of requisite permit required for dispatching and removing agriculture produce claimed exemption of market fees - Subsequently, permits were found forged - Levy of market fees on five times value of agriculture produce - Held - It is imperative for a trader seeking exemption to pay market fees to be sure that at first instance the agriculture produce had suffered market fees - Merely because the trader has been permitted to take the agriculture produce from market area in itself will not be a prove that market fees has been paid - Petitioner held liable to pay market fees - Petition dismissed.* (Paras 10 & 11)

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 19, कृषि उपज मण्डी (मण्डी फीस का भुगतान) नियम, म.प्र. 1990, नियम 3 – याची ने अधिसूचित

*W.P. No.3163/2008 (Jabalpur)

कृषि उपज अन्य मण्डी क्षेत्र से क्रय की – कृषि उपज को भेजने और हटाने के लिए आवश्यक अपेक्षित अनुज्ञापत्र के आधार पर मण्डी फीस की छूट का दावा किया – तत्पश्चात् अनुज्ञापत्र कूटरचित पाये गये – कृषि उपज के पाँच गुना मूल्य पर मण्डी फीस का उद्ग्रहण – अभिनिर्धारित – मण्डी फीस का भुगतान करने से छूट चाहने वाले व्यापारी के लिए यह अनिवार्य है कि यह सुनिश्चित करे कि प्रथम अवसर पर कृषि उपज ने मण्डी फीस सहन कर ली थी – केवल इसलिए कि व्यापारी को मण्डी क्षेत्र से कृषि उपज ले जाने के लिए अनुज्ञात किया गया है, अपने आप में यह सबूत नही होगा कि मण्डी फीस का भुगतान कर दिया गया है – याची को मण्डी फीस अदा करने के लिए दायी ठहराया गया – याचिका खारिज।

Cases referred :

W.P. No.399/2003 *(M/s Prestige Exports, Indore Vs. State of M.P. & ors.)* and W.P. No.70/2004 *(Mahavir Prasad Vs. Madhya Pradesh State Agriculture Marketing Board & ors.)*.

K.N. Agrawal, for the petitioner.
Harish Agnihotri, G.A., for the respondent No.1.
Vijay Pandey, for the respondent No.2.
Sanjay Sarwate, for the respondent No.3.

ORDER

SANJAY YADAV, J. :–The petitioners are engaged in the business of sale and purchase of various kinds of Agricultural produce and have been duly granted licence for the same by respondent no.3 Krishi Upaj Mandi Samiti, Itarsi. Challenge put forth in these bunch of writ petitions is to the orders passed under Section 19(4) of the Krishi Upaj Mandi, Adhiniyam 1972, whereby on a finding arrived at that the petitioners have re-sold the notified agricultural produce without payment of market fee payable on such produce, have been subjected to pay five times the market fee with nirashrit fees.

2. The case of the petitioners is that between the period from 1.10.2001 to 10.12.2001 at different time, the petitioners purchased some agricultural produce from respondents No.5 to 7 – who were licenced traders of respondent No.4 Krishi Upak Mandi Samiti, Dabra. These transactions, it is urged, were commercial transactions and were under clear understanding and bonafide belief that the market fees on said agricultural produce was already paid by respondents No.5 to 7 firms during the course of first transaction taken place in the market area of respondent no.4. It is contended that the requisite permit (anugya patra) which is required for dispatching and removing the agricultural produce separately from the market area of respondent no.4, in duplicate, issued from the respondent no.4. These permits, it is contended, bear the hologram, a symbol of their genuineness. It is further contended that on the strength of said permits, the agricultural produce purchased from market area of respondent No.4 were accepted at market area of respondent no.3 where the petitioners are registered as traders and since the

agricultural produce had suffered the market fees during the course of first transaction the petitioners were granted exemption from market fees at Itarsi, market area.

3. The petitioners were subjected to a show cause notice dated 1.1.2004. The show cause notice had the reference of a letter No.B-6/1-2/44/1 Part-4/ Dabra/ 929 dated 22.12.2003 of the Managing Director, M.P. State Agriculture Marketing Board, disclosing therein that the permits issued to cover the agricultural produce purchased at market are of respondent No.4 on verification by State Economic Offence Investigation Bureau were found forged, and therefore, the exemption sought by the petitioner from the payment of market fee at market area Itarsi was not proper. Thus, by said show cause notice the petitioners were granted the opportunity to explain as to why five times market fee be not recovered along with interest. The petitioners filed their reply indicating therein that they were not instrumental in the forgery, but had entered into a commercial transaction with the traders registered with respondent No.4, and therefore, the petitioners cannot be saddled with the penal rate on a presumption that no market fee was paid for the agricultural produce purchased by the petitioners. Respondent No.3 after considering the reply filed by the petitioners passed the orders holding them liable for five times market fee along with interest and the nirashrit fee. The orders were individually addressed to respective petitioners. Being aggrieved the petitioners preferred representation under section 59 of the Adhiniyam, 1972 before the Additional Director, Madhya Pradesh State Agricultural Marketing Board, which came to be rejected by order dated 14.3.2006. Challenge to the order in appeal before the State Government was also negatived by order dated 5.2.2008. These orders are under challenge in these bunch of writ petitions which were analogously heard.

4. The learned counsel for the petitioners has raised three fold contentions:

> "(i) the Anygya Patra (permits) in question in respect of agricultural products (as detailed in the chart) purchased by the petitioner firm in the market area of Res.No.3 Mandi Samiti, Dabra after submission of requisite declaration form in Form 10 and payment of market fees thereon, to its (Res.No.3 Mandi Samit Dabra) and they were submitted by the petitioner to the respondent No.3 Mandi Samiti Itarsi within the prescribed period.
>
> (i) That in the Form 10 which were sent by the Seller firm (respondents 5 to 7) the details regarding the receipt number, and date, Vehicle number and name of the Driver etc. are clearly mentioned, hence in view of that there was no occasion for the petitioner to doubt in any manner the genuineness of the Anugya Patra (permits) in question;

(ii) that even if it is assumed that Anugya Patra (permits in question) issued from the respondent No.4 Mandi Samiti Dabra were subsequently found fabricated/forged on verification, then the liability in regard to imposition of market fees at the rate of five times in terms of the penal provision contained in section 19(4) of the Mandi Ahiniyam, 1972 can be fastened only on such licensed traders of respondent No.4 Mandi Samiti Dabra from whom the petitioner firm had purchased the agricultural produce in the market area of respondent No.4 Mandi Samiti and who had given the said Anugya Patra (permits) in question issued from the respondent No.4 Mandi Samiti Dabra to the petitioner at the time the said agricultural produce covered by the said Anugya Patra (permits) in question was sold by them to the petitioner (i.e by the respondents No.5 to 7 sellers Firms) to the petitioner".

5. On the anvil of these contentions the petitioners contend that the impugned orders are illegal, arbitrary and contrary to the provisions of Adhiniyam, 1972. It is urged, that without holding an enquiry in regard to the facts of petitioners involvement in the entire happenings leading to fabrication of the permits (anugya patra), the petitioners cannot be saddled with penalty and at best could have been charged the normal market fee. In other words, the contention of the petitioners are that there being no mensrea, they cannot be held guilty of non-payment of market fee at market area of respondent no.4. Quashment of orders is accordingly sought.

6. Respondent No.3 has filed its return and has supported the action taken against the petitioners. It is contended that having entered into a commercial transaction with the traders registered with respondent No.4, it was the responsibility of the petitioners to have ensured from the respondent No.4 that the permits issued to them were original. A mere permission to remove agricultural produce from market area of respondent No.4 ispo facto it is contended, is not sufficient to draw an inference that the permits issued were genuine. Placing reliance on section 19(1) of the Act and the rules framed thereunder, viz, the M.P.Krishi Upaj Mandi (Payment of Market Fees) Rules, 1990, (hereinafter referred as Rules of 1990) it is contended that it is the primary liability of the trader who claims exemption from payment of market fee to establish the payment of market fee on the agricultural produce being so re-sold in the market area of another market committee and the petitioners having failed to establish this fact have rightly been dealt with under section 19(4) of the Act of 1972. The respondents have further relied upon the judgment rendered in *M/S Prestige Exports, Indore V. State of M.P. & others* (W.P.No.399/2003) decided on 19.11.2003 by the

Indore Bench of this High Court and *Mahavir Prasad V.Madhya Pradesh State Agriculture Marketing Board and others* (W.P.No.70/2004) decided on 9.8.2007 by the Gwalior Bench of this High Court; whereby similar actions has been upheld. It is further contended that the respondent under a bonafide belief that the declaration given by the petitioners are correct granted exemption from paying the market fee but on discovery of the fact that actually no market fee was paid, the action under section 19(4) of the Act of 1972 taken thereof by the respondent cannot be found fault with. It is further urged that even after issuance of show cause notice no material is brought on record to prove that the market fee was paid at first instance on the agricultural produce re-sold in market area of respondent No.3. On these averments the respondents seek dismissal of the petitions.

7. Considered the rival contentions; and before appreciating the same, relevant it will be to note certain provisions of Act of 1972 and the Rules made thereunder.

Section 2(e) defines "Commission Agent" in the following terms:

> "means a person who on behalf of his principal [trader] and in consideration of a commission or percentage upon the amount involved in such transaction buys agricultural produce and makes payment in cash, keeps it in his custody and delivers it to the principal [trader] in due course or who receives and takes in his custody agricultural produce sent for sake [within the market area or from outside the market area], sells the same in the market area collects payment therefor from the buyer and remits the sale proceeds to his principal [trader];

Section 2(p) defines "trader" in the following terms:

> 'trader' means a person who in his normal course of business buys or sells any notified agricultural produce, and includes a person engaged in processing of agricultural produce, but does not include an agriculturist as defined in clause (b) of this sub-section.]

Section 19 empowers every market committee to levy market fee, the provisions which is of relevance in the present context, in its entirety is in following terms:

> **"19. Power to levy market fee.-** (1) Every Market Committee shall levy market fee,-
>
> (i) on the sale of notified agricultural produce whether brought from within the State or from outside the State into the market area; and
>
> (ii) on the notified agricultural produce whether brought from

within the State or from outside the State into the market areas and used for processing;

at such rates as may be fixed by the State Government from time to time subject to a minimum rate of fifty paise and a maximum of two rupees for every one hundred rupees of the price in the manner prescribed:

Provided that no Market Committee other than the one in whose market area the notified agricultural produce is brought for sale or processing by an agriculturist or trader, as the case may be for the first time shall levy such market fee.]

2. The market fees shall be payable by the buyer of the notified agricultural produce and shall not be deducted from the price payable to the seller:

[Provided that where the buyer of a notified agricultural produce cannot be identified, all the fees shall be payable by the person who may have sold or brought the produce for sale in the market area:

Provided further that in case of commercial transaction between traders in the market area, the market fees shall be collected and paid by the seller].

[Provided also that no fees shall be levied upto 31 st March, 1990 on such agricultural produce as may be specified by the State Government by notification in this behalf if such produce has been sold outside the market yard or sub-market yard by an agriculturist to a co-operative society of which he is a member:]

[Provided also that for the agricultural produce brought in the market area for commercial transaction or for processing the market fees shall be deposited by the buyer or processor as the case may be, in the Market Committee Office within [fourteen days] if the buyer or processor has not submitted the permit issued under sub-section (6) of Section 19.]

(3) The market fees referred to in sub-section(1) shall not levied on any notified agricultural produce,-

(i) in more than one market area, in the State; or

(ii) more than once in the same market area;

if it is re-sold,-

(a) in the case if (i) in the market other than the one in which it was brought for sale or brought or sold by an agricultural or

trader as the case may be, for the first time and has suffered fee therein;

(b) in the case of (ii), in the same market area;

in the course of commercial transactions between traders or to consumers [subject to furnishing of information in such form as may be prescribed in the bye-laws by the person concerned to the effect] that the notified agricultural produce being so re-sold has already suffered fee in the other marked area of the State.

(4) If any notified agricultural produce is found to have been processed re-sold or sold out of yard without payment of market fee payable on such produce the market fee shall be levied or recovered on five times the market value of the processed produce or value of the agricultural produce as the case may be.]

(5) The market functionaries, as the Market Committee may be bye-laws specify, shall maintain account relating to sale and purchase [or processing] in such forms and submit to the Market Committee such periodical returns as may be prescribed.

(6) No notified agricultural produce shall be removed out of the market yard, market proper or the market area as the case may be, except in accordance with a permit issued by the Market Committee, in such form and in such manner as may be prescribed by the bye-laws:

Provided that if any person removes or transports the processed product of notified or agricultural produce from the market proper of the market area, as the case may be, such person shall carry with him the bill or cash memorandum issued under Section 43 of the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 (No.5. Of 1995).

(7) The Market Committee may levy and collect entrance fee on vehicles, plying on hire, which may enter into market yard at such rate as may be specified in the bye-laws".

8. Thus, a market fee is levied on an agricultural produce in the market area. Proviso to sub-section 1 however, stipulates that no market committee other than the one in whose market area the notified agricultural produce is brought for sale or processing by an agriculturist or trader as the case may be, for the first time shall levy such market fee. The onus, however, is cast on the agriculturist or traders to give a declaration under section 19(3) and vide form prescribed under the Rules of 1990,viz, The M.P.Krishi Upaj Mandi (Payment of Market Fees)

Rules, 1990 framed under section 19(1). Rule 3 of the Rules of 1990 stipulates:

"3.(i)Every Trader/Processor/Commission Agent of a Trader shall be required by Sub-Section (3) of section 19 make a declaration in a Form appended to these rules of the fact of payment of market fee on the agricultural produce being re-sold in the market area of another Market Committee.

(ii) Booklets of declaration form (each booklet shall have fifty declaration forms, each, in triplicate) shall be supplied by the Market Committee to the concerned Trader/Processor/Commission Agent of a Trader on payment of price.

Copies of the declaration form shall be printed in different colours. Trader/ Processor/Commission Agent of a Trader shall give original and duplicate copies duly filled in to the purchaser. The purchaser shall submit these declarations forms in original and duplicate to the Market Committee where the Agricultural produce is being re-sold.The Secretary of the Market Committee shall retain original copy for the record of market committee and the duplicate copy shall be duly returned to the concerned purchaser after affixing the seal of cancellation.

(iii) The printing of the booklet of these declaration forms shall be arranged by the Madhya Pradesh State Agricultural Marketing Board, which shall duly number them and maintain proper accounts thereto and supply these booklets to all the Market Committees. The Market Committee concerned shall charge Two Rupees extra for each booklet and supply on payment to such Trader/Processor/Commission Agent of a Trader who will give a requisition in writing.

4. The Madhya Pradesh Krishi Upaj Mandi(Refund of Market Fees) Rules, 1986, is hereby repealed:

Provided that anything done or any action taken under the rules so repealed shall be deemed to have been done or taken under the corresponding provisions of these rules.

Sub-section (6) of section 19 prior to its substitution by M.P.Act No. 15 of 2003 (w.e.f. 15.6.2003) was as under:

"6. No notified Agricultural produce or any produce processed therefrom shall be removed out of the market area except in accordance with a permit issued in such manner and in such form as may be prescribed by the Board:

Provided that for the removal of processed goods, the licensed

processor or his authorised representative may issue the permit within the limit fixed for the particular processor by the Market Committee."

9. The proviso thus empowered the licensed processor or his authorised representation to issue the permit for removal of processed goods. The expression "processing" is defined under section 3 (mmm) in the following terms:

"Processing" means powdering, crushing, decorticating, husking, parboiling, polishing, ginning, pressing, curing or any other treatment to which an agricultural produce or its product is subjected to before final consumption;

Whereas the "processor" is defined in the following terms under section 3 (mmmm) :

"processor" means a person who processes agricultural produce by manual or mechanical means;

10. These provisions make imperative for a trader seeking exemption to pay market fee to be sure that at first instance the agricultural produce had suffered market fee. Merely because the trader has been permitted to take the agricultural produce from a market area in itself will not be a prove that the market fee has been payed. There is no such provision as deemed payment under the statute. The concept of mens rea as ushered in by the petitioners is not attracted. In other words even if the petitioners have no role in forging the permits, he is still, liable to pay the market fee on agricultural produce if not subjected or suffered the market fee. In *M/s Prestige Exports* (Supra) it has held:

"7. It is not dispute nor any attempt was made to contend by the petitioner that the 74 declaration forms submitted by the petitioner were forged one. In other words , it being an admitted fact that the forms on the basis of which the petitioner did not pay Mandi fees were forged documents. The only ground which the petitioner was trying to avoid liability but the real author was those two traders from whom the petitioner purchased the soyabean. In my view, it is no defence to avoid the laibility from the concern Mandi as to whether their seller (two traders) have actually paid the Mandi fees on the soyabean which they were going to purchase from their seller. Petitioner was not new in business. They had been purchasing soyabean on regular basis in day to day business activity and hence, it was not at all difficult for them to verify and find out from the concern Mandi as to whether their seller has actually paid Mandi Fees so as to entitle them to issue necessary declaratory forms in favour of petitioner to enable them to claim exemption from payment of Mandi fees

twice. In no case, the petitioner can claim any immunity, nor can disown their liability, not can claim any ignorance of whole transaction. As rightly held by the authorities below, it was a clear case of evasion of Mandi fees by the petitioner who submitted forged declaration forms and on that basis, claimed total exemption from payment of fees.

8. I do not agree to the submission of learned counsel for the petitioner when he urged that inquiry into the allegation of fraud/forged should have been made. In my view, when petitioner did not dispute the fact (though at a later stage) of the forms being forged, there was no need to hold any inquiry. As a matter of fact, it was for the petitioner to have inquired prior to submission of forms with the Mandi as to whether the forms in question are genuine or not? No document was filed by the petitioner in the proceedings below to show that they had made all possible inquiry and were fully satisfied with the genuineness of the forms. As held supra, it was a clear case where petitioner was equally responsible and party to the creation of the forms because the benefit of those forms directly went to the petitioner. Such inference is discernible on the fact of the transaction.

11. Thus having regard to the entirety of facts, no case for interference is made out.

12. In result the petition fails and is hereby dismissed. However, no costs.

Petition dismissed.

I.L.R. [2009] M. P., 2228
WRIT PETITION
Before Mr. Justice K.K. Lahoti & Mrs. Justice Sushma Shrivastava
20 March, 2009*

GOVIND PRASAD DUBEY ... Petitioner
Vs.
CHANDRA MOHAN AGNIHOTRI & anr. ... Respondents

Civil Procedure Code (5 of 1908), Order 1 Rule 10, Transfer of Property Act, 1882, Sections 53A & 54 - *Suit for eviction - Application for impleading as defendant on the strength of oral agreement of sale - Rejection - Writ Petition - Held - To claim plea of part performance, written contract is essential - The contract for sale of immovable property by itself does not create any interest or charge in property - No interest created in property - Petitioner not entitled to be impleaded as party - Petition dismissed.* (Paras 6 & 8)

*W.P. No.1537/2009 (Jabalpur)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10, सम्पत्ति अन्तरण अधिनियम, 1882, धाराएँ 53ए व 54 – बेदखली के लिए वाद – विक्रय के मौखिक अनुबन्ध के बल पर प्रतिवादी के रूप में पक्षकार बनाये जाने का आवेदन – खारिजी – रिट याचिका – अभिनिर्धारित – मौखिक पालन के अभिवचन का दावा करने के लिए लिखित संविदा आवश्यक है – स्थावर सम्पत्ति के विक्रय की संविदा स्वमेव सम्पत्ति में कोई हित या भार सृष्ट नही करती – सम्पत्ति में कोई हित सृष्ट नही – याची पक्षकार बनाये जाने का हकदार नही – याचिका खारिज।

Cases referred :

AIR 2003 SC 3542, AIR 1985 MP 122, (2004) 8 SCC 614, AIR 1961 MP 237.

Siddharth Gulatee, for the petitioner.

O R D E R

K.K.LAHOTI,J :–This petition is directed against an order dated 28.1.2009 by the Ist Additional District Judge, Hoshangabad in Civil Suit No.34-A/2006, by which an application filed by petitioner under order 1 Rule 10 read with section 151 C.P.C., dated 11.11.2008 was rejected.

2. Learned counsel for petitioner submitted :

(a) That the petitioner was necessary party in the suit filed by respondent no.1 against respondent no.2.

(b) That the petitioner alongwith respondent no.2 entered into a contract to purchase the disputed premises for a consideration of Rs.90,000/-. Out of this, Rs.45,000/- were paid by the petitioner and in part performance of the contract petitioner was in possession of the suit premises. In the aforesaid circumstances, when a suit for eviction was filed by respondent no.1 against respondent no.2, to protect the interest of petitioner, it was necessary to implead him as defendant.

(c) That there was collusion between respondent no.1 and 2 so it became necessary for the petitioner to implead him as party.

(d) The petitioner placed reliance to the Apex Court judgment in *D.S.Parvathamma Vs. A.Srinivasan* (AIR 2003 SC 3542) = [(2003) 4 SCC 705] and a judgment of this Court reported in *Mukhtiyar Mohammad Vs. Panna Lal and others* (AIR 1985 MP 122) and submitted that this petition be allowed, impugned order be quashed and application filed by the petitioner for his impleadment as party under Order 1 Rule 10 C.P.C., be allowed.

3. To appreciate the aforesaid contention, factual position in the case may be stated. The respondent no.1 filed a suit for eviction under section 12 of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as 'Act' for short) against respondent no.2. In the said suit the petitioner filed an application under order 1 Rule 10 read with section 151 C.P.C., stating that the disputed property

was recorded in the revenue papers in the year 1993 in the name of plaintiff Chandra Mohan Agnihotri. An amount of Rs.90,000/- was paid to the plaintiff out of which Rs.45,000/- was paid by the petitioner alongwith his brother Keshav Dubey on the same date it was agreed between plaintiff, defendant and petitioner that in the sale deed this fact would be mentioned that out of total consideration, Rs.45,000/- were paid by the petitioner herein. It was further pleaded in the application that at the time of execution of sale deed, the sale of 1st floor was to be affected in favour of petitioner and the possession on the suit property of defendant Keshav Dubey shall be treated on behalf of petitioner.

That on the date of filing of application 11.11.2008, petitioner became aware that a suit was filed by the respondent no.1 against respondent no.2, but without making such averments in the plaint in respect of agreements between the petitioner, respondent no.2 and plaintiff.

On the aforesaid grounds it was prayed that the petitioner be impleaded as defendant no.2 in the plaint.

4. Alongwith the application petitioner filed an affidavit before the trial Court which is available on page 13, 14 and 15 of the paper book, in which in para 2 of the affidavit the petitioner had stated a fact that the said agreement was oral agreement and no document was available with him.

5. The trial Court after hearing both the parties found :-

(i) That the petitioner has alleged an oral agreement between the parties.

(ii) That the present suit is based on landlord-tenant relationship and the petitioner had not alleged any tenancy with the plaintiff.

(iii) That the petitioner had not filed any suit for specific performance of the contract, while the defendant no.1 filed a suit for specific performance of the contract against the plaintiff as was pleaded by the defendant in para 33 of the written statement. The trial Court found that in case the plaintiff proves the tenancy the suit shall be decided, but by impleading the petitioner as party, it shall enlarge the scope which is not permissible under the law.

(iv) That the petitioner was not necessary party for the decision of the suit.

(v) That the petitioner may file an application for his impleadment in the suit filed by the defendant Keshav Dubey against the plaintiff for specific performance of the contract, but in the present suit of eviction he was not necessary party and dismissed the application.

This order is under challenge in this petition.

6. In this case it is not in dispute that the present suit was filed for eviction on the ground enumerated under section 12 of the Act. The scope of suit is limited and the lis is between the landlord and tenant based on tenancy. Though the defendant Keshav Dubey, who is the real brother of petitioner in written statement took a plea of alleged agreement with the plaintiff, but it appears that he had not pleaded in the written statement that such agreement was alongwith petitioner and plaintiff. There is no written agreement between the parties and on the basis of an oral agreement, the present application was filed. It is alleged that the entire consideration of Rs.90,000/- was paid by the petitioner and defendant to the plaintiff, but without any document. The alleged agreement as pleaded in the plaint was of 1993 and the period of nearabout 15 years has elapsed since then, but what steps were taken by the petitioner for enforcing the agreement nothing is on record to claim part performance as envisaged under section 53-A of Transfer of Property Act, (hereinafter referred to as 'T.P.Act' for short) a written agreement is the essential requirement under section 53-A of the T.P.Act. For ready reference section 53-A may be quoted which reads as under :-

> **"53A. Part performance-** Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract,
>
> then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

In view of the aforesaid specific provision, to claim a plea under section 53-A of the T.P.Act a written contract was essential and in absence of any document in writing, the petitioner was not entitled to claim a plea of part performance in the matter. Apart from this, section 54 of the T.P.Act specifically provides that the contract for sale of immovable property by itself does not create any interest or charge in the property. In view of specific mandate under section 54 of the T.P.Act, no interest or charge on such property was created in favour of petitioner. In view of specific mandate under section 54 when no interest was created in the property, the petitioner was not entitled to be impleaded as party. For ready reference section 54 may be quoted, which reads as under :-

> **54. "Sale" defined**- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> **Sale how made.** - Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upward, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property."
>
> **Contract for sale.** - A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

7. The Apex Court considering this aspect in *Rambahu Namdeo Gajre Vs. Narayan Bapuji Dhotra* [(2004) 8 SCC 614] held that the doctrine of part performance aims at protecting the possession of such transferee provided certain conditions contemplated by section 53-A are fulfilled. These conditions are :

> (a) there must be a contract for transfer for consideration of any immovable property.
>
> (b) the contract must be in writing, signed by the transferor or some one on his behalf.
>
> (c) the writing must be in such words from which the terms necessary to construe the transfer may be ascertained,
>
> (d) the transferee must in part performance of the contract take possession of the property, or of any part thereof,

(e) the transferee must have done some act in furtherance of the contract; and

(f) the transferee must have performed or be willing to perform his part of the contract.

8. In the present case, it is not the case of petitioner that there was a contract in writing between the petitioner and respondent no.1, the petitioner was put into possession of the suit property in part performance of the contract, the petitioner had done some act in furtherance of the contract or the petitioner had performed or was willing to perform his part of the contract. In absence of aforesaid essential ingredients of section 53-A of the T.P.Act, prima facie no case was established in favour of petitioner.

9. So far as the judgment of Apex Court in *D.S.Parvathamma* (supra) in that case the agreement of sale of the premises by original landlord was in favour of tenant in possession. The tenant failing to disown his character as lessee and also failing to prove that possession was delivered to him in part performance of the agreement, he was not entitled for any benefit. Apart from this suit for specific performance of contract filed by the tenant was dismissed on merits. On the aforesaid grounds the Apex Court held that the tenant was not entitled to claim any benefit in the case. The Apex Court relied on the case of *Bhagwandas Parsadilal Vs. Surajmal* (AIR 1961 MP 237) in the matter.

10. In view of aforesaid factual position petitioner is not entitled to take any benefit of *D.S.Parvathamma* (supra). Similarly judgment of this Court in *Bhagwandas Parsadilal* is not applicable in the facts of the present case.

11. In view of aforesaid factual discussion, we do not find any merit in this petition. This petition is dismissed at admission stage, with no order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 2233
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice K.S. Chauhan
26 March, 2009*

AKHIL BHARTIYA UPBHOKTA CONGRESS, BHOPAL ... Petitioner
Vs.
STATE OF M.P. & ors. .... Respondents

A. Interpretation of Statutes - Comma (,) - *Comma (,) used between two words has to have its signification and each word has to be treated as separate word and thereby a separate category.* (Para 28)

क. कानूनों का निर्वचन – अल्पविराम (,) – दो शब्दों के बीच प्रयुक्त अल्पविराम

*W.P. No.14719/2006 (Jabalpur)

(,) को अपना अर्थ रखना चाहिए और प्रत्येक शब्द को पृथक शब्द और तद्द्वारा पृथक वर्ग मानना चाहिए।

B. **Consumer Protection Act (68 of 1986), Section 16(1)(b)(iii) -** ***Composition of State Commission - Eligibility Criteria - Public Affairs or Administration - Respondent No.4 had worked for 14 years as an executive in Informatics Computer System - Term 'administration' is of wide expanse and indubitably includes administration of an institution or organization which basically relates to supervision of management or performance of executive duties of institution, business or the like.*** (Para 37)

ख. उपभोक्ता संरक्षण अधिनियम (1986 का 68), धारा 16(1)(बी)(iii) – राज्य आयोग की संरचना – पात्रता मापदण्ड – लोक कार्य या प्रशासन – प्रत्यर्थी क्र. 4 ने इन्फोर्मेटिक्स कम्प्यूटर सिस्टम में कार्यकारी के रूप में 14 वर्ष कार्य किया – शब्द 'प्रशासन' व्यापक विस्तार का है और असंदिग्ध रूप से किसी संस्थान या संगठन के प्रशासन को भी सम्मिलित करता है जो मौलिक रूप से प्रबन्ध के पर्यवेक्षण या संस्थान, कारोबार या इसी प्रकार के किसी अन्य के कार्यकारी कर्तव्यों के पालन से सम्बंधित है।

Cases referred :

AIR 1952 Nagpur 330, AIR 1965 SC 491, AIR 1975 Delhi 66, 1971 Lab IC 556, AIR 1968 SC 1495, AIR 2001 SC 3435, AIR 2003 SC 1201, AIR 2006 SC 3106, AIR 1982 SC 1413, (1987) 1 SCC 424, (1994) 1 SCC 243, (1996) 6 SCC 385, (1998) 8 SCC 1, (2006) 4 SCC 98, AIR 1970 SC 1559, AIR 1971 SC 2471, AIR 1989 Karnataka 192, AIR 1970 SC 2079, AIR 2003 SC 355.

Santosh Kumar Dwivedi, for the petitioner.

R.N. Singh, A.G. with *Vivekanand Awasthi, G.A.,* for the respondent Nos.1 & 2.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–The petitioner, a consumer society registered under the provisions of the Madhya Pradesh Society Registrikaran Adhiniyam, 1973, is engaged in performing certain activities relating to welfare of consumers. Various assertions have been made about the functioning of the society and the significant role played by it in the field of consumer services. It is contended that to subserve the public purpose, the Society through its President has preferred the present public interest litigation challenging the appointment of the respondent No.4 as a Member of the M.P. State Consumer Disputes Redressal Commission under the Consumer Protection Act, 1986 [for short 'the Act'].

2. At the very outset, it is condign to state that though averments and assertions have been put forth with regard to the selection process involved in the selection of the respondent No.4, yet Mr. Santosh Kumar Dwivedi, learned counsel for the petitioner, after due deliberation on his part, fairly stated that he does not intend to

press the said facet and in fact, in the course of hearing, abandoned the same. The learned counsel, we must candidly state, with all humility at his command addressed us that the society stands on the footing of a relator and assails the appointment of the fourth respondent solely on the parameters of writ of quo warranto as she does not meet the eligibility criteria to hold a public office as provided under Section 16(1)(b) of the Act.

3. It is contended in the petition that the fourth respondent does not possess the minimum qualification for appointment inasmuch as the criteria provided under Section 16 of the Act are not even remotely satisfied by the said respondent. It is apropos to note here that though specific assertions have not been made Mr. Dwivedi, yet the learned counsel, placing reliance on the provisions of the Act and the documents brought on record by the respondents No.1 and 2 in their counter affidavit, advanced proponements to erect the edifice that the selection and continuance of the respondent No.4 is bound to founder and collapse as she has been appointed despite lack of requisite qualification.

4. Mr. R.N. Singh, learned Advocate General for the State, very fairly stated and rightly so, that as there is assertion, though a miminal one, that the respondent No.4 does not meet the eligibility criteria and the petitioner being a relator and the counter affidavit having been filed justifying the selection, it becomes a warrant to address the issue in question. Ergo, we proceed.

5. Presently, we shall adumbrate the stand put forth in the return filed by the respondents No.1 and 2. It is worth-noting that as there have been various allegations and challenge to the manner of selection reply, has been given exhaustively in that regard. As Mr. Dwivedi, learned counsel appearing for the petitioner, abandoned the said stance there is no justification to refer to the said part of pleadings. What is set forth in the return is that the respondent No.4 is duly qualified for the post of Member of the State Consumer Redressal Commission as she is a postgraduate and has sufficient experience to her credit as envisaged under the Act. Certain documents have been brought on record as Annexure-R/2 series to demonstrate that she is qualified. Thus, the only thing that is required to be dwelled upon is whether the respondent No.4 is qualified to hold the post or is to be ousted as an usurper to a public office.

7. Before we advert to the provisions and the facts pertaining to qualifications and meeting the eligibility criteria, it is appropriate to refer to certain authorities in the field.

8. In *G.D. Karkare vs. T.L. Shevde and others*, AIR 1952 Nagpur 330, the Division Bench has expressed the view as under:

> *"(7) Before we consider grounds Nos.2,3 and 4, it is necessary to consider the nature of the writ 'quo warranto'. We cannot do better than quote from the judgment of Lord Reading C.J. In REX v. SPEYER', (1915) 1 KB 595:*

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"In early times the writ of quo warranto was in the nature of a writ of right for the King against any subject who claimed or usurped any office, franchise, or liberty to inquire by what authority he supported his claim inorder to determine the right: Blackstone's Commentaries, 8th Edn., vol.3, p. 262. It was a civil writ at the suit of the Crown : 'REX vs. MARSDEN', (1765) 3 Bur 1812. Originally the writ had to be returned before the King's justices at Westminster, but afterwards only before the justices in Iyre by virtue of the statutes or Quo Warranto, 6 Edw..1, (Statute of Gloucester) and 18 Edw.1, Statute 2." "The writ of quo warranto, however, fell into disuse and led to the substitution of proceedings by way of information in the nature of quo warranto. Whatever the immediate cause of the change or whenever the immediate cause of the change or whenever it was brought about is not ascertainable: Tancred on Quo Warranto, p.2; but the practice of filing information by the Attorney-General inlieu of these writs is very ancient: 'DARLEY v. QUEEN, (1846) 12Cl & F 520 at p.537. At a later period the King's coroner commenced the practice of exhibiting information of quo warranto at the instance of private persons, but this power of the King's coroner was much restrained by the Statute 4 & 5 Will. & Mar.c.18, which was passed to prevent malicious information at the suit of private persons being filed by the King's coroner.

In REX vs. HERTFORD CORPORATION, 1 Ld. Raym. 426, it was decided that information in the nature of quo warranto were within the purview of this statute,and thereafter the King's coroner did not file informations without the order of the Court. Subsequently the statute of 9 anne, c.20, was passed to render informations in the nature of quo warranto more speedy and effectual and for the more easy trial of the rights of offices and franchises in corporation and boroughs. Since that time there has been a tendency of the Court to grant or refuse informations to private prosecutors according to the facts and circumstances of the case, and hence it is that it becomes so difficult to reconcile many of the decisions, as was pointed out by Lord Brougham in 'DARBEY v. THE QUEEN, (1846) 12 Cl & F 420 : 8 ER 1513."

It is necessary to add that since the decision in REX v. SPEYER', (1916) 1 KB 595 (supra) the remedy against usurpation of office has been further simplified in England.

Under S.9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 (1-2 Geo. VI, Ch.63) informations in the nature of 'quo warranto' have been abolished. The High Court now grants an injunction restraining any person from acting in an office in which he is not entitled to act.

(8) In DAIDEY v. THE QUEEN, (1846) 12 Cl & F 520 at p.537: 8 ER, the Judges were summoned to the House of Lords to give their opinion. The House of Lords accepted the opinion given by Tindall, CJ. The conclusion of Tindall C.J., is expressed in the following words:

"After the consideration of all the cases and dictation on this subject, the result appears to be that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others."

So what the Court has to consider in an application for a writ of 'quo warranto' is whether there has been usurpation of an office of a public nature and an office substantive in character i.e. an office independent of title. If the office be of a very small nature like that of petitioner, as in Anonymus' 94 ER 190, the Court may refuse to grant the information."

9. In *University of Mysore and another vs. C.D. Govinda Rao and another,* AIR 1965 SC 491, their Lordships have ruled thus :

"6. The judgment of the High Court does not indicate that the attention of the High Court was drawn to the technical nature of the writ of quo warranto which was claimed by the respondent in the present proceedings, and the conditions which had to be satisfied before a writ could issue in such proceedings.

7. As Halsbury has observed:*

** Halsbury's Laws of England, 3rd Ed. Vol., II, P. 145*

"An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be

determined." Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

(underlining is ours)

10. In *P.L. Lakhanpal vs. Ajit Nath Ray, Chief Justice of India, New Delhi and others,* AIR 1975 Delhi 66, the Full Bench of Delhi High Court has held as under:

"12. On the other hand, in Janardhan Reddy v. State of Hyderabad, 1951 SCR 344 :(AIR 1951 SC 217) it has been observed that the power given to it under Part III of the Constitution is a large one, but it has to be exercised in accordance with well established principles. In T. C. Basappa v. T. Nagappa, (1955) 1 SCR 250 : (AIR 1954 SC 440) the same principle has been repeated but it has been clarified that the procedural technicalities of the English law do not apply. These cases help me to re-affirm the view that the scope of the power of the High Court to issue a writ of quo warranto

under Article 226 of the Constitution is not wider than it is in England and Courts in this country have followed the principles including the limitations which have been well established in England. In fact, in (1964) 4 SCR 575 : (AIR 1965 SC 491) (supra), the Supreme Court has observed that a writ of quo warranto is a writ of technical nature and has approved the statements made in Halsbury's Laws of England in that behalf."

11. In *Prabhudutt Sharma v. State of Rajasthan,* 1971 Lab IC 556 (Raj.), the High Court of Rajasthan specified the four requisites for a writ of quo warranto, namely, (1) the office must be held under the State or have been created by a statute, (2) it should be an office of a substantive character, (3) its duties must be of a public nature and (4) it should have been usurped by some person. It has been further held therein that even when these requirements are fulfilled, it is open to the court to refuse or grant the writ after taking into consideration the circumstances of the case and the consequences which would follow if it is allowed and that it should be in the public interest to grant the writ.

12. In *Statesman (private) Ltd. v. H. Deb,* AIR 1968 SC 1495, their Lordships have expressed the view that the High Court in a quo warranto proceeding should be slow to pronounce upon the matter unless there is a clear infringement of the law.

13. In *B.R. Kapur v. State of T.N.*, AIR 2001 SC 3435, it has been held that a writ of quo warranto is a writ which lies against the person, who according to the relator is not entitled to hold an office of public nature and is only a usurper of the office. It is the person, against whom the writ of quo warranto is directed, who is required to show, by what authority that person is entitled to hold the office. The challenge can be made on various grounds, including on the grounds that the professor of the office does not fulfill the required qualifications or suffers from any disqualification, which debars the person to hold such office.

14. In High Court of *Gujarat v. Gujarat Kishan Mazdoor Panchayat,* AIR 2003 SC 1201, S.B. Sinha,J. In his concurring judgment expressed the view as follows:

"The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine at the outset as to whether a case has been made out for issuance of a writ of certiorari or a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. While issuing such a writ, the court merely makes a public declaration but will not consider the respective impact of the candidates or other factors which may be relevant for issuance

of writ of certiorari. [See R.K. Jain vs. *Union of India and Others reported in (1993) 4 SCC 119 para 74]."*

(Emphasis supplied)

15. In *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn.*, AIR 2006 SC 3106, it has been held that the High Court in its exercise of writ jurisdiction is required to determine, at the outset, as to whether a case has been made out for issuance of writ of quo warranto. The writ of quo warranto does not lie if the alleged violation is not of statutory provisions/rules or if the alleged violation is not of a statutory nature. A writ of quo waranto cannot be issued unless there is a clear violation of law in the appointment.

16. Keeping the aforesaid principles in view, it is to be tested whether the respondent No.4 satisfies the eligibility criteria to entitle her to be in the office or not. Section 16 of the Act deals with the composition of the State Commission. The relevant part of the said provision reads as under:

"16. Composition of the State Commission. -

(1) Each State Commission shall consist of -

(a) a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President:

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;

(b) not less than two, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely:-

(i) be not less than thirty-five years of age;

(ii) possess a bachelor's degree from a recognised university; and

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration;

Provided that not more than fifty per cent of the members shall be from amongst persons having a judicial background;

Explanation- For the purposes of this clause, the expression "persons having a judicial background" shall mean persons having knowledge and experience for at least a period

of ten years as a presiding officer of at the district level or any tribunal at equivalent level;

Provided further that a person shall be disqualified for appointment as a member, if he-

(a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the State Government, involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(e) has, in the opinion of the State Government, such financial or other interest, as is likely to affect prejudicially the discharge by him of his functions as a member; or

(f) has such other disqualifications as may be prescribed by the State Government."

17. It is submitted by the learned counsel for the petitioner that the fourth respondent does not possess adequate knowledge and experience for at least a period of ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. It is contended by him that the stand taken in the return to the effect that she is a postgraduate and in view of the resume submitted by the said respondent, she is qualified is founded on a fallacious perception. On a perusal of the resume contained in Annexure-R/2 which has been filed in support of the stand that the fourth respondent meets the eligibility criteria as provided under the Act, it is noticeable that she is a postgraduate in Western History. The work experience shows that she had worked for 14 years as an executive at Informatics Computer Systems, Bhopal, taught students of Advanced Diploma and Honours Diploma Courses, taught Computer Science to the students of St. Joseph's Convent, Bhopal and Carmel Convent, Bhopal for 3 years, was the Branch Manager of the Bhopal Branch of ICS before resigning due to personal reasons in October, 2000. The extra curricular activities which have been stated in the resume are that she had been associated with several NGOs' and other voluntary organizations working in the field of education and women empowerment and consumer/investor protection, involved in educating consumers about their rights and responsibilities, relief admissible under the various laws and the procedure for filing complaints for simple, inexpensive and speedy redressal of their grievances. It is worth-noting that Annexure-R/2 has gone

undisputed. Thus, the question that is to be considered is whether the work experience and the extra curricular activities do meet the requirement as engrafted under Section 16(1)(b)(iii) of the Act. The submission of Mr. Dwivedi, learned counsel for the petitioner, is that the respondent No.4 does not have adequate knowledge and experience of 10 years in dealing with the problems relating to economics, law, commerce, accountancy, industries, public affairs or administration and all these requirements are to be read in a conjunctive manner. Alternatively, a selectee or the holder of an office must have 10 years experience either in public affairs or public administration, if he or she does not have any other qualification.

18. Per contra, the submission of Mr. R.N. Singh, learned Advocate General for the State, is that if an interpretation is placed that a candidate must have knowledge and experience in all the fields, it would lead to an absurd result and that is also not the intendment of the Legislature. It is his further contention that the law does not require impossible things to happen and what is urged by the learned counsel for the petitioner is in the realm of impossibility. It is propounded by Mr. Singh that each part of the requirement, as the provision reads, is mutually exclusive. Resisting the alternative submission of the learned counsel for the petitioner that public affairs or public administration should mean public affairs or public administration, the learned Advocate General urged that such a construction is not in consonance with the basic intention of the provision and if the provision is appreciated appositely, it would convey administration in any field and has nothing to do with public affairs because the purpose of this Act is quite different.

19. Regard being had to the aforesaid stance and counter stand, we think it appropriate to refer to the statement of objects and reasons. It reads as under:

> ***"Statement of objects and reasons-***
>
> *The Consumer Protection Bill, 1986 seeks to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith.*
>
> *2. It seeks, inter alia, to promote and protect the rights of consumers such as-*
>
> *(a) the right to be protected against marketing of goods which are hazardous to life and property;*
>
> *(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;*
>
> *(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;*

(d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and

(f) right to consumer education.

3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central levels. These quasi-judicial bodies will observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided.

5. The Bill seeks to achieve the above objects."

20. On a perusal of the same, it is evincible that the Act was brought into force to promote and protect the rights of consumers in various terms. It was avowed purpose to meet certain deficiencies. To fulfill the purpose of the Act, the Legislature has established various forums, viz., District Forum, State Commission and National Commission. The District Forum is established under Section 9 of the Act and State Commission is composed under Section 16 of the Act. We have referred to the objects and reasons only to understand the basic purpose of the Act. In this regard, it would not be inapposite to refer to certain citations in the field.

21. In *Lt. Col. Prithi Pal Singh Bedi Vs. Union of India and others*, AIR 1982 SC 1413, the Apex Court has expressed the view as follows:

"The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognized canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision the Court should adopt literal construction if it does not lead to an absurdity. The first question to be posed is whether there is any ambiguity in the language used in Rule 40. If there is none, it would mean the language used, speaks the mind of Parliament and there is no need to look somewhere else to

discover the intention or meaning. If the literal construction leads to an absurdity, external aids to construction can be resorted to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object which it is required to subserve and the authority by which the rule is framed. This necessitates examination of the broad features of the Act."

22. In this regard, we may refer with profit to the decision rendered in *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and others*, (1987) 1 SCC 424, wherein it has been held as follows:

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statue is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its schemes, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.....".

23. The 1986 Act is a social benefit oriented legislation. In *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243, the Apex Court has expressed thus:

"2. ..... To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view

that a preamble cannot control otherwise plain meaning of a provision. In fact, the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot... "

24. The aforesaid facet has been reiterated in *Fair Air Engineers Pvt. Ltd. and Another v. N.K. Modi*, (1996) 6 SCC 385.

25. Keeping the aforesaid purpose in view, Section 16(1)(b)(iii) of the Act is to be appreciated. The said provision requires a member to have qualifications which pertain to possessing of adequate knowledge and experience for at least 10 years in dealing with the terms relating to economics, law, commerce, accountancy, industries, public affairs or public administration. The submission of Mr. Dwivedi is that the holder of office should have experience in all the fields does not stand to reason and, in fact, the provision does not so envisage and such a construction should not be placed. The Legislature has used a comma (,) after the term economics, law, commerce, accountancy, industry and, therefore, it cannot be said that a member should have the qualifications in all the fields.

26. In *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others*, (1998) 8 SCC 1, a two-Judge Bench of the Apex Court while dealing with the effect of comma (,) in dictionary clause has expressed the view as under:

"65. Learned counsel for the Chinar Trust is trying to

give a measure of importance to the punctuation mark "comma", more than it deserves. If "comma" were that important, there, incidentally, is another "comma" before and after the word "High Court". This "comma" obviously separates the phrase "before which the proceeding concerned is pending" provision from the word "High Court" with the result that this phrase becomes applicable both to "High Court" and the "Registrar". The word "concerned" in this phrase is also of significance inasmuch as the word "Tribunal" has been used in different sections in relation to different proceedings. At some places in the Act, all the three words, namely, "Registrar", "High Court" and "Tribunal" have been used which indicate that if the proceeding under that particular provision is pending before the "Registrar" then on account of that proceeding, the Registrar becomes the "Tribunal". So also, if the proceeding is pending before the High Court then that proceeding makes the High Court a "Tribunal". It is in that sense that the word "proceeding concerned" has to be understood.

27. In *State of Maharashtra and Others v. Man Adim Jamat Mandal,* (2006) 4 SCC 98, their Lordships while dealing with the punctuation mark comma (,) held as under:

> *"The common pattern found in most of the group entries is that there is a punctuation mark comma (,) between one Entry and another Entry in the group signifying that each one of them is deemed to be a separate Scheduled Tribe by itself. In the present case, Entry 18 of the Schedule clearly signifies that each of the Tribe mentioned therein is deemed to be a separate Tribe by itself and not a sub-Tribe of 'Gond'.*

28. In view of the aforesaid pronouncement of law, we have no hesitation in our mind that 'comma' used in the subsection between the two words has to have its signification and each word has to be treated as separate word and thereby a separate category.

29. Emphasis has been laid by Mr. Dwivedi that when the term 'or' has been used between 'public affairs or administration' it would mean public affairs or public administration. The word 'or' is normally disjunctive but at times it is read vice versa to give effect to the intention of the legislature. They have to be understood in the context of their use. When we have already interpreted that by use of the punctuation mark 'comma' every category is separated and there is use of comma before public affairs or administration they have to be read

separately and disjunctively. Placing such a construction, in our considered opinion, it does not produce an unintelligible or absurd result. On the contrary, the same is in consonance with the objects and reasons and the scheme of the Act.

30. The interpretation can be viewed from another angle. Section 16 (1) (b) (iii) is couched in both manner, positive manner as far as qualifications are concerned and in negative manner as far as the disqualification is concerned. In this context, it would not be inapposite to refer to decision rendered in *The Star Co. Ltd. v. The Commissioner of Income – tax (Central) Calcutta,* AIR 1970 SC 1559, wherein it has been held as under:

> *"Since the two parts of condition (2) are alternative, it is unnecessary to consider whether the second part of condition (2) is satisfied in this case. In the view we take, both the conditions, on the satisfaction of which a company may be deemed a company in which the public are substantially interested, are satisfied."*

31. In *the Punjab Produce and Trading Co. Ltd. v. The Commissioner of Income tax, West Bengal II Calcutta,* AIR 1971 SC 2471, it has been held that if there are two negative conditions and one remains unfulfilled, both are to be fulfilled. In the said case, it is also opined that if there are positive conditions, it has to be treated as alternative terms.

32. In the case at hand, in actuality, it provides certain positive conditions to be satisfied by a candidate to be appointed as a Member. Section 16 (1) (b) (i) and (ii) are similar conditions and the respondent No.4 satisfies them. As far as sub-section (1) (b) (iii) is concerned they are positive conditions to be acquired as it postulates 'public affairs or administration' and, therefore, they are to be read alternatively thereby disjunctive and separate from each other.

33. Once we have already held so, it is necessitous to understand what is exactly meant by administration. 'Administration' has been defined in Black's Law Dictionary as follows:

> *"Administration -*
>
> *Management or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like. In public laws, the administration of government means the practical management and direction of the executive department, or of the public machinery or functions, or of the operations of the various organs or agencies. Direction or oversight of an office, service, employment. Greene vs. Wheeler, C.C.A. Wis., 29 F.2d 468, 469. The term 'administration' is also conveniently applied to the whole class*

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of the public functionaries, or those on charge of the management of the executive department."

34. In this context, we may profitably produce a paragraph from *Ram Mohan Rao vs. Endowments Commissioner in Karnataka, Bangalore and another,* AIR 1989 Karnataka 192:

> *"20. The expression 'administration' signifies the Government of the day or the machinery of the government which implements the Government policy and the word 'policy' connotes the formation of a general line or course of action – the idea of leadership and the taking of a major decision on a matter of discretion. And administration involves the execution of the policy according to general principles (Garner's Administrative Law.)*

35. In this context, we may refer with profit to the Constitution Bench decision in *State of Kerala v. Very Rev. Mother Provincial,* AIR 1970 SC 2079, wherein, while dealing with the facet of administration in minority institutions, it has been held thus:

> *"9. The next part of the right relates to the administration of such institutions. Administration means 'management of the affairs of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."*

36. In *T.M.A. Pai Foundation and Others v. State of Karnataka and Others,* AIR 2003 SC 355, it has been held as under:

> *"Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30."*

37. In view of the aforesaid enunciations of law, the term 'administration' is of wide expanse and indubitably includes administration of an institution or organization which basically relates to supervision of the management or performance of the executive duties of institution, business or the like.

38. In the case at hand, the petitioner had worked for 14 years as an executive in Informatics Computer System. The said assertion has not been undisputed.

She was also the Branch Manager of the Bhopal branch of ICS. When there is assertion that she had worked as an executive in Informatics Computer System, there can be no scintilla of doubt that she had worked as an executive relating to affairs of the said institution. That apart, as is evincible from the resume, she was associated with several organisations working in the field of education and women and consumer/investor protection. The said aspect has also gone uncontroverted. Thus, she, on the first count meets the eligibility criteria. That apart, the second count also goes in her favour.

39. In view of the aforesaid analysis and regard being had to the social benefit oriented legislation, the schematic rationalisation and the legislative intendment, it appears necessitous to appoint members from various walks of life which also includes a woman as a Member of the Commission. Keeping in view the concept of quo warranto and its fundamental technical nature and regard being had to the conceptual facet of administration and the resume of the respondent No.4, we find that she meets the eligibility criteria and cannot be regarded as an usurper of a public office.

40. Ex consequenti, there is no substratum in the writ petition and accordingly, it has to pave the path of inevitable dismissal which we direct. However, in the peculiar facts and circumstances of the case, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 2249
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari
30 March, 2009*

MAYA LALCHANDANI (MRS.) & ors. ... Petitioners
Vs.
BOARD OF REVENUE & ors. ... Respondents

Land Revenue Code, M.P. (20 of 1959), Sections 32 & 43 - *Inherent powers of Revenue Court - Powers can be exercised within Code itself and not beyond the Code - Revenue authority does not have the power to grant injunction - Petition allowed.* (Para 4)

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 32 व 43 – राजस्व न्यायालय की अन्तर्निहित शक्तियाँ – शक्तियों का प्रयोग स्वयं संहिता के अन्तर्गत ही किया जा सकता है न कि संहिता के परे – राजस्व प्राधिकारी को व्यादेश अनुदत्त करने की शक्ति नही है – याचिका मंजूर।

Ravish Agrawal with *Abhishek Sen,* for the petitioners.
T.S. Ruprah, Addl.A.G., for the respondent Nos.1 to 4.
Rajendra Tiwari with *T.K. Khadka,* for the respondent No.5.

*W.P. No.1687/2004 (Jabalpur)

JUDGMENT (ORAL)

The Judgment of the Court was delivered by R.S. GARG, J. :–The petitioners being aggrieved by order dated 23.12.2003 passed by the learned President, Board of Revenue in Appeal Case No.A/661-PBR/2003 have filed this petition submitting interalia that the Board of Revenue was obliged to decide the matter in accordance with the Rules framed under Section 109/110 of the M.P. Land Revenue Code and Revenue Board had no jurisdiction to issue injunction till disposal of the dispute relating to the title.

2. Shri Agrawal, learned counsel for the petitioners, after taking us through Rule 32 of the Rules framed under Section 109/110 of the M.P. Land Revenue Code (referred to as 'Code') submitted that when ever a question relating to title is raised then summary enquiry is to be made by the competent revenue authority and on the strength of the findings orders have to be passed in favour of the person best entitled for mutation.

3. Shri Tiwari, learned counsel for the respondent no.5 however, submitted that the Board of Revenue in exercise of its powers under Section 32 read with Section 43 of the M.P. Land Revenue Code could issue such a direction as the Board of Revenue was of the opinion that there being complicated questions of title being involved in the matter the parties should be asked to go to the Civil Court.

4. After going through the order passed by the learned President, Board of Revenue and taking into consideration the legal provisions, we are of the opinion that the directions issued in paragraph 7 of the order passed by the Board of Revenue cannot be allowed to stand. Section 32 of the Land Revenue Code talks of the inherent powers of the Revenue authorities while Section 43 talks of applicability of the Code of Civil Procedure. It is to be seen from Section 32 that nothing in the Land Revenue Code shall be deemed to limit or otherwise affect the inherent power of the Revenue Court to make such orders as may be necessary to meet the ends of justice or as may be necessary to prevent the abuse of the process of Court. Section 43 simply provides that unless otherwise expressly provided in the Code, the procedure laid down in the Code of Civil Procedure shall, so far as may be, followed in all proceedings under the Code. Section 43 in no case would authorize a revenue authority to grant an injunction. Section 43 simply provides that the procedure laid down in the Code of Civil Procedure so far as may be followed in all proceedings under the Code. It is also to be seen from the provisions of the Code of Civil Procedure that an injunction can be granted only by Civil Court and by none else. Section 32 of the M.P. Land Revenue Code only talks of the inherent powers of the Revenue Courts where they are required to make such order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. The powers under Section 32 can

be exercised within the Code itself and not beyond the Code. If the revenue authority does not have the power to grant injunction then the Board of Revenue also could not grant injunction.

5. Taking into consideration the totality of the circumstances and the provisions of law, we set aside the order passed by the learned President, Board of Revenue and remand the matter back to the said Court for deciding the matter in accordance with law and the observations made by us.

6. The contesting respondent shall appear before the President, Board of Revenue on 27.4.2009 along with a copy of this order. The Board of Revenue shall decide the matter preferably within three months from the date of appearance of the parties.

7. The petition is allowed. There shall be no order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 2251
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
9 April, 2009*

DEVENDRA MINERALS (M/S) .... Petitioner
Vs.
STATE OF M.P. & ors. .... Respondents

Constitution, Article 226 - *Contract - Tender for purchase of minerals - Petitioner despite extension of time failed to lift quantity of mineral allotted - Other joint venture companies were offered to carry out the work and one of the offer being appropriate one was accepted - Except petitioner no offeree challenged the action - Held - It can not be said that without calling any offer from other companies which were ready to work in joint venture work was allotted - Action of allotment not arbitrary - Petition dismissed.* (Paras 11 to 13)

संविधान, अनुच्छेद 226 – संविदा – खनिजों के क्रय के लिए निविदा – याची समय बढ़ाए जाने के बावजूद आवंटित खनिज की मात्रा उठाने में विफल रहा – अन्य सहउद्यम कम्पनियों को कार्य के निष्पादन का प्रस्ताव दिया गया और उनमें से एक प्रस्ताव समुचित होने से स्वीकार किया गया – याची के सिवाय अन्य किसी प्रस्तावगृहीता ने कार्यवाही को चुनौती नही दी – अभिनिर्धारित – यह नही कहा जा सकता कि अन्य कम्पनियों से कोई प्रस्ताव आमंत्रित किये बिना, जो सहउद्यम में कार्य करने को तैयार थीं, कार्य आवंटित किया गया – आवंटन की कार्यवाही मनमानी नही – याचिका खारिज।

Cases referred :
AIR 1979 SC 1628, AIR 1980 SC 1992, (2003) 1 SCC 341, (2007) 8 SCC 1, (2006) 10 SCC 1.

*W.P. No.6377/2006 (Jabalpur)

D.K. Dixit, for the petitioner.
Deepak Awasthi, G.A., for the respondent No.1.
R.S. Jaiswal with *Manoj Kushwah,* for the respondent Nos.2 & 3.
Piyush Dharmadhikari, for the respondent No.4.

ORDER

The Order of the Court was delivered by **R.K. Gupta, J.** :–The petitioner, a partnership firm engaged in the business of minerals and mining operations, has filed two separate writ petitions being W.P. No.6377/2006 and W.P. No.12011/2006. The main reliefs which are prayed for in W.P. No. 6377/2006 are reproduced as under:

(i) To command the respondents No.1,2, 3 to stop all illegal activities including excavation and sale of the minerals at Kari Mines, Dist. Tikamgarh by issuance of an appropriate writ and/or direction;

(ii) To command the respondents No.1,2,3 to restrain the respondent No.4 from the work of excavation at Kari Mines District Tikamgarh and also from dealing with the excavated minerals by issuance of an appropriate writ and/or direction;

(iii) To command the respondents No.1,2, 3 to sell the excavated minerals as per the established procedure and law and also to consider the application of the petitioner whereby he is ready to purchase the minerals at the higher rate to the extent of 10% which is being received as on today by the respondent No.2 & 3 by issuance of an appropriate writ and/or direction;

(iv) To command the respondent No.1 to enquire into the illegalities which have been committed till date by the respondents No.2, 3 & 4 and to deal with them as per law by issuance of an appropriate writ and/or direction.....;

The reliefs which are prayed for in W.P. No. 12011/2006 are reproduced as under :

(i) To command the respondents to start the tender process immediately inviting tenders for the sale of minerals of the Kari Mines and to award the tender to the successful tenderer by issuance of an appropriate writ and/or direction;

(ii) To restrain the respondent no.2 from carrying out any operations at Kari Mines till the completion of the tender process by issuance of an appropriate writ and/or direction;

(iii) To command the respondent no.1 to make an enquiry into the matter in respect to the alleged joint venture of the

respondent no.2 with M/s Katni Bauxite Private Limited and its offer for purchase of the minerals and also about the cancellation of the tender process and to deal with the same as per law by taking proper action in the matter by issuance of an appropriate writ and/or direction..."

2. From the aforesaid reproduction of the reliefs it is discernible that the reliefs which are prayed for in both the petitions are interrelated and the questions of fact and law involved in the petitions also being identical, both the petitions are heard together and a common order is passed.

3. For the sake of convenience the facts of the case are referred to from W.P. No.6377/2006, which state that the M.P. State Mining Corporation Ltd., the second respondent, was granted mining lease for extraction of Pyrophyllite and Diaspore by the State Government over an area of five hectares in village Kari of District Tikamgarh. Tenders were invited by the second respondent for purchase of Pyrophyllite material and pursuance thereof petitioner had submitted its tender on 28.1.2003. The tender of the petitioner was accepted by the second respondent vide order dated 7.2.2003 (Annexure P-1) for purchase of Pyrophyllite from the Kari Diaspore Pyrophyllite mines of the Corporation to the tune of Rs.3300 tons at the rate of Rs.351/per ton. The said order clearly stipulated that the entire quantity of Pyrophyllite was to be lifted within a period of 90 days and royalty/ commercial tax/sales tax and all other relevant taxes, if applicable, were payable additionally at the approved rates. The order dated 7.2.2003 also envisaged that all terms and conditions of the tender notice dated 28.1.2003 were applicable. Thereafter, another tender was floated by the second respondent for purchase of Pyrophyllite Grade-II and the petitioner had submitted his bid on 25.8.2003, which was also accepted by the respondents for about 2000 tons of Pyrophyllite Grade-II at the rate of Rs.529/- on the terms and conditions envisaged in the letter of acceptance dated 2.9.2003 (Annexure P-2). The contention of the petitioner is that the petitioner had completed the aforesaid work and had lifted the whole material under the aforesaid tenders but thereafter the respondents No.2 and 3 did not invite any tender and, instead, granted the material/lease of the Kari mines to the fourth respondent i.e. M/s Katni Bauxite Ltd. in the year 2005. According to the petitioner, he made an application, Annexure P/3, to the third respondent for lifting the entire material of the mines @10% above the rates of the fourth respondent to whom the work was allotted but to no avail. In this background, the petitioner by filing the petitions has prayed for issue of directions to the respondents to stop all illegal activities in relation to Kari Mines of the respondent Nos. 1 and 2.

4. On the other hand, the respondents No.2 and 3 by filing their reply have stated in para 2 of their return that in pursuance of order dated 7.2.2003 (Annexure P-1) for purchase of 3300 tone Pyrophyllite @Rs.351/per ton the petitioner had failed to lift the material within the stipulated period of 90 days but took six months

to lift the same. Thereafter also when the petitioner was granted order on 2.9.2003 (Annexure P-3) for purchase of 2000 tone of Pyrophyllite @ Rs.529/- per ton from the mines of respondent No.2 he took about six months as against the prescribed period of 60 days to lift the material and thus, the petitioner had not carried out the work of lifting the minerals as per the work order and delayed the same. It is further submitted by them that the respondent No.2, Corporation has entered into a joint venture agreement with M/s Katni Minerals Pvt. Ltd. and has set up a joint venture company under the name and style as M/s Katni Bauxite Pvt. Ltd. for bauxite mining and the respondent No.4 being a joint venture company has offered to purchase Diaspore mineral @ Rs.755.00 per ton and Pyrophyllite mineral @Rs.840.00 per ton and also agreed to pay royalty and other taxes separately which is more than the offer given by the Corporation. The respondents have accepted the offer of respondent No.4 and order dated 14.1.2005 (Annexure R-1) was placed on the above rates for a period of one year specifying that if the work was found satisfactory the same shall be extended by enhancing 6% of the sale price. On this basis it is submitted on behalf of the respondents that the Corporation is bound to give preference to the offer given by the joint venture company and as such there was no necessity to call any tender. It is further submitted on their behalf that the petitioner is not ready to purchase the material at the rates given by the respondent No.4, therefore, the act of the Corporation cannot be said to be illegal.

5. The respondent No.1, the State Government, by filing their return has simply adopted the return filed by the respondents No.2 and 3 and has prayed for dismissal of the writ petition.

6. We have heard learned counsel for the parties and perused the record and now we proceed to examine the contentions put forth on behalf of the parties.

7. While arguing the matter, learned counsel for the petitioner informed us that after the interregnum period the respondent No.2 had auctioned the mines in the year 2008 by inviting the tenders and against the same the petitioner has no objection and the present dispute relates only to the interregnum period. It is submitted on behalf of the petitioner that the respondent No.2 arbitrarily and by adopting unfair means had given contract to the respondent No.4 in the interregnum period. Learned counsel for the petitioner relied on the decision passed by the Apex Court in *Ramana Dayaram Shetty v. The International Airport Authority of India and others*, AIR 1979 SC 1628 and referring to para-11 of the same he submitted that the Apex Court has held that in a welfare State, the Government has to regulate and dispense special services and the State being provider of large number of benefits, without adopting a fair method and procedure could not have given the contract in favour of the respondent No.4.

8. Per contra, the learned senior counsel appearing for the respondents No.2

and 3 relied upon the judgment passed by the Apex Court in *M/s Kasturi Lal Lakshmi Reddy v. The State of Jammu & Kahmir and another,* AIR 1980 SC 1992 and on the authority of the same submitted that the Mines Act, 1952 does not provide any rates for selling of the excavated material and it is also submitted that keeping in view the facts and circumstances of the case, the contract which has been entered into with the respondent No.4 is a proper one. It is further contended that when the petitioner was given the work of lifting the excavated material by inviting tender and a condition was imposed that the said excavated mineral shall be lifted within 60 days, he failed to lift the same within the stipulated time, therefore, extension was granted and during the extension period also the petitioner could not lift the complete material. On the basis of the same, it is submitted by the respondents that the petitioner had failed to perform his own obligation under the contract by not lifting the material within the stipulated period even though initially the period was extended. On the other hand, when contract was entered into with the respondent No.4 not only better rates have been offered by respondent No.4 but it has also performed the contract work satisfactorily by lifting the considerable quantity within the stipulated period and quantity as such lifted was more than what was lifted by the petitioner. Learned senior counsel for the respondents No.2 and 3 submitted that keeping in view the fairness of the action and also after considering the totality of the circumstances, the allotment of contract in favour of respondent No.4 fulfills the requirement not only of reasonableness but also of public interest. To bolster his contentions, learned senior counsel appearing for the respondents No.2 and 3 took us through paragraphs 11, 12 and 14 of the decision rendered by the Apex Court in *M/s Kasturi Lal's case* (supra), which are reproduced as under:-

> "11. So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largesse. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner, it has to be exercised for the public good. Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest. Every action

taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largesse, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

12. Now what is the test of reasonableness which has to be applied in order to determine the validity of governmental action. It is undoubtedly true, as pointed out by Patanjali, Sastri J., in *State of Madras v. V. G. Row* (1952) SCR 597 : (AIR 1952 SC 196), that in forming his own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judge participating in the decision, would play an important part, but even so, the test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The concept of reasonableness in fact pervades the entire constitutional scheme. The interaction of Articles 14, 19 and 21 analysed by this Court in *Maneka Gandhi v. Union of India,* (1978) 2 SCR 621 : (AIR 1978 SC 597) clearly demonstrates that the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights and, as several decisions of this Court show, this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles. It has been laid down by this Court in *E. P. Royappa v. State of Tamil Nadu,* (1974) 2 SCR 348 : (AIR 1974 SC 555) and *Maneka Gandhi's case* (supra) that Article 14 strikes at arbitrariness in State action and since the principle of reasonableness and rationality, which is legally as well as philosophically an essential element of equality or non-arbitrariness, is projected by this article, it must characterise every governmental action, whether it be under the authority of law or in exercise of executive power without making of law. So also the concept of reasonableness runs through the totality of Article 19 and requires that restrictions on the freedoms of the citizen, in order to be permissible, must at the best be reasonable. Similarly Art. 21 in the full plenitude of its activist magnitude as discovered by Maneka Gandhi's case, insists that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law and such procedure must be reasonable, fair

and just. The Directive Principles concretise and give shape to the concept of reasonableness envisaged in Articles 14, 19 and 21 and other articles enumerating the fundamental rights. By defining the national aims and the constitutional goals, they set forth the standards or norms of reasonableness which must guide and animate governmental action. Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily, subject to any constitutional or legal inhibitions or other overriding considerations, qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would prima facie incur the reproach of being unreasonable.

14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the Court would have to decide whether the action of the Govt. is reasonable and in public interest. But one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is

wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the Court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the governmental action. This is one of the most important functions of the Court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the Court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the Court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides.

