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THE HIGH COURT OF MADHYA PRADESH

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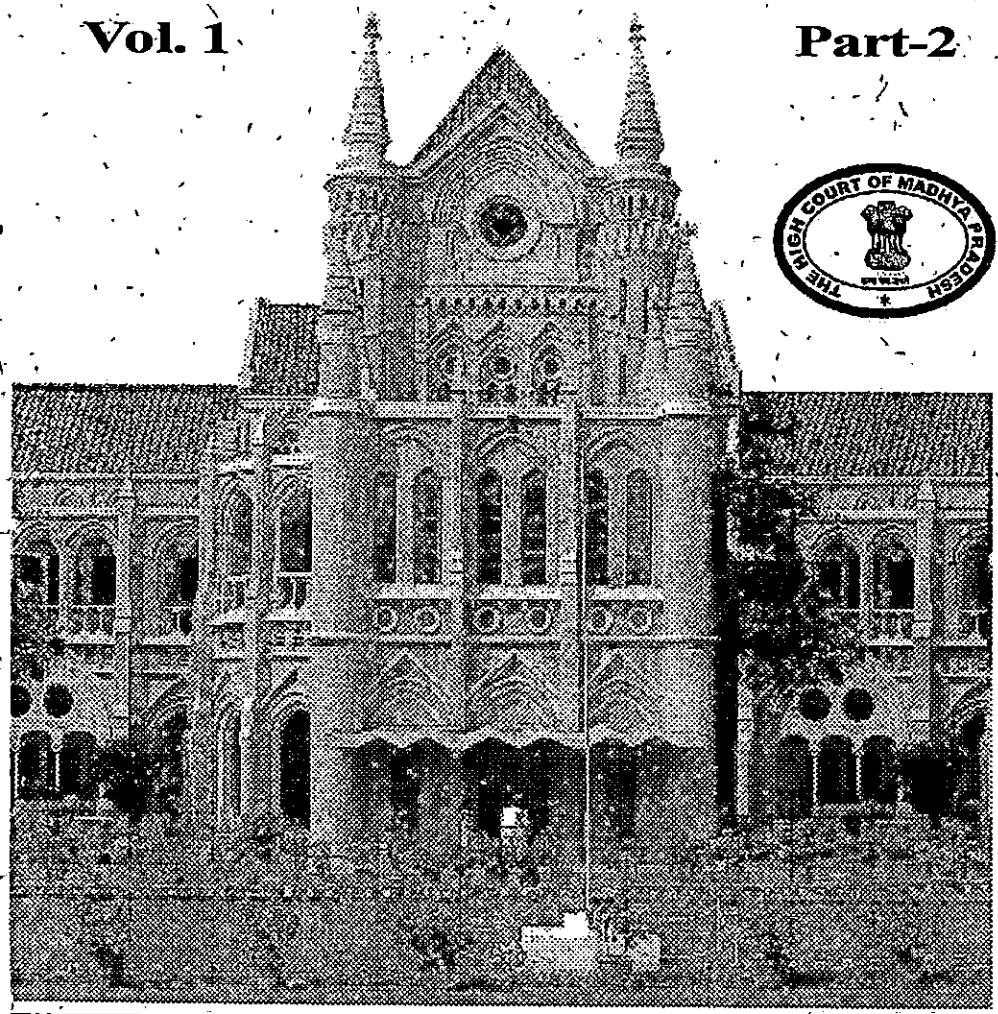

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(12)

K.S. Chauhan, J.- AYUB BEG
Vs.
STATE OF M.P.

Penal Code (45 of 1860), Section 306 - ***Abetment to commit suicide*** - *Deceased married to appellant about 1 ½ years prior to her death - Marriage was a love marriage - No question of demand of dowry and no such demand was made by appellant - Conduct of appellant was not such as was likely to drive deceased to commit suicide or to cause grave injury or endanger her life - Ingredients require to prove cruelty has not been established - Appellant acquitted - Appeal allowed.* AIR 2002 SC 1998, 1995 MPLJ 757, 2003(5) MPHT 6 (CG), 2000(2) MPHT 118 (NOC) (ref.).

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या करने का दुष्प्रेरण – मृतक का विवाह अपीलार्थी के साथ उसकी मृत्यु के लगभग 1) वर्ष पूर्व हुआ – विवाह प्रेम विवाह था – दहेज की माँग का कोई प्रश्न नही और न अपीलार्थी द्वारा ऐसी कोई माँग की गई – अपीलार्थी का आचरण ऐसा नही था जिससे मृतक को आत्महत्या करने या उसके जीवन को गंभीर क्षति या खतरा कारित करने की आशंका हो – क्रूरता साबित करने के लिए अपेक्षित तत्व साबित नही – अपीलार्थी दोषमुक्त – अपील मंजूर। AIR 2002 SC 1998, 1995 MPLJ 757, 2003(5) MPHT 6 (CG), 2000(2) MPHT 118 (NOC) (संदर्भित).

Sanjay Kumar Patel, for the appellant.

G.P. Singh, Dy.G.A., for the respondent/State.

***Cr.A. No.1054/1994 (Jabalpur), D/- 17 October, 2008.**

Short Note

(13)

B.M. Gupta, J GOVIND SINGH
Vs.
STATE OF M.P. & ors.

A. Dowry Prohibition Act (28 of 1961), Section 2 - ***Dowry - Meaning*** - *Any money, property or valuable security given, as a consideration of marriage, before, at or after the marriage would be covered by the expression 'dowry' u/s 2 of the Act.*

क. दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 2 – दहेज – अर्थ – विवाह के पूर्व, विवाह के समय या उसके बाद विवाह के प्रतिफल स्वरूप दिया गया कोई धन, सम्पत्ति या मूल्यवान प्रतिभूति अधिनियम की धारा 2 के अन्तर्गत अभिव्यक्ति 'दहेज' के अन्तर्गत आएगा।

B. Dowry Prohibition Act (28 of 1961), Section 3 & 4 - ***Penalty for giving or taking dowry and penalty for demanding dowry*** - *U/s 4 of the Act, mere demand of dowry is punishable - If such demand is satisfied, then that act will be punishable u/s 3 of the Act, which provides graver sentence.*

ख. दहेज प्रतिषेध अधिनियम (1961 का 28), धाराएँ 3 व 4 – दहेज लेने या देने के लिए शास्ति और दहेज की माँग करने के लिए शास्ति – अधिनियम की धारा 4 के अन्तर्गत दहेज की केवल माँग दण्डनीय है – यदि ऐसी माँग पूरी हो जाती है, तब वह कृत्य अधिनियम की धारा 3 के अन्तर्गत दण्डनीय होगा, जो गुरुत्तर दण्डादेश का उपबंध करती है।

Dhirendra Singh, for the applicant.
Kalpna Chauhan, P.P. for the Non-applicant No.1/State.
None, for the respondent Nos.2 & 3 despite service as observed in order dated 28-11-2008.

***Cr.R. No.837/2007 (Gwalior), D/- 2 December, 2008.**

Short Note

(14)

A.K. Patnaik, CJ & Ajit Singh, J — GURUCHARAN SINGH BEDI
Vs.
STATE OF M.P. & ors.

Constitution, Article 226 - ***Investigation by CBI cannot be ordered as a matter of routine - Missing person - Application filed for a direction that the case of applicant's missing son be directed to be investigated by the CBI - Before giving any direction court thought it proper to seek the opinion of the SP, CBI in the matter - SP, CBI in his reply stated that the Police had made extensive efforts to locate the missing boy by utilizing all resources at their command and therefore it will not be appropriate for the CBI to intervene - Held - CBI enquiry cannot be ordered as a matter of routine or merely because the party made some allegation - Court declined to order investigation by CBI - However, application dismissed with the direction that Police would continue to make sincere efforts to trace the missing son of applicant.*** (2008) 2 SCC 409 (ref.).

संविधान, अनुच्छेद 226 – सीबीआई से अन्वेषण कराने का आदेश नित्यक्रम के रूप में नही दिया जा सकता – खोया हुआ व्यक्ति – इस निदेश के लिए आवेदन पेश किया गया कि आवेदक के खोये हुए पुत्र के मामले में सीबीआई द्वारा अन्वेषण का निदेश दिया जावे – कोई निदेश देने के पूर्व न्यायालय ने यह उचित समझा कि मामले में एसपी, सीबीआई की राय ली जाए – एसपी, सीबीआई ने अपने जवाब में कथन किया कि पुलिस ने उनके नियंत्रण के सभी साधनों का प्रयोग कर खोये हुए बालक का पता लगाने के लिए व्यापक प्रयास किये थे और इसलिए सीबीआई के लिए यह उचित नही होगा कि हस्तक्षेप करे – अभिनिर्धारित – सीबीआई जाँच का आदेश, नित्यक्रम के रूप में या केवल इस कारण कि पक्षकार ने कुछ आरोप लगाए हैं, नही दिया जा सकता – न्यायालय ने सीबीआई द्वारा अन्वेषण करने का आदेश देने से इंकार किया – तथापि आवेदन इस निदेश के साथ खारिज किया गया कि पुलिस आवेदक के खोये हुए पुत्र को खोजने के लिए गंभीर प्रयास करना जारी रखे। (2008) 2 SCC 409 (संदर्भित).

Gurucharan Singh Bedi, applicant in person.
Vijay K. Shukla, Dy.A.G., for the non-applicants.
Jayant Neekhra, for the non-applicant/CBI.

***M.C.C. No.160/2005 (Jabalpur), D/- 3 November, 2008.**

NOTES OF CASES SECTION

Short Note

(15)

K.S. Chauhan, J

KAVINDRA NATH THAKUR

Vs.

STATE OF M.P.

A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) - *Complainant and accused were unaware with each other before the incident - Caste of complainant was not known to accused - Incident took place at the house of accused - It was not in public view - Essential ingredients to prove offence u/s 3(1)(x) that insult or intimidation done with intent to humiliate a member of particular community not proved - Conviction and sentence set-aside - Appeal allowed.* 2003(1) ALD (Cri) 252 (AP), 2004 CrLJ 503 (AP) (ref.).

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) – परिवादी और अभियुक्त घटना से पूर्व एक दूसरे से अपरिचित थे – अभियुक्त को परिवादी की जाति ज्ञात नही थी – घटना अभियुक्त के घर पर हुई – वह लोक दृष्टिगोचर स्थान नही था – धारा 3(1)(ग) के अधीन अपराध को साबित करने के लिए आवश्यक तत्व, कि समुदाय विशेष के किसी सदस्य को नीचा दिखाने के आशय से अपमानित या अभित्रस्त किया, साबित नही – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर। 2003(1) ALD (Cri) 252 (AP), 2004 CrLJ 503 (AP) (संदर्भित).

B. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - *Delayed FIR - The report was lodged after due deliberation and consultation with the office employees and the officer himself - Officer on the same day was apprised but he didn't send complainant to lodge the report at outpost - Report exaggerated and does not contain the true facts of the case - The report is delayed and no plausible explanation has been offered on behalf of the prosecution to condone such delay - FIR cannot be relied on.*

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – विलम्बित एफआईआर – कार्यालयीन कर्मचारियों और स्वयं अधिकारी के साथ सम्यक् विचार विमर्श और परामर्श के बाद रिपोर्ट दर्ज करायी गई – अधिकारी को उसी दिन सूचना दी गई किन्तु उसने परिवादी को चौकी में रिपोर्ट दर्ज कराने के लिए नही भेजा – रिपोर्ट अतिश्योक्तिपूर्ण और मामले के सही तथ्य उसमें अन्तर्विष्ट नही – रिपोर्ट विलम्बित और ऐसे विलम्ब को क्षमा करने के लिए अभियोजन की ओर से कोई तर्कसंगत स्पष्टीकरण प्रस्तुत नही किया गया – एफआईआर पर विश्वास नही किया जा सकता।

S.K. Verma, for the appellant.

G.P. Singh, Dy.G.A., for the respondent/State.

***Cr.A. No.1062/1994 (Jabalpur), D/- 14 October, 2008.**

Short Note

(16)

Shantanu Kemkar, J

NARENDRA
Vs.
STATE OF M.P. & anr.

Service Law - *Transfer - Arbitrary exercise of power - Petitioner was transferred within 3 months and transfer order of resp. No.2 was cancelled who was working as in-charge of the post since last 3 years - Held - Department failed to explain any reason or administrative exigency to cancel transfer order of resp. No.2 and transfer of petitioner within 3 months of joining - Petitioner transferred to accommodate resp. No.2 - Order is arbitrary exercise of power - Transfer order of petitioner quashed.*

It is not in dispute that the petitioner had joined as Chief Municipal Officer Rau on 09.01.08 pursuant to the order dt. 07.01.08. It is also not in dispute that prior to his posting the second respondent who is a Sanitary Inspector was working as Incharge of the said post. It is also not in dispute that the second respondent is posted at Rau since 2004. The respondents have not stated as to under what circumstances, the transfer order dt. 29.11.07 of the second respondent from Rau to Dhamnod has been cancelled. When the petitioner was already posted only on 07.01.08 at Rau in the capacity of Chief Municipal Officer, there was no occasion to post the second respondent as Incharge Chief Municipal Officer at Rau. If there was any administrative exigency or any other just ground for cancellation of order of transfer of the second respondent to Dhamnod the same could have been disclosed in the order dt. 18.06.08 or even could have been disclosed in the return, however that has not been done.

सेवा विधि – स्थानांतरण – शक्ति का मनमाना प्रयोग – याची को 3 माह के भीतर स्थानांतरित किया गया और प्रत्यर्थी क्र. 2 का स्थानांतरण आदेश रद्द किया गया जो पिछले 3 वर्ष से पद पर प्रभारी के रूप में कार्य कर रहा था – अभिनिर्धारित – विभाग प्रत्यर्थी क्र. 2 का स्थानांतरण आदेश रद्द करने और याची को पदग्रहण करने के 3 माह के भीतर स्थानांतरित करने का कोई कारण या अनिवार्य प्रशासनिक आवश्यकता स्पष्ट करने में असफल – प्रत्यर्थी क्र. 2 को सुविधा देने के लिए याची को स्थानांतरित किया गया – आदेश शक्ति का मनमाना प्रयोग है – याची का स्थानांतरण आदेश अभिखण्डित।

A.K. Sethi with Rahul Sethi, for the petitioner.

Sanjay Joshi, D.G.A., for the respondent No.1/State.

L.R. Bhatnagar, for the respondent No.2.

***W.P. (S) No.3786/2008 (Indore), D/- 24 November, 2008.**

Short Note

(17)

S.R. Waghmare, J

NATIONAL INSURANCE CO. LTD.

Vs.

MATHURABAI

Motor Vehicles Act (59 of 1988), Section 147 - ***Breach of policy - Deceased was a passenger for fare travelling in a tractor - As per policy condition, tractor can be used for agricultural purposes - Held - Breach of policy - Insurance Company exonerated - However, Insurance Company directed to pay compensation and recover the amount from owner.*** 2004 ACJ 1909, 2007 ACJ 1909, 1997(2) MPLJ, 2003 ACJ 1 (SC) (ref.)

मोटर यान अधिनियम (1988 का 59), धारा 147 – पॉलिसी भंग – मृतक ट्रेक्टर में किराये से यात्रा कर रहा था – पॉलिसी शर्त के अनुसार ट्रेक्टर केवल कृषि प्रयोजनों के लिए प्रयुक्त किया जा सकता था – अभिनिर्धारित – पॉलिसी भंग – बीमा कम्पनी को विमुक्त किया गया – तथापि, बीमा कम्पनी को प्रतिकर अदा करने और वाहन स्वामी से राशि वसूल करने के निदेश दिये गये। 2004 ACJ 1909, 2007 ACJ 1909, 1997(2) MPLJ, 2003 ACJ 1 (SC) (संदर्भित).

S.V. Dandwate, for the appellant / National Insuruance Co. Ltd.

K.K. Tiwari on behalf of *Manoj Saxena,* for the respondents.

***M.A. No.708/2003 (Indore), D/- 2 September, 2008.**

Short Note

(18)

S.K. Gangele, J

VISHAL SINGH

Vs.

SHAILENDRA SINGH & ors.

Motor Vehicles Act (59 of 1988), Section 166 - ***Compensation enhanced - Claimant aged 35 years was a truck driver met in accident suffered injuries in right leg - Five operations were performed - Due to unsuccessful operation there was gangrene in right leg - Ultimately right leg above knee level amputated - Tribunal awarded a total compensation of Rs.3 lacs - Held - As per the second schedule u/s 163-A of the Act there is permanent disability results from the total injuries - Total loss of earning capacity - Loss of income Rs.24,000 p.a. multiplier 16 will be applicable then total loss of income comes Rs.3,84,000 plus Rs.36,000 for loss of income of one year during treatment period plus Rs.50,000 for medical expenses plus Rs.50,000 for pain and suffering - Total compensation of Rs.5,20,000 minus Rs.3 lac already awarded by tribunal - Claimant will get the enhanced compensation of Rs.2,20,000 with interest @ 8% p.a. from the date of filing of claim application.*** 1976 AC 141, 2003 ACJ 1181, 2008 ACJ 9, 2008 ACJ 2865, AIR 2004 SC 4269 (ref.)

मोटर यान अधिनियम (1988 का 59), धारा 166 – प्रतिकर बढ़ाना – 35 वर्ष उम्र का दावेदार ट्रक ड्रायवर था जिसे दुर्घटना में दांए पैर में क्षतियाँ आईं – पाँच बार शल्यक्रिया की गई – असफल शल्यक्रिया के कारण उसके दांए पैर में गेंगरीन हो गया – अंतिमतः दांए पैर को घुटने के ऊपर तक काटा गया – अधिकरण ने कुल 3 लाख रुपये प्रतिकर अधिनिर्णीत किया – अभिनिर्धारित – अधिनियम की धारा 163–ए के अन्तर्गत द्वितीय अनुसूची के अनुसार सम्पूर्ण क्षतियों का परिणाम स्थायी निःशक्तता है – उपार्जन क्षमता की सम्पूर्ण हानि – आय की हानि 24,000 रुपये प्रतिवर्ष का 16 का गुणक लागू होगा तब आय की कुल हानि 3,84,000 रुपये आयी और इलाज की अवधि के दौरान एक वर्ष की आय की हानि के लिए 36,000 रुपये तथा चिकित्सीय व्यय के लिए 50,000 रुपये एवं कष्ट और पीड़ा के लिए 50,000 रुपये – कुल प्रतिकर 5,20,000 रुपये जिसमें से अधिकरण द्वारा पूर्व में अधिनिर्णीत 3 लाख रुपये घटाये गए – दावेदार बढ़ा हुआ प्रतिकर 2,20,000 रुपये, दावा आवेदन पेश करने की तारीख से 8 प्रतिशत वार्षिक ब्याज सहित प्राप्त करेगा। 1976 AC 141, 2003 ACJ 1181, 2008 ACJ 9, 2008 ACJ 2865, AIR 2004 SC 4269 (संदर्भित).

Mahesh Haswani, for the appellant.
None, for the respondent No.1.
O.P. Mathur, for the respondent No.2.
B.N. Malhotra, for the respondent No.3/The New India Insurance Co. Ltd.

***M.A. No.147/2004 (Gwalior), D/- 21 January, 2009.**

Short Note
(19)

W.A. Shah, J

ZAIRUS MASTER
Vs.
STATE OF M.P. & ors.

Criminal Procedure Code, 1973 (2 of 1974), Sections 362 & 482 - *Application for recalling order of dismissal of criminal revision directed against framing of charges - Held - Court can not interfere with judgment or final order after it is signed, except to correct clerical or arithmetic error - Recalling of final order not permissible - Application dismissed.* AIR 1987 Raj 83, 2008(1) MPLJ (Cri) 733 (SC) = ILR [2008] MP 424 (ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 362 व 482 – आरोप विरचित किये जाने के विरुद्ध निर्दिष्ट दाण्डिक पुनरीक्षण की खारिजी के आदेश को वापस लेने का आवेदन – अभिनिर्धारित – न्यायालय निर्णय या अंतिम आदेश में, उसके हस्ताक्षरित हो जाने के बाद, लिपिकीय या अंकगणितीय त्रुटि को ठीक करने के सिवाय हस्तक्षेप नही कर सकता – अंतिम आदेश को वापस लेना अनुज्ञेय नही – आवेदन खारिज। AIR 1987 Raj 83, 2008(1) MPLJ (Cri) 733 (SC) = ILR [2008] MP 424 (संदर्भित).

Amit Agrawal, for the applicant.
Manish Joshi, Panel Lawyer, for the non-applicant/State.

***M.Cr.C. No.1274/2007 (Indore), D/- 5 September, 2008.**

MADAN Vs. STATE OF M.P.

I.L.R. [2009] M. P., 327

SUPREME COURT OF INDIA

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

11 July, 2008*

MADAN & ors. ... Appellants

Vs.