9. Mr. Jaiswal, learned senior counsel appearing for respondent No.2 and 3 further placed reliance on the decision of the Apex Court rendered in *Rayalaseema Paper Mills Ltd. and another v. Government of A.P. and others,* (2003) 1 SCC 341. He submitted that in this decision the Apex Court also approved the action of the State Government wherein an agreement was entered into by the State Government with a private Paper Mill for supply of certain soft and hardwood to them every year for a specified period for manufacture of paper. In that case also the question of judicial scope under Article 226 of the Constitution of India coupled with the matter with regard to price fixation including the tenure of the agreement was considered. The relevant paragraphs 14 and 15 from the said decision are quoted as below:-

"14. Before we enter the discussion, it is made clear that the determination of rates of royalty for supply of forest produce to paper mills is not governed by any statute or a statutory order.

The Government while entering into the agreement with the paper mills had undertaken to supply a certain specified quantity of wood each year for a period of 20 years. The Government had not assured the mills that it will supply bamboo and other forest produce required by them at a particular rate. Nor was there an agreement between them with respect to the manner in which the rates of royalty would be determined. There was no assurance that the mills would be consulted or associated while fixing the rates of royalty. Even where the matter is governed by a statute or a statutory order, the scope of judicial enquiry is limited. This Court in *Union of India v. Cynamide India Ltd.* examined the scope of judicial interference in the matters of price fixation and observed: (SCC pp. 734-35, paras 4-6)

> "4. We start with the observation, 'Price fixation is neither the function nor the forte of the Court'. We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the legislature has decreed the pricing policy and prescribed the factors which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not re-evaluate the considerations even if the prices are demonstrably injurious to some manufacturers or producers. The Court will, of course, examine if there is any hostile discrimination. That is a different 'cup of tea' altogether.'
>
> 5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal

rate - in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity.

6. Occasionally, the legislature directs the subordinate legislating body to make 'such enquiry as it thinks fit before making the subordinate legislation. In such a situation, while such enquiry by the subordinate legislating body as it deems fit is a condition precedent to the subordinate legislation, the nature and the extent of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for 'such enquiry as it thinks fit' is generally an enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information from all and whatever source and not intended to vest any right in anyone other than the subordinate legislating body. It is the sort of enquiry which the legislature itself may cause to be made before legislating, an enquiry which will not confer any right on anyone."

15. This Court was examining the scope of judicial scrutiny in the matters of price fixation where it was governed by statutory provisions. The scope of judicial scrutiny would be far less where the price fixation is not governed by the statute or a statutory order. Where the legislature has prescribed the factors which should be taken into consideration and which should guide the determination of price, the Courts would examine whether the considerations for fixing the price mentioned in the statute or the statutory order have been kept in mind while fixing the price and whether these factors have guided the determination. The Courts would not go beyond that point. In the present appeals, there is no law, or any statutory provision laying down the criteria or the principles which must be followed, or which must guide the determination of rates of royalty. No doubt, any arbitrary action taken by the State would be subject to the scrutiny by the Courts because arbitrariness is the very antithesis of rule of law. But this

does not mean that this Court would act as an appellate authority over the determination of rates of royalty by the Government. Government is the owner of the products. While it had agreed to supply a particular quantity every year for specified period, it had never agreed to supply at a particular rate; not did it stipulate with the mill owners the basis upon which it would determine the rates of royalty. It is open to the Government to fix such price as it thinks appropriate having regard to public interest, which inter alia, may include interest of revenue, environmental, ecology, the need of mills and the requirements of other consumers. The price is not to be fixed keeping in mind the requirements of the mills alone."

10. The principles of judicial review have been considered by the Apex Court in its decision rendered in *Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others*, (2007) 8 SCC 1 wherein their Lordships of the Apex Court after taking into consideration its earlier decision rendered in *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1, held in paragraph 39 as under:-

"39. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger pubic interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles, laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty

that norm/standard should be clear. As stated above "certainty" is an important aspect of the rule of law. In Reliance Airport Developers the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided."

11. In the light of the aforesaid decision, the action on the part of the respondents with regard to fairness in the action has to be taken into account by applying the basic test whether there is any infirmity in the decision-making process and not in the decision itself. In the present case, it is seen that the respondent No.4 while submitting its return has filed a document, Annexure R-1. This is the order issued by the second respondent to the respondent No.4 on 14.1.2005 and relates to allotment of mine under the joint venture. This order itself indicates that offers from different joint venture companies were called and the offer which was submitted by the respondent No.4 under the joint venture was accepted and accordingly the work of lifting the mineral was allotted to the respondent No.4. On the basis of the same, it cannot be said that the respondent No.2 after taking the work from the petitioner was interested to allot the work to respondent No.4 only. There had been offers given to other companies to carry out the work of removing the excavated minerals under the joint venture. No other company has come forward to challenge the acceptance of offer of respondent No.4 by the respondent No.2 and it is only the petitioner who has agitated the matter. It is also not a case of the petitioner that it was ready to work with the respondent No.2 in a joint venture.

12. The petitioner has also filed rejoinder and the only objection on its part seems to be that no fresh tender was invited in the interregnum period after the two contract works which were allotted to the petitioner were completed by him and without calling tenders the work was allotted to the respondent No.4.

13. To consider the submission so put forth on behalf of the petitioner, it would be further appropriate to judge the action of the respondents by the test of reasonableness and public interest, as it has been held in *M/s Kasturi Lal's case* (supra). It is seen that earlier when the petitioner was granted the contract work, the petitioner failed to perform its contract within the stipulated period despite there having been extension granted by the respondent No.2. Once the petitioner had failed to discharge its contractual obligation, the other joint venture companies which were registered with the respondent No.2 were offered to carry out the work of and one of the offeree was respondent No.4 whose offer, being appropriate one, was accepted. It cannot be said that without calling any offer from the other companies which were ready to work in joint venture the respondent No.4 has been allotted the work.

14. In view of the aforesaid, we are of the view that it is not a case where the respondent No.2 has acted arbitrarily.

15. Shri Dixit, learned counsel for the petitioner has invited our attention to the order dated 30.7.1999/5.8.1999 (Annexure P/8) by which the lease of the Kari Mines for excavation of the minerals was granted to the second respondent. He submitted that the condition No.8 of the order Annexure P/8 clearly stipulates that the mines so allotted to the respondent No.2 shall not be re-allotted to any other person or institution and the excavation shall only be done by the Corporation otherwise the permission shall be cancelled. It is further contended that the respondent No.4 is excavating the minerals and also dealing with the same and it is alleged that the action of the respondents No.2 and 4 in connivance with each other is illegal and violative of the terms and conditions laid down in the order, Annexure P/8.

16. While we minutely consider the submission of learned counsel for the petitioner with regard to condition No.8 of the order dated 30.7.1999/5.8.1999 (Annexure P-8) we do not find any material on record to show that in the joint venture with the respondent No.4 the respondent No.2 has permitted the respondent No.4 to carry out the mining operation. It is stated on behalf of the respondent No.2 that respondent No.4 has agreed to pay royalty other than the cost of excavated material. From the material on record, it is only gathered that the activities of respondent No.4 in a joint venture with the respondent No.2 are only restricted for the purposes of lifting the excavated material and the mining operations are being carried out by the respondent No.2. It does not mean that the mine has been transferred to the respondent No.4 and therefore, a joint venture agreement has been entered into by respondent No.2 with the respondent No.4.

17. Lastly, it is further put forth on behalf of the petitioner that an application was submitted under the Right to Information Act, 2005 on 31.1.2006 but it was returned and the respondent No.3 refused to give any information saying that it was confidential. The petitioner has filed the copies of correspondence between the petitioner and the respondent No.3 on record as Annexures P/4 to P/6. The petitioner has also submitted an appeal under the Right to Information Act to the respondent No.2 but it is stated that no decision has been taken.

18. The respondents No.2 and 3 in their return in para-7 have submitted that the appeal of the petitioner under the Right to Information Act, 2005 is not pending and same has been dismissed by order dated 2.5.2006 (Annexure R-3) in default of deposit of requisite fees. In this view of the matter, we do not find any illegality in the action of the respondents in this regard.

In view of the aforesaid discussion, we are of the considered opinion that no case for interference is made out and both the petitions stand dismissed accordingly.

Petition dismissed.

I.L.R. [2009] M. P., 2264

WRIT PETITION

Before Mr. Justice Sanjay Yadav

8 May, 2009*

NAVEEN KUMAR SOOD .... Petitioner

Vs.

STATE OF M.P. ... Respondent

Municipalities Act, M.P. (37 of 1961), Section 41-A - ***Removal of President or Chairman of a Committee - Opportunity of hearing*** - *Petitioner removed from the post of President on the ground that he does not belong to OBC and yet got elected on the basis of temporary caste certificate - Petitioner withdrew the application for grant of permanent caste certificate - Temporary caste certificate expired as there was no permanent caste certificate - Held - Petitioner appeared before authority and presented his case - Onus to prove that he belonged to OBC was on petitioner - Petitioner has failed to discharge the onus - Any amount of reasonable opportunity will not mitigate the factor that he does not belong to OBC - Petition dismissed.* (Paras 12 to 15)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41–ए – किसी समिति के अध्यक्ष या चेयरमेन का हटाया जाना – सुनवाई का अवसर – याची को अध्यक्ष के पद से इस आधार पर हटाया गया कि वह ओबीसी से सम्बद्ध नही है और अभी तक अस्थायी जाति प्रमाण पत्र के आधार पर चुना गया – याची ने स्थायी जाति प्रमाण पत्र प्रदान किये जाने का आवेदन वापस ले लिया – अस्थायी जाति प्रमाण पत्र समाप्त हो गया क्योंकि कोई स्थायी जाति प्रमाण पत्र नही था – अभिनिर्धारित – याची प्राधिकारी के समक्ष उपस्थित हुआ और अपना मामला पेश किया – यह साबित करने का भार कि वह ओबीसी से सम्बद्ध था याची पर था – याची भार उन्मोचित करने में असफल रहा – युक्तियुक्त अवसर की कोई मात्रा इस कारक में कमी नही करेगी कि वह ओबीसी से सम्बद्ध नही है – याचिका खारिज।

Cases referred :

AIR 1960 SC 415, (1984) 1 SCC 43.

Abhijit Bhowmik, for the petitioner.

Jaideep Singh, G.A., for the respondent/State.

Sheel Nagu & J.K. Pillai, for the intervenors.

O R D E R

SANJAY YADAV, J. :–Petitioner challenges the order dated 6-3-2007 passed by the State Government purportedly in exercise of powers under section 41-A of the M. P. Municipalities Act, 1961 (hereinafter for short 'Act of 1961') whereby the petitioner was removed from the post of President, Municipal Committee, Junnardeo. Section 41-A of the Act of 1961 contemplates :

"41-A. Removal of President or Chairman of a

*W.P. No.4115/2007 (Jabalpur)

Committee. (1) The State Government may, at any time, remove a President, Vice President or a Chairman of any Committee, if his continuance as such is not, in the opinion of the State Government desirable in public interest or in the interest of the Council or if it is found that he is incapable of performing his duties or is working against the provisions of the Act or any rules made thereunder

(2) The State Government may, while ordering the removal under sub-section (1), also order that such President, Vice President or Chairman of any committee shall be disqualified to hold such post for the next term:

Provided that no such order under this Section shall be passed unless a reasonable opportunity of being heard is given.

2. The removal of the petitioner is on the ground that he does not belong to the other backward category and yet got elected as President on the basis of temporary Caste Certificate by declaring himself to be belonging to a "Khati" caste.

3. The facts briefly are that the petitioner contested election for the post of President, Municipal Committee, Junnardeo, held in November, 2004. The said post was reserved for other backward class category. The petitioner contested on the anvil of temporary caste certificate issued in his favour on 27-10-2004.

4. A show cause notice dated 29-4-2006 under section 41-A of the Act of 1961 was issued to the petitioner calling upon him as to why he be not removed from the post of President, Municipal Committee, Junnardeo, having contested the election on the basis of bogus caste certificate. This show cause notice though was initially stayed in Writ Petition No. 7453/06 by order dated 20-5-2006 but the stay was subsequently vacated on 5-12-2006 and the State Govt. was directed to decide the matter. Consequent thereupon, the State Govt. vide impugned order dated 6-3-2007 removed the petitioner from the post of President, Municipal Committee, Junnardeo. It is this order which is being challenged in the present writ petition.

5. Few facts existing prior to the issuance of show cause notice would be necessary for just appreciation.

6. The order of issuance of Caste Certificate and the election of the petitioner was subjected to challenge by the candidates who lost the election forming subject matter of Case No. 1/04,3/05 and 4/05 in the Court of First Additional District Judge, Chhindwara, whereas, case bearing No. 1/04 is allegedly dismissed for want of prosecution by order dated 30-7-2005; other loses, viz., 3/05 and 4/05 are reportedly pending. In the meantime, the case regarding grant of permanent Caste Certificate bearing Rev. Case No. 122/B/21/04-05 instituted at the instance of the petitioner was processed by the Sub Divisional Officer, Revenue, Junnardeo, who by his order dated 5-9-05 rejected the plea of the petitioner for grant of permanent

Caste Certificate thus refusing to acknowledge petitioner as belonging to a "Khati" caste. The order was passed on the basis of the enquiry conducted by the Tahsildar. The order spells out that "प्रकरण में प्रस्तुत समस्त दस्तावेजों एवं तहसीलदार जुन्नारदेव के द्वारा प्रस्तुत जांच प्रतिवेदन एवं प्रकरण के गुण दोषों पर विचार उपरान्त आवेदक नवीन कुमार खुद की जाति भखाती होना नहीं पाया जाता है। उक्त आवेदक का स्थाई जाति प्रमाण पत्र का आवेदन खारिज होकर दाखिल दफ्तर हों।"

7. Petitioner challenged the order dated 5.9.2005 in Writ Petition No. 10691/05. The said writ petition was decided finally on 8-5-2006 in the following terms :

> "To appreciate the aforesaid contentions, it may be seen that the petitioner was an applicant for getting the caste certificate before the Sub Divisional Officer. Though a provisional caste certificate was issued to the petitioner but when the petitioner during course of the enquiry moved to the authority for dismissal of the application, it was not necessary for the authority to decide the case on merits. Aforesaid right is an unfettered right of the petitioner to get his application dismissed at any stage of proceeding. What was the effect of the aforesaid dismissal, it ought to have been seen by the authority in accordance with law. So far as right of the petitioner for withdrawal or dismissal of the application is concerned, it is unfettered right of the petitioner. Until and unless such prayer is made, aforesaid authority ought to have decided the matter on merits. When the petitioner made such prayer for dismissal of the application for grant of permanent caste certificate, the authority ought to have dismissed the application and erred in proceeding with the matter. The consequences of dismissal of the aforesaid application ought to have been considered by the concerned authority in accordance with law but merely on the ground that the petitioner contested the election on the strength of temporary caste certificate will not be a ground to deny the dismissal of the application as prayed by the petitioner.
>
> In view of the aforesaid, this petition is allowed. Order Annexure P/21 dated 5-9-2005 passed by the S.D.O. Junnardeo is hereby set aside and the application filed by the petitioner for grant of permanent caste certificate stands dismissed as prayed by the petitioner vide Annexure P/12 and P/19."

8. The outcome of the aforesaid order was that the temporary caste certificate issued in favour of the petitioner on 27-10-2004 came to expire after six months and there was no permanent caste certificate in favour of the petitioner that he belonged to "खाटी"caste.

9. The challenge mainly is on the ground that the petitioner is not afforded a

reasonable opportunity of hearing as a result whereof the petitioner did not get the occasion to bring forth the facts that the petitioner belongs to a caste "Khati" and the caste certificate was issued in favour of the petitioner in March 1996, which the petitioner deposited with the Election Officer while he was contesting election for Member/Director of Adim Jati Sewa Sahkari Samiti Maryadit, Dungaria, tahsil Junnardeo, district-Chhindwara. Non-grant of reasonable opportunity of hearing, it is urged, has prejudiced the cause of the petitioner to seek justice and the order of removal based on such defective proceeding is not tenable in the eyes of law.

10. The respondents on the other hand refute the averments that the petitioner was not given a reasonable opportunity of hearing. It is urged that the petitioner was not a member belonging to the other backward class and thus was not eligible to contest the election of President, Municipal Committee, Junnardeo, reserved for OBC category and yet in order to contest the election as an OBC candidate he obtained the certificate of caste "Khati", a provisional one, valid for six months. It was incumbent upon him to have obtained the permanent caste certificate. Instead the petitioner withdrew the proceedings. It is further contended that the matter whereunder the provisional caste certificate issued was processed, the same culminated into an order dated 5-9-2005 wherein it was held that the petitioner does not belong to a khati caste and his application was rejected. Thus, it is urged, that petitioner being not a member of the "khati" caste was rightly held to be not entitled to hold the post of President, Municipal Committee, Junnardeo. It is, therefore, stated that the order impugned is neither perverse nor bad in law.

11. Considered the rival submissions and perused the respective pleadings and record.

12. True it is that the order dated 4-5-2005, whereby, the claim of the petitioner for grant of certificate of "khati" caste was rejected, succumbed to the order dated 8-5-2006 passed in Writ Petition No. 10691/05, but the order rested the onus on the petitioner to prove that he belongs to "khati" caste. This onus, the petitioner has failed to discharge, and any amount of reasonable opportunity will not mitigate the factor that does not belong to Khati caste. The petitioner when subjected to show cause notice, about the credibility of a caste certificate which the petitioner states that he obtained "under misapprehension of law", tenders no explanation and in fact makes no effort to negative the same. He has thus to blame himself as he failed to discharge the burden that he belongs to an other backward caste.

13. In *M/s. Fedco (P) Ltd. And another v. S.N. Bilgrami and others* (AIR 1960 SC 415), their Lordships were pleased to observe:

> "(8) The requirement that a reasonable opportunity of being heard must be given has to elements. The first is that an opportunity

to be heard must be given; the second is that this opportunity must be reasonable. Both these matters are justiciable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable. In the present case, a notice to show cause against the proposed order was given; it was stated in the notice that the ground on which the cancellation was proposed was that the licences had been obtained fraudulently; and later on a personal hearing was given. It must therefore be held that the requirement that an opportunity to be heard must be given was satisfied....."

14. In *K.L. Tripathi v. State Bank of India* (1984) 1 SCC 43, their Lordships were pleased to observe:

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

15. In the case at hand it is observed that the petitioner had challenged the show cause notice issued to him under section 41-A of the Act of 1961 in W. P. No. 7453/06 wherein initially a stay was granted but subsequently by order dated 5-12-2006 the same was vacated. The petitioner thereafter was called upon to appear on 1-2-2007 and 6-2-2007. The petitioner appeared on 6-2-2007 and presented his case. In the teeth of these facts the arguments of the petitioner that he was not afforded an opportunity of hearing cannot be accepted. The petitioner had ample opportunity to represent his case. Furthermore, the impugned order being based on cogent material and facts on record does not call for any interference.

16. Consequently, petition fails and is hereby dismissed. However, no costs.

Petition dismissed.

I.L.R. [2009] M. P., 2269
WRIT PETITION

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

15 May, 2009*

ASSOCIATION OF PRIVATE DENTAL & MEDICAL COLLEGES ... Petitioner

Vs.

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

A. **Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 3(d), 6 & 7, Constitution, Articles 19 & 226 - *Constitutional validity - Admission in private unaided professional educational institution on the basis of common entrance test to be conducted by State or by any agency authorized by State - Held - Provisions do not violate fundamental right under Article 19 or interfere with autonomy of private unaided professional educational institutions.*** (Paras 27 to 34)

क. निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 3(डी), 6 व 7, संविधान, अनुच्छेद 19 व 226 – संवैधानिक विधिमान्यता – राज्य द्वारा या राज्य द्वारा प्राधिकृत किसी एजेंसी द्वारा संचालित की जाने वाली सामान्य प्रवेश परीक्षा के आधार पर निजी गैर सहायता प्राप्त व्यावसायिक शैक्षणिक संस्थान में प्रवेश – अभिनिर्धारित – उपबंध अनुच्छेद 19 के अधीन मूलभूत अधिकार का अतिक्रमण या निजी गैर सहायता प्राप्त व्यावसायिक शैक्षणिक संस्थान की स्वायत्तता में हस्तक्षेप नहीं करते।

B. **Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Section 3(d) - *Legislature in its wisdom thought that responsibility of conducting common entrance test should be entrusted to State Government or agency authorized by State - Held - State Government's order authorizing VYAPAM to conduct common entrance test for admission to professional courses, not open to challenge.*** (Para 35)

ख. निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धारा 3(डी) – विधायिका ने अपने विवेक से विचार किया कि सामान्य प्रवेश परीक्षा संचालित करने की जिम्मेदारी राज्य सरकार या राज्य द्वारा प्राधिकृत एजेंसी को सौंपनी चाहिए – अभिनिर्धारित – व्यावसायिक पाठ्यक्रमों में प्रवेश के लिए सामान्य प्रवेश परीक्षा संचालित करने के लिए व्यापम को अधिकृत करने वाले राज्य सरकार के आदेश को चुनौती नहीं दी जा सकती।

C. **Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 4 & 9 - *Right***

*W.P. No.1975/2008 (Jabalpur)

to charge its own fee - Factors to be taken into consideration by committee while determining fee - Provisions of Ss. 4 & 9 do not violate this right. (Para 39)

ग. निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 4 व 9 – अपना स्वयं का शुल्क प्रभारित करने का अधिकार – शुल्क का निर्धारण करते समय समिति द्वारा विचार में लिये जाने वाले कारक – धारा 4 व 9 के उपबंध इस अधिकार का अतिक्रमण नही करते।

D. Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Section 8, Admission Rules, 2008, Rule 4(2), Private Medical and Dental Postgraduate Course Entrance Examination Rules, M.P. 2009, Rules 7 & 15(9) - *There is no reverse discrimination against the unreserved category candidates - Object of sequence of counselling is to ensure that unreserved category candidates participate in counselling at the end not only for the unreserved seats but also for those reserved seats which could not be filled up on account of non-availability of reserved candidates.* (Para 47)

घ. निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धारा 8, प्रवेश नियम, 2008, नियम 4(2), निजी चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2009, नियम 7 व 15(9) – अनारक्षित वर्ग के अभ्यर्थी के विरुद्ध कोई विपरीत विभेद नही – काउंसिलिंग के अनुक्रम का उद्देश्य यह सुनिश्चित करना है कि अनारक्षित वर्ग के अभ्यर्थी न केवल अनारक्षित सीटों के लिए बल्कि उन आरक्षित सीटों के लिए भी जो आरक्षित अभ्यर्थियों की अनुपलब्धता के कारण नही भरी जा सकीं, काउंसिलिंग में अंत में हिस्सा लें।

E. Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Sections 3(a) & 5, Private Medical and Dental Postgraduate Course Entrance Examination Rules, M.P. 2009, Rule 10 - *Eligibility* - *Permanent registration by M.P. Medical / Dental Council - Rule 10(2)(iii) ultra vires to Ss. 5 & 3 of Act.* (Paras 51 & 52)

ङ. निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धाराएँ 3(ए) व 5, निजी चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2009, नियम 10 – पात्रता – म.प्र. चिकित्सा/दंत परिषद द्वारा स्थायी पंजीयन – नियम 10(2)(iii) अधिनियम की धारा 5 व 3 के अधिकारातीत है।

Cases referred :

(1993) 1 SCC 645, (2002) 8 SCC 364, (2003) 6 SCC 697, (2005) 6 SCC 535, (2004) 4 SCC 311, (2007) 2 SCC 181, (1970) 2 SCC 417, (1990) 1 SCC 428, (1999) 2 SCC 343, (2005) 12 SCC 752, (1990) 1 SCC 613, AIR 1997 SC 128, (1996) 3 SCC 709, (2008) 2 SCC 254, (2008) 6 SCC 1, AIR 1956 SC 298, AIR 1961 SC 82, AIR 1963 SC 1947, (1969) 2 SCC 248, AIR 1957 SC 896, (1981) 2

SCC 600, (1984) 4 SCC 353, (1997) 9 SCC 495, (1973) 4 SCC 225, (1992) 3 SCC 339, (2005) 8 SCC 534, (1999) 7 SCC 120, (1988) 2 SCC 214, AIR 1964 SC 179, (2009) 1 SCC 1, AIR 2007 SC 71, 2004(3) MPLJ 82, AIR 1963 SC 649.

Rajendra Tiwari & V.K. Tankha, for the petitioner.

Sunil Gupta with *V.K. Shukla, Dy.A.G. & Samdarshi Tiwari, G.A.,* for the respondent Nos.1 & 2.

P.K. Kaurav, for the respondent No.3.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :–In this batch of writ petitions filed under Article 226 of the Constitution, the common questions which arise for decision are that how far is it permissible under the Constitution for the State to control and regulate admissions and fees in private unaided professional educational institutions in the State of Madhya Pradesh.

2. The background facts are that in *Unni Krishnan vs. State of Andhra Pradesh,* 1993 (1) SCC 645, a five Judges Bench of the Supreme Court held that there was no fundamental right to professional education which flows from Art. 21 of the Constitution but framed a scheme in the nature of guidelines which the appropriate Governments and recognising and affiliating authorities were to implement as conditions for grant of permission, recognition or affiliation under which the seats in professional colleges were to be divided into free seats and payment seats and a common entrance test was to be conducted by the State Government and the first 50% students in the merit list were to be admitted in free seats with nominal fees and the second 50% students in the merit list were to be admitted in payment seats and the fees payable for the payment seats were to take care of the costs of education of the professional college. This scheme of Unni Krishnan was implemented by the State Governments all over the country until in *T.M.A. Pai Foundation vs. State of Karnataka,* 2002 (8) SCC 364, eleven Judges Bench of the Supreme Court held that education will fall under the expression "occupation" in Art. 19(1)(g) of the Constitution and therefore a citizen has a fundamental right to establish and administer an educational institution and this right will include the right of the private educational institution to admit students and to charge its own fees from students and the decision in Unni Krishnan in so far as framing of scheme relating to grant of admission and fixing the fees was not correct. In T.M.A. Pai Foundation, however, the Supreme Court held that the admission procedure must be merit based transparent and non-exploitative and the fees to be charged from the students cannot be unreasonable and exorbitant. To ensure that admissions in Private Unaided Professional Educational Institutions is merit based, transparent and non-exploitative and that the fees charged are reasonable and non-exorbitant and there is no profiteering, a five Judges Bench

of the Supreme Court in *Islamic Academy of Education vs. State of Karnataka,* 2003(6) SCC 697, directed constitution of two Committees of State Government, each headed by sitting or retired High Court Judges to be nominated by the Chief Justice of the State, the Admission Committee which was to supervise and ensure that the test conducted for admission to Private Professional Colleges is fair and transparent and the Fees Committee which was to ensure that the fees proposed by the Private Unaided Professional Colleges are reasonable and there is no profiteering and no charging of capitation fee. Accordingly, the two Committees were constituted by the State Governments with retired High Court Judges as Chairmen of the Committees. On a reference made on certain questions, a seven Judges Bench of the Supreme Court in *P.A. Inamdar and others vs. State of Maharashtra and others,* 2005(6) SCC 535 again clarified the law as laid down by the eleven Judges Bench in *T.M.A. Pai Foundation* (supra) and observed inter alia that it is for the Central Government or the State Government in the absence of a Central legislation, to come out with a detailed well-thought-out legislation on the subject and that the State must act towards the direction. Accordingly, the State Legislature of Madhya Pradesh has enacted the M.P. Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 (for short 'the Act, 2007').

3. The Association of Private Dental and Medical Colleges of the State of Madhya Pradesh (for short "the Association") has challenged the provisions of the Act, 2007 as ultra vires the Constitution in W.P. No.1975/2008. Under Section 12 of the Act, 2007 the State Government has power to make rules and in exercise of such power, the State Government has made the Admission Rules, 2008 (for short 'the Rules, 2008'). The Association has also challenged the Rules, 2008 as ultra vires the Constitution and the Act, 2007 in W.P. No.9496/2008. Under the Scheme of the Act, 2007 and the Rules, 2008, admissions to private unaided professional educational institutions are to be based on merit determined in the common entrance test followed by centralised counselling by the State Government or any agency authorised by the State Government. The State Government issued orders on 28.2.2009 that the State Government shall conduct the common entrance test for admission to Postgraduate Medical and Dental Courses for the academic session 2008-09 through Madhya Pradesh Professional Examination Board (VYAPAM). The Association has challenged this order dated 28.2.2009 of the State Government authorising VYAPAM to conduct the common entrance test for admissions to Postgraduate Medical and Dental Courses for grant of admission for the academic session 2008-09 as illegal, arbitrary and contrary to the law as laid down in *T.M.A. Pai Foundation* and *P.A. Inamdar* (supra) in W.P. No.2764/2009.

4. Three Professional Colleges, Modern Dental College & Research Centre at Indore, R.D. Gardi Medical College at Ujjain and People's College of Dental

Sciences & Research Centre, Bhopal have filed W.P. No.2732/2009 challenging the provisions of the 2007 Act and the 2008 Rules as well as the order dated 28.2.2009 of the State Government authorising VYAPAM to conduct common entrance test for admissions to the Post Graduate Professional Medical and Dental Courses in the Private Professional Colleges in the State of Madhya Pradesh as ultra vires the Constitution. The State Government issued another order dated 5.3.2009 authorising VYAPAM to conduct the common entrance test for admissions to the graduate medical and dental courses in the private medical and dental colleges in the State of Madhya Pradesh. Guru Gobind Singh College of Dental Sciences & Research Centre, Burhanpur which claims to be a minority unaided professional educational institution college has filed W.P. No.2880/2009 challenging the vires of the Act, 2007 and the orders dated 28.2.2009 of the State Government and 5.3.2009 authorising VYAPAM to conduct common entrance tests for admissions to post-graduate and graduate medical and dental courses in the private medical and dental colleges in the State of Madhya Pradesh as ultra vires Article 30 of the Constitution.

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5. The State Government in exercise of its powers under Section 12 of the Act, 2007 has also framed the Madhya Pradesh Private Medical and Dental Postgraduate Course Entrance Examination Rules, 2009 (for short 'the 2009 Rules') and two private professional colleges, namely Modern Dental College & Research Centre, Indore and R.D. Gardi Medical College, Ujjain have filed W.P. No.3732/2009 challenging the 2009 Rules as ultra vires the Constitution. Three medical graduates residing in Bihar, Maharashtra and Rajasthan have also challenged the 2009 Rules as ultra vires the Constitution in W.P. No.3886/2009.

6. The challenge to the provisions of the 2007 Act, the 2008 Rules, the 2009 Rules and the order dated 28.2.2009 and 5.9.2009 of the State Government can be classified into four heads:

(i)The challenge to the provisions relating to admission;

(ii)The challenge to the provisions relating to fixation of fee;

(iii)The challenge to the provisions for reservation and

(iv)The challenge to the provisions relating to eligibility for Admission.

We may now deal each head of challenge separately.

Challenge to the provisions relating to admission:

7. Sections 3(d), 6 and 7 of the Act, 2007 which relate to admission are quoted hereinbelow:

> **"3(d)"common entrance test"** means an entrance test, conducted for determination of merit of the candidates followed by centralised counselling for the purpose of merit based admission

to professional colleges or institutions through a single window procedure by the State Government or by any agency authorised by it.

6. Common entrance test- In private unaided professional educational institution, admission to sanctioned intake shall be on the basis of the common entrance test in such manner as may be prescribed by the State Government.

7. Admission-Every admission to private unaided professional educational institution shall be made in accordance with the provisions of this Act or the rules made thereunder and every admission made in contravention shall be void."

8. Sub-sections (1), (9), (10) and (12) of Section 4 which deal with power of the Act, 2007 which deal with the powers of the Admission and Fee Regulatory Committee regarding admission are also extracted hereinbelow:

"(1) The State Government shall, by notification in the official Gazette, constitute a Committee to be called the Admission and Fee Regulatory Committee, for the supervision and guidance of the admission process and for the fixation of fee to be charged from candidates seeking admission in a private professional educational institution.

(9) The Committee may hear complaint with regard to admission in contravention of the provisions contained herein, collecting of capitation fee or fee in excess of fee determined or profiteering by any institution, and if the Committee after enquiry finds that there has been any violation of the provisions for admission on the part of the unaided professional colleges or institution, it shall make appropriate recommendations for returning any excess amount collected to the person concerned, and also recommend to the Government for imposing a fine upto rupees ten lakhs, and the Government may on receipt of such recommendation, fix the fine and collect the same in the case of each such violation or decide any other course of action as if it deem fit and the amount so fixed together with interest thereon shall be recovered as if it is an arrear of land revenue and the committee may also declare admission made in respect of any or all seats in a particular college or institution to be dehors merit and therefore invalid and communicate the same to the concerned university, and on the receipt of such communication, the University shall debar such candidates from appearing in the examination and cancel the results of examination already appeared for.

(10) The Committee may, if satisfied that any unaided professional college or institution has violated any of the provision of this Act and after approval of the State Government, recommend to the University or appropriate authority for withdrawal of the affiliation or recognition of such college or institution or decide any other course of action as it deems fit.

(12) The Committee shall ensure that the admission in an institution is done in a fair and transparent manner."

Contentions of the petitioners:

9. Mr. L.K. Verma and Vivek Tankha, learned senior counsel appearing for the petitioners, submitted that in *T.M.A. Pai Foundation* (supra), the Supreme Court has held that private unaided non-minority educational institution has a fundamental right under Article 19(1)(g) of the Constitution to carry on its occupation and this right will include the right to select and admit students of its choice and that the scheme framed in *Unni Krishnan* (supra) and followed by the Government cannot be reasonable restrictions under Article 19(1)(6) of the Constitution on this fundamental right. They submitted that the Supreme Court has also held in *T.M.A. Pai Foundation* (supra) that the right to establish and administer an educational institution can b e regulated, but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure including qualified staff and the prevention of mal-administration by those in charge of management and cannot include nomination of students for admissions which would be unacceptable restrictions on the fundamental right of the educational institution. They referred to the observations in para 55 of the judgment of the Supreme Court in *T.M.A. Pai Foundation* (supra) as reported in the SCC that the essence of a private unaided educational institution is the autonomy that the institution must have in its management and administration. They also referred to para 65 of the judgment of Supreme Court in *T.M.A. Pai Foundation* (supra) in which the Supreme Court has further held that a private educational institution has a personality of its own, and in order to maintain its atmosphere and tradition, it is but necessary that it must have the right to choose and select students who can be admitted to its courses of studies. They referred to the observations of the Court in *T.M.A. Pai Foundation* (supra) that any scheme, rule or regulation that does not give the institution the right to reject the students who might otherwise be qualified according to their performance in the entrance test, would be an unreasonable restriction on the right under Art. 19 (1) (g) of the Constitution. They submitted that the Supreme Court has also held in *T.M.A. Pai Foundation* (supra) that unaided educational institutions administered by linguistic or religious minorities must have assured maximum autonomy in relation to admission of students and conditions of recognition cannot be such as to whittle down the right of minority institutions under Article 30 of the Constitution.

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10. Mr. Verma and Mr. Tankha submitted that in *P.A. Inamdar* (supra), the Supreme Court referring to the law laid down in *T.M.A. Pai Foundation* (supra) reiterated that the right to establish an educational institution being an occupation is protected by Article 19(1)(g) of the Constitution and such right is available to all citizens, minority or non-minority. They submitted that in *P.A. Inamdar* (supra) however the Supreme Court also held that the right to impart education under Article 19(1)(g) is subject to control by clause (6) of Article 19 of the Constitution but made it clear that the State has no power to insist on seat sharing in unaided private professional educational institutions by fixing a quota of seats between the management and the State and that State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks or any criteria except merit. They submitted that in *P.A. Inamdar* (supra) the Supreme Court referring to *T.M.A. Pai Foundation* (supra), reiterated that professional institutions should be given greater autonomy in determination of admission procedure and State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure. They referred to para 137 and 138 of the judgment in *P.A. Inamdar* (supra) as reported in the SCC in which it is observed that unaided educational institutions may have their own procedure fulfilling the test of being fair, transparent and non-exploitative and that the admission procedure so adopted by the private educational institutions can be taken over by the State substituting its own procedure if it fails to satisfy by the triple tests of being fair, transparent and non-exploitative.

11. Mr. Verma and Mr. Tankha submitted that in Section 6 of the Act, 2007, it is provided that admission to sanctioned intake in private unaided professional educational institution shall be on the basis of common entrance test in such manner as may be prescribed by the State Government and in Section 3(d) "common entrance test" has been defined to mean an entrance test, conducted for determination of merit of candidates followed by centralised counselling based on merit to professional colleges or institutions through a single window procedure by the "State Government or by any agency authorised by it". They submitted that Section 6 read with Section 3(d) of the Act, 2007 therefore empowers the State Government or any agency authorised by the State Government to conduct the common entrance test and directly encroach upon the fundamental right of private unaided educational institutions under Article 19(1)(g) of the Constitution as well as the fundamental right of the minority unaided educational institutions under Art. 30 of the Constitution in selecting and admitting students of their choice, as explained in *T.M.A. Pai Foundation and P.A. Inamdar.* They submitted that para 137 of the judgment of Supreme Court in *P.A. Inamdar* as reported in the SCC is clear that only if the admission procedure adopted by the private institution or a group of institutions fails to satisfy all or any of the triple tests of being fair,

transparent and non-exploitative that the State can take over the admission procedure by substituting its own procedure, but by the impugned provisions in Section 6 and 3(d) of the Act, 2007, the State has taken over the admission procedure from the private unaided educational institutions even when the procedure has been fair, transparent and non-exploitative.

12. Mr. Verma and Mr. Tankha submitted that from the return filed by the respondents it appears that the Admission and Fee Regulatory Committee made recommendation on 6.3.2009 that the Association should not be allowed to hold the common entrance test but the decision authorising VYAPAM to conduct the common entrance test for postgraduate medical courses was taken by the State Government on 28.2.2009 much prior to the recommendation of the Admission and Fee Regulatory Committee and this would go to show that when the decision was taken by the State Government on 28.2.2009, there were actually no materials before the State Government to take a view that the entrance test conducted by the Association was not fair or not transparent or was exploitative. They further submitted that in any case the report of the Admission and Fee Regulatory Committee and the materials furnished along with report would show that there was no complaint with regard to the common entrance tests conducted by the Association or with regard to counselling and that the complaints were confined to admissions not given to candidates after the common entrance test and counselling. They submitting that such complaints can be dealt with by the Admission and Fee Regulatory Committee which has vast powers under Section 4 of the Act, 2007.

13. Mr. Verma and Mr. Tankha submitted that a reading of sub-section (9) of Section 4 of the Act, 2007 would make it clear that the Admission and Fee Regulatory Committee may hear complaint with regard to admission in contravention of the provisions of the Act and if the Committee after enquiry finds that there has been any violation of the provisions for admission on the part of any private unaided professional institution, it can make recommendations to the Government for imposing a fine of rupees ten lakhs and the Government may on receipt of such recommendation fix the fine and collect the same in the case of each such violation or decide any other course of action as it deems fit and the amount so fixed together with interest thereon shall be recovered as if it is an arrear of land revenue. They submitted that under sub-section (9) of Section 4 of the Act, the Admission and Fee Regulatory Committee may also declare admission made in respect of any or all seats in a particular college or institution to be dehors merit and invalid and communicate the same to the University and on such communication the University shall debar the candidates from examination and cancel the results of the examination already taken by the candidate. They also referred to sub-section ((10)) of Section 4 quoted above to show that the Admission and Fee Regulatory Committee also has power to recommend to the University

after approval of the State Government for withdrawal of the affiliation of any unaided professional college or institution if it has violated the provisions of the Act. They submitted that considering these vast powers available with the Admission and Fee Regulatory Committee to deal with a case of admission not based on merit, it was not necessary for the State to take over the procedure of admission in seats in private professional colleges or institutions and to authorise an agency to conduct the common entrance tests.

14. Mr. Verma and Mr. Tankha submitted that in any case before taking over the procedure for admission and authorising VYAPAM to conduct the common entrance test by orders dated 28.2.2009 and 5.3.2009, principles of natural justice ought to have been followed and the materials before the State Government on the basis of which the orders were passed should have been furnished to the Association and an opportunity should have been given to the Association to show cause against the proposed take over of the admission procedure by the State Government or authorisation of VYAPAM as an agency to conduct the common entrance tests. Mr. Tankha cited the decision in *Mardia Chemicals Ltd. and others vs. Union of India and others,* (2004) 4 SCC 311 in which the Supreme Court has held that all those who defaulted according to the Banks and Financial Institutions must not be condemned unheard. He also cited the decision of the Supreme Court in *Rajesh Kumar and others vs. Dy. CIT and others,* (2007) 2 SCC 181 for the proposition that principles of natural justice have to be followed where civil consequences ensue. He submitted that if one medical or dental college resorts to unfair practice, the management of such college can be dealt with by the Admission and Fee Regulatory Committee under sub-sections (9) and (10) of Section 4 of the Act, 2007, but because of lapse of one such Dental or Medical College, the other Dental and Medical Colleges should not be made to suffer and their fundamental rights under Art.19(1)(g) and Art.30 of the Constitution should not be infringed.

15. Mr. Verma cited the decision in *State of Kerala, etc. vs. Very Rev. Mother Provincial, etc.,* (1970) 2 SCC 417 in which the Supreme Court relying on its earlier decisions has held that the right of minority educational institution under Article 30(1) of the Constitution may be subject to only regulations relating to standards of education which are not part of the management as such and the other aspects of management must be left out to the minority institutions. He also cited the decision in *Bihar State Madarasa Education Board, Patna vs. Madarasa Hanfia Arabic College, Jamalia and others,* (1990) 1 SCC 428 in which the Supreme Court has held that the State has no power to completely take over the management of a minority institution and under the guise of regulating the educational standards to secure efficiency in the institution, the State is not entitled to frame rules or regulations compelling the management to surrender its right of administration.

Contentions of the respondents

16. Mr. R.N. Singh, learned Advocate General appearing for the State of Madhya Pradesh; submitted that in *Unni Krishnan, T.M.A. Pai Foundation and P.A. Inamdar* (supra), there was no challenge to any Act similar to the Act, 2007. He submitted that in para 134 of the judgment in *P.A. Inamdar* (supra), the Supreme Court has observed that excellence in education and maintenance of high standards at this level are a must in professional colleges and to fulfill these objectives, the State can and rather must, in national interest, step in. He submitted that in paras 135, 136 and 137 of the judgment in *P.A. Inamdar* (supra), the Supreme Court has further observed that transparency and merit shall have to be assured and that the fundamental right to choose the students to be allowed admission is subject to it being fair, transparent and non-exploitative in minority unaided institutions and the State can also provide a procedure for holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration. He submitted that the Supreme Court has also suggested in para 155 of the judgment in *P.A.Inamdar* (supra) that it is for the Central Government or for the State Government, in the absence of a Central legislation, to come out with a detailed well thought out legislation on the subject and such a legislation is long awaited and the States must act towards this direction. Mr. Singh submitted that to achieve the objectives of fairness, transparency, merit based and non-exploitative admissions in professional colleges, the Act, 2007 has been enacted in accordance with the suggestion of the Supreme Court in *P.A. Inamdar* (supra). He referred to the long title of the Act, 2007 as well as the Statement of objects and reasons appended to the Bill which became the Act 2007 to show that the Act, 2007 was enacted for making special provisions for advancement of socially and educationally backward classes and for Scheduled Castes and Scheduled Tribes in relation to admission in the light of Art.15 (5) of the Constitution of India, inserted by the Constitution (Ninety-third Amendment) Act, 2005 and to provide for regulation of admission and determination of fees in private unaided professional institutions in the State of M.P. He submitted that Section 6 read with Section 3 (d) of the Act of 2007 which provides that the common entrance test will be conducted by the State Government or by any agency authorised by it and admissions will be based on such common entrance test are regulatory measures made by the State Legislature in exercise of its powers under Article 246 read with Entry 25, List-III to the Seventh Schedule of the Constitution and are meant to ensure that professional educational institutions maintain proper standards in professional educational institutions and there is fairness, transparency and no exploitation in the admission procedure.

17. Mr. Singh cited *Peerless General Finance vs. Reserve Bank of India,* 1992 (2) S.C.C. 343 in which the Supreme Court has held that Clause (6) of Art.19 of the Constitution empowers the State to make any law imposing in the

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interest of the general public reasonable restrictions on the exercise of the right under Art.19 (1) (g) of the Constitution and when the law has imposed restrictions on the fundamental rights, what the Court has to examine is the substance of the legislation without being guided by the mere appearance of the legislation. Mr. Singh pointed out that in the aforesaid decision, the Supreme Court has further held that the Court cannot question the wisdom, the need or the desirability of the regulation and the State can regulate the exercise of fundamental rights to save the public from a substantive evil and the existence of the evil as well as the means adopted to check it are the matters for the legislative judgment. He submitted that in *Mylapore Club vs. State of Tamilnadu and another,* 2005 (12) S.C.C. 752, the Supreme Court has further observed that the power to legislate is a plenary power vested in the Legislature and unless those who challenge the legislation clearly establish that their fundamental rights under the Constitution are affected or that the Legislature lacks the legislative competence, they would not succeed in the challenge to the enactment brought forward in the wisdom of the legislature.

18. Mr. Singh also cited *Charan Lal Sahu vs. Union of India,* 1990 (1) S.C.C. 613 in which Chief Justice Sabyasachi Mukharji observed that the State has the power and jurisdiction and for this purpose unless the impugned Act is otherwise unreasonable and violative of constitutional provisions, no question of giving a hearing to the parties for taking over the rights of the parties arises and for legislation of Parliament, no principles of natural justice are attracted provided such legislation is within the competence of the legislature. He cited the decision in *Krishnan Kakkanth vs. Government of Kerala,* AIR 1997 S.C. 128 wherein the Supreme Court has held that reasonableness of restriction under Art. 19 (6) of the Constitution is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restrictions are imposed and a restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. He pointed out that in the aforesaid decision, the Supreme Court has further held that in determining the infringement of the right guaranteed under Art.19 (1), the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all enter into judicial verdict.

19. Mr. Singh cited the observations of Jeevan Reddy, J. in *State of A.P. and others vs. Mcdowell & Company and others,* 1996 (3) S.C.C.709 that if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Art.19 (1) of the Constitution, it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Art.19 of the Constitution and no enactment can be struck down just by saying that it is arbitrary or

unreasonable or because the court thinks that the enactment is unjustified because the Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them and the court cannot sit in judgment over their wisdom. He also relied on a recent decision of Supreme Court in *Karnataka Bank Limited vs. State of Andhra Pradesh and others,* 2008 (2) S.C.C. 254 for the proposition that where the validity of a statute is in question and there are two interpretations, one which would make the law valid and the other void, the former must be preferred and the validity of law will be upheld and in pronouncing the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, justice or injustice of law and if that which is passed into law is within the scope of power conferred on a legislature and violates no restrictions on that power , the law must be upheld whatever a court may think of it.

20. Mr. Singh finally submitted that the agency authorised by the State Government by orders dated 28.2.2009 and 5.3.2009 to conduct the Common Entrance Tests for admissions to the private Dental and Medical Colleges in the State of M.P., VYAPAM has been conducting common entrance tests for admissions to different professional courses in the State for 20 years without any complaints and has advertised the programme of the common entrance tests and counselling for admissions to the post-graduate medical and dental courses in the different medical and dental colleges in the State in both local newspapers and national newspapers, such as Dainik Bhaskar, Dainik Jagaran, Nai Duniya, Pioneer, Hindustan Times, Indian Express, the Hindu, and Rojgar Aur Nirman and a large number of centres have been opened up in different places in the State and outside the State to receive the applications from candidates and in response to the advertisement, more than 2000 candidates have applied whereas in response to the advertisement issued by the Association on behalf of the private Dental and Medical Colleges in the State of M.P., only about 200 applications have been received. He argued that this shows that when an agency of the State Government, such as VYAPAM, is entrusted the work of conducting a common entrance test, candidates from all sections of the society are likely to get an opportunity to participate in the common entrance test for admissions in the private Dental and Medical Colleges in the State of M.P. and therefore Section 6 read with Section 3 (d) of the Act, 2007 and the orders dated 28.2.2009 and 5.3.2009 of the State Government authorising VYAPAM to conduct the common entrance tests should not be struck down by the Court as ultra vires.

21. Mr. Sunil Gupta, learned counsel appearing for the respondents in some of the writ petitions, submitted that after the decision of the Supreme Court in *T.M.A. Pai Foundation and P.A. Inamdar* (supra), Art.15 (5) was inserted in the Constitution by the Constitution Ninety Third Amendment Act, 2005 and it was provided therein that nothing in Art.15 or in Art.19 (1) (g) of the Constitution will

prevent the State from making any special provision by law for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provision relates to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Art.30 of the Constitution. He submitted that by the Constitution Ninety Third Amendment Act, 2005, therefore, the decisions of the Supreme Court in *T.M.A. Pai Foundation and P.A. Inamdar* (supra) that all citizens have a fundamental right to establish educational institutions under Art.19 (1) (g) of the Constitution have been overcome by inserting clause (5) in Article 15 of the Constitution and special provisions made in any law for the advancement of a socially and educationally backward classes or for the Scheduled Castes or the Scheduled Tribes for admission to educational institutions, including private educational institutions, whether aided or unaided are saved from challenges under Arts.15 and 19 (1) (g) of the Constitution. In support of this contention, he relied on the judgment of Balakrishnan, C.J. in *Ashok Kumar Thakur vs. Union of India,* 2008 (6) S.C.C. 1. He submitted that Clause (5) of Art.15 of the Constitution enables the State to make any special provision by law for the advancement of any educationally and socially backward classes of citizens, or for the Scheduled Castes or the Scheduled Tribes, and reservation is only one of the tools of advancement of socially and educationally backward classes, Scheduled Castes and Scheduled Tribes, as has been held in the judgment of the Balakrishnan C.J. and Dr. Arijit Pasayat J. in *Ashok Kumar Thakur* (supra). He submitted that the directive principle in Art.46 of the Constitution also provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. He submitted that to achieve the objects mentioned in Art.15 (5), Art.38(2), Art.41 and Art.46 of the Constitution, the State Legislature has made the Act, 2007 as would be clear from the Long Title of the Act as well as the Statement of Objects and Reasons appended to the Bill which became the Act, 2007 and all the provisions of the Act including the provision relating to admission, fixation of fees and reservation are to be tested in the light of the provisions of Art.15 (5) and Art.46 of the Constitution. He argued that to discharge these constitutional obligations imposed on the State under Art.15 (5) and Art.46 of the Constitution, the State must take over the admission process and conduct the entrance examination and counselling and must ensure that only such agency is authorised by the State, which will advance the educational interests of the weaker sections of the people and of Scheduled Castes and Scheduled Tribes and will conduct the common entrance test and the counselling in a fair, transparent and non-exploitative manner. Mr. Gupta submitted that the objects of Arts.15 (5) and

46 can be ensured by the State by reduction in application fee or even total waiver thereof, a single window common entrance test procedure for both the State aided institutions and private professional educational institutions; opening more centres throughout the State particularly in rural, remote and backward areas, providing transport, boarding and lodging facilities, relaxing marks for eligibility and relaxing cut off marks for selection.

22. Mr. Gupta next submitted that clause (6) of Art. 19 of the Constitution provides that nothing in Art. 19 (1) (g) of the Constitution shall prevent the State from making any law imposing in the interests of general public reasonable restrictions on the exercise of the right conferred by Art. 19 (1) (g) and in particular, prevent the State from making any law relating to carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. He submitted that it is now settled by a series of decisions of the Supreme Court in *Ram Chandra vs. State of Orissa* AIR 1956 SC 298, *J.Y. Kondala vs. A.P. S.R.T. Corporation* AIR 1961 SC 82, *Akadasi vs. State of Orissa* AIR 1963 SC 1047 and *Virajlal Manilal vs. State of M.P.* 1969 (2) SCC 248 that any law which relates to the carrying on by the State, of any trade, business, industry or service, need not satisfy the test of reasonableness of restrictions. He argued that the private professional educational institutions hold common entrance test on payment of consideration or application fee by candidates and invariably the application fee charged by private educational institutions is quite substantial and therefore, the holding of the common entrance test by the private professional educational institute is a business or service and by the provisions of Section 6 read with Section 3 (d) of the Act 2007, this business or device of holding common entrance test has been taken over by the State and the provisions of Section 6 read with Section 3 (d) of the Act 2007 need not satisfy the test of reasonableness of restrictions and are clearly saved by the second limb of Clause (6) of Art. 19 of the Constitution on the ground that these provisions are violative of fundamental right guaranteed under Art. 19 (1) (g) of the Constitution of India.

23. Mr. Gupta submitted that in the event the court holds that the provisions of Section 6 read with Section 3 (d) of the Act 2007 are not saved by the second limb of clause (6) of Art.19 of the Constitution, Section 6 read with Section 3 (d) of the Act 2007 are reasonable restrictions in the interest of general public. He submitted relying on *Virendra vs. State of Punjab*, AIR 1957 SC 896 that the expression 'in the interest of general public' in Art.19 (6) of the Constitution makes the ambit of the protection of a reasonable restriction under Art.19 (6) very wide. He cited *Laxmi Khandsari vs. State of U.P.* 1981 (2) SCC 600, in which the Supreme Court has laid down how the expression "reasonable restrictions" in clauses (2) to (6) of Art. 19 of the Constitution is to be construed and has held that as to what are "reasonable restrictions" would naturally depend

on the nature and circumstances of the case, the character of the statute, the object which it seeks to serve, the existing circumstances, the extent of the evil sought to be remedied as also the nature of the restraint or restriction placed on the right of the citizen and it was difficult to lay down any hard and fast rule of universal application. He also relied on *Sreenivasa G. Traders vs. State of A.P.*, 1984 (4) SCC 353 for the proposition that the fundamental right of citizens to practice any profession or to carry on any occupation or trade or business guaranteed under Art. 19 (1) (g) has its own limitations and there is no protection of this right unless there is a measure of control and regulation of the right of each individual in the interests of all and in order to determine the reasonableness of a restriction imposed upon the right guaranteed by Art. 19 (1) (g), the Court must have regard to the nature and the conditions prevailing in the trade in respect of which reasonable restrictions are sought to be imposed by the impugned law. He pointed out that in *Krishnan Kakkanth vs. Government of Kerala and others*, 1997 (9) SCC 495, the Supreme Court has further held that reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of general public and not from the stand point of interest of persons upon whom the restrictions are imposed.

24. Mr. Gupta argued that a law which implements a directive principle of State policy must be held to be imposing a reasonable restriction on the fundamental rights under Art.19 (1) of the Constitution and in support of this argument, cited *Kesavanand Bharti vs. State* 1973 (4) SCC 225, *Workmen, Minakshi Mills Limited and another vs. Minakshi Mills Limited and another*, 1992 (3) SCC 339 and *State of Gujarat vs. Mirzapur Moti Qureshi Kassab Jamat and others*, 2005 (8) SCC 534. He submitted that in *TMA Pai Foundation and P.A. Inamdar* (supra), the Supreme Court has held that an educational institution had the fundamental right to carry on its occupation guaranteed by Art. 19 (1) (g) of the Constitution and that this fundamental right included the right to admit students of its choice subject to selection of students for admission by a rational method such as the common entrance test. He submitted relying on *Dr. Preeti Shrivastava vs. State of M.P.*, 1999 (7) SCC 120 that a common entrance test only provides uniform criteria for judging merit of candidates, who come from different universities with different standards of teaching and evaluation, by a common yardstick. He submitted that this being the underlying purpose of common entrance test, Section 6 read with Section 3 (d) of the Act, 2007 which provides for a common entrance test to be conducted by the State or by an agency authorised by the State is a reasonable restriction in the interest of general public as the object of Section 6 read with Section 3 (d) of the Act 2007 is to ensure that admissions to private unaided institutions are merit based, fair, transparent and non-exploitative. He further submitted that Section 6 read with Section 3 (d) of the Act 2007 providing for common entrance test by the State or an agency authorised by it, also implements

the directive principle in Art.38 of the Constitution which provides that the State shall promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice social, economic and political, shall inform all the institutions of the national life. He argued that Section 6 read with Section 3 (d) of the Act 2007 also implements Art.41 of the Constitution which provides that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to education. He submitted that Section 6 read with Section 3 (d) of the Act 2007 therefore satisfies the tests laid down by the Supreme Court in the decisions relating to reasonable restrictions in the interest of general public

25. Finally, Mr. Gupta argued that the judgments of the Supreme Court in *TMA Pai Foundation and P.A. Inamdar* (supra), are to be read not as statutes which should cover all future contingencies but as law which temporarily occupy the field until the State makes a legislation. He submitted that when the judgments in *TMA Pai Foundation and P.A. Inamdar* (supra) were delivered by the Supreme Court, there was no law regulating professional education and the Act, 2007 which has been made by the State Legislature in exercise of its plenary powers under Art.246 read with Entry 25 of List-III to the Seventh Schedule of the Constitution cannot be struck down on the ground that it violates any prior decision of the Court. He submitted that in any case, on a correct and complete reading of decisions of the Supreme Court in *TMA Pai Foundation and P.A. Inamdar* (supra), the Act, 2007 is in consonance with the judgments in *TMA Pai Foundation and P.A. Inamdar* (supra) and is merely regulatory in nature and does not affect the fundamental right of the citizens to carry on the occupation of imparting professional education inasmuch as it does not interfere with the autonomy of the professional educational institutions and their income through collection of fees as determined by the Admission and Fees Committee.

Rejoinder on behalf of the petitioners

26. In rejoinder, Mr. Verma and Mr. Tankha submitted that Art.15 (5) of the Constitution inserted by the Ninety Third Constitution Amendment is only an enabling provision providing that the State may make a law for advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and for the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions covered under Art.30 (1) of the Constitution and such special provisions would be saved from the challenge of violation of the right of private educational institutions under Art.19 (1) (g) of the Constitution. They submitted that the highest form of special provision for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes or for the Scheduled Tribes is reservation of seats for admissions in educational institutions including private

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educational institutions and this is what is sought to be done in Section 8 of the Act, 2007. They submitted that Art.15 (5) of the Constitution, therefore will only save Section 8 of the Act, 2007 from the challenge of violation of the fundamental right of educational institutions under Art.19 (1) (g) of the Constitution but will not save other provisions of the Act, 2007 which encroach upon the fundamental right of such educational institutions under Art.19 (1) (g) of the Constitution. They submitted that the contention of Mr. Gupta that by insertion of Art.15 (5) of the Constitution by the Ninety Third Constitution Amendment, the judgments of the Supreme Court in TMA Pai Foundation and P.A. Inamdar (supra) on the fundamental right of private educational institutions under Art. 19 (1) (g) of the Constitution have been overcome, is thus misconceived. They submitted referring to the various paragraphs of the judgment of Balakrishnan, C.J. in *Ashok Kumar Thakur vs. Union of India* (supra) that Balakrishnan, CJ has not held that the decisions of the Supreme Court in *TMA Pai Foundation and P.A. Inamdar* (supra) that all citizens have a fundamental right to establish educational institution under Art.19 (1) (g) of the Constitution have been overcome. They submitted that Art.19 (1) (g) of the Constitution is a very important fundamental right of the citizens and cannot be held to be totally annihilated by the insertion of Art.15 (5) in the Constitution by the Ninety Third Constitution Amendment. They submitted that the contention of Mr. Gupta that the service being carried on by professional educational institutions to hold the common entrance test has been taken over by the State under the second limb of Art.19 (6) of the Constitution is wholly misconceived. They submitted that regulations made by the Government must be in accordance with the observations of the Supreme Court in *TMA Pai Foundation and P.A. Inamdar* (supra) because this is what has been directed by the Supreme Court in para 155 of the judgment in *P.A. Inamdar* (supra). They further submitted that neither the Long Title of the Act, 2007 nor the Statement of Objects and Reasons appended to the Bill which became the Act, 2007 anywhere state that the Act, 2007 has been made to implement any of the directive principles of State policy and, therefore, the contention of Mr. Gupta that the Act, 2007 has been made to implement the directive principles of the State Policy is misconceived. They submitted that in *State of Gujarat vs. Mirzapur Moti Qureshi Kassab Jamat and others* (supra) cited by Mr. Gupta, the Supreme Court has also held that a restriction placed on any fundamental right aimed at securing directive principles will be held as reasonable and intra-vires subject to two limitations : first that it does not run in clear conflict with fundamental rights and second that it has been enacted within the legislative competence of the enacting Legislature under Part-XI, Chapter-1 of the Constitution. They argued that even if the Act, 2007 is held to be implementing any directive principle of the State Policy as contended by Mr. Gupta, the provisions of the Act, 2007 cannot violate the fundamental right under Art.19 (1) (g) of the Constitution and the provisions of

the Act, 2007 will therefore have to be in consonance with the judgments of the Supreme Court in *TMA Pai Foundation and P.A. Inamdar* (supra).

Conclusions with reasons

27. We are of the considered opinion that Section 6 read with Section 3 (d) of the Act, 2007 which provide that admissions to sanctioned intake shall be on the basis of common entrance test followed by centralised counselling by the State Government or by any agency authorised by the State Government are in consonance with the judgments of the Supreme Court in *TMA Pai Foundation and P.A. Inamdar* (supra). Section 2 of the Act, 2007 makes it clear that it only applies to private unaided educational institutions which impart professional education. Hence, we will have to examine the judgments in *TMA Pai Foundation and P.A. Inamdar* (supra) to find out whether these judgments permit admission to professional educational institutions on the basis of merit as determined in a common entrance test followed by centralised counselling by the State Government or its agencies.

28. In *TMA Pai Foundation* (supra), the Supreme Court has dealt with admission to professional institutions in paragraphs 58 and 59 at pages 545 and 546 of the SCC which are quoted herein below:

> "58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.
>
> 59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by Government agencies."

It is thus clear from para 58 of the judgment that in *TMA Pai Foundation* (supra) quoted above that the Supreme Court has held that the applicant who seeks admission to a professional educational institution in order to become a competent professional must be a meritorious candidate and he cannot be put at a disadvantage

by preferences shown to less meritorious but more influential applicants and, therefore, excellence in professional education would require that greater emphasis be laid on the merit of the students seeking admission. It will be further clear from para 59 of the judgment in *TMA Pai Foundation* (supra) quoted above, that merit is usually determined for admission to a professional educational institution either by the marks that the students obtain at qualifying examination or at a common entrance test conducted by the institution or 'in the case of professional colleges, by Government agencies". In *TMA Pai Foundation* (supra), therefore, the Supreme Court was of the view that merit for admission to a professional institution could be determined by common entrance test conducted by the Government agencies.

29. In *TMA Pai Foundation* (supra), the Supreme Court has dealt with the regulations that can be framed for unaided private professional educational institutions and in paragraphs 67 and 68, has held:

> "67. We now come to the regulations that can be framed relating to private unaided professional institutions.
>
> 68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. ...."

It will be clear from the aforesaid portion of the judgment in *TMA Pai Foundation* (supra) that unaided professional educational institutions are entitled to autonomy in admissions but they cannot forego or discard the principle of merit and it would

therefore be permissible for the Government to require the private unaided educational institutions to provide for a merit based admission while at the same time giving the management sufficient discretion in admissions. In the aforesaid portion of the judgment in *TMA Pai Foundation* (supra), the Supreme Court has further held that this can be ensured through various methods and one method is by providing that certain percentage of seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. Here also, the judgment of the Supreme Court in *TMA Pai Foundation* (supra) is clear that in the seats reserved for admission by the management, only those students who have passed the common entrance test held by the management or by the State can be admitted.

30. Mr. Verma and Mr. Tankha however submitted that these observations in paragraphs 59 and 68 of the judgment of the Supreme Court in *TMA Pai Foundation* (supra) that the merit is to be determined for admission to professional educational institutions by common entrance test to be conducted by Government agencies were explained by the Supreme Court in *P.A. Inamdar* (supra) in paragraphs 125 and 126 of the judgment at page 601 of the SCC and it was held therein that in judgment of *TMA Pai Foundation* (supra), there was nothing which allows the State to control admissions in private unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State as if it was filling the seats available to be filled up at its discretion in such private institutions and this would amount to nationalisation of seats which has been specifically disapproved in *TMA Pai Foundation* (supra). They submitted that in *P.A. Inamdar* (supra), the Supreme Court has further held that imposition of quota of State seats or enforcing reservation policy of the State on available seats are acts constituting a serious encroachment on the right of autonomy of private unaided professional educational institutions and such appropriation of seats can not be held to be regulatory measure in the interest of the minority within the meaning of Art.30 (1) or reasonable restriction within the meaning of Art. 19 (6) of the Constitution. They submitted that the Supreme Court further held in *P.A. Inamdar* (supra) that merely because the resources of the State in providing professional education are limited, the private unaided professional educational institutions, which intend to provide better education, cannot be forced by the State to make admissions on the basis of reservation policy to less meritorious candidates and unaided institutions, as they are not deriving any funds from State, can have their own admissions in a fair, transparent, non-exploitative manner based on merit. They also referred to the portions of judgment of the Supreme Court in *P.A. Inamdar* (supra) in which the observations in paragraph 68 of the judgment in *TMA Pai Foundation* (supra) were interpreted

to merely permit unaided private professional educational institutions to maintain merit as the criteria of admission by voluntarily agreeing for seat sharing with the State or adopting selection based on common entrance test by the State. They submitted that from the judgment of the Supreme Court in *TMA Pai Foundation* (supra), as explained in *P.A. Inamdar* (supra), it would thus be clear that the common entrance test was to be held by the private unaided professional educational institutions and not by the State or its agency.

31. We are unable to accept the aforesaid submission of Mr. Verma and Mr. Tankha. In *P.A. Inamdar* (supra), the Supreme Court dealt with the admission procedure of unaided professional educational institutions, both minority and non-minority, in paragraphs 133 to 138 at pages 603, 604 and 605 of the SCC. In paragraph 134 in *P.A.Inamdar* (supra), the Supreme Court has held that for professional educational institutions, excellence in admission and maintenance of high standards are a must and to fulfil these objectives, the State can and rather must in the national interest step in because the education, knowledge and learning possessed by individuals collectively constitute national wealth and in paragraph 135 of the judgment in *P.A. Inamdar* (supra), the Supreme Court has further held that in minority professional educational institutions also, aided or unaided, admission should be at the State level and transparency and merit have to be assured in admissions. In paragraphs 136 and 137 in *P.A. Inamdar* (supra), the Supreme Court has observed that admissions in professional educational institutions can be made on the basis of a common entrance test either conducted by the institutions joined together or by the State itself or an agency for holding such test. Paragraphs 136 and 137 of the judgment of the Supreme Court in *P.A. Inamdar* (supra) are quoted herein below:

> "136. Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on the same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different

institutions depending on the courses of study offered, the number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting the common entrance test ("CET" for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfilment of twin objects of transparency and merit. CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralised counselling or, in other words, single-window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter se of the students so chosen.

137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the aforesaid triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration. The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated herein above, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

It will be thus clear from the paragraphs 136 and 137 of the judgment in *P.A. Inamdar* (supra), quoted above, that admissions to private unaided professional educational institutions can be made on the basis of merit of candidates determined in the common entrance test followed by centralised counselling by the institutions imparting same or similar professional education together or by the State or by an agency which must enjoy utmost credibility and expertise and that the common entrance test followed by centralised counselling must satisfy the triple test of being fair, transparent and non-exploitative. Thus, the judgments of the Supreme

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Court in *TMA Pai Foundation and P.A. Inamdar* (supra) permit holding of a common entrance test for determination of merit for admission to private unaided professional educational institutions by the State as well as any agency which enjoy utmost credibility and expertise in the matter and which should ensure transparency in merit.

32. Mr. Verma and Mr. Tankha, however, submitted that in paragraph 136 of the judgment in *P.A. Inamdar* (supra), the Supreme Court has also observed that the admission procedure adopted by private institutions if it fails to satisfy all or any of the triple tests, can be taken over by the State substituting its own procedure and not otherwise. Sufficient materials have been filed before us by the respondents to show that prior to the enactment of the Act, 2007, this Court as well as the Committee constituted as per the orders of the Supreme Court in *Islamic Academy of Education* (supra), had to enquire into complaints of malpractice in admissions in private professional educational institutions and after finding the complaints to be true, directed the institutions to give admission to the aggrieved students in the next academic session and this would show that the private professional educational institutions were not able to ensure a fair, transparent and non-exploitative admission procedure before Act, 2007 was enacted. In paragraph 138 of the judgment in *P.A. Inamdar* (supra), the Supreme Court has held that having regard to the larger interest and welfare of the students' community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admissions by providing a centralised and single window procedure and such a procedure can secure grant of merit based admissions on a transparent basis. Sections 6 and 7 read with Section 3 (d) of the Act, 2007 are such regulatory measures legislated by the State Legislature of Madhya Pradesh having regard to the larger interest and welfare of the students' community to promote merit, achieve excellence, curb malpractices and to secure grant of merit based admissions in a transparent manner. The Legislature in its wisdom has taken the view, looking at the prevailing conditions relating to admissions in private professional educational institutions in the State of Madhya Pradesh that merit based admissions could be ensured through a common entrance test followed by centralised counselling either by the State or by an agency authorised by the State. Sections 3 (d), 6 and 7 of the Act, 2007 do not compel the private unaided professional educational institutions to give up a share of the seats available to candidates chosen by the State and do not amount to nationalisation of seats because for all the seats to which admissions take place on the basis of a common entrance test followed by centralised counselling by the State or an agency authorised by the State, the private unaided professional institutions are entitled to change their own fees from the students as finalised by the Admission and Fees Regulatory Committee. The impugned provisions of the Act, 2007 do not impose a quota of State seats on available seats of unaided private professional educational institutions and, therefore, do not

constitute serious encroachment on the right of autonomy of the unaided private professional educational institutions. All that Sections 3 (d), 6 and 7 of the Act, 2007 do is to ensure that admissions to private professional educational institutions are based on merit, determined in a common entrance test followed by centralised counselling by a single window procedure either by the State or by an agency authorised by the State. The underlying purpose of Sections 3 (d), 6 and 7 of the Act, 2007 is not to enable the State to fill up all the seats in the private unaided professional educational institutions but to achieve excellence and to promote merit and curb malpractices in admissions by providing that either the State or an agency authorised by the State, which has utmost credibility and expertise, conducts the common entrance test followed by centralised counselling and such regulatory measures have been held by the Supreme Court in *P.A. Inamdar* (supra) to be reasonable restrictions in the interest of minority institutions permissible under Art.30 (1) of the Constitution and in the interest of general public permissible under Art. 19 (6) of the Constitution in paragraph 144 of the judgment in *P.A. Inamdar* (supra) at page 606 of the SCC, which is quoted herein below:

> "144. The two Committees for monitoring admission procedure and determining fee structure in the judgment of **Islamic Academy** are in our view, permissible as regulatory measures aided at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education or non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Article 30 (1) or the right of minorities and non-minorities under Article 19 (1 (g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30 (1) and in the interest of general public under Article 19 (6) of the Constitution."

33. We are also unable to accept the contention of Mr. Verma and Mr. Tankha that the Admission and Fee Regulatory Committee has sufficient powers under sub-sections (1), (9), (10) and (12) of Section 4 of the Act, 2007 to ensure fairness and transparency in the admission process and, therefore, it was not necessary to provide in Section 3 (d) of the Act, 2007 that the common entrance test should be conducted by the State or by an agency authorised by the State. As has been held by the Supreme Court in *P.A. Inamdar* (supra) in para 136 quoted above, the agency conducting the common entrance test must be one enjoying utmost credibility and expertise in the matter so as to ensure the fulfilment of the twin objects of transparency and merit and must save the student community from harassment and exploitation. Hence, the choice of the agency for conducting the

common entrance test is very crucial for ensuring transparency and merit in the common entrance test as well as for ensuring that student community is not exploited and since it is the responsibility of the State to ensure a merit based, transparent, fair and non-exploitative common entrance test, the agency must be one which the State Government thinks, will fulfil these objectives. In sub-section (1) of Section 4 of the Act, 2007, the Admission and Fee Regulatory Committee has only the power to supervise and guide the admission process but no power to choose the agency which will conduct the common entrance test. Under sub-section (9) of Section 4 of the Act, 2007, the Committee has the power to hear complaints with regard to admission in contravention of the provisions contained in the Act, 2007. Under sub-section (10) of Section 4 of the Act, 2007, the Committee has the power to recommend to the university or appropriate authority for withdrawal of the affiliation or recognition of such college which violates any provision of the Act, 2007. Under sub-section (12) of Section 4 of the Act, 2007, the Committee is under an obligation to ensure that the admission in an institution is done in a fair and transparent manner. All these powers and duties of the Committee relate to stages after the common entrance test and the centralised counselling.

34. Sections 3 (d), 6 and 7 of the Act, 2007 by providing that the common entrance test for determining merit for admissions in the private unaided professional educational institutions by a common entrance test to be conducted by the State or by an agency authorised by the State do not interfere with the autonomy of private unaided professional educational institutions, as such private professional educational institutions are entitled to collect the fees from the students admitted to the institutions on the basis of merit, appoint their own staff (teaching and non-teaching), discipline and remove the staff, provide infrastructure and other facilities for students and do all such other things as are necessary to impart professional education to the students. Sections 3 (d), 6 and 7 of the Act, 2007, therefore, do not impinge on the fundamental right to carry on the occupation of establishing and administering professional educational institutions as an occupation. The only purpose of Sections 3 (d), 6 and 7 of the Act, 2007 is to ensure that students of excellence are selected on the basis of a common entrance test conducted by the State or an agency authorised by the State and that students without excellence and merit do not make entry into these professional educational institutions through malpractices and influence. As has been held both in the judgments in *TMA Pai Foundation* and *P.A. Inamdar* (supra), the right of private unaided professional educational institutions to admit students of their choice is subject to selection of students on the basis of their merit through a transparent, fair and non-exploitative procedure. In our considered opinion therefore, Sections 3 (d), 6 and 7 of the Act, 2007 do not in any way violate the fundamental right of citizens guaranteed under Art.19 (1) (g) of the Constitution. In view of this conclusion, it is not necessary

for us to decide whether the provisions of Sections 3 (d), 6 and 7 of the Act, 2007 are saved by Art. 15 (5) of the Constitution or by the second limb of Art. 19 (6) of the Constitution relating to the power of the State to make a law for creation of monopoly in its favour in respect of any service.

35. We now come to the challenge to the orders dated 28.2.2009 and 5.3.2009 of the State Government authorising VYAPAM to conduct common entrance tests for admissions to the professional courses. The grounds urged by Mr. Verma and Mr. Tankha in support of the challenge are that when the decision was taken by the State Government on 28.2.2009 to authorise VYAPAM to conduct the common entrance test, there were actually no materials before the State Government to take a view that the entrance test conducted by the Association was not fair or was not transparent or was not non-exploitative. This argument is based on the observations in the last portion of paragraph 137 of the judgment of the Supreme Court in *P.A. Inamdar* (supra) that if the admission procedure adopted by private institutions fails to satisfy all or any of the triple tests of fairness, transparency and non-exploitative character, then the admission procedure can be taken over by the State. But we have already held that both in *TMA Pai Foundation and P.A. Inamdar* (supra), the Supreme Court has observed that common entrance test may be conducted either by the private professional educational institutions or by the State or by an agency which enjoys utmost credibility and expertise in the matter. The State Legislature in its wisdom has provided in Sections 3 (d), 6 and 7 of the Act, 2007 that the common entrance test followed by centralised counselling must be conducted by the State or an agency authorised by the State Government, presumably because the Legislature had thought that the responsibility of conducting the common entrance test should be entrusted to the State Government which can better promote the larger interest and welfare of the students by ensuring that merit and excellence are the basis of admission and by curbing malpractices and the Legislature had also thought that such a responsibility should not be entrusted to private unaided professional educational institutions which may not be able to promote such larger interest and welfare of the student community and promote merit, achieve excellence and curb malpractices. Once such a responsibility is entrusted to the State Government by the Legislature under Section 3 (d) of the Act, 2007, it is for the State Government to decide which agency has the utmost credibility and has the expertise to hold the common entrance test and if the State Government has decided in its order dated 28.2.2009 to entrust VYAPAM, which had been holding such common entrance tests for twenty years with expertise and credibility, the Court cannot quash this order of the State Government on the ground that sufficient materials were not before the State Government not to authorise the Association for conducting the common entrance test. Yet another ground urged by Mr. Verma and Mr. Tankha for assailing the orders dated 28.2.2009 and 5.3.2009 of the State

Government to authorise VYAPAM to conduct the common entrance tests is that no opportunity was given to the Association before the State Government took the decisions on 28.2.2009 and 5.3.2009 to authorise VYAPAM instead of the Association to conduct the common entrance tests for Post-Graduate and Graduate medical and dental courses in the unaided private institutions. This ground is based on an erroneous premise that the Association had a right to hold the common entrance test and such right had been affected by the orders dated 28.2.2009 and 5.3.2009. Under Sections 3 (d), 6 and 7 of the Act, 2007, the Legislature has vested powers on the State Government to hold the common entrance test or authorise an agency to hold the common entrance test and the Legislature was not required to follow the principles of natural justice before enacting Sections 3 (d), 6 and 7 of the Act, 2007. The Association, however, could be entrusted to hold the common entrance test by the State Government as its agency if the State Government was convinced about its credibility and its expertise to hold the common entrance test.

Challenge to the provisions relating to fixation of fees.

36. Sections 4 (1), 4 (8) and 9 of the Act, 2007 which relate to fixation of fees are quoted herein below:

> **"4. Constitution, composition, disqualifications and functions of Committee –**
>
> (1)The State Government shall, by notification in the official Gazette, constitute a Committee to be called the Admission and Fee Regulatory Committee, for the supervision and guidance of the admission process and for the fixation of fee to be charged from candidates seeking admission in a private professional educational institution.
>
> .....
>
> (8)The Committee may require a private aided or unaided professional educational institution or, a deemed University to furnish, by a prescribed date, information as may be necessary for enabling the Committee to determine the fee that may be charged by the institution in respect of each professional course, and the fee so determined shall be valid for such period as notified by the State Government."
>
> **"9. Factors –**
>
> (1) Having regard to -
>
> (i) the location of the private unaided professional educational institution,
>
> (ii) the nature of the professional course;

(iii) the cost of land and building;

(iv) the available infrastructure, teaching, non teaching staff and equipment;

(v) the expenditure on administration and maintenance;

(vi) a reasonable surplus required for growth and development of the professional institution;

(vii) any other relevant factor,

the committee shall determine, in the manner prescribed, the fee to be charged by a private unaided professional educational institution.

(2)The Committee shall give the institution an opportunity of being heard before fixing any fee:

Provided that no such fees, as may be fixed by the Committee, shall amount to profiteering or commercialisation of education."

Contentions of the petitioners

37. Mr. Verma and Mr. Tankha submitted that a reading of Section 4 (1) of the Act, 2007 shows that power has been vested in the Admission and Fee Regulatory Committee to fix the fee to be charged from candidates seeking admission in private unaided professional educational institutions and a reading of Section 4 (8) of the Act, 2007 would show that the Committee has been empowered to determine the fee that may be charged by the institution in respect of each professional course. They submitted that in paragraph 56 of the judgment in *TMA Pai Foundation* (supra), the Supreme Court has held that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money and, therefore, it has to be left to the institution, if it chooses not to seek any aid from the Government, to determine the scale of fee that it can charge from the students. They submitted that the Supreme Court has further observed in paragraph 56 in *TMA Pai Foundation* (supra) that the decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government. They pointed out that in paragraph 56 of the judgment in *TMA Pai Foundation* (supra), however, the Supreme Court has held that in establishment of an educational institution, the object should not be to make a profit inasmuch as education is essentially charitable in nature but there can be a reasonable surplus which may be generated by the educational institution for purposes of development of education and expansion of the institution. They submitted that in *P.A. Inamdar* (supra), the Supreme Court has further clarified in paragraph 139 that as per the law declared in *TMA Pai Foundation* (supra) to set up a reasonable fee structure is also a component of "right to establish and administer an institution" and, therefore, every institution is

free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee. They submitted that in paragraph 141 of the judgment in *P.A. Inamdar* (supra), the Supreme Court has further held that every institution is free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering and charging of capitation fee. They also referred to paragraph 149 of the judgment in *P.A. Inamdar* (supra) in which the Supreme Court has observed that the decisions of some of the Committees for regulating fee constituted pursuant to the order passed in *Islamic Academy of Education* (supra) was subject to the serious criticism by pointing out that the fee structure approved by them was abysmally low which had rendered the functioning of the institution almost impossible or made the institutions run into losses and has further observed that in some of the institutions, teachers had left their jobs and migrated to other institutions as it was not possible for the management to restrain highly talented and qualified teachers against the salary permitted by the Committees. They submitted that in the aforesaid paragraph 149 of the judgment in *P.A. Inamdar* (supra), the Supreme Court has further observed that the Committees should be more sensitive and should act rationally and reasonably with due regard for realities and they should refrain from generalising fee structure and where needed, should go into account, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution. They submitted that from the aforesaid observations of the Supreme Court in both *TMA Pai Foundation and P.A. Inamdar* (supra), it is clear that each individual institution can charge its own fee depending upon its costs of providing professional education and yet by Section 4 (1), Section 4 (8) and Section 9 (1) of the Act, 2007, power has been vested in the Committee to fix and determine the fees to be charged by a private unaided professional educational institution.

Contention of the respondents

38. Mr. R.N. Singh, learned Advocate General, on the other hand, submitted that the provisions of Section 4 (1) and Section 4 (8) of the Act, 2007 have to be read with Section 9 of the Act, 2007 and so read, it will be clear that the private professional educational institutions propose their own fees and the Committee only examines whether the fees proposed are based on factors mentioned in Section 9 (1) of the Act, 2007 and are not exorbitant and do not amount to commercialisation of education and profiteering and these provisions do not in any way encroach on the right of private educational institutions to charge their own fees. Mr. Gupta, learned counsel appearing for the respondents in some of the cases further submitted that if exploitation of weaker sections of the Society is to be prevented and the educational advancement of socially and educationally backward classes and Scheduled Castes and Scheduled Tribes is to be ensured in accordance with Art.15 (5) of the Constitution as well as the directive principles of State Policy in

Arts.38 to 41 and 46 of the Constitution, the Committee must have the power to ensure that the fees charged by private professional educational institutions are reasonable and affordable.

39. We are of the view that Sections 4 (1) and 4 (8) of the Act, 2007 have to be read with Section 9 (1) of the Act, 2007, which deals with factors which have to be taken into consideration by the Committee while determining the fee to be charged by a private unaided professional educational institution. A reading of sub-section (1) of Section 9 of the Act, 2007 would show that the location of private unaided professional educational institution, the nature of the professional course, the cost of land and building, the available infrastructure, teaching, non-teaching staff and equipment, the expenditure on administration and maintenance, a reasonable surplus required for growth and development of the professional institution and any other relevant factor, have to be taken into consideration by the Committee while determining the fees to be charged by a private unaided professional educational institution. Thus, all the cost components of the particular private unaided professional educational institution as well as the reasonable surplus required for growth and development of the institution and all other factors relevant for imparting professional education have to be considered by the Committee while determining the fee. Section 4 (8) of the Act, 2007 further provides that the Committee may require a private aided or unaided professional educational institution to furnish information that may be necessary for enabling the Committee to determine the fees that may be charged by the institution in respect of each professional course. Each professional educational institution, therefore, can furnish information with regard to the fees that it proposes to charge from the candidates seeking admission taking into account all the cost components, the reasonable surplus required for growth and development and other factors relevant to impart professional education as mentioned in Section 9 (1) of the Act, 2007 and the function of the Committee is only to find out, after giving due opportunity of being heard to the institution as provided in Section 9 (2) of the Act, 2007 whether the fees proposed by the institution to be charged to the student are based on the factors mentioned in Section 9 (1) of the Act, 2007 and did not amount to profiteering and commercialisation of the education. The word "determination" has been defined in Black's Law Dictionary, Eighth Edition, to mean a final decision by the Court or an administrative agency. The Committee, therefore, while determining the fee only gives the final approval to the proposed fee to be charged after being satisfied that it was based on the factors mentioned in Section 9 (1) of the Act, 2007 and there was no profiteering or commercialisation of education. The expression 'fixation of fees' in Section 4 (1) of the Act, 2007 means that the fee to be charged from candidates seeking admission in the private professional educational institution did not vary from student to student and also remained fixed for a certain period as mentioned in Section 4 (8) of the Act, 2007. As has

been held by the Supreme Court in *Peerless General Finance vs. Reserve Bank of India* (supra), the Court has to examine the substance of the provisions of the law to find lout whether provisions of the law impose reasonable restrictions in the interest of the general public. The provisions in Sections 4 (1), 4 (8) and 9 of the Act, 2007 in substance empower the Committee to be only satisfied that the fee proposed by a private professional educational institution did not amount to profiteering or commercialisation of education and was based on the factors mentioned in Section 9 (1) of the Act, 2007. The provisions of the Act, 2007 do not therefore violate the right of private professional educational institution to charge its own fee.

Challenge to the provisions for reservation

40. Art.15 (5) of the Constitution, Section 8 of the Act, 2007, Rule 4 (2) of the 2008 Rules, relevant portion of Rule 7 of the 2009 Rules and Rule 15 (9) of the 2009 Rules are quoted herein below:

Article 15 (5) of the Constitution of India

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth –

.....

(5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."

Section 8 of the Act, 2007

"8. Reservation of seats - In admission to private unaided professional educational institutions, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution of India, there shall be reservation at the stage of admission for the persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens as may be prescribed by the State Government."

Rule 4 (2) of the 2008 Rules

"4. Admission Rules –

(1).....

(2) Allocation/Reservation of seats in every institutions and in its branch 16%, 20% and 14% seats of General pool (85% of total intake) shall be served for the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes (excluding creamy layer Other Backward Classes category) respectively as notified by the State Government in this regard."

Relevant portion of Rule 7 and Rule 15 (9) of the 2009 Rules

"7. Reservation- .....

20% Seats are reserved for candidates belonging to Scheduled Tribes, 16% seats are reserved for candidates belonging to Scheduled Castes and 14% seats are reserved for candidates belonging to other backward classes other than creamy layer of OBC of Madhya Pradesh or as amended from time to time. ..."

"15 COUNSELLING –

.....

(9) Counselling of candidates will be done according to following sequence category wise -

A. ST Category
B. SC Category
C. OBC Category
D. Unreserved Category.

In case the eligible candidates to the extent of reservation in any category 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."

Contentions of the petitioners

41. Mr. Verma and Mr. Tankha, learned senior counsel for the petitioners submitted that since the petitioners have not challenged in the present batch of writ petitions the Ninety Third Constitution Amendment inserting Art.15 (5) of the Constitution, the petitioners are not in a position to challenge the reservation provisions in the Act, 2007, in the 2008 Rules and in the 2009 Rules. They, however, submitted that in separate writ petitions, the Ninety Third Constitution Amendment inserting Art.15 (5) in the Constitution has been challenged by some of the petitioners and the decision of this Court on this point should be without prejudice to the contentions of the petitioners in such separate writ petition in which Art.15 (5) of the Constitution is challenged.

42. Mr. A.M. Mathur, learned Senior Counsel appearing for the petitioners in W.P.No.2732 of 2009, however, submitted that a reading of the reservation provisions in Rule 7 of the 2009 Rules, would show that 20% seats are reserved for candidates belonging to Scheduled Tribes, 16% seats are reserved for candidates belonging to Scheduled Castes and 14% seats are reserved for candidates belonging to Other Backward Classes, other than creamy layer of OBC in Madhya Pradesh. He submitted that the number of seats in the Post Graduate Dental and Medical courses in different specialised disciplines or subjects are so few that the percentage of reservation of 20%, 16% and 14% for ST, SC and OBCs cannot be worked out. He cited the decision of the Supreme Court in *Dr. Chakradhar Paswan vs. State of Bihar and others* 1988 (2) SCC 214 in which there were only three posts of Deputy Director, one in Homoeopathic, one in Unani and one in Ayurvedic and the Supreme Court held that these three posts are distinct and separate as they pertain to different disciplines and the posts cannot be grouped together and relying on *T. Devadasan vs. Union of India*, AIR 1964 SC 179, held that no reservation could be made under Art.16 (4) of the Constitution as reservation coming under Art.16 (4) of the Constitution presupposes the availability of atleast one post in that cadre. He also cited the decision in *State of Karnataka and others vs. K. Govindappa and another*, 2009 (1) SCC 1 in which also the Supreme Court has held that reservation cannot be applied to a single post under Art.16 (4) of the Constitution as that would amount to 100% reservation.

43. Mr. Mathur next submitted that the provisions in Rule 15 (9) of the 2009 Rules further show that as per the sequence of counselling, the ST category candidates, SC category candidates and the OBC category candidates will have preference over the unreserved category candidates. He submitted that Rule 15 (9) of the 2009 Rules therefore would be in clear violation of the right to equality of the unreserved category candidates inasmuch as the unreserved category candidates despite their higher marks in the common entrance test would be forced to take seats in the Post Graduate Medical and Dental courses left out by ST, SC and OBC category candidates. Mr. Tankha submitted that Rule 15 (9) of the

2009 Rules amounts to reverse discrimination against unreserved category candidates and cited the judgment in *M. Nagraj vs. Union of India,* AIR 2007 SC 71 in which the Supreme Court has observed that in matters relating to affirmative action by the State, such as reservation, the rights under Arts.14 and 16 of the Constitution are required to be protected and a reasonable balance is to be struck so that there is no reverse discrimination.

Contentions of the respondents

44. Mr. R.N. Singh, learned Advocate General and Mr. Gupta, learned counsel appearing for some of the respondents, on the other hand, submitted that the reservation provision in the 2009 Rules are meant to achieve the objects of Art.15 (5) of the Constitution. Mr. Singh further submitted that the sequence of counselling in Rule 15 (9) of the 2009 Rules is in accordance with the directions of a Division Bench of this Court in *Dr. Amit Kumar Aritwal vs. State of M.P.,* 2004 (3) MPLJ 82.

Conclusions with reasons

45. Art.15 (4) of the Constitution provides that nothing in Art.15 or in clause (2) of Art.29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. In *M.R. Balaji and others vs. State of M.P. and others*, AIR 1963 SC 649, a Constitution Bench of the Supreme Court interpreting Art.15 (4) of the Constitution held that it is because the interest of the society at large will be served by promoting the advancement of the weaker sections in the society that Art.15 (4) of the Constitution authorises special provision to be made, but if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art.15 (4) and, therefore, it would be extremely unreasonable to assume that in enacting Art.15 (4), the Constitution intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes is concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored (para 31 at page 662 of the AIR). In the aforesaid decision, the Supreme Court also held that when the State makes a special provision for advancement of weaker sections of the society specified in Art. 15 (4), it has to approach its task objectively and in a rational manner and it has to take reasonable and even generous steps to help the advancement of weaker elements; the requirements of the community at large must be born in mind and a formula must be evolved which should strike a reasonable balance between the several relevant considerations. Since Art. 15 (5) inserted by Ninety Third Constitution Amendment also is an enabling provision for the State to make any special provision by law for advancement of any socially and educationally backward classes of citizens or for the Scheduled Tribes or the Scheduled Castes

in so far as such special provision relates to admission to the educational institutions including the private professional educational institutions, whether aided or unaided by the State, we have to bear in mind the aforesaid principles laid down by the Supreme Court in *M.R. Balaji* (supra) in the context of Art.15 (4) of the Constitution.

46. The portion of Rule 7 of the 2009 Rules quoted above, shows that 20% seats, 16% seats and 14% seats are reserved for candidates belonging to Scheduled Tribes, Scheduled Castes and Other Backward Classes, other than creamy layer of OBCs of Madhya Pradesh. The word 'seats' in Rule 7 would mean the total seats in all the specialised disciplines or subjects of the Post Graduate Medical and Dental courses in the private unaided Medical and Dental Colleges in the State of Madhya Pradesh and not seats in specific specialised disciplines/subjects in the Post Graduate Medical and Dental courses in the private unaided Medical and Dental Colleges in the State of Madhya Pradesh. If the word 'seats' in Rule 7 of the 2009 Rules was to mean seats in specific specialised disciplines or subjects in Post Graduate Medical and Dental Courses in the private unaided Medical and Dental Colleges in the State of Madhya Pradesh, as contended by Mr. Mathur, then the percentages of 20%, 16% and 14% reservations in favour of Scheduled Tribes, Scheduled Castes and OBCs cannot be worked out and the provision in the newly inserted Art.15 (5) of the Constitution cannot be implemented. For advancement of socially and educationally backward classes of citizens and for the Scheduled Tribes and for the Scheduled Castes, it is, therefore, necessary that a formula has to be evolved which would strike a reasonable balance between rights of Unreserved category candidates and the rights of the Scheduled Tribes, Scheduled Castes and OBCs mentioned in Rule 7 have to be worked out. As a matter of fact, we find that by notification dated 27th April, 2009 of the State Government, the distribution of the seats of Post Graduate Medical and Dental courses in the three private unaided Medical Colleges are as follows:

"DISTRIBUTION OF DEGREE SEATS IRE PG COUNSELLING, APRIL-MAY, 2009

R.D. Gardi Medical College, Ujjain

S.No. (1)	Subject (2)	UR (3)	ST (4)	SC (5)	OBC (6)	Total (7)
1.	Anatomy	1	1	-	1	3
2.	Community Medicine	2*	1	1	-	4
3.	Dermatology	1	-	-	-	1
4.	TB Chest	-	-	-	1	1
5.	General Medicine	1	1	1	-	3
6.	General Surgery.	2	1	1	-	4
7.	Obst. & Gyane.	1	-	-	1	2
8.	Ophthalmology	1	-	-	-	1

9.	Oto-Rhino-Laryngology	1	-	-	-	1
10.	Paediatrics	1	-	-	1	2
11.	Pathology	2	1	1	-	4
12.	Pharmacology	1	-	-	1	2
13.	Microbiology	1	1	-	-	2
14.	Radiology	1	1	1	-	3
15.	Psychitary	1	-	-	-	1

नोट . कम्यूनिटी मेडीसन में UR श्रेणी की * से दर्शाई सीट विकलांग श्रेणी के लिये आरक्षित है

DISTRIBUTION OF DEGREE SEATS PRE-PG COUNSELLING, APRIL-MAY, 2009

S.No.	Subject	Modern Dental College Indore.					Peoples College of Dental Science, Bhopal.					Grand total
(1)	(2)	(3) UR	(4) ST	(5) SC	(6) OBC	(7) Tot.	(8) UR	(9) ST	(10) SC	(11) OBC	(12) Tot.	(13)
1.	Prostho-dontics	2	1	-	-	3	1	-	1	1	3	6
2.	Periodon-tics	1	-	1	1	3	2	1	1	1	3	6
3.	Conserva-tive Den-tistry.	2	1	-	-	3	1	-	1	1	3	6
4.	oral Patho-logy.	1	-	1	1	3	2	1	-	-	3	6
5.	Oral Sur-gery.	2	1	1	-	4	2	1*	-	-	3	7
6.	Oral Medi-cine & Radiology.	1	1	-	1	3	2	1	-	-	3	6
7.	Orthodon-tics	2	1	-	-	3	1	-	1	1	3	6
8.	Pedodon-tics	2	-	1*	1	4	2	1	-	-	3	7
9.	Commu-nity Den-tistry.	-	-	-	-	0	1	1	1	1	3	3
Total		13	5	4	4	26	14	6	4	3	27	53

नोट . 1. पीपुल्स कालेज आफ डेंटल साइंस, भोपाल की ST श्रेणी की ओरल सर्जरी * से दर्शाई सीट विकलांग श्रेणी के लिये आरक्षित है.

2. मार्डन डेंटल कालेज, इन्दौर की SC श्रेणी की पीडोडोंटिक्स * से दर्शाई सीट विकलांग श्रेणी कि लिये आरक्षित है.

The aforesaid distribution of seats between Unreserved, Scheduled Tribes, Scheduled Castes and OBC category candidates shows that sufficient number of seats have been allotted also for Unreserved category candidates in different disciplines or subjects of Post Graduate Medical and Dental courses in Medical and Dental Colleges in the State of Madhya Pradesh and a reasonable balance has been struck between the rights of the Unreserved category candidates and of Scheduled Tribes, Scheduled Castes and Other Backward Classes. We are, therefore, unable to accept the contention of Mr. Mathur and Mr. Tankha that there is a reverse discrimination against the unreserved category candidates in the 2009 Rules.

47. Once the seats in specific specialised disciplines or subjects have been allotted to Unreserved, Scheduled Tribes, Scheduled Castes and OBC categories of candidates, there can be no apprehension that the unreserved category candidates scoring higher marks than the Scheduled Tribes, Scheduled Castes and OBC categories candidates will not get seats in the disciplines or subjects of their choice because of the sequence of counselling given in Rule 15 (9) of the 2009 Rules. As a matter of fact, we find that Rule 15 (9) of the 2009 Rules has been framed in accordance with the directions of this Court in a Division Bench judgment in *Dr. Amit Kumar Arihit* (supra). The rationale for the sequence of counselling followed in Rule 15 (9) has been given in paragraph 11 of the judgment of the Division Bench in *Dr. Amit Kumar Arihit* (supra) and the object of the sequence of counselling in Rule 15 (9) of the 2009 Rules is to ensure that Unreserved category candidates participate in the counselling at the end not only for the seats allotted to Unreserved category candidates but also, for the seats which have been reserved for Scheduled Tribes, Scheduled Castes and OBC categories of candidates but which would not be filled up on account of non-availability of Scheduled Tribes, Scheduled Castes or OBC categories of candidates so that the Unreserved category candidates get maximum opportunity to get the subjects of their choice. The challenge to the reservation provisions of Rule 15 (9) of the 2009 Rules, therefore, also fails.

Challenge to the provision relating to eligibility for admission.

48. Sections 3 (d) and 5 of the Act, 2007 and Rule 10 of the 2009 Rules which relates to eligibility of a candidate for taking the common entrance examination for admission to the Post Graduate Medical and Dental courses in private unaided Medical and Dental Colleges in the State of Madhya Pradesh are quoted herein below:

Sections 3 (a) and 5 of the Act, 2007-

"3. Definitions – In this Act, unless the context otherwise requires –

.....

(a) **"appropriate authority"** means a Central or State authority established by the Central or the State Government for laying down norms and conditions for ensuring standards of professional education."

"5. Eligibility – The eligibility for admission to a private unaided professional educational institutions shall be such as may be notified by the appropriate authority.".

Rule 10 of the 2009 Rules –.

"10. Eligibility:

(1) The candidate must be citizen of India

AND

The candidate must have passed all MBBS/BDS Examination from any recognized Medical/Dental College of India.

(2) (i) Eligible Candidate must have undertaken studies in an institution recognised by MCI/DCI.

(ii) Eligible Candidate must have completed compulsory internship from a MCI/DCI recognised institution on or before 31.03.2009.

(iii) Eligible Candidate must permanently be registered by Madhya Pradesh Medical/Dental Council (and/or MCI/DCI) on or before 30.04.2009."

Contentions of the petitioners

49. The petitioners in W.P.No.3732 of 2009 and W.P.No.3886 of 2009 have contended that Rule 10 (2) (iii) of the 2009 Rules provides that eligible candidate must be permanently registered with Madhya Pradesh Medical/Dental Council (and/or MCI/DCI) on or before 30.04.2009 and therefore, bars candidates who are permanently registered with other States Medical/Dental Councils from taking the common entrance test. The contention on behalf of the petitioners is that Section 5 of the Act, 2007 is clear that eligibility for admission to the private unaided professional educational institution shall be such as may be notified by the 'appropriate authority' and 'appropriate authority' has been defined in Section 3 (a) of the Act, 2007 to mean a Central or State Authority established by the Central or the State Government for laying down norms and conditions for ensuring standards of professional education. On behalf of the petitioners, it was submitted

that Medical Council of India and the Dental Council of India are the authorities established under the Acts of Parliament to lay down the norms and conditions for ensuring standards of medical and dental education and the regulations made by the Medical Council of India and the Dental Council of India do not limit the eligibility for admission to Post Graduate Medical and Dental courses to only those candidates who are permanently registered by the M.P. Medical/Dental Council and, therefore, the provision in Rule 10 (2) (iii) of the 2009 Rules are ultra-vires.

Contentions of the respondents

50. In the return filed on behalf of the respondents in W.P.No.3732 of 2009, it is contended in para 15 that a candidate who undergoes any of the Post Graduate courses in an institution of a particular State is mandatorily required to be registered with the concerned State Medical or Dental Council or MCI/DCI for the reason that the curriculum of post graduate courses contains the examination of out-door/in-door patients, their treatment and to operate and deal with post operative care, besides studies and research and, therefore, a person who is not registered with the Medical Council of the particular State cannot perform his/her studies in a valid manner, rather he/she cannot be allowed to study as per the Medical Council of India norms.

Conclusions with reasons

51. We find that in Post Graduate Medical Education Regulations, 2000, as amended, the following provision is made with regard to eligibility for admission to post-graduate Colleges:

> " ...Every student, selected for admission to a Post Graduate medical course in any of the medical institutions on acquiring MBBS degree or an equivalent qualification thereto shall have obtained permanent registration with the Medical Council of India, or any of the State Medical Council(s) or shall obtain the same within a period of one month from the date of his/her admission, failing which his/her admission shall stand cancelled."

It is clear from the aforesaid provision that a student, who has obtained permanent registration with Medical Council of India or any of the State Councils, is eligible for admission to Post Graduate Medical courses in any of the medical institutions. Hence the provision in Rule 10 (2) (iii) of the 2009 Rules that the candidate should have obtained permanent registration with the State Medical Council of Madhya Pradesh and not State Medical Councils of other States is ultra-vires Section 5 read with Section 3 (a) of the Act, 2007.

52. In the Dental Council of India Revised MDS Course Regulations, 2007, it is provided:

"ELIGIBILITY:

A candidate for admission to the MDS course (Master of Dental Surgery) must have a recognised degree of BDS (Bachelor of Dental Surgery) awarded by an Indian University in respect of recognised Dental College under Section 10 (2) of the Dentists Act, 1948 or an equivalent qualification recognised by the Dental Council of India and should have obtained permanent registration with the State Dental Council. Candidates not possessing a recognised Dental qualification for the above purpose should secure the prior approval of his qualifications by the Dental Council of India before he can be admitted to the MDS Course of any University in India."

It will be clear from the language of the eligibility provision in the Dental Council of India Revised MDS Course Regulations, 2007 that a candidate for admission to MDS course should have obtained permanent registration with the State Dental Council besides having a recognised degree of BDS or an equivalent qualification recognised by the Dental Council of India. Hence the provision in Rule 10 (2) (iii) of the 2009 Rules that a candidate must be permanently registered with the State Dental Council and not with State Dental Councils of other States is ultra vires Section 5 read with Section 3 (a) of the Act, 2007.

53. Our judgment declaring Rule 10 (2) (iii) of the 2009 Rules as ultra-vires will be operative only from the academic session 2010-11 because the common entrance examination for admissions to Post Graduate Medical Courses in private unaided professional educational institutions in Madhya Pradesh for the academic session is already over and if our judgment on this point is allowed to apply to also the common entrance examination which has already taken place, the entire common entrance examination will have to be cancelled, leading to grave consequences for the students who will not be able to get admission to the seats in the Post-graduate Medical and Dental courses in the academic session 2009-10 by 31st May, 2009, the last date fixed for the admissions.

54. Although a challenge was made also to some of the provisions of the 2008 Rules, the counsel for the petitioners did not seriously address the Court on the validity of the provisions of the 2008 Rules and, therefore, we have not dealt with the same.

55. In the result, while we do not find any merit to the challenge to the Act, 2007, the 2008 Rules and the orders dated 28.2.2009 and 5.3.2009 of the State Government, we declare that the provisions of Rule 10 (2) (iii) of the 2009 Rules are ultra-vires, but such declaration will not affect the common entrance test already conducted by VYAPAM for admissions to the Post-graduate Medical and Dental courses in the private unaided educational institutions in the State of M.P. for the year 2009-10. The candidates who have succeeded in the common

entrance test conducted by VYAPAM, we are told, have participated in the counselling. The successful candidates after counselling be admitted to the post-graduate Medical and Dental courses in the private unaided Medical and Dental Colleges in the State of Madhya Pradesh by 31st May, 2009.

All interim orders passed are vacated.

Order accordingly.

I.L.R. [2009] M. P., 2310
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
19 June, 2009*

ANGAD SINGH RATHORE ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Police Regulations, M.P., Regulation 270, Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 29(iii) - *Petitioner, Inspector of Police - In departmental proceeding, punishment of penalty of Rs.1000/- inflicted by I.G.P. - Show cause notice by D.G.P. exercising suo-moto revisional power -Held - Power of review could not be exercised after six months of order of punishment - Order quashed - Petition allowed.* (Paras 9 to 11)

पुलिस विनियम, म.प्र., विनियम 270, सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29(iii) – याची पुलिस निरीक्षक – विभागीय कार्यवाही में पुलिस महानिरीक्षक द्वारा 1000/– रुपये की शास्ति का दण्ड अधिरोपित किया गया – पुलिस महानिदेशक द्वारा स्वप्रेरणाधीन पुनरीक्षण शक्ति का प्रयोग करते हुए कारण बताओ सूचना पत्र – अभिनिर्धारित – दण्ड के आदेश के छः माह बाद पुनर्विलोकन की शक्ति का प्रयोग नही किया जा सकता था – आदेश अभिखण्डित – याचिका मंजूर।

Cases referred :

(2007(1) MPLJ 392), 1970 MPLJ 430, 1985 MPLJ 343.

Sachin Bhatnagar, for the petitioner.
Arvind Gokhale, G.A., for the respondents.

O R D E R

SHANTANU KEMKAR, J. :–Petitioner is working on the post of Inspector in the Home (Police Department) of the State Government.

2. A notice dt.15.05.06 (Annexure A/2) was issued to the petitioner by the third respondent Inspector General of Police, Ujjain to show cause as to why departmental proceedings be not initiated against him for the misconduct alleged

*W P No.5918/2007(S) (Indore)

in the said notice. The petitioner submitted reply (Annexure A/3) on 25.05.06 to the said show cause notice and denied the charges levelled against him. However instead of taking any decision on the basis of the said reply, the third respondent Inspector General of Police, Ujjain Zone issued him yet another show cause notice dt.14.06.06 (Annexure A/4) on the same facts. On receipt of the said show cause notice, having regard to the punishment proposed in the said notice which was not very severe the petitioner thought it proper to accept the punishment proposed in the said notice. He therefore submitted his reply dt.24.06.06 (Annexure P/5) and requested for lenient punishment. On receipt of the petitioner's reply dt.24.06.06 (Annexure A/5) the third respondent considered the same and having regard to the nature of misconduct, the entire facts and circumstances of the alleged incident, took a lenient view and instead of the proposed punishment of withholding of one increment without cumulative effect inflicted upon the petitioner punishment of penalty of Rs.1000/- vide order dt.15.07.06 (Annexure A/6).

3. After more than eight months of passing of the aforesaid punishment order dt.15.07.06 (Annexure A/6) the second respondent Director General of Police which is also an appellate authority against the impugned order passed by the third respondent issued a notice dt.24.03.07 (Annexure A/1) to the petitioner exercising its suo-motu revisional powers provided under regulation 270(iv) of the M.P.Police Regulations (for short Regulations) calling upon him to show cause as to why the order dt.15.07.06 passed by the third respondent Inspector General of Police, Ujjain Zone be not reviewed and departmental inquiry be not initiated against him having regard to the gravity of the misconduct.

4. On receipt of the aforesaid show cause notice dt.24.03.07 (Annexure A/1) to take the matter in suo-motu revision, the petitioner submitted reply (Annexure A/7) to it challenging the jurisdiction of the second respondent to issue the show cause notice after expiry of six months from the passing of the order of penalty (Annexure P/6). He also prayed for dropping of the proposed action against him. The second respondent vide order dt.23.07.07 rejected the petitioner's objection about limitation, cancelled the penalty order dt.15.07.06 (Annexure P/6) passed by the third respondent and ordered to initiate disciplinary proceedings against the petitioner. Feeling aggrieved, the petitioner has filed this petition.

5. Shri Sachin Bhatnagar learned counsel for the petitioner argued that the impugned order of exercising the suo-motu revisional power under Regulation 270(4) of the Regulations by the second respondent who is an appellate authority against the order of penalty passed by the third respondent beyond the period of six months is impermissible. He submits that when the police regulations are silent about the limitation for exercising suo-motu revisional powers the provisions of M.P.Civil Services (Classification, Control and Appeal) Rules, 1966 (for short the Rules) will be applicable. He placing reliance on Rule 29 of (iii) the Rules

argued that the second respondent being an appellate authority the order of penalty could have been reviewed by him, within six months of the date of the said order of penalty. He submitted that in view of regulation 262 of the Regulations against the order of penalty dt.15.07.06 (Annexure A/6) passed by the third respondent Inspector General of Police, Ujjain Zone the second respondent Director General of Police would be the appellate authority being authority immediately superior to him. In the circumstances he argued that the Director General of Police being the appellate authority the power of review could have been exercised by him only within six months from the date of the order dt.15.07.06 which was proposed to be reviewed. In support of his submissions he placed reliance on the judgment passed by this Court in the case of *Sushil Kumar Shrivastava v. State of M.P. and others* (2007(1)MPLJ 392).

6. Shri Arvind Gokhale learned Government Advocate while supporting the action taken by the second respondent to invoke powers of suo-motu revision argued that the second respondent Director General of Police being the Head of the department directly under the State Government, no period of limitation is prescribed for the head of the department for taking the matter in suo-motu revision. In support of this submission he placed reliance on Rule 29(ii) of the Rules.

7. It is not in dispute that the second respondent is the authority immediately superior to the third respondent Inspector General of Police who had passed the punishment order dt.15.07.06 to the petitioner. Regulation 270 provides that every order of punishment or exoneration, whether original or appellate shall be liable to revision suo-motu by any authority superior to the authority making the order. Since no period of limitation for taking the matter in suo-motu revision has been prescribed in the M.P. Police Regulations, in view of the law laid down by this Court in the case of *Premchandra v. State* [1970 MPLJ 430], *Krishnanaryan Shivpyare Dixit v.State of M.P. and others* [1985 MPLJ 343 and in the case *Sushil Kumar Shrivastava* (supra) in the absence of any provision in the Police Regulations the provisions contained in the Rules get attracted.

8. Regulation 262 of the Regulations reads thus :

> *"Every Officer against whom an order may be passed under Regulation 214 and who thinks himself wronged thereby shall be entitled to prefer an appeal against such order to the authority immediately superior to the officer who passed the order of punishment; and, [if the appeal if from an officer of the rank of Inspector or of an equivalent rank] and the appeal relates to an order than that referred to in sub-head (I) of Regulation 214 and is rejected by the appellate authority, he may prefer a second appeal to the State Government :*
>
> *"Provided that a probationer shall have no right of appeal.*

against the orders of his discharge if he has been given an opportunity to show cause against the discharge and his reply duly considered as required by the rule contained in Police Regulation 228-A.

"Regulation 270 provides for suo-motu revision.

"(1) Every order of punishment or exoneration, whether original or appellate shall be liable to revision suo-motu by any authority superior to the authority making the order.

"(2) Every appellate order by a final appellate authority shall be liable to revision by such final appellate authority, on application made in that behalf by the person against whom the order has been passed.

"Rule 29 of the Rules provides for review which reads thus:

"29.(1) Notwithstanding anything contained in these rules except rule 11-

"(i) the Governor; or"

(ii) the head of a department directly under the State Government, in the case of a Government servant serving in a department or office (not being the secretariat), under the control of such head of a department, or

"(iii) the appellate authority, within six months of the date of the order proposed to be reviewed, or"

(iv) any other authority specified in this behalf by the Governor by a general or special order, and within such time as may be prescribed in such general or special order may at any time, either on his or its own motion or otherwise call for the records of any inquiry and review any order made under these rules or under the rules repealed by rule 34 from which an appeal is allowed but from which no appeal has been preferred or from, which no appeal is allowed, after consultation with the Commission where such consultation is necessary, and may-

"(a) confirm, modify or set aside the order; or

"(b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or

"(c) remit the case to the authority which made the order or to any other authority directing such authority to make

such further inquiry as it may consider proper in the circumstances of the case; or

"(d) pass such other orders as it may deem fit:"

Provided that no order imposing or enhancing any penalty shall be made by any reviewing authority unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose; any of the penalties specified in clauses(v) to (ix) of rule 10 or to enhance the penalty imposed by the order sought to be reviewed to any of the penalties specified in those clauses, no such penalty shall be imposed except after an inquiry in the manner laid down in rule 14[1] [x x x] and except after consultation with the Commission where such consultation is necessary:

"Provided further that no power to review shall be exercised by the head of department unless-

(i) the authority which made the order in appeal, or

(ii) the authority to which an appeal would lie, where no appeal has been preferred, is subordinate to him.

"Explanation .....

9. It is not disputed that in view of Regulation 262 of the Regulations against the penalty order dt.15.05.06 passed by the third respondent Inspector General of Police, Ujjain the appellate authority would be is the second respondent Director General of Police. Regulation 270 empowers any authority superior to the authority making the order of penalty to review the order suo-motu. This being the position and the Director General of Police being the superior authority as well as appellate authority against the order of penalty sought to be reviewed the provisions contained in Rule 29 Sub Clause (iii) of the Rules would get attracted. Rule 29(iii) provides that the appellate authority may review the order proposed to be reviewed within six months. In the present case the second respondent appellate authority sought to review the order after more than eight months. In the circumstances the action to take the order of penalty in review having been taken after six months is barred by limitation.

10. The contention of learned Government Advocate that the second respondent being the Head of the department no period of limitation is provided for taking the matter in suo-motu revision is misconceived. Police Regulation 270 provides that the review shall be made by any authority superior to the authority making order. In view of Regulation 262 the appellate authority against the order of penalty passed by the Inspector General of Police, Ujjain is Director General of Police

being the authority superior to the authority making the order. In the circumstances proposed action of review by the Director General of Police is in the capacity of the appellate authority and therefore the suo-motu powers could not have been exercised by him after the prescribed period of limitation of six months in view of Rule 29(iii) of the Rules, 1966.

11. Having regard to the aforesaid, in my considered view the impugned order dt.23.07.07 (Annexure A/8) setting aside the order of penalty passed by the third respondent as also the proposed action against the petitioner in pursuance to the show cause notice dt.24.03.07 (Annexure A/1) are liable to be and are hereby quashed.

12. The petition is allowed. No order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 2315
WRIT PETITION
Before Mr. Justice Viney Mittal
30 June, 2009*

GURUJI SEVA NYAS (SHRI) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Lokayukt Tatha Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Sections 10, 11 & 12 - *Allotment of plot to petitioner trust by Indore Development Authority (IDA) following the due process - On complaint being made, without hearing petitioner Lokayukt directed IDA to cancel allotment - IDA treating the direction of Lokayukt binding cancelled allotment - Held - Inquiry conducted by the Lokayukt only by issuing show cause notice to Chairman of IDA, and after taking explanation and perusal of record of IDA - Entire exercise has been done behind the back of petitioner - Although formal proof as required in Evidence Act and Cr.P.C. may not be required for proceeding before the Lokayukt, still adherence of principles of natural justice is required - Order of IDA cancelling allotment quashed - Lokayukt directed to look into complaint afresh after affording opportunity to all affected parties.* (Para)

लोकायुक्त तथा उप–लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएँ 10, 11 व 12 – इन्दौर विकास प्राधिकरण द्वारा सम्यक प्रक्रिया का पालन कर याची ट्रस्ट को भूखण्ड का आबंटन – शिकायत किये जाने पर, याची को सुने बिना लोकायुक्त ने इन्दौर विकास प्राधिकरण को आबंटन रद्द करने का निदेश दिया – इन्दौर विकास प्राधिकरण ने लोकायुक्त का निदेश बाध्यकारी मानकर आबंटन रद्द किया – अभिनिर्धारित – लोकायुक्त द्वारा केवल इन्दौर विकास प्राधिकरण के अध्यक्ष को कारण बताओ सूचनापत्र जारी कर और स्पष्टीकरण लेने तथा इन्दौर विकास प्राधिकरण

*W.P. No.7724/2008 (Indore)

के अभिलेख का परिशीलन करने के बाद जाँच की गई – सम्पूर्ण कवायद याची के पीछे की गई – यद्यपि साक्ष्य अधिनियम और द.प्र.सं. में अपेक्षित औपचारिक सबूत लोकायुक्त के समक्ष कार्यवाही के लिए अपेक्षित नहीं हो सकता तब भी नैसर्गिक न्याय के सिद्धांतों का अनुसरण आवश्यक है – इन्दौर विकास प्राधिकरण का आबंटन रद्द करने का आदेश अभिखण्डित – लोकायुक्त को सभी प्रभावित पक्षकारों को अवसर देने के बाद शिकायत की पुनः जाँच पड़ताल करने का निदेश दिया गया।

Cases referred :

(2004) 2 SCC 579, Judgment dated 02.04.2005 passed by P&H High Court in CWP No.20075/2003 (Jai Singh Vs. Punjab State Human Rights Commission & anr., Judgment dated 18.05.2005 passed by P&H High Court in CWP No.18237/2003 (Jatt Ram Vs. Punjab State Human Rights Commission & anr., 2009(1) MPLJ 632.

A.K. Sethi with *Rahul Sethi,* for the petitioner.
Vivek Patwa, Dy.G.A., for the respondent No.1.
Z.A. Khan with *Vinita Phaye,* for the respondent No.2.
Manoj Dwivedi, for the respondent No.3.

VINEY MITTAL, J. :–The petitioner-Shri Guruji Seva Nyas (hereinafter referred as the petitioner-trust) is a public trust registered under the provisions of Madhya Pradesh Public Trust Act, 1951, and has approached this Court raising a challenge to the cancellation order dated December 12, 2008, passed by Indore Development Authority (IDA), respondent No. 2, with regard to plots Nos. A and B, situated in Scheme No. 54, Indore.

The facts.

2. An advertisement dated March 23, 2007 was issued by IDA, inviting tenders for allotment of two plots, being plot No. A, measuring 4110 square meters, and plot No. B, measuring 4376 square meters, both situated in Scheme No. 54, Indore, which had been floated by IDA. Only Public Trusts, Societies, registered under the Societies Registration Act, Registered Companies or Cooperative Societies, so registered in the State, were to be treated as eligible for allotment of the said plots.

3. The petitioner-trust claims that on April 7, 2007, it submitted an application for allotment of both the plots. Along with the application, as required, Rs.10,00,000/- each, i.e. a total of Rs. 20,00,000/-, was deposited by it as earnest money. The tenders were submitted by the petitioner-trust , submitting the tender price at the rate of Rs. 5200/- per square meter. The aforesaid tenders were opened by IDA on April 10, 2007. There were a total of ten tenders. Since the tender submitted by the petitioner-trust was found to be highest, the same was provisionally accepted by IDA, subject to an approval to be granted by the State Government. According to the petitioner-trust, even the aforesaid approval was granted by the State

Government on April 12, 2007, as required under Rule 19 of Madhya Pradesh Nagar Tatha Gram Nivesh (Vikasit Bhumion, Grihon, Bhawanon Tatha Anya Sanrachnaon Ka Vyayan) Niyam, 1975. On the aforesaid approval granted by the State Government, a formal allotment letter was issued by IDA on April 12, 2007, itself, for allotment of both the plots to the petitioner-trust. For plot No. A, a premium of Rs. 2,13,72,000/- was fixed, whereas for plot No. B, the premium fixed was Rs. 2,27,55,200/-.

4. The petitioner-trust has pleaded that as per the conditions of allotment, the amount which was required to be deposited by it, was actually so deposited and up-to August 2007. A total amount of Rs. 3,26,92,085/-was deposited. Since there was a default for some payment, even penal interest for the aforesaid defaulting period was deposited. Consequently, two allotment letters, Annexures P-10 and P-11, were issued with regard to the aforesaid two plots by IDA to the petitioner-trust on August 26, 2007.

5. It appears that some complaint was made by one K.K. Mishra to the Lokayukt, State of Madhya Pradesh, whereby a grievance appears to have been made against the aforesaid allotment of the plots to the petitioner-trust by IDA. On receipt of the aforesaid complaint, the Lokayukt appears to have sought some explanation/response from IDA in the matter. It also appears from the record (as per the stand taken by the Lokayukt in the reply filed on its behalf) that IDA had furnished some explanations on June 30, 2007, January 18, 2008, March 19, 2008, April 23, 2008 and May 7, 2008. As per the reply filed on behalf of the Lokayukt, it also appears that the relevant record of IDA was made available for examination by the Lokayukt. However, the petitioner-trust has specifically pleaded, and the said fact has not even been disputed by the respondents, including the Lokayukt, that at no stage, the petitioner-trust had ever been issued any show cause notice in the matter, nor any opportunity had ever been provided to it, to appear and explain the allotment in question. Ultimately, on May 7, 2008, a communication was issued by the Lokayukt to IDA, issuing directions, to cancel the allotment of both the plots. The aforesaid communication issued by Lokayukt to IDA is available on record as Annexure R-3/1 with the reply filed on behalf of the Lokayukt.

6. On receipt of the aforesaid directions from the Lokayukt, IDA issued an order dated July 14, 2008, whereby the allotment of the plots in question, in favour of the petitioner-trust, was ordered to be cancelled. A copy of the aforesaid cancellation order has been appended as Annexure P-14 with the petition. Even the aforesaid cancellation order was passed by IDA without ever issuing any show cause notice to the petitioner-trust, and without ever affording it an opportunity to explain the matter.

7. In these circumstances the petitioner-trust approached this Court through a writ petition, being WP No. 4306 of 2008, raising a challenge to the aforesaid

cancellation order. Since it was found by this Court that IDA had ordered the cancellation of the plots, in complete violation of the principles of natural justice, therefore, this Court, without going any further into the controversy, through an order dated July 16, 2008, quashed the cancellation order dated July 14, 2008. However, a liberty was granted to IDA to initiate fresh proceedings, against the petitioner-trust, if so desired, by issuing a show cause notice, at the first instance, and thereafter on consideration of the reply of the petitioner-trust, by passing a fresh order. A copy of the order dated July 16, 2008 passed by this Court in WP No. 4306 of 2008 has been appended as Annexure P-15 with the petition.

8. In terms of the liberty granted to IDA, and keeping in view the directions issued by the Lokayukt, a show cause notice dated August 18, 2008, Annexure P-16, was issued by IDA to the petitioner-trust, proposing the cancellation of the plots in question. A detailed reply was filed by the petitioner-trust on September 17, 2008 (Annexure P-19). However, although the petitioner-trust appears to have raised many pleas in the detailed reply to the proposed action of cancellation, but without consideration of the said pleas raised by it, IDA has passed a fresh order on December 12, 2008, whereby the allotment of the plots in question has been ordered to be cancelled. A copy of the aforesaid cancellation order has been appended as Annexure P-20 with the petition, and is a subject matter of challenge before this Court.

9. The petitioner-trust has challenged the aforesaid action taken by IDA by raising various pleas. It has been maintained that although IDA was required to pass a fresh order, after issuance of a show cause notice for cancellation, only after taking into consideration the reply filed by the petitioner-trust, but the impugned order Annexure P-20 reveals that various pleas raised by the petitioner-trust, have not at all been adverted to. It has been maintained that as a matter of fact, a perusal of the cancellation order shows that the same has been passed, merely on the basis of the directions issued by the Lokayukt, by observing that the decision taken by the Lokayukt is to be treated as binding on IDA. It has also been maintained by the petitioner-trust that due procedure had been followed by IDA, in allotting the plots in question, and even when the tenders submitted by the petitioner-trust were found to be highest, and before the allotment of the plots even the requisite sanction of the State Government under the Rules had also been obtained. Thus, the petitioner-trust has pleaded that there was no justification for IDA to have ordered the cancellation of the plots.

10. It has also been maintained by the petitioner-trust that since the cancellation order recites to have been passed on the directions issued by the Lokayukt, but the petitioner-trust had never been issued any notice of any such proceedings/ investigation taken out by the Lokayukt, nor at any stage had ever received notice from the Lokayukt in the matter. It has also been pleaded by the petitioner-trust that the Lokayukt was having no authority or jurisdiction for ordering cancellation

of the allotment of the plots. According to the petitioner-trust, since it had deposited a huge amount after acceptance of its tenders, being highest, IDA was even estopped from cancelling the same.

11. The claim made by the petitioner-trust has been contested by respondents No. 2 and 3. Two separate replies have been filed. In the reply filed on behalf of IDA, the facts, as pleaded by the petitioner-trust, have not been disputed. As a matter of fact, it has been conceded that the tenders submitted by the petitioner-trust, for both the plots at the rate of 5200 per square meter, were the highest and therefore, a resolution was passed by IDA to accept the same, and the requisite approval of the State Government was sought under rules 19/20 of the Rules, which was also granted by the State Government. However, the only defence offered by IDA is that having received the directions from the Lokayukt, IDA was duty bound in law to carry out the said directions, being binding upon it, and therefore, the cancellation order with regard to the plots in question had been passed.

12. In the separate reply filed on behalf of Lokayukt, respondent No. 3, it has been maintained that a complaint was received by the Lokayukt from one K.K. Mishra, in which it was alleged that officers of IDA had abused their official position, and had illegally allotted two plots to the petitioner-trust, in violation of the terms and conditions of the tender, and contrary to the government circulars and guidelines, causing a huge loss to the State Exchequer. According to the said reply, the aforesaid complaint was duly enquired into by seeking an explanation from IDA, and by perusing its record, and as per the advise rendered by the Legal Advisor of the Lokayukt, it was found that the petitioner-trust was not eligible for allotment of two plots. Consequently, the Lokayukt had passed an order on May 5, 2008, thereby making a recommendation to the Principal Secretary, Housing and Environment Department of the State Government, and also to IDA, for cancellation of two plots, allotted to the petitioner-trust.

13. It would be relevant to notice, at this stage only, that although a specific plea has been raised by the petitioner-trust that all proceedings on the aforesaid complaint of K.K. Mishra were conducted in the office of the Lokayukt, behind the back of the petitioner-trust, and without ever issuing any show cause notice to it, the said fact has not at all been denied in the reply filed on behalf of respondent No. 3. However, it has been maintained that "an enquiry had been conducted according to prescribed procedure, after giving due notice to the petitioner and also opportunity of personal hearing (copy of the notice and reply sent by them, Annexure-P/1, copy of the note-sheets dated 22.2.2008, 19.3.2008, 27.3.2008 and 23.4.2008 Annexure-P/2), as per para 2.1 of the reply of respondent No. 3". However, a perusal of the aforesaid notice in the reply depicts that the said show cause notice had merely been issued by the office of the Lokayukt to the Chairman of IDA, and the reply had also been submitted only by the Chairman of IDA.

There is absolutely no material on record, nor has even been pleaded in the reply of respondent No. 3, that any show cause notice had ever been issued to the petitioner-trust, requiring it to explain the matter.

14. I have heard Shri A.K. Sethi, learned senior counsel for the petitioner-trust, Shri Vivek Patwa, learned Deputy Government counsel for respondent No. 1-State, Shri Z.A. Khan, learned senior counsel appearing for respondent No. 2-IDA and Shri Manoj Dwivedi, learned counsel for respondent No. 3-Lokayukt, and with their assistance, have also gone through the record of the case.

15. All the learned counsel for the parties, during the course of arguments, have reiterated the pleas raised by the parties in their respective pleadings.

16. Shri A.K. Sethi, learned senior counsel for the petitioner-trust, has referred to various provisions of Madhya Pradesh Lokayukt and Up-Lokayukt Act, 1981, (hereinafter called as the Act), and maintained that firstly, since the complaint in question appears to have been made by the complainant K.K. Mishra, alleging wrong/illegal allotment of the plots to the petitioner-trust, therefore, no investigation/ enquiry, could be held in the matter by the Lokayukt behind the back of the petitioner-trust, and without issuing a show cause notice to the petitioner-trust, seeking its explanation, and without associating it in the matter. On that basis, it has been maintained that the mandatory procedure had not been followed by the Lokayukt, as laid under the Act, and in any case, the procedure adopted by the Lokayukt was in complete violation of the principles of natural justice.

17. Shri Sethi has further argued that under the provisions of the Act, the Lokayukt has been empowered to hold an enquiry, and on being satisfied that the allegation in the compliant is established, may submit a report in writing, to communicate his findings and recommendation, along with the relevant documents etc., to the Competent Authority. Shri Sethi maintains that as per Section 12 of the Act, the report submitted by the Lokayukt is in the nature of a recommendation, and therefore, the Competent Authority is required to independently examine the report and the material submitted before it, and take appropriate action thereupon. Thus, according to Shri Sethi, the communication dated May 7, 2008, Annexure R-3/1, issued by the Lokayukt to IDA, being in the nature of directions to IDA to cancel the allotment of the plots to the petitioner-trust, such directions were not envisaged under the provisions of the Act, and was in fact without jurisdiction.

18. Additionally, learned senior counsel for the petitioner-trust has argued that even after having received the report of the Lokayukt, IDA was duty bound in law to independently examine the issue, consider the report and examine the material, and after taking into consideration the reply filed by the petitioner-trust, an order was required to be passed, de-hors the recommendation made by the Lokayukt, whereas the cancellation order Annexure P-20, has merely been passed treating the directions of the Lokayukt as binding.

19. On the other hand, Shri Z.A. Khan, learned senior counsel for respondent No. 2, has defended the cancellation order, Annexure P-20, by maintaining that once, the directions had been issued by the Lokayukt, then it was not desirable that a Development Authority, such as IDA, should sit in judgment over the directions issued by such a high Authority, as the Lokayukt, and therefore, the directions issued by the Lokayukt were infact treated as binding by IDA.

20. However, Shri Manoj Dwivedi, learned counsel appearing for the Lokayukt, respondent No. 3, has defended the directions Annexure R-3/1, dated May 7, 2008, issued by the Lokayukt to IDA, with regard to the cancellation of both the plots. Shri Dwivedi has maintained that an enquiry had been conducted by the Lokayukt, in which, a show cause notice was issued to IDA, and an explanation was sought in the matter from it, with regard to the allotment of said plots to the petitioner-trust. Thereafter a reply was filed by IDA, and even the relevant documents were produced. According to the learned counsel, once the Lokayukt was satisfied on perusal of the record, then the entire procedure should be taken to have been followed, and therefore, the directions, which had been issued by the Lokayukt to IDA, were to be carried out by IDA. Thus Shri Dwivedi maintains that the allotment of plots had rightly been cancelled by IDA.

21. I have given my thoughtful consideration to the rival contentions raised by learned counsel for the parties. I have also perused the various provisions of the Act, and gone through the relevant law on the point.

22. At the outset, it would be pertinent to extract certain relevant provisions of the Act, as under.

> **"10. Procedure in respect of enquiry :-** The Lokayukt or Up-Lokayukt shall, in each case before it decide the procedure to be followed for making the enquiry and in so doing ensure that the principles of natural justice are satisfied.
>
> **11. Applicability of Evidence Act and Code of Criminal Procedure :-**
>
> (1) The general principles of powers conferred by Evidence Act, 1872, (No. 1 of 1872), and Criminal Procedure Code, 1973 (No. 2 of 1974) shall as nearly as may apply to the procedure of enquiry before Lokayukt or Up-Lokayukt in the matter of-
>
> (a) Summoning and enforcing the attendance of any person and his examination on oath.
>
> (b) requiring the discovery and production of documents and proof thereof.
>
> (c) receiving evidence on affidavits:

(d) requisitioning any public record or copy thereof from any court or office :

(e) issuing commission for examination of witness of documents, and such other matters as may be prescribed :

Provided that no proceeding before the Lokayukt or Up-Lokayukt shall be invalidated only on account of want of formal proof if the principles of natural justice are satisfied.

Provided further that where it is necessary to summon any Government servant in his official capacity, his statement on affidavit shall be deemed to be sufficient as evidence.

(2) Any proceeding before the Lokayukt or Up-Lokayukt shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (No. 45 of 1860).

(3) The Lokayukt or the Up-Lokayukt shall be deemed to be court within the meaning of Contempt of Court Act, 1971 (No. LXX of 1971).

12. Report of Lokayukt and Up-Lokayukt :-

(1) If, after enquiry into the allegations, the Lokayukt or an Up-Lokayukt is satisfied that such allegation is established, he shall, by report in writing, communicate his findings and recommendation along with the relevant document, materials and other evidence to the competent authority.

(2) The competent authority shall examine the report forwarded to it under sub-section (3) and intimate, within three months of the date of receipt of the report, the Lokayukt or, as the case may be, the Up-Lokayukt, the action taken or proposed to be taken on the basis of the report.

(3) If the Lokayukt or Up-Lokayukt is satisfied with the action taken or proposed to be taken on his recommendations, he shall close the case under information to the complainant, the public servant and the competent authority concerned. In any other case, if he considers that the case so deserves, he may make a special report upon the case to the Governor and also inform the complainant concerned.

(4) The Lokayukt and the Up-Lokayukt shall present annually a consolidated report on the performance of their functions under this Act, to the Governor.

(5) If in any special report under sub-section (3) or the annual report under sub-section (4) any adverse comment is made against any public servant, such report shall also contain the substance of the defence adduced by such public servant and the comment made thereon by or on behalf of the State Government or department concerned of the State Government or the public authority concerned, as the case may be.

(6) On receipt of a special report under sub-section (3), or the annual report under sub-section (4), the Governor shall cause a copy there of together with an explanatory memorandum to be laid before the State Legislative Assembly.

(7) Subject to the provisions of Section 10, the Lokauyukt may at his discretion make available from time to time, the substance of cases closed or otherwise disposed of by him or by an Up-Lokayukt, which may appear to him to be of general public, academic or professional interest, in such manner and to such persons as he may deem appropriate.

(Emphasis Supplied)

23. A bare perusal of the language employed in Section 10 of the Act clearly depicts that as and when, a complaint is received by the Lokayukt, it is entitled, in each case, to decide the procedure to be followed, for making the enquiry into such complaint, but while evolving the said procedure, it has to be ensured that the principles of natural justice are satisfied.

24. In the present case, when some complaint made by the complainant K.K. Mishra had been received in the office of the Lokayukt, then at the time when an enquiry/investigation was being made in the said complaint, since the allegations in the said complaints were primarily with regard to the alleged wrong allotment of the plots in question to the petitioner-trust, therefore, it was obviously a mandatory requirement, as per Section 10 of the Act, to have issued a show cause notice to the petitioner-trust also, and associate it with any investigation/ enquiry, which was proposed by the Lokayukt. However, in the present case, the aforesaid investigation/enquiry had been conducted only by issuing a show cause notice to the Chairman of IDA, and after taking an explanation from IDA, and merely on perusal of some record of IDA. Thus, the entire aforesaid exercise appears to have been done behind the back of the petitioner-trust, and without adhering to the principles of natural justice. On this ground alone, it is apparent that the directions contained in the communication dated May 7, 2008, Annexure R-3/1 issued by the Lokayukt to IDA, are in complete violation of the mandatory provisions of Section 10 of the Act and as such are liable to be set aside.

25. A reference to the provision of Section 11 of the Act further supports the

inference that although the provisions of Evidence Act and Code of Criminal Procedure have been made applicable for the enquiry proceedings/investigation before the Lokayukt, still even though a formal proof as per the said provisions may not be really required, still adherence of the principles of natural justice is required.

26. This brings me to the next issue canvassed, as to whether the report of the Lokayukt under Section 12 of the Act, is to be treated as an order/direction, capable of execution/enforcement, or is to be treated as a recommendation to the State Government/Competent Authority, to take appropriate action in the matter, on the basis of the said report.

27. A bare perusal of the language employed in Section 12(1) of the Act clearly depicts that if, after enquiry into the allegations of complaint, the Lokayukt is satisfied that such allegation is established, he shall, by report in writing, communicate his findings and recommendation, along with the relevant documents, materials and other evidence to the Competent Authority. Under sub-section 12(2), on receipt of the said report, the Competent Authority, is required to examine the report, and under sub-section (3) intimate within three months of the receipt of the report, the action taken or proposed to be taken on the basis of the report.