STATE OF M.P. ... Respondent

A. **Penal Code (45 of 1860), Section 96** - *Right of private defence - A plea of right of private defence cannot be based on surmises and speculations - While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor - In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting.* (Para 6)

क. दण्ड संहिता (1860 का 45), धारा 96 – प्राइवेट प्रतिरक्षा का अधिकार – प्राइवेट प्रतिरक्षा के अधिकार का अभिवचन अनुमान और अन्दाज पर आधारित नही हो सकता – यह विचार करते समय कि क्या किसी अभियुक्त को प्राइवेट प्रतिरक्षा का अधिकार उपलब्ध है, यह सुसंगत नही है कि क्या उसे आक्रमणकर्ता को गम्भीर और घातक क्षति पहुँचाने का अवसर था – यह निष्कर्ष निकालने के लिए कि क्या प्राइवेट प्रतिरक्षा का अधिकार किसी अभियुक्त को उपलब्ध है सम्पूर्ण घटना की जाँच सावधानी से करनी चाहिए और उसे उचित विन्यास में देखी जानी चाहिए।

B. **Penal Code (45 of 1860), Section 97** - *Deals with the subject matter of right of private defence - The plea of right comprises the body or property (i) of the person exercising the right, or (ii) of any other person, and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property.* (Para 6)

ख. दण्ड संहिता (1860 का 45), धारा 97 – प्राइवेट प्रतिरक्षा के अधिकार की विषयवस्तु पर कार्यवाही करना – प्राइवेट प्रतिरक्षा के अधिकार के अभिवचन में शरीर या सम्पत्ति का अधिकार समाविष्ट है (i) प्राइवेट प्रतिरक्षा के अधिकार का प्रयोग करने वाले व्यक्ति को उसके शरीर या सम्पत्ति की प्रतिरक्षा का अधिकार है, या (ii) अन्य किसी व्यक्ति के शरीर या अन्य व्यक्ति की सम्पत्ति के सम्बन्ध में चोरी, लूट, रिष्टि या आपराधिक अतिचार के अपराधों में और ऐसे अपराधों के प्रयत्नों के मामले में प्राइवेट प्रतिरक्षा के अधिकार का प्रयोग किया जा सकता है।

C. **Penal Code (45 of 1860), Section 99** - *Section 99 lays down the limits of right of private defence - The right given u/ss 96 to 98 and 100 to 106 is controlled by Section 99.* (Para 6)

ग. दण्ड संहिता (1860 का 45), धारा 99 – धारा 99 प्राइवेट प्रतिरक्षा के अधिकार की सीमाएँ निर्धारित करती है – धारा 96 से 98 व 100 से 106 के अन्तर्गत दिया अधिकार धारा 99 से नियंत्रित होता है।

*Cr.A. No.1058/2008

D. Penal Code (45 of 1860), Sections 100 & 101 - *To claim a right of private defence extending to voluntarily causing death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him - Burden is on the accused to show that he had a right of private defence which extended to causing of death - Sections 100 & 101 define the limit and extent of right of private defence.* (Para 6)

घ. दण्ड संहिता (1860 का 45), धाराएँ 100 व 101 – स्वेच्छया मृत्यु कारित करने तक विस्तृत प्राइवेट प्रतिरक्षा के अधिकार का दावा करने के लिए अभियुक्त को यह दर्शित करना ही होगा कि यह आशंका करने के लिए युक्तियुक्त आधारों से पैदा होने वाली परिस्थितियाँ थीं कि उसे या तो मृत्यु या घोर उपहति कारित की जाएगी – यह दर्शित करने का भार अभियुक्त पर है कि उसे प्राइवेट प्रतिरक्षा का अधिकार था जो मृत्यु कारित करने तक विस्तृत है – धाराएँ 100 व 101 प्राइवेट प्रतिरक्षा के अधिकार की सीमाएँ और विस्तार परिभाषित करती हैं।

E. Penal Code (45 of 1860), Sections 96 & 98 - *Sections 96 & 98 give a right of private defence against certain offences and acts - The right given u/ss 96 to 98 and 100 to 106 is controlled by Section 99.* (Para 6)

ङ. दण्ड संहिता (1860 का 45), धाराएँ 96 व 98 – धाराएँ 96 व 98 कतिपय अपराधों और कार्यों के विरुद्ध प्राइवेट प्रतिरक्षा का अधिकार प्रदान करतीं हैं – धारा 96 से 98 व 100 से 106 के अन्तर्गत दिया अधिकार धारा 99 से नियंत्रित होता है।

F. Penal Code (45 of 1860), Sections 102 & 105 - *Deal with commencement and continuance of right of private defence of body and property respectively - The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until that there is that reasonable apprehension - The right lasts so long as the reasonable apprehension of danger to the body continues.* (Para 7)

च. दण्ड संहिता (1860 का 45), धाराएँ 102 व 105 – क्रमशः शरीर और सम्पत्ति के प्राइवेट प्रतिरक्षा के अधिकार के प्रारम्भ और जारी रहने के सम्बन्ध में कार्यवाही करतीं हैं – जैसे ही शरीर को, प्रयत्न या धमकी या अपराध करने से, खतरे की युक्तियुक्त आशंका प्रारम्भ होती है यद्यपि अपराध नही किया जा सकता था, अधिकार प्रारम्भ होता है किन्तु जब तक नही कि वह युक्तियुक्त आशंका है – अधिकार उस समय तक प्रभावी होता है जब तक शरीर को खतरे की युक्तियुक्त आशंका बनी रहती है।

Cases referred :

AIR 1963 SC 612, (2003) 2 SCC 661, (2003) 7 SCC 643, (2006) 9 SCC 678.

J U D G M E N T

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

2. Challenge in this appeal is to the judgment of a Division Bench of Madhya

Pradesh High Court, Indore Bench upholding the conviction of the appellants for offence punishable under Section 302 read with Section 149 and Section 323 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Each of the appellants was sentenced to undergo RI for life and to pay a fine of Rs.1,000/- with default stipulation.

3. The prosecution case as unfolded during trial is as follows:

In the intervening night of 3rd and 4th July, 1991 at about 12.00 in village Khandakhedi Kishanlal (hereinafter referred to as the 'deceased'), his wife Sampatbai and daughter Premlatabai were sleeping inside their house. At that moment appellants and deceased accused Jalu @ Jalamsingh and juvenile accused Jeevan reached at their house. They broke open the wooden door, while abusing the inmates and reached in the courtyard. They told deceased Kishanlal that they would not permit him to take his she-buffallows from their field and asked as to why deceased made a complaint in Tehsil/Revenue Court. They also threatened to eliminate him. While saying all these, appellants Madan and Kamal caught hold both the hands of Kishanlal and threw him near the wall, thereafter assaulted him by lathi. Sampatbai, wife of deceased Kishanlal (PW-2) cried for help. She and her daughter Premlata (PW-1) tried to save deceased but both were assaulted by lathi. Umraobai (PW-3) was assaulted by the deceased accused Jalu @ Jalamsingh when she tried to rescue the deceased. Babulal (PW-7) after hearing the cry reached over there and he was also assaulted by accused persons. When Ramsingh (PW-8) and Premsingh (PW-9) arrived, appellants fled away. The deceased fell unconscious and died on the way to police station. Premlata (PW-1), Sampatbai, Umraobai, Babulal, Premsingh alongwith village Chowkidar Anarsingh reached at the police station at 4.00 a.m. and lodged the report (Ex.P-1) which was recorded by SHO (PW-12) Nandlal. The injured persons were sent for medical examination and treatment. Their medical reports are Ex.P-24 to P-28. After preparation of inquest report (Ex.P-11) dead body of Kishanlal was sent to hospital and postmortem was conducted by Dr. A.S. Rana (PW-13) who issued postmortem report (Ex.P-29). Investigating Officer prepared spot map (Ex.P-2) and also effected seizure of blood stained earth, controller earth, pieces of sticks vide Ex.P-3 from the spot. Through seizure memo (Ex.P-4) pieces of bangles, pieces of glass of watch and roof tiles were seized. Patvari Govindram (PW-6) prepared the spot map (Ex.P-10). After arrest, on disclosure statement of the accused persons lathis were seized and seized articles were sent with covering letter (Ex.P-23) to FSL, Sagar. Dr. Rana also gave report (Ex.P-30) after examination of lathis seized from the accused persons. On completion of the investigation charge sheet was filed before the learned JMFC, Sanwer against the appellants and deceased accused Jalu @ Jalam and juvenile accused

Jeevan was produced and charge sheeted before the juvenile Court as directed by the trial Court because he was found below 16 years of age. During the course of trial, accused Jalu @ Jalamsingh died, therefore, case against him was closed.

The appellants denied the charges and pleaded innocence. They examined three witnesses in defence whereas prosecution examined 15 witnesses and adduced 31 documents in evidence. The trial Court found the appellants guilty, convicted them as aforenoted.

Before the High Court the stand taken was to the exercise of the right of private defence. It was pointed out that the deceased and prosecution witnesses were aggressors. In any event, when the appellants had assaulted, then in right of private defence they are entitled to get the benefit of exception in terms of Sections 96 and 97 IPC. The High Court turned down the stand and upheld the conviction.

4. In support of the appeal, learned counsel for the appellants submitted that most of the injuries were on non vital parts. It has been established that injuries have been sustained by the appellants in the same incident. The High Court had exercised the appellate power under Section 386 (b) (ii) of the Code of Criminal Procedure, 1973 (in short the 'Code') and had altered the finding of the trial Court in para 27 that the appellants were injured in the same incident in which the deceased and injured witnesses were assaulted and it was held that as per own saying by the defence the appellants sustained injuries at the house of the appellant-Kamal. In essence, it was pointed out that the trial Court and the High Court should have accepted the plea of exercise of right of private defence.

5. Learned counsel for the respondent-State on the other hand submitted that there was injury on the head though there was no fracture and the rest were on non vital parts of the body. Nevertheless, even according to own saying of the accused appellants, there was no question of exercise of right of private defence.

6. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 IPC deals with the subject-matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 IPC lays down the limits of the right of private defence. Sections 96 and 98 IPC give a right of private defence against certain offences

and acts. The right given under Sections 96 to 98 and 100 to 106 IPC is controlled by Section 99 IPC. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

7. Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until that there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In *Jai Dev v. State of Punjab* (AIR 1963 SC 612), it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

8. The above position was highlighted in *Rizan and Another vs. State of Chhattisgarh, through the Chief Secretary, Govt. of Chhattisgarh, Raipur, Chhatttisgarh* (2003 (2) SCC 661), and *Sucha Singh and Anr. v. State of Punjab* (2003 (7) SCC 643) and *Raj Pal and Ors. v. The State of Haryana* (2006 (9) SCC 678).

9. The High Court observed that according to the appellants incident occurred in two difference places in difference phases and in the incident of assault to the deceased and the witnesses they were not present and they sustained injuries caused by the deceased and some of the injured witnesses at the house of Kamal. The High Court has in part accepted the stand of the appellants that they were exercising the right of private defence, but at the same time the evidence also shows that the appellants committed criminal trespass. Therefore, they cannot claim the benefit of exception of having acted in exercise of right of private defence.

10. On a combined reading of the judgments of the trial Court and the High Court it is clear that the evidence is to the effect that the accused appellants were upto some stage exercising the right to protect and defend their properties. But thereafter they exceeded the right. Therefore, this appears to be a case where instead of convicting the appellants under Section 302 IPC it would be proper to convict the appellants for offence punishable under Section 304 Part I, IPC. Custodial sentence of 10 years would meet the ends of justice.

11. The appeal is allowed to the aforesaid extent.

Appeal allowed.