28. The Supreme Court of India, while examining the powers of Human Rights Commission, constituted under the provisions of Protection of Human Right Act, 1993, in the case of *N.C. Dhoundial Vs. Union of India and others* 2004(2) SCC 579, held as follows.

> "14. We cannot endorse the view of the Commission. The Commission which is a "unique expert body" is, no doubt, entrusted with a very important function of protecting human rights, but, it is needless to point out that the Commission has no unlimited jurisdiction nor does it exercise plenary powers in derogation of the statutory limitations. The Commission, which is the creature of statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act. Of course, as any other statutory functionary, it undoubtedly has incidental or ancillary power to effectively exercise its jurisdiction in respect of the powers confided to it but the Commission should necessarily act within the parameters prescribed by the Act creating it and the confines of jurisdiction vested in it by the Act. The Commission is one of the fora which can redress the grievances arising out of violations of human rights. Even if it is not in a position to take up the enquiry and to afford redressal on account of certain statutory fetters or handicaps, the aggrieved persons are not without other remedies. The assumption underlying the observation in the

concluding passage extracted above proceeds on an incorrect premise that the person wronged by violation of human rights would be left without remedy if the Commission does not take the matter".

29. A Division Bench of Punjab and Haryana High Court again dealing with the powers of State Human Rights Commission under the provisions of said 1993 Act, in the case of *Jai Singh Vs. Punjab State Human Rights Commission and another* CWP 20075 of 2003 decided on April 2, 2005, held as follows.

> "It may also be relevant to notice that the Commission is a creature of a Statute i.e. Protection of Human Right Act, 1993. It, therefore, cannot obviously clothe itself with such powers which have not been conferred upon it by the aforesaid Statute. Apparently powers of judicial review have not been conferred upon the Commission. Powers of holding parallel proceedings, where the matter is already pending before a competent court (civil or criminal), have also not been envisaged by the Act. Under the provisions of the Act, the Commission has been merely constituted with a function to make recommendations to the appropriate Government, when any violation of human rights by a public servant, is brought to its notice, after due investigation of the matter. As the language of section 18 itself suggests that the Commission has only power to make recommendations to the concerned Government or authority, for initiation of proceedings, or for initiation of such action as may be deemed fit. The word "recommendation" necessarily means "to Suggest". "Such a suggestion cannot be treated to be a decision capable of execution or enforcement."

30. Again, another Division Bench of Punjab and Haryana High Court in a later case, being, *Jatt Ram Vs. Punjab State Human Rights Commission and another,* CWP 18237 of 2003 decided on May 18, 2005, approved the view in *Jai Singh's case* (supra), by making the following observations.

> "Thus the view taken by us with regard to meaning of the word "recommendations" in *Jai Singh's case* (supra) stands fully fortified. We reiterate that the word "recommendation" used in Section 18 of the Act necessarily means "to suggest". Such a suggestion cannot be treated to be a decision capable of execution or enforcement."

31. To find out the true import of the word "recommend", it would be relevant to refer to Webster's Encyclopedic Unabridged Dictionary of the English Language (New Revised Edition) as follows.

"Recommend" means 1. to present as worthy of confidence, acceptance use etc; commend; mention favourably; to recommend an applicant for a job to recommend a book 2. to represent or urged as advisable or expedient; to recommend caution. 3. to advise as an alternative; suggest (a choice, course of action etc.) as appropriate, beneficial, or the like; He recommended the blue plate special. The doctor recommended special exercises for her. 4. to make desirable or attractive; a plan that has very little to recommend it.

"Recommendation" has been described to mean an act of recommending. 2. a letter or the like recommending a person or thing, 3. representation in favour of a person or thing. 4. anything that serves to a recommend a person or thing or induce acceptance or favour.

Similarly in Corpus Juris Secundum, the word "recommend" and "recommendation" have been ascribed the following meaning:

"RECOMMEND", to advise or counsel, to counsel as to a course of action, to commend, to commend to the favourable, notice of another, to bestow commendation on, to praise as desirable advantageous, trustworthy, or advisable, to put in a favourable light before any one, to speak in behalf of, to present as one's advice or choice or as having one's approval, to commit to, to commit to another's care, confidence, or acceptance, with favouring representations, to consign, to give in charge, to offer with favourable representations.

Ordinarily it involves the idea that another has the final decision although it is sometimes used in an a imperative sense.

"Recommend" has been held synonymous with, or equivalent to, "desire".

"Recommendation": The act of one person in giving to another a favourable account of the character, responsibility, or skill of a third, the act of recommending or commending a person or thing to notice, use, confidence, or civility of another, favourable representation, mere suggestion as to the desirability of a certain course of action to be pursued, that which procures a favourable reception. The word is also defined as meaning a note commending a person to favour.

"Recommendation": has been held equivalent to, or synonymous with, "certificate" and "reference", and has been compared with, or distinguished form, "decision" and "instruction"

In Chambers 21st Century Dictionary (Revised Edition) also, Recommend has been described to mean to suggest as being suitable to be accepted, chosen etc; to commend".

32. Therefore, in my considered view, the language of Section 12 of the Act has necessarily to be interpreted, keeping in view the aforesaid meaning and interpretation.

33. While dealing with the provisions of M.P. Anusuchit Jati Ayog Adhiniyam, 1995, and interpreting the powers and functions of M.P. State Scheduled Caste Commission, a Division Bench of this Court in the case of *S.K. Verma Vs. State of M.P. and others*, 2009(1) MPLJ 632 has held that the Commission is only an advisory body and has not been constituted to act as a superior body, or an adjudicating authority, having judicial or quasi-judicial powers, to sit over and above all departments of the State Government. The orders passed by the Commission cannot be enforced by it, nor directions can be issued calling for a compliance report. The law laid down in *S.K. Verma's case* (supra) is also relevant, and is attracted to the controversy in the present case, as well.

34. Although the communication, Annexure R-3/1 dated May 7, 2008, issued by the Lokayukt to IDA, indicates that directions had been issued for cancellation of the plots to the petitioner-trust, and IDA has treated the said directions as binding upon it, whether or not the aforesaid directions were automatically binding upon IDA or not is a matter of divergence between the learned counsel for the parties. Whereas the learned senior counsel for the petitioner-trust maintains that such directions were not binding, and even on receipt of the said report from the Lokayukt, IDA was required in law to have examined the matter independently; the learned counsel for the respondents have maintained that the Lokayukt, being such a high Authority and creation of a statute, the report given by the said Authority obviously, is to be treated as binding upon IDA. However, since I find that even the mandatory procedure had not been followed by the Lokayukt, while issuing the aforesaid directions Annexure R-3/1, dated May 7, 2008, in as much as, the petitioner-trust had not at all been heard in the matter, as was required under Section 10 of the Act, therefore, it would be appropriate not to express any opinion on the said controversy, since the matter on the complaint filed by K.K. Mishra, requires to be examined afresh by the Lokayukt, by associating all concerned. However, as noticed earlier, as is even the agreed position between the parties, that the order of cancellation dated December 12, 2008, Annexure P-20, has been passed by IDA, merely on the basis of the report dated May 7, 2008, Annexure R-3/1, therefore, if the complaint of K.K. Mishra is now to be examined afresh by the Lokayukt, then obviously, the cancellation order Annexure P-20 is liable to be quashed, at this stage.

35. Consequently, in view of the aforesaid discussion, the communication/report

dated May 7, 2008, Annexure R-3/1, forwarded by the Lokayukt to the State Government, as well as Indore Development Authority, is hereby quashed, being in violation of the principles of natural justice, and being in contravention of the provisions of Section 10 of the Act. The Lokayukt is requested to look into the complaint made by K.K. Mishra, once again, if so desired, after holding an appropriate enquiry into the matter, and after affording an opportunity to all the affected parties i.e. the complainant, petitioner-trust, as well as Indore Development Authority. If after such enquiry/investigation, it is desired to submit a report, as per Section 12(1) of the Act, then further action, in accordance with law, shall obviously be taken. As a result thereof, the order dated December 12, 2008, Annexure P-20 passed by IDA is also quashed.

C.c. as per rules. *Order accordingly.*

I.L.R. [2009] M. P., 2328
APPELLATE CIVIL
Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
27 February, 2009*

HAMEEDA BEGUM (SMT.) & anr. ... Appellants
Vs.
SMT. CHAMPA BAI JAIN & ors. ... Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12, Transfer of Property Act, 1882, Section 111(d) - *Tenancy & determination of lease - A part of tenanted premises purchased by one of the legal heirs of tenant - Whether due to execution of sale deed, tenancy stood extinguished by merger as postulated u/s 111(d) of T.P. Act - Held - One of three legal heirs of tenant had purchased part of the property and not all the co-tenants, tenancy continues - Tenant continues to be tenant for the purpose of Act, 1961 and can be evicted only in accordance with Rent Act.* (Para 11)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12, सम्पत्ति अंतरण अधिनियम, 1882, धारा 111(डी) – किरायेदारी और पट्टे का पर्यवसान – किरायेदारी वाले परिसर का एक हिस्सा किरायेदार के विधिक वारिसों में से एक के द्वारा क्रय किया गया – क्या विक्रय विलेख के निष्पादन के कारण किरायेदारी सम्पत्ति अंतरण अधिनियम की धारा 111(डी) के अधीन अपेक्षित विलयन द्वारा निर्वापित हो गयी – अभिनिर्धारित – किरायेदार के तीन विधिक वारिसों में से एक ने सम्पत्ति का हिस्सा क्रय किया था न कि सभी सह–किरायेदारों ने, किरायेदारी जारी रहती है – किरायेदार अधिनियम 1961 के प्रयोजन के लिए किरायेदार बना रहता है और केवल किराया अधिनियम के अनुसार ही बेदखल किया जा सकता है।

B. Civil Procedure Code (5 of 1908), Section 11 - *Res judicata - Conditions - Law discussed.* (Para 19)

*F.A. No.451/2003 (Jabalpur)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – शर्तें – विधि विवेचित।

C. Evidence Act (1 of 1872), Section 115 - *Estoppel - There can be no estoppel on a pure question of law and question of jurisdiction is pure question of law.* (Para 20)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 115 – विबंध – विधि के शुद्ध प्रश्न पर कोई विबंध नही हो सकता और अधिकारिता का प्रश्न शुद्ध विधि का प्रश्न है।

D. Civil Procedure Code (5 of 1908), Section 11 - *Res judicata - Where there is a fresh cause of action, interpretation of law in previous suit cannot operate as res judicata - A statutory direction cannot be overridden or defeated by a previous judgment between parties.* (Paras 22 & 24)

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – जहाँ कोई नया वाद कारण हो, पूर्ववर्ती वाद में विधि का निर्वचन पूर्व–न्याय के रूप में प्रवर्तित नही हो सकता – कोई कानूनी निदेश पक्षकारों के मध्य किसी पूर्ववर्ती निर्णय द्वारा अधिभावी या विफल नही किया जा सकता।

E. Civil Procedure Code (5 of 1908), Section 11 - *Res judicata - Principle of res judicata will not apply when the entire matter was still in appeal and the matter had not attained finality.* (Para 23)

ङ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – पूर्व–न्याय का सिद्धांत लागू नही होगा जब सम्पूर्ण मामला अपील में हो और मामले ने अंतिमता प्राप्त नही की हो।

F. Limitation Act (36 of 1963), Section 27, Article 65 - *Sale deed - No suit for partition filed by purchaser within 12 years - Purchaser admittedly in possession as tenants - It cannot be said that plaintiff has perfected title by virtue of adverse possession - Sale deed could not be said to be void and ineffective.* (Paras 40 to 43)

च. परिसीमा अधिनियम (1963 का 36), धारा 27, अनुच्छेद 65 – विक्रय विलेख – क्रेता द्वारा 12 वर्ष के भीतर विभाजन का कोई वाद पेश नही किया गया – क्रेता स्वीकृत रूप से किरायेदार के रूप में कब्जे में – यह नही कहा जा सकता कि वादी ने प्रतिकूल कब्जे द्वारा पूर्ण हक प्राप्त कर लिया है – विक्रय विलेख शून्य और निष्प्रभावी नही कहा जा सकता।

Cases referred :

2004(1) MPLJ 50, AIR 2005 SC 2857, 1973 MPLJ 650, AIR 1972 MP 17, AIR 1975 SC 2130, AIR 1979 SC 1745, (1996) 6 SCC 373, AIR 1966 SC 1332, AIR 1963 SC 1128, AIR 1991 SC 993, (1970) 1 SCC 613, AIR 1966 SC 1637, AIR 1998 SC 3118, (1996) 6 SCC 96, (1996) 6 SCC 424, (1999) 5 SCC 590, (1973) 3 SCC 729, AIR 2006 SC 2844, AIR 1964 SC 1013, AIR 1976 SC 939, AIR 1965 SC 1153, AIR 1990 SC 334, (1980) 3 SCC 162, (1976) 4 SCC 47, AIR 1962 SC 214, AIR 1988 SC 1345, (1987) 4 SCC 410, (1993) 1 SCC 531, AIR

1982 SC 20, (2000) 7 SCC 543, AIR 2003 SC 1475, AIR 2001 SC 2469, (1939) 2 All.E.R. 559, (1937) AC 826, 1948 Ch.D. 221, (2007) UKHL 51, (2002) ICR 1026, (2000) ICR 1, 1973 MPLJ 832, AIR 1981 J&K 21, AIR 1928 Cal 777, AIR 1953 Cal 259, AIR 2001 SC 61, AIR 1966 SC 470, AIR 1954 SC 337, AIR 2006 SC 3608, 1973 MPLJ 650.

Hafizullah, in person as appellant No.2.

Ravish Agarwal with *Pranay Verma,* for the respondents.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the plaintiffs aggrieved by the judgment and decree dated 15.7.03 passed by 18th Addl. District Judge (Fast Track Court), Jabalpur in Civil Suit No. 11-A/2002. The plaintiffs/appellants had filed the instant suit for declaring that sale deeds dated 3.2.82 and 20.9.82 executed in favour of Inder Kumar Jain/defendant no.3 to be null and void. Prayer has also been made for grant of eviction decree against the tenant on the grounds contemplated under Sections 12(1)(f),(b) and (c) of M.P. Accommodation Control Act,1961 (hereinafter referred to as "the Act").

2. It is averred in the plaint that plaintiffs are owner cum landlord of the dwelling house bearing no. 667,667/1 to 667/3 situated at Kotwali Ward, Jabalpur known as "Kudrat Manjil". The suit house was let out to late Shikharchand Jain, father of Inder Kumar Jain vide registered lease deed dated 1.5.68 at the monthly rent of Rs.150/- for non-residential purposes. House is double storey building shown in red colour in the plaint map. Defendant no.1 is widow of late Shri Shikharchand Jain, other two defendants are sons of late Shikharchand Jain, they had inherited the tenancy rights in the suit house after death of Shikharchand Jain. Plaintiffs filed an ejectment suit CS No.147-A/88 which was decided on 30.7.91 by 9th Civil Judge, Class-II,Jabalpur under Sections 12(1)(f), (b) and (c) of the Act. During pendency of said ejectment suit in the life time of the original tenant Shikharchand Jain, his son Inder Kumar Jain had purchased a portion of the suit house from Smt.Begum Bi (since deceased) by a registered sale deed dated 3.2.82. The sale deed was executed on the basis of gift deed dated 17.4.74. The defendant no.3 Inder Kumar Jain further purchased undivided share in the suit house during pendency of civil suit no. 147-A/88 vide registered sale deed dated 20.9.82.

3. It is also averred in the plaint that sale deed dated 3.2.82 and 20.9.82 have become null and void ab initio as the steps have not been taken by the purchaser for partition and possession, remedy has become barred by limitation now by virtue of Article 65 of Limitation Act, 1963. Present value of the suit house is worth Rs.25 Lacs. The right of the defendant no.3 stands extinguished by passage of time being stranger purchaser of the suit dwelling house, therefore, collateral and incidental findings of the former suit cannot be said to be res judicata, plaintiff

no.2 is a practicing lawyer at Jabalpur, he requires the suit accommodation bona fide for non-residential purpose to start office of Advocacy. He is not having any other alternative suitable accommodation for the said purpose. He is running office in a rented accommodation belonging to a trust namely, Duccani Muslim Musafir Khana" near Clock Tower, Omti, Jabalpur. Defendants had sub-let 2nd floor of the suit house without written consent of the plaintiffs to others, they are liable to be evicted under section 12(1)(b) of the Act. Accommodation had been sub-let to late Bala Prasad. The defendants denied the contract of tenancy as well as title of the plaintiffs in the written statement which is likely to affect adversely and substantially the interest of plaintiffs/landlord. The decision of SA No.813/95 cannot operate as res judicata, it is not based on law. Suit has been valued at Rs.8 Lacs for declaring the sale deeds as null and void, for the purpose of ejectment in the MP Accommodation Control Act, it has been valued at 12 times of monthly rent.

4. In the written statement filed by defendants 1 and 3 it is contended that decision of High Court in SA No.813/95 decided on 12.5.97 is res-judicata and binding between the parties. Suit for ejectment is not maintainable against co-owner, the plaintiffs should first go in for partition. There is no tenancy at present. It came to an end during the life time of Shikharchand Jain. Defendant no.3 had purchased southern half portion vide sale deed dated 2.2.82. Defendant no.3 became absolute owner of the portion purchased by him, the lease, if any, after sale of the aforesaid divided portion was split up under Section 109 of Transfer of Properties Act. They are paying rent under the orders of the Court. The sale deed is not hit by Section 52 of Transfer of Properties Act. Other facts with respect to civil suits relating to sale deeds have been pleaded. In the previous suit need of Alimuddin son of Jalaluddin was shown for the ground floor for business. Defendant no.3 is a bona fide purchaser for good consideration and had purchased undivided share of Sona Begum in northern half portion. Plaintiffs have to prove that sale deed dated 20th September, 1992 is subject-matter of challenge before the Apex Court. Defendant no.3 is in possession, it was for the plaintiff no.2 to apply for partition. Article 65 of the Limitation Act is not applicable, no date has been given from which date possession has become adverse, sale deeds cannot be declared null and void. There is misjoinder of cause of action. Defendants no.1 to 3 were not party to the contract of tenancy dated 1.5.98, there was no lease deed dated 1.5.98. The house was let out to late Shikharchand Jain for non-residential purposes i.e. business. Even after death of Shikharchand Jain, defendant no. 1 to 3 are in possession of the suit house as LRs of late Shikharchand Jain. This Court has held defendant no.3 to be co-owner not tenant. The previous suit has been held to be not maintainable for ejectment, co-ownership rights have been acquired. Plaintiffs are not entitled for any mandatory injunction seeking possession. The plaintiffs are not absolute owner of the suit house, Hafizullah is

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co-owner in respect of northern half along with Habibullah, Inayatullah and Sona Begum in Kudrat Manjil, one co-owner has not the right to maintain the suit if objected to by other co-owner, hence prayer has been made to dismiss the suit.

5. The trial Court has dismissed the suit, bona fide need of the appellant Hafizullah has been found, however, the suit has been dismissed on the ground of decision rendered by this Court in SA No.813/95 and in CR No.1676/01 passed by Division Bench of this Court in which this Court has held that Inder Kumar Jain has become co-owner of undivided portion of the house. It would be unjust and inequitable to throw out a co-owner from possession of suit accommodation merely because a tenant had purchased the share of co-owner, his legal right to retain the possession till partition as a co-owner cannot be whittled down. In aforesaid civil revision *Hameeda Begum vs. Champabai Jain* 2004(1) MPLJ 50 it has been held that co-owner and landlord cannot file a suit for eviction against a tenant if another co-owner objects. The tenant who had purchased the property from a co-owner and gets into shoes of co-owner need not file a suit for partition and separate possession. The judgment rendered in SA No.48-A/88 operates as res judicata. Despite pure question of law decided therein, judgment inter se parties would be binding, the trial Court has also held that plaintiffs are estopped from denying title of Mst. Begum Bi and Sona bi. Inder Kumar Jain/defendant no.3 purchaser from Mst. Begum bi and Sona bi vide registered sale deed dated 2.2.82 and 20.9.82 is co-owner and his title did not extinguish for omission to sue for partition within 12 years, consequently the instant appeal has been preferred.

6. Shri Hafizullah/appellant has submitted that inspite of the fact that bona fide need has been upheld, the trial Court has committed an error in not passing a decree for ejectment on the ground under Section 12(1)(f) of the Act. Decision in previous civil suit out of which SA No.813/95 arose cannot operates as res judicata and also the decision in civil revision *Hamida Begum vs. Champabai Jain* (supra) against which SLP is pending in Apex Court. He has relied upon the decision of Apex Court in *Pramod Kumar Jaiswal and others v. Bibi Husn Bano and others* AIR 2005 SC 2857 in which the Apex Court has held that acquisition of rights of some co-owner landlords by lessee does not amount to extinguishment of tenancy by merger as postulated by S.111(d) of the Transfer of Properties Act. Their position as tenant continues and they are bound to comply with requirements of Rent Control Act. Thus, he has submitted that in view of pronouncement of the Apex Court in *Pramod Kumar Jaiswal and others v. Bibi Husn Bano* (supra) the previous decision in which relevant provisions were not noticed cannot operates as res judicata with respect to fresh cause of action. The law of land has to prevail. The judgment inter se parties cannot be said to be binding with respect to the need which arose subsequently and the instant suit is based on title also apart from the ground under section 12(1)(f) of the Act, instant suit is based on fresh cause of action. He has also submitted that remedy of the

purchaser Inder Kumar Jain has become barred by limitation by applying section 27 read with Article 65 of the Limitation Act as he has not filed the suit for partition and separate possession within a period of 12 years. The sale deeds be declared to be null and void. In the previous civil suit, similar prayer was not made with respect to sale deeds. He has also submitted that Smt.Hamida Begum/ plaintiff no.1 has 17/100 undivided share and Hafizullah has 43/100 undivided share, thus, plaintiff jointly owned 3/5 share whereas Inder Kumar Jain had purchased 2/5 undivided share. Thus, he has submitted that there is no justification even otherwise for the purchaser to retain the possession of the property till partition is made. Even on partition tenancy of two other tenants defendants no.1 and 2 would not come to an end as well as of Inder Kumar even from rest of the portion which may fall in the share of plaintiffs. The stranger purchaser cannot retain the possession of entire property which he has not purchased for which he has placed reliance on a decision of this Court in *Ramdayal vs.Manaklal* 1973 MPLJ 650.

7. Shri Ravish Agrawal, learned senior counsel appearing with Shri Pranay Verma for respondents has submitted that the decision rendered in SA No.813/95 being inter se parties operates as res judicata. Right of Inder Kumar Jain did not extinguish for omission to sue for partition within 12 years. He has also referred to the various other decisions inter se parties and submitted that with respect to Tamliknama dated 17.4.74 civil suit 106-A/97 has been dismissed, the decision has attained finality. In the proceedings under Section 23-A of MP Accommodation Control Act before Rent Controlling Authority, application preferred was dismissed out of which CR No.1676/01 arose which decision is also binding between the parties against which SLP is pending before the Apex Court. The decision of Apex Court in *Pramod Kumar Jaiswal and others v. Bibi Husn Bano* (supra) takes a contrary view to the decision rendered by this Court in SA No.813/95 decided on 12.5.97 and in CR No. 1676/01, *Hameeda Begum vs. Champabai Jain* (supra). The position is not improved as the question raised is res judicata and binding inter se parties. Decision of the Apex Court may be binding judicial precedent, the principles of res judicata have to prevail. He has also relied on various decisions to be referred later.

8. Following questions arise for consideration in appeal :-

> " (i) Whether due to execution of sale deed dated 2.2.82 and 20.9.82 tenancy stood extinguished by merger as postulated under Section 111(d) of TP Act or in other words purchaser of part of property Inder Kumar Jain and other defendants who have not purchased property continue to be the tenant and bound to comply with the requirements of Rent Controlling Act and are liable to be evicted on the grounds contemplated under the MP Accommodation Control Act?

(ii) Whether even by filing suit for partition the plaintiffs can recover possession of entire property from defendants no.1,2 and 3, particularly when only part of tenanted premises has been purchased by Inder Kumar Jain, or the remedy is to recover the possession on the ground under section 12(1) of MP Accommodation Control Act?

(iii) Whether the present suit can be said to be based on fresh cause of action and genuine requirement of plaintiff under section 12(1)(f) of MP Accommodation Control Act and considering the relief for declaration that sale deeds are null and void whether the decisions in previous civil suit out of which SA No.813/95 arose and the decision in CR No.1676/01 *(Hameeda Begum vs. Champabai Jain)* can be said to be res-judicata and binding inter se parties, moreso in view of decision in *Pramod Kumar Jaiswal and others v. Bibi Husn Bano* (supra) on question of law?

(iv) Whether the sale deeds dated 2.2.82 and 20.9.82 can be declared null and void due to failure of Inder Kumar Jain to sue for partition and separate possession within 12 years of purchasing the property by applying Article 65 of Limitation Act?

(v) In case defendant Inder Kumar is not tenant and in case of co-owner whether he can retain the possession of the entire house whereas he had purchased smaller portion vide registered sale deeds dated 2.2.82 and 20.9.82 from one of the co-owner?

9. **In Ref. Question No.(i):** The undisputed fact, in the instant case, is that Inder Kumar Jain had purchased only part of the property vide registered sale deeds dated 2.2.82 and 20.9.82, the property is undivided, the original tenant Shikhar Chand Jain was his father, in his life time he occupied the premises as tenant, he died in the year 1989. The tenancy right had devolved upon the LRs on death of Shikharchand Jain, Inder Kumar Jain defendant no.3 is not the only person who inherited the tenancy, there are other tenants also, widow and her sons defendant no. 1 and 2 ,and, in our opinion, there is no merger of the tenancy by virtue of Section 111(d) of the Transfer of Property Act , 1882 which provides thus :-

> **"111.Determination of lease** : A lease of immovable property determines :-
>
> (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right."

In Inder Kumar Jain the interest of lessee and lessor in the whole of the property has not vested, at the same time, he has purchased only part of property. There is no merger of tenancy into co-ownership right. Question is what is the status of

the defendants, their status in the absence of determination under Section 111 of TP Act is that of the tenant and Inder Kumar Jain defendant no.3 is only a purchaser of part of the property and larger portion still belongs to the plaintiffs, defendants no.1 and 2 continue in occupation as tenants. It cannot be said that defendant no.3 is occupying the entire premises as co-owner, even entire property has not been purchased, even part of the property cannot be said to be possessed by defendant no.3 as co-owner as there was no partition. The property remains undivided so far, is not disputed on facts. Until and unless there is merger of tenancy rights into the co-ownership right of Inder Kumar Jain, the status of the defendant no.3 remains as tenant in the absence of merger of tenancy beside defendants no.1 and 2 continue to be tenant which is precisely the question decided by the Apex Court in similar facts in *Pramod Kumar Jaiswal and others vs. Bibi Husn Bano and others* (supra) in which the lessee had acquired only the rights of certain co-owner landlords and may have the right to work out his rights against the others. The right to work out his rights would not enable him to plead that the two rights in the whole of the property has come to vest in him. The question whether on the acquisition of the rights of some of the co-owner landlords by the tenant, there is an extinguishment of tenancy by S.111(d) of the Transfer of Property Act. On taking an assignment from some of the co-owner landlords, the interests of the lessee and the lessor in the whole of the property do not become vested at the same time in one person in the same right. Therefore, a lessee who has taken assignment of the rights of a co-owner lessor, cannot successfully raise the plea of determination of tenancy on the ground of merger of his lessee's estate in that of the estate of the landlord. The Apex Court has laid down that tenancy did not come to an end, the position of the lessee as tenant continued and they are bound to comply with the requirement of Rent Control Act under which order for deposit of arrears of rent has been passed against them. The ownership of the property which is subject-matter of tenancy is certainly a larger estate than the tenancy itself. If the tenant acquires the entire interest of the owner in the whole of the estate forming the subject-matter of tenancy, tenancy could have merged into ownership and the estate of tenant stands enlarged into that of a full owner. The tenant cannot be the owner/co-owner and tenant at the same time. The Apex Court has laid down in *Pramod Kumar Jaiswal and others vs. Bibi Husn Bano and others* (supra) thus :-

> "6. Ownership of the property which is the subject-matter of tenancy is certainly a larger estate than the tenancy itself and naturally larger than the sub-tenancy. If the sub-tenant acquires the entire interest of the owner in the whole of the estate forming the subject-matter of sub-tenancy, the sub-tenancy merges into ownership and the estate of sub-tenant stands enlarged into that of a full owner. The sub-tenant cannot be the owner and the sub-

tenant both at the same time. Of course, the situation would have been different if the sub-tenant would not have acquired the entire estate of the owner or the ownership interest in the entire estate forming subject-matter of sub-lease, as was the case in *Badri Narain Jha and others v. Rameshwar Dayal Singh and others,* AIR 1951 SC 186 or in *Shaikh Faqir Baksh v. Murli Dhar and others,* AIR 1931 PC 63.

14. On the admitted facts and based on the arguments, the only question that requires to be considered is the effect of the purchase of the rights of certain co-owner landlords by the tenants of the building, on the lease originally taken by them and on the basis of which they held the building. A lease in terms of Section 105 of the Transfer of Property Act gets determined on the happening of one of the events referred to in Section 111 of the Transfer of Property Act. The clause relevant for our purpose is admittedly Clause (d). Insofar as it is relevant, the Section reads :

"Section 111 : Determination of lease - a lease of immovable property determines-

(a) x x x x

(b) x x x x

(c) x x x x

(d) In case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right.

(e) x x x x

(f) x x x x

(g) x x x x"

On a plain reading of the provision, it is clear that in case where a tenant takes an assignment of the rights of the landlord or the reversion, the lease is determined, only in a case where by such assignment, the interests of the lessee and the lessor in the whole of the property, become vested in the tenant. The emphasis in the Section is clearly on the coalescing of the entire rights of the lessor and the lessee in the whole of the property in the hands of the lessee. The above provision incorporates the doctrine of merger at common law. According to Blackstone (as quoted in Broom's Legal Maxims) :

"When a less estate and a greater estate, limited subsequent

to it, coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or in the law phraseology, is said to be merged, that is sunk or drowned in the greater; or to express the same thing in other words, the greater estate is accelerated so as to become at once an estate in possession."

In Cheshire and Burn's Modern Law of Real Property, 16th Edition, it is stated,

"The term 'merger' means that, where a lesser and a greater estate in the same land come together and vest, without any intermediate estate, in the same person and in the same right, the lesser is immediately annihilated by operation of law. It is said to be "merged", that is, sunk or drowned, in the greater estate."

It is further stated :-

"The essentials are that the estates shall unite in the same person without any intervening estate, and that the person in whom they unite shall hold them both in the same right.

To illustrate the first essential, if A, who is tenant for life, with remainder to B for life, remainder to C in fee, purchases and takes a conveyance of C's fee, the intervening life interest of B, since it is vested, excludes the possibility of merger." (See page 993).

35.Here in this case, the lessee has acquired only the rights of certain co-owner landlords and may have the right to work out his rights against the others. The right to work out his rights would not enable him to plead that the two rights in the whole of the property has come to vest in him. What is involved in the present case is the question whether on the acquisition of the rights of some of the co-owner landlords by the tenant, there is an extinguishment of the tenancy by merger as postulated by Section 111 (d) of the Transfer of Property Act. T. Lakshmipathi answer that question and with respect, answers that question correctly. AIR 2003 SC 2427 : 2003 AIR SCW 2436.

36. A plain and grammatical interpretation of Section 111(d) of the Transfer of Property Act leaves no room for doubt that unless the interests of the lessee and that of the lessor in the whole of the property leased, become vested at the same time in one person in the same right, a determination of the lease cannot take place. On taking an assignment from some of the co-owner landlords, the interests of the lessee and the lessor in the whole of the property do not become vested at the same time in one person

in the same right. Therefore, a lessee who has taken assignment of the rights of a co-owner lessor, cannot successfully raise the plea of determination of tenancy on the ground of merger of his lessee's estate in that of the estate of the landlord. It is, thus, clear that there is no substance in the contention of the learned counsel for the appellants that in the case on hand, it should have been held that the tenancy stood determined and the application of the landlord for a direction to the tenant to deposit the rent in arrears should have been dismissed. The position of the appellants as tenants continue and they are bound to comply with the requirements of the Rent Control Act under which the order for deposit has been passed against them. The High Court has rightly dismissed the revision."

10. In *Shantaram Laxmanrao Kekre vs. Shyam Sundar and another* AIR 1972 SC MP 17 a Division Bench of this Court has laid down that in a suit by co-owner/landlords for ejectment of the tenant on ground of bona fide requirement even if one of them establishes his bona fide requirement in respect of a part of the premises leased, the decree for eviction from the entire premises must follow because there can be no splitting of tenancy . The Division Bench has held thus :-

"11. There is, therefore, no reason why the decree for eviction should not extend to the whole of the demised premises. There can be no doubt that the words "if he is the owner thereof" in Section 12(1)(e) do lend support to the contention that in the case of co-owners, each of the landlord must separately plead his own residential need. These words only show that for purposes of Cl.(e) one of the landlords suing for eviction cannot rely upon the need of another landlord. However, where all the co-owners join in a suit for eviction, there is no logic or reason why a decree should not follow, upon the proof of the need of any one of them under Section 12(1)(e). Any other construction of Section 12(1)(e) of the Act would lead to a rather anomalous situation. If that decree for eviction were to be restricted to the portion owned by the landlord whose need is established, it would mean a splitting up of the tenancy and also allow a rank trespasser to continue in possession over the remaining portion of the demised premises, in respect of which no need is established under Section 12(1)(e). The way we would interpret Section 12(1)(e) is that once any of the landlords succeeds in proving his bona fide requirement, the protection of the tenant against eviction disappears. In that event, the ban against the filing of a suit is removed and the suit as a whole must be decreed under the Transfer of Property Act".

11. Section 44 of the Transfer of Property Act deals with the situation of transfer by one co-owner of the immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. However, where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. As Inder Kumar Jain is not a member of the plaintiffs' family, he has no right by virtue of Section 44 to claim to be in joint possession or other common or part enjoyment of the dwelling house. Section 109 of the TP Act provides the rights of lessor's transferee. The transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it, but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him. But, in the instant case, there was no determination of the lease due to aforesaid reasons as provided and also the provisions of Section 111(d) of TP Act.

In the instant case, one of three legal heir of the tenant only one had purchased part of the property not all the co-tenants, tenancy continues and there is a need as on date of filing of suit which has been found, thus, eviction can be made from the entire property as tenancy continues . The tenant continues to be tenant for the purpose of MP Accommodation Control Act and can be evicted only in accordance with the Rent Act as also held by the Apex Court in *Roshan lal and another vs. Madan Lal and others* AIR 1975 SC 2130 and in *V.Dhanapal Chettiar vs. Yesodai Ammal* AIR 1979 SC 1745.

12. <u>In Ref.Question No.(ii):</u>-In the instant case when we consider the facts also Smt. Champa Bai Jain, widow of late Shikharchand Jain has also inherited the tenancy beside Puranchand Jain son of Shikharchand Jain. Inder Kumar Jain, another son of Shikharchand Jain had only purchased part of the tenanted premises and ownership on larger part still remains with the plaintiffs/appellants. It is not the case that Champabai Jain and Puranchand Jain are enjoying the possession in separate portions, their possession as tenant continues. The status of Inder Kumar Jain also continues to be a tenant and he cannot be said to be in possession as co-owner, he is in possession with other legal heirs of the tenant. Thus, there is no merger of tenancy into his rights of co-ownership. In case, it is held that Inder Kumar Jain is in possession as co-owner, that would also defeat the protection available to Champabai Jain, Puranchand Jain, other heirs of the original tenant

available under Section 12 of the MP Accommodation Control Act .On facts which are essential for the decision, there is no dispute, it is purely a legal question whether tenancy comes to an end and it was not the question decided or even resorted to in the decision rendered in SA No. 813/95. Thus, remedy of the plaintiff is only to seek ejectment under MP Accommodation Control Act of Smt. Champa bai and Puranchand Jain as tenancy had never been surrendered by Champabai Jain, Puranchand Jain and they have also not purchased the property, only part of the property has been purchased by Inder Kumar Jain, Inder Kumar continues to be the tenant. Ownership of larger part still remains with the plaintiffs and there is no other person in the body of co-owners except Inder Kumar Jain along with the plaintiffs and the tenancy of Shikharchand Jain being heritable is enjoyed by his LRs and otherwise also as per Section 111(d) of the TP Act it has not come to an end. In the previous decision, there is no finding recorded on this material aspect, consequently when status continues as tenant, obviously the recourse has to be for eviction under MP Accommodation Control Act by way of filing partition suit, tenants cannot be evicted in absence of ground under Section 12 of the Act. The tenancy has been inherited by larger body of persons whereas purchase has been made by single person out of them, and even the tenancy of Inder Kumar has not merged into his co-ownership rights.

13. In Ref. Question No. (iii) :- Coming to question of res-judicata In the previous civil suits for ejectment out of which SA No.813/95 arose bona fide need of office and residence of Hafizullah was claimed. Ground under section 12(1)(f) was found established, ground under section 12(1)(b) was negatived, it was also found that ground under section 12(1)(c) of the MP Accommodation Control Act was not made out. The decision of the trial Court was affirmed by the appellate Court, suit was dismissed on the ground that Inder Kumar Jain could not be evicted as he became co-owner along with plaintiff and others, first appeal was also dismissed against which SA 13/95 was filed which was dismissed by this Court. In the second appeal question posed for consideration by this Court was that :-

> " Whether under the facts and in the circumstances of the case, the appellant who is a owner, is entitled to sue the defendant despite the refusal on part of other co-owner for eviction of the tenant and if yes, whether the appellant is entitled to a decree on the ground of section 12(1)(f) of the Act ?"

It was urged on behalf of the appellant that landlord tenant relationship did not come to an end due to execution of sale deed dated 20th September, 1982. Partial sale of the property did not have the effect of determination of integrity of tenancy.

Single Bench of this Court in SA No.813/95 came to the conclusion that

there was no partition between co-owners despite that one of the co-owners has transferred her share to defendant no.5 Inder Kumar Jain. He steps into her shoes and became a co-owner of the property without his share being specified. Reliance was placed on a decision of Apex Court in *Sk. Sattar Mohd. Choudhari, Appellant v. Gundappa Amabadas Bukate* 1996 (6) SCC 373 in which High Court reversed the judgment on the ground that despite partition between the co-owners lease was not effected, it remains indivisible. The Apex Court has observed that the tenancy cannot be split up either in estate or in rent or any other obligation by unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/ lessor. The right of joint lessors contemplated by Section 109 comes to be possessed by each of them separately and independently. There is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation among themselves. Whether the premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and that, even if he was being dealt with by only one of them on behalf of the whole body of the lessors, he cannot object to the transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property. It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigour of Rent Control laws which protected eviction of tenants except on specified grounds set out in the relevant statute. Relying upon the aforesaid decision of Apex Court, single Bench of this Court came to the conclusion that unless a portion of reversion is assigned by virtue of transfer or partition to a co-owner, he cannot unilaterally file a suit for eviction from a portion of the reversion. He can file a suit for and on behalf of all the owners in respect of entire demise with express or implied consent of the owners. In the decision of Apex Court in *Sk. Sattar Mohd. Choudhari, Appellant v. Gundappa Amabadas Bukate* (supra) the respondent had purchased the remaining portion of shop which fell in the share of appellant's brother, thus, after partition it was held that tenancy merged in his right as owner of that portion, he remained tenant only with respect to disputed portion and consequently the suit filed by appellant in respect of that portion was clearly maintainable. Single Bench of this Court concluded thus :-

> "25. It is obvious that the plaintiffs face a similar position here with a rider that the property is not partitioned. The defendant no.5 has become a co-owner, albeit, of undivided portion of the

house. How can he be evicted ? His share qua sole owner has not been specified. It would be most unjust and inequitable to throw out a co-owner from the possession of the suit accommodation merely because as a tenant he had purchased the share of a co-owner. His legal right to retain possession till partition qua co-owner cannot be whittled down. The Supreme Court case - *Sarvinder Singh vs. Dalip Singh and others* reported in 1997 (1) MPLJ 324(supra) relied upon by the appellants, is not applicable to the facts of this case. It is not necessary to deal with other decisions cited by the learned counsel for the appellants in view of the decision in *Sk. Sattar Mohd. Choudhari, Appellant v. Gundappa Amabadas Bukate* (1996) 6 SCC 373 (supra). In this case, the cases of *Mohar Singh*, AIR 1988 SC 1365 and *Badri Narain Jha*, AIR 1951 SC 186 (supra) were considered and distinguished.

26. The result of the aforesaid discussion is that the Court below rightly held that the suit filed by plaintiffs was not maintainable. The judgment and decree passed by the Court below are confirmed. The suit filed by the appellants is dismissed. No costs."

No doubt about it that single Bench of this Court has held that it would be unjust and inequitable to throw out a co-owner from possession of suit accommodation merely because as a tenant he had purchased the share of a co-owner. His legal right to retain possession till partition qua co-owner cannot be whittled down. Suit filed was held to be not maintainable.

14. Another decision on which plea of res-judicata is build up relates to the proceedings before RCA, Jabalpur initiated in revenue case no.2-A/90(7) 97-98 by Hamida Begum and others which was dismissed as untenable vide Order dated 11.10.01 passed by RCA out of which CR No.1676/01 arose which was filed by Hamida Begum in this Court. Case was remitted to the RCA who recorded the finding on the need which was negatived, thereafter the decision was rendered by this Court in *Hameeda Begum vs. Champabai Jain* 2004 (1) MPLJ 50, civil revision was dismissed against which SLP No. 2436/04 has been filed by Hamida Begum before the Apex Court which is pending, the Apex Court has granted the leave to appeal against the decision rendered in civil revision.

15. In CR No. 1676/01 *Hameeda Begum vs. Champabai Jain* (supra) following questions were referred for consideration :-

"(1) Whether a co-owner (co-landlord) can file a suit for eviction against the tenant even if the other co-owner objects to the eviction of the tenant ;

(2) Whether the tenant who has purchased the undivided share of one of the co-owners is liable to eviction at the instance of other co-owners and then it is for him to bring a suit for partition and separate possession;

(3) Whether the decision in the Second Appeal on the aforesaid pure questions of law operates as res judicata in the subsequent eviction proceedings under Section 23-A of the Act on a different cause of action (bona fide need of the son of the applicant).

The Division Bench thereafter discussed the matter thus :-

"(1) A co-owner/landlord cannot file a suit for eviction against the tenant if the co-owner objects.

(2) If a tenant who purchased the property from co-owner and gets into the shoes of the co-owner need not file a suit for partition and separate possession and there is no obligation on his part to handover possession and thereafter sue for partition and separate possession. Any co-owner who wants to have possession, by meets and bounds may file a suit for partition and claim separate possession and thereafter seek eviction of the tenant from the part of reversion falling to his share after partition.

(3) The judgment rendered in the second Appeal operates as res judicata despite pure questions of law decided therein. We may also add here that the judgment having been delivered inter se parties, the same would have been otherwise binding on us, in view of the law laid down by this Court in the case of *Shyamacharan vs. Sheojee Bhai* 1964 MPLJ 502 as well as the conception in the case of *Mulam Chand* (supra) that the doctrine of res judicata over weighs the binding precedent."

16. It is not in dispute that the aforesaid decisions this Court has taken the view contrary to the decision of Apex Court in *Pramod Kumar Jaiswal and others v. Bibi Husn Bano and others* (supra) without considering various material aspects and provisions of Section 111(d) of TP Act and the question whether tenancy continues.

17. Question arises whether a decision can operate as res judicata in the facts of the instant case, suit has been filed for the purpose of declaration that sale deeds dated 2.2.82 and 20.9.82 are void and fresh cause of action for need under Section 12(1)(f) which existed as on the date of filing of the suit. It is also not disputed that *Pramod Kumar Jaiswal and others v. Bibi Husn Bano and others* (supra) may have the effect of binding precedent, but submission raised by respondents is that rule of res judicata has to prevail over the binding precedent.

18. In the previous decision rendered by this Court in SA No.813/95 this Court has held that Inder Kumar Jain has stepped into the shoes of co-owner of undivided portion of the house. It would be unjust and inequitable to throw out a co-owner from possession of suit accommodation merely because as a tenant he had purchased the share of co-owner. His legal right to retain the possession cannot be whittled down. This Court did not consider at all the question of merger of tenancy into the co-ownership right. Provisions of Section 111 (d) of The Transfer of Property Act was not even referred to. Similarly in civil revision 1676/01 *(Hameeda Begum vs. Champa Bai Jain and other* (supra)) provisions of Section 111(d) of Transfer of Property Act was not even referred to. Division Bench of this Court did not take into consideration the aforesaid aspects and the decision of civil revision rendered by this Court has not attained finality as leave to appeal has been granted by the Apex Court and the matter is pending consideration. The question which has been raised in the instant matter that there is no merger of the tenancy rights and the defendants purchaser and other heirs of Shikharchand Jain continues to be tenant inspite of purchase of part of the property was not decided in previous matters.

19. Five following conditions must co-exist to constitute a matter as res judicata. The five tests have been laid down by the Apex Court in *Sheodan Singh vs. Daryao Kunwar* AIR 1966 SC 1332, (i) The matter directly substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit; (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (iii) The parties must have litigated under the same title in the former suit; (iv) The court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and (v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. In order, therefore, that the decision is res judicata it will have to be seen whether all the five conditions mentioned have been satisfied. In *Mysore State Electricity Board vs. Bangalore Woollen, Cotton, and Silk Mills Ltd.* AIR 1963 SC 1128 in order to decide whether a decision in an earlier litigation operates as res judicata, the court must look at the nature of the litigation, what were the issues raised therein and what was actually decided in it.

20. Another question is that previous decision which was rendered only on pure question of law, whether such a decision without considering whether tenancy had merged into the co-ownership right can be said to be res judicata. When on question of law and its alteration when decision will not operate as res-judicata the Apex Court in *Isabella Johnson(smt.) vs. M.A. Susai* (1991) 1 SCC 494 : AIR 1991 SC 993 following the decision in *Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B.Jeejeebhoy* (1970) 1 SCC 613 has laid down that it is well settled

that there can be no estoppal on a pure question of law and in this case the question of jurisdiction is pure question of law. In *Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B.Jeejeebhoy* (supra) the Apex Court has laid down that where the decision is on a question of law, i.e., the interpretation of a statute, it being res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" means the right litigated between the parties, i.e, the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the court or a decision of the court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.Under the rule of res judicata, for a rule of procedure cannot supersede the law of the land. The Apex Court has laid down in *Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B.Jeejeebhoy* (supra) thus :-

> "6. The authorities on the question whether a decision on a question of law operates as res judicata disclose widely differing views. In some cases it was decided that a decision on a question of law can never be res judicata in a subsequent proceeding between the same parties: *Parthasardhi Ayyangar v. Chinnakrishna Ayyangar,* ILR 5 Mad 304; *Chamanlal v. Bapubhai,* ILR 22 Bom 669; and *Kanta Devi v. Kalawati,* AIR 1946 Lah 419. On the other hand Aikman, J., in *Chandi Prasad v. Maharaja Mahendra Singh,* ILR 23 All 5 held that a decision on a question of law is always res judicata. But as observed by Rankin, C. J., in *Tarini Charan Bhattacharjee v. Kedar Nath Haldar,* ILR 56 Cal 723 .
>
> "Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation may all be questions of law. In such questions the rights of parties are not the only matter for consideration."
>
> We may analyse the illustrative cases relating to questions of law, decisions on which may be deemed res judicata in subsequent proceeding. In *Bindeshwari Charan Singh v. Bageshwari Charan Singh*, LR 63 IA 53 ,the Judicial Committee held that a decision of a Court in a previous suit between the same parties that Section 12-A of the Chota Nagpur Encumbered Estates Act 6 of 1876 which renders void a transaction to which it applies was inapplicable, was res judicata. In that case the owner of an impartible estate, after his estate was released from management,

executed a maintenance grant in favour of his minor son B, but without the sanction of the Commissioner as required by Section 12-A of the Act. B on attaining majority sued his father and brothers for a maintenance grant at the rate of Rs. 4,000 per annum. The claim was decreed, and the plaintiff was awarded a decree for a grant of Rs. 4,000/- inclusive of the previous grant of 1909, and the Court held that the grant of 1909 was valid in law. The father implemented the decree and made an additional maintenance grant upto the value of the decreed sum. In an action by the sons of B's brothers challenging the two grants on the plea that the grants were illegal and not binding upon them, the Judicial Committee held that the plea was barred as res judicata in respect of both the grants--in respect of the first because there was an express decision on the validity of the first grant in the earlier suit, and in respect of the second the decision in the first suit was res judicata as to the validity of the second grant which was made in fulfilment of the obligation under the Court's decision. The Judicial Committee held that in respect of the first grant, the decision that Section 12-A did not apply to the grant, was res judicata, and in respect of the second grant the constriction between the same parties of Section 12-A was res judicata. Validity of the second grant was never adjudicated upon in any previous suit : the second grant was held valid because between the parties it was decided that to the grant of maintenance of an impartible zamindari Section 12-A of the Chota Nagpur Encumbered Estates Act had no application. This part of the judgment of the Judicial Committee is open to doubt.

7. Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties:

Tarini Charan Bhattacharjee's case (supra). It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

8. In a case relating to levy of tax a decision valuing property or determining liability to tax in a different taxable period or event is binding only in that period or event, and is not binding in the subsequent years, and therefore the rule of res judicata has no application; see *Broken Hill Proprietary Co, Ltd. v. Municipal Council of Broken Hill,* 1926 AC 94.

9. A question of jurisdiction of the Court, or of procedure, or

a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin.C. J., observed in *Tarini Charan Bhattacharjee's case*(supra):

"The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."

10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure, means the right litigated between the parties, i. e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of the order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."

21. Considering similar question in *Isabella Johnson(Smt.) vs. M.A. Susai* (supra), the Apex Court has held thus :-

"5. Learned counsel for the appellant submitted that the learned Judge of the High Court was in error, as the earlier decisions of the Rent Controller to the effect that it was the city Civil Court and not the Rent Controller who had the jurisdiction to entertain the suit for eviction filed by the appellant against the respondent, constituted res judicata between the parties on the question of jurisdiction. It was submitted by him that, even if that decision was wrong, the issue of jurisdiction was finally decided between the parties and that decision was that it was the Civil Court and not the Rent Controller that had the jurisdiction to entertain and dispose of the suit for eviction. He further submitted that the respondent could not be permitted to take inconsistent pleas as he was barred by the principles of estoppel from taking up the plea before the Civil Court that it was the Rent Controller who had the exclusive jurisdiction to entertain the suit. He placed reliance on a decision rendered by a Division Bench comprising two learned Judges of this Court in *Avtar Singh v. Jagjit Singh,* (1979) 4 SCC 83, which took the view that the Civil Court's decision regarding lack of jurisdiction will operate as res judicata in a subsequent suit. In that case the Civil Court declined jurisdiction. The Civil Court took the view that it had no jurisdiction to try the suit in question and directed the return of the plaint for representation to the appropriate Revenue Court. When the claim was filed in the Revenue Court, the Court took the view that it had no jurisdiction to try the claim. Thereupon, a suit was again instituted in the Civil Court for the same relief. This suit failed throughout on the ground of res judicata. The High Court affirmed the dismissal and the Division Bench of this Court took the view that the High Court was right in taking the view that the principles of res judicata were applicable to the issue of jurisdiction. In our opinion, the contention of learned counsel for the appellant cannot be upheld. We find that in *Mathura Prasad Baloo Jaiswal v. Dossibai N. B. Jeejeebhoy,* (1970) 1 SCC 613 : (1970) 3 SCR 830, a Bench comprising three learned Judges of this Court has taken the view that a decision on the question of jurisdiction of the Court or a pure question of law unrelated to the right of the parties to a previous suit is not res judicata in the subsequent suit. The Court observed:- (SCC p.619,para11).

"It is true that in determining the application of the rule of res

judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in S. 11 of the Code of Civil Procedure means the right litigated between the parties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

7. The same view has been reiterated by a Bench comprising three learned Judges of this court in *Sushil Kumar Mehta v. Gobind Ram Bohra*, (1990) 1 SCC 193. We find that the decision of three learned Judges of this Court in *Mathura Prasad Bajoo Jaiswal v. Dossibai, N. B. Jeejeebhoy* (1970) 1 SCC 613 :(1970) 3 SCR 830 has not been noticed at all by the Division Bench comprising two learned Judges of this Court which delivered the judgment in *Avtar Singh v. Jagjit Singh* (1979) 4 SCC 83 and hence, to the extent, that the judgment in *Avtar Singh's Case* takes the view that the principle of res judicata is applicable to an erroneous decision on jurisdiction, it cannot be regarded as good law. In our opinion a court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of res judicata. It is well settled that there can be no estoppel on a pure question of law and in this case the question of jurisdiction is a pure question of law.

22. In case there is a fresh cause of action,interpretation of law in previous case cannot operate as res judicata. The Apex Court in *Anwar Khan Mehboob Co. vs. State of M.P.* AIR 1966 SC 1637 has laid down that a decision cannot constitute a bar on the principle of res judicata when new circumstances have

come to exist which require a reappraisal of the true legal position. The Apex Court considering the fact that the Division Bench did not refer to right to property in the previous decision that true position of law was not taken into consideration. The attention of the Division Bench was not directed to the reference, hence, it was laid down by Apex Court that such a decision cannot constitute a bar on principle of res judicata. The Apex Court held thus :-

> "12. We have explained above that the Divisional Bench did not refer to right to property although it is possible that it thought in terms of property in leaves, timber etc. On their being severed from earth as existing even before leaves, timber etc. were so severed. This was not the true position in law because the agreements then considered betokened a licence coupled with a grant but no right in any property movable or immovable of any kind. The petitioner firm like the others had a licence to go to the forests to pick and carry away tendu leaves but had no other right. The attention of the Divisional Bench was not directed to this difference. Such a decision cannot constitute a bar on the principle of res judicata when new circumstances have come to exist which require a reappraisal of the true legal position."

23. Principle of res judicata will not apply when the entire matter was still in appeal and the matter had not attained finality and was still in dispute, thus the decision rendered by the Division Bench of this Court in civil revision which arose out of RCA proceedings cannot operate as res judicata on the basis of principles laid down by the Apex Court in *K.Muthuswami Gounder vs. N.Palaniapa Gounder* (1998) 7 SCC 327 : AIR 1998 SC 3118. As leave to appeal has been granted by the Apex Court against the decision rendered in civil revision, it cannot be said to operate as res judicata, the decision has not attained finality. Provisions of Section 111(d) of Transfer of Property Act have not been taken into consideration.

24. In the previous decision aforesaid question as to whether tenancy stood determined was not even resorted to, principles of estoppel or res judicata do not apply where to give effect to them would be to counter some statutory direction or prohibition, a statutory direction cannot be overridden or defeated by a previous judgment between the parties. In *P.G.Eshwarappa vs. M.Rudrappa and others* (1996) 6 SCC 96 the aforesaid principle has been laid down by the Apex Court thus :-

> "4. The principles of estoppel or res judicata do not apply where to give effect to them would be to counter some statutory direction or prohibition. A statutory direction or prohibition cannot be overridden or defeated by a previous judgment between the parties."

25. The Apex Court has laid down in *Allahabad Development Authority vs. Nasiruzzaman and others* (1996) 6 SCC 424 that Section 11-A does not apply to cases of acquisitions under S.17 where possession was already taken and the land stood vested in the State. The notification under Section 4 and declaration under Section 6 of the Land Acquisition Act do not lapse due to failure to make an award within two years from the date of the declaration. Principle of res judicata does not apply where to give effect to them would be to counter some statutory direction or prohibition. It cannot be defeated by a previous judgment between the parties. The Apex Court has held that when the previous decision is found to be erroneous on its face, the principle of res judicata will not apply to counter some statutory direction. The Apex Court has held thus :-

> "6. In view of the above ratio, it is seen that when the legislature has directed to act in a particular manner and the failure to act results in a consequence, the question is whether the previous order operates as res judicata or estoppel as against the persons in dispute. When the previous decision was found to be erroneous on its face, this Court held in the above judgment that it does not operate as res judicata. We respectfully follow the ratio therein. The principle of estoppel or res judicata does not apply where to give effect to them would be to counter some statutory direction or prohibition. A statutory direction or prohibition cannot be overridden or defeated by a previous judgment between the parties. In view of the fact that land had already stood vested in the State free from all encumbrances, the question of lapse of notification under Section 4(1) and the declaration under Section 6 would not arise. Considered from this perspective, original direction itself was erroneous and the later direction with regard to delivery of possession of the land, in consequence, was not valid in law. Further, it is made clear that the respondents are entitled to interest at 9% for one year from the date of taking possession and thereafter at 15% per annum till the date of deposit into court. The respondents are not entitled to market value as on the date of award. "

26. In *Hope Plantations Ltd. vs. Taluk Land board, Peermade and another* (1999) 5 SCC 590 the Apex Court has laid down that even a wrong decision is binding. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. The Apex Court has laid down thus :-

"31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. But that situation does not exist here. Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule 1) review is not permissible on the ground

"that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. "

In the instant case, there is a fresh cause of action with respect to necessity of plaintiff no.2, there is fresh cause of action and law of land is available in the shape of decision of Apex Court in *Pramod Kumar Jaiswal and others vs.Bibi Husn Bano* (supra) taking into consideration the intendment of Section 111(d) of the TP Act laying down that there is no determination of tenancy by factum of purchase by the tenant from one of co-owner of the part of tenanted premises and liability to comply with the Rent Act continues. Previous decision cannot be said to operate as res judicata. Otherwise it would not be possible to get the accommodation vacated forever on the basis of landlord tenant relationship as there is no determination of tenancy,even after partition there are other co-tenants defendants no.1 and 2 who will remain tenant,thus, the decision rendered earlier cannot operate as res judicata.

27. The point of law when neither raised in the High Court nor decided by the Apex Court can be raised in any other proceedings and raising of such point of law is not barred in subsequent proceedings has been laid down by the Apex Court in *Sockieting Tea Co. (Private) Ltd. v. Under Secretary to the Govt. of Assam and others* (1973) 3 SCC 729. In *Union of India and another vs. Manik Lal Banerjee* AIR 2006 SC 2844 the Apex Court has held that if a decision has been rendered without taking into account the statutory provision, the same cannot be considered to be a binding precedent. The previous decision was rendered without taking into consideration the effect of Section 111(d) of TP Act. The instant suit is based on fresh cause of action, if the decision in previous proceedings

be regarded as conclusive, it will assume status of special rule of law applicable to the party in derogation to law of land declared by the Apex Court in *Pramod Kumar Jaiswal and others vs. Bibi Husn Bano* (supra).

28. In *Amalgamated Coalfields Ltd. and another, v. Janapada Sabha Chhindwara and others* AIR 1964 SC 1013 the Apex Court has laid down that liability to pay tax year to year is based on different cause of action. If any point of fact or law is considered in determining the liability for a given year, they can generally be deemed to have been considered and decided in collateral and incidental way. It would not prevent fresh adjudication by bar of res judicata on similar questions of liability for subsequent years. The Apex Court in *C.M.Arumugam vs. S.Rajgopal an others* AIR 1976 SC 939 has laid down that when a mixed question of law and fact was decided by the Apex Court in an earlier case relating to 1967, elections do not operate as res judicata when the same questions are agitated which relates to 1972 General Election when fresh evidence is adduced and all the parties were not the same. The question was whether on conversion to Christianity a particular candidate ceased to be a member of SC. The Apex Court held that the question can be reagitated as there is fresh cause of action and on the same question fresh adjudication can be made.

29. Section 11 of CPC intended to cover the suit over which the Civil Court was given jurisdiction under the provisions of the Code has been laid down by the Apex Court in *Gulabchand Chhotalal Parikh vs. State of Gujrat* AIR 1965 SC 1153. In *Supreme Court Employees Welfare Association vs. Union of India and others* AIR 1990 SC 334 the Apex Court has laid down that the decision on an abstract question of law or question of jurisdiction would not operate as res judicata in a subsequent suit or proceeding if the cause of action is different. In *Jaisingh Jairam Tyagi and others vs. Mamanchand Ratilal Agarwal and others* (1980) 3 SCC 162 the Apex Court has laid down the decision cannot operate res judicata against legislative mandate/direction. Decision cannot be permitted to attain special rule or law in derogation of the rule declared by legislature.

30. The rule of res judicata is not applicable where nature of proceedings and authority before such claims were made were different as laid down in *The Andhra Pradesh State Road Transport Corporation, Hyderabad vs. P.Venkateswara Rao and others* (1976) 4 SCC 47 and subsequent suit means the whole suit not part of it as laid down by the Apex Court in *Mst. Gulab Bai and others vs. Manphool Bai* AIR 1962 SC 214.

31. The Apex Court has laid down in *Surajmal vs. Radheshyam* (1988) 3 SCC 18 : AIR 1988 SC 1345 that bona fide need of landlord must be considered with reference to the time when a suit for eviction is filed and it cannot be assumed that once the question of necessity is decided against the plaintiff it has to be assumed that he will not have a bona fide and genuine necessity ever in future. Thus,

in the instant case need has to be seen as to the time suit was filed. In *Richpal Singh and others vs. Dalip* (1987) 4 SCC 410 subsequent civil suit for restoration of possession on ground of plaintiff being mortgagee in possession and not tenant thereby disputing relationship of landlord and tenant between the parties, the Apex Court has held that suit was not barred by res judicata.

32. In the instant case, question of title has also been raised beside fresh cause of action on the grounds under Section 12(1)(f) of MP Accommodation Control Act. In the previous suit only question involved was that of ejectment as a tenant, the Apex Court has held in *Rameshwar Dayal vs. Banda (Dead) Through His LRs and another* (1993) 1 SC 531 that even if question of title is incidentally determined by Small Cause Court does not operate as res judicata in a subsequent suit based on title. In *Smt. Gangabai, Appellant v. Smt. Chhabubai* AIR 1982 SC 20, the Apex Court has held that determination by Small Cause Court regarding the title of immovable property would only be incidental to the main issue in the suit. Finding of title cannot be res judicata in a regular civil suit for determination of enforcement of any right or interest in immovable property. In *Gram Panchayat of Village Naulakha vs. Ujagar Singh and others* (2000) 7 SCC 543 it has been laid down where the earlier suit was for injunction only and no question of title was gone into or decided, the earlier suit could not be binding on the question of title.

33. In *Sarwan Kumar and another vs. Madan Lal Aggarwal* AIR 2003 SC 1475 the Apex Court has laid down that decree passed by the Civil Court on the basis that commercial tenancy is not heritable, subsequently commercial tenancy was held to be not heritable. The declaration of the law was not made prospective by the Supreme Court. The Apex Court has held that decree earlier passed by the Civil Court becomes without jurisdiction and objection as to its executability can be raised before the Executing Court. In *N.R.Narayan Swamy vs. B. Francis Jagan* AIR 2001 SC 2469 the Apex Court has held that successive suits can be filed by landlord on a ground of bona fide requirement or non-payment of rent. Due to withdrawal of first suit as not pressed, second suit will not be barred by Order 23 Rule 1 CPC or by Section 45 of Karnataka Act.

34. It would be appropriate to refer the decisions relied upon by Shri Ravish Agarwal, learned Sr.Advocate, appearing for respondents. He has referred to the decision in *Derrick vs. Williams* (1939) 2 All.E.R.559 . The Court of Appeal has laid down in the context of the facts that child of the respondent was killed by a motor lorry, an action was brought claiming damage under the Law Reform (Miscellaneous Provisions) Act, 1934, some amount was paid with denial of liability, that sum was taken out. At that time reliance was placed on the decision of Court of Appeal in *Rose vs. Ford* (1937) AC 826, it was thought that damages could not be recovered in respect of expectation of life, but that decision was in 1937 reversed in the House of Lords. Respondent brought the action in 1938 based

upon same facts and claimed damages for loss of expectation of life, the Court applied the law as it was at the time when decision was given and the fact that law was subsequently altered by a decision of higher Court or by the legislature gives no right to have an action retried. Said decision has no application as the instant suit is based on fresh cause of action beside it is based on question of title which was not involved in the previous suit and along with fresh cause of action of bona fide requirement which has to be seen in such cases on the date of filing of the suit. He has also relied upon decision of Chancery Division in *Re Waring. Westminster Bank vs. Burton Butler* 1948 Ch.D.221 in which the earlier decision was over ruled later on and it became clear that decision of Court of Appeal was wrong, later on trustees asked whether in view of provisions of Section 20 of the Finance Act, 1945 two tax free annuities ought to be paid in full. It was held that in the case of the annuitant who was a party to the previous proceedings the principle of res judicata applied and it was bound by the decision of the Court of Appeal. However, annuitant who had not been a party to the previous decision, was not bound by the order of the Court of Appeal and was entitled to claim retrospectively the full amount of her annuity. It was held that though the decision has been over ruled , it is nevertheless a subsisting order which is binding on the parties to the proceedings in which it was made. But in the instant case, ratio has no application as it is based on fresh cause of action and tenancy continues, tenant can be evicted on availability of grounds under Section 12 of MP Accommodation Control Act and question of title is also agitated.

35. Another decision relied upon is rendered by the House of Lords in *Watt vs. Ahsan* (2007) UKHL 51 . In the aforesaid case, question arose on Section 12 of the Race Relations Act, 1976. The submission was made that they were party and that *Ali vs. McDonagh* (2002) ICR 1026 was wrongly decided. In any case, the interpretation given to Section 12 by the EAT in *Sawyer v. Ahsan* (2000) ICR 1 is res judicata between him and the Labour Party, not only for the purposes of his first complaint but for the other two as well. It was opined that the EAT was wrong in *Sawyer vs. Ahsan* (2000) ICR 1 to hold that the Labour Party was a qualifying body, but there was no appeal against the decision of EAT , it was held that decision was binding upon the parties though wrong in law. When the Tribunal was having the jurisdiction to decide the question, it is binding upon the parties though erroneous. There is no dispute with the aforesaid proposition, but here we are concerned with the fresh cause of action on which suit is based and previously relevant statutory provision of Section 111(d) of TP Act was not taken into consideration, question of determination of tenancy was also not decided.

36. Shri Agarwal has also relied upon decision of this Court in *State of M.P. vs. Mulamchand* 1973 MPLJ 832 in which it has been laid down that question of law in relation to given set of facts attains finality, it operates as res judicata in a later suit or proceeding between same parties, even if it was erroneous. Even if

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in the earlier case issue of law was wrongly interpreted to ignorance of binding precedent or if in a subsequent binding precedent the law has been interpreted otherwise the earlier decision on the question of law which has attained finality will operate as res judicata in a subsequent suit or proceeding between the same parties. The rule admits of certain exceptions. One is that where the decision relates to the jurisdiction of the Court to try the earlier proceeding it will not operate as res judicata if in the subsequent suit it is found to be erroneous because the question of jurisdiction is unrelated to rights claimed by one party and denied by other. Another exception is where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties. Third exception is that a decision of a Court sanctioning something which is illegal does not operate as res judicata and a party affected by the decision is not precluded from challenging its validity.

In the instant case, the earlier decisions rendered by this Court were not on the question of law of merger of tenancy into co-ownership and section 111(d) of the TP Act was not considered, thus, it cannot be said to be operating as res judicata in the present suit based on fresh cause of action of ejectment of tenant and title. Tenant has protection under Rent Act, he can be evicted only on availability of ground under Section 12 of the Act. It is a question pertaining to jurisdiction to evict. There is no finding of fact which is coming in the way in the instant suit. The main question is that of the status of the defendants and beyond iota of doubt, they are tenants and tenancy is not determined by the fact that only portion of the property had been purchased by one of the heirs of the original tenant.

37. Reliance has also been placed on decision in *Abdul Salam vs. State of Jammu and Kashmir and others* AIR 1981 Jammu & Kashmir 21 , it has been laid down that a judgment interse parties of a competent Court in a previous writ petition would operate as res judicata in a subsequent suit between the same parties even if it was contrary to the decision of Apex Court in a different case. The correctness or otherwise of the earlier decision is wholly irrelevant where the conditions for the application of the rule of res judicata are satisfied in the latter case. The decision is distinguishable for the aforesaid reasons. Learned counsel for respondent has also relied upon decision in *Tarini Charan Bhattacharjee and others vs. Kedar Nath Haldar* AIR 1928 Calcutta 777 where the matter directly and substantially in issue in the former suit was not an abstract question of law but a mixed question of fact and law is res judicata. Alteration of law by subsequent decisions and different interpretation of law by judicial decision does not affect the principle of res judicata but legislative change might affect it. There is no dispute with the aforesaid proposition, but the ratio has no application in the instant case in the facts of the case for the aforesaid reasons.

38. Yet another submission has been raised by Shri Ravish Agarwal, learned senior counsel that Division Bench of this Court in civil revision has taken a different view though leave to appeal has been granted and the appeal is pending before the Apex Court against the decision, it would be appropriate to refer the matter to a larger Bench. We would have referred the matter to a larger Bench,but for the availability of decision of Apex Court in *Pramod Kumar Jaiswal and others v. Bibi Husn Bano and others* (supra) which clinches the issue and that Section 111(d) of TP Act was not taken into consideration by single Bench of this Court while deciding SA No.813/95 and by Division Bench of this Court while deciding the Civil Revision No.1676/01, moreover instant suit being based on fresh cause of action, we are not inclined to accept the submission to refer the case for decision to a larger Bench in view of availability of decision of Apex Court which is squarely applicable in the facts of the instant case to hold that defendants continue to be tenant; there is no determination of tenancy and they can be evicted in accordance with MP Accommodation Control Act.

39. In view of the aforesaid discussion, we reiterate that rule of res judicata cannot prevail in the instant case as tenancy continues apart from that. present suit is based on question of title and fresh cause of action under Section 12(1)(f) of the Act . Moreover it is based on fresh cause of action for which decision on question of law cannot operate as res judicata and in the previous judgment rendered by this Court, relevant statutory provision and question of determination of tenancy was not gone into. Question is what is the status of the defendants as on today. In answer to the query made to Shri Ravish Agarwal, learned Senior Counsel appearing for respondents simply stated that this is for the Court to determine. In our considered opinion,they are tenant,partition with one of tenants will not determine the tenancy in facts of case . The tenants cannot be denied protection under Rent Act nor can be evicted except in accordance with MP Accommodation Control Act. No special law in derogation to decision of Apex Court in *Pramod Kumar Jaiswal and others vs. Bibi Husn Bano* (supra) and statutory direction under Section 111(d) of TP Act by virtue of rule of res judicata can be permitted to prevail between parties in view of fresh cause of action. Merely because one of co-tenant Inder Kumar Jain purchased part of tenanted premises, the tenancy has not come to an end and this Court did not conclude in the previous decision that tenancy has come to an end due to purchase of part of tenanted property. The decision of Apex Court is binding precedent on question of law which was not decided by this Court in previous decisions. Even erroneous decision on question of law would not operate as res judicata cause of action being different. Rule of res judicata on facts of instant case cannot prevail.

40. In Ref. Question No.(iv):-Coming to the next submission raised by Shri Hafizullah that sale deeds have become void as no suit has been filed for possession by Inder Kumar within 12 years of purchase,remedy of Inder Kumar has become

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barred by limitation as per Section 27 and Article 65 of the Limitation Act. With respect to portion purchased by him,Section 27 provides for extinguishment of right to property in case suit is not filed within the prescribed period of limitation. Article 65 has been pressed into service which provides period of 12 years limitation when the possession of defendant becomes adverse to the plaintiff. There is no question of adverse possession in the instant case by the plaintiffs, actual possession is with the defendants, they are enjoying premises as tenant. Appellant has relied upon a decision in *Dulal Chandra Chatterjee vs. Gosthabehari Mitra* AIR 1953 Calcutta 259 meaning of "dwelling house" has been interpreted. In *Gautam Paul vs. Debi Rani Paul and others* AIR 2001 SC 61 it has been held that dwelling house belonging to undivided family merely because a person is related by blood through common ancestor does not make him member of family.

41. He has also relied upon decision of Apex Court in *M.V.S.Manikayala Rao vs. M.Narasimhaswami and others* AIR 1966 SC 470. It was also observed by the Apex Court that it is clear that in the absence of a clear acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of non-alienating coparceners would be adverse to the alienee, from the date on which he became entitled to sue for general partition and possession of his alienor's share. The fact that the alienee has purchased an undivided interest of joint family property is not inconsistent with the conception of adverse possession of that interest. In the instant case, defendants are in possession and it could not be said that the plaintiffs have perfected the title by adverse possession.

42. Shri Hafizullah has also relied upon decision of Apex Court in *Wuntakal Yalpi Chenabasavana Gowd vs. Rao Bahadur Y. Mahabaleshwarappa and another* AIR 1954 SC 337 in which the Apex Court has dealt with the concept when possession of one co-owner becoming adverse to another by ouster. The mere assertion of his joint title by the dispossessed co-sharer will not interrupt the running of adverse possession. In the instant case there is no ouster of the defendants, they are enjoying the property as tenants as such there is no question of adverse possession. Even if it is taken as dwelling house for the residential purposes of the family as the defendants are in possession as tenant, it cannot be said that plaintiffs have perfected their title by adverse possession. Concept of Section 27 of Limitation Act has been dealt with in *Prem Singh and others vs. Birbal and others* AIR 2006 SC 3608 . The Apex Court has observed that Limitation Act bars a remedy, but does not extinguish the right. The only exception is to be found in Section 27 of the Limitation Act which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. In the instant case, as there is no adverse possession of the plaintiffs, it cannot be said that sale deeds have become void for the reasons that there is failure to sue

within a period of twelve years on the strength of sale deed, in the absence of there being adverse possession, it cannot be held as contended that sale deeds have become void due to failure to sue within prescribed period of limitation under Article 65 of Limitation Act.

43. In our opinion, it cannot be said that by virtue of adverse possession the plaintiffs have perfected their right, title and interest on the basis of adverse possession as such sale deeds could not be said to be void and ineffective. The defendants are admittedly in possession as tenants, thus, it cannot be said that efficacy of sale deed has been lost.

44. In Ref. Question No.(v) :-Examining the question from yet another angle, though, we have found that status of defendants is that of tenant inspite of purchase by the defendants of the share of the property which is in their occupation. The Full Bench of this Court in *Ramdayal vs. Manaklal* 1973 MPLJ 650 has laid down that the purchaser can retain the possession only of the share and can ask the other co-owners to sue for partition only in case possession on the portion of property is not in excess of the share, but here the possession is not that of co-owner but continues to be that of tenant; in case of co-owner possession could not have been retained in view of decision of Full Bench of this Court.

45. With respect to need it is not disputed that the finding has been given in favour of plaintiff no.2 Hafizullah that he is running the office of Advocacy in tenanted premises. The need is genuine one and has not been rightly disputed. Only his entitlement has been disputed due to decisions rendered in previous civil suit and the proceedings before the RCA.

46. Grounds under Sections 12(1)(b) and (c) were taken in the previous suits which were negatived on merits as such we refrain ourselves from entering into aforesaid grounds as grounds were based on same facts which formed part of the present suit. However, with respect to need, the need has to be considered with reference to the date on which the suit was filed, it was fresh cause of action.

47. In view of the aforesaid discussion, we are of the opinion that tenancy was inherited on death of Shikharchand Jain and in the life time of Shikharchand Jain original tenant, by purchase of portion of house by his son, the tenancy did not come to an end, thereafter tenancy was inherited by LRs including Inder Kumar Jain, the defendants 1,2 and 3 continue to be the tenant even as on today and are liable to be evicted as per MP Accommodation Control Act. In view of the fact that need has been made out which fact is not disputed, we grant a decree of ejectment under Section 12(1)(f) of MP Accommodation Control Act.

48. Resultantly, the appeal is allowed, decree of ejectment is granted against the defendant respondents on the grounds envisaged under Section 12(1)(f) of MP Accommodation Control Act. However, ejectment is subject to safeguards

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provided under Section 12(6) of MP Accommodation Control Act. The Executing Court to ensure the compliance of the aforesaid provision. Parties to bear their own costs as incurred in the appeal.

Appeal allowed.

I.L.R. [2009] M. P., 2360
APPELLATE CIVIL
Before Mr. Justice K.K. Lahoti
16 March, 2009*

RAMAWTAR & ors. ... Appellants
Vs.
MANGI LAL (DECEASED) THROUGH L.RS. & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 100 - *Suit to declare sale deed executed by father void as executed without consideration and legal necessity - Defendant pleaded partition - Held - Variation in pleading and evidence in regard to time of partition - After alleged partition one sale deed jointly executed - Partition by metes and bounds not established - Appellate Court erred in revising findings of trial Court - Appeal allowed.* (Para 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – पिता द्वारा निष्पादित विक्रय विलेख बिना प्रतिफल और विधिक आवश्यकता के निष्पादित किये जाने के कारण शून्य घोषित किये जाने के लिए वाद – प्रतिवादी ने विभाजन का अभिवचन किया – अभिनिर्धारित – विभाजन के समय के सम्बन्ध में अभिवचन और साक्ष्य में अंतर – कथित विभाजन के बाद संयुक्त रूप से एक विक्रय विलेख निष्पादित – माप और सीमांकन करके विभाजन साबित नही – अपीलीय न्यायालय ने विचारण न्यायालय के निष्कर्षों को उलटने में त्रुटि की – अपील मंजूर।

B. ***Transposing of parties*** *- Suit by Bheroji against his father Dallaji - During pendency Dallaji died and his daughter Devi Bai impleaded - Plaintiff Bheoroji died issueless and Devi Bai transposed as plaintiff - Held - Devi Bai being sister of plaintiff entitled to succeed the property of Bheroji as she was Class-II heir - In absence of partition between Bheroji and Dallaji, Devi Bai was entitled for share in properties of Dallaji - Her transposition as plaintiff was valid.* (Para 11)

ख. पक्षकारों का पक्षांतरण – भैरोजी द्वारा अपने पिता दल्लाजी के विरुद्ध वाद – लम्बित रहने के दौरान दल्लाजी की मृत्यु हो गयी और उसकी पुत्री देवी बाई को पक्षकार बनाया गया – वादी भैरोजी की संतानहीन मृत्यु हुई और देवी बाई वादी के रूप में पक्षांतरित हुई – अभिनिर्धारित – देवी बाई वादी की बहिन होने से भैरोजी की सम्पत्ति की उत्तराधिकारी होने की हकदार क्योंकि वह द्वितीय श्रेणी की वारिस थी – भैरोजी और दल्लाजी के मध्य विभाजन के अभाव में देवी बाई दल्लाजी की सम्पत्तियों में हिस्से की हकदार थी – उसका वादी के रूप में पक्षांतरण विधिमान्य।

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*S.A. No.555/1993 (Jabalpur)

Cases referred :

(2003) 8 SCC 740, (2007) 6 SCC 401, AIR 1983 SC 114.

Divesh Jain, for the appellant.

Shailendra Varma, for the respondent.

J U D G M E N T

K.K. Lahoti, J. :–Plaintiff Devi Bai, who died during the pendency of this appeal, preferred this appeal aggrieved by judgment and decree dated 27.9.1993 by District Judge, Sehore in Civil Appeal no.64-A/1993 by which the judgment and decree passed in her favour by the Civil Judge Class I Sehore, in Civil Suit No.31-A/79 dated 25.3.1986 was reversed and the suit of the plaintiff was dismissed.

2. This appeal was admitted on 29.6.1995 on following substantial question of law:

> "A. Finding that the appellant who was defendant no.3 brought on record as a legal representative of the deceased Dalla and after the death of Bhaironji, transposed as a plaintiff, was the Court justified in non-suiting her because of pleadings?
>
> B. Having held the property
>
> (a) in possession of Dallaji was ancestral, could Dallaji sell any specific property unless partition between him (Dallaji) and his son was effected and proved?
>
> (b) If joint, could Dallaji sell any property without legal necessity? Did the defendants Nos.1(a) to (i) and 2 prove this?"

3. The learned counsel appearing for the appellant submitted that the trial Court after due consideration of the evidence of the parties arrived at a finding that there was no partition between Dallaji and Bheroji, the father and the son, but the appellate Court without considering the pleadings and the evidence on record, reversed the aforesaid findings.

That, except the findings of the trial Court in respect of partition, other findings were maintained by the appellate Court. The findings recorded by the appellate Court in para 21 are apparently perverse and deserve to be set aside.

> (iii) The defendant had not pleaded partition specifically the date of partition, but it was pleaded of 40 years back. The witnesses of the defendants stated that alleged partition took place 15 years before filing of the suit, which was contrary to the pleadings. The trial Court after due appreciation of the evidence recorded findings in favour of the plaintiff, which have been erroneously reversed by the appellate Court.

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(iv) The burden of proof was on the defendant but the defendant failed to discharge it.

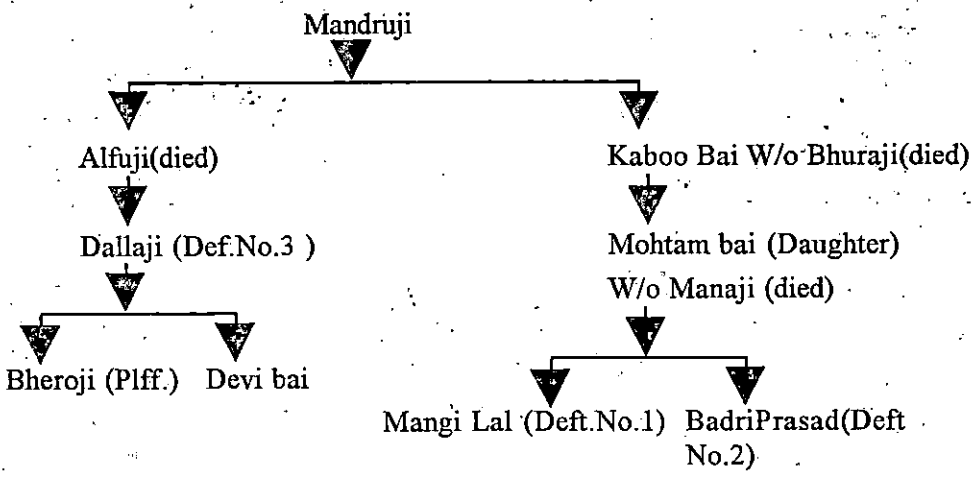
(v) The appellate Court also not considered the fact that during the pendency of the suit, plaintiff Bheroji died and Dev Bai, his sister was brought on record, which was a material aspect in the matter.

(vi) That, there was no partition of ancestral property between Dallaji and Bheroji, and in these circumstances, Dallaji was not entitled to alienate ancestral properties without legal necessity.

It is prayed that this appeal be allowed, the judgment and decree of the appellate Court be set aside and that of the trial court be restored.

4. Shri Shailendra Varma, the learned counsel appearing for the respondents, supported the judgment and decree. He referred various paragraphs of the written statement and statement of Dev Bai in support of his contention. It was submitted by him that the appellate Court rightly recorded findings that ancestral property was partitioned by Dallaji with Bheroji,. The trial Court without considering the material on record, decree the suit, which has been rightly dismissed by the appellate Court. It is submitted by Shri Verma that the judgment and decree of the appellate Court is based on recording of finding of fact, needs no interference by this Court.

5. To appreciate rival contentions of the parties, factual position in the case may be stated. The genealogical tree of the parties is as under:



(a) The case of the plaintiff as pleaded in the plaint was that late Madruji acquired, owned and possessed till his death various properties of which details are mentioned in para 2 of the plaint as Group A, Group B, Group C and

Group D. Groups A,B,C relate to various lands of village Khandwa Tehsil and Dist. Sehore. Group D is the house property. So far as land shown in group A is concerned, there is no dispute in this case as the sale deed by which Group A properties were alienated, was dated 27.5.63 and these lands were alienated jointly by Dallaji and Bheroji, plaintiff and defendant no.3.

(b) The suit was filed by Bheroji against his father on the allegation that he was about 85 years old very much addicted to wine since long. He stopped actual cultivation since long and plaintiff alone was in actual possession of all the lands. The plaintiff was earning from the land and maintaining himself and his father defendant no.3. As the plaintiff was not providing wine or at some times providing limited wine, so he was annoyed with the plaintiff and because of this, there were quarrels in between them. The defendants 1 and 2 being near relations and neighbourers were knowing all this and to avail opportunity for their benefit and taking undue advantage of addiction of him, provided liquor in excess to the defendant no.3, prevailed upon him. Relations between defendant no.3, with defendants 1 and 2 became thick and the defendants taking advantages of this obtained signatures of defendant no.3 on various documents. The defendant no.3 for purchase of wine had sold initially, pieces of the land to other also and the plaintiff had to pay off those considerations. So far as three sale deeds in question are concerned, details were given in para 4 of the plaint. The defendants 1 and 2 filed a civil suit on the strength of the registered sale deed mentioned in para 4(a) of the paint and obtained an ad interim injunction order ex parte without service of notice upon plaintiff on 2.7.1968. By the interim injunction, the plaintiff was restrained from entering into the lands mentioned in Groups B and C. Thereafter the defendants 1 and 2 destroyed the crops sown by the plaintiff. The ex parte injunction was confirmed by the trial Court and the appeal against it was pending at the time of filing of the suit before the Additional District Judge, Sehore. Proceedings under Section 145 Cr.P.C. were also pending as Misc. Cr.Case No.98/1968 before the concerned Executive Magistrate. It was ultimately decided against the plaintiff and the order was challenged by filing a revision before the ASJ Sehore.

(c) That, the sale deeds in respect of properties shown in Groups B & C dated 28.2.1968 and 29.5.1968 by Dallaji in favour of defendants 1 and 2 were challenged by the plaintiff on the grounds that all were null and void and were not binding on the plaintiff. The transactions were made by defendant no.3 under undue influence, without his free consent and when he was not capable of understanding the nature of said transactions or forming rational judgments as to its effect upon his interest. No consideration was paid to defendant no.3 of the transactions.

(d) That, the defendant no.3 had no right or authority or title to sell all or any portion of the lands as all of them were ancestral properties and without legal

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necessity could not have been sold. The defendant no.3 had only half share in it and after his death. during the pendency of the suit, the plaintiff Bheroji became the sole owner of the property.

(e) That land of Khasra Nos.158/159/1 measuring 8.5 acres was also sold by defendant no.3 to one Mukhna ji. The plaintiff ,on knowing it, returned the consideration and got land back and was in exclusive possession over it.

On the aforesaid grounds, the plaintiff prayed for declarations that the sale deeds be declared as illegal, null and void, ineffective and not binding upon the plaintiff and claimed possession of the lands.

6. The defendants contested the suit by filing written statement. Defendants 1 and 2 filed a joint written statement in which they took following pleas:

(a) That, the suit of plaintiff was barred by limitation and the Civil Court had no jurisdiction to try the same.

(b) That, Alfooji became a Mohammadan and all his rights were relinquished from the family. Bhuraji was the 'Gharjamai'(son in law residing with father in law) of Mandruji. The wife of Alfooji also went in Natra when Dallaji was hardly about 10 years of age. The status of the ancestral property had come to an end from that very day when Alfooji became Mohammadan. Bhuraji brought Dallaji and gave him some land and a house also. Dallaji during his life time also transferred some land measuring about 13 acres to Rewaram, Salagram, Ram Narain and Jagannath of Khandwa. Bheraji was arrested in an offence under Sections 302 and 376 I.P.C. in which Dallaji sold about 10 acres of land to Ghasiram. The wife of the plaintiff also left him and opted in Natra. marriage. Bheroji, was separated by the deceased Dallaji before 40 years after giving him share in agricultural land. The land in group A was also given in his share and half portion of the house. The plaintiff sold his land in the year 1963 and sold half of his house to Shankar Lal and half to defendants

(c) During the pendency of the suit Dev Bai was party in the capacity of defendant. Initially she was added as LR of Dallaji and after the death of Bheroji, she was transposed as plaintiff. The case of plaintiff and Dalla ji was inconsistent, so she took inconsistent pleas and the suit deserves to be dismissed. Apart from this, the cause of action accrues to Dev Bai from the date of her transposition as plaintiff and the suit on the aforesaid date was time barred. On the aforesaid grounds, defendants 1 and 2 contested the suit inter alia by denying allegations in the plaint.

7. The trial Court framed issues and after recording evidence arrived at a finding shown against each of the issues.

(a) The trial Court found as under: (i) that Dallaji was in habit of consuming liquor and was an old person. He was also sick because of old age and was unable to move, but it was not proved that he was unable to understand his well beings. In absence of evidence that Dallaji lost his power of understanding or the sale deeds were got registered under influence, no finding can be recorded in favour of the plaintiff and accordingly issue no.1 was decided against the plaintiff (ii) that the plaintiff successfully proved that the consideration of the sale deeds dated 28.2..68 and 29.5.1968 were not paid to Dallaji or to the plaintiff. The burden was on the defendant to prove payment of such consideration. The evidence produced by the defendant was not convincing. Apart from this the evidence produced before the Tehsildar was entirely different and the defendant was confronted with the previous statement. On appreciation of the entire evidence, the trial Court in paragraphs 8,9 and 10 recorded findings in favour of the plaintiff that the sale deeds were without any consideration. That there was no mis-joinder cause of action in the suit because validity of two sale deeds were challenged, as the validity was challenged on the same ground. There was no mis-joinder of cause of action in the suit. The order under Section 145 Cr.P.C. by the S.D.O. was in accordance with law and could not have been challenged by the plaintiff. The findings recorded in the proceedings under Section 145 Cr.P.C. were factual which cannot be challenged in the civil suit.

(b) The trial Court while considering issue no.3 in paras 14 to 18, recorded findings that the disputed properties were ancestral properties in the hands of Dallaji. There was no partition between Dallaji and Bheroji. The plaintiff successfully proved that there was no partition between Dalla ji and Bheroji and relying on the evidence of the plaintiff and disbelieving the evidence of defendant, a finding was recorded by the trial Court that no partition took place between them. While considering this aspect, the trial Court considered the sale deed in respect of lands of Group A and found that on the sale deeds both Dallaji and Bheroji signed and if there was earlier partition of the said land, there was no question of getting signatures of both father and son on the sale deed.

(c) The defendants in the evidence stated that the partition took place 15 years back while in the written statement it was pleaded as 40 years back. There was material discrepancy between pleadings and proof, and the evidence of the defendants was not reliable.

(d) That, in the properties, plaintiff Bheroji was having half share and Dallaji was not having any right to alienate property, including the share of plaintiff Bheroji. The sale deeds were not executed for the necessity of family. The trial Court considered in this regard plea of defendant that an amount of Rs.2,000/-

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was borrowed by Dallaji for last rites of his wife and also that Dallaji borrowed amount for the marriage of daughter Devbai, but disbelieved the evidence. That, the suit was within limitation as it was filed within 3 years from the sale deeds dated 22.6.1968 and 29.5.1968.

(e) Recording the aforesaid findings, the trial Court found that the plaintiff was entitled for a decree for a declaration that the sale deeds dated 22.6.68 and 29.5.1968 so far it relates to the share and entitlement of Bheraji, were illegal and were not binding on the plaintiff. The LRs of defendant no.2 Mangi Lal and defendant Badria Prasad within three months from the date of decree may file a suit for partition and get their title declared otherwise the plaintiff shall be entitled to possession of the land properties shown in Groups B,C and D.

8. Against the judgment and decree passed by the trial Court, defendant preferred an appeal. The appellate Court recorded following findings:

(i) That, for the disputed sale deeds, defendants 1 and 2 had not paid any consideration. Defendants 1 and 2 were taking care of defendant no.1 in his old age and were providing food also. The sale deeds were got executed by undue influence and without consideration.

(ii) That, both the sale deeds were without any consideration, The aforesaid sale deeds were not challenged by the vendor so the plaintiff Bheroji was not entitled to challenge the sale deed.

(iii) That the disputed lands were ancestral properties. The lands were purchased before 40 years of filing of the suit and fell into the share of defendant no.3.

(iv) The appellate Court reversed the finding of the trial Court in respect of non-partition of the properties and recorded finding that the aforesaid lands were divided between Dallaji and Bhero Ji. The appellate Court also found that a criminal case was registered against the plaintiff Bheroji under Sections 376 and 302 I.P.C.. in which he was arrested and was convicted. During this period, wife of Bheroji left to the plaintiff and defendant no.3 sold 15 acres of land. The plaintiff was of a bad character and his conduct was not good so the relations between plaintiff and his father were not good, they were divided and residing separately.

(v) The appellate Court also recorded finding that after release from the jail, the plaintiff and his father partitioned the property . That irrigated land of 9 acres along with well, of which details were given in Group A, were given to the plaintiff, while defendant no.3 retained 23 acres unirrigated land of which details were given in groups B and C. On these grounds, the appellate Court found that division between father and son was proved and in this regard, the finding of the trial Court were reversed.

(vi) In para 22, the appellate Court found that the properties were already divided before sale of the property shown in groups B and C, the defendant no.3 was sole owner of the property and was entitled to sell. The plaintiff was not entitled to challenge the aforesaid sell. The appellate Court found that the plaintiff Dev Bai cannot get any right after the death of plaintiff. On these grounds, the suit was dismissed.

9. The findings recorded by the appellate Court may be summarized in nutshell that the appellate Court reversed the finding of the trial Court in so far as it relates to partition between plaintiff Bheroji and defendant no.3 Dallaji, and recorded finding that before sale of the properties of Groups B,C and D, partition took place but other findings in favour of the plaintiff by the trial Court were maintained/affirmed .

10. So the mute question in this second appeal is whether the findings of the appellate Court that there was partition between plaintiff Bheroji and defendant no.3 Dallaji was proved or it was in accordance with law. The learned counsel for the appellant placed reliance to two judgments of the Apex Court. In *Kashi Nath vs. Jaganatth* (2003) 8 SCC 740 , the apex Court held that if there is variation between pleadings and evidence, such evidence cannot be relied upon and an adverse inference is to be drawn, as the pleadings and evidence are self-contradictory. Another judgment relied upon by the appellant is of *Venkataramana Hebbar vs. M.Rajagopal, Hebbar*[(2007)6 SCC 401]. The apex Court held that in a suit in which plaintiff claimed partition of property in question and the defendant contended that since the parties had arrived at a family settlement, part of it had been acted upon and the plaintiff was estopped from filing of the said suit, then it must be established by the defendant that there had been a partition by metes and bounds. Mere separate possession, unless a partition of joint family takes place by metes and bounds, will not non suit the plaintiff.

11. In the light of the aforesaid judgments of the apex Court, the factual position in the present case may be looked into. The case of the plaintiff was very specific that there was no partition between Bheroji and Dallaji.The defendant no.3 Dallaji alienated specific properties shown in Groups B.C. and D, The defendants in the written statement in para 8 specifically pleaded that the plaintiff was separated by the deceased Dalla Ji before 40 years, after giving him agricultural land mentioned in para 2 in group A and half of the house which the plaintiff Bheroji transferred to one Shankar lal and defendants 1 and 2. Accordingly, lands mentioned in para 2 Group B&C were sold to defendants 1 and 2 by Dallaji without the consent of plaintiff. The plaintiff Bheroji was estopped to challenge the transaction.As Dallaji was recorded bhumiswami of the land mentioned in groups (a), sold share of the plaintiff jointly to the respondent. Defendant Dallaji was the sole owner of the rest of property after partition. The aforesaid pleadings are vague in respect of partition, because in paras 8 and 23 of the written statement,

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the defendant pleaded that plaintiff Bheroji was separated before 40 years but had not specifically pleaded a partition between father and son by meets and bound. Even for the sake of argument, the pleadings may be treated as of that before 40 years, there was partition between Bheroji and Dallaji then the defendant's evidence was contrary to the aforesaid pleadings. DW1 Mangi lal in para 11 of his statement specifically stated that the partition took place 15-16 years back. His statement was recorded on 16.4.1977. Other witness DW2 Gaurishankar in para 9 of the statement stated that before 15 years, there was partition between Dallaji and Bheroji. DW3 Mohan lal though stated that there was a partition between Dallaji and Bheroji, but in para 12 he stated that partition was effected in the presence of Mangi Lal DW1, while Mangi lal had not admitted this fact in para 11 of his statement, though he was asked very specifically whether partition was effected in his presence. Apart from this, if there was a partition between Dallaji and Bheroji then for the sale of Group A lands, there was no question of execution of sale deeds by both Dallaji and Bheroji. These aspects were considered by the trial Court while recording a finding that there was no partition of ancestral lands between Dallajil and Bheroji, but the appellate Court on hypothesis that after return from jail there was partition between plaintiff Bheroji and Dallaji was apparently erroneous. The defendant pleaded no such case in the written statement and in absence of any pleadings in that regard, the appellate Court erred in reversing well considered findings of the trial Court.

In view of the aforesaid, the findings of the appellate Court in this regard are not sustainable under the law. It is settled law that the appellate Court before reversing finding of the trial court was required to look into the reasons of the trial Court on the basis of which the trial Court recorded its findings and if without considering those reasons, the appellate Court reversed the finding, the aforesaid cannot be sustained under the law. See *Madhusudandas vs. Narayani Bai* [AIR 1983 SC 114]

12. Apart from this, the appellate Court also recorded findings that Dallaji incurred certain expenses in defending Bheroji from criminal case, but in this regard, the defendant had not made any averments in the written statement. In absence of this, the findings of the appellate Court are based on surmises and conjectures. The findings recorded by the appellate Court in paras 21 and 22 of the judgment in respect of partition between Dallaji and Bheroji are not sustainable under the law and accordingly, the aforesaid findings are set aside. Except this, other findings of the trial Court were affirmed by the appellate Court in respect of which no arguments were advanced by the parties and the aforesaid findings which have attained finality need not be discussed in the second appeal.

13. So far as Dev Bai is concerned, initially she was impleaded after death of Dallaji as defendant no.3, as she was daughter of Dallaji, but after death of Bheroji, sole plaintiff, she was transposed in place of Bheroji as Bheroji died

issueless. Being sister of Bheroji, she was entitled to succeed the properties of Bheroji as she was class II heir of Bheroji. Apart from this, being daughter of Dallaji, in absence of any partition between Bheroji and Dallaji, she was entitled for her share also in the properties of Dallaji and was entitled to contest the suit in place of plaintiff Bheroji by her transposition as plaintiff.

14. In view of the aforesaid discussion, the judgment and decree passed by the appellate Court is not sustainable under the law and accordingly it is set aside and that of the trial Court is restored.

A decree be drawn up, according to the judgment of the trial Court. Considering the facts of the case, the appellant shall be entitled for cost of this appeal.Counsel's fee Rs.2,000/-.

Appeal allowed.

I.L.R. [2009] M. P., 2369
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
17 March, 2009*

VIJAY KUMAR SEN & ors. ... Appellants
Vs.
GOVIND PRASAD ... Respondent

Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(f) & (h) - ***Suit for eviction - Non-residential accommodation required for major son and rebuilding - During pendency, son started business on the rear side of suit shop whose approach from a narrow lane - Held - Need of plaintiff has not come to an end as place of business is not suitable - Decree of eviction affirmed - Appeal dismissed.*** (Para 12)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(एफ) व (एच) – बेदखली का वाद – वयस्क पुत्र और पुनर्निर्माण के लिए अनिवासिक स्थान की आवश्यकता – लम्बित रहने के दौरान पुत्र ने वादग्रस्त दुकान के पीछे की ओर कारोबार प्रारम्भ किया जिसका प्रवेश मार्ग एक संकरी गली से – अभिनिर्धारित – वादी की आवश्यकता समाप्त नही हुई क्योंकि कारोबार का स्थान उपयुक्त नही है – बेदखली की डिक्री की पुष्टि – अपील खारिज।

R.K. Verma, for the appellants.
Siddhartha Patel, for the respondent.

J U D G M E N T

A.K. Shrivastava, J. :–This appeal has been filed by defendants assailing the judgment and decree passed by two Courts below decreeing the suit of plaintiff on the ground envisaged under Section 12(1)(f) of the M.P. Accommodation Control Act, 1961 (for brevity 'the Act').

*S.A. No.259/2004 (Jabalpur)

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2. In brief the case of plaintiff is that appellants are his tenants and they are running a shop owned by the plaintiff and which has been shown as A,B,C, D in the plaint map under red lines. According to the plaintiff, the building consisting of the suit shop is near about 70 years is old and it needs reconstruction, therefore, the plaintiff got the plan sanctioned from the Municipal Corporation, Jabalpur.

3. It has also been pleaded in para 8 of the plaint that plaintiff has to construct a shop of a dimension marked by letters G,H,E & F in the plaint map bigger than the one to be vacated by the defendants as per plan sanctioned by the Municipal Corporation. Further it has been pleaded by plaintiff in para 9 of the plaint that the plaintiff is having only one adult son Shashin living with him and who has passed his M.Com about 7 years ago but but not getting any job or service despite his full efforts. The plaintiff is constructing the said shop marked with G,H,E,F for occupation of his son and to run a shop therein to earn his livelihood and for that purpose he has no other non-residential accommodation of his own except the suit shop in the city of Jabalpur. On these premised pleadings, it has been prayed by the plaintiff that the suit be decreed.

4. The learned Trial Court after framing necessary issues decreed the suit. The appeal which was filed by defendants has been dismissed by the impugned judgment and decree.

5. In this manner, the present appeal has been filed by defendants assailing the impugned judgment and decree of two Courts below.

6. This Court on 5.10.2004 admitted the second appeal on the following substantial questions of law :-

> "(i) Whether the First Appellate Court erred in substantial error of law in not deciding the application filed by the appellants under Order 41 Rule 27 CPC ?
>
> (ii) Whether First Appellate Court erred in substantial error of law in rejecting the application of amendment filed by the appellants ?
>
> (iii) Whether by ignoring the facts narrated in the amendment application, the First Appellate Court erred in law, affirming the decree passed under Section 12(1)(f) of M.P. Accommodation Control Act, 1961 ?"

7. The contention of Shri R.K.Verma, learned counsel for the appellants is that the learned First Appellate Court erred in not deciding the application filed under Order 41 Rule 27 CPC. Further it has been argued that the learned First Appellate Court erred in law in rejecting the application filed by the appellants under Order VI Rule 17 CPC and by ignoring the facts mentioned in the application, the decree passed by learned Trial Court under Section 12(1)(f) of the Act which

has been affirmed by learned First Appellate Court cannot be allowed to remain stand.

8. On the other hand, Shri Siddhartha Patel, learned counsel for the respondent has argued in support of the impugned judgment and has submitted that the application under Order 41 Rule 27 CPC was filed but along with the application no documents were filed and therefore the learned First Appellate Court rightly did not pass any order on that application. Further it has been argued by learned counsel for respondent that no application to amend the written statement was filed by appellants in the appellate court. The application which was filed by them was to amend the memo of appeal only. The contention of learned counsel is that despite the application was dismissed, the learned First Appellate Court considered the grounds which were taken in the application and therefore no prejudice has been caused to the appellants. By inviting my attention to the plaint map, it has been argued that if the contention of learned counsel for appellants is accepted, it would amount to ask the proposed customers to approach the plaintiff's shop by entering from a narrow gali and the defendants shall be permitted to run their business in the suit property which is on the front side of the road. The contention of learned counsel is that the tenant is nobody to curtail the choice of the landlord. On these premised submission, it has been argued by learned counsel that this appeal sans substance and the same be dismissed.

9. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be dismissed.

Regarding Substantial Question of Law No.1 :

10. On going through the record of the learned First Appellate Court, it is gathered that an application under Order 41 Rule 27 CPC was filed by appellant on 7.4.2003 mentioning that certain documents could not be filed in the Trial Court and it was prayed that the application be allowed. True, no order has been passed by learned First Appellate Court on this application. But, it is equally true that along with the application, no documents were filed. Apart from this, the description of the document which appellants intended to file has also not been mentioned in the application and therefore, according to me, even if the learned First Appellate Court did not pass any order on the said application, no prejudice is caused to the defendant/ appellant.

11. The substantial question of law No.1 is thus answered accordingly.

Substantial Questions of Law No.2 and 3 :

12. On going through the application filed under Order VI Rule 17 CPC filed by appellant before the First Appellate Court, it is gathered that they want to add one more ground as a ground in the memo of appeal. This application is not to amend the written statement on the contrary it was filed only to amend the appeal memo.

The learned First Appellate Court has rejected this application but the contents of the application were considered in the impugned judgment. The ground which was proposed to be taken by way of amendment in the memo of appeal is that the son of plaintiff Shashin Dubey for whose need the suit accommodation is to be vacated, has started the business of ready made garments adjacent to the suit shop and therefore the need has come to an end. The learned First Appellate Court from para 17 onwards has categorically held that the place where presently the son of plaintiff has started the business of readymade garments is on the rear side of the suit shop and the approach is from a narrow gali. On going through the plaint map, this Court finds that the suit shop is on the front side of the road and on the rear side of the suit shop, the place where the plaintiff's son is carrying on the business is situated. The approach of the place of business of plaintiff's son is from a narrow gali and, therefore, according to me, the learned First Appellate Court rightly did not find that the need of plaintiff has come to an end as well as the place where the plaintiff's son is carrying on the business is suitable to him. The learned First Appellate Court held that after the demolition of the suit shop, some portion of the suit shop would be included in that premises in which plaintiff's son is carrying on the business and the view will be the front view of the road. Hence, to me, learned Courts below did not commit any error in decreeing the suit of plaintiff on the grounds envisaged under Section 12(1)(f) and (h) of the Act.

13. The substantial questions of law No.2 and 3 are thus answered accordingly and decided against the appellants.

14. This Court has decided all the substantial questions of law framed by this Court against the appellants but it would be relevant to mention one important fact that the decree of eviction was passed on the ground envisaged under Section 12(1)(f) and (h) of the Act. No substantial question of law on the ground envisaged under clause (h) of the Act has been framed and the said decree has attained finality.

15. Resultantly, this appeal fails and is hereby dismissed with costs. Counsel fee Rs.2000/- if pre-certified.

16. At the last, Shri R.K.Verma, learned counsel for appellants submits that some breathing time may be given to appellants to vacate the suit premises because they are carrying on the business for last 50 years in the suit premises. Although this prayer has been vigorously opposed by learned counsel for plaintiff/respondent, but looking to the facts and circumstances that appellants are carrying on business for last 50 years in the suit premises, some time is granted to vacate the suit shop. The appellants are directed to vacate the suit shop on or before 30th April, 2010 on the following conditions:

> (i) the appellants shall desposit the entire rent as well as the costs of two courts below if any due, in the trial Court on or before 30/4/2009;

(ii) an usual undertaking shall be submitted by the appellants on or before 30/4/2009 that they shall vacate the suit premises on or before 30/4/2010 and will not create any third party's interest in the suit property; and

(iii) they shall also deposit the monthly rent in terms of Section 13 of the Act which may be withdrawn by respondent/plaintiff.

It is however made clear that if any of the condition is not fulfilled or is violated, the respondents shall be free to execute the decree.

17. This appeal is accordingly dismissed with the aforesaid observations.

Appeal dismissed.

I.L.R. [2009] M. P., 2373
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
24 March, 2009*

NEW INDIA ASSURANCE COMPANY LTD. ... Appellant
Vs.
LALITA DEVI & ors. ... Respondents

Motor Vehicles Act (59 of 1988), Sections 166, 168 & 149 - *Liability of Insurance Company - Driver of tractor took the tractor for tilling agricultural field accompanied by deceased - Driver of tractor during course or the master's agent in the course of that agency negligently left the tractor with ignition key inserted in ignition lock - Deceased turn on the key and started the tractor - Tractor turned turtle resulting in death of deceased - 50% liability rightly fastened on driver, owner and insurance company - Appeal dismissed.* (Paras 5 to 7)

मोटर यान अधिनियम (1988 का 59), धाराएँ 166, 168 व 149 – बीमा कम्पनी का दायित्व – ट्रेक्टर का ड्रायवर मृतक के साथ खेत जोतने के लिए ट्रेक्टर ले गया – ट्रेक्टर के ड्रायवर ने उस दौरान या मालिक के अभिकर्ता ने उस अभिकरण के दौरान ट्रेक्टर को उपेक्षापूर्वक ज्वलन चाबी के साथ ज्वलन ताले में लगा हुआ छोड़ा – मृतक ने चाबी को घुमाया और ट्रेक्टर चालू किया – ट्रेक्टर उलट गया जिसके परिणामस्वरूप मृतक की मृत्यु हुई – ड्रायवर, मालिक और बीमा कम्पनी पर 50 प्रतिशत दायित्व उचित रूप से डाला गया – अपील खारिज।

Cases referred :

2008(1) MPLJ 72 (FB), 1987 MPLJ 347 (SC)

Virendra Verma, for the appellant.

Suyash Tripathi, for the respondent Nos.1 to 4.

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*M.A. No.1628/1998 (Jabalpur)

ORDER

ABHAY M. NAIK, J. :–Facts found proved by the Claims Tribunal are that the tractor bearing registration No.M.P.18-A/7678 was owned by respondent No.6. In the night of 9.7.97, Omkar Singh, respondent No.5 took the tractor for tilling the agricultural field. He was accompanied by the deceased Ramniwas Singh He left the tractor with the ignition key in the ignition lock. Ramniwas Singh, switched on by the key and started the tractor which turned turtled resulting into death of Ramniwas Singh. The Claims Tribunal found that the tractor was duly insured with the appellant. It fastened the liability to the extent of 50% on the owner of the tractor whose driver was found negligent in leaving the tractor alongwith ignition key in the ignition lock. 50% liability was fastened on Ramniwas, since he was not having a driving licence. Accordingly, the claim petition was allowed to the tune of Rs.87,500/- i.e. 50% of the total liability and the respondent Nos.5 and 6 with the Insurance Company were found liable for compensation jointly and severally. Aggrieved by it, present appeal has been preferred.

2. Shri Virendra Verma, and Shri Suyash Tripathi, learned counsel for parties made their submissions which have been considered in the light of material on record.

3. It is contended by Shri Virendra Verma, learned counsel for the appellant that Ramniwas was having no driving licence. It was he who drove the tractor without driving licence and further drove it with negligence due to which the accident was caused. This apart, it is contended that Ramniwas accompanied Omkar Singh obviously as a passenger and since the tractor was not insured for passenger, no liability for compensation can be fastened on the Insurance Company. Reliance for this purposed has been placed on the Full Bench decision of this Court dated 11.10.2007 passed in M.A. No.687/99 *(Bhav Singh Vs. Smt. Savirani & others)*.

4. In the case of *Bhav Singh* (supra), the deceased was a passenger on the tractor whereas there was no provision for passenger. In the case in hands, though, Ramniwas Singh might have accompanied Omkar Singh, but he occupied the position of driver, after the tractor was left by Omkar Singh with its ignition key in the ignition lock of the tractor. Thus, the Full Bench decision relied on by the learned counsel for the appellant has no application in the present case. It does not deal with the case of compensation for death of driver of the tractor. It may be additionally seen that the insurance policy is on record as Ex./D-2 which reveals that the premium for driver was duly paid and the risk of driver was duly covered by it. This being so, the appellant does not get any assistance from the Full Bench decision (supra).

5. Since, the deceased drove the tractor without having the driving licence, the claimants are rightly found to be not entitled to compensation to the extent of

negligence of the deceased himself. However, the Claims Tribunal has further appreciated that Omkar Singh, the driver of the insured by leaving the tractor with its ignition key in the ignition lock acted with negligence and has thus contributed in the accident to the extent of 50%. Supreme Court of India in the case of *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and others* (1987) 2 SCC 654 upheld the view of the Gujarat High Court which was summed up in paragraph-3 of the said decision which is reproduced below :-

> "In the present case there is not an allegation even that the insurer had at any time committed a breach of this condition. The insured has never permitted the cleaner to drive on the fatal occasion. The insured has permitted only the driver who is admittedly the licensed driver. It is the driver's negligence in leaving the vehicle with its engine running with the ignition key in the ignition lock that resulted in this accident. But for this gross negligence of the driver, the cleaner would not have been able to interfere with this vehicle. Once a finding is that the driver in the course of the employment or the master's agent in the course of that agency, he negligently left the vehicle with the cleaner, the vicarious liability would immediately be fastened to the owner of the truck. Even if vicarious liability arises because of this principle of social justice and not because the owner committed any breach of the policy condition. The owner in the present case never gave permission to this cleaner to drive and, therefore, the owner even though he had become liable by reason of his vicarious liability he could not be held guilty of the breach of the contractual condition embodied in the policy of insurance. Therefore, the insurer cannot plead any exemption on the ground that the owner had committed breach of the specified condition....."

6. It is not a dispute in the present case that the offending tractor was insured with the appellant and as per the insurance policy Ex./D-2, premium to cover the risk of driver was paid. It is not the case of the appellant that even the risk of the driver of the offending tractor was not covered under the policy. Ramniwas might have accompanied respondent No. 5 as passenger, but at the time of occurrence of accident, the driver (respondent No.5) was not thereon the tractor and position of the driver was occupied by the deceased Ramniwas Singh. Omkar Singh by that time had left the tractor with the ignition key inserted in the ignition lock itself. But for this gross negligence of Omkar Singh, deceased Ramniwas would not have been able to interfere with the tractor. It has been found as a fact that respondent No.5 in the course of the employment or the master's agent in the course of that agency, negligently left the vehicle with the ignition key inserted in the ignition lock itself, the vicarious liability would be fastened to the owner of

the offending tractor. Considering it, the Claims Tribunal is not found to have committed any mistake in fastening the liability on the driver and owner to the extent of 50%. Thus, in the totality of facts and circumstances of the case, moreso, looking to the beneficial object of legislation, the Claims Tribunal is not found to have committed any mistake in fastening the liability for compensation to the extent of 50% on appellant and respondent Nos.5 and 6 in joint and several manner. Since, the tractor at the time of accident was admittedly insured with the appellant, it cannot escape from the liability to make payment of compensation to the claimants who are entitled to 50% of the compensation arising out of the accident which was caused due to the negligence of the agency of the owner.

7. In the result, I do not find any force in the appeal and the same is hereby dismissed, however, with no costs.

Appeal dismissed.

I.L.R. [2009] M. P., 2376
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
13 April, 2009*

KRISHNA KUMAR SETHI ... Appellant
Vs.
UNION OF INDIA ... Respondent

Railways Act (24 of 1989), Sections 85, 95, 103 & 110 - *Damages for delayed delivery - Delay in transit - Appellant claimed negligence on part of railways in handing over consignment of lemon - Consignment handed over to appellant in damaged condition and after scheduled date - No objection raised by appellant at the time of delivery - Undated Panchnama not proved in accordance with law - Appellant did not specify the cost of purchase and also not established prevailing market price - No evidence as to how many pieces of lemon were in each consignment - Order dismissing claim of appellant proper - Appeal dismissed.* (Paras 13 & 16)

रेल अधिनियम (1989 का 24), धाराएँ 85, 95, 103 व 110 – विलम्बित परिदान के लिए नुकसानी – परिवहन में विलम्ब – अपीलार्थी ने नीबू का परेषण सौंपने में रेलवे की उपेक्षा का दावा किया – परेषण अपीलार्थी को क्षतिग्रस्त अवस्था में और नियत तारीख के बाद सौंपा गया – अपीलार्थी द्वारा परिदान के समय कोई आपत्ति नही उठाई गई – बिना तारीख का पंचनामा विधि अनुसार साबित नही हुआ – अपीलार्थी ने क्रय करने की कीमत विनिर्दिष्ट नही की और प्रचलित बाजार मूल्य साबित नही किया – कोई साक्ष्य नहीं कि प्रत्येक परेषण में नीबू की कितनी मात्रा थी – अपीलार्थी का दावा खारिज करने का आदेश उचित – अपील खारिज।

Cases referred :
AIR 1981 All. 268, AIR 1976 SC 1414.

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*M.A. No.2408/2005 (Jabalpur)

P.L. Shrivastava, for the appellant.
Indira Nair with *Khushi Saha,* for the respondent.

ORDER

ABHAY M. NAIK, J. :–This appeal has been preferred by the claimant against dismissal of his claim by Railway claims tribunal, Bhopal vide decision dated 9.11.2004 in O.A. No. 454/2002.

2. Briefly stated facts as averred in the claim petition are that the claimant/ appellant is a fruits and vegetables vendor. A consignment was sent on 17.2.2000 by parcel vide Railway receipt No. 034867 containing 21 bags of lemon weighing 567/570 Kgs. from Bhusawal Station to Bhopal. Additional surcharges were also plaid for speedy delivery because it contained item of perishable nature. The consignment ought to have been received at Bhopal on 18.2.2000, however, due to mistake, the parcel was not unloaded at Bhopal and was allowed to be carried to further. It was brought back and was delivered to the appellant on 20th of February, 2000. Appellant had made complaint on 18.2.2000 to the Chief Parcel Observer who informed that mistakenly the parcel could not be unloaded at Bhopal and was allowed to travel further. It was stated, thus, there was negligence and misconduct on the part of Railway employee. The consignment of parcel was received by the appellant at Bhopal Railway Station on 20th of February, 2000 in a damaged condition. However, it was certified by the delivery clerk that the consignment was delivered in proper condition. It is stated that on account of damage caused to the lemon, the claimant suffered a monetary loss of Rs.19950/-. This amount was claimed with interest.

3. Stand of the respondent was that there was no negligence or misconduct on the part of its employee. Moreover, the claimant/appellant did not suffer any monetary loss.

4. Learned Railway Claims Tribunal vide its impugned order dated 9.11.04 found that the claimant has failed to prove that he had suffered monetary loss to the tune of Rs.19,950/- . Aggrieved by the same, the present appeal has been preferred by the claimant.

5. Mrs. P.L. Shrivastava, learned counsel for the appellant and Smt. Indira Nair, learned Sr. advocate with Ms. Khushi Saha, advocate made their submissions at length.

6. Considered the submissions and perused the record.

7. Ms. P.L. Shrivastava, counsel for the appellant contended that the parcel containing 21 bags of lemon was booked by the appellant at Bhusawal Railway Station on 17.2.2000 vide receipt No. 034867. It ought to have reached Bhopal Railway Station on 18.2.2000 because the requisite charges as well as additional surcharge at the rate of 20% were paid for quick delivery. Consignment was

received by the appellant not on 18.2.2000, but on 20th of February, 2000 and Panchnama was prepared while accepting delivery of goods in damaged condition. Since the damage certificate was not issued, a Panchnama was prepared as contained at page 10 of the record of Railway Claims Tribunal, Bhopal. Lemons received by the claimant/appellant on 20th of February, 2000 were in damaged condition, so they could fetch Rs. 6300/- only. It caused loss of Rs.19950/- which the claimant is entitled to recover from the respondent. Ms. P.L. Shrivastava, learned counsel for the appellant submitted that in view of sections 78, 81, 95, 103 of the Railways Act, the claim ought to have been allowed.

8. On the contrary, it is contended on behalf of the respondent that the claimant/ appellant was obliged to prove by virtue of section 110 of the Act that the monetary loss has actually occurred. The damage was not proved at all by positive and cogent evidence and thus, the claim petition was rightly dismissed.

9. To appreciate the scope of dispute, aforesaid provisions are reproduced below :-

78. Power to measure, weigh, etc. - Notwithstanding anything contained in the railway receipt, the railway administration may, before the delivery of the consignment, have the right to-

(i) re-measure, re-weigh or re-classify any consignment;

(ii) re-calculate the freight and other charges; and

(iii) correct any other error or collect any amount that may have been omitted to be charged.

81. Open delivery of consignments.- Where the consignment arrives in a damaged condition or shows signs of having been tampered with and the consignee or the endorsee demands open delivery, the railway administration shall give open delivery in such manner as may be prescribed.

95. Delay or detention in transit.- A railway administration shall not be responsible for the loss, destruction, damage or deterioration of any consignment proved by the owner to have been caused by the delay or detention in their carriage if the railway administration proves that the delay or detention arose for reasons beyond its control or without negligence or misconduct on its part or on the part of any of its servants.

103. Extent of monetary liablity in respect of any consignment -(1) Where any consignment is entrusted to a railway administration for carriage by railway and the value of such consignment has not been declared as required under sub-section (2) by the consignor, the amount of liability of the railway administration for the loss, destruction, damage, deterioration or non-delivery of the consignment shall in no case exceed such amount calculated with reference to the weight of the consignment as may be prescribed, and where such

consignment consists of an animal, the liability shall not exceed such amount as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), where the consignor declares the value of any consignment at the time of its entrustment to a railway administration for carriage by railway, and pays such percentage charge as may be prescribed on so much of the value of such consignment as is in excess of the liability of the railway administration as calculated or specified, as the case may be, under sub-section (1), the liability of the railway administration for the loss, destruction, damage, deterioration or non-delivery of such consignment shall not exceed the value so declared.

(3) The Central Government may, from time to time, by notification, direct that such goods as may be specified in the notification shall not be accepted for carriage by railway unless the value of such goods is declared and percentage charge is paid as required under sub-section (2).

10. A conjoint reading of all the aforesaid provisions makes it clear that if the consignment arrives in a damaged condition, the Railway Administration shall give open delivery in the prescribed manner. If the delay in transit or delivery is for the reasons beyond its control or without negligence or misconduct on the part of the Railway, the Railway Administration shall not be responsible for the loss. Extent of monetary liability in respect of consignment is provided in section 103 of the said Act. Section 78 provides certain powers in order to protect freight and other charges. In the case in hand, the consignment as per delivery certificate was shown to have been handed over in good and proper condition. If the claimant had any objection at the time of taking delivery about condition of goods, he ought to have submitted an application under acknowledgment about specific condition of goods. No such step is proved to have been taken timely. Moreover, the alleged Panchnama which is at page 10 of the record of the Railway claims tribunal, Bhopal is undated and unexhibited. Moreover, the same has not been proved in lawful manner by any of the independent persons shown to have put signature on it. Admittedly, the Railway Administration has not placed on record any evidence to prove that the cause of delay was beyond its control. However, this by itself will not make the claimant entitled to the damages in view of section 110 of the said Act which runs as follows:-

110. Burden of proof.-In an application before the claims Tribunal for compensation for loss, destruction, damage, deterioration or non-delivery of any goods, the burden of proving-

(a) the monetary loss actually actually sustained; or

(b) where the value has been declared under sub-section (2) of section 103 in respect of any consignment that the value so declared is its true value,

shall lie on the person claiming compensation, but subject to the other

provisions contained in this Act, it shall not be necessary for him to prove how the loss, destruction, damage, deterioration or non-delivery was caused.

11. In view of Section 110 (supra) , actual monetary loss is to be necessarily established. It may be seen that claimant/appellant has not specified the purchase cost. No document/bill pertaining to the purchase of goods was placed on record to establish the purchase cost. Similarly, the prevailing sale/market price has also not been established by any positive and cogent evidence.

12. Learned counsel for the appellant submitted that prevailing market price was pleaded as Rs.125 per 100 pieces of lemon which may be accepted as the prevailing market price. However, on perusal it is found that in the written statement contents of paragraph 7(i) . and 7(ii) were denied. In view of this denial, it was obligatory on the part of the claimant/appellant to prove the purchase costs in order to prove the actual loss.

13. Learned counsel for the appellant relied upon the affidavit of the appellant. Relevant paragraphs of the affidavit are reproduced below :-

> "(1) That, the consignor had dispatched a con-signment of 21 bags of lemons, weighing 570 Kgs. under parcel Way Bill No. 034867, dt. 17.02.00, Ex. Bhusawal to Bhopal for safe car-riage and delivery.
>
> (2) That the consignment reached destination station after a considerable delay in transit and due to the negligence of the railway employees, the consignment was not unloaded by the railway, it was over carried. I requested the Beena railway staff to unload the consignment but due to some technical fault at the train, it was not unloaded. I complained re-garding the same to the senior railway official vide my letter dated 18.02.2000 but no heed was paid in this regard.
>
> (3) That, notice dated 18.05.2000 under section 106 of the Railways Act was delivered by hand on 20.06.2000 to the respondent. In spite of this notice, the claim was snot settled and hence, this application.
>
> (4) That, due to negligence and misconduct on the part of the railway employees, I sustained a loss of Rs.19,950/- towards the rotten lemons @ 125/- per hundred, which comes to Rs.125 x 10= 1250 x 21= 26,250/-, which was sold in the market @ Rs.308/- per bag=300 x 21= 6300/- because of low quality, hence I sustained a loss amounting to Rs.26,250/- (-) 6300/=19950/- which is entitled to get from the railway.
>
> (5) That the applicant is the consignee and the owner of the

goods and therefore, got legal and locus-standi to claim compensation as. per Railway Rules."

14. On perusal of the aforesaid, it is clear that appellant did not state on oath about the prevailing market price though he has explained about loss on account of sale of alleged damaged items. He has nowhere mentioned in specific about the prevailing market rate of lemon. Moreover, there is no specific mention about piecewise quantity of lemon in one bag. On the contrary, it was mentioned that there was consignment of 21 bags of lemon weighing 570 kgs. There is no averment that how many pieces of lemon were kept in each bag. On the other hand, no prevailing market price per Kg. was mentioned either in the claim petition or in the affidavit. It is a matter of common sense that lemon are available in various different sizes and without averment and necessary proof, no presumption may be drawn about the relationship of pieces and Kgs. with reference to lemon. This apart, the appellant has not produced a single witness who was alleged signatory of the so called Panchnama certifying that 80% of goods were rotten/ in damaged condition.

15. Mrs. P.L. Shrivastava, learned counsel for the appellant placing reliance on the decision of *New Swadeshi Sugar Mills Ltd. Vs. Union of India* (AIR 1981 Allahabad 268) contended that the consignment was weighing 570 kgs. Prevailing market rate was pleaded at Rs. 125/- per 100 pieces. The same was reiterated in the affidavit and the damages ought to have been granted on its basis. As discussed in the preceding paragraphs, it is observed that the claimant/appellant has failed to specifically aver kilogramwise market price of lemon. There is no evidence on record that how many pieces of lemon were contained in each bag or how many pieces of lemon were contained in the consignment. Weight of consignment was 570 Kgs., therefore, it was necessary for the claimant to prove the market price per Kilogram. In the case of *Union of India and others Vs. Sugauli Sugar Works (P) Ltd.* AIR 1976 SC 1414, Hon'ble Supreme Court while confirming the decision of High Court of Patna observed that High Court said that the evidence of Plaintiffs witness Gaya Prasad showed the selling rate of sugar and there was no challenge to that evidence. In the case in hand, no evidence was produced by the claimant/appellant to prove per kilogram market price either at the place of purchase or at the place of destination. At an earlier occasion, the market rate of lemon, as per claimant's father's evidence, was found to be Rs-2.50 per Kg. Vide this court order dated 6.12.1979. Even if it is to be taken to have increased four times, it would amount to Rs.10/- per Kg. Accordingly, market price could have been at the most Rs.5700/-. Claimant/appellant having already sold the lemon for Rs.6300/-, cannot be said to have suffered any loss.

16. In the result, learned Railway Claims Tribunal is found to have rightly dismissed the claim petition for want of proof about actual monetary loss. Claimant/appellant does not get any assistance from the provisions contained in sections 78, 81, 95

and 103 of the Railways Act in absence of proof that actual monetary loss was suffered by him. Resultantly, the appeal being devoid of substance is hereby dismissed, however, without order as to cost.

Appeal dismissed.

I.L.R. [2009] M. P., 2382
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
18 April, 2009*

NEELAM TIWARI ... Appellant
Vs.
SUNIL TIWARI ... Respondent

A. Hindu Marriage Act (25 of 1955), Section 13(1)(i) - *Divorce - Decree of divorce on the ground that after the solemnization of the marriage appellant had voluntary sexual intercourse with any person other than her spouse - Held - Satisfactory and convincing circumstantial evidence that appellant indulged in illicit sexual relationship with other than husband - She went to Surat along with him and they stayed there together in one room for more than one month - Decree of divorce u/s 13(1)(i) justified.* (Para 17)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i) – विवाह विच्छेद – विवाह विच्छेद की डिक्री इस आधार पर कि विवाह के अनुष्ठापन के बाद अपीलार्थी ने अपने पति से भिन्न किसी व्यक्ति के साथ स्वेच्छया मैथुन किया था – अभिनिर्धारित – समाधानप्रद और विश्वास दिलाने वाली परिस्थितिजन्य साक्ष्य कि अपीलार्थी पति से भिन्न व्यक्ति के साथ अवैध लैंगिक सम्बन्ध में आसक्त हुई – वह उसके साथ सूरत गयी और वे वहाँ एक साथ एक ही कमरे में एक माह से अधिक रुके – धारा 13(1)(i) के अन्तर्गत विवाह विच्छेद की डिक्री न्यायोचित ठहराई गयी।

B. Hindu Marriage Act (25 of 1955), Section 13(1)(i) - *Standard of proof - Petition on ground u/s 13(1)(i) - Held - The general standard and degree of proof required in such cases need not reach certainty but it must carry a high degree of probability because of gravity of the issue.* (Para 9)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i) – सबूत के मानक – धारा 13(1)(i) के आधार पर याचिका – अभिनिर्धारित – ऐसे मामलों में अपेक्षित सबूत के सामान्य मानक और कोटि को निश्चितता पर पहुँचने की आवश्यकता नही है बल्कि उसे विषय की गंभीरता के कारण संभाव्यता की उच्च कोटि वहन करना चाहिए।

C. Hindu Marriage Act (25 of 1955), Section 13(1)(i) - *Necessary party - Divorce - Adultery - Whether the person with whom allegation of adultery are made is a necessary party - Held - No - There is no provision in the Act or rules framed by the High Court for impleading such person as a party.* (Para 5)

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*F.A. No.158/2007 (Jabalpur)

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i) – आवश्यक पक्षकार – विवाह विच्छेद – जारता – क्या व्यक्ति, जिसके साथ जारता के अभिकथन किये गये हैं, आवश्यक पक्षकार है – अभिनिर्धारित – नहीं – अधिनियम या उच्च न्यायालय द्वारा बनाये गये नियमों में ऐसे व्यक्ति को पक्षकार बनाने का कोई उपबंध नही है।

Cases referred :

AIR 1998 Kerala 189, AIR 2000 AP 328, AIR 1975 SC 1534, AIR 1988 SC 121, AIR 1980 Orissa 171.

Mrigendra Singh, for the appellant.

None, for the respondent though served.

J U D G M E N T

P.K. JAISWAL, J. :–This is an appeal under Section 28 of the Hindu Marriage Act, 1955 (in short 'the Act'), challenging the judgment and decree dated 24.11.2006, allowing the petition of the respondent under Section 13 of the 'Act', and granting him a decree for divorce against the appellant-wife.

2. Undisputedly the appellant was married to the respondent-husband on 22.4.2004 in accordance with Hindu rites at village Dhaba Goutman Tola of District Rewa. After marriage she had gone to her in-laws place and stayed with them for a period of 8-10 days and thereafter she came to her parents' place at village Dhaba Goutman Tola. According to respondent, after marriage though he lived with his wife, but he had no physical relation with his wife. The appellant-Neelam was having illicit relations with Anurag Mishra and when she was residing at her parents' place, she with her consent had gone to Surat with Anurag Mishra on 12.9.2005 and she stayed with him for a period of more than one month at Surat in one room and during this period she had physical relations with him. Thus she had extramarital relations with one Anurag Mishra to whom she knew prior to her marriage and, therefore, it is practically impossible for him to live with his wife and, therefore, he prayed that a decree for divorce be granted under Section 13(1)(i) and 13(1)(i-a) of the 'Act'.

3. The appellant/non-applicant filed her written statement in which she admitted her marriage with the respondent on 22.4.2004 but she denied that after marriage she had gone to her in-laws place and stayed there for 8-10 days with her husband. She also denied that due to her resistance, respondent had no physical relation with her. It is contended that she was abducted by one Anurag Mishra on 12.9.2005 and when her uncle Shivanand Tiwari and police personnel of police station Hanumana came to Surat she was taken to her parents' place at district Rewa. She lodged and FIR against Anurag Mishra. After investigation challan has been filed and a criminal case under Sections 368, 498 and 347 of IPC had been registered against the applicant. She denied that she had extramarital relation with Anurag Mishra and contended that on 12.9.2005 she was coming from Hanumana College she was abducted by said Anurag Mishra and was at Surat for a period of more

than one month. The appellant-wife therefore prayed that petition for divorce be dismissed.

4. The trial Court after appreciating the statement of respondent, Sunil Kumar (PW-1), Brijbhan Prasad Tiwari (PW-2), Abhimanu (PW-3), Chhotelal Dubey (PW-4), appellant Neelam (NAW-1), father of the appellant Daya Shanker Dwivedi (NAW-2) and Buddhsen Sen (NAW-3) came to the conclusion that the appellant had voluntarily sexual intercourse with Anurag Mishra other than her spouse. The respondent by adducing cogent evidence sufficiently proved the ground of adultery and granted a decree for divorce against the appellant by the impugned judgment and decree dated 24.11.2006.

5. Shri Mrigendra Singh, learned counsel for the appellant has submitted that allegation against present appellant was that she is living in adultery with one Anurag Mishra but he was not impleaded as co-respondent in the petition which is mandatory. In support of the said contention, he drew my attention to the Division Bench decision of Kerala High Court *M.K.Kunhiraman v. Santha alias Devaki*, AIR 1998 Kerala 189 in which High Court of Kerala in exercise of the powers conferred under Sections 14 and 21 of the Hindu Marriage Act, 1955 and Article 227 of the Constitution of India framed the rules with the previous approval of the Governor to regulate proceedings under the said Act. Rule 7(4) of the said Rule states that in every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons, the petitioner shall implead the person or persons as co-respondent in the petition by stating the name, occupation and place of residence of such person or persons so far as they can be ascertained. Here in the present case, there is no such provision in the Act or Rules framed therein by this Court and, therefore, the decision cited by the learned counsel for the appellant in the case of *M.K.Kunhiraman* (supra) will not be applicable in the present facts and circumstances of the case nor on that ground the impugned judgment can be set aside. Similar is the view of the Division Bench decision of Andhra Pradesh High Court in the case of *Mirapala Venkata Ramana v. Mirapala Peddiraju* AIR 2000 A.P. 328 wherein the alleged adulterer was not impleaded as party and, therefore, the Division Bench of Andhra Pradesh High Court set aside the order granting divorce on the ground of adultery.

6. The next submission of learned counsel for the appellant that as per FIR dated 2.11.2005 (Ex.P/1), statement of appellant-Neelam (Ex.P/6) and order dated 26.10.2005 (Ex.P/5) it has not been proved that appellant with her consent had gone to Surat along with Anurag Mishra nor there is any evidence to prove that she had sexual intercourse with Anurag Mishra or they stayed in one room for a period more than one month. The learned Trial Court committed error in holding that respondent by cogent evidence proved the ground of adultery against the appellant. He submitted that appellant was abducted by one Anurag Mishra and

was detained at Surat from where she was rescued by the police party and her family members. The said accused is facing criminal proceeding in relation to the offence registered against him under Sections 368, 498 and 347 of IPC, the Trial Court committed legal error in not relying on the averments made in the FIR as well as the order dated 26.10.2005 and statement of Neelam recorded in the criminal court vide Ex.P/6. He further submitted that the Trial Court on the basis of presumption granted a decree against the appellant whereas she did not have any sexual intercourse with any other person outside the marriage forcefully or voluntarily and the finding on this count is perverse and contrary to the law.

7. I have heard learned counsel for the appellant and perused the record of the case.

8. The sole contention for consideration in this appeal is whether there is any evidence to indicate that the appellant after the solemnization of her marriage had voluntarily sexual intercourse with any other person than her husband-the respondent?

9. It is settled law that the marriage bond shall not be set aside lightly or without strict enquiry. The general standard and degree of proof required in such cases need not reach certainty, but it must carry a high degree of probability, because of the gravity of issue. In the case of *Dr.N.G.Dastane vs. Mrs. S.Dastane*, AIR 1975 SC 1534, it was pointed out that as the proceedings under the Hindu Marriage Act, 1955, are of civil nature, the test of criminal proceedings need not be applied and it is not necessary to prove the allegations beyond all reasonable doubt, the reason being that a criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities and it would be wrong to input such a consideration into trial of civil nature. The word 'satisfied' in section 23 of the 'Act' must mean satisfied on preponderance of probabilities and not satisfaction beyond reasonable doubt; which requires proof of higher standard in criminal or quasi-criminal trials. Proof beyond reasonable doubt is not postulated where human relationship is involved and eye-witnesses are difficult to obtain. Similar proposition was laid down in *Shobha Rani vs. Madhukar Reddi*, AIR 1988 SC 121.