I.L.R. [2009] M. P., 332
SUPREME COURT OF INDIA
Before Mr. Justice Arijit Pasayat & Mr. Justice P. Sathasivam
11 July, 2008*

MAHILA VINOD KUMARI ... Petitioner
Vs.
STATE OF M.P. ... Respondent

A. **Criminal Procedure Code, 1973 (2 of 1974), Sections 340 & 344** - *To deal with the case of perjury, Court of Sessions and Magistrate of the First Class has two options either take action u/s 344 or in alternative file complaint after taking the recourse to Section 340(1).* (Para 7)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 340 व 344 – शपथ पर मिथ्या साक्ष्य के मामले में कार्यवाही करने के लिए सेशन न्यायालय और प्रथम श्रेणी मजिस्ट्रेट को दो विकल्प हैं वह या तो धारा 344 के अधीन कार्यवाही करे या विकल्प में धारा 340(1) का आश्रय लेकर परिवाद पेश करे।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 340 - When Court should exercise powers u/s 340, explained by the Apex Court.***

The Court has been given an option to proceed to punish summarily u/s 344 or to resort to oridinary procedure by way of complaint u/s 340 so that, as for instance, where the Court is of opinion that perjury committed is likely to raise complicated questions or deserves more severe punishment than that permitted u/s 344 or the case is otherwise of such a nature or for some reasons considered to be such that the case should be disposed of under the ordinary procedure which would be more appropriate, the Court may chose to do so. (Para 7)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 – न्यायालय को कब धारा 340 के अधीन शक्तियों का प्रयोग करना चाहिए, शीर्ष न्यायालय द्वारा स्पष्ट किया गया।

C. **Criminal Procedure Code, 1973 (2 of 1974), Section 344** - *Mandatory conditions for exercising the power - Explained by the Apex Court.*

For exercising the powers under this Section the Court at the time of delivery of judgment or final order must at the first instance express an opinion to the effect that the witness before it has either intentionally given false evidence or fabricated such evidence. The second condition is that the Court must come to the conclusion that in the interest of justice the witness concerned should be punished summarily by it for the offence which appears to have been committed by the witness and the third condition is that before commencing the summary trial for punishment the witness must be given reasonable opportunity of showing cause why should not be so punished. All the conditions are mandatory. (Para 8)

*Cr.Misc.Petition Nos.8515-8516/2008

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 344 – शक्ति का प्रयोग करने की आज्ञापक शर्तें – शीर्ष न्यायालय द्वारा स्पष्ट की गईं।

JUDGMENT

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT, J. :–Heard learned counsel for the petitioner.

2. Delay condoned.

3. Though, we are not inclined to entertain the special leave petitions, but we find that there is a need for expressing views on action to be taken for maliciously setting law into motion.

4. The petitioner lodged a report against two persons at Pichhore Police Station to the effect that on 28.1.1993 between 6.00 to 7.00 a.m. she was waylaid by them who dragged her and committed rape on her, one after another. She claimed to have narrated the incident to her father and uncle and, thereafter lodged the report at the police station. On the basis of the report, matter was investigated. The accused persons were arrested. Charge-sheet was filed. The accused persons faced trial for alleged commission of offence punishable under Section 376(2)(g) of the Indian Penal Code, 1860 (in short 'the IPC'). The accused persons abjured their guilt. During trial, the petitioner stated that she had actually not been raped. As she resiled from the statement made during investigation, she was permitted to be cross-examined by the prosecution. She even denied to have lodged the first information report (Exh.P-1) and to have given any statement to the police (Exh.P-2). In view of the statement of the petitioner, the two accused persons were acquitted by judgment dated 28.11.2001. The Trial Court found that the petitioner had tendered false evidence and had fabricated evidence against the accused persons with the intention that such evidence shall be used in the proceedings, and, therefore, directed cognizance in terms of Section 344 of the Code of Criminal Procedure, 1973 (in short 'the Code') to be taken against the petitioner. A show-cause notice was issued and the case was registered against the petitioner who filed reply to the effect that being an illiterate lady, she had committed the mistake and may be excused. The Trial Court found that the petitioner admitted her guilt that she had lodged false report of rape against the accused. She was, accordingly, sentenced to undergo three months' simple imprisonment. Aggrieved by the order, the petitioner filed an appeal before the Madhya Pradesh High Court, which, by the impugned order, was dismissed.

5. Stand before the High Court was that being an illiterate lady, she does not understand law and the particulars of the offence were not explained to her and, therefore, the appeal should be allowed. This was opposed by the State on the ground that the petitioner had admitted her guilt before the Trial Court and, therefore, the conviction is well founded. The High Court perused the records of the Trial Court and found that in the show-cause reply she had admitted that she had told lies all through. The stand that the particulars of the offence were not

explained to her, was found to be equally untenable, because in the show-cause notice issued, relevant details were given. In the first information report, and the statement recorded by the police, she had clearly stated that she was raped by the accused persons. But in Court she denied to have stated so. Learned counsel for the petitioner submitted that the Court imposed 15 days' simple imprisonment which is harsh. But that is not the end of the matter. The petitioner filed an application before the High Court stating that a wrong statement was made before the High Court that she had already suffered custody for 15 days, which weighed with the High Court to reduce the sentence.

6. Learned counsel for the petitioner stated that being a girl of tender age, she was pressurized by her mother and uncle to give a false report. This is at variance with the statement made in court during trial to the effect that she had not reported anything to the police. It is a settled position in law that so far as sexual offences are concerned, sanctity is attached to the statement of a victim. This Court, has, in several cases, held that the evidence of the prosecutrix alone is sufficient for the purpose of conviction if it is found to be reliable, cogent and credible. In the present case, on the basis of the allegations made by the petitioner, two persons were arrested and had to face trial and suffered the ignominy of being involved in a serious offence like rape. Their acquittal, may, to a certain extent, have washed away the stigma, but that is not enough. The purpose of enacting Section 344, Cr.P.C. corresponding to Section 479-A of the Code of Criminal Procedure, 1898 (hereinafter referred to as 'the Old Code') appears to be further arm the Court with a weapon to deal with more flagrant cases and not to take away the weapon already in its possession. The object of the legislature underlying enactment of the provision is that the evil of perjury and fabrication of evidence has to be eradicated and can be better achieved now as it is open to the courts to take recourse to Section 340(1) (corresponding to Section 476 of the Old Code) in cases in which they are failed to take action under Section 344 Cr.P.C.

7. This section introduces an additional alternative procedure to punish perjury by the very Court before which it is committed in place of old Section 479 A which did not have the desired effect to eradicate the evils of perjury. The salient features of this new provision are:

> (1) Special powers have been conferred on two specified Courts, namely Court of Session and Magistrate of the First Class, to take cognizance of an offence of perjury committed by a witness in a proceeding before it instead of filing a complaint before a Magistrate and try and punish the offender by following the procedure of summary trials. For summary trial, see Ch. 21.
>
> (2) This power is to be exercised after having the matter considered by the Court only at the time of delivery of the judgment or final order.

(3) The offender shall be given a reasonable opportunity of showing cause before he is punished.

(4) The maximum sentence that may be imposed is 3 month's imprisonment or a fine up to Rs.500 or both.

(5) The order of the Court is appealable (vide S. 351).

(6) The procedure in this section is an alternative to one under Sections 340-343. The Court has been given an option to proceed to punish summarily under this section or to resort to ordinary procedure by way of complaint under Section 340 so that, as for instance, where the Court is of opinion that perjury committed is likely to raise complicated questions or deserves more severe punishment than that permitted under this section or the case is otherwise of such a nature or for some reasons considered to be such that the case should be disposed of under the ordinary procedure which would be more appropriate, the Court may chose to do so [vide sub-section (3)].

(7) Further proceedings of any trial initiated under this section shall be stayed and thus, any sentence imposed shall also not be executed until the disposal of an appeal or revision against the judgment or order in the main proceedings in which the witness gave perjured evidence or fabricated false evidence [vide sub-section (4)].

8. For exercising the powers under the section the Court at the time of delivery of judgment or final order must at the first instance express an opinion to the effect that the witness before it has either intentionally given false evidence or fabricated such evidence. The second condition is that the Court must come to the conclusion that in the interests of justice the witness concerned should be punished summarily by it for the offence which appears to have been committed by the witness. And the third condition is that before commencing the summary trial for punishment the witness must be given reasonable opportunity of showing cause why he should not be so punished. All these conditions are mandatory. [See *Narayanswamy v. State of Muharashtra*, (1971) 2 SCC 182].

9. The object of the provision is to deal with the evil perjury in a summary way.

10. The evil of perjury has assumed alarming propositions in cases depending on oral evidence and in order to deal with the menace effectively it is desirable for the courts to use the provision more effectively and frequently than it is presently done.

11. In the case at hand, the court has rightly taken action and we find nothing infirm in the order of the Trial Court and the High Court to warrant interference. The special leave petitions are, accordingly dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 336

WRIT APPEAL

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

1 September, 2008*

B.N. VERMA ... Appellant

Vs.

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

A. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 12 - *Departmental Enquiry - Charge sheet dated 04.07.1995 issued against appellant - Enquiry Officer appointed in relation to charge sheet dated 04.07.1995 but the said enquiry was abandoned - Another charge sheet on different allegation issued on 15.04.1997 - Enquiry Officer who was appointed to enquire into the first charge sheet assumed jurisdiction to make enquiry into the charge sheet dated 15.04.1997 - Held - No enquiry officer appointed relating to charge sheet dated 15.04.1997 - In absence of order of appointment of enquiry officer, some person would not have jurisdiction to conduct enquiry - Entire enquiry vitiated - Appeal allowed.* (Paras 13 & 14)

क. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 12 – विभागीय जाँच – अपीलार्थी के विरुद्ध आरोप पत्र तारीख 04.07.1995 को जारी – आरोप पत्र तारीख 04.07.1995 के सम्बन्ध में जाँच अधिकारी नियुक्त किन्तु उक्त जाँच परित्यक्त कर दी गई – भिन्न अभिकथन पर एक अन्य आरोप पत्र 15.04.1997 को जारी – जाँच अधिकारी, जिसे प्रथम आरोप पत्र की जाँच करने के लिए नियुक्त किया गया था, उसे आरोप पत्र तारीख 15.04.1997 की जाँच करने के लिए अधिकारिता है ऐसा मान लिया – अभिनिर्धारित – आरोप पत्र तारीख 15.04.1997 के संबंध में कोई जाँच अधिकारी नियुक्त नही – जाँच अधिकारी के नियुक्ति आदेश के अभाव में, किसी व्यक्ति को जाँच करने की अधिकारिता नही होती – सम्पूर्ण जाँच दूषित – अपील मंजूर।

B. Service Law - Constitution, Article 226 - *Departmental Enquiry - Competence & Jurisdiction of Enquiry Officer - Question of competence & jurisdiction can be raised in writ petition for the first time.* (Para 16)

ख. सेवा विधि – संविधान, अनुच्छेद 226 – विभागीय जाँच – जाँच अधिकारी की सक्षमता और अधिकारिता – सक्षमता और अधिकारिता का प्रश्न प्रथम बार रिट याचिका में उठाया जा सकता है।

Case referred :

1971 MPLJ 626.

S.P. Rai, for the appellant.

Rahul Jain, for the respondents.

*W.A. No.556/2006 (Jabalpur)

B. N. VERMA Vs. STATE OF M.P.

J U D G M E N T (ORAL)

The Judgment of the Court was delivered by **R.S. GARG, J.** :–The short facts necessary for disposal of the present writ appeal are that a charge sheet was issued to the petitioner on 4.7.1995 and much before that i.e. on 21.6.1995 he was placed under suspension. An enquiry officer was appointed to enquire into the allegations made and charges levelled against the petitioner.It also appears that another charge sheet was again issued to the petitioner on 15.4.1997 (AnnexureA-3/1) alleging inter alia that while functioning as Superintendent, Bapu Vimukt Jati Ashram, Raisen the petitioner defalcated scholarship amount of Rs.13,500/- which was to be released in favour of 45 resident students. After considering the reply of the petitioner dated 9.5.1997 (in relation to the second charge sheet) a departmental enquiry was conducted against the petitioner. After recording the evidence the enquiry officer found the petitioner guilty of the charges. The Collector, Raisen, the appointing authority issued notice to the petitioner along with the copy of the enquiry report dated 22.11.1999, which was accordingly replied by the petitioner. The Collector vide order dated 29.12.1999 (Annexure A/1) imposed capital punishment of dismissal against the petitioner. As the appeal proved futile the petitioner filed Original Application No. 1810/2000 before the M.P. Administrative Tribunal, Bench at Bhopal but on abolition of the Tribunal the matter came to this Court and was registered as W.P. No.24992/2002. After hearing learned counsel for the parties the learned single Judge was pleased to dismiss the writ petition, therefore, the petitioner filed the present writ appeal.