10. Coming to the evidence in the instant case, the respondent-applicant Sunil Kumar Tiwari (AW-1) has stated that he was married on 22.4.2004 with the appellant-Neelam at the house of father of the appellant. Thereafter, appellant had stayed with him for a period of 5-6 days at her in-laws house at village Delhai. She was not happy with the marriage and, therefore, she had gone to her parents' place and from where she refused to come to her in-laws place. She on 22.9.2005 with her consent had left her parents' place along with Anurag Mishra and stayed with her at Surat. Ex.P/1 is FIR lodged by Daya Shanker Dwivedi on 2.11.2005 against Anurag Mishra at Police Station Hanumana. Vide Crimine No.151/2005 a

case under Section 368, 498 and 347 of IPC was registered against him. Ex.P/2 is the final report under Section 173 of Cr.P.C. Ex.P/3 is Rojnamcha dated 20th September, 2005. On 24.10.2005 she was recovered at Surat and she came to her parents' place along with police party and her uncle. On 27.10.2005 her statement was recorded in Missing Case No.11/05. As per her statement, her date of birth is 1.1.1985. She in her statement has deposed that she is ready to go with her husband-respondent. It is well settled that FIR is not a substantive piece of evidence.

11. Appellant Neelam (NAW-1) in para 2 of her statement has deposed that she was prosecuting her studies at Hanumana degree college. On 12.9.2005, when she was coming back from her college along with her friend Savita, on the way her friend had gone to her house along with her brother and she was alone and when she reached Taxi stand, at that time she met Anurag Mishra, he requested her to have tea and sweets at hotel then she had gone along with him and had sweets. After eating the sweets, she became unconscious for a period of 3-4 days and when she became conscious, she found herself at Surat where she was confined by Anurag Mishra in one room. She in para 4 of her statement has admitted that brother-in-law of her uncle is staying at Surat. She had telephone number and she intimated him that she is at Surat. She in para 5 of her cross-examination has deposed that Anurag Mishra is residing at village Rajadho and distance between Rajadho and Dhaba Gautwan is 10-15 kms. She also admitted that Anurag Mishra is distantly related with her and due to the said relations she had gone to his place at village Rajadho and he also visited at her place from time to time. Thus, she in her cross-examination admitted that she met number of times with Anurag Mishra. In view of above, it cannot be said that she for the first time met him on 12.9.2005 or before 12.9.2005 she never met him. In para 5 she has deposed that though she regularly goes to attend college at Hanumana but she does not know the name of hotel where she had snacks with Anurag Mishra. She also denied the suggestion made by the respondent's counsel that after marriage she had stayed at her in-laws place for 5-6 days. She in para 7 of her cross-examination has admitted that on 12.9.2005 she had gone to college at about 10.00 a.m. and she had returned from the college at 4.00 p.m. in the afternoon but she admitted that her attendance was not recorded in the college attendance register on 12.9.2005. She also admitted regarding the certificate of her attendance issued by the Principal, to the police authorities and as per said certificate in the month of September, 2005 she was absent from 5th onwards. She also admitted that she had stayed at Surat for a period of more than one month. In para 8 she has deposed that she was unconscious up to 19.9.2005. It cannot be believed that she was unconscious for a period from 12.9.2005 to 19.9.2005. This statement of the appellant is unnatural. It is unbelievable that she was unconscious for a period of 5 days and during that period on 12.9.2005 she had gone to Surat from Hanumana. In para 9 she admitted that she had given clothes for stitching her

Salwar Suit to Gopal tailor at Hanumana and Anurag Mishra knows this fact very well and it is Anurag Mishra who had taken delivery of stitched Salwar Suit of appellant from the said tailor. She in para 9 also admitted that she received her Salwar Suit at Surat. In para 11 she also admitted that it is Anurag Mishra who had paid the stitching charges to her tailor. In para 12 she also admitted that she and Anurag Mishra were residing together at Surat. She in this para also admitted that when police personnel asked for her medical treatment, she refused for her medical treatment. From the above evidence, it is very clear that she had gone to Surat along with Anurag Mishra with her consent and stayed along with Anurag Mishra at Surat. This shows that she had relations with Anurag Mishra and they stayed at Surat and knowingly refused for her medical treatment because she was married. NAW-1 in para 14 of her cross-examination has admitted that she phoned to her parents from STD Booth at Surat. She with her free consent had gone to STD Booth to phone her parents. From the above, the statement of the appellant that she was confined in one room by Anurag Mishra is incorrect and unacceptable. From her cross-examination, it is clear that she knew Anurag Mishra much prior to the date of her marriage and she stayed with him for a period of more than one month till her parents and police personnel came to Surat. From the above evidence, it is also clear that she stayed in one room with Anurag Mishra. Thus from her evidence, it is very clear and specific that she had illicit relations with Anurag Mishra.

12. Dayashanker (NAW-2), father of the appellant-Neelam in his statement has deposed that on 12.9.2005 when her daughter did not return from Hanumana College, he did not lodge any complaint for a period of 7-8 days. He also in para 9 of his cross-examination has admitted that no medical test on her daughter was conducted. Thus, it cannot be said that Anurag Mishra gave her some medicine and she had gone along with Anurag Mishra without her consent.

13. Thus, there is overwhelming evidence on record to support the finding of the trial Court that appellant had illicit relation with another man and she was leading an adulterous life.

14. From the evidence on record, it is amply established that appellant Neelam had illicit sexual relations with Anurag Mishra.

15. In *Banchhanidhi Das vs. Kamla Devi and another,* AIR 1980 Orissa 171, it has been observed that :-

> "While it is true that evidence of adultery has to be clear and definite and the allegation has to be proved beyond reasonable doubt, it would be difficult to get direct evidence of acts of adultery. 'Living in adultery" is suggestive of the fact that a single instance of adultery may not be adequate. In the instant case, the letters refer to a course of adulterous conduct and, therefore, the

requirement of section 13 of the Act has been satisfied. As has been pointed out in Raden on Divorce it is not necessary that there should be direct evidence of adultery as it is not easily available. It has been also stated that rarely the parties would be caught in acts of adultery. Circumstantial evidence must, however, be sufficiently strong and conclusive.

16. However, the law as it now stands, there is no necessity to prove that the offending spouse is living in adultery and any single set of sexual intercourse with any person other than the spouse is not sufficient for the aggrieved spouse to obtain a divorce under clause (i) (1) of Section 13 of the Act. Here, in the present case it is found that the appellant-wife had gone to Surat with a person other than husband and both of them stayed together in one room for a period of more than one month and both of them had opportunity to commit sexual intercourse in natural course of thing then it must be presumed that she had committed voluntary sexual intercourse with that person especially she was missing after marriage and was recovered from the house of Anurag Mishra at Surat.

17. In the instant case, there is satisfactory and convincing circumstantial evidence that the appellant-Neelam was having extra-marital relations with Anurag Mishra and indulged in illicit sexual relationship with him and she with her consent had gone to Surat along with Anurag Mishra and they stayed together in one room at Surat for a period of more than one month. Hence the degree for divorce under Section 13(1) (i) of the 'Act' was justifiably granted by the Trial Court in favour of the respondent-husband.

18. In view of above discussion, clearly the decree of divorce granted by the learned Trial Court under Section 13(1)(i) and 13(1) (i-a) of the 'Act' is fully justified. It does not call for any interference nor it can be said that the respondent has failed to prove the ground of adultery. The appeal filed by the appellant-wife has no merit and is hereby dismissed. Parties shall however, bear their own costs of this appeal.

Appeal dismissed.

I.L.R. [2009] M. P., 2388
APPELLATE CIVIL
Before Mr. Justice Dipak Misra & Mr. Justice B.M. Gupta
4 May, 2009*

CHHOTIBAI (SMT.) ... Appellant
Vs.
SMT. SUNITA KUSHWAH ... Respondent

A. Family Courts Act (66 of 1984), Section 7(1) Explanation (g) -

*F.A. No.52/2008 (Gwalior)

Guardianship of a minor girl - Mother is a natural guardian and minor child ordinarily should be in custody of mother - However, while dealing with facet of custody of child, welfare of child is of paramount consideration. (Para 7)

क. कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 7(1) स्पष्टीकरण (जी) – अवयस्क बालिका की संरक्षकता – माता प्राकृतिक संरक्षक है और अवयस्क संतान साधारणतः माता की अभिरक्षा में होना चाहिए – तथापि, संतान की अभिरक्षा के पहलू पर कार्यवाही करते समय संतान का कल्याण सर्वोपरि विचार है।

B. **Family Courts Act (66 of 1984), Section 7(1) Explanation (g) -** ***Guardianship of a minor girl*** *- Child staying with her grandmother after death of her father - Child on being asked declined to go with her mother - Mother did not have good marital relationship with her husband - FIR was lodged in connection with demand of dowry - During serious ailment of husband, respondent did not come to see him - Grandmother has good financial status - Child looks healthy and happy - She would suffer immense depression and there may be emotional setback if she is taken away from her grandmother - Grandmother appointed as custodian of child - However, mother is at liberty to visit the child at the house of Grandmother - Appeal allowed.* (Paras 13 & 14)

ख. कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 7(1) स्पष्टीकरण (जी) – अवयस्क बालिका की संरक्षकता – संतान उसके पिता की मृत्यु के बाद अपनी दादी के साथ रह रही थी – संतान से पूछे जाने पर उसने अपनी माता के साथ जाने से इंकार कर दिया – माता के अपने पति के साथ अच्छे वैवाहिक सम्बन्ध नही थे – दहेज की माँग के सम्बन्ध में एफ.आई.आर. दर्ज करायी गई – पति की गम्भीर बीमारी के दौरान प्रत्यर्थी उसे देखने नही आयी – दादी की अच्छी वित्तीय स्थिति है – संतान स्वस्थ और खुश दिखाई देती है – यदि उसे उसकी दादी के पास से दूर ले जाया जाता है तो उसे अत्यधिक अवसाद होगा और भावनात्मक धक्का लग सकता है – दादी को संतान के अभिरक्षक के रूप में नियुक्त किया गया – तथापि, माता को दादी के घर पर संतान से मिलने की स्वतंत्रता दी गई – अपील मंजूर।

Cases referred :

AIR 1973 SC 2090, (1999) 2 SCC 228, AIR 2008 SC 2262.

Ashok Khedkar, for the appellant.

Raju Sharma with *Anuradha Singh,* for the respondent.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–In this appeal preferred under Section 19 of the Family Courts Act, 1984 the defensibility of the order dated 19-12-2007 passed by Principal Judge, Family Court, Gwalior in Case No.7/07 registered under the Guardian and Wards Act, 1890 (for short 'the Act') is called in question.

2. The facts which are necessitous to be exposited for adjudication of the

appeal are that the appellant, Smt. Chhotibai Kushwah, preferred an application under Section 8 of the Act before the Family Court, forming the subject-matter of Case No.6/2007 pleading, *inter alia*, that Ku. Komal Kushwah, aged about 3 years, has been residing with her for the last two years and has an inseggregable emotional bond with her. On 18-7-2004 the father of Ku. Komal Kushwah expired due to incurable ailment. Before his death Jagesh Kushwah, son of the appellant, had executed a will in favour of his mother and bequeathed all movable and immovable properties. The said will was executed, as set forth, as he had no faith on his wife, the respondent herein. There is an expression of desire in the will that the present appellant would look after and take care of Ku. Komal as his wife, the respondent herein, has been residing in her parental house at Harkota Samadhiya Colony, Gwalior and had no emotional attachment for the minor child. It was asserted in the application filed before the Family Court that the respondent had left the husband knowing fully well that he was suffering from severe ailment and after 1½ years of suffering Jagesh breathed his last. After the death of Jagesh she did not come back to her matrimonial home even to attend the rituals of her husband. It was contended that she is habituated to lead an independent life and had no concern for the minor child and, in fact, she is desirous to enter into a second wedlock. It was put forth that the appellant had been looking after the minor child, Komal, in a most effective and affectionate manner and hence, she is entitled to her custody. It was alleged that the respondent/non-applicant, was desirous for taking custody of the minor child only to grab the property and misuse the same. It was also alleged that the mother-respondent had been leading an unchaste life. On the aforesaid foundation a prayer was made to declare her as *guardian ad litem* of the minor child.

3. The aforesaid stand and stance of the appellant was vehemently resisted by the wife disputing all the allegations. It was contended that no will at any point of time was executed by her husband and only after his death the will has been fabricated. It is submitted that a civil suit was pending in the court of Fifth Additional District Judge, Gwalior. It was highlighted that she was capable of looking after and bringing up of the child and she had no intention to enter into the second marriage. Allegations with regard to her character and chastity was seriously disputed. It was also alleged that during the life time of the husband the appellant as well as her husband demanded dowry from her and accordingly an FIR was lodged on 14-5-2004 at Mahila Thana, Hujrat Kotwali and eventually a compromise was entered into between her and husband at Mahila Paramarsh Kendra. It was the case of the respondent before the Family Court that as she was not keeping in good health she had stayed with her parents for six months for proper treatment and thereafter she came to her matrimonial home and lived with her husband. Her husband passed away on 18-4-2004 but no intimation was sent to her. On receipt of the information of death of her husband from others she had come to her matrimonial home next day and participated in the ritual.

4. Be it placed on record, the respondent-Smt. Sunita Kushwah had also filed an application under Section 25 of the Guardian and Wards Act read with Section 6 of the Minority and Guardianship Act before the Family Court wherein she had pleaded about the FIR and the compromise that was effected. She had pleaded that she being the mother and natural guardian was entitled to custody but her mother-in-law, Smt.Chhotibai had forcibly kept the child away from her. It was contended that she was capable of looking after the minor daughter and to give her education. It was her case that her mother-in-law had not bothered to take-care of the child by admitting her in a school. It was also put forth that Chhotibai was aged about 65 years and had no income. The aforesaid case filed by the respondent was registered as Case No.7/07.

5. The learned Family Judge framed three issues and came to hold that the respondent-mother being the natural guardian of the minor child, Komal, is entitled to take custody of the child and that she is capable of maintaining and looking after the minor. The Family Court to arrive at the aforesaid conclusions analysed the evidence and ascribed the reasons to the effect that Chhotibai had not been able to prove that she had sent the child to school; that there are contradictions in the evidence with regard to the Will; that the Will executed by Jagesh was not filed before the Family Court; that she is an old lady and suffers from blood pressure; that the mother is capable of maintaining the child; that she has deposed that she does not intend to marry and lead an unmarried life for the sake of her child; that she is 28 years of age and is in good health; and that Chhotibai had not brought the minor child to Court to prove that she had no emotional attachment with the mother. Being of this view, as has been indicated hereinbefore, the Family Court allowed the application of the wife and rejected that of the mother-in-law.

6. We have heard Mr. Ashok Khedkar, learned counsel for the appellant and Mr. Raju Sharma along with Ms. Anuradha Singh, Advocate for the respondent.

7. There can be no dispute that the mother is the natural guardian and the minor child ordinarily should be in the custody of the mother, but, while dealing with the facet of custody of the child, the welfare of the child is of paramount consideration.

8. In this context we may fruitfully refer to the decision rendered in *Rosy Jacob vs. Jacob A. Chakramakkal. Jacob* AIR 1973 SC 2090 wherein the apex Court has expressed the view as follows:

> *"....Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the -welfare of the children would be better promoted by granting their custody to him as against the -wife - who may also be equally affectionate towards her, children and otherwise equally free from blemish, and, who, in addition, because if her profession and financial resources may be in a*

position to guarantee better health, education and maintenance for them. The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

9. In *Geetha Hariharan (Ms) and another vs. Reserve Bank of India and another* (1999)2 SCC 228 emphasis has also been laid that the whole tenor of the Act of 1956 is to protect the welfare of the child.

10. Recently in *Mausami Moitra Ganguli vs. Jayanti Ganguli*, AIR 2008 SC 2262 a two-Judge Bench of the Apex Court has expressed the view thus:

"14. The principles of law in relation to the custody of a minor child are well settled, It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the "welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obligerate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the backgrounds of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining

factor for the custody of the child, it is here that a heavy duty is cast on the Court to exercise its, judicial discretion judiciously in the background of all he relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

11. In the said case their Lordships referred to Halsbury's Laws of England (Fourth Edition Vol.13) pertaining to the custody and maintenance of children which reads as follows:-

"809. Principles as to custody and upbringing of minors. Where in any proceedings before any Court, the custody or upbringing or minor is in question, the Court, in deciding that question, must regard the -welfare of the minor as the first and paramount consideration, and must not take into consideration -whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother,or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same right and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

12. After so stating their Lordships took note of the fact that there was nothing on record to suggest that the welfare of the child is in anyway in peril in the hands of the father who had been appointed as custodian by the High Court with certain conditions. In that context their Lordships further observed about the surrounding atmosphere in causation of emotional strain and depression of a child. Their Lordships further proceeded to state what had happened during the proceedings which we quote with profit:

"...It is also significant to note that during the course of hearing on one of the dates, when we had not yet interviewed Satyajeet, we had suggested that it would be better if the child could stay with his mother for some more time. However, upon hearing us, he started crying and whining and, " showed reluctance to go with the mother. Watching his reaction, we dropped the proposal. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive

custody to the father with visitation rights to the mother deserves to be maintained."

13. On the touchstone of the aforesaid enunciation of law the factual matrix of the present case is to be tested. At the very outset we may state that on the date of hearing we had asked the parties to remain personally present with the child. The appellant had brought Komal with her. The child being repeatedly asked by us categorically stated that she would like to stay with Smt. Chhotibai, the grand-mother. She articulately stated that she has been prosecuting her studies. On being asked to go with her mother she burst into tears and, in a way, in an uncontrollable manner. The child declined to go with her mother in a most unequivocal manner. Be it noted, the whole proceeding was conducted in camera in presence of the parties along with their respective counsel.

14. Apart from the aforesaid it is worth noting that the respondent did not have good marital relationship with her husband. There was marital discard as an FIR was lodged in connection with demand of dowry. True it is, there was a compromise, but as we perceive the said efforts did not bring in harmony and compatibility between the spouces. During serious ailment of the husband the respondent did not come to see him. She was away at her parental home on the excuse that she was suffering. We have only stated the aforesaid facts with regard to the emotional bond of the mother with the child. The learned Family Judge, as is manifest from the order, has not really addressed to the core issues but had addressed to the issues which are transient innature. There is material on record to show that Smt. Chhotibai has good financial status. She has been looking after the child quite well. The child looks quite healthy and happy. Further we are of the considered opinion, that she would suffer immense depression and there may be emotional setback if she is taken away from Smt. Chhotibai. On being questioned we could note that the child has been going to school and has learnt certain things as she could express with certitude and clarity.

15. In view of the aforesaid, we are inclined to direct that the appellant should be appointed as the custodian of the child. However, the respondent, the natural mother, is at liberty to visit the child at the house of Smt. Chhotibai whenever she feels to go and visit the child. The appellant, Smt. Chhotibai, shall allow the child to meet the respondent. Frequency of visit should be more when there will be school vacations or on appropriate occasions which would include festivals.

16. In the result, we allow the appeal and set aside the order passed by the learned Family Judge, dated. 19-12-2007 appointing the respondent as custodian of the child Ku. Komal and direct the appellant to be the custodian of the child with the aforementioned conditions. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2009] M. P., 2395
APPELLATE CIVIL

Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
17 August, 2009*

ASSISTANT COMMISSIONER OF INCOME TAX ... Appellant
Vs.
M/S SHUBHASH TRADERS ... Respondent

Income Tax Act (43 of 1961), Section 260A, Limitation Act, 1963, Sections 4 to 24 - *Applicability of provisions of Limitation Act - Whether High Court can condone the delay in filing appeal u/s 260A of Act, 1961 - Held - Act, 1961 is a self contained Code - There need not be mandatory exclusion of applicability of provisions of Limitation Act - There can be necessary exclusion by language in which provision is couched and intention of legislature - Section 260A does not allow High Court to condone delay - High Court has no power to condone the delay - Appeal dismissed as barred by time.* (Paras 20 & 23)

आयकर अधिनियम (1961 का 43), धारा 260ए, परिसीमा अधिनियम, 1963, धाराएँ 4 से 24 – आयकर अधिनियम के उपबंधों की प्रयोज्यनीयता – क्या उच्च न्यायालय अधिनियम 1961 की धारा 260ए के अधीन अपील पेश करने में हुआ विलम्ब क्षमा कर सकता है – अभिनिर्धारित – अधिनियम 1961 एक स्वतः पूर्ण संहिता है – परिसीमा अधिनियम के उपबंधों की प्रयोज्यनीता का आज्ञापक अपवर्जन होने की आवश्यकता नही है – भाषा जिसमें उपबंध विवक्षित है और विधायिका के आशय द्वारा आवश्यक अपवर्जन हो सकता है – धारा 260ए उच्च न्यायालय को विलम्ब क्षमा करने की अनुमति नही देती – उच्च न्यायालय को विलम्ब क्षमा करने की कोई शक्ति नही है – अपील समयवर्जित होने के आधार पर खारिज।

Cases referred :

(2009) 5 SCC 791, (2007) 289 ITR 382 (Bom) (FB), (2008) 3 SCC 73, 1993 Supp (2) SCC 433, (2008) 1 SCC 666, (2002) 3 SCC 705, (2001) 8 SCC 470, JT 2009(8) SC 134, AIR 1964 SC 1099, AIR 1969 SC 872, AIR 1974 SC 480, (1993) 1 SCC 636, (2004) 4 SCC 252, (2004) 11 SCC 472, AIR 1956 SC 604, Income Tax Appeal (L) No.3592/2008.

Sanjay Lal, for the appellant.
Alok Aradhe & Sumit Nema, Amicus Curiae.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–These three appeals preferred under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') were listed for default for not filing the application for condonation of delay supported with affidavit. At that juncture, a query was made from Mr. Sanjay Lal whether the High Court can condone the

*I.T.A. No.44/2009 (Jabalpur)

delay when an appeal is preferred beyond the time prescribed under Section 260A of the Act in view of the decision rendered by the Apex Court in *Commissioner of Customs and Central Excise v. Hongo India Private Limited and Another*, (2009) 5 SCC 791. Mr. Alok Aradhe, learned senior counsel and Mr. Sumit Nema, learned counsel were appointed as amicus curiae.

2. Be it noted, there is no dispute over the fact that the appeals have been preferred beyond the period of limitation.

3. The centripodal question that emerges for consideration is whether the High Court can condone the delay and if the delay is not condonable; there is no justification for granting time to file an application for condonation of delay supported with affidavit. Hence, we proceed to deal with the controversy. In this context, it is apposite to scan the anatomy of certain provisions of the Act which relate to preferring of appeals before various forums. Chapter XX deals with appeals and revision. Section 249 prescribes for an appeal under the Act to be preferred within 30 days before the Commissioner (Appeals). Sub-section (3) provides for the Commissioner (Appeals) to admit the appeal after expiration of the said period if he is satisfied that the appellant has sufficient cause for not preferring the appeal within the stipulated time. Section 253 of the Act provides for an appeal to the Income Tax Appellate Tribunal (in short 'the tribunal'). Sub-section (3) of Section 253 provides that an appeal under sub-section (1) or (2) of Section 253 shall be filed within 60 days from the date from which the order is communicated. Sub-section (5) of the said section provides that the tribunal may admit an appeal or permit filing of the memorandum of cross examination after expiry of the relevant period referred to in sub-section (3) or (4) after it is satisfied that there is sufficient cause for not presenting the same within the stipulated time.

4. Section 260A of the Act provides that an appeal shall lie to the High Court from every order passed by the tribunal. As the main thrust is on the said provision, it is condign to reproduce the same:

> *"260A. Appeal to High Court. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.*
>
> *(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be*
>
> *(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner:*

(b) xxx

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which-

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section."

5. On a scrutiny of the aforesaid provision, it is clear as noon day that no provision for condonation of delay is prescribed in Section 260A which stands in contradistinction to Sections 249 and 253.

6. The submission of Mr. Sanjay Lal, learned counsel appearing for the Revenue, is that there is no prohibition under Section 260A of the Act which denudes the High Court from exercising the power to condone the delay and further in the absence of any express exclusion of provisions of the Limitation Act, the provision contained in Section 29(2) of the Limitation Act is attracted. It is urged by him that such an exclusion is not to be readily or lightly inferred. It is canvassed by

Mr. Lal that when there is no clear indication of exclusion of applicability of Sections 4 to 24 of the Limitation Act, the power of the High Court which is plenary in nature should not be curbed or curtailed by inference. The learned counsel has commended us to a Full Bench decision of the Bombay High Court rendered in *Commissioner of Income-Tax v. Velingkar Brothers*, [2007] 289 ITR 382 (Bom) (FB).

7. Mr. Alok Aradhe, learned senior counsel submitted that the language employed under Section 260A of the Act does not exclude the applicability of Sections 4 to 24 of the Limitation Act and hence, this Court should construe that it has the jurisdiction to condone the delay as Section 29(2) gets attracted. The learned senior counsel submitted that as a proposition of law, by implication, there can be exclusion of Sections 4 to 24 of the Limitation Act but for the said purpose, the principle of strict interpretation has to be applied regard being had to the jurisdiction of the superior Court. He has commended us to certain decisions which we shall advert to at the relevant time.

8. Mr. Nema submitted that since the Code of Civil Procedure is attracted under Section 260A of the Act, delay in filing the appeal can be condoned if a case is made out on the foundation of existence of sufficient cause.

9. Before we advert to the other decisions, it is imperative to understand the ratio laid down in the three-Judge Bench decision *Hongo India Private Limited* (supra). In the said case, the question arose whether the High Court has power to condone the delay in presentation of reference application under Section 35-H (1) of the unamended Central Excise Act, 1944 beyond the prescribed period by application of Section 5 of the Limitation Act. Be it noted, the matter was referred to a larger Bench as a two-Judge Bench had expressed its doubt with regard to the decision in *CCE & Customs v. Punjab Fibres Ltd.*, (2008) 3 SCC 73. Their Lordships referred to the provisions under Section 35 of the Central Excise Act, 1944 and dealt with the contention whether in the absence of specific prohibition in the said enactment for condoning delay, the High Court has power under Section 5 of the Limitation Act, 1963 to condone the delay beyond the period prescribed under the main statute. The Apex Court took note of the fact that in the case of appeal to the High Court under Section 35-G and reference to the High Court under Section 35-H of the 1944 Act, 180 days have been provided for preferring the appeal and revision and beyond that, there is no further clause empowering the High Court to condone the delay. Their Lordships referred to Sections 5 and 29(2) of the Limitation Act and took note of the decisions rendered in *M.V. Elisabeth v. Harwan Investment and Trading (P) Ltd.*, 1993 Supp (2) SCC 433, *M.M. Thomas v. State of Kerala*, (2008) 1 SCC 666, *Sharda Devi v. State of Bihar*, (2002) 3 SCC 705 and *Union of India v. Popular Construction Co.*, (2001) 8 SCC 470 and eventually held as under:

"30. In the earlier part of our order, we have adverted to Chapter VI-A of the Act which provides for appeals and revisions to various authorities. Though parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to the Appellate Tribunal. Also an additional period of 90 days in the case of revision by the Central Government has been provided. However, in the case of an appeal to the High Court under Section 35-G and reference application to the High Court under Section 35-H, Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.

31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd. The Commissioner of Customs, Central Excise, Noida was the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference under Section 35-H (1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises v. CCE concluded that : (Punjab Fibres Ltd. case, SCC p. 75, para 8)

"8..... the High Court was justified in holding that there was no power for condonation of delay in filing reference application."

32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted, what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to the High Court.

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and

unextendable by a court under Section 5 of the Limitation Act. It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act."

(Emphasis supplied)

10. In this context, we may note another decision of the Apex Court rendered in *Chaudharana Steels (P) Ltd. v. Commissioner of Income Tax,* JT 2009 (8) SC 134 wherein a two-Judge Bench has held as under:

"In this appeal the only question that arises for consideration is whether there is power for condonation of delay in filing an appeal under Section 35G of the Central Excise Act, 1944 (in short the 'Act'). By judgment delivered in Commissioner of Customs, Central Excise, Noida v. Punjab Fibres Ltd. Noida MANU/SC?0835/2008 it was held that the High Court has no power to condone delay in seeking reference under Section 35H of the Act. Doubting correctness of the view reference was made to larger Bench. By judgment dated 27.3.2009 a three-Judge Bench in Commissioner of Customs & Central Excise v. Hongo India (P) Ltd. and Anr. 2009 (4) SCALE 374 concurred with the view taken by the two-Judge Bench in Punjab Fibres case (supra). The decision has full application to the present case also."

11. Be it noted, in this case their Lordships were dealing with the appeal under Section 35-G of the Central Excise Act, 1944.

12. It is submitted by Mr. Aradhe that the decision rendered in *Hongo India Private Limited* (supra) is distinguishable as that was dealing with a reference and further under a different statute and, therefore, the said principle would not be applicable to the Income Tax Act and further, in the absence of any direct proscription, the applicability of Sections 4 to 24 of the Limitation Act should not readily be excluded from the sphere of the 1961 Act. In this regard, he has commended us to the decision rendered in *Vidyacharan Shukla v. Khubchand Baghel and Others,* AIR 1964 SC 1099. The learned senior counsel has specifically drawn our attention to paragraph 26 of the decision wherein the Constitution Bench has held as under:

"The contention is that sub-s. (3) of S. 116-A of the Act not only provides a period of limitation for such an appeal but also the circumstances under which the delay can be excused, indicating thereby that the general provisions of the Limitation Act are excluded. There are two answers to this

argument. Firstly, S. 29(2) (a) of the Limitation Act speaks of express exclusion but there is no express exclusion in sub-s. (3) of S. 116-A of the Act; secondly, the proviso from which an implied exclusion is sought to be drawn does not lead to any such necessary implication. The proviso has become necessary because, if the proviso was not enacted, S. 29(2) (b) of the Limitation Act would have excluded the operation of S. 5 of the Limitation Act with the result that even if a sufficient cause for the delay existed, the High Court would have been helpless to excuse the delay. I therefore, hold the proviso to sub-s. (3) of S. 116-A of the Act only restores the power denied to the Court under S. 29(2) (b) of the Limitation Act."

(Underlining is ours)

13. In *K. Venkateswara Rao and Another v. Bekkam Narasimha Reddi and Others,* AIR 1969 SC 872, it has been held as follows:

"The Indian Limitation Act of 1963 is an Act to consolidate and amend the law of limitation of suits and other proceedings and for purposes connected therewith. The provisions of this Act will apply to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless the application thereof has been excluded by any enactment: the extent of such application is governed by Section 29 (2) of the Limitation Act. In our opinion however the Limitation Act cannot apply to proceedings like an election petition inasmuch as the Representation of the People Act is a complete and self-contained code which does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act"

(Emphasis supplied)

14. In *Hukumdev Narain Yadav v. Lalit Narain Mishra,* AIR 1974 SC 480, the controversy that arose was whether Section 5 of the Limitation Act was applicable to the election petition under the provisions of the Representation of People Act. Their Lordships, while dealing with the said issue, expressed the view as under:

".....It is contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. As usual the meaning given in the Dictionary has been relied

upon, but what we have to see is whether the scheme of the special law, that is, in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded. then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law excluded their operation. The provisions of S. 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall be dismissed are provided for in S. 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Ss. 81, 82 or 117. It will be seen that S. 81 is not the only section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under S. 81 it should equally apply to Ss. 82 and 117 because under S. 86 the High Court cannot say that by an application of Section 5 of the Limitation Act, S. 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Sections 82 and 117 of the Act or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the Act, it cannot be said that they apply to S. 81. Again S. 6 of the Limitation Act which provides for the extension of the period of limitation till after the disability in the case of a person who is either a minor or insane or an idiot is inapplicable to an election petition. Similarly, Ss. 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of the filing of election petitions and their trial.

18. It was sought to be contended that only those provisions of the Limitation Act which are applicable to the nature of the proceedings under the Act, unless expressly excluded, would be attracted. But this is not what S. 29 (2) of the Limitation Act says, because it provides that Sections 4 to

24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. If none of them are excluded, all of them would become applicable. Whether those sections are applicable is not determined by the terms of those sections, but by their applicability or inapplicability to the proceedings under the special or local law. A person who is a minor or is insane or is an idiot cannot file an election petition to challenge an election, nor is there any provision in the Act for legal representation of an election petitioner or respondent in that petition who dies, in order to make Section 16 of the Limitation Act applicable. The applicability of these provisions has, therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Act relating to the filing of election petitions and their trial to ascertain whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in S. 29 (2) of that Act."

15. In *Anwari Basa Varaj Patil and Others v. Siddaramaiah and Others,* (1993) 1 SCC 636, it has been held as follows:

"There is no provision in the Representation of the Pople Act, 1951 making all or any of the provisions of the Limitation Act applicable to the proceedings under that Act. Even by virtue of Section 29(2) of the Limitation Act the provisions thereof would not become applicable to the recrimination notice under Section 97. The R.P. Act is a self-contained code. The proviso to Section 97(1) requiring a commencement of the trial [which in view of the Explanation to Section 86(4) means within 14 days of the date fixed for the respondents to appear before the High Court to answer the claim or claims] has also a particular meaning and object behind it. The idea is that the recrimination notice, if any, should be filed at the earliest possible time so that both the election petition and the recrimination notice are tried at the same time. The recrimination notice is thus comparable to an election petition. When the Supreme Court in H.N. Yadav case has already held that Section 5 of the Limitation Act does not apply to the filing of an election petition, it does not equally apply to the filing of the recrimination notice."

(quoted from the placitum)

16. In *Popular Construction Co.* (supra), their Lordships placing reliance on the decision rendered in *Hukumdev Naraian Yadav* (supra) expressed the view as under:

> *"13. Apart from the language, 'express exclusion' may follow from the scheme and object of the special or local law. "Even in a case where the special law does not exclude the provisions of sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. (SCC p. 146, para 17)*
>
> *14. Here the history and scheme of the 1996 Act support the conclusion that the time limit prescribed under section 34 to challenge an award is absolute and unextendable by court under section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process". [4(v) of the statement of objects and reasons of the Arbitration and Conciliation Act, 1996]. This objective has found expression in section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:*
>
> *"5. Extent of Judicial intervention - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part."*
>
> *15. The 'part' referred to in section 5 is part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in part I and is therefore subject to the sweep of the prohibition contained in section 5 of the 1996 Act."*

17. In *Gopal Sardar v. Karuna Sardar,* (2004) 4 SCC 252, the Apex Court was dealing with the provisions of the West Bengal Land Reforms Act, 1955 and specifically with Section 8 which provides for filing of an application within a period of four months from the date of such transfer. The question that arose was whether the provisions of the Limitation Act would apply. There was no provision for condonation of delay in the 1955 Act and other provisions of the Act expressly or impliedly provides for the period of limitation. In that context, it has been held as follows:

> *"8. There is yet another good reason for insisting that right of pre-emption must be exercised within the period*

specified under Section 8 of the Act so that the rights of purchasers of a land cannot be eclipsed for a long time. Right of pre-emption was sought to be exercised after six years and four years from the dates of transfer respectively as against the period of four months prescribed under Section 8 of the Act without any scope for extension of that period. Sub-section (3) was added to Section 8 of the Act by the West Bengal Land Reforms (Amendment) Act, 1972 w.e.f. 15-2-1971. Prior to 15-2-1971; an application under Section 8 was required to be made to the "Revenue Officer specifically empowered by the State Government in this behalf." This phrase was substituted by the phrase "Munsif having territorial jurisdiction" by the aforementioned amendment. Even after this amend-ment when an application is required to be made before the Munsif Court, no amend-ment was made to Section 8 of the Act either to apply Section 5 of the Limitation Act or its principles so as to enable a party to make an application after the expiry of the period of limitation prescribed on showing sufficient cause for not making an application within time. The Act is of 1955 and for all these years, no provision is made under Section 8 of the Act providing for condonation of delay. Thus, when Section 5 of the Limitation Act is not made applicable to the proceedings under Section 8 of the Act unlike to the other proceedings under the Act, as already stated above, it is appropriate to construe that the period of limitation prescribed under Sec-tion 8 of the Act specifically and expressly governs an application to be made under the said section and not the period pre-scribed under Article 137 of the Limitation Act."

18. In *Fairgrowth Investment Ltd. v. Custodian*, (2004) 11 SCC 472, their Lordships were dealing with the provision under Section 4(2) of the Special Court (Trial of Offences Relating to Transportations in Securities) Act, 1992. The said provision provides for filing of objection within thirty days. The question that emerged for consideration before their Lordships pertained to the applicability of the Limitation Act. In that context, their Lordships held as under:

"17. This brings us to the question whether the power to condone the delay in filing a petition under Section 4(2) exists in the Special Court. We have held that the statute itself does not provide for it. A possible source of the power could be Section 5 of the Limitation Act, 1963, provided it applies to the Act. Section 29(2) of the Limitation Act, 1963 provides for the application of the provisions of Section 4 to Section 24 of

the 1963 Act including Section 5, to any special or local law which prescribes a period of limitation in respect of any suit, appeal or application different from the period prescribed under the Limitation Act. In other words, the general rule as far as special and local Acts are concerned is that the specified provisions including Section 5 of the Limitation Act will apply provided the special or local Act provides a period of limitation different from that prescribed under the Limitation Act. There is an additional requirement viz. that the special/local Act does not expressly exclude the application of the Limitation Act It has been held in Union of India v. Popular Construction Co. that the word "exclusion" also includes "exclusion by necessary implication". This proposition of law is not in dispute. The only question is - does the Act expressly or necessarily exclude the provisions of the Limitation Act? We think it does. The fact that it has provided for a power to condone delay under Section 10(3) of the Act, shows that Parliament had consciously excluded the power of the court in relation to Section 4(2). This view also finds support in the decision of this Court in Gopal Sardar v. Karuna Sardar. The statutory provision under consideration in that case was Section 8 of the West Bengal Land Reforms Act, 1955. It was held: (SCC p. 265, para 13) "When in the same statute in respect of various other provisions relating to filing of appeals and revisions, specific provisions are made so as to give benefit of Section 5 of the Limitation Act and such provision is not made to an application to be made under Section 8 of the Act, it obviously and necessarily follows that the legislature consciously excluded the application of Section 5 of the Limitation Act."

(Emphasis supplied)

19. At this juncture, we may note with profit the decision rendered in *Ravulu Subba Rao and Others v. Commissioner of Income Tax, Madras,* AIR 1956 SC 604 wherein their Lordships have held as follows:

"To sum up, the Indian Income Tax Act is a self contained code exhaustive of the matters dealt with therein and its provisions show an intention to depart from the common rule, qui facit per alium facit per se. Its intention again is that a firm should be given benefit of S. 23(5) (a), only if it is registered under S.26-A in accordance with the conditions laid down in that section and the rules framed thereunder. And as those rules require the application to be signed by the partner

in person, the signature by an agent on his behalf is invalid."
(Underlining is ours)

20. We have referred to the said decision to hold that even after coming into force of the 1961 Act, it has to be construed as a self contained code and hence, paragraphs 33 and 35 of the *Hongo India Private Limited* (supra) would get attracted. We may hasten to clarify that there need not be mandatory exclusion of the applicability of the provisions of the Limitation Act by special law and there can be necessary exclusion by the language in which the provision is couched and regard being had to the intendment of the legislature. On a scanning of the anatomy of the provisions of the Income Tax Act relating to condonation of delay, we have no doubt that Section 260A does not allow the High Court to condone the delay regard being had to the scheme of the Act and the period which has been stipulated in the said provision. We are disposed to think so because Section 260A permits the assessee or the Revenue to prefer an appeal within 120 days from the date on which the order appealed against is received by the assessee. The receipt of the order passed by the assessee has its own signification. By no stretch of imagination, its significance can be marginalised. Two aspects, namely, the period and the date from which it is computed, have to be given their due weightage and on conferral of such weightage, the only conclusion which can be arrived at in the backdrop of *Hongo India Private Limited* (supra) is that this Court has no power to condone the delay.

21. We would be failing in our duty if we do not refer to the citation brought to our notice by Mr. Nema rendered by the Bombay High Court in *Commissioner of Income Tax v. Grasim Industries Limited,* (Income Tax Appeal (L) No.3592 of 2008). The learned counsel has commended us to paragraph 6 of the said judgment. It reads as follows:

> *"6. We have carefully considered the rival submissions. It is not in dispute that section 35G of the Excise Act is pari materia with Section 260 of the I.T. Act. Section 260A(7) of the I.T. Act as well as Section 35G (9) of the Excise Act provide that the provisions of the Code of Civil Procedure, 1908 relating to appeals to the High Court as far as may be, apply to the appeals filed under the respective provisions. No such provision is to be found in Section 35H of the Excise Act. Therefore, the argument advanced by the counsel for the revenue that Section 35G and Section 35H of the Excise Act are materially different cannot be said to be wholly without substance. However, once the Apex Court has held that the High Court has no power to condone delay in filing appeal under Section 35G of the Excise Act, we have no option but to hold that this Court has no power to condone delay under*

Section 260A of the I.T. Act because Section 260A of the I.T. Act is pari materia with Section 35 G of the Excise Act."

22. In our considered opinion, the applicability of the Code of Civil Procedure to appeals to the High Court under Section 35G of Excise Act and Section 260A (7) of the Income Tax Act is really of no assistance inasmuch as that only postulates that the provisions of the Code of Civil Procedure relating to appeals to the High Court shall apply to appeals under the provisions of Section 260A of the Income Tax Act to the High Court. The said provision cannot be construed to confer power on the High Court to condone delay. That apart, as has been noticed earlier, the Apex Court in *Chaudharana Steels (P) Ltd.* (supra), while dealing with the appeal under Section 35G of the Central Excise Act, 1944, held that the decision rendered in *Hongo India Private Limited* (supra) shall have full application to an appeal under Section 35G. The decision is binding on the High Court under Article 141 of the Constitution of India and hence, we conclude and hold that the principle shall apply on all fours to an appeal preferred under Section 260A of the Act.

23. In the result, we are of the considered opinion that this Court has no power to condone the delay in filing the appeal under Section 260A of the Income Tax Act, 1961 beyond the prescribed period and, therefore, the appeals inevitably have to pave the path of dismissal and we so direct.

Appeal dismissed.

I.L.R. [2009] M. P., 2409
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi
5 February, 2009*

SHAKIR & anr. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. **Penal Code (45 of 1860), Sections 302, 394 & 460** - *Appellants alleged to have committed loot and murder - FIR lodged by eye witness who identified four accused in identification parade held after 11 months of incident - Looted material seized from all four accused - Held - Eye witness admitted that she has not seen fourth accused at the time of incident but identified him in identification parade on the basis of his conduct - In absence of reliable test identification parade, conviction of fourth accused converted to S. 411 of IPC - Appeal partly allowed.* (Paras 10 & 14)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 394 व 460 – अपीलार्थी ने कथित रूप से लूट और हत्या की – प्रत्यक्षदर्शी साक्षी द्वारा एफ.आई.आर. दर्ज करायी गई जिसने घटना

*Cr.A. No.724/2002 (Indore)

के 11 माह बाद की गई शिनाख्त परेड में चार अभियुक्तों की शिनाख्त की – लूटी गई सामग्री सभी चारों अभियुक्तों से अभिग्रहीत की गई – अभिनिर्धारित – प्रत्यक्षदर्शी साक्षी ने स्वीकार किया कि उसने घटना के समय चौथें अभियुक्त को नही देखा किन्तु शिनाख्त परेड में उसकी शिनाख्त उसके आचरण के आधार पर की – विश्वसनीय शिनाख्त परेड के अभाव में चौथे अभियुक्त की दोषसिद्धि भा.द.सं. की धारा 411 में परिवर्तित – अपील अंशतः मंजूर।

B. **Evidence Act (1 of 1872), Section 9** - *Identification parade after 11 months of incident - Held - Accused were arrested after lapse of 9-10 months and after arrest within reasonable period identification parade was held - No question was put to I.O. for giving explanation for delay - Delay simplicitor is not sufficient to discard the evidence led by any party and same can be taken into consideration only after affording opportunity to explain.* (Para 13)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 9 – घटना के 11 माह बाद शिनाख्त परेड – अभिनिर्धारित – अभियुक्त को 9–10 माह बीत जाने के बाद गिरफ्तार किया गया और गिरफ्तारी के बाद युक्तियुक्त कालावधि के भीतर शिनाख्त परेड करायी गई – विलम्ब का स्पष्टीकरण देने के लिए अनुसंधानकर्ता अधिकारी के समक्ष कोई प्रश्न नही रखा गया – साधारण विलम्ब किसी पक्षकार द्वारा पेश साक्ष्य को अमान्य करने के लिए पर्याप्त नही है और केवल स्पष्ट करने का अवसर देने के बाद उसे विचार में लिया जा सकता है।

Ms. Shannu Khan, A. Salim & Akash Sharma, for the appellants.

JUDGMENT

The Judgment of the Court was delivered by **S.L. KOCHAR, J.** :– Since all the three aforesaid appeals are arising out of one and the same judgment, therefore, they are being decided by this common judgment.

2. The appellants named above have preferred the appeals against the judgment dated 16/5/2002, passed by the learned IIIrd Additional Sessions Judge, Ujjain in S.T. No. 157/2001, whereby convicting them for the offence punishable under Sections 302, 394 and 460 of the I.P.C. and sentenced them to suffer imprisonment for life with fine of Rs.2,000/-, in default of payment of fine, to undergo one year R.I., 7 years R.I. and fine of Rs.2,000/-, in default of payment of fine, to undergo additional one year R.I. and 7 years R.I. with fine of Rs. 1,000/-, in default of payment of fine, to undergo one year R.I. respectively. It has been further directed that in the event of non-deposit of fine, the sentence on each count shall run consecutively.

3. Briefly stated the prosecution case as unfolded before the Trial Court is that complainant Pooja (P.W.11) and deceased Seema were residing with their family members in double storeyed house, situated near diversion of Badnagar, Tehsil Road, District Ujjain. In the intervening night of 30th and 31st March 2002, at about 12 O' Clock, while Pooja (P.W.11) was studying in her room at

ground floor, at that moment, she overheard the cry of her sister-in-law deceased Seema, on this, she proceeded towards the room situated in first floor and saw two persons taking out articles from "Godrej Almirah" in the room. At that juncture, miscreants by some object dealt a blow on back side of her head because of which she fell unconscious and regained consciousness at about 3.00 a.m. Pooja went into the room of deceased Seema and found her in unconscious condition. Seema was having injury on her head and blood was oozing from the injury. Pooja immediately rushed to the house of neighbour Radheshyam and disclosed about the incident to Radheshyam and his mother. They sent telephonic message to police, on which, police reached on the spot. Seema and Pooja were taken in a police van to hospital in injured condition, but Seema died on the way. The miscreants, who committed the incident were young persons having medium health and height wearing pant and shirt. Pooja lodged the report (Ex-P/18) wherein she has stated that if miscreants will be brought before her, she will identify them F.I.R. (Ex-P/18) was recorded by Rajesh Sharma(P.W.15), the then S.H.O. of Police Station Badnagar, District Ujjain. Dr. A.K. Jain (P.W.2) medically examined Pooja (P.W.11) and issued her M.L.C. report (Ex-P/l). Dr. Jain also performed autopsy of dead-body of Seema with panel of two more Doctors and gave Postmortem report (Ex-P/2). Appellants were arrested and on their disclosure statements, as per provision under Section 27 of the Evidence Act, looted property was said to have been seized. Looted property was identified by eye-witness Pooja (P.W.11) in Test Identification Parade conducted by Naib Tehsildar R.K. Mishra (P.W.9) through identification memo Ex-P/17. She had also identified the appellants in Test Identification Parade held by Naib Tehsiladar T.R. Verma(P.W.7). The identification memo of appellants Pappu, Asraf, Jafar and Shakir are Ex-P/6, P/7, P/8 and P/9 respectively. On statement given by Shakir vide Ex-P/13-A, a golden chain and one bag bearing name of "Girdhari Traders", Badnagar were seized through seizure memo (Ex-P/14), from Asraf on memorandum statement (Ex-P/11), through seizure memo (Ex-P/15), two golden rings were seized and appellant Jafar got done the recovery of one golden chain, two golden bangles, one pair of silver anklet and three pair of *'Bichhiya'*. His memorandum statement and seizure of looted property are Ex-P/21 and P/20. Appellant Pappu gave memorandum statement(Ex-P/12) and in pursuance thereof, two golden bangles and one pair of ear-rings were seized vide seizure memo (Ex-P/16-A). On completion of investigation, appellants were charge-sheeted for commission of offence under Sections 460, 302, 394 read with 397 of the I.P.C.

4. Appellants denied the charges and pleaded their false implication by the police. They were charged for commission of offence under Sections 394 read with Section 397, 302 and 460 of the I.P.C. The appellants have not examined any witness in defence whereas prosecution has examined in all 18 witnesses and adduced 24 documents to prove its case.

5. Learned Trial Court, finding the appellants guilty, convicted and sentenced the appellants as described herein-above.

6. Learned counsel for the appellants has submitted that evidence of Test Identification after about more than 11 months by solitary eye-witness Pooja(P.W.11) should not be relied upon by the Trial Court because of lapse of such a long time and delay. It is also argued that evidence of panch witnesses, for recovery of looted property/ornaments, from the possession of the appellants is contradictory and solitary testimony of Police Officer A.S.I. D.L. Chouhan(P.W.12) is not reliable to prove the recovery of looted ornaments at the instance of the appellants. It is further argued that identification of appellant Jafar is not at all dependable by Pooja(P.W.11), who mentioned specifically in the F.I.R. only presence of three persons inside the house at the time of incident.

7. On the other hand, learned counsel for the State has supported the impugned judgment of conviction and sentence passed by the learned Trial Court.

8. Having heard learned counsel for the parties and after perusing the entire record carefully, we are of the opinion that evidence of Pooja(P.W.11) is fully reliable for appellants except appellant Jafar and her testimony is corroborated by her F.I.R.(Ex-P/18), medical evidence of Dr. A.K. Jain(P.W.2) and evidence of recovery of looted ornaments from the possession of appellants. Appellant Jafar would be liable for offence under Section 411 of the I.P.C. because recovery of looted property a golden chain, two bangles, silver anklet and three pair of silver *"Bichhiya"* were seized after about 11 months of the incident through his memorandum statement(Ex-P/21) dated 27/2/2001 and seizure memo(Ex-P/20). Appellant Jafar gave statement which was recorded by A.S.I. D.L. Chouhan(P.W.12) in pursuance thereof, property was recovered at his instance.

9. Pooja(P.W.11) has deposed that in the night of incident, at about 12.30 midnight while she was resting in her room after her studies and her sister-in-law Seema was in the room of first floor of the house, at that moment, she overheard the cry of Seema and rushed towards her room. At that time, she saw two appellants taking out articles from "Godrej Almirah". Both the accused after hearing the sound of her foot-steps, looked towards her and at that moment, somebody dealt a blow on her head from back side, she immediately turned and saw that third person, thereafter, she fell giddiness and became unconscious. She regained consciousness in the night at 3.15 a.m., thereafter, she reached in the room of her sister-in-law Seema, who was lying unconscious and having injury on her head. The articles in the room were disturbed. She immediately approached the neighbour Radheshyam and also disclosed about the incident to Radheshyam, his father Mangilal and mother. They intimated the police on telephone. The police party reached on the spot and took her and deceased Seema in police van. She lodged the report(Ex-P/18) in the Police Station, thereafter, both were sent to

Government Hospital, Badnagar. She was referred for further treatment to Ujjain and after checkup, she returned back in the evening to Badnagar. She has stated in para 4 of her statement specifically that she had seen the miscreants and will be able to identify them. She identified the appellants in Bherugarh Jail and proved her signature on identification memos Ex-P/6, P/7, P/8 and P/9. She has also proved her signature on identification memo(Ex-P/17) of recovered looted golden and silver ornaments. Test Identification of the appellants was conducted by Naib Tehsildar R.K. Mishra(P.W.9) and he has corroborated the statement of this witness Pooja about identification of looted property in Test Identification Parade vide memo(Ex-P/17). Naib Tehsildar T.R. Verma(P.W.7) has also corroborated the version of Pooja about identification of appellants in Test Identification Parade vide memos Ex-P/6, P/7, P/8 and P/9 regarding identification of appellants Pappu, Asraf, Jafar and Shakir respectively. Dr. A.K. Jain (P.W.2) medically examined this witness and found injury on her head. He proved her M.L.C. Report (Ex-P/1). In the opinion of Dr. Jain, injury could be caused by hard and blunt object.

10. Though Pooja(P.W.11), in Court, identified appellant Jafar and accepted his identification in Test Identification Parade vide memo(Ex-P/8) dated 12/3/2001, but her identification in Test Identification Parade for appellant Jafar does not inspire confidence because of her positive admission in para 13 of her deposition that at the time of incident, she had not seen the fourth accused but she identified the said accused in Test Identification Parade because he was trying to hide himself and in Court, she pointed out appellant Jafar, who was the fourth accused. This statement shows that at the time of incident, she had not seen appellant Jafar, therefore, she could not identify him in Test Identification Parade and her identification in Test Identification Parade was based on conduct of the appellant and not on the basis of actual seeing the appellant and keeping his feature and personality in her memory. In this view of the matter, in absence of reliable Test Identification Parade evidence, we are of the opinion that conviction of appellant Jafar for the above mentioned offence is not sustainable, but at the same time, he would be liable for conviction under Section 411 of the I.P.C. for receiving property of offence. The appellant Jafar is convicted on the basis of presumption of lower degree as per provision under Section 114 of the evidence Act that he was a receiver of stolen property and he failed to explain the possession of the recovered ornaments of the complainant party. At this stage, it is made clear that appellants have not claimed the seized ornaments of their own and they have denied the recovery and seizure.

11. A.S.I. D.L. Chouhan(P.W.12) has proved the memorandum statement(Ex-P/13-A), P/12, P/21 and P/11 of appellants Shakir, Pappu, Jafar and Asraf respectively. He has also proved the seizure of golden chain and one bag bearing name of "Girdhari Traders", Badnagar vide (Ex-P/14), two bangles and one

pair golden ear-rings through seizure memo(Ex-P/16), a golden chain, two golden bangles, Silver anklet, three pairs *"Bicchiya"* vide seizure memo(Ex-P/20) and two golden rings through seizure memo(Ex-P/15) respectively from the exclusive possession of the appellants. The statement of A.S.I. D.L. Chouhan has been corroborated on material particulars by the evidence of Ketan Soni(P.W.5), Kailash(P.W.13), Ganpat (P.W.14) and Yusuf(P.W.8). Kamalkant (P. W.I 8) has proved the entry in his Accounts Book(Ex-P/25) showing the pledging of chain, a looted property by appellant Shakir.

12. Learned counsel for the appellants have also argued that homicidal death of deceased Seema has not been proved by the prosecution beyond all reasonable doubt. It is admitted position that nobody has seen appellants assaulting Seema, who was found in unconscious condition in her bedroom at first floor of the residential house of their family and Pooja(P.W.11) was studying in ground floor room. She narrated the entire incident and identified appellants Pappu, Asraf and Shakir in the Test Identification Parade as well as in the Court. She has also mentioned in the F.I.R. that she would be able to identify the miscreants and she successfully identified these three appellants in Test Identification Parade held during the course of investigation and also in Court. P.W.2 Dr. A.K. Jain proved the postmortem report(Ex-P/2) of deceased Seema. According to this witness, he conducted postmortem on 1/4/2000 at 10.10 a.m. and found one lacerated wound on the head of the deceased at occipital parietal region. The clotted blood was present surrounding the wounds. On internal examination, he did not find any injury, but right side of the heart was full of blood and left chamber was empty. On external examination, he had also found bleeding from nose. In the opinion of Dr. Jain, deceased Seema died because of asphyxia caused due to congestion in respiratory passage. The postmortem was performed by panel of three Doctors and Dr. Jain proved the signature of his companion doctors L.A. Kapadia and Smt. Shradha Dave. In cross-examination, para 17, he deposed that the death of deceased could be caused by pressing of mouth or throttling and he denied that in causing of such death, blood and froth would not come from the nose of the deceased. He has specifically stated that in the case of asphyxial death, blood and froth comes from the nostril. In the opinion of Dr. Jain and looking to his entire evidence, we are satisfied that deceased met homicidal death at the time of incident and since presence of appellants Pappu, Asraf and Shakir established inside the house, who committed robbery, the circumstances are pointing towards them for commission of murder of deceased Seema beyond reasonable doubt.

13. The appellants were arrested after the lapse of 9-10 months and after arrest within a reasonable period Test Identification parade was held by the Investigating Agency. Apart from this, no questions were put by the defence to the Investigating Officer for giving explanation if there was any delay in holding test identification parade. It is settled legal position that delay simplicitor is not

sufficient to discard the evidence led by any party and same can be taken into consideration only after affording an opportunity to explain the same by the concerned witness. See *Bharat Singh vs. State of U.P.* (A.I.R. 1972 SC 2478)"

14. In the result, on the basis of foregoing discussion, Cri.A.No. 731/2002 of appellant Jafar is allowed in part. His conviction and sentence as awarded by the learned Trial Court are, hereby, set aside instead thereof, he is convicted under Section 411 of the I.P.C. and sentenced to R.I. for three years with fine of Rs.15,000/-, in default of payment of fine, he shall suffer additional R.I. for two years. The Cri.A. No.724/2002 of appellants Shakir, Asraf and Cri.A. No.669/2002 of appellant Pappu are, hereby, dismissed.

15. Original judgment is retained in Cri.A. No.724/02 and a copy whereof be placed in the record of connected Cri.A. No.731/02 & Cri A No 669/02.

Appeal dismissed.

I.L.R. [2009] M. P., 2415
APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava

17 February, 2009*

SHYAM SINGH & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence - Three eye witnesses reached the place of occurrence together after getting the information regarding quarrel - Their presence on the scene of occurrence is not reflected in the FIR lodged soon after the occurrence - Held - It becomes highly doubtful and unnatural that by the time these witnesses reached the place of occurrence they would have seen the 4 accused still assaulting the deceased - Statement of these eye witnesses cannot be believed and deserves to be discarded.* (Para 15)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – तीन प्रत्यक्षदर्शी साक्षी झगड़े की जानकारी मिलने पर घटनास्थल पर एक साथ पहुँचे – घटनास्थल पर उनकी उपस्थिति घटना के तुरन्त बाद दर्ज एफ.आई.आर. में प्रतिबिम्बित नही होती – अभिनिर्धारित – यह अत्यंत शंकास्पद और अस्वाभाविक है कि जब ये साक्षी घटनास्थल पहुँचे हों उस समय उन्होंने 4 अभियुक्तों को मृतक पर हमला करते हुए देखा हो – इन प्रत्यक्षदर्शी साक्षियों के कथनों पर विश्वास नही किया जा सकता और अमान्य किये जाने योग्य हैं।

B. Evidence Act (1 of 1872), Section 3 - *Testimony of interested and partisan witness - Testimony of an injured eye witness was not supported by independent witnesses and independent witnesses were declared hostile -*

*Cr.A. No.742/1993 (Jabalpur)

Held - Various injuries were found on the person of injured eye witness - His presence on the scene of occurrence not doubted - Merely because independent witnesses have turned hostile cannot be a ground to reject the reliable portion of the testimony of an injured eye witness - Such evidence cannot be wipeded out in the absence of corroboration. (Para 18)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – हितबद्ध और समर्थक साक्षी का परिसाक्ष्य – स्वतंत्र साक्षियों द्वारा क्षतिग्रस्त प्रत्यक्षदर्शी साक्षी के परिसाक्ष्य का समर्थन नही किया गया और स्वतंत्र साक्षियों को पक्षद्रोही घोषित किया गया – अभिनिर्धारित – क्षतिग्रस्त प्रत्यक्षदर्शी साक्षी के शरीर पर विभिन्न क्षतियाँ पायी गयीं – घटनास्थल पर उसकी उपस्थिति शंकास्पद नही – केवल इसलिए कि स्वतंत्र साक्षी पक्षद्रोही हो गये, क्षतिग्रस्त प्रत्यक्षदर्शी साक्षी के परिसाक्ष्य के विश्वसनीय भाग को अस्वीकृत करने का आधार नही हो सकता – ऐसा साक्ष्य सम्पुष्टि के अभाव में विलोपित नही किया जा सकता।

C. **Penal Code (45 of 1860), Section 97 - *Right of private defence of the body and of property - Injury to the accused - Held - Mere fact that some of the accused persons had sustained simple injuries would not ipso facto mean that they acted in exercise of right of private defense - It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved.*** (Paras 21 & 23)

ग. दण्ड संहिता (1986 का 45), धारा 97 – शरीर और सम्पत्ति की प्राइवेट प्रतिरक्षा का अधिकार – अभियुक्त को क्षति – अभिनिर्धारित – केवल तथ्य कि अभियुक्तों में से कुछ को साधारण क्षति आयी, का स्वयमेव ही यह अर्थ नही होगा कि उन्होंने प्राइवेट प्रतिरक्षा के अधिकार के प्रयोग में कार्य किया – विधि की दृष्टि में या अपरिवर्तनीय नियम के रूप में यह अभिनिर्धारित नहीं किया जा सकता कि जब कभी अभियुक्त को उसी घटना में कोई क्षति आती है तो अभियोजन क्षति का स्पष्टीकरण देने के दायित्वाधीन है और अभियोजन के ऐसा करने में असफल रहने पर अभियोजन के मामले पर विश्वास नही किया जाना चाहिए।

D. **Penal Code (45 of 1860), Sections 302, 304 Part I - *Culpable homicide not amounting to murder - Incident occurred on the spur of moment in sudden quarrel in the heat of passion without any premeditation - Held - Sentence u/s 302 of IPC converted to that of 304 Part I of IPC.*** (Para 26)

घ. दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – घटना बिना किसी पूर्वचिन्तन के क्षण की प्रेरणा पर अचानक झगड़े में आवेश की तीव्रता में घटित हुई – अभिनिर्धारित – भा.द.सं. की धारा 302 का दण्डादेश भा.द.सं. की धारा 304 भाग I में परिवर्तित किया गया।

Cases referred :

AIR 1979 SC 135, AIR 1975 SC 1026, AIR 1996 SC 3197, AIR 2007 SC 363, (2001) 6 SCC 145, AIR 1957 SC 469, AIR 1982 SC 1185, 2004 SC 4100, AIR 2007 SC 3228, 1968 CrLJ 806, AIR 1988 SC 560, AIR 1998 SC 1554.

S.C. Datt with *Siddharth Datt,* for the appellants.
R.S. Patel, Addl.A.G., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by SMT. SUSHMA SHRIVASTAVA, J. :– This judgment shall govern the disposal of Criminal Appeal no.742/93 and Criminal Appeal No.717/94 arising out of judgments passed by Additional Sessions Judge, Sohagpur, in S.T. No.130/88 convicting the appellants under Section 302/34, 324/34 of IPC and sentencing them to life imprisonment with fine of Rs.1,000/- and rigorous imprisonment for two years respectively. Being aggrieved by their conviction and order of sentence, appellant Shyam Singh, Kamlesh and Munna @ Bhawani have preferred Criminal Appeal No.742/93, whereas appellant Mahesh Kumar has preferred Criminal Appeal No.717/94.

2. According to prosecution, on 26.3.88 about 10 'O'clock in the morning at village Jamada, when complainant Kunjilal was fencing his 'khalihan', appellants Shyam Singh, Mahesh, Kamlesh and Munna @ Bhawani armed with axe, lathi and kharedua came there on a tractor and appellant Shyam Singh said that he would make his 'khalihan' there. When complainant Kunjilal told him that he was making his 'khalihan' there for last three years, appellant Shyam Singh said to chop off his limbs. Thereupon appellant Kamlesh gave an axe blow on his occipital region, appellant Shyam Singh gave another axe blow on his right leg, while appellant Munna assaulted him with kharedua on his left leg. When his father Ishwar Singh, tried to intervene and rescue him, appellant Kamlesh gave an axe blow on the right side of the scalp of Ishwar Singh. Appellant Shyam Singh also gave an axe blow on the left side of his ribs, while appellant Mahesh gave lathi blow on his chest. As a result of injuries inflicted on him, Ishwar Singh fell unconscious. Upon hue and cry, Baijnath, Madhav, Jeevan and Halkori reached there; then appellants fled away.

3. The FIR of the incident was lodged by complainant Kunjilal at Police Station Pipariya, on the basis of which an offence was registered against the appellants and was investigated. Injured Kunjilal and Ishwar Singh were sent for medical examination. Ishwar Singh, however, succumbed to his injuries in the hospital. The intimation of his death was given to the Police from the hospital, whereupon merg intimation was recorded and merg inquest report was prepared. The dead body of Ishwar Singh was sent for postmortem examination. Blood stained earth and plain earth were seized from the spot. Spot map was drawn. Blood stained clothes of deceased Ishwar Singh as well as of injured Kunjilal were also seized. The axe, lathi and kharedua used in the commission of offence were seized at the instance of appellants Shyam Singh, Kamlesh, Munna and Mahesh respectively. After due investigation, appellants Shyam Singh, Kamlesh, Munna @ Bhawani, Mahesh Kumar and two others were prosecuted under Section 147, 148, 149, 307

and 302 of IPC and were committed for trial. Co-accused Seetaram and Bagdar @ Dilip were, however, discharged by the Sessions Court vide order dated 26.3.92. Appellants Shyam Singh, Kamlesh, Munna @ Bhawani, and Mahesh were charged under Section 302/34 and 307/34 of IPC.

4. Appellants abjured the guilt. According to appellants, complainant Kunjilal and Ishwar Singh (deceased) armed with axe and lathi came to their 'khalihan' and tried to make their own 'khalihan' over there; when they objected, they assaulted them.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellants guilty under Section 302/34, 324/34 of IPC for causing death of Ishwar Singh and injury to Kunjilal, convicted and sentenced them as aforesaid by the impugned judgment, which has given rise to these two appeals.

6. We have heard learned counsel for the parties.

7. Learned counsel for the appellants submitted that the trial court gravely erred in placing implicit reliance on the unreliable testimony of interested and partisan witnesses without any independent corroboration and failed to appreciate that the so-called eyewitnesses had not actually seen the incident, but they were introduced as eyewitnesses by Investigating Officer after recording their statements after lapse of a month. Learned counsel for the appellants also submitted that the trial court failed to consider that the appellants had gone to make their own 'khalihan' and had no intention to kill the deceased or to cause injury and they acted in the exercise of right of private defence. It was also submitted that the case would not travel beyond the ambit of Section 304 of IPC.

8. Learned counsel for the State, on the other hand, supported and justified the conviction of the appellants as recorded by the trial court.

9. We have gone through the entire evidence. It is clearly borne out from the medical evidence that deceased Ishwar Singh (hereinafter referred to as 'deceased') met a homicidal death. Dr. R.C. Agrawal (P.W-16), who conducted the medical examination of the deceased prior to his death and also conducted his postmortem examination after death, found following antemortem injuries on his person:-

> "1. Incised wound of 3" x 1/4" x scalp deep over parietal region on right side of head, horizontal in direction.
>
> 2. Incised wound of 1 ¾ x 1/8" x skin deep over lateral aspect of chest on left side, oblique in direction.
>
> 3. Contusion of 1" x 7" over chest on left side.

10. On internal postmortem examination of the deceased, a depressed fracture on his right parietal bone of the skull was found and brain membrane was also

torn. In the opinion of Dr. R.C. Agrawal (P.W-16), injuries No. 1 and 2 were caused by sharp cutting object and injury No. 3 was caused by blunt object and the cause of death was coma due to head injury and the death was homicidal in nature. The detailed postmortem report (Ex.P-28) of the deceased as well as his MLC report (Ex.P-25) are also placed on record. There are no reasons to disagree with the aforesaid medical evidence and the opinion of Dr. R.C. Agrawal (P.W-16) that deceased met a homicidal death.

11. It is also evident from unchallenged testimony of Dr. R.C. Agrawal (P.W-16) that on the medical examination of complainant Kunjilal on 26.3.88 various injuries including injuries caused by sharp edged weapon were found on his person as per his MLC report (Ex.P-26). Complainant Kunjilal (P.W-2) was thus an injured eyewitness; his presence on the scene of occurrence, therefore, could not be doubted.

12. The conviction of the appellants is founded on the testimony of complainant Kunjilal (P.W-2) and the other three eyewitnesses, namely, Harisingh, (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10). Complainant Kunjilal (P.W-2) deposed in his evidence that on the day of occurrence when he was preparing his 'khalihan', appellants Shyam Singh, Mahesh, Kamlesh and Munna @ Bhawani and two others came there by tractor and questioned him how he was making 'khalihan' there. When complainant told them that he was making 'khalihan' there for last three years, appellant Shyam Singh said to chop off his limbs. Appellants Kamlesh and Shyam Singh then gave axe blows to him causing injury on his scalp and right leg, whereas appellants Munna @ Bhawani and Mahesh assaulted him by means of kharedua (a wooden object) and lathi. According to complainant Kunjilal (P.W-2), when his father Ishwar Singh rushed to rescue him, appellant Kamlesh gave an axe blow on the right occipital region of his father. Appellant Shyam Singh gave an axe blow on the left side of his ribs, while appellant Munna assaulted on his head with kharedua and appellant Mahesh gave a lathi blow on his chest; as a result, his father fell down and became unconscious. Complainant Kunjilal (P.W-2) further deposed that when Baijnath, Jeevan and Halkori came there to rescue them, appellants fled away on their tractor; thereafter, Harisingh, Leeladhar and Patel took him and his father to Police Station Pipariya, where he lodged the FIR (Ex.P-4) and they were sent to hospital, where his father expired.

13. Harisingh (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10) also tried to support the aforesaid version and deposed that when they reached the place of occurrence they saw that appellants Kamlesh and Shyam Singh had assaulted the deceased by axe, appellant Mahesh gave a lathi blow on his chest, while appellant Munna assaulted the deceased by kharedua.

14. The main thrust of the submission of learned counsel for the appellants has been that the so-called eyewitnesses Harisingh (P.W-6), Rewa Shankar (P.W-7)

and Leeladhar (P.W-10) had never witnessed any assault on the deceased and they have given a cooked up version that they saw the four appellants assaulting the deceased, which is also indicated by the fact that their names were not mentioned in the FIR (Ex.P-4) and their statements were also recorded by Police after about a month. Reliance was placed in this behalf on the decisions of the Apex Court in the case of *Ganesh Bhavan Patel and another Vs. State of Maharashtra* reported in AIR 1979 SC page 135 and *Ram Kumar Pande Vs. The State of Madhya Pradesh* reported in AIR 1975 Supreme Court page 1026.

15. We find some force in the aforesaid submission of learned counsel for the appellants in view of the fact that the presence of three witnesses, namely, Harisingh, (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10) on the scene of occurrence is not reflected in the FIR (Ex.P-4) lodged soon after the occurrence, whereas the other four eyewitnesses were specifically named in the FIR, which cast a cloud of suspicion over the testimony of the aforesaid three witnesses that they actually witnessed the appellants assaulting the deceased. Even otherwise, their version in this behalf appears to be doubtful for the reason that, according to Harisingh (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10), they reached the place of occurrence after getting the information regarding quarrel in the 'khalihan' and, therefore, it becomes highly doubtful and unnatural that by the time they reached the 'khalihan' they would have seen the four appellants still assaulting the deceased. Leeladhar (P.W-10) also clearly deposed that when they reached the place of occurrence, appellants were fleeing by the tractor and all these three persons, as their evidence indicates, had reached the place of occurrence together. Thus, in view of the statement of Leeladhar (P.W-10), the statement of the aforesaid three eyewitnesses that they had seen the four appellants assaulting the deceased, cannot be believed and deserves to be discarded.

16. However, there are no reasons to ignore the evidence of complainant Kunjilal (P.W-2), who is an injured eyewitness. Although the evidence of complainant Kunjilal also suffers from some embellishment in as much as he had attributed kharedua blow to appellant Munna in causing injuries to the deceased, while there was no such averment made in the FIR (Ex.P-4) lodged by him that appellant Munna assaulted the deceased by kharedua on his scalp, but that cannot be a ground to reject his entire evidence. Apposite to add that the remaining part of his evidence is essentially consistent with the contents of FIR (Ex.P-4), as also corroborated by the medical evidence. In fact, there are no reasons to disbelieve the statement of complainant Kunjilal (P.W-2) to the effect that when his father Ishwar Singh (deceased) tried to rescue him, appellant Kamlesh gave an axe blow on the scalp of his father on right side and appellant Shyam Singh gave an axe blow on the left side of his chest, appellant Mahesh gave him a lathi blow, thereby causing injuries resulting into his death. Needless to point out that the plea of alibi taken by appellant Mahesh Kumar was rightly rejected by the trial

court as his presence, participation and involvement in the incident of assault to complainant Kunjilal as well as to the deceased is reflected from the very beginning, i.e. from the time of lodging of the FIR (Ex.P-4) soon after the incident.

17. However, the involvement and participation of appellant Munna in the later part of the incident in assaulting and causing the death of deceased appears to be doubtful. As mentioned above, the statement made by complainant Kunjilal (P.W-2) that appellant Munna also assaulted the deceased by kharedua on his scalp does not find place in the FIR (Ex.P-4) lodged by Kunjilal (P.W-2) soon after the occurrence. Dr. R.C. Agrawal (P.W-16) also found an incised wound caused by sharp edged weapon on the scalp of the deceased with underlying depressed fracture. No other external injury caused by hard and blunt object like kharedua was found by doctor on the scalp of the deceased. Thus, the statement of complainant Kunjilal (P.W-2) that appellant Munna gave a kharedua blow to his father on his head also does not find corroboration from the medical evidence. In view of the complete omission of this fact in the FIR (Ex.P-4), it becomes highly doubtful that appellant Munna gave a kharedua blow on the scalp of the deceased. The statement of complainant Kunjilal (P.W-2) on this point, therefore, cannot be believed as true. The evidence of other three witnesses, namely, Harisingh, (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10) has already been disbelieved. There is no such evidence on record that appellant Munna exhorted or otherwise aided the other appellants in assaulting the deceased and causing his death so as to indicate his participation or sharing the common intention with them in causing his death. Appellant Munna is thus, entitled to benefit of doubt in this behalf.

18. However, as already said, there are no cogent reasons to discard the ocular evidence of complainant Kunjilal (P.W-2) that the other three appellants, namely, Shyam Singh, Kamlesh and Mahesh conjointly assaulted the deceased and thereby intentionally caused injuries on his vital parts resulting into his death. Although the three independent witnesses, namely, Baijnath (P.W-3), Jeevan (P.W-4) and Halkori (P.W-5) have not supported complainant's version and have turned hostile to prosecution, but that by itself cannot be a ground to reject the reliable portion of the testimony of complainant Kunjilal (P.W-2). As observed by the Apex Court in the case of *Pattu Lal Vs. State of Punjab* reported in AIR 1996 S.C. Pg. 3197 evidentiary value of a deposition, which is otherwise admissible and reliable is not just wiped out in the absence of corroboration.

19. Learned counsel for the appellants submitted that the trial court failed to appreciate that appellants Shyam Singh and Kamlesh also sustained injuries in the incident as found by Dr. R.C. Agrawal (P.W-16) on their person, which remained unexplained and that appellant party was in settled possession of the land where complainant Kunjilal tried to encroach upon and make his own 'khalihan' and assaulted the appellant party when objected to, and thus right of private defence was available to the appellants. Reliance was placed in this behalf on the decision

rendered by the Apex Court reported in AIR 2002 Supreme Court page 2980 *(Subramani & others Vs. State of Tamil Nadu)*, AIR 2003 Supreme Court Page 3204 *(Laxman Singh Vs. Poonam Singh & Others)*, (2004)2 Supreme Court Cases page 203 *(James Martin V. State of Kerala)*. There can be no disagreement with the law relating to the exercise of right of private defence as enunciated in the aforesaid decisions cited by learned counsel for the appellants, but each case has to be examined on its own merits, facts and surrounding circumstance of the case.

20. In the instant case, complainant Kunjilal (P.W-2) deposed that the place where he was making 'khalihan' was a Govt. land. He denied the suggestion that appellant party was in possession of that land. There is no such such substantive evidence on record that the land where incident took place and where complainant Kunjilal (P.W-2) was making his 'khalihan' belonged to the appellant party or they were in settled possession of the land. The oral evidence rendered by Ramlal (D.W-1) examined on behalf of the appellants in this behalf without corroboration from revenue records has no authenticity. There was also no dependable evidence on record that complainant Kunjilal (P.W-2) or his father (deceased) had assaulted any of the appellants and caused injuries to appellants Shyam Singh and Kamlesh so as to give rise to exercise of right of private defence by the appellants. The injuries found by Dr. R.C. Agrawal (P.W-16) on the person of appellants Kamlesh and Shyam Singh were also simple in nature and caused by hard and blunt object.

21. The mere fact that appellants Shyam Singh and Kamlesh had sustained simple injuries would not ipso facto mean that they acted in exercise of right of private defence. It would be profitable to reproduce the following observation made by the Apex Court in this behalf in the case of *Naveen Chandra Vs. State of Uttranchal* reported in AIR 2007 Supreme Court page 363:-

> "It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. The burden is on the accused to show that he had the right of private defence"

22. Their lordships further observed in the aforesaid case as under:-

> "The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for vindictive, aggressive or

retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure."

23. As regards the non-explanation of injuries sustained by the two appellants, the Apex Court has held in its three Judges Bench decision *Takhaji Hiraji Vs. Thakore Kubersingh Chamansingh and others* reported in (2001)6 SCC page 145 that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved.

24. Thus in the instant case, it could not be established that appellants had acted in the exercise of the right of private defence. The citations referred to by learned counsel for the appellants, as reported in 1968 Cri.L.J page 806 *(Munshi Ram and others Vs. Delhi Administration)*, AIR 1988 Supreme Court Court case 560 *(Patori Devi and another Vs. Amar Nath and others and Jai Narain and others)*, AIR 1998 Supreme Court page 1554 *(Pohap Singh Vs. State of Haryana and others)* have turned on the different set of facts and are of no avail to the appellants in the present case.

25. Learned counsel for the appellant last submitted that the evidence of complainant Kunjilal (P.W-2) itself indicated that the appellants had gone to the place of occurrence for preparing 'khalihan' and they had also Jaretha with them on their tractor trolley and when they found complainant Kunjilal was preparing 'khalihan there, an altercation took place between them, the incident occurred on the spur of moment, when the father of complainant Kunjilal intervened in the sudden quarrel, his death occurred in a sudden fight without any premeditation. Thus, according to learned counsel for the appellants, the case would not go beyond the ambit of Section 304 of IPC as none of the appellants had any intention to kill the deceased. Reliance was also placed in this behalf on the decisions of the Apex Court reported in AIR 1957 Supreme Court page 469 *(Jumman and others Vs. State of Punjab and others)*, AIR 1982 Supreme Court page 1185 *(Ram Karan and others Vs. State of Uttar Pradesh)*, 2004 Supreme Court page 4100 *(Sridhar Bhuyan Vs. State of Orissa)*, and AIR 2007 Supreme Court page 3228 *(Kulesh Mondal Vs. State of West Bengal)* and it was submitted that Exception 4 of Section 300 of IPC would also be applicable.

26. We have considered the aforesaid submissions. It is manifest from the evidence of complainant Kunjilal (P.W-2) that the incident arose over the issue of making 'khalihan' and when the deceased intervened in the quarrel between his son Kunjilal (P.W-2) and the appellants and tried to rescue him, appellant Shyam Singh, Mahesh and Kamlesh, as held above, made assault on the deceased causing injuries resulting into his death. It is obvious from the aforesaid facts that the

appellants had no premeditation to kill the deceased and incident occurred on the spur of moment in a sudden quarrel in the heat of passion without any premeditation. In view of the aforesaid facts, as well as only few injuries caused to the deceased, we are of the opinion that the case of the appellants Shyam Singh, Kamlesh and Mahesh would come within the purview of Section 304 Part I of IPC. The conviction of the three appellants, namely, Shyam Singh, Kamlesh and Mahesh under Section 302/34 of IPC, therefore, deserves to be altered to one under Section 304 Part-I of IPC. Appellant Munna @ Bhawani, however, as discussed earlier, is entitled to benefit of doubt and deserves to be acquitted of the charge under Section 302/34 of IPC.

27. As regards the conviction of the four appellants under Section 324/34 of IPC, in view of clear and cogent evidence of injured Kunjilal (P.W-2) himself against all the four appellants coupled with the corroborative medical evidence indicating injuries caused to him by sharp edged weapon, the conviction of all the four appellants under Section 324/34 of IPC does not warrant any interference in appeal.

28. As regards the sentence, life imprisonment awarded to appellants Shyam Singh, Kamlesh, Mahesh Kumar, in our opinion, deserves to be modified and reduced to a period of rigorous imprisonment for ten years under Section 304 Part I of IPC, with an amount of fine of Rs.1,000/- (One thousand only), as already imposed by the trial court, in default further rigorous imprisonment for one year. The sentence of rigorous imprisonment for two years awarded to four appellants for the offence under Section 324/34 of IPC, however, looking to the number of injuries caused on the body of complainant Kunjilal, does not call for any interference.

29. Consequently, appeal is partly allowed. The conviction of appellants Shyam Singh, Kamlesh and Mahesh under Section 302/34 of IPC is altered to one under Section 304 Part I read with Section 34 of IPC and the life imprisonment awarded to them is modified and reduced to a period of rigorous imprisonment for ten years with fine of Rs.1,000/- (One thousand only) each, in default further rigorous imprisonment for one year. The conviction of appellant no.3 Munna @ Bhawani under Section 302/34 of IPC and life imprisonment awarded to him are set aside and he is acquitted of the charge under Section 302/34 of IPC. We, however, uphold the conviction and sentence of all the four appellants, namely, Shyam Singh, Kamlesh, Munna and Mahesh under Section 324/34 of IPC. Needless to add that the substantive sentence for both the offences shall run concurrently and set off shall be given to them for the period already undergone by each of the appellants.

30. Appellants are on bail. They shall surrender forthwith to their bail bonds to serve out the remaining portion of their sentence.

Appeal is accordingly disposed of.

Appeal disposed of.

JAMUNA Vs. STATE OF M.P.

I.L.R. [2009] M. P., 2425
APPELLATE CRIMINAL
Before Mr. Justice U.C. Maheshwari
5 March, 2009*

JAMUNA & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. **Evidence Act (1 of 1872), Section 3** - *Appreciation of evidence - Relative witnesses - Reliability - Appellants convicted on the testimony of wife and son of the deceased - Ground of near relationship of the eye witnesses with the victim or the deceased could not be a sole ground to discard their testimonies, if the same appear to be reliable in other circumstances of the case - Court is under obligation to scrutinize such evidence carefully and cautiously.* (Para 12)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – नातेदार साक्षी – विश्वसनीयता – अपीलार्थियों को मृतक की पत्नी और पुत्र के परिसाक्ष्य पर दोषसिद्ध किया गया – प्रत्यक्षदर्शी साक्षियों की पीड़ित या मृतक से निकट नातेदारी का आधार उनके परिसाक्ष्य को अमान्य करने का एकमात्र आधार नही हो सकता, यदि वह मामले की अन्य परिस्थितियों में विश्वसनीय प्रतीत होती हो – न्यायालय ऐसी साक्ष्य की सावधानीपूर्वक और सतर्कतापूर्वक जाँच करने के दायित्वाधीन है।

B. **Evidence Act (1 of 1872), Section 3** - *Appreciation of evidence -Conflict between ocular evidence and medical evidence - Reliability - Held - If there is a conflict between ocular evidence of the eye witness and the medical evidence, then ocular evidence prevails over medical evidence as the medical evidence is only as an expert evidence, while the deposition of the eye witness speaks about the real incident.* (Para 17)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – दृष्टि साक्ष्य और चिकित्सीय साक्ष्य में अन्तर्विरोध – विश्वसनीयता – अभिनिर्धारित – यदि प्रत्यक्षदर्शी साक्षी के दृष्टि साक्ष्य और चिकित्सीय साक्ष्य में कोई अन्तर्विरोध हो तब दृष्टि साक्ष्य चिकित्सीय साक्ष्य पर अभिभावी होगी क्योंकि चिकित्सीय साक्ष्य केवल विशेषज्ञ साक्ष्य के रूप में है जबकि प्रत्यक्षदर्शी साक्षी का अभिसाक्ष्य वास्तविक घटना के बारे में बताता है।

C. **Penal Code (45 of 1860), Section 304 Part-II r/w Sections 149** - *Culpable homicide not amounting to murder - Sentence - Incident occurred in order to save the theft of motor pump and also in the heat of passion - Appellants are the bread winners of their family - Held - Jail sentence of 10 years reduced to a period of 5 year.* (Para 20)

ग. दण्ड संहिता (1860 का 45), धारा 304 भाग–II सहपठित धारा 149 – हत्या की कोटि में न आने वाला आपराधिक मानव वध – दण्डादेश – घटना मोटर पम्प

*Cr.A. No.1735/1996 (Jabalpur)

की चोरी को बचाने के लिए और आवेश की तीव्रता में घटित हुई – अपीलार्थी उनके परिवार के कमाने वाले व्यक्ति हैं – अभिनिर्धारित – 10 वर्ष का जेल दण्डादेश 5 वर्ष की कालावधि में बदला गया।

Cases referred :

AIR 1993 SC 484, AIR 1984 SC 1233.

P.R. Bhave with *Bhanu Pratap Yadav*, for the appellants.
Sushila Paliwal, G.A., for the respondent/State.

J U D G M E N T

U.C. Maheshwari, J. :– The appellants have directed this appeal being aggrieved by the judgment dated 26.9.1996 passed by the 1st Additional Sessions Judge, Sidhi in Sessions Trial No. 55/95 convicting to each of them under Sections 304 Part-II r/w 149, 147 and 340/142 of the IPC with a direction to undergo for ten years RI with fine of Rs. 1000, in default of it further six months RI in the first count while six months RI separately under both the remaining counts.

2. The facts giving rise to this appeal in short are that on dated 27.1.1995 at about 3.30 in the noon Tejmani, son of Sumer the Watchman of village Rajmilan recorded the merge intimation report at Police Station Madha contending that at about 10 o'clock in the morning, he went to the market of said village where he came to know from Bhailal Nai that Raj Kumar is caught hold raid handed in the last night by Jamuna Prasad Sahu while he was stealing the motor pump of Surajlal Sahu and thereafter he was kept in his house. On which he visited such place of Suraj Lal where nearby his house, he saw the Raj Kumar lying under the tree of jack fruit. At the same time Devi Sharan, Sarpanch came there, whom Raj Kumar confessed that he came there to commit theft. On which son of Surajlal asked him (the Watchman) taking the Raj Kumar to Police Station but physically Raj Kumar was not feeling comfortable and could not walk, inspite of it, son of Suraj Lal Sahu brought him up to the bus stand where he died. The signs of bleeding were present on the nose and ear of said Raj Kumar. As per further case the said informer could not explain the cause of the death in his intimation. In it's enquiry after preparing inquest Panchanama the dead body was sent to hospital where its postmortem was carried out, in which the death of Raj Kumar was found to be homicidal in nature and the appellants were prime facie found to be the accused for causing the alleged injuries to Raj Kumar, on which FIR was registered against them at the aforesaid Police Station on dated 28.1.1995 with respect of the offence under Section 147, 149, 342, 302 of IPC. After holding investigation they were charge sheeted for the same. After framing charges of the aforesaid offenses and recording evidence, on appreciation, the appellants instead the aforesaid offenses are held guilty under Section 304, Part - II, r/w 149, 147 and 342/149 of IPC and punished with the above mentioned punishment. The same are under challenge in this appeal.

3. Shri P.R. Bhave, learned Senior Advocate, assisted by Shri Bhanu Pratap

Yadav taking me through the evidence adduced by the prosecution and exhibited documents said that prosecution has failed to prove the alleged offence beyond reasonable doubt against any of the appellants. He further said that the story put fourth by the prosecution has not been proved by any independent source of evidence. The independent witnesses Umakaul (PW-2), Hirwa (PW-4) and Devisharan (PW-9) turned hostile at trial and have not stated anything against any of the appellants. So far witnesses Raju (PW-5) and Chhoti(PW-6), the son and the wife of the deceased are concerned, he said that in view of the postmortem report and the deposition of concerned doctor their testimonies are not reliable. They being family members of the deceased are the interested witnesses that is why their testimonies could not be a foundation for conviction of the appellants unless corroborated by any independent source of evidence. Besides this in view of the inter se inconsistency between the depositions of aforesaid witnesses Raju and Chhoti and also in view of contractions and omissions from the case diary statements they are not reliable. As per deposition of Dr. R.B. Singh who carried out, the autopsy of deceased on 28.1.1995, Raj Kumar died before 36 hours from the time of carrying out the postmortem while as per deposition of said Raju and Chhoti they saw the Raj Kumar alive lastly with the appellants on 27.1.1995. In view of medical opinion it could not be inferred that on 27.1.1995 the deceased was alive, on proper appreciation of evidence the trial court ought to have acquitted the appellants but contrary to it, they have been convicted under the wrong premises. With these submissions he firstly prayed for acquittal of the appellants. In alternative he argued that in any case if the impugned conviction of the appellants is upheld then considering the scenario of the incident in which it was happened and taking into consideration that the incident took place long back before thirteen years in the year 1995 and the appellants have already suffered some months in the judicial custody before releasing them on bail during trial and also suffered some period in jail between the period from the date of holding the conviction till passing the order for suspension of their jail sentence by this court, and they did not have any other criminal antecedents in their lives and are the only responsible persons to look after their family affairs, instead to send them again jail by adopting some lenient view their jail sentences be reduced upto the period for which they have already suffered the sentence as undergone, as stated above, and prayed to allow the appeal accordingly.

4. On the other hand, responding the aforesaid arguments Smt. Sushila Paliwal, learned Government Advocate by justifying the conviction and the sentence of the appellants said, that same are based on proper appreciation of the evidence and also in conformity with law. The same do not require any interference either for acquittal or reducing the awarded jail sentence at this stage and prayed for dismissal of this appeal.

5. Having heard and perused the record alongwith the impugned judgment.

6. It is true that the impugned conviction of the appellants is mainly based on the testimonies of Raju (PW-5) and Chhoti Bai (PW-6), the son and the wife of the deceased while some of the eye witnesses namely Uma Kaul (PW-2), Hirwa (PW-4) (the maternal Uncle of said Raju) and Devi Sharan (P-9) turned hostile and have not stated directly any incriminating thing against any of the appellants.

7. Tejmani (PW-2), the village Watchman while proving the merge intimation report stated some background of the incident. According to his deposition, on the aforesaid fateful day at about 10.30 in the morning, he came to the market of village Rajmilan where from Bhailal Nai he came to know that Jamuna, appellant no. 1 has caught hold a thief on which he went towards the house of Surajmal where he saw the Raj Kumar lying injured on the floor and was also crying. He saw the injuries on his ear, head and the legs. He further said that on asking the reason of sustaining such injuries Jamuna told him that Raj Kumar sustained the same on falling down from the roof while carrying out the theft of motor pump. Witness further stated that Raj Kumar died there in his presence. In paragraph 5 of the deposition he categorically stated that the wife of Raj Kumar also came to such place where Raj Kumar was lying. She asked him the name of the culprit who caused the injuries but Raj Kumar did not tell anything. The deposition of this witness clearly shows that after sustaining injuries Raj Kumar was lying near the house of Suraj Lal where his wife also came and asked the names of the culprits from him. His deposition also shows that Raj Kumar died only after having talk with his wife. So presence of the wife near the house of Surajlal where Raj Kumar was lying after sustaining the injuries has been established by this witness.

8. Apart the above, Devi Sharan (PW-9) although turned hostile but, however, stated that on the date of the incident at about 7 o'clock in the morning he saw the Raj Kumar alive near the house of Suraj Lal where the accused were also present. Rai Kumar told him that after consuming the large quantity of liquor by him he was caught hold by Suraj Lal and others. On asking shown the name of Uma Kaul with whom he was stealing the motor pump. Accordingly, this witness also speaks that on the date of the incident at about 7 o'clock in the morning Raj Kumar was lying alive near the house of Suraj Lal under detention of the appellants.

9. In the available circumstances, it could be inferred that looking to the status of the appellants and their family in the village the aforesaid independent witnesses either under their fear or the influence did not state the actual incident and some of them turned hostile. On the other hand from the depositions of Raju (PW-5) and the Chhoti (PW-6), son and wife of the deceased, it appears that they being from the poor family the deceased Raj Kumar was involved in the profession of begging and a day before the incident he had gone to market with his bag and "Dhapali" the musical instrument for begging but did not return upto the evening and on the next morning it was known to his wife Chhoti (PW-6) that he is lying under the tree of jack fruit near the well of Suraj Lal, on which she alongwith her

son Raju (PW-5) rushed to the aforesaid tree where she saw her husband Raj Kumar tied with a tree after tying his legs and hands and he was being beaten by the present appellants by means of fists and kicks. In such beating on giving a blow of kick by Ramdas to Rajkumar, his tongue came out. At the same time due to fear of the appellants Chhoti (PW-6) alongwith her son came back to their home from such place. Thereafter at about 11 o'clock she came to know that after killing her husband the appellants threw him in the Chhanda market. Then she alongwith her son and family members went to such market where they found Raj Kumar dead. The dead body was taken to 'home, thereafter she went to the Police Station, Manda and lodged the report while her son Raju went to inform his maternal Uncle Hirwa. Although the report as stated by this witness is not available on the record but merely on that count in the available circumstances, it would not be deemed that either merge or the FIR of the alleged incident was wrongly registered at the Police Station either at the instance of the Watchman of the village or Shri Urnesh Mishra, S.H.O. of Police Station, Manda respectively.

10. In the deposition of Chhoti, she specifically stated the names of all the appellants as culprits of the incident who caused injuries to her husband, deceased Raj Kumar. She also shown the presence of twenty to twenty five persons on the place of incident. Although she stated that Tejmani, the Watchman also gave a blow of stick on the head of Raj Kumar but in investigation in the lack of evidence such Tejmani was not charge sheeted. I am of the view that for any reasons if the evidence against Tajmani could not be collected by the investigation agency, then it does not mean that the appellants, against whom case has been found to be proved are entitled to extend any benefit on such ground. Thus, such argument is hereby failed.

11. The aforesaid testimony of the wife of the deceased is further supported by his son Raju (PW-5), who stated the similar version with some minor differences in his chief as stated by her, Although in cross examination this witness stated that when he went to inform his maternal uncle Hirwa, he did not say him the names of the culprits. Non mentioning the names of the culprits to Hirwa could not be a sufficient circumstance to disbelieve the deposition of this witness. On going through the cross examination of both the witnesses, I have not found any circumstance destroying the version stated by them in their chief or contrary to the story put fourth by the prosecution against the appellants.

12. Nowadays it is settled proposition of law that merely/the ground of near relationship of the eye witnesses with the victim or the deceased could not be a sole ground to discard their testimonies, it the same appear to be reliable in other circumstances of the case. Although court is under obligation to scrutinize such evidence carefully and cautiously.

13. In view of the aforesaid discussion, it has been established that said Raj

Kumar before 2-3 hours from his death was seen alive. It is noted that not only the direct evidence against the appellants for causing the alleged injuries to the deceased are available on record but subsequent circumstances are also proved against them. Therefore, it is held that deceased Raj Kumar was lastly seen alive with the appellants while he was being beaten by them, as stated above and later he was found dead. In such premises, the trial court has not committed any error in holding guilty the appellants for the aforesaid offences.

14. On perusing the postmortem report, Ex. P-11 and the deposition of Dr. R.B. Singh (PW-10), it is apparent that the deceased sustained various injuries on different part of his person, with the injuries on nose, left ear, right shoulder, both hands. He also sustained the fractures of ulna and shoulder bone of the right hand alongwith the fractures of 5th, 6th and 7th ribs of right side. According to the opinion of doctor the cause of death of the deceased Raj Kumar was hemorrhagic shock due to rupture of lower Lobeay of right lunge and the death is within of near about 36 hours. Looking to the nature of injuries mentioned in the postmortem report, the same were sufficient to cause death in the ordinary course of the nature. In such premises, the trial court has not committed any error in holding the death of Raj Kumar as homicidal in nature.

15. I am not impressed with the argument advanced by the appellants' counsel saying that as per deposition of Dr. R.B. Singh, (PW-10) such death took place before 36 hours from the time of carrying out the autopsy, accordingly to him such death took place in the mid night of 26th to 27th January 1995, thus, there was no question to see the Raj Kumar alive by his wife and son in the morning of 27.1.1995. Firstly in view of the specific averments in the postmortem report, Ex. P-11 stating the death within 36 hours the aforesaid version of the doctor stated in the deposition being contrary to such report is not reliable. Secondly as per the postmortem report the rigor mortis was present in the dead body and was not passed away. In such premises, it could not be held that the alleged death took place before 36 hours from the time of the postmortem. Therefore, on such ground no benefit can be extended to the appellants. Hence, the arguments of the appellants in this regard fails.

16. Apart the above, it is settled proposition of law that if there is a conflict between ocular evidence of the eye witnesses and the medical evidence, then the ocular evidence prevails over the medical evidence as the medical evidence is only as an expert evidence while the deposition of eye witnesses speaks about the real incident. Such principle was laid down by the Apex Court in the matter of *Solan ki Chimanbhai Ukabhai, Vs. State of Gujarat* reported m AIR 1983 SUPREME COURT 484 in which it was held as under:-

> 12. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence

can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.

17. In the aforesaid premises, although the medical evidence does not appear to be contrary with the ocular evidence but for the sake of argument, if it is contradictory, then the ocular evidence is reliable as held in the matter of *Punjab Singh Vs. State of Haryana,* reported in AIR 1984 SUPREME COURT 1233 as under:-

"2. We first take up the case of Punjab Singh. Miss Lily Thomas, learned counsel for the appellant contended that Punjab Singh had not participated in the assault on the deceased. P. W. 5, P. W. 6 and P. W. 8 clearly state in their evidence that Punjab. Singh gave a gandasa blow to the deceased. This evidence has been accepted by both the Courts. The only contention raised was that medical evidence is inconsistent with the direct testimony. This contention must fail for two reasons:

(i) that if direct evidence is satisfactory and reliable the same cannot be rejected on hypothetical medical evidence; and

(ii) as pointed out by Mr. K. G. Bhagat, learned Additional Solicitor General appearing for the State of Haryana, that if medical evidence is properly read, it only shows two alternative possibilities but not any inconsistency. That appears to be correct. That is the only point pressed in favour of the Punjab Singh. Miss Lily Thomas, learned counsel for the appellant contended that Punjab Singh is a young man and he is a college going student and that some consideration may be shown to him. We are satisfied that no case is made out for compassionate approach when the deceased has been done away. The appeal of Punjab Singh fails and is dismissed."

18. It appears from the impugned judgment that trial court after appreciation of evidence, not only of the prosecution but also the defence witnesses' who mainly stated regarding the defence of the alibi with respect of the respective appellants' by disbelieving such defence, and taking into consideration the scenario in which the alleged incident took place has rightly held that appellants have not committed such act with intention to cause the death of Raj Kumar and in such premises, the conviction of the appellants under Section 304-11 r/w 149 of IPC

appears to be correct. I have not found any infirmity or perversity in such approach of the trial court. Hence the same is hereby affirmed.

19. So far the conviction of the appellants with and aid of Section 149 of IPC and under Section 147 of IPC are concerned, in view of the aforesaid discussions, I have found sufficient evidence against the appellants for constituting the unlawful assembly for the aforesaid object; hence such findings of the trial court do not require any interference, thus, the same are hereby affirmed.

20. Coming to consider the prayer for reduction of the jail sentence awarded under Section 304 -II IPC by the trial court against the appellants, it is noted that taking into consideration the scenario of the incident the appellants instead the charge of Section 302/149 of IPC have been convicted for minor offence of such category under Section 304, Part -II with punishment of ten years with fine of Rs.1000. In the available circumstances, it appears that in order to save the theft of motor pump in the hit of passions the alleged incident was happened long back before fifteen years in the year 1995 and thereafter the appellants have already suffered some months in the judicial custody during pendency of the trial before releasing on bail and also from the date of the impugned judgment till passing the order for suspension of their jail sentences. They also appear to be the bread winner of their respective family. But in the available circumstances, I do not find fit to reduce their jail sentence upto the period only of some months for which they have already suffered. However, considering the over all circumstances of the case by enhancing some amount of fine with a direction to give the same to the complainant's family to subserve the justice with them, I deem fit to reduce the jail sentence of the appellants from ten years to five years by enhancing some amount of fine under Section 304, Part - II, r/w Section 149 of IPC.

21. Therefore, by allowing this appeal in part the sentences of the appellants under Section 304 r/w Section 149 are reduced from ten years to five years by enhancing the amount of fine from Rs. 1000 to Rs. 5000/- (Rs. five thousands) against each of the appellants, in default of it, the concerning appellants have to suffer further six months rigorous imprisonment while findings of the impugned judgment holding conviction and sentence to the appellants under Section 341/149 and 147 of IPC are hereby affirmed. On depositing the aforesaid fine amount by the appellants, the same be given to the wife of the deceased, Raj Kumar only and in her absence to her legal heirs after due verification. Till the aforesaid extent the impugned judgment is modified. In pursuance of it, the appellants are directed to surrender themselves before the trial court on or before 31st March 2009 for facing the remaining jail sentence, failing which the trial court is directed to take appropriate steps against them or any of them, as the case may be, to serve the remaining jail sentence.

Appeal partly allowed.

BHOLA PRASAD RAIDAS Vs. STATE OF M. P.

I.L.R. [2009] M. P., 2433
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
13 March, 2009*

BHOLA PRASAD RAIDAS ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 376 - *Rape* - *Whether conviction can be awarded in case the prosecutrix has not been examined* - *Held* - *Merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned.* (Para 13)

दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – क्या अभियोक्त्री की परीक्षा न किये जाने की दशा में दोषसिद्धि अधिनिर्णीत की जा सकती है – अभिनिर्धारित – केवल इसलिए कि पीड़ित की मृत्यु हो गयी और परिणामतः उसकी परीक्षा नही की जा सकी, अभियुक्त को दोषमुक्त करने का आधार कभी नही हो सकता यदि सम्बन्धित अभियुक्त के दाण्डिक कृत्य को साबित करने के लिए अन्यथा साक्ष्य उपलब्ध हो।

Cases referred :

AIR 1992 SC 2043, AIR 2006 SC 1267.

Manisha Shrivastava, for the appellant.
Ramesh Shukla, Dy.G.A., for the respondent/State.

J U D G M E N T

R.C. Mishra, J. :–The appellant stands convicted under Section 376(1) of the IPC and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.500/- and in default to suffer S.I. for 2 months. The corresponding judgment dated 30/9/2004 passed by Sessions Judge, Shahdol in S.T. No.131/2004 is the subject matter of challenge in this appeal.

2. Briefly stated, the prosecution version is as follows -

(i) At the relevant point of time, the appellant was residing in the immediate neighbourhood of Babbu Prasad Tiwari (PW2), father of the prosecutrix (since dead), in village Jamuna Basti, Parasi Road.

(ii) On the festive day of Maha Shivratri falling on 18/2/2004 at about 7 p.m., the prosecutrix, a girl aged about 15 years, had gone all-alone to fetch water from the Well situated near the appellant's house. Taking an undue advantage of her loneliness, the appellant committed rape on her. Immediately after return

*Cr.A. No.1840/2004 (Jabalpur)

to her house, the prosecutrix narrated the incident to her mother Pushpa Tiwari (PW3) and aunt Manisha.

(iii) Marriage of the prosecutrix was proposed to be solemnized in the coming Vaishakha month of Hindu Calendar. The appellant is a member of Scheduled Caste whereas Babbu Prasad is the Pujari of Shiva temple located in the village. In these circumstances, the prosecutrix, feeling disgusted and humiliated, committed suicide in the night intervening 19th and 20th February, 2004 by hanging herself in the Saar (cowshed) adjoining her house.

(iv) Upon information given by Koledas (PW1) as to an unnatural death of the prosecutrix, initially, a marg was registered at P.S. Bhalumara. After inquest proceedings, dead body of the prosecutrix was sent to the hospital for post mortem. Dr. S. Kori (PW9), while opining that cause of death of the prosecutrix was asphyxia due to hanging, also corroborated the factum of recent ante-mortem intercourse with her. However, she prepared two slides from vaginal smear of the prosecutrix.

(v) On 20.02.2004 only, in the light of findings of the marg inquiry, M.K. Upadhyay (PW10), the then SHO, recorded the FIR (Ex.P-13) to register a case under Section 306 of the IPC.

(vi) During investigation, Sari worn by the prosecutrix at the time of sexual act was seized. The appellant was apprehended and subjected to medical examination. Dr. O.P. Choudhary (PW11) found that the appellant was capable of performing sexual intercourse. He also prepared slides from appellant's semen. These slides along with slides prepared from the vaginal smear of the prosecutrix and her Sari were forwarded to FSL, Sagar for chemical examination. The corresponding report (Ex.P-2) indicated that all the articles found to contain seminal stains and human spermatozoa.

(vii) After due investigation, charge-sheet was presented in the Court of JMFC, Kotma who committed the case to the Court of Session for trial.

3. On being charged with the offences punishable under Sections 376(1) and 306 of the IPC, the appellant pleaded false implication due to animosity. In the examination, under Section 313 of the Code of Criminal Procedure, he further asserted that consequent to a quarrel that ensued on cutting of Bari (fencing), his mother forbade members of Babbu's family to draw water from the Well with the result that they were required to fetch water from another Well owned by one Ganesh Prasad Lohar.

4. To bring home the charges, the prosecution examined as many as 11 witnesses including the parents of the prosecutrix and the medical expert. No evidence was adduced in defence.

5. On consideration of the entire evidence on record, the learned trial Judge, for the reasons recorded in the impugned judgment, came to the conclusion that the appellant was guilty of the offence of rape only. He, accordingly, acquitted the appellant of the charge of abetment of suicide and convicted & sentenced him as indicated hereinabove. No appeal against the order of acquittal in respect of the offence under Section 306 of the IPC has been preferred by the State.

6. Legality and propriety of impugned conviction have been assailed primarily on the ground that, in absence of victim's evidence, the charge of rape was also not proved beyond a reasonable doubt. However, learned Dy. Govt. Advocate, while inviting attention to the corresponding incriminating pieces of evidence, has submitted that the conviction in question is well merited.

7. Before proceeding to appreciate the merits of the rival contentions in a proper perspective, it is necessary to first advert to the medical and forensic evidence available on record.

8. Autopsy Surgeon Dr. S. Kori (PW9) testified that sexual intercourse was performed with the prosecutrix before her death due to asphyxia caused by hanging. According to her, for confirmation of the opinion as to rape, she also prepared slides from the prosecutrix's vaginal secretion. The relevant findings recorded by Dr. S. Kori in the post-mortem report (Ex.P-12) may be reproduced as under -

> No matting found over the pubic hairs, dry blood found over post part of perineum.
>
> Hymen tear found completely circular in shape. Size 2.5 cm x 2.5 cm. Vagina both sides two lacerated wounds found. Right side - 1 cm x ½ cm x ¼ cm. Lt. Side - 1 cm x ¼ cm x ¼ cm in size.
>
> Blood found in vagina. No injury in uterus. No injury found over labia majora. Slight swelling found over labia minora".

In the light of these findings, a categorical opinion that the prosecutrix was subjected to sexual assault before her death was rightly accepted.

9. No dispute was raised as to the opinion recorded by Dr. O.P. Choudhary (PW11) in the report (Ex.P-15) that the appellant was capable of performing sexual intercourse. His assertion that he had prepared two slides from the semen of the appellant was also not challenged in the cross-examination. As pointed out already, Chemical Examiner also confirmed the factum of sexual intercourse with the prosecutrix by reporting that the slides and the Sari forwarded to FSL, Sagar contained seminal stains and human spermatozoa.

10. Coming to the other evidence on record, it may be seen that Pushpa (PW3),

mother of the prosecutrix, duly corroborated the prosecution version. According to her, - on being asked in presence of her Deorani (co-sister) about cause of delay in fetching water, the prosecutrix candidly revealed that she was ravished by the appellant only and the Sari worn by the prosecutrix was also found stained with blood and soil. It also came in her statement that on the following day, the prosecutrix neither took bath nor ate any thing and, in the next morning, her dead body was found hanging in the Saar. Pushpa was cross-examined at length but nothing beneficial to the defence could be elicited. Her evidence drew adequate support not only from the medical evidence but also from other evidence on record.

11. Corroborating testimony of his wife, Babbu Prasad (PW2) deposed that on being informed about the incident, he consulted Koledas and Ramkhelawan, who, in turn, had proposed a visit to his house to understand the things but, in the meanwhile, his daughter ended her life. Koledas (PW1) and Ramkhelawan (PW4) substantially supported Babbu's corresponding statement. It is relevant to note that no question as to the alleged dispute regarding Bari was put in the cross-examination of Babbu Prasad. Thus, the defence was not only after thought but was inherently improbable as no father would stoop so low to bring forth a false charge of rape with his minor and unmarried daughter because of some dispute of trivial nature.

12. Evidence of A.K. Pandey (PW7) relates to investigation. His assertion that he had seized a Sari containing stains from Pushpa was not challenged in the cross-examination. While corroborating the fact that dead body of the prosecutrix was found hanging in the Saar, he also described the attendant circumstances to prove suicide. He firmly refuted the suggestion that it was a case of murder. As indicated already, the medical evidence also did not support the theory of homicide.

13. Further, irrespective of the mode of prosecutrix's death, the case of the prosecution could not be thrown overboard due to non-availability of the victim for examination (*State of Karnataka vs. Mahabaleshwar Gourya Naik* AIR 1992 SC 2043 relied on). The relevant observations may be reproduced as under -

> "merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned."

14. Accordingly, learned trial Judge did not commit any illegality in holding that the other overwhelming evidence on record was sufficient to prove the charge of rape beyond a reasonable doubt. Moreover, the probability of defence was not established. The impugned conviction, therefore, deserves to be maintained.

15. While inviting attention to the fact that the appellant has already suffered a period of more than 5 years in custody, learned counsel for the appellant has submitted that interests of justice would be met if the term of the custodial sentence is reduced to the period already undergone.

16. Since, the age of the prosecutrix was more than 12 years, the offence of rape on her carried a minimum sentence of 7 years' imprisonment. Further, as explained by the Supreme Court in *Dinesh vs. State of Rajasthan* AIR 2006 SC 1267 -

> "The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence".

17. Taking into consideration the social impact of the crime and other relevant facts and circumstances of the case, I am of the view that although, the term of jail sentence deserves reduction yet, there is no adequate or special reason for imposing a sub-minimum sentence.

18. In the result, the appeal is allowed in part. The impugned conviction and consequent sentence of fine passed against the appellant are hereby affirmed. However, the term of custodial sentence is reduced from 10 years to 7 years.

Appeal partly allowed.

I.L.R. [2009] M. P., 2437
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena
21 April, 2009*

BADDU @ JHAM SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. **Penal Code (45 of 1860), Section 304-B** - *Dowry death - "Soon before her death" - Evidence indicated that the deceased was subjected to cruelty before her death - Held - What would constitute the period of "soon before the occurrence" - Depending upon the facts and circumstances of each case - There appears lack of existence of a proximate and live link between the effect of cruelty based on dowry demand and the death of deceased - Conviction & sentence u/s 304-B of the Code set-aside.* (Para 14)

*Cr.A. No.296/2005 (Jabalpur)

क. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – "उसकी मृत्यु से ठीक पूर्व" – साक्ष्य से उपदर्शित होता है कि मृतक के साथ उसकी मृत्यु के पूर्व क्रूरता की गई – अभिनिर्धारित – "घटना के ठीक पूर्व" की कालावधि कैसे गठित होगी – यह प्रत्येक मामले के तथ्यों और परिस्थितियों पर निर्भर करता है – दहेज की माँग पर आधारित क्रूरता के प्रभाव और मृतक की मृत्यु के मध्य निकटवर्ती और सीधे सम्बन्ध के अस्तित्व का आभाव प्रतीत होता है – संहिता की धारा 304–बी के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त।

B. Evidence Act (1 of 1872), Section 113-B - *Prosecution failed to show that soon before her death deceased had been subjected to cruelty or harassment for or in connection with any demand for dowry by the husband - Provisions of S. 113-B cannot be attracted.* (Para 14)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 113–बी – अभियोजन यह दर्शित करने में विफल रहा कि पति द्वारा मृतक के साथ उसकी मृत्यु के ठीक पूर्व दहेज की किसी माँग के लिए या के सम्बन्ध में क्रूरता की गई या तंग किया गया – धारा 113–बी के उपबंध आकृष्ट नही किये जा सकते।

Cases referred :

(2004) 9 SCC 476, (2004) 9 SCC 157.

Pramendra Sen, for the appellant.

R.N. Yadav, Panel Lawyer, for the respondent/State.

J U D G M E N T

Rakesh Saksena, J. :–Appellant has filed this appeal against the judgment dated 5th January, 2005 passed by the 1st Additional Sessions Judge, Jabalpur in Sessions Trial No.34/2003 convicting him under sections 498-A and 304-B of the Indian Penal Code and section 4 of the Dowry Prohibition Act and sentencing him to rigorous imprisonment for 3 years with fine of Rs. 1000/-, rigorous imprisonment for 10 years and rigorous imprisonment for 6 months with fine of Rs.7000/-, on each count, respectively.

2. According to the prosecution, Batko Bai (deceased) was married to appellant two years prior to the occurrence. Rs.30,000/- cash and other articles worth Rs.70,000/- were given in the dowry. After about 6 months of the marriage, accused persons namely Baddu @ Jham Singh (husband), Smt. Sanni Bai @ Channi Bai (mother-in-law), Giran Singh (father-in-law) and Ballu @ Bhagwat Singh (younger brother of Baddu) started harassing Batko Bai for not meeting the demand of Rs.10,000/- cash and a Suzuki motorcycle. Though Chanda Bai (PW2), mother of deceased, made endeavours to make the accused persons understand to keep her happy but all in vain. On the occasion of "Raksha Bandhan" when Nanhe Singh (PW4), brother of deceased, went to the house of accused persons for fetching his sister, they again raised the demand of Rs.10,000/- and did not permit her to go. On 16.10.2002, Batko Bai suffered burn injuries under suspicious circumstances. She was taken to Medical College, Jabalpur for the treatment but

on the same day she died of burn injuries. On the report made by the ward boy to police station, Garha, marg intimation Ex.P/1 was recorded. After inquest, dead body of Batko Bai was sent for postmortem examination. On 17.10.2002, Dr. N.N.Kukrele (PW7) and Dr.Smt.Totode performed postmortem examination and found 90% burn injuries on her body. The said injuries were ante mortem in nature. Postmortem examination report is Ex.P/8-A.

3. On 18.10.2002, Smt. Chanda Bai (PW2) submitted a written report Ex.P/2 to police. After requisite investigation, charge sheet was filed and case was committed for trial.

4. Before the trial Court, charges under sections 498-A, 304-B of the Indian Penal Code and section 4 of the Dowry Prohibition Act were framed.

5. All the accused persons abjured their guilt and pleaded false implication. They, however, did not adduce any evidence in their defence. Trial Court relying mainly on the evidence of Chanda Bai (PW2), Mullu (PW3) and Nanhe Singh (PW4) held the appellant guilty and convicted and sentenced him as mentioned above. However, finding the evidence insufficient to bring home the charge against other accused persons, acquitted them.

6. Learned counsel for the appellant contended that the evidence of Chanda Bai (PW2), Mullu Singh (PW3) and Nanhe Singh (PW4), who are respectively the mother and brothers of Batko Bai, in regard to the cruelty allegedly meted out to her is unreliable. Their evidence is discrepant and contradictory. They made several omissions and contradictions in respect of the material aspects of the prosecution story. According to him, death of Batko Bai was merely an accident while cooking on the stove. There was absolutely no reliable evidence to show that any act of cruelty was committed or any demand was made soon before her death. On the other hand, learned counsel for the State justified the judgment of the court below by adopting the reasonings of the learned trial Judge.

7. I have carefully considered the submissions made by learned counsel of both the sides and perused the impugned judgment and the evidence on record.

8. Apex Court in the case of *Vidhya Devi and another vs. State of Haryana* (2004) 9 SCC 476, observed that: -

> "6 .....It may be seen that Section 304-B IPC was mainly introduced having regard to the increasing menace of dowry deaths by burns and bodily injury or otherwise than under normal circumstances and the insufficiency of the existing provisions of law to combat them effectively and also with the laudable object of curbing the menace of dowry deaths with a firm hand. In order to attract Section 304-B IPC the court must be satisfied that: (i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal

circumstances; (ii) such death must have occurred within seven years of her marriage; (iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by the relatives of her husband; (iv) such cruelty or harassment must be for or in connection with demand for dowry; and (v) such cruelty or harassment is shown to have been meted out to the woman soon before her death meaning thereby the proximity in point of time and not too remote or stale in point of time and relevance. The legislature has also taken care to enact a statutory presumption as to dowry death by inserting Section 113-B to the Indian Evidence Act, 1872 to the extent that when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death."

In *Kaliyaperumal and another vs. State of Tamilnadu* (2004) 9 SCC 157, apex court explained the meaning of the expression "soon before" as used in section 304-B I.P.C. and section 113-B of the Evidence Act holding that:

"The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led in by the prosecution. "Soon before" is a relative term and it would depend upon circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under section 113-B. The expression "soon before her death" used in the substantive Section 304-B and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link

between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."

9. It is an admitted position in the case that Smt. Batko Bai (deceased) was married to appellant two years before her death, which took place on 16.10.2002. From the evidence of Chanda Bai (PW2), Mullu Singh (PW3) and Nanhe Singh (PW4), Sushil Ranjan Singh (PW10), S.D.O.P. and Dr.N.N.Kukrele (PW7), it has been amply established that Batko Bai had died of burn injuries in the house of appellant. Thus, it has been proved by the prosecution evidence that deceased, who was married to appellant, died in the house of her husband, otherwise then under normal circumstances within 7 years of her marriage.

10. The question that now remains to be decided is whether deceased was subjected to cruelty or harassment by the appellant for, or in connection with, any demand for dowry soon before her death.

11. Chanda Bai (PW2), mother of deceased, stated that after the marriage, Batko Bai went to her in-laws house. She came to her house thrice. Every time she told that her mother-in-law complained to her that she did not get sufficient dowry in marriage. She also told that other accused persons including the appellant asked her to bring a Suzuki motorcycle and Rs.10,000/- cash. They used to taunt and also maltreat her. When her son Nanhe Singh went to fetch Batko Bai from her husband's house, they did not send her and appellant told him that he should first bring motorcycle and Rs.10,000/-. In the month of "Sawan" her another son Mullu Singh had also gone to fetch her but they did not send her. In the same year in the month of "Kuar" she received information that Batko was burnt. In the cross-examination, this witness was confronted with the report Ex.P/2 lodged by her, wherein the facts that her son Mullu Singh went to fetch Batko Bai in the month of "Sawan" and that she was harassed by the accused persons were found missing. The fact that appellant used to beat Batko Bai was also not found mentioned in Ex.P/2.

12. Mullu Singh (PW3) stated that Batko Bai did not tell him that appellant demanded the motorcycle and Rs.10,000/- cash. According to him, she had disclosed this fact only to his mother. According to him, in the month of "Sawan" he had gone to fetch Batko Bai from her in-laws house but they did not send her and instead demanded money and the motorcycle. At that time, he did not meet Batko Bai. In para 8 of his statement, he admitted that after passing of 6 months after the marriage Batko Bai did not tell him that she had any problem in her in-laws house. In para 6, he admitted that within the period of 6 months after the marriage Batko Bai did not make any complaint about the behaviour of anybody

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in her in-laws house, on the contrary, she said that she was living happily. It is important to note that Nanhe Singh (PW4) also stated that after about 6 months of the marriage in the month of "Sawan" he had gone to the house of Batko Bai and then appellant had told him that first he should bring a motorcycle and Rs.10,000/- cash then only his sister would be sent with him. Neither Mullu Singh nor Nanhe Singh stated that they had gone together to fetch Batko Bai from her in-laws house in the month of "Sawan". This throws a cloud of suspicion on their evidence and indicates that either of them or both of them were telling a lie.

13. Prosecution evidence on the point as to when the demand was made, is discrepant. According to Chanda Bai (PW2), Batko Bai came to her house three times just after the marriage and told to her that appellant was demanding motorcycle and money, whereas according to Mullu Singh (PW3), until after 6 months Batko Bai did not make any complaint about any problem or harassment in her in-laws house and that she lived there happily.

14. From the evidence of the aforesaid three witnesses, in my opinion, it is though established that the deceased died in the house of appellant within seven years of her marriage and a demand of Suzuki motorcycle and Rs.10,000/- cash was made from her, yet it has not been satisfactorily established by the prosecution evidence that the said demand was made and on not meeting of that demand she was subjected to any cruelty "soon before" her death. It is true that no straitjacket formula can be laid down as to what would constitute the period of "soon before the occurrence", it has to be determined by the court, depending upon the facts and circumstances of each case. On closely scrutinizing the evidence of the prosecution witnesses, I am of the opinion that there appears lack of existence of a proximate and live link between the effect of cruelty based on dowry demand and the death of Batko Bai. Provision of Section 113-B of the Evidence Act also cannot be pressed into use since the prosecution has failed to show that soon before her death, deceased had been subjected to cruelty or harassment for or in connection with any demand for dowry, by the appellant.

15. Taking into consideration all the above circumstances, I am of the view that the appellant has been rightly convicted for the offence under section 498-A of the Indian Penal Code and section 4 of the Dowry Prohibition Act. Accordingly, his conviction and sentences for these offences are affirmed. However, his conviction under section 304-B of the Indian Penal Code and sentence of rigorous imprisonment for 10 years is set aside.

16. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2009] M. P., 2443
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena
30 April, 2009*

MEERA BAI & anr. ... Appellants
Vs.
STATE OF M.P. ... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Sections 195, 211 & 340 - *Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence - Enquiry - Trial Court except recording the finding that prosecution witnesses gave false evidence did not go into the question whether it was expedient that they should be prosecuted - It must be a case of deliberate falsehood and the Court must be satisfied that there is reasonable foundation for charge - Appeal allowed - Court directed to withdraw complaint.* (Paras 11 to 13)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 195, 211 व 340 – लोक सेवकों के विधिपूर्ण प्राधिकार के अवमान के लिए, लोक न्याय के विरुद्ध अपराधों के लिए और साक्ष्य में दिये गये दस्तावेजों से सम्बन्धित अपराधों के लिए अभियोजन – जाँच – विचारण न्यायालय सिवाय यह निष्कर्ष अभिलिखित करने के कि अभियोजन साक्षियों ने मिथ्या साक्ष्य दी, इस प्रश्न पर विचार नही कर सकता कि क्या यह उचित था कि उन्हें अभियोजित किया जाना चाहिए – इसे अवश्य ही जानबूझकर किये गये असत्य का मामला होना चाहिए और न्यायालय का यह समाधान अवश्य ही होना चाहिए कि आरोप के लिए युक्तियुक्त आधार है – अपील मंजूर – न्यायालय को परिवाद वापस लेने का निदेश दिया गया।

Case referred :

1987 CrLJ 1994.

K.L. Soni, for the appellants.
G.S. Thakur, Panel Lawyer, for the respondent/State.

J U D G M E N T

RAKESH SAKSENA, J. :–Appellants have filed this appeal under Section 341 of the Code of Criminal Procedure against the Criminal Complaint No. 1716/2007, filed by the Special Judge , SC/ST (Prevention of Atrocities) Act, Panna against them under Section 340 of the Code of Criminal Procedure seeking their punishment under Sections 195 and 211 of the Indian Penal Code for giving false evidence in Special Sessions Trial No. 3/2006.

2. On the report lodged by appellant Meerabai an offence under Section 376(1) of the Indian Penal Code and Section 3(2)(5) of SC/ST (Prevention of Atrocities) Act was registered against Khillu @ Khilawan and under Sections 201, 193 of

*Cr.A. No.2571/2008 (Jabalpur)

the Indian Penal Code and Section 3(2)(6) of the SC/ST (Prevention of Atrocities) Act against accused Ram Vishwash and Omprakash.

3. Complainant/appellant Meerabai lodged the report on 18.6.2002 with the police that on 16.6.2002, accused Khillu committed rape on her. In the course of investigation, Meerabai submitted an affidavit on 1.7.2002 stating that Khillu did not commit rape and she had lodged the report under acute excitement and infuriation. On the same day she submitted a similar application also to the police. On 18.7.2002 and 20th August, 2002, again she made an application to the Superintendent of Police, Panna that accused persons obtained her signatures forcibly on some blank papers by extending threats to her. On investigation by the police, the allegation of rape as well as the report lodged by her against Khillu was found false, accordingly, a final report was submitted by police.

4. On 7.10.2002, complainant Meerabai filed a private complaint in the Court of Chief Judicial Magistrate, Panna making allegation of rape against Khillu. Chief Judicial Magistrate called the report from the concerned police. Sub Divisional Officer, Police Panna submitted report that the first information report lodged by the complainant was false. Learned Magistrate recorded the statement of Meera bai wherein she made allegations against the accused persons of commission of the offence. Learned Magistrate took cognizance and after recording the evidence committed the case to the court of Special Judge for the trial.

5. Before the trial Court, in Sessions Trial No. 3/2006, Meera Bai and her husband Balare gave evidence against the accused persons. They also stated that the accused persons had obtained their signatures on the affidavits under threat. Trial court after appreciation of the evidence came to conclusion that the story of rape was concocted and false and the complainant had filed false complaint in the Court of Magistrate and acquitted the accused on 23.8.2007. Learned trial judge then filed a complaint against Meera Bai and her husband Balare under Section 340 of the Code of Criminal Procedure for getting them punished for the offence under Sections 195 and 211 of the Indian Penal Code.

6. Learned Magistrate after taking into consideration the judgment dated 23.8.2007 passed by the Special Judge in the Special Case No. 3/2006, took cognizance of the offence under Section 195 of the Indian Penal Code and summoned the appellants.

7. Aggrieved by filing of the complaint, the complainant (appellant) viz. Meera Bai and her husband Balare filed this appeal under Section 341 of the Code of Criminal Procedure.

8. Learned counsel for the appellants submitted that before filing the complaint, learned trial Judge ought to have made a preliminary enquiry as to whether a prima facie case was made out for filing a complaint against the appellants. It was necessary that this enquiry should have been made before filing the complaint.

Since no such enquiry was made by the trial Court, filing of the complaint by it was illegal. He placed reliance in the case of *Vittappan Vs. State* -1987 CRI. L.J. 1994 a judgment of the Kerala High Court.

9. Learned Panel Lawyer for the State, on the other hand, justified the filing of the compliant on the ground that the trial Court in its judgment gave clear finding that the complainant and the prosecution witness Balare had no faith in truth and they had given false evidence in the Court.

10. In the case of *Vittappan* (supra) it has been observed that:

> "8. The provisions of S.340 are more or less procedural. Before directing a complaint to be lodged the court must form an opinion on being satisfied and come to the conclusion on such satisfaction that the person charged has intentionally given false evidence and that for the eradiction of the evils of perjury and in the interest of justice it is expedient that he should be prosecuted. The opinion must be formed at the time or before delivering the judgment. It may also be advantageous to consider whether there was mens rea in giving the false evidence. If there is any doubt in the mind of the court in respect of the bona fides of the defence of the person exercise of the power may not be justified. *Bibhuti Bhusan Basu v. Corporation of Calcutta,* 1982 Cri. LJ. 909 (Cal.)"

11. On perusal of the record, I find that except recording the finding that the prosecution witnesses (appellants) gave false evidence, trial Court did not go into the question whether it was expedient that they should be prosecuted. The enquiry as contemplated in Section 340 of the Code of Criminal Procedure is an enquiry by the trial Court itself for reassuring that the offence which appears to have been committed is in or in relation to the proceeding in that Court. Recording a finding by the trial Court regarding commission of the offence is a condition precedent to the prosecution. Some times, in many cases lack of truthfulness may be noticed in the evidence of witnesses, but it would not call for their prosecution in all the cases. It must be a prima facie case of deliberate falsehood and the Court must be satisfied that there is reasonable foundation for the charge.

12. In my opinion, in the instant case, since the trial Court did not keep in mind the aforesaid aspect of the matter, filing of complaint was not called for.

13. For the foregoing reasons, I am of the opinion that the Complaint No. 1716/2007, filed by the Special Judge, SC/ST (Prevention of Atrocities) Act, Panna in the Court of Chief Judicial Magistrate, Panna deserves to be withdrawn. Accordingly, this appeal is allowed and the Special Judge is directed to withdraw the complaint.

Appeal allowed.

I.L.R. [2009] M. P., 2446
CRIMINAL REVISION
Before Mr. Justice K.S. Chauhan
9 February, 2009*

PAWAN KUMAR ... Applicant
Vs.
MAMTA & anr. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - *Maintenance - Illegitimate child - Illegitimate child born out of illicit relationship of applicant and non-applicant No.1, is entitled for maintenance till she attains majority.* (Paras 13 & 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – अधर्मज शिशु – आवेदक और अनावेदक क्रमांक 1 के अवैध सम्बन्धों से उत्पन्न अधर्मज शिशु उसके वयस्कता प्राप्त करने तक भरण–पोषण की हकदार है।

K.B. Bhatnagar, for the applicant.
Sanjay Saini, for the non-applicants.

ORDER

K.S. Chauhan, J. :–This criminal revision under Section 397/401 of the Code of Criminal Procedure has been preferred being aggrieved by the order dated 28.12.2004 passed by Additional Chief Judicial Magistrate, Mandla in M.Cr.C. No.272/03, whereby the application filed by respondents under Section 125 of Cr.P.C. has been partly allowed and the petitioner has been directed to pay the maintenance at the rate of Rs.500/- per month to respondent No.2.

2. The facts of the case are that the applicants/respondents (hereinafter referred as respondents) filed an application under Section 125 Cr.P.C. before the concerned Magistrate wherein it was averred that respondent No.1 Mamta was alone in her house on the day of incident i.e. to say in the month of Baishakh in the year 1999. The petitioner/non-applicant (hereafter referred as the petitioner) entered in her house, asked for a glass of water and when she went inside the room he closed the door and committed forcible sexual intercourse and assured to perform marriage with her. He had been committing such sexual intercourse with her at the intervals of 2-4 days and continued the same for near about 1½ years as a result of which she conceived. Thereafter he refused to marry with her. Panchayat was convened but he did not turn up in Panchayat, therefore, she lodged the report at police station Bamhani on 05.11.2000. On the basis of which a criminal case was registered against the petitioner. He was prosecuted for the offence under Section 376 of I.P.C. but ultimately he was acquitted from the charge but the Court observed in its judgment that respondent No.1 conceived as

*Cr.R. No.139/2005 (Jabalpur)

a result of the sexual intercourse by the petitioner as a result thereof respondent No.2 Swati was born and thus on the basis of her being illegitimate daughter of the petitioner the application was filed claiming maintenance for herself and for her daughter Swati. The averments were also made that the respondents are unable to maintain themselves whereas the petitioner has sufficient means to support them. Hence petitioner be directed to pay maintenance to the respondents.

3. The petitioner filed the written reply denying most of the averments made by the respondents in the application mainly contending that he has not committed sexual intercourse with respondent No.1. The respondent No.2 is not his illegitimate daughter, therefore, he is not liable to pay the maintenance to the respondents. Further it was also contended that he has no any means to earn and he is dependent upon his father, therefore, he is not capable to pay the maintenance to the respondents.

4. Both the parties adduced evidence in support of their pleadings wherein Rampyari (AW-1), Mamta (AW-2), Malilal (AW-3) and Ajay Mishra (AW-4) were examined on behalf of the respondents whereas Pawan Kumar Barmaiya (NAW-1) and Ramphal (NAW-2) were examined on behalf of the petitioner. After appreciating the evidence, the Court below rejected the application of respondent No.1 Mamta Bai on the basis that she was not married with the petitioner but allowed the application of respondent No.2 on the basis that she is the illegitimate daughter born to respondent No.1 by the sexual intercourse of the petitioner hence directed to pay the maintenance allowance at the rate Rs.500/- per month which was to be effective w.e.f. 01.01.2005. Being aggrieved by the impugned order, the instant revision has been preferred on the grounds mentioned in the memo of revision.

5. Learned counsel for the petitioner submitted that the Court below has erred in allowing the amendment application of the respondents wherein the inconsistent pleading was taken against the original pleadings. As per original pleadings the case of the respondents was that the respondent No.1 is the wedded wife of petitioner and respondent No.2 is the legitimate daughter born out of their wedlock but by the amendment which was allowed by the Court it was incorporated that respondent No.2 was born on account of the continuous illicit intercourse by petitioner with respondent No.1. The subsequent pleadings being inconsistent against the original pleadings ought not to have been allowed by the Court below but by allowing such application the Court below has committed an illegality. Learned counsel further submitted that the finding of the court below that the respondent No.1 was conceived because of the sexual intercourse by the petitioner and as a result thereof respondent No.2 was born is erroneous. The court below has guided by the observations made by the Sessions Judge in S.T. No.6/01 that respondent No.2 is the illegitimate daughter of the petitioner. Such observation does not have the binding effect. Mamta (AW-2) has admitted in para 10 of her

deposition that there was no access of the petitioner after January, 2000, therefore, the birth of respondent No.2 in the month of Baishakh in the year 2001 by respondent No.1 could never be connected with the petitioner because it was more than 280 days since then. In absence of blood group which might be useful to furnish the evidence of paternity, it can not be accepted that respondent No.2 is his illegitimate daughter. Learned counsel further submitted that the Court below has committed an illegality by relying on the birth certificate (Ex.P-1) because the date of birth of the respondent No.2 is 01.01.2001 whereas the birth certificate has been registered on 20.06.2003. Furthermore, it was not supported by medical record and such record if any has not been produced by the respondents and, therefore, the adverse inference ought to have been drawn against them under Section 114(g) of Indian Evidence Act. On the aforesaid submissions, the learned counsel argued that order passed by the Court below is erroneous which deserves to be set aside and consequently it be held that the petitioner is not liable to pay maintenance to respondent No.2.

6. On the contrary, Shri Sanjay Saini, learned counsel appearing on behalf of respondents mainly submitted that the court below has not committed any illegality in allowing the amendment application. Such amendment had not been challenged. The finding of the Sessions Court in its judgment (Ex.P-2) has also not been challenged and has become final in between the parties. The judgment is relevant under Section 41 of the Indian Evidence Act. The birth certificate (Ex.P-1) is a public document and is relevant under Section 35 of Indian Evidence Act. Learned counsel further submitted that Pawan Kumar (NAW-1) has admitted in para 5 of his deposition that in the birth certificate (Ex.P-1) the name of Pawan Kumar Barmaiya is mentioned in the column of father. Knowing this well he did not raise any objection in this regard hence the order passed by the Court below is proper and does not call for any interference in this revision.

7. The main point for consideration in this revision is that whether the Court below has committed any illegality in granting maintenance to respondent No.2?

8. No doubt, originally the respondents came with a case that respondent No.1 is the wedded wife of petitioner and respondent No.2 is their daughter. But subsequently the amendment application was moved to the effect that the petitioner committed sexual intercourse with the assurance that he will perform the marriage with respondent No.1 and continued doing the sexual intercourse for 1½ years with the interval of some days and as a result thereof she conceived and gave birth to respondent No.2. No doubt it was an inconsistent pleading which was allowed by the Court below but there is no bar to take inconsistent plea and such amendment may be allowed. No fault can be found with the order of the Court below in allowing the amendment application. Keeping in view the entire facts and circumstances of this case, the fact remains that petitioner gave assurance to respondent No.1 to marry and committed continue sexual intercourse with her.