2. Shri Rai, learned counsel for the appellant submitted that the enquiry officer was appointed in relation to charge sheet dated 4.7.1995 but the said enquiry was abandoned and the enquiry officer who was appointed to make enquiry into the first charge sheet assumed jurisdiction to make enquiry into the charge sheet dated 15.4.1997. The submission is that if the enquiry officer was not appointed nor was authorized to make enquiry into the charge sheet dated 15.4.1997 issued by the department then he was an authority which can be condemned as forum non judice and as the enquiry officer had no jurisdiction to make an enquiry, he could not submit his enquiry report to the Collector and the Collector on the strength of such enquiry report could not award the punishment.

3. Shri Rahul Jain, learned counsel for the respondent/State, on the other hand placing reliance upon letter dated 21.8.1997 (Annexure A/5 in this writ appeal) submitted that the enquiry officer Shri L. N. Sharma was appointed to enquire into the charge sheet dated 15.4.1997, therefore, the submissions of the petitioner are patently wrong and are contrary to records.

4. Contending contrary to this submission, Shri Rai submitted that on a perusal of the letter dated 21.8.1997, it would clearly appear that it was making reference to petitioner's suspension. order dated 21.6.1995 and, therefore, this matter could

not be related to the charge sheet dated 15.4.1997 but, would be relatable to the charge sheet which was issued on 4.7.1995 i.e. after the suspension was made.

5. We have gone through Annexure A/5 and have also gone through the order passed by the learned single judge.

6. The question posed before us has been rejected by the learned single Judge mainly on the ground that the question regarding non-appointment of the enquiry officer was never raised by the petitioner before the Enquiry Officer or before the Appellate Authority, therefore, such question could not be allowed to be raised for the first time in the writ. The learned single Judge has observed that from order dated 21.8.1997 it would clearly appear that the enquiry officer was appointed not to enquire into the charge sheet dated 4.7.1995 only.

7. In our considered opinion from a perusal of letter dated 21.8.1997 it would clearly appear that it does not refer to the charge sheet dated 4.7.1995 or 15.4.1997 but it refers to an event which took place prior to 4.7.1995.

8. The letter dated 21.8.1997 clearly refers to earlier letter dated 21.6.1995 where under the petitioner B. N. Verma was placed under suspension. It would therefore be reasonable, just and prudent to hold that in relation to the charge sheet issued immediately after 21.6.1995, Shri L. N. Sharma, the Deputy Collector was appointed as Departmental Enquiry Officer and the District Organiser, Adim Jati Kalyan Vibhag, Raisen was appointed as Presenting Officer. By no stretch of imagination the order/letter dated 21.8.1997 can be related to the charge sheet dated 15.4.1997.

9. It appears that the departmental officer and the enquiry officer all belaboured under a misapprehension that enquiry officer was appointed in relation to the charge sheet dated 15.4.1997 less appreciating that the letter dated 21.8.1997 was referring to an action taken on 21.6.1995.

10. It is also to be seen that the petitioner was not placed under suspension in relation to the charge sheet dated 15.4.1997 but was placed under suspension in relation to the charge sheet dated 4.7.1995. If these are the facts floating on the surface of the records, we must hold that in connection with the charge sheet dated 15.4.1997 no enquiry officer was ever appointed.

11. We would also be justified in observing that the State-Government despite fullest opportunity available to it before the State Administrative Tribunal, before the Single Judge and in this writ appeal did not produce any material to convince us that the order dated 21.8.1997 was in relation to charge dated 15.4.1997.

12. After we have reached to the conclusion that no Enquiry Officer was appointed to enquire into the charge sheet dated. 15.4.1997, the question still would be that is the petitioner precluded from raising these questions before this Court.

13. The law in relation to the domestic enquiry clearly provides that after a

show cause notice is issued if the authority does not find the reply to be satisfactory it may issue a charge sheet. Before or after issuance of the charge sheet the delinquent can be placed under suspension. After the charge sheet is issued the delinquent is again required to submit his reply to the charges. In case he does not admit the charges levelled against him then the concerned disciplinary authority has to appoint an Enquiry Officer and has also to appoint a Presenting Officer. The delinquent officer would be given a date to appear before the officer and he may submit his written statement. After such written statement is filed the enquiry officer shall proceed to record the statements on behalf of the department and shall also receive the documents. After the prosecution closes its case the delinquent officer/employee would be given appropriate opportunity of defence. In case the enquiry officer is not the disciplinary authority then such enquiry officer shall place his report before the disciplinary authority. The disciplinary authority if himself conducts the enquiry then after recording its own findings or after receiving the report from the enquiry officer may issue a notice to the delinquent officer against proposed punishment.

14. We are referring to the procedure in detail to show that an-officer unless is appointed as an enquiry officer he cannot receive the written statement nor he can receive the evidence either documentary or oral. Appointment of a person as enquiry officer clothes him with the jurisdiction to conduct the enquiry. In case like present when there is total violation of the rules and the enquiry had proceeded contrary to the provision of the rules, the State would not be allowed to say that the question ought to have been raised before the Enquiry Officer or the Disciplinary Authority or the Appellate Authority. The State by raising such pleadings is in fact adding premium to its own wrong. It would be trite to say that if law provides a particular mode for doing a thing then it has to be done following the mode or procedure or not at all. In fact the State would be obliged to convince the Court that after issuance of the charge sheet an enquiry officer rather a competent enquiry officer was appointed and such enquiry officer was conferred jurisdiction to receive the documents, evidence etc. In absence of an order of appointment of the enquiry officer some person would not have jurisdiction to conduct the enquiry. In the present case non-appointment of the Enquiry Officer has vitiated the enquiry proceedings.

15. Present is not a case where the disciplinary authority has come out with the case that the disciplinary authority had appointed an enquiry officer or delegated its functions and powers in favour of somebody to record the findings after receiving the report.

16. In our considered opinion the learned single Judge not only made a mistake on the factual aspect by observing that the order dated 21.8.1997 could be read in favour of the State also erred even on the legal aspect in holding that such a question regarding competence and jurisdiction of the Enquiry Officer was since

not raised before the enquiry officer, disciplinary authority or appellate authority, therefore, could not be raised before the High Court. When the question of jurisdiction goes to the very root of the matter and a fact finding enquiry is not required to be made then question of jurisdiction can certainly be raised in the writ petition.

17. In the matter of *Shyam Bahadur Shrivastava Vs. State of M.P.* 1971 MPLJ 626 the Division Bench of this Court had observed that objection relating to defect in enquiry on ground of violation of natural justice, which is vital can be taken for the first time in a writ proceeding. If violation of the principles of natural justice can be raised as a ground for the first time in the writ petition then the question of total lack of jurisdiction of the enquiry officer can certainly be raised for the first time in the writ petition.

18. As the State Government has failed in proving that it had appointed an enquiry officer to enquire into the charge sheet dated 15.4.1997, we are unable to hold that the disciplinary authority on strength of the enquiry report could dismiss the petitioner from services or the appellate authority could dismiss the petitioner's appeal.

19. For the reasons aforesaid, we set aside the complete enquiry proceedings, the order passed by the disciplinary authority and the order passed by the appellate authority. With all humility at our command, we set aside the order passed by the learned single Judge.

20. We are told that the petitioner is yet to retire, under the circumstances, we hereby direct that the petitioner would continue to be under suspension as he was on the date of the order of dismissal. The respondents would be entitled to proceed with the charge sheet dated 4.7.1995 and may also proceed to enquire into charge sheet dated 15.4.1997 provided they appoint a enquiry officer in accordance with law or the disciplinary authority himself takes up the issue and decides the matter in accordance with law. We would however, also crave indulgence of the departmental authorities to Rule 9 of Madhya Pradesh Civil Services (Pension) Rules, 1976 which relates to right of the Governor to withhold or withdraw pension. The petitioner would be entitled to the subsistence allowance from the date of his termination till the date of his reinstatement. The said amount shall be paid to him before he retires. There shall be no order as to costs.

Order accordingly.

I.L.R. [2009] M. P., 341
WRIT PETITION
Before Mr. Justice R.S. Jha
2 September, 2008*

DEVENDRA KUMAR TRIPATHI ....Petitioner
Vs.
STATE OF M.P. ... Respondent

A. Service Law - Development Authority Services (Officers and Servants) Recruitment Rules, M.P. 1987, Rules 7 & 17 - *Promotion - Petitioner working on the post of Steno-typist - DPC recommended to Board the name of petitioner for promotion to the post of Stenographer which is Class III post - Board in its turn sent the proposal to State Government for approval - Held - Promotions on Class III and IV posts have to be made by Chairman with prior approval of the Board - Board directed to consider the case of petitioner and take decision as per Rules - Petition allowed.* (Paras 9&10)

क. सेवा विधि – विकास प्राधिकरण सेवाएँ (अधिकारी और सेवक) भर्ती नियम, म.प्र. 1987, नियम 7 व 17 – पदोन्नति – याची स्टेनो टायपिस्ट के पद पर कार्यरत – विभागीय पदोन्नति समिति ने बोर्ड से स्टेनोग्राफर के पद पर, जो वर्ग–तीन पद है, पदोन्नति के लिए याची के नाम की अनुशंसा की – बोर्ड ने प्रस्ताव अनुमोदन के लिए राज्य सरकार को भेजा – अभिनिर्धारित – वर्ग तीन और चार के पदों पर पदोन्नति बोर्ड के पूर्व अनुमोदन से अध्यक्ष को करनी होती है – बोर्ड को याची के मामले पर विचार करने और नियमानुसार निर्णय लेने के लिए निदेशित किया गया – याचिका मंजूर।

B. Service Law - Development Authority Services (Officers and Servants) Recruitment Rules, M.P. 1987, Rules 7, 8 & 17 - *Appointment by promotion - Rule 17 which deals with appointment by promotion, makes the provision of Rule 7(a) & 7(b) applicable in respect of promotion to all posts - Rule 17 further indicates that while this rule refers to the appointing authority, it does not confer the power of promotion upon any authority different or other than the authority named in Rule 8.* (Para 8)

ख. सेवा विधि – विकास प्राधिकरण सेवाएँ (अधिकारी और सेवक) भर्ती नियम, म.प्र. 1987, नियम 7, 8 व 17 – पदोन्नति द्वारा नियुक्ति – नियम 17, जो पदोन्नति द्वारा नियुक्ति के विषय में है, नियम 7(ए) व 7(बी) के उपबंध सभी पदों पर पदोन्नति के सम्बन्ध में लागू हैं – नियम 17 आगे उपदर्शित करता है कि यह नियम नियुक्ति प्राधिकारी को निर्दिष्ट करता है, यह नियम 8 में नामित प्राधिकारी से अलग या भिन्न किसी प्राधिकारी को पदोन्नति की शक्ति प्रदत्त नही करता है।

Devendra Gangrade, for the petitioner.
Om Namdeo, G.A., for the respondent No.1.
Thaman Khadka, for respondents No.2 & 3.