The Sessions Court while passing the judgment (Ex.P-2) in the rape case did not find the petitioner guilty for the simple reason that the respondent No.1 was consenting party but it has been observed that respondent No.1 was conceived as a result of sexual intercourse by the petitioner as a consequence thereof the respondent No.2 was born. Though this finding is given by the Sessions Court in rape case but is relevant in between the parties. The petitioner has not challenged such finding in the proper Forum. No doubt, since the paternity of a child can be determined by the Civil Court, therefore, became final. Such finding of Sessions Court can't be brushed aside.

9. No doubt, Mamta (AW-2) has deposed in her evidence in para 10 that no cohabitation took place in between them after January, 2000. The birth of respondent No.2 is of 01.01.2001. In such circumstances, the learned counsel for the petitioner has argued that there was no probability of conceiving respondent No.1 by this petitioner. But this contention is not acceptable for the simple reason that the respondent No.1 is rustic villager and she has given the evidence that after first incident i.e. to say in the month of Baishakh, 1999 he continued to commit sexual intercourse with the respondent No.1 upto 1½ years on the interval of some days, therefore, it can not be expected from her to specify the date from which he did not commit sexual intercourse with her. It is evident that respondent No.1 lodged F.I.R. (Ex.P-9) of rape case on 05.11.2000 and at that time she was carrying the pregnancy of 7 months and respondent No.2 has taken birth on 01.01.2001, therefore, it can very well be said that respondent No.1 was conceived as a result of sexual intercourse by the petitioner and gave birth to respondent No.2.

10. Ex.P-1 is the birth certificate issued by the competent authority which is relevant under Section 35 of Indian Evidence Act. In the birth certificate Pawan Barmaiya is shown father of Swati. This Pawan Barmaiya is the petitioner in the case. He himself has admitted in para 5 of his deposition that he has not taken any objection in this regard. If he came to know that his name as father of Ku. Swati Barmaiya is entered incorrectly then he might have taken any action in this regard by initiating any legal proceeding but the same has not been done which indicates that he had no objection if his name continued as father of Swati Barmaiya. Since Ex.P-1 is a public document issued by the competent authority, it does not adversely affect the authenticity and genuineness of this document if registered after some time of taking of birth of child. On the basis of the this document it can be said that petitioner is shown as father of Ku. Swati.

11. Learned counsel for the petitioner submitted that there is no blood group to prove the paternity of the child. The Court below has rejected the application for DNA test, therefore, in absence of such evidence, it cannot be held that respondent No.2 is the illegitimate daughter of the petitioner.

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12. On perusal of record, it reveals that an application was moved on behalf of respondents under Section 45 of Indian Evidence Act for conducting the DNA test but this application was contested by the petitioner and ultimately the Court dismissed the application on 22.12.2004. It clearly indicates that the respondents tried for the DNA test to which the petitioner himself objected. Thus the respondents were bona fide on their part whereas the petitioner was not, therefore, now he cannot say that on want of such evidence the paternity of respondent No.2 cannot be proved.

13. On perusal of impugned judgment, it is evidently clear that Court below has held that respondent No.2 is the illegitimate daughter born out of the illicit relationship of respondent No.1 and petitioner. Such finding prima facie appears to be reasonable and proper.

14. It is evident that respondents are not in a position to maintain themselves. The respondent No.2 is the minor daughter. On the contrary, petitioner is having the sufficient means. It has been stated on his behalf that presently he is not earning anything. The agriculture land is in the name of his mother. His father is a teacher by occupation and the Kirana shop is also in the name of his mother, therefore, the petitioner himself is dependent and is not in a position to provide maintenance. But this argument cannot be accepted for the simple reason that he is a young able-bodied person and this is sufficient that he has means to pay maintenance. He is only son whose parents have sufficient property. Since respondent No.2 has born on account of his illegal act committed with respondent No.1-mother of Swati hence he is responsible and liable to maintain her till she attains majority. The Court below has not committed any illegality in awarding the maintenance to respondent No.2. The revision is meritless and deserves to be dismissed.

15. Consequently, this revision fails and is dismissed accordingly. The order passed by the Court below is hereby affirmed. The court below is directed to abide by the order passed on 28.12.2004.

Revision dismissed.

I.L.R. [2009] M. P., 2450
CRIMINAL REVISION
Before Mr. Justice K.S. Chauhan
13 February, 2009*

NARENDRA YADAV @ MANTOO ... Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicants

Juvenile Justice (Care and Protection of Children) Act (56 of 2000),

*Cr.R. No.724/2003 (Jabalpur)

Section 49 - *Enquiry - School certificate reveals that applicant was more than 18 years of age - Applicant in counter case disclosed his age as 19 years in deposition - Ossification test shows that applicant was 17 years & 6 months of age - Held - School record has been maintained in regular course of business - Ossification test is merely opinion of radiologist and not conclusive proof of age - Two years margin can be given in either side - Applicant was not juvenile on the date of incident - Revision dismissed.* (Paras 12 & 18)

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 49 – जाँच – विद्यालय प्रमाण पत्र प्रकट करता है कि आवेदक 18 वर्ष से अधिक उम्र का था – आवेदक ने प्रति–मामले में अभिसाक्ष्य में अपनी उम्र 19 वर्ष प्रकट की – ऑसीफिकेशन टेस्ट दर्शाता है कि आवेदक की उम्र 17 वर्ष 6 माह थी – अभिनिर्धारित – विद्यालयीन अभिलेख कारबार के नियमित अनुक्रम में रखा गया है – ऑसीफिकेशन टेस्ट मात्र रेडियोलॉजिस्ट की राय है न कि उम्र का निश्चायक सबूत – दो वर्ष का अंतर दोनों ओर दिया जा सकता है – आवेदक घटना की तारीख को किशोर नही था – पुनरीक्षण खारिज।

Cases referred :

AIR 2001 SC 2231, AIR 1982 SC 1057, 2007(I) MPWN 75, 2007(II) MPWN 77, 2003(4) MPLJ 136.

Adil Usmani, for the applicant.

Manikant Sharma, for the non-applicant No.2.

O R D E R

K.S. CHAUHAN, J. :–This criminal revision under Section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 read with Sections 397/401 of the Code of Criminal Procedure has been preferred by the petitioner being aggrieved by the impugned order dated 12/5/2003 passed by the Third Additional Sessions Judge, Bhopal in Criminal Revision No.110/2003, whereby the order dated 24/2/2003 passed by the Juvenile Court, Bhopal in Case No.498/2002 has been set aside by holding that the petitioner is more than 18 years of age.

2. This case has got its chequered history, which can be narrated as follows:-

The petitioner and other accused persons are being tried for the charges under Sections 302, 323, 324/34 of IPC in the Court of First Additional Sessions Judge, Bhopal. The case was fixed on 6/8/2002 for framing charge against the accused persons. On the same day, petitioner moved an application that he is child, hence cannot be tried by the Sessions Court. The application was allowed and it was found that the petitioner was below 18 years of age at the time of occurrence, hence direction was given to the prosecution to file charge sheet before the Juvenile Court, Bhopal. The copy of the order sheet dated 14/8/2002 passed by the First Additional Sessions Judge, Bhopal in ST No.223/2000 is Annexure A-1. Being aggrieved by this order, respondent No.2 filed Criminal Revision No.1049/2002 before this Court, which was dismissed as withdrawn on 4/12/2002 and the direction

was made to the Juvenile Court to conclude the enquiry as early as possible. The copy of the order dated 4/12/2002 is Annexure A-2. The Juvenile Court under the provisions of Section 49 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to the "Act") made an enquiry about the age of the petitioner and found that the date of birth of the petitioner is 16/11/1982, therefore he was not child on 3/5/2002 the day of occurrence and referred the matter to the Sessions Court, Bhopal. A copy of the order dated 25/9/2002 passed by the competent authority is Annexure A-3. Being aggrieved by this order, petitioner filed a criminal appeal under Section 52 of the Act in the Sessions Court, Bhopal, which was registered as Criminal Appeal No.132/2002 and the Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 allowed the appeal and remanded back the case for fresh enquiry. The copy of the order dated 18/11/2002 is Annexure A-4. Pursuant to this order, the competent authority again conducted an enquiry and after recording the statements of witnesses has come to the conclusion that petitioner was below 18 years at the time of occurrence and hence would be dealt with by Juvenile Court, Bhopal. A copy of the order dated 24/2/03 passed by the competent authority is Annexure A-5. Being aggrieved by this order, respondent No.2 filed criminal revision in the Sessions Court (in fact appeal ought to have been filed), which was allowed by the impugned order dated 12/5/2003. Against which the instant revision has been filed on the grounds mentioned in the memo of revision.

3. Shri Adil Usmani, learned counsel for the petitioner submitted that the age cannot be determined only on the basis of school certificate. As per the ossification test, the petitioner was below 18 years and even in the border line cases, the benefit should be given to the petitioner. The Court below has not properly considered the evidence of Rajjo Bai, mother of the petitioner. The Court below has also overlooked the orders dated 14/8/2002, 18/11/2002 and 24/2/2003 passed in favour of the petitioner. The order is erroneous, which deserves to be set aside and it be held that the petitioner is child under the Act.

4. On the contrary, Shri Manikant Sharma, learned counsel appearing on behalf of respondent No.2 supported the impugned order mainly contending that the petitioner has not come with clean hands from the beginning. In the application under Section 54 of Cr.P.C., it was mentioned that he is an illiterate person, but he has prosecuted his studies in school and the record thereof has been produced. According to the school record his date of birth is 16/11/1982. This record has been maintained in regular course of business. According to this record, he was more than 18 years on the day of incident. The Court below has considered the case in the proper way and has rightly come to the conclusion that the petitioner is more than 18 years. Such finding does not call for any interference in this revision.

5. Considered the rival contentions raised by learned counsel for the parties.

6. From the very beginning the stand of the petitioner was that he is an uneducated. Initially such facts were mentioned in application under Section 54 of Cr.P.C. filed by him before the First Additional Sessions Judge, Bhopal. His mother Rajjo Bai has also deposed in her evidence that her son Narendra Yadav is an un-educated. But this fact is not true in the light of evidence of Smt. Vidya Desai and R.N.Gupta.

7. Smt. Vidya Desai has deposed that on 6/7/1988 she was a teacher in Gujrati Society Middle School, Bhopal. On that day Narendra was admitted in the school. According to the scholar register Ex.P-3 his date of birth is 16/11/1982. He has studied in that school upto 8th class. Thereafter he has taken transfer certificate to study in other school. She has also deposed that she has taught this boy Narendra in 8th class. Thus, according to her evidence, which is given on the basis of scholar register Ex.P-3, the date of birth of Narendra is 16/11/1982.

8. R.N.Gupta has also stated that the certificate Ex.P-1 was issued from the office of District Education Officer, Bhopal, in which the date of birth of Narendra Yadav is mentioned as 16/11/1982. This certificate has been issued under the signature of Assistant Director, District Education Office, Bhopal. According to this certificate Ex.P-1, which was issued in the year 1997, the date of birth of Narendra Yadav was shown 16/11/1982. Thus, school record shows that his date of birth is 16/11/1982.

9. Khalil Ahmed Khan has also given the evidence that there is one counter case in between the parties, wherein the petitioner Narendra Yadav stated his age 19 years in the deposition, which was recorded on 5/3/2003. The certified copy of the statement is Ex.D-2, which is recorded in Criminal Case No.3601/2003. Thus, it is evident that petitioner Narendra Yadav in the deposition given before the JMFC, Bhopal has shown his age 19 years on 5/3/2003 the date which was before this incident. Khalil Ahmed Khan has further deposed that this petitioner along with other family members executed a sale deed on 28/7/2000 wherein his age was shown 18 years and this sale deed has been done prior to this incident. Thus the evidence adduced by the respondent No.2 prima facie goes to show that petitioner was more than 18 years on the date of incident.

10. Learned counsel for the petitioner submitted that the age cannot be determined only on the basis of school record. He has placed reliance on the decision of the Apex Court in the case of *Ram Deo Chauhan v. State of Assam,* AIR 2001 SC 2231. In this case the entry in school register showed that accused was juvenile on relevant date. However school register was not shown to be maintained by public servant in discharge of his official act or by any other competent authority in such circumstances entry in school register cannot be accepted as positive proof regarding date of birth of accused petitioner.

11. Learned counsel for the respondent No.2 has placed reliance on the decision

reported in the case of *Umesh Chandra v. State of Rajasthan,* AIR 1982 SC 1057, in which it has been held that as per Section 35 of the Indian Evidence Act, 1872, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only.

12. So far as present case is concerned, the record of the school has been maintained in the regular course of business. Moreover, the certificate Ex.P-1, which was issued by the Board also contains the same date of birth which is recorded in school record. By accepting such date of birth petitioner is more than 18 years on the relevant date.

13. Learned counsel for the petitioner has relied upon the ossification test conducted by Dr. Anjani Arora, who has opined the age of the petitioner was 17 years and 6 months on 9/8/2002 when he was examined by her. But she has also deposed that there may be an error of 6 months plus minus in both sides. Thus on this basis the contention of the learned counsel for the petitioner is that he was child.

14. On the contrary learned counsel for the respondent No.2 has submitted that the order was passed by the Juvenile Court on 24/2/2003, but the statement of Dr. Anjani Arora was recorded on 26/2/2003, therefore, this evidence cannot be made the basis of such finding.

15. In the case of *Ram Dev Chauhan* (supra) the Apex Court has held thus:

> "The Statement of the doctor is no more than an opinion. The Court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can be no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology, while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform".

16. In the case of *Sanjay V. State of MP,* 2007(1) MPWN 75, this Court has held that in determination of age of juvenile, hyper technical approach should not be adopted and in border line cases the Court should lean in favour of the juvenile.

17. In the case of *Anuj Singh V. State of MP,* 2007(2) MPWN 77, this Court has held that benefit of an error in the case of age determination by ossification test, be given to the accused. In the case of *Jugraj v. State of MP,* 2003(4)

MPLJ 136, this Court has held that on the basis of ossification test no definite opinion should be formed.

18. Determination of age on the basis of ossification test is merely the opinion of the radiologist and not conclusive proof of age. Two years margin can be given in either side. However, in the present case Dr. Anjani Arora has given margin of 6 months plus minus in both sides. If other evidence in this case is also considered, then prima facie finding of the ossification test also goes against the petitioner to hold that he was more than 18 years on the relevant date.

19. So far as evidence of Rajjo Bai mother of the petitioner is concerned, she has not given any definite evidence regarding birth of her son. She has given only general statement, which is quite insufficient to hold that her son was child. No documentary evidence such as 'Janma Patrika' Horoscope and Birth Certificate has been adduced.

20. Thus, considering all the evidence available on record, it can be said that petitioner was not child on the date of incident. There is no illegality, infirmity or perversity in the impugned order, hence it does not call for any interference. The revision is meritless and deserves to be dismissed.

21. Consequently, this revision fails and is dismissed accordingly. The order 2/7/2003 regarding stay of further proceeding in ST No.223/2000 pending in the Court of First Additional Sessions Judge, Bhopal is hereby vacated.

Revision dismissed.

I.L.R. [2009] M. P., 2455
CRIMINAL REVISION
Before Mr. Justice B.M. Gupta
2 July, 2009*

STATE OF M.P. ... Applicant
Vs.
DR. RAMLAKHAN SINGH & ors. ... Non-applicants

A. Penal Code (45 of 1860), Section 304A - *Causing death by negligence - Non-applicant No.1 put mask at the face of patient attached with cylinder containing no oxygen - Looking to the condition of patient, doctor checked and found cylinder to be empty - After some time patient died - Held - In absence of postmortem, cause of death remained unknown - Doctor cannot be held responsible for such criminal negligence.* (Para 12A)

क. दण्ड संहिता (1860 का 45), धारा 304ए – उपेक्षा द्वारा मृत्यु कारित करना – अनावेदक क्र. 1 ने मरीज के मुँह पर ऐसे सिलिण्डर से जुड़ा हुआ मास्क रखा जिसमें ऑक्सीजन नही थी – मरीज की दशा को देखते हुए चिकित्सक ने जाँच की और सिलिण्डर को खाली

*Cr.R. No.389/2008 (Gwalior)

होना पाया – कुछ समय बाद मरीज की मृत्यु हो गई – अभिनिर्धारित – शव परीक्षा के अभाव में मृत्यु का कारण अज्ञात रहा – चिकित्सक को ऐसी दाण्डिक उपेक्षा के लिए उत्तरदायी नही ठहराया जा सकता।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 227 - ***Framing of charges - If allegations in FIR are accepted in its entirety and in its face value, do not constitute offence - Where it constitutes offence but there is no legal evidence, High Court is justified in quashing criminal proceedings.*** (Para 14)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – आरोपों की विरचना – यदि एफ.आई.आर. के अभिकथन पूर्णतः और प्रत्यक्षतः स्वीकार कर लिये जाते हैं, अपराध गठित नही करते – जहाँ यह अपराध गठित करता है किन्तु कोई विधिक साक्ष्य नही है, उच्च न्यायालय दाण्डिक कार्यवाहियाँ अभिखण्डित करने में न्यायोचित।

Cases referred :

AIR 1972 SC 1150, 1999 SCC (Cri) 76, 2004(II) MPJR 63, 2005(3) Crimes 63 (SC), 1960(3) SCR 338, 1992 Supp (1) SCC 335.

R.D. Agrawal, P.P., for the applicant/State.
Amit Lahoti, for the non-applicant No.1.
R.K. Sharma, for the non-applicant No.2.
Y.S. Tomar, for the non-applicant No.3.

O R D E R

B.M.Gupta, J. :–All these three petitions are arising out of one common order, hence as agreed to by all the parties, they have been heard together and are being disposed of by this common order.

2. The facts of the case of prosecution, as per the FIR are, that during intervening night of 5th and 6th August 2001 at about 01.00 a.m., Ramlal Kaul, CJM Vidisha (hereinafter referred as the deceased) was admitted in District Hospital Vidisha. He was feeling severe pain in his chest. He was attended by his son Ravindra Kaul and Priyadarshan Sharma, JMFC. Accused Dr.Ramlakhan Singh was on duty, who attended the deceased. During treatment he put oxygen mask on the face of the deceased. Immediately after putting the mask, deceased started feeling restlessness, which was reported by Ravindra Kaul to the doctor, on which Dr.Ramlakhan Singh checked the gas cylinder and found the same as empty. Immediately he removed the mask from the face. During that time, another doctor Bansal came and after examining the deceased declared him as dead. During treatment this accused Dr.Ramlakhan Singh sent calls to call Medical Specialist Dr.Bagrecha. When he could not available, he sent further calls to accused Dr.R.S.Sharma and Dr.M.S.Rajput. It was reported from the house of Dr.Radheshyam Sharma that he is out of station. Despite efforts, Dr.Mangal Singh Rajput also could not be available and thus these two doctors did not reach the

hospital for the treatment of the deceased. Upon reporting the matter, Crime No.414/01 was registered at Police Station Kotwali Vidisha for the offence punishable under Section 304-A IPC against Dr.Ramlakhan Singh alongwith one more, whose name was not mentioned in FIR. After completing the investigation, the charge sheet was filed against Dr.Ramlakhan Singh, Dr.Mangal Singh Rajput and Dr.Radheshyam Sharma for the offence punishable under Section 304-A of IPC.

3A. Vide order dated 14th December 2006, J.M.F.C. Vidisha in Criminal Case No.949/06, has framed charge under Section 193 and 304-A of IPC against accused Ramlakhan Singh and Mangal Singh Rajput and under Section 304-A of IPC against accused Radheshyam Sharma. Feeling aggrieved, three Criminal Revisions bearing Cr.Re.No.70/07, Cr.R.No.71/07 and Cr.R.No.72/07 were filed by all these three accused persons, which have been disposed of vide one impugned order dated 12th March 2008 passed by First Additional Sessions Judge Vidisha. Vide impugned order, the charge framed against accused Ramlakhan Singh has been affirmed. Revision filed by accused Radheshyam Sharma has been allowed and he has been discharged from charge under Section 304-A of IPC. Accused Mangal Singh Rajput has been discharged under Section 304-A of IPC, however, his charge under Section 193 IPC has been affirmed.

3B. Feeling aggrieved with the impugned order, State has preferred Criminal Revision No.389/08 praying therein to affirm the order as a whole passed by learned Magistrate. M.Cr.C.No.3704/08 has been filed by petitioner Mangal Singh Rajput, assailing the order affirming charge under Section 193 of IPC against him. M.Cr.C.No.3883/08 has been filed by petitioner Ramlakhan Singh assailing the impugned order as a whole and seeking discharge from all the two charges.

4. Although, these three petitions have not been admitted for final hearing, yet as per the order dated 15th January 2009, all these petitions have been listed for final hearing, hence the parties have been heard finally in all the three petitions.

5. Shri R.D.Agrawal for the State has drawn attention at the statement of Civil Surgeon Dr.Pankaj Shukla and has submitted that he has also held the doctors responsible and also has mentioned that Dr.Mangal Singh Rajput was on duty and Dr.Radheshyam Sharma left the headquarters without permission. He has also drawn attention at the report dated 11th Sept. 2001 of Additional Collector Vidisha, who has also observed the doctor's negligence. With regard to accused Ramlakhan Singh he has submitted that before putting a mask at the nose of the deceased, he was required to check as to whether the oxygen is available in the cylinder or not.

6. Shri R.K.Sharma, learned advocate for accused Radheshyam Sharma has submitted that neither he was on emergency duty nor he was required to be available on call and he was very much in town. He did not give any treatment to the deceased and he has further submitted that when JMFC Shri Priyadarshan Sharma returned from his house, he was informed by Dr.Bansal that Shri Kaul

has died. While drawing attention at the judgments of the Apex Court in the cases of *Ambalal D.Bhatt v. The State of Gujarat* - AIR 1972 SC 1150, *Rakesh Ranjan Gupta v. State of U.P. and another* 1999 - SCC (Cri) 76 & *Dr.Smt.Beena Yadu v. State of Madhya Pradesh* – 2004 (II) MPJR 63, he has submitted that the impugned order deserves to be affirmed with regard to him.

7. Shri Amit Lahoti, learned counsel for the accused Dr.Ramlakhan Singh has referred paras 27, 29, 30 and 51 to 54 of the judgment in the case of *Jacob Mathew Vs. State of Punjab and another* - 2005 (3) Crimes 63 (SC), and has submitted that in view of this judgment, even if this accused put the mask on the nose and face of the deceased, having no oxygen, he can not be held liable. In this case there is no opinion of competent doctor that this petitioner was negligent. No postmortem of the deceased was conducted. As stated by witness Rambharose, who was the compounder at the relevant time, and also as per para 6 of the letter dated 12th November 2001, written by Civil Surgeon Vidisha to In charge Police Station Kotwali, Vidisha, it was not his duty to check the cylinder as to whether it is filled or empty. Deceased Shri Kaul died within a period of 10 minutes after admitting in the hospital. During that period best available attendance and treatment has been given by him to the deceased. In the last he has submitted that there is not an iota of evidence on record with regard to framing of the charge under Section 193 of IPC. He has drawn attention at the statement of Dr.Pankaj Shukla, para 2, who has stated that on 6th August 2001, he obtained the signatures of Dr.Mangal Singh Rajput on the register, in which his duty was assigned, as Dr.Bagrecha was on leave. In this regard, he has submitted that the incident had happened during the night of 5th and 6th August 2001. Thus, his duty was not assigned before the incident by the Civil Surgeon.

8. Shri Y.S.Tomar, learned counsel for accused Mangal Singh Rajput, has submitted that Dr.Bagrecha was very much available in the town and he was not on leave. Only evidence against this accused is that despite efforts he could not wake up and came to the hospital. There is not an iota of evidence on record with regard to the charge under Section 193 of IPC.

9. In view of the facts and submissions mentioned as above, with regard to the charge under Section 304-A of IPC, it is alleged against accused Ramlakhan Singh that when he attended the deceased, required promptness was not shown and oxygen mask put on the face of the deceased was found without oxygen in the cylinder. However, immediately after putting the mask the same was removed. With regard to accused Mangal Singh Rajput, it is alleged that his duty was to remain available on call. With regard to accused Radheshyam Sharma, he being a government doctor, was expected to available in emergency cases. But both these doctors on call could not be available during the fateful night. These allegations have been denied on behalf of all the three doctors.

10. During arguments on behalf of the State reliance has been placed at the statement of Civil Surgeon Dr.Pankaj Shukla. As per his statement, the deceased was admitted in the hospital at 1.40 a.m. on 6th August 20-01. This fact gets corroboration from another prosecution witness Rambharose Ahirwar, who was the Compounder in the hospital at the relevant time. As observed by the learned Judge in para 21, the deceased died before 1.55 a.m. in the same night. This fact also gets support from the statement of Rambharose Ahirwar, who has mentioned in his statement that he came to know at about 1.55 or 2.00 a.m. that deceased has died. In view of this, it is apparent that even as per the evidence of the prosecution, within 15 minutes deceased died in the hospital. It is an admitted fact that no postmortem was conducted. Hence cause of death is unknown. As per the statement of Civil Surgeon Dr.Pankaj Shukla, at the relevant time, one Dr.Bagrecha was posted as Medical Specialist, but he was on leave on oral request. On this oral request, he asked Dr.Mangal Singh Rajput to remain available on duty at his place, that was also an oral direction. It is also mentioned by this witness that next day on 6th August 2001, an application was received from Dr.Bagrecha and that too was not in correct proforma. Thereafter, he put a note on the register and got it signed by Dr.Rajput on 6th August 2001. It indicates that the duty of Dr.Rajput was assigned in writing after the incident. Dr.Radheshyam Sharma had left the headquarters to go to his sister's home. He has also mentioned that during the fateful night, when both the doctors were called, they could not be available and when the person, who had gone to call Dr.Rajput, came back empty hand, the deceased had already died. In view of this, the argument on behalf of Dr.Rajput appears impressive, that had he been available, he could have no chance to give treatment to the deceased. In view of all, it is crystal clear that both these doctors did not treat the deceased. With regard to the fact that the oxygen cylinder was found empty, vide afore-quoted letter dated 12th November 2001, written by the Civil Surgeon to the In charge Police Station, it appears that this was the responsibility of Ward in charge. He did not mention that for this act, the doctor was responsible. Similarly, witness Rambharose Ahirwar has mentioned that in emergency it is his duty to check the oxygen cylinder as to whether the same is filled or empty. On 5th August 2001, he checked the cylinder and found filled with oxygen. This letter and the statement of this departmental witness indicates that prima faciely it was not the duty of Dr.Ramlakhan Singh to check the cylinder.

11. Apart from the above, if the case of the prosecution including the allegations mentioned against the doctors are taken as true for the sake of arguments, in view of the following judgment of the Apex Court, it is tobe seen whether the doctors can be held responsible for criminal negligence in this case, which is required for framing the charge under Section 304-A of IPC. The landmark and the latest judgment of the apex court rendered by Hon'ble three judges Bench is the judgment of *Jacob Mathew* (supra). For ready reference, the relevant paras

of this case from paras 1,7,8,50,51,53 and 54, which includes the brief facts of that case also, are as under :-

Brief facts of *Dr.Jacob Mathew's case* are :

"1.....The gist of the information is that on 15.2.1995, the informant's father, late Jiwan Lal Sharma was admitted as a patient in a private ward of CMC Hospital, Ludhiana. On 22.2.1995 at about 11 p.m., Jiwan Lal felt difficulty in breathing. The complainant's elder brother, Vijay Sharma who was present in the room contacted the duty nurse, who in her turn called some doctor to attend to the patient. No doctor turned up for about 20 to 25 minutes. Then, Dr. Jacob Mathew, the appellant before us and Dr. Allen Joseph came to the room of the patient. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The patient tried to get up but the medical staff asked him to remain in the bed. The oxygen cylinder was found to be empty. There was no other gas cylinder available in the room. Vijay Sharma went to the adjoining room and brought a gas cylinder therefrom. However, there was no arrangement to make the gas cylinder functional and in-between, 5 to 7 minutes were wasted. By this time, another doctor came who declared that the patient was dead.....

6. The matter came up for hearing before a Bench of two learned Judges of this Court. Reliance was placed by the appellant on a recent two-judge Bench decision of this Court in *Dr.Suresh Gupta v. Govt. of NCT of Delhi and Anr.* (2004) 6 SCC 422. The Bench hearing this appeal doubted the correctness of the view taken in *Dr. Suresh Gupta's case* and vide order dated 9.9.2004 expressed the opinion that the matter called for consideration by a Bench of three Judges. This is how the case has come up for hearing before this Bench.

7. In *Dr. Suresh Gupta's case*, the patient, a young man with no history of any heart ailment, was subjected to an operation performed by Dr. Suresh Gupta for nasal deformity. The operation was neither complicated nor serious. The patient died. On investigation, the cause of death was found to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". The Bench formed an opinion that this act attributed to the doctor, even if accepted to be true, could be described as an act of negligence as there was lack of due care and precaution. But, the Court

categorically held - "for this act of negligence he may be liable in tort, his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable".

8. The referring Bench in its order dated 9.9.2004 has assigned two reasons for their disagreement with the view taken in *Dr. Suresh Gupta's case* which are as under :-2004 AIR SCW 4422 :

AIR 2004 SC 4091 : 2004 Cri LJ 3870

(1) Negligence or recklessness being 'gross' is not a requirement of Section 304A of IPC and if the view taken in *Dr. Suresh Gupta's case* is to be followed then the word 'gross' shall have to be read into Section 304A IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.

(2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence would be done to the plain and unambiguous language of Section 304A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial Court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved."

After discussion, Hon'ble Court observed as under :

"50. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case.

51. .....The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. ....."

"53. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the

prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

Case at hand

54. Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be - we express no opinion thereon) but the accused appellant cannot be proceeded against under Section 304A IPC on the parameters of Bolam's test."

(Emphasis supplied)

12.A Ultimately, Hon'ble Court allowed the appeal of Dr.Jacob Mathew in that case in the aforementioned facts mentioned in para 1 of the case. As observed by the Apex Court in the aforementioned case, with regard to the alleged negligence of Dr.Ramlakhan Singh, it may be mentioned that the facts of the case of *Dr.Jacob Mathew* (supra) are more or less similar to the present case. In the aforementioned facts, the Hon'ble Apex Court has observed that no such negligence appears on the part of the doctor, for which he can be prosecuted for the aforesaid offence of Section 304-A of IPC. In absence of postmortem of the deceased, the cause of

death is still unknown. No certificate has been obtained by the Investigating Officer of an independent and competent medical officer as it is required as per the observation of the Apex Court in paragraph 53 of the case of Dr.Jacob Mathew. In view of the observation of the apex court in the case of *Dr.Jacob Mathew* (supra), the facts being similar, the framing of charge against Dr.Ramlakhan Singh under Section 304-A IPC does not appear justified.

12.B. With regard to the rest of the two doctors; namely Dr.Mangal Singh Rajput and Dr.Radheshyam Sharma, the allegation against them mainly is that on call they could not be available at the relevant time. It is a fact that they did not treat the deceased at all. On these facts of their non availability, they can not be held responsible for such criminal negligence, on which they can be prosecuted for the offence punishable under Section 304-A of IPC. As rightly submitted on behalf of these doctors, at the most they can be dealt with in accordance with their service rules, if any lapse appear on their part.

13. With regard to another charge under Section 193 of IPC, when it is argued on behalf of the doctors that there is no evidence on record, then despite putting specific question by the court, no evidence oral or documentary has been shown on behalf of the State. On perusal of para 6 of the impugned order, it appears that with regard to accused Ramlakhan Singh it is mentioned that in bed head tickets he put some overwriting and thus committed forgery. With regard to accused Mangal Singh Rajput it is mentioned that he caused false entries by subordinate employees of the hospital in call register. None of those documents or relevant oral evidence has been highlighted by the State during the course of arguments despite asking specifically with regard to it. In Criminal Revision No.389/08 filed by the State, on perusal of order dated 18th November 2008, it appears that a direction was given by the court to file the documents, but thereafter till today no documents have been filed. It is informed that copies of charge sheet have been filed in M.Cr.C.No.3883/08 by the petitioner Ramlakhan Singh. Even from those documents, during arguments, nothing could be highlighted on behalf of the State with regard to this offence. Thus, the charge under Section 193 of IPC appears without evidence.

14. In view of the above, it appears that in the facts and circumstances of this case, in the light of the observation of the Apex Court, in the case of Dr.Jacob Mathew (supra) and as observed in para 12 hereinabove, framing of charge against them under Section 304-A of IPC is baseless. With regard to charge under Section 193 of IPC, there is lack of evidence. As observed by the Apex Court in the case of *R.P.Kapoor Vs. State of Punjab* 1960 (3) SCR 338 in para 6, the inherent power of this Court can be exercised for quashing the criminal proceedings where the allegation in the FIR at its face value and accepted in its entirety do not constitute the offence alleged and where the allegation constitutes an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly

fails to prove the charge. Thereafter, in subsequent case of the *State of Haryana and others v. Bhajan Lal and others* 1992 Supp (1) SCC 335 in para 102 (1) or (3), the Apex court has observed that where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused; or where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, the criminal proceeding can be quashed by this court while invoking the inherent power to prevent abuse of the process of any court or otherwise to secure the ends of justice.

15. In view of all, M.Cr.C.3704/08 and M.Cr.C.No.3883/08 deserve to be allowed and Cri.Rev.No.389/08 deserves to be dismissed.

16. Consequently, M.Cr.C.3704/08 and M.Cr.C.No.3883/08 are allowed and Dr.Ramlakhan Singh and Dr.Mangal Singh Rajput are discharged from the charge under Section 304-A alongwith Section 193 of IPC and Section 193 of IPC respectively and Cri.Rev.No.389/08 is dismissed being devoid of merits.

Revision dismissed.

I.L.R. [2009] M. P., 2464
ARBITRATION CASE
Before Mr. Justice Rajendra Menon
7 July, 2009*

PAWAN KUMAR JAIN ... Applicant
Vs.
UNION OF INDIA ... Non-applicant

Arbitration and Conciliation Act (26 of 1996), Section 11(6) - ***Arbitration clause - Excepted matter - By invoking clause of agreement, S.E. imposed penalty on contractor due to delay of execution of work - Request for appointment of Arbitrator - Held - Clause 2 of agreement provides a detailed process and machinery for adjudication of dispute with regard to compensation for delay in execution of contract - Arbitration clause excludes excepted matter like adjudication under clause 2 from it's purview - Dispute not arbitrable being excepted matter - Application dismissed.*** (Paras 16 to 19)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – माध्यस्थम् खण्ड – आपवादिक मामला – अनुबन्ध के खण्ड का अवलंब लेकर एस.ई. ने ठेकेदार पर कार्य के निष्पादन में विलम्ब के कारण शास्ति अधिरोपित की – मध्यस्थ की नियुक्ति के लिए प्रार्थना – अभिनिर्धारित – अनुबन्ध का खण्ड 2 संविदा के निष्पादन में विलम्ब के लिए प्रतिकर के सम्बन्ध में विवाद के न्यायनिर्णयन के लिए विस्तृत प्रक्रिया और तंत्र उपबंधित करता है – माध्यस्थम् खण्ड, खण्ड

*Arbitration Case No.34/2007 (Jabalpur)

2 के अधीन न्यायनिर्णयन के समान आपवादिक मामले को उसके कार्यक्षेत्र से अपवर्जित करता है – विवाद आपवादिक मामला होने से मध्यस्थता योग्य नही – आवेदन खारिज।

Cases referred :

(1989) 1 SCC 657, (1999) 4 SCC 491, (2002) 4 SCC 45, 2008 Arb.WLJ 639 (SC) = (2009) 2 SCC 37.

V.R. Rao with *S. Rao,* for the applicant.

Soman K. Menon, Addl. Standing Counsel, for the non-applicant.

ORDER

Rajendra Menon, J. :–As common questions are involved in both these applications and as relief claimed are also for appointing an arbitral tribunal, they are being considered and decided by this common order.

2. Applicants have invoked jurisdiction of this Court under section 11(6) of the Arbitration and Conciliation Act, 1996 (for short the 'Act') seeking referral of certain disputes to an arbitral tribunal. In MCC No.1694/2007, petitioner was granted contract for construction of Jawahar Navodaya Vidyalaya, Badwara, District Katni vide Agreement No.13/EE/JCD/2003-2004. Similarly, in Arbitration Case No.34/2007, applicant was granted contract for construction of four number Type II; eight number Type III quarters; and, Principal's residence including installation of water supply and sanitary equipments at Jawahar Navodaya Vidyalaya, Badwara, District vide Agreement No.13/EE/JCD/2003-04.

3. In the execution of these agreements certain dispute arose between the parties and, therefore, invoking Clause 25 of the Agreement i.e.. Document No.1, filed in both the cases, applicant sought for constitution of an Arbitral Tribunal. Prayer of the applicant was allowed and in each of the cases Shri R. Gopal Krishnan was appointed as sole arbitrator. The dispute was pending adjudication before the sole arbitrator, when further dispute arose between the parties with regard to imposition of compensation (i.e.. liquidated damages) for delay in execution of the contract under Clause 7. In MCC No.1694/2007, as per the terms and conditions of the contract, the work was to be completed by 10.7.2004. It could not be completed by the aforesaid time, but was completed only on 17.7.2007. According to the petitioner, the delay was attributable to the non-applicant and according to the non-applicant it is the applicant who was responsible for the delay.

4. Be that as it may, the Superintending Engineer invoking the provisions of Clause 2 of the Agreement imposed penalty by way of compensation to the tune of Rs.5,87,104=00 for the delay. The aforesaid decision, document No.3, was communicated to the applicant, who immediately protested and sought for waiver of the penalty vide document No.4 dated 31.1.2007. The same was rejected vide document No.5 on 15.2.2007, by the Superintending Engineer. As the other dispute with regard to execution of the contract was already pending, applicant sought

reference of the dispute pertaining to liquidated damages to the same arbitrator on 22.3.2007 by invoking Clause 25 of the Agreement. When the request was not acceded to, applicant has filed this application under section 11(6) of the Act.

5. In Arbitration Case No.34/2007, certain disputes arose between the parties and the dispute in this case was also referred to Shri R. Gopal Krishnan, the sole arbitrator. Initially, six disputes were referred to this arbitrator. Applicant vide document No.3 dated 12.10.2007 sought for referring two more claims. The second claim pertained to levy of compensation (i.e.. liquidated damage) amounting to Rs.5,87,104=00. The Chief Engineer vide document No.4 dated 28.11.2007 referred the first claim i.e.. Claim No.7 indicated in document No.3 to the same arbitrator, but rejected the claim with regard to levy of compensation/penalty and, therefore, applicant is before this Court seeking constitution of the arbitral Tribunal for resolution of the aforesaid dispute.

6. It is, therefore, clear that in both these applications, applicant wants constitution of arbitral tribunal for deciding the dispute pertaining to imposition of penalty/compensation (i.e.. liquidated damages) to the tune of Rs.5,87,104=00 in MCC No.1694/2007 and to the same extent in the second case also i.e.. Arbitration Case No.34/2007.

7. Shri V.R. Rao, learned Senior Advocate, submitted that as the question of imposing liquidated damages is a disputed question which has to be adjudicated by an independent authority, therefore, the matter has to be referred for arbitration.

8. Refuting the aforesaid contention and inviting attention of this Court to Clauses 25 and 2 of the Agreement in question, filed by the respondent alongwith their objection, Shri S.K. Menon, learned counsel for the respondent, argued that the question of imposition of liquidated damages and the right of the non-applicant to recover the same falls within the purview of excepted matters and, therefore, cannot be referred for arbitration. Placing reliance on judgments of the Supreme Court in the matters of *Vishwanath Sood Vs. Union of India and another,* (1989) 1 SCC 657; *Food Corporation of India Vs. Sreekanth Transport,* (1999) 4 SCC 491; and, *General Manager, Northern Railway and Another Vs. Sarvesh Chopra,* (2002) 4 SCC 45, learned counsel for the respondent submits that the dispute cannot be referred for arbitration now as the same falls in the excepted clause of the agreement.

9. Shri V.R. Rao, learned Senior Advocate, refuted the aforesaid and invited attention of this Court to a recent judgment of the Supreme Court in the case of *Bharat Sanchar Nigam Limited and Another Vs. Motorola India Pvt. Ltd.,* 2008 Arb. WLJ 639 (SC)=2009 (2) SCC 37, submitted that after considering both the judgments relied upon by respondents, the Supreme Court in the case of *BSNL* (supra) has held that the matter can be referred for arbitration.

10. On this objection of the learned Senior Advocate, learned counsel for the

respondent again referred to the agreements in question so also the agreements, which was subject matter of consideration before the Supreme Court, in the case of *BSNL* (supra), and distinguished the judgment by contending that in an agreement where a procedure and system for resolution of dispute is provided, the matter would fall in the excepted category and, therefore, beyond reference to an arbitration tribunal:

11. I have heard learned counsel for the parties and have perused the record. There is no dispute with regard to factual aspects of the matter. However, the main controversy involved in these applications pertain to the effect of 'excepted clause' available in an agreement and its consequential effect on the arbitration clause?

12. Before adverting to consider the legal question decided by the Supreme Court in the cases referred to hereinabove, it would be appropriate to take note of the clauses in the agreement in question, relevant to the dispute in hand. Under Clause 5 of the agreement, a contractor is mandated to maintain a particular progress of the work and failure to complete the work in accordance to the terms stipulated in Clause 5 entitles the department to recover an agreed compensation commonly known as the liquidated damages. Clause 2 of the agreement in this regard reads as under:

> **"Clause 2:** If the contractor fails to maintain the required progress in terms of Clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below or such smaller amount as the Superintending Engineer (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/week (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete."

That apart, the relevant provision pertaining to reference of a dispute for arbitration is contained in Clause 25, which reads as under:

> **"Clause 25:** Except where otherwise provided in the contract all questions and dispute relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders

or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

xxx xxx xxx

xxx xxx xxx"

A perusal of these two clauses would show that if a contractor fails to maintain the required progress of work in terms of Clause 5, then Clause 2 enables the Government to recover compensation or damages and the Superintending Engineer is delegated the power of adjudication and his decision is final.

13. Clause 25 pertains to reference of dispute for arbitration and the same begins with the words "Except where otherwise provided in the contract..". Similar clause and the effect of the same has been considered in the cases relied upon by learned counsel for the parties. In the case of *Vishwanath Sood* (supra), Clause 2 and Clause 25 of the agreement therein are para-materia with Clauses 2 and 25 involved in this petition. The clauses are reproduced in paragraph 4 of the said judgment and after evaluating the said clauses in paragraph 6, the contentions as advanced are reproduced and finally the conclusion drawn is contained in paragraph 9 of the judgment, which reads as under:

"9. The Division Bench has construed the expression in clause 2 in parenthesis that "the Superintending Engineer's decision shall be final" as referring only to a finality qua the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be, changed without the approval of the Government. After referring to certain judicial decisions regarding the meaning of the word "final" in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under clause 25. We are unable to accept this view. Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words "except where otherwise provided in the contract" would become meaningless. We are therefore inclined

to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation, determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator."

(Emphasis supplied)

It is, therefore, clear that in the case of *Vishwanath Sood* (supra), similar clauses have been interpreted by the Supreme Court and a decision rendered in favour of the department and if the said principle is followed, then the objection of the respondent has to be accepted.

14. The matter was again considered in the case of *Sreekanth Transport* (supra) and the meaning and import of 'excepted matters' is dealt with in the following manner in paragraphs 2 and 3:

"2. At the outset, it is pertinent to note that in the usual government contracts, the reference to which would be made immediately hereafter, there is exclusion of some matters from the purview of arbitration and a senior officer of the Department usually is given the authority and power to adjudicate the same. The clause itself records that the decision of the senior officer, being the adjudicator shall be final and binding between the parties - this is what popularly known as 'excepted matters' in a Government or governmental agencies' contract.

3. 'Excepted matters' obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator - concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the Courts have found out lacking in its jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event the claims arising within the ambit of excepted matters, question of assumption of jurisdiction of any arbitrator either with or without the intervention of the Court would not arise. The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters: what are these exceptions, however, are questions of fact and usually mentioned in the contract documents and forms part of the agreement as such there is no

ambiguity in the matter of adjudication of these specialised matters and termed in the agreement as the excepted matters."

If the aforesaid two judgments are evaluated in the backdrop of the clauses in the agreement applicable in the present case, there is, no, deviating away from the fact that the objection raised by the respondent has to be upheld.

15. However, Shri V.R. Rao, learned Senior Advocate, had referred to a subsequent judgment in the case of *BSNL* (supra) and had tried to indicate that the principles followed in the case of *Vishwanath Sood and Sreekanth Transport* (supra) have been deviated from or diluted. If the case of *BSNL* (supra) is evaluated, it would be seen that the said case was decided in accordance to the clauses available in the agreement, which was subject matter of adjudication before the Supreme Court. The relevant Clauses were 16.2 and 20.1. After analyzing the Clauses in the said case and after evaluating the principles laid down in the case of *Vishwanath Sood and Sarvesh Chopra* (supra), it has been held by the Supreme Court that the case of *Vishwanath Sood* (supra) will not apply in the case of *BSNL* (supra) due to some difference in the agreement concerned. It was held by the Supreme Court that when the agreement entered into between the parties does not provide for any adjudicatory process for deciding a question or dispute or difference, which is a condition precedent for imposing or quantification of damages, then arbitration has to be allowed. However, it is held that in case the contract itself provides for resolution, adjudication of a dispute, then the 'excepted clause' would be made applicable. In this regard, the observations and findings of the Supreme Court in paragraph 12, of *BSNL* (supra), is relevant and the same reads as under:

"12. The Learned Senior Counsel for the appellant relied on the decisions of this Court in *Vishwanath Sood Vs. UOI* (supra) and *General Manager, Northern Railway Vs. Sarvesh Chopra*, (2002) 4 SCC 45. These cases, we are afraid, will not be of any help to the appellants being distinguishable on facts and having different contractual clauses. We may note that Clause 16.2 cannot be treated as an excepted matter. This is because admittedly, it does not, provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages nor is it a no claim or no liability clause.

In *Vishwanath Sood's case* (supra), it was held by this Court that a particular claim of the Government was excluded because the Superintendent Engineer acted as the Revisional Authority to decide disputes between the two parties by an adjudicatory process, there being a complete machinery for settlement of the disputes in

the relevant clause and most importantly, the Superintendent Engineer had the discretion on consideration of the facts and circumstances including mitigating facts, held no damages was payable. Again in the case of Sarvesh Chopra, this Court had held that the claims covered by the no claims clause, i.e., where the contractor had given up the right to make a claim for breach on the part of the Government was not arbitrable in terms of the arbitration clause contained therein and Clause 63 of the General Conditions of the contract which provided for exclusion because no claim clause was excepted as such claims were simply not entertainable. In view of the discussions made hereinabove, we hold that the disputes raised by the respondents are arbitrable and not excepted from scope of arbitration."

(Emphasis supplied)

It is clear from the aforesaid judgment of the Supreme Court that in the case of *Vishwanath Sood* (supra), the Superintending Engineer was authorized to decide the dispute between the parties by an adjudicatory process and there being a complete machinery for settlement of dispute in the agreement, it was held that the matter would fall in the category of 'excepted matters' and is beyond arbitration.

16. In the present case, the agreements and the relevant clauses are para-materia, infact similar to the one in the case of *Vishwanath Sood* (supra). Clause 2 of the contract stipulates an adjudicatory process wherein the Superintending Engineer is empowered to decide the question of compensation in case of breach of Clause 5, his decision has to be in writing and is final. In the case of *Vishwanath Sood* (supra), this Clause is interpreted and if the findings recorded by the Supreme Court in paragraph 9 of the said judgment is scrutinized, it would be seen that the dispute with regard to imposition of compensation under Clause 2 would fall in the 'excepted matter' category.

17. In the present case, Clause 2 of the agreement provides a detailed process and machinery for adjudicating disputes with regard to compensation for delay in execution of the contract and Clause 25 i.e. the arbitration clause, begins with the words "Except where otherwise provided in the contract.." thereby excluding from its purview excepted matters like those contemplated under Clause 2.

18. Thus, this Court is of the considered view that the dispute now sought to be referred to an arbitral Tribunal for adjudication comes within the 'excepted clause' and in the light of the principles laid down by the Supreme Court, as indicated hereinabove, the same cannot be referred for arbitration.

19. Accordingly, finding the objection of the respondents to be sustainable, the same is upheld and holding that the dispute sought to be referred falls in a category, which is clearly termed as 'excepted matters' beyond the purview of arbitration

under Clause 25 of the agreement in question, this application is dismissed without any order so as to costs.

Application dismissed.

I.L.R. [2009] M. P., 2472

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi

12 February, 2009*

ROOP SINGH ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 446(3) & 362 - *Provision of S. 362 imposing restriction to alter or review the judgment or final order disposing of a case would not apply in passing of the order u/s 446(3) of the Code - Because the provision u/s 362 starts with a saving clause and the order under sub-section (1), (2) or (3) of S. 446 of the Code is not a final order disposing a case.* (Paras 8 & 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 446(3) व 362 – किसी मामले का निपटारा करने वाले किसी निर्णय या अंतिम आदेश को परिवर्तित करने या उसका पुनर्विलोकन करने पर रोक लगाने वाला धारा 362 का उपबंध संहिता की धारा 446(3) के अंतर्गत आदेश पारित करने में लागू नही होगा – क्योंकि धारा 362 का उपबंध व्यावृत्ति खण्ड से प्रारम्भ होता है और संहिता की धारा 446 की उपधारा (1), (2) या (3) के अन्तर्गत आदेश किसी मामले का निपटारा करने वाला अंतिम आदेश नही है।

Cases referred :

1957 MPLJ 330, 1993(II) MPWN 201, 2002(I) MPWN 181, 1983(2) Crimes 145, AIR 1954 Bom. 360, 1982(2) CrLJ 2333, 2005 CrLR (MP) 351, 2004 CrLJ 3389.

J.B. Dave, for the applicant.

Girish Desai, Dy.A.G., for the non-applicant/State.

O R D E R

The Order of the Court was delivered by **S. L. Kochar, J.** :–By this petition under section 482 of the Cr.P.C., the applicant has prayed for not recovering the amount of Rs. 30,000/-as penalty and his discharge therefrom as directed by the Division Bench of this High Court in Cri. Appeal No. 120/05 on 13.02.078.

2. The question arose for consideration in this petition is whether the Criminal Court has power under section 446(3) of the Code of Criminal Procedure (For short the Code) to remit any portion of the penalty after forfeiture of surety(surety

of the appellant) bond and call upon applicant to show cause as to why it should not be paid and if sufficient cause is not shown and penalty is not paid, the Court may start recovery proceedings for recovery of penalty amount.

3. Section 446 of the code has been embodied in Chapter XXXIII regarding provisions as to bail and bonds. The order passed under section 446 of the Code are appelable under section 449 of the Code available in the same Chapter. Under the scheme of the Code of Criminal Procedure, it appears that Chapter XXXIII is an independent Chapter regarding provisions as to bail and bonds. Sections 436 to 439 are providing procedure and power of grant of bail in bailable and non-bailable offences by Judicial Magistrate First Class up to the High Court. and from sections 440 to 450 provide provision of amount of bond and reduction thereof, bond of accused and sureties, discharge from custody, power to order sufficient bail when first taken is insufficient, discharge of sureties deposit instead of recognizance, (permission to deposit cash amount or Government Promissory Notes), provision when bond has been forfeited, cancellation of bond and bail bond, procedure in case of insolvency or death of surety and when a bond is forfeited, bond required from minor, appeal from orders under section 446 and power to direct levy of amount due of certain recognizance.

4. It would be apposite to reproduce the relevant provision of section 446 of the Code for convenience which is extracted herein-below:-

"446. **Procedure when bond has been forfeited:-**

(1) Where a bond under this code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court or any Court to which the case has subsequently been transferred, that the bond has been forfeited,

or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited,

the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

***Explanation:-** A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.*

August-09 (First)

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code:

[Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]

(3)The Court may, after recording its reasons for doing so, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under Section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under Section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.

Section 446-A:-

Cancellation of bond and bail bond:- *Without prejudice to the provisions of section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition-*

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition:

Provided that subject to any other provision of this Code

he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient."

5. Under section 446 (1) the Court has power to forfeit the bond and call upon a person bound by such bond to pay the penalty or to show cause as to why it should not be paid. Under sub-section(2) if sufficient cause is not shown and penalty is not paid, the Court may start recovery proceedings. Under subsection (3), the Court has discretion to remit any portion of penalty imposed and enforce payment in part only.

6. Now the question is after passing of the order to pay penalty and commencement of recovery proceedings whether the Court has power to remit any portion of the penalty or not. This question came for consideration before this High Court in the case of *Suwalal V/s State of M.P.*(1957 MPLJ. 330), *Roop Singh V/s State of M.P.* (1993(2) W.N,. 201), *Rajendra Prasad Jaiswal V/s State of M.P.* (2002(1) W.N. 181) and *Ram Prasad V/s State of M.P.* (1983(2) Crimes 145) and other High Courts in the cases of *Balraj S. Kapoor V/s State of Bombay* (AIR 1954 Bombay 360) and *Moolaram V/s State of Rajasthan,* (1982(2) Cri.L.J. 2333); In all these judgments of this High Court as well as Rajasthan and Bombay High Courts, it is held that Criminal Court has power to remit any portion of the penalty as per provision under section 446(3) of the Code till final realization of penalty amount. It is specifically held that forfeiture of bond and order for payment of penalty and non-payment of penalty amount and in pendency of recovery proceedings, the Court has power to remit any portion of the penalty as per provision under section 446(3) of the Code till final realization of the penalty amount.

7. Considering the aforesaid judgments, this High Court passed a detailed judgment in the case of *Shambhulal V/s State of M.P.* (2005 Cri.L.R.(M.P.) 351). and specifically held and clarified that exercise of power under section 446(3) of the Code for remitting the penalty amount by criminal Court, would not amount review of its own order and Subordinate Courts have power to remit any portion of penalty imposed and enforce payment in part only.

8. Learned counsel for the Non-applicant (State) has brought to the notice of this Court the judgment rendered by the learned Single Judge of Kerala High Court in the case of *Jamila Khade and others V/s State of Kerala* (2004Cri.L.J. 3389), wherein it is held in paras 20 and 21 that the criminal Court has no power to remit a portion of the penalty as per provision under section 446(3) of the Code and this provision can be considered by the Court at the time of passing the order under section 446(1) and (2) of the Code. Learned Single Judge has also assigned reasons for this view that a criminal Court does not have power to review or

alter its own order. This Court with respect, does not agree with this preposition. It is true that in the Code of Criminal Procedure, there is no specific power regarding review or alter its own order by the criminal Court. But when specific provision is prescribed in the Code of Criminal Procedure for review or alter a particular order by the criminal Court, then this general provision will not apply. In this regard provision under section 362 of the Code is relevant which reads thus;-

> **362 Court not to alter Judgment.- Save as otherwise provided by this Code or by any other law for the time being in force, the Court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."**

9. This provision of section 362 of the Code would not apply because it starts with a saving clause, therefore, passing of order under section 446 (3) of the Code to remit any portion of the penalty is not covered by the provision of section 362 imposing restriction to alter or review the judgment or final order disposing of a case and the provision to bail and bonds in Chapter XXXIII under the Scheme of Criminal Procedure 1973, are independent and provide separate and independent provisions to bail and bonds. It is also significant to mention here that by passing order under Sub Section 1, 2 or under Section 3 of Section 446 of the Code the case is not disposed of.

10. In view of the above, this Court has discretionary power, after recording reasons as per provision under section 446(3) of the Code to remit any portion of penalty imposed by order in para 12 of the impugned judgment. This Court is conscious about use of discretionary powers judiciously.

11. Learned counsel for the applicant has submitted that the petitioner is an old man aged 60 years having small agricultural land and earning livelihood by cultivation and also by working as labourer. He comes from tribal (Bheel) community residing in interior village of Jhabua District. He received show cause notice on 09.02.08 for his appearance and to show cause on 11.02.08. Within such a short span of time, he could not arrange finance and prepare himself to come for filing reply and in the meanwhile impugned judgment and order has been passed by this High Court on 13.02.08. It is also submitted that the applicant/surety got the appellant arrested by giving information to the police.

12. Having heard learned counsel for the parties and looking to the fact that the appellant was arrested and lodged into jail, thereafter impugned final judgment was passed on 13.02.08 acquitting the appellant Sumaliya, ends of justice would be sub served to direct the applicant/surety to deposit as penalty bond amount of Rs. 5,000/- out of bond amount of Rs. 30,000/-.

13. In the result, this petition is allowed in part and the order in para 12 passed

by the impugned judgment dated 13.02.08 in Cri. Appeal No. 120/05 is modified up to the extent indicated herein-above.. The applicant is directed to deposit Rs. 5,000/- (Five thousand rupees) on or before 30.03.09 failing which the learned Chief Judicial Magistrate, Jhabua is directed to take appropriate legal steps for recovery of amount of Rs. 5,000/-

Petition partly allowed.

I.L.R. [2009] M. P., 2477
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Mody
24 March, 2009*

AMAN KHAN ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 437(6), Unlawful Activities (Prevention) Act, 1967, Sections 3(10) & 13 - *Unless for reasons to be recorded in writing, the Magistrate otherwise directs - Application u/s 437(6) of the Code dismissed by the Magistrate - Against the order revision also dismissed - Application u/s 482 of the Code before High Court - Held - Applicant was not produced on the fixed date by the jail authority - This can hardly be a reason for rejecting the application filed u/s 437(6) of the Code - Direction to release the applicant on furnishing bail bond of Rs.50,000 with surety - Application allowed.* (Para 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437(6), विधिविरुद्ध क्रियाकलाप (निवारण) अधिनियम, 1967, धाराएँ 3(10) व 13 – जब तक ऐसे कारणों से जो लेखबद्ध किये जायेंगे मजिस्ट्रेट अन्यथा निदेशित न करे – मजिस्ट्रेट द्वारा संहिता की धारा 437(6) के अन्तर्गत आवेदन खारिज – आदेश के विरुद्ध पुनरीक्षण भी खारिज – उच्च न्यायालय के समक्ष संहिता की धारा 482 के अन्तर्गत आवेदन – अभिनिर्धारित – जेल प्राधिकारी द्वारा आवेदक को नियत तारीख को पेश नही किया गया – यह संहिता की धारा 437(6) के अन्तर्गत पेश आवेदन को नामंजूर करने का मुश्किल से एक कारण हो सकता है – प्रतिभू सहित 50,000 रुपये का जमानत बन्धपत्र पेश करने पर आवेदक को मुक्त करने का निदेश – आवेदन मंजूर।

Cases referred :
2008(I) MPWN 16, CrLR (MP) 2002.

Wajid Khan, for the applicant.
C.R. Karnik, Dy.G.A., for the non-applicant.

ORDER

N.K. Mody, J. :–Being aggrieved by the order dated 4/3/2009 passed by X ASJ, Indore in Cr.Rev.No. 163/2009 which is arising out of order dated 24/2/2009

*M.Cr.C. No.2112/2009 (Indore)

passed by JMFC, Indore in cr.case No.25927/05 whereby the application filed by the petitioner under section 437(6) Cr.P.C. was dismissed, was maintained the present petition has been filed.

2. Short facts of the case are that petitioner was prosecuted for an offence punishable under section 3,10 and 13 of Unlawful Activities(Prevention) Act 1967 and the petitioner was arrested on 19/8/2008. The application was filed by the petitioner under section 437(6) Cr.P.C., on 19/2/2009 wherein it was alleged that since more than 2 months have lapsed and no evidence has been adduced by the prosecution therefore petitioner be released forthwith. The application was contested by the State. After hearing the parties the application was dismissed against which a revision petition was filed which was also dismissed hence this petition.

3. Learned counsel for petitioner submits that after arrest of the petitioner on 19/8/2008 charges were framed against the petitioner on 30/11/2008 and for the first time case was fixed for recording of evidence on 15/12/2008. It is submitted that till 19/8/2009 no evidence was adduced by the prosecution, therefore application was filed by the petitioner on 19/2/2009. It is submitted that it is the statutory right of the petitioner to get himself released as no evidence was adduced by the petitioner within two months from the first day fixed for the evidence. Learned counsel further submits that thereafter also the case was listed for evidence on 18/3/2009. On that date also no witness of the prosecution was present and case was adjourned for 30/7/2009.

4. Learned counsel for petitioner placed reliance on a decision in the matter of *Rajendra Vs. State of M.P.*, 2008(1) MPWN 16 wherein this court has held that, "trial should be completed within a period of sixty days and since there is no special reason to hold the accused in custody after sixty days, therefore the accused be released on bail on furnishing personal bond with surety,"

5. Reliance was also placed on a decision in the matter of *Haricharan Ramteka Vs. State of Chhattisaarh*, Cr.L.R.(MP) 2002 wherein the bail application was filed by the accused under section 437(6) Cr.P.C., it was held that such bail application cannot be rejected on ground that Courts are loaded with work and as the summons have been issued and witnesses present in Court could not be examined because of non availability of expert's report.

6. On the strength of aforesaid decisions, learned counsel for petitioner submits that the petition filed by the petitioner be allowed and impugned orders passed by learned courts below be quashed and application filed under section 437(6) be allowed and petitioner be released forthwith.

7. Learned counsel for state submits that petition filed by the petitioner is not maintainable as it is a second revision petition under the garb of sec.482 Cr.P.C.. It is submitted that it is not a case where witnesses were not present before the

court below, on the contrary witness Rajmani was present on 29/12/2008 but the same could not be examined as the petitioner was not brought to the court from the custody and since the question of identification was involved, therefore the witness Rajmani who was present on that day could not be examined. It is also submitted that other two witnesses Pannalal and Bablu were also present on that day. It is submitted that in the facts and circumstances of the case the petition filed by the petitioner deserves to be dismissed.

8. From perusal of record it is evident that petitioner was prosecuted for the offence punishable under section 3,10, and 13 of the Unlawful Activities(Prevention) Act 1967.

9. Section 3 of the Act deals with declaration of an association as unlawful. Section 10 deals with penalty for being members of an unlawful association, according to which a person who is and continues to be a member of an association declared unlawful by a notification, or takes part in meeting of any such unlawful association or contributes to, or receives or solicits any contribution for the purpose of, any such unlawful association, or in any way assists; the operations of any such unlawful association, shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine.

10. Section 13 deals with punishment for unlawful activities.

11. Subsection 6 of Section 437 Cr.P.C. lays down that "If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."

12. From perusal of record it appears that only reason has been assigned by the learned courts below while rejecting the application filed by the petitioner was that petitioner was not produced on the fixed date by the jail authority. This can hardly be a reason for rejecting the application filed by the petitioner under section 437(6) Cr.P.C. It also appears that in the earlier petition filed by the petitioner which was disposed of by this court vide order dated 12/12/2008 in M.Cr.C.No.6609/08 it was specifically directed to expedite the trial and complete the same as early as possible. Inspite of direction of this court nothing was done by the prosecution to expedite the case, on the contrary case was fixed for recoding of evidence on 12/1/2009, 23/1/2009, 6/2/2009, 19/2/2009 and 4/3/2009 but any of the date, none of the witness was examined by the respondent. From perusal of certified copy of the order which has been produced by the petitioner it is evident that on 18/3/2009 also no witness of the prosecution was present. In the facts and circumstances of the case, there was no justification on the part of learned courts below in dismissing the application filed by the petitioner.

13. In view of this the petition filed by the petitioner is allowed and impugned order passed by the learned courts below is set aside with a further direction to release the petitioner forthwith on furnishing bail bond of Rs.50,000/- (Rs.Fifty thousand) with a surety of the like amount and cash security of Rs.10,000/- and subject to the condition that petitioner shall remain present on each and every date before the learned court below and shall also mark his presence after every fortnight before the concerned P.S. till the case is concluded.

C.C. as per rules.

Petition allowed.

I.L.R. [2009] M. P., 2480

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice Indrani Datta

4 August, 2009*

MITHLA KACHHI ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 439 - *Bail - Delay in trial - Delay in trial is not sole ground to grant bail - Other relevant facts and circumstances are also required to be seen - Application rejected.* (Para 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – विचारण में विलम्ब – विचारण में विलम्ब जमानत दिये जाने का एकमात्र आधार नही है – अन्य सुसंगत तथ्यों और परिस्थितियों को भी देखा जाना आवश्यक है – आवेदन नामंजूर।

Cases referred :

1991 JLJ 273, 1978 MPLJ 623, 1986 CrLJ 279, (2007) 1 SCC 242, (2007) 1 SCC 70.

S.S. Kushwah, for the applicant.

J.M. Sahani, P.L., for the non-applicant/State.

O R D E R

INDRANI DATTA, J. :—Heard.

2. Perused the case diary.

3. This is 12th bail application under Section 439 of Cr.P.C. filed by the applicant for grant of bail.

4. His first application (M.Cr.C. No.5942/06) was dismissed on 26.2.07 as withdrawn. Second application (M.Cr.C. No. 1547/07) was dismissed on 19.4.07 on merits. Third and Fourth applications (M.Cr.C. No.3440/07 and 4146/07) were dismissed on 3.7.07 and 3.8.07 on the ground that there is no change in

*M.Cr.C. No.3047/2009 (Gwalior).

circumstance. Fifth application (M.Cr.C. No.6339/07) was dismissed on 2.11.07. Sixth application (M.Cr.C. No.7198/07) was dismissed on 4.1.08 as withdrawn. Seventh apptication (M.Cr.C. No.537/08) was filed on the ground of parity with co-accused Raj Kumar Yadav which also met with dismissal on 25.1.08. Eighth application (M.Cr.C. No.1315/08) was dismissed on 18.3.08 as withdrawn. Ninth application (M.Cr.C. No.2781/08) was also dismissed on 9.5.08. Tenth application (M.Cr.C. No.5330/08) was dismissed on 14.8.09 on merit. Eleventh application (M.Cr.C. No.8224/08) was dismissed on 27.2.09 on the basis that no new ground is made out. Thus, this is 12th application for grant of bail.

5. Applicant has been arrested by the Police Station Sarsai, District Datia in connection with Crime No.36/06, registered for offence punishable under Section 364, 302, 120-B, 147, 148 IPC and Section 25/27 Arms Act.

6. It is contended on behalf of the applicant that the applicant has been falsely implicated in the case. Co-accused Surendra and Raj Kumar Yadav have already been enlarged on bail. It is further contended that in S.T. No.51/07 witness Kalicharan is examined as PW-1 and witness Modi Kushwah is examined as PW-6 and both have been declared hostile and they have not uttered anything against the present applicant and witness Modi Kushwah has not identified deceased and he has stated that dead body shown to him was not dead body of deceased Laxmi.

7. To bolster his contention, learned counsel for the applicant drew this Court's attention to a citation in the case of *Kaniram and others v. State of M.P.* reported in 1991 JLJ 273 and *Babu Mulla and others v. State of M.P.* reported in 1978 MPLJ 623 wherein accused persons were enlarged on bail on the ground of delayed trial. Furthermore, learned counsel for applicant also took this Court through a citation in the case of *Ram Sahodar v. State of Madhya Pradesh,* 1986 CRI.L.J 279 wherein, it has been held that circumstances may change and a person earlier found not entitled for bail may subsequently become so entitled for bail due to changed circumstances.

8. A close reading of the aforesaid citations reveals that the facts and circumstances of the case at hand are altogether distinguishable. The Supreme Court in the case of *Chenna Boyanna Krishna Yadav v. State of Maharashtra and another* reported in (2007)1 SCC 242 has held that though mere period of incarceration and/or likelihood of delays in conclusion of trial are not by themselves singly or conjointly enough for grant of bail. Yet both these factors may be taken into consideration while deciding the question of bail. Over and above, the Hon'ble Supreme Court in the case of *Rajesh Rjan Yadav v. CBI* reported in (2007) 1 SCC 70 has held that there is no absolute rule that a long period of incarceration by itself would entitle an undertrial to bail.

9. Considering the above canons and the fact that bench of this Court while

deciding the 10th bail application (M.Cr.C. No.5330/08) has considered statements of PW-6 Modi Kushwah and other relevant statements and thereafter rejected the application on merit there appears no change in circumstance.

10. Accordingly, the application is dismissed. However, looking tc the period of custody of the applicant the trial court is expected tc expedite the trial.

Application dismissed.