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*W.P. No.5180/2007(S) (Jabalpur)

DEVENDRA KUMAR TRIPATHI Vs. STATE OF M.P.

ORDER

R.S. JHA, J. :–With the consent of the learned counsel for the parties, the petition is heard finally.

2. The petitioner has filed this petition being aggrieved by the resolution of respondent No.2 dated 26-3-2007, Annexure P-9, whereby the petitioner's case for promotion has been sent for approval to the State Government.

3. The case of the petitioner before this Court is that the petitioner, who is at present working as a Steno-typist in the establishment of the respondent No.2 having been finally appointed on that post on 22-12-2004, is entitled to be considered for promotion on the post of Stenographer as per the provisions of the M.P. Development Authority Services (Officers And Servants) Recruitment Rules, 1987. It is further submitted that the petitioner was considered by a Departmental Promotion Committee convened by the respondent for promotion on the post of Stenographer but his case was deferred as clarification regarding the requirement of five years service on the post of Steno-typist was sought and it was ultimately decided that the petitioner should be treated as Steno-typist with effect from 23-1-1991 and his case should be considered for promotion on the post of Stenographer. Accordingly, the Departmental Promotion Committee, on reconsideration of the petitioner's case, found him fit for promotion on the post of Stenographer and directed placing the proceedings for approval before the Board of the respondent No.2. On 30-10-2006 the Board considered the recommendation of the Departmental Promotion Committee and requested the Joint Director, Town & Country Planning, Jabalpur and the Chief Executive Offier of the Jabalpur Development Authority to scrutinize the petitioner's case and give their opinion in that respect. Both the Joint Director as well as the Chief Executive Officer gave an opinion that the promotion proceedings in respect of the petitioner were in accordance with law and, therefore, the Board in a subsequent meeting held on 26-3-2007 again considered the petitioner's case of promotion but instead of taking a decision thereon decided to send the matter for approval of the State Government. The petitioner being aggrieved by the aforesaid decision of the Board has filed the present petition.

4. It is submitted by the learned counsel for the petitioner that the provisions of rule 7 (a) and 7 (b) of the Rules 1987 clearly provide that cases of eligible persons belonging to Class III posts, like the petitioner, should be considered by a Departmental Promotion Committee which should prepare a list of approved candidates and place it before the Board of the authority for approval. The rules further provide that on approval by the Board, order of promotion in respect of selected persons should be issued. It is submitted that there is no provision in the Rules of 1987 which prescribes or provides that the cases of Class III employees working in the Development Authority should be referred to the State Government for approval or which requires that promotion in their respect can be made only

after taking approval of the State Government. It is asserted that in accordance with the provisions of the Rules of 1987, as the petitioner's case was recommended by the Committee of the Board should have granted approval for promotion. It is submitted that the impugned resolution of the respondent authority dated 26-3-2007 by which the petitioner's case has been referred to the State Government for approval is contrary to the provisions of the Rules 1987 and inspite of repeated representations being made by the petitioner no action has been taken by any of the respondents as a result of which the petitioner inspite of approval by the Board for his case of promotion in the year 2006 has not been granted promotion as there has been no response in the intervening period by the State Government.

5. The learned counsel appearing for the respondents 2 & 3 has filed a return and submitted that the petitioner's case was considered for promotion by a Departmental Promotion Committee which recommended his case to the Board. It is further stated that the Board after getting the matter examined by the Joint Director, Town & Country Planning has sent the petitioner's case for promotion for approval to the State Government and as soon as the appropriate directions are issued by the State Government consequential orders would be issued. It is submitted that the petitioner's case for promotion is pending before the State Government and, therefore, the respondent authorities who have done their part cannot issue an order of promotion until and unless his case is approved by the State Government. However, the return filed by the respondents 2 & 3 is silent in respect of the contention of the petitioner to the effect that procedure of seeking the State's approval in cases of promotion of Class III employees is not contemplated by the Rules of 1987 or the contention of the petitioner that such a procedure is contrary to the procedure prescribed under the Rules of 1987.

6. Shri Om Namdeo, learned Government Advocate appearing for respondent No.1 submits that the case of the petitioner has been sent by the Authority to the State. However, in all fairness, the learned Government Advocate does not dispute the fact that as per the provisions of rule 7(a) and 7(b) of the Rules 1987, approval of the State Government for making promotion of Class III employees is not contemplated and that the authority competent to make promotions in respect of Class III employees is the respondent No.3 after approval of the Board.

7. To properly appreciate the contentions of the learned counsel for the parties, it is necessary to take into consideration the provisions of rules 7, 8 & 17 of the M.P. Development Authority Services (Officers And Servants) Recruitment Rules, 1987, which read as under:

> "7. Selection Committee.- (a) The appointments to the Development Authority Services Class I and Class II shall be made on the recommendation of a Selection Committee constituted by the State Government for the purpose. Such Selection Committee shall consist of-

(i)	Special Secretary to Government of M.P. Housing & Environment.	Chairman
(ii)	Director, Town & Country Planning	Member
(iii)	Chief Engineer/Addl. Commissioner (Teach.) M.P. Housing Board.	Member
(iv)	Chairman of Any Development Authority/ Town Improvement Trust/SADA to be nominated by Government.	Member
(v)	Executive Director, M.P. Vikas Pradhikaran Sangh	Member

(b) In case of Class III and Class IV posts, the Chairman shall constitute the Committee consisting of -

(i)	Chief Executive Officer	Member
(ii)	Senior Engineer	Member
(iii)	Regional Joint Director or his representative.	Member

8. Appointing Authority.- (1) All appointments to Authority Services, Class I and Class II shall be made by the State Government.

(2) All appointments to the Authority Services, Class III and Class IV shall be made by the Chairman with prior approval of the Board.

17. Appointment by Promotion.- (1) The appointment by promotion to Class I and Class II services shall be made on the recommendation of the Committee as referred to in Rule 7 (a) and to Class III services on the recommendation of the Committee referred to in Rule 7(b).

(2) The Committee shall meet at intervals ordinarily not exceeding one year.

(3) Promotion to M.P. Development Authority services I, II and III shall consider cases of persons who on 1st day of January of that year in which committee meets,had completed service (whether officiating or substantive) in the post and have educational qualifications as specified in schedule II.

(4) In selecting candidates for promotion regard shall had to -

(i) fact and energy;

(ii) intelligence and ability;

(iii) integrity; and

(iv) previous record of service.

(5) The selection for inclusion in selection list shall be on seniority cum merit basis."

8. A perusal of the aforesaid rules makes it abundantly clear that the Chairman of the Authority, i.e., the respondent No.3 in the present case, is required to constitute a Committee consisting of Chief Executive Officer, Senior Engineer and Regional Joint Director or his representative to consider cases of promotion to Class III and Class IV posts. Rule 8(2) which prescribes the appointing authorities, states that all appointments to Class III and Class IV shall be made by the Chairman with prior approval of the Board. Rule 17 which deals with appointment by promotion makes the provision of Rule 7(a) and (7(b) applicable in respect of promotion to all posts. A perusal of Rule 17 further indicates that while this rule refers to the appointing authority, it does not confer the power of promotion upon any authority different or other than the authorities named in Rule 8 of the Rules 1987. Schedule III appended to the Rules, framed under Rule 17 (3), prescribes five years continuous service on the post of Steno-typist along with passing of such tests as prescribed from time to time as the requisite experience and qualifications for consideration for promotion on the post of Stenographer.

9. In view of the above provisions of the rules, there is no iota of doubt that the promotions on Class III and Class IV posts have to be made by the Chairman of the Development Authority concerned with the prior approval of its Board. In the instant case, the petitioner's case was duly considered by the Committee constituted by the Chairman and was sent for approval of the Board. It is evident from a perusal of Annexure P-9, filed along with the petition, that the petitioner's case after approval was considered by the Board in its meeting held on 26-3-2007 but instead of taking a decision thereon by either approving or disapproving the recommendation of the Committee, the Board took a decision to forward his case to the State Government for approval. Apparently, the procedure adopted by the Board is not in conformity with the Rules of 1987. The Board may adopt a procedure as it did in its previous meeting held on 30-10-2006 of seeking the opinion of the Joint Director, Town & Country Planning or such other related and concerned authority, but it is not required to send the case for approval to the State Government as that kind of prior approval is neither contemplated nor prescribed by the statutory provision.

10 In view of the aforesaid facts and circumstances, I am of the considered opinion that the decision of the Board of the respondents 2 and 3 to refer the case for promotion of the petitioner for approval to the State Government in its meeting

held on 26-3-2007 is apparently contrary to the provisions of Rule 8 of the Rules of 1987 and, therefore, the aforesaid decision of the Board of the respondent Jabalpur Development Authority dated 26-3-2007 referring the case for promotion of the petitioner for approval deserves to be and is accordingly quashed. As a consequence, the respondents 2 & 3 are directed to consider the case of the petitioner as required by the procedure prescribed by Rules 7 & 8 of the Rules 1987 and take a decision in accordance with the procedure prescribed therein after taking into consideration all aspects in respect thereto as this Court has not expressed any opinion about the entitlement and right of the petitioner for promotion on the post of Stenographer and has left the matter open to be decided by the authority in accordance with the procedure prescribed in the Rules 1987. In other words the petitioner's case for promotion be reconsidered by the Board at its own level, in accordance with the rules and a positive or negative resolution may be passed so as to enable the respondent authority to pass consequential orders in that respect. The aforesaid exercise be undertaken expeditiously preferably within a period of three months from the date of furnishing a copy of this order.

The petition is accordingly allowed with the aforesaid directions.

c.c. as per rules.

Petition allowed.

I.L.R. [2009] M. P., 346
WRIT APPEAL
Before Mr. Justice Dipak Misra & Mr. Justice K.S. Chauhan
14 November, 2008*

AMBRISH KUMAR ... Appellant
Vs.
STATE OF M.P. & ors. ... Respondents

A. Land Acquisition Act (1 of 1894), Section 17 - *Urgency clause - Conditions to be fulfilled - For invoking urgency clause satisfaction has to be reached on germane and cogent reasons - There has to be proper and apposite application of mind - Real urgency must emanate from situation as power of invoking urgency clause is extraordinary - It is necessary to consider whether delay would frustrate the purpose - Whether rights of citizens have been curtailed and abridged in arbitrary manner - Whether urgency is of such degree that enquiry u/s 5A has to be dispensed with - Whether special powers have been adequately and appositely exercised.* (Para 19)

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 17 – अत्यावश्यकता खण्ड – पूरी की जाने वाली शर्तें – अत्यावश्यकता खण्ड का अवलंब लेने के लिए समाधान संगत और

*W.A. No.960/2008 (Jabalpur)

अकाट्य कारणों पर होना चाहिए – मस्तिष्क का उचित और उपयुक्त प्रयोग होना चाहिए – परिस्थिति से वास्तविक अत्यावश्यकता प्रकट होना चाहिए क्योंकि अत्यावश्यकता खण्ड का अवलंब लेने की शक्ति असाधारण है – यह विचार करना आवश्यक है कि क्या विलम्ब प्रयोजन को विफल कर देगा – क्या नागरिकों के अधिकार मनमाने तरीके से कम और न्यून किये गये हैं – क्या अत्यावश्यकता इस कोटि की है कि धारा 5ए के अन्तर्गत जाँच को त्याग देना चाहिए – क्या विशेष शक्तियाँ पर्याप्त और उपयुक्त रूप से प्रयोग की गईं हैं।

B. Land Acquisition Act (1 of 1894), Sections 4 & 6 - *Declaration u/s 6 has to be issued only after issue of notification u/s 4.* (Para 22)

ख. भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4 व 6 – धारा 6 के अन्तर्गत घोषणा सिर्फ धारा 4 के अधीन अधिसूचना जारी होने के बाद की जानी चाहिए।

C. Land Acquisition Act (1 of 1894), Section 17 - *Urgency Clause - Powers of Commissioner - State Government has delegated powers to Commissioner of Division for granting sanction for invoking urgency clause - Sanction granted by Commissioner cannot be treated as invalid.* (Para 23)

ग. भूमि अर्जन अधिनियम (1894 का 1), धारा 17 – अत्यावश्यकता खण्ड – कमिश्नर की शक्तियाँ – राज्य सरकार ने अत्यावश्यकता खण्ड का अवलंब लेने की मंजूरी प्रदान करने के लिए संभाग के कमिश्नर को शक्तियाँ प्रत्यायोजित कीं हैं – कमिश्नर द्वारा दी गई मंजूरी अवैधानिक नही मानी जा सकती।

D. Land Acquisition Act (1 of 1894), Section 6 - *Structure - Land sought to be acquired for the purposes of constructing canal - Structure standing on the land would definitely cause impediment as course of canal cannot be diverted to suit interest of an individual - Appeal dismissed.* (Para 28)

घ. भूमि अर्जन अधिनियम (1894 का 1), धारा 6 – ढांचा – नहर निर्माण के प्रयोजन के लिए भूमि का अधिग्रहण चाहा गया – भूमि पर खड़ा ढांचा निश्चित रूप से अवरोध कारित करेगा, किसी व्यक्ति को संतुष्ट करने के लिए नहर का बहाव नही मोड़ा जा सकता।

Cases referred :

(1989) 1 SCC 591, (2005) 10 SCC 162, (2007) 6 SCC 634, AIR 1979 SC 1594, AIR 1980 SC 319, AIR 1991 Orissa 205, 1997(1) MPLJ 547, (1998) 6 SCC 1, 1992(2) JLJ 361, AIR 2004 SC 3582, (2004) 8 SCC 14, (2002) 4 SCC 160, (2001) 7 SCC 545.

Rajendra Tiwari & R.K. Jain, for the appellant.
Kumaresh Pathak, Dy.A.G., for the respondents.

O R D E R

The Order of the Court was delivered by DIPAK MISRA, J. :–These two appeals have been preferred under Section 2(1) of

the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal), Adhiniyam, 2005 challenging the defensibility and sustainability of the order dated 8.8.2008 passed by the learned single Judge in W.P. No.8723/2007 and W.P. No. 8726/2007. Be it noted, the learned single Judge has disposed of both the writ petitions in a composite manner and adverted to the facts in Writ Petition No.8726/2007. As in Writ Appeal No.960/2008 the assail is to order passed in Writ Petition No.8726/2007, for the sake of clarity and convenience, we shall advert to the material facts and grounds urged in the said appeal.

2. The appellant is the owner of the land bearing Survey No.957 admeasuring area 1.58 hectares at village Morghari, District – Khandwa. The said land was diverted by order dated 3.11.2005 under Section 172 of the M.P. Land Revenue Code, 1959 (for short 'the Code') for construction of godown. The petitioner has availed a loan of Rs.25.55 Lacs from the State Bank of India, Sanawad Branch. A 'no objection certificate' for construction of godown was also issued by the Gram Panchayat. As set forth, he has constructed a godown having capacity of 1000 MT which was sanctioned by the NABARD scheme. Various aspects were put forth about diversion and construction of the godown. Against this factual backdrop, it was contended before the learned single Judge that the respondent State, without carrying out proper survey of the land, proposed a canal to be passed through the aforesaid land bearing Survey Nos. 925 and 957 and without application of mind, it issued a notification dated 8.8.2006 under Section 4(1) of the Land Acquisition Act, 1894 (for short 'the Act'). On the same day, a declaration under Section 6 was issued. It was also urged that the notification under Section 4(1) of the Act was not published in the newspaper and the notification and declaration were issued on 8.8.2006. In the notification under Section 4(1) of the Act, it was stipulated that the provision of Section 5A of the Act would not be applicable as the urgency clause was invoked under the provision of Section 17 (1) of the Act.

3. It was averred in the writ petition that before invocation of the urgency provision as per Section 17 of the Act, it was incumbent on the part of the appropriate Government to examine the urgency but no exercise was carried out in the said regard and further the Collector had himself invoked the urgency provision and not the State Government. It was further put forth that though the Secretary has power to grant permission for invocation of the urgency clause, yet the Commissioner on 11.8.2006 had granted the permission. It was highlighted that it was not a fit case where the urgency provision could have been invoked inasmuch as the power conferred under Section 5-A of Act is a valuable right and a land owner cannot be deprived of the said right in an arbitrary manner. Various assertions have been made about the diversion of the land along with various other ancillary facets to highlight that an alternative sight could have been chosen and further that the rights of the petitioners had been throttled in a most

arbitrary and capricious manner. It was also asseverated that no prior survey in respect of alignment of canal was done and hence, the entire exercise was vitiated.

4. On the basis of the aforesaid grounds, a prayer was made to issue a writ of certiorari for quashment of the notification issued under Section 4(1) and the declaration issued under Section 6 of the Act as per Annexures P-6 and P-7 to the writ petition.

5. The respondents in oppugnation submitted that the notifications under Sections 4 and 6 were not issued simultaneously; that the same notifications were assailed by other landholders before the Indore Bench of the High Court and the Indore Bench had dismissed the writ petition; that the notifications were issued after conducting necessary survey and the documents relating to the survey were available on record; that the construction of the entire canal is complete except for the area belonging to the writ petitioners; and as there is belated approach, there is no justification to quash the notifications.

6. The learned Single Judge upon hearing the learned counsel for the parties referred to the decision rendered by the Indore Bench in W.P. No.5659/06 and came to hold that the notification 4(1) read with Section 17(1) was issued on 8.8.2006 and was published in the gazette dated 18.8.2006 and the notification issued under Section 6 of the Act was published in the gazette on 25-8-2006; that the notification under Section 4(1) and the notification published under Section 6(2) are on different dates; that the Commissioner has been delegated the power to grant sanction to invoke the provisions contained in Section 17 of the Act; that the ground that permission was granted on 11-8-2006 whereas the notification under Section 4 read with 17(1) had already been issued on 8-8-06 does not merit consideration inasmuch as the document which has been placed reliance upon, Annexure-P/8, does not disclose that such permission was given by the Commissioner on 8-8-2006; that the stand that no survey was done before issuing the notifications under Sections 4 and 6 before invoking the urgency clause is unfounded and unacceptable; that the stance that there are houses constructed on their land and, therefore, their land could not have been acquired is sans substance as the land was acquired for public purpose and the land of the petitioners falls in the area on which the canal is to be constructed; that the path of the canal cannot be deviated for the convenience of any individual landowner or on the ground that there is construction existing on the land; that there is material on record to the effect that the entire construction of the canal is already complete excepting the area consisting of the petitioners' land and 2-3 small pieces of land which are in dispute; that the fund of the project having been provided by the Central Government under the Accelerated Irrigation Benefit Programme and the loan having been procured from NABARD and other sources, there is no justification to cancel the notification.

7. Questioning the legal validity of the order passed by the learned Single Judge, Mr. Rajendra Tiwari, learned Senior Counsel, has raised the following contentions:

(a) The writ Court has committed illegality in its appreciation of the factual matrix on the anvil of the settled law and erred in not holding that the urgency clause should not have been invoked in the case at hand.

(b) The learned Single Judge has fallen into grave error by not accepting the submission that there has been simultaneous publication of notifications under Sections 4 and 6 of the Act and that alone vitiates the issue of the notifications.

(c) The learned Single Judge has misconstrued the documents brought on record in arriving at the conclusion that the notifications have been issued on different dates though actually it is not so.

(d) Before invoking the urgency clause for issue of the notifications the permission from the State Government was a condition precedent but the same having not been done, the entire exercise of issuance of notifications is sensitively susceptible and on that ground, they are liable to be quashed.

(e) The vital and valuable right conferred on the land-owner under Section 5-A of the Act has been curbed and throttled and for such curtailment, statutory measures are to be taken in an appropriate and objective manner but when the same has been done in a most capricious manner throwing all norms to the winds, the notifications are liable to be lanceted.

(f) The action of the authority is reeked with mala fide and once mala fide enters into any arena of decision making process, the same has to be regarded as vulnerable and to be axed in exercise of power of judicial review.

(g) Once materials have been produced before the Court to the effect that constructions have been raised by land owners, the authorities should have been well advised to exclude such constructed areas and not to affect the rights of the petitioners.

To bolster the aforesaid submissions, the learned Senior Counsel has placed reliance on the decisions rendered in *State of Uttar Pradesh vs. Radhey Shyam Nigam and others,* (1989)1 SCC 591; *Jagdish Chand and another vs. State of Haryana and another,* (2005) 10 SCC 162; and *Ramkrishan Mahajan vs. Union Territory of Chandigarh and others,* (2007)6 SCC 634.

8. Mr. Kumaresh Pathak, learned Deputy Advocate General for the State, supported the order passed by the learned single Judge contending, inter alia, that all the issues that had been raised by the petitioner in the writ petition have been

appositely and appropriately dealt with by the learned single Judge and no error can be found with the same.

9. First we shall deal with the facet whether the notifications were issued for public purpose and whether there was necessity to invoke the urgency clause. Submission of Mr. Tiwari, learned senior counsel, is that only under unavoidable circumstances, Section 17 of the Act is to be invoked and the same cannot be taken recourse to in a mechanical manner. It is canvassed by him that the circumstances cannot be said to be such which could not brook delay and it was not an unforeseen situation. It is put forth by him that the petitioners should have been allowed to file their objections under Section 5 of the Act. As is evincible from the stand of the respondents, in order to generate electricity and with the intention to use the water of river Narmada for irrigation, four major projects, i.e., Bargi Indira Sagar project, Omkareshwar project, Maheshwar project in the State of M.P. and Sardar Sarovar project in the State of Gujarat were planned to be constructed, out of which, Bargi, Indira Sagar and Sardar Sarovar dams have been completed. Omkareshwar dam is on the verge of completion and Maheshwar project is under progress. It is canvassed that Omkareshwar project is situated at river Narmada 40 kms downstream of Indira Sagar project near Omkareshwar Temple in Khandwa district. Omkareshwar project is a multipurpose project with an installed capacity of 520 MW with designed annual energy generation of 1166 million units and annual irrigation of 2.83 lacs hectares. The culturable command area is 1.47 lacs hectare generation of power. Omkareshwar project is directly related to regulate release of water from I.S.P. and, therefore, it is the most beneficiary project of the Narmada complex. The entire canal system has been divided in four phases. A chart has been produced indicating the phase, canal reach, proposed irrigation and year of completion. In Phase-I, the year of completion is 2008-09 and proposed irrigation area is 24,000 hactare. Phase -II is to be completed in the year 2008-09 and its prposed irrigation area is 17766 hactare. Phase-III is to be completed in the year 2009-10 and it covers 50424 hactares and as regards phase – IV the completion year is 2010-2011 and 54630 hactare is proposed for irrigation. By this canal system 529 villages situated at Khandwa, Khargone and Dhar districts are likely to be benefitted. Total 950 hactare of land is required for construction of the canal system of Phase -I and about 132 villages are to be affected. The expenditure incurred on the Omkareshwar project canal upto August, 2007 is about Rs.80 Crores. The fund for completion of the canal system is being provided by the Central Government under the 'Accelerated Irrigation Benefit Programme' (AIBP) and loan by NABARD under RIDF XII. It is contended that if these grants are not used timely, then the entire amount would be lapsed and due to delay, the cost of the project would be increased heavily. The land is to be acquired for the purpose of left bank canal. The facts and figures have been given in detail about the enormity of the project.

10. It is worth noting that the petitioners have small patches of land situated at Khargone and Khandwa districts. Regard being had to the purpose of acquisition of land and the fact that a large tract is required, the question arises whether the invocation of the urgency clause was necessary or not.

11. In *Dora Phalauli v. State of Punjab and Others*, AIR 1979 SC 1594, it has been held that for making the provision of sub-section (1) of section 17 applicable, there must be an urgency in the matter of taking immediate possession. It has been ruled therein that it is to be remembered that the right of a person having any interest in the property to file an objection under Section 5-A of the Act should not be interfered with in such a casual or cavalier manner.

12. In the case of *State of Punjab and Another v. Gurdial Singh and Others*, AIR 1980 SC 319, it has been held as under:-

> "16..... It is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power."

13. In *Chandra Mani Sahu and Others v. State of Orissa and Others*, AIR 1991 Orissa 205, the Division Bench of the High Court of Orissa has expressed the view as under:

> "4.....The use of emergency powers cannot be a usual feature and only in extra-ordinary circumstances the same can be applied. It is only where the emergency is of such a nature that it would not brook a delay of 30 days, the time requisite for filing an objection, that the emergency provisions can be resorted to. The State has to justify, if questioned, that any delay would have frustrated the purpose for which the acquisition was sought to be made and/or that great prejudice and inconvenience would have been caused. A valuable right is conferred by S. 5-A and a person whose land is sought to be acquired has a right to make representation. If the State wants to take away this valuable right of participation, it has to justify its action by showing existence of emergent situations. The emergency provisions cannot be applied casually. The purpose for which a party is granted an opportunity

of filing its objections in mani-fold, in an appropriate case it can establish absence of public purpose and even suggest alternative sites....."

Their Lordships further proceeded to state as under:

".....While it cannot be gainsaid that it depends upon subjective satisfaction of the State Government as to in which cases the emergency provisions are to be applied, yet the Court can consider whether the situations warranted resort to the emergency provisions. It can also consider whether such emergent situations existed when enquiry u/S. 5-A was dispensed with. Authorities have to indicate basis for the conclusion that there was an urgency which necessitated elimination of summary proceedings u/S/ 5-A. It is not just the existence of urgency, but the need to dispense with hearing of objections u/S. 5-A, which has to be established by the authorities."

14. In *Bhoomandal Singh v. State of M.P. and Others,* 1997 (1) MPLJ 547, it has been held as follows:

".. It is settled law that urgency provision can be invoked only in those cases where it is not possible for the State Government or acquiring authority to wait for a long period or where the purpose is such as would not brook delay of more than thirty days. It was apparent from the facts and it was not a case which could not brook the delay of 30 days. As such dispensing with the requirement of Section 5-A was not proper."

15. In *Om Prakash and Another v. State of U.P. and Others,* (1998) 6 SCC 1 a two-Judge Bench of the Apex Court, while dealing with the grounds for invocation of urgency clause and dispensation with inquiry under Section 5-A, expressed that the scheme of the Act has to be kept in view and after referring to Section 17 of the Act, held thus:

"....If the urgency was of such a nature that it could not brook the delay on account of Section 5-A proceedings, it is difficult to appreciate as to why Section 6 notification in the present case could be issued only after one year from the issuance of Section 4 notification. No explanation for this delay is forthcoming on record. This also shows that according to the State authorities, there was no real urgency underlying dispensing with Section 5-A inquiry despite NOIDA suggesting at the top of its voice about the need for urgently acquiring the lands for the development of Sector 43 and other sectors.."

16. In *Siyaram and Other v. State of M.P. and Others,* 1999 (2) JLJ 361, a

Division Bench of this Court, while dealing with a notification issued under Section 4(1) read with Section 17 of the Act, expressed the view that the Courts have to see public interest vis-a-vis private interest while exercising power under Article 226 of the Constitution of India.

17. In *Union of India and Others v. Kishan Lal Arneja and Others,* AIR 2004 SC 3582, a two-Judge Bench of the Apex Court has opined thus:

> "17. Section 17 confers extraordinary powers on the authorities under which it can dispense with the normal procedure laid down under Section 5-A of the Act in exceptional case of urgency. Such powers cannot be lightly restored to except in case of real urgency enabling the Government to take immediate possession of the land proposed to be acquired for public purpose. A public purpose , however laudable, it may be by itself not sufficient to take aid of Section 17 to use this extraordinary power as use of such power deprives a land owner of his right in relation to immovable property to file objections for the proposed acquisition and it also dispenses with the inquiry under Section 5A of the Act. The Authority must have subjective satisfaction of the need for invoking urgency clause under Section 17 keeping in mind the nature of the public purpose, real urgency that the situation demands and the time factor i.e. whether taking possession of the property can wait for a minimum period within which the objections could be received from the land owners and the inquiry under Section 5A of th Act could be completed. In other words, if power under Section 17 is not exercised, the very purpose for which the land is being acquired urgently would be frustrated or defeated. Normally urgency to acquire a land for public purpose does not arise suddenly or overnight but sometimes such urgency may arise unexpectedly, exceptionally or extraordinarily depending on situations such as due to earthquake, flood or some specific time bound project where the delay is likely to render the purpose nugatory or infructuous. A citizen's property can be acquired in accordance with law but in the absence of real and genuine urgency, it may not be appropriate to deprive an aggrieved party of a fair and just opportunity of putting forth its objections for due consideration of the acquiring authority, while applying the urgency clause, the State should indeed act with due care and responsibility. Invoking urgency clause cannot be a substitute or support for the laxity, lethargy or lack of care on the part of the State Administration.

18. In *Union of India and Ors. Vs. Mukesh Hans,* (2004) 8 SCC 14, it has been held in paragraphs 31 and 32 as under:

"31. Section 17(4) as noticed above provides that in cases where the appropriate Government has come to the conclusion that there exists an urgency or unforeseen emergency as required under sub-section (1) or (2) of Section 17 it may direct that the provisions of Section 5A shall not apply and if such direction is given then 5A inquiry can be dispensed with and a declaration may be made under Section 6 on publication of 4(1) notification and possession can be made.

32. A careful perusal of this provision which is an exception to the normal mode of acquisition contemplated under the Act shows mere existence of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4) that by itself is not sufficient to direct the dispensation of 5A inquiry. It requires an opinion to be formed by the concerned government that along with the existence of such urgency or unforeseen emergency there is also a need for dispensing with 5A inquiry which indicates that the Legislature intended the appropriate government to apply its mind before dispensing with 5A inquiry. It also indicates that the mere existence of an urgency under Section 17(1) or unforeseen emergency under Section 17(2) would not by themselves be sufficient for dispensing with 5A inquiry. If that was not the intention of the Legislature then the latter part of subsection (4) of Section 17 would not have been necessary and the Legislature in Section 17(1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically 5A inquiry will be dispensed with. But then that is not language of the Section which in our opinion requires the appropriate Government to further consider the need for dispensing with 5A inquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with 5A inquiry does not mean that in and every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with 5A inquiry. It is possible in a given case the urgency noticed by the appropriate Government under Section 17(1) or the unforeseen emergency under Section 17(2) itself may be of such degree that it could require the appropriate Government on that very basis to dispense with the inquiry under Section 5A but then there is a need for application of mind by the appropriate Government that such an urgency for dispensation of the 5A inquiry is inherent in the two types of urgencies contemplated under Section 17(1) and (2) of the Act."

19. The present factual matrix is to be tested on the anvil and touchstone of the aforesaid pronouncement of law. On a studied scrutiny of the principles enunciated in the aforesaid decisions, it is luminescent that a satisfaction has to be reached on germane and cogent reasons; there has to be proper and apposite application of mind; the power of invoking urgency clause being extraordinary, the real urgency must emanate from the situation; it is necessary to consider whether the delay would defeat the purpose; it is to be scrutinised whether the lethargy of the State has been substituted by taking recourse to the urgency clause; it is to be scanned whether the rights of the citizens have been curtailed and abridged in an arbitrary manner; and whether the urgency or the unforeseen urgency is of such a degree that the enquiry under Section 5A has to be dispensed with and whether the special powers have been adequately and appositely exercised to marginalise the minimal right that the statute conferred on the citizen to file his objection.

20. In the case at hand, it is evident that the project is enormous in nature; that finance was made available by the Central Government under the 'Accelerated Irrigation Benefit Programme' (AIBP) and loan by NABARD under RIDF XII; that the entire canal work was to be carried out in four phases ; that the projects were already to be worked out; that the Omkareshwar project was near completion and the work of Maheshwar project was under progress; that the construction of Phase -I canal had been taken for execution; that huge expenditure is involved in the project; that there was a time factor for the canal project and hence, the invocation of urgency clause cannot be really found fault with.

21. In this regard, we may refer with profit to the decision rendered in *First Land Acquisition Collector v. Nirodhi Prakash Gangoli and Anr,* (2002) 4 SCC 160, wherein it has been held as under:

> "The question of urgency of an acquisition under Sections 17(1) and (4) of the Act is a matter of subjective satisfaction of the Government and ordinarily it is not open to the Court to make a scrutiny of the propriety of that satisfaction on an objective appraisal of facts. In this view of the matter when the Government takes a decision, taking all relevant considerations into account and is satisfied that there exists emergency for invoking powers under Sections 17(1) and(4) of the Act, and issues notification accordingly, the same should not be interfered with by the Court unless the Court comes to the conclusion that the appropriate authority had not applied its mind to the relevant factors or that the decision has been taken by the appropriate authority malafide."

Regard being had to the totality of circumstances, it cannot be said there was no urgency. In fact, there has been application of mind in invoking the urgency clause and there is no malafide intention in such a decision.

22. The next contention that requires to be addressed to is whether the

notifications issued under Section 4 and Section 6 of the Act are simultaneous and hence, they are not sustainable. In this context it is apposite to refer to the decision in *Radhey Shyam Nigam* (supra) wherein it has been held that declaration under Section 6 has to be issued only after issue of notification under Section 4 even where urgency provisions of Section 17 are invoked in view of the expression 'after the date of the notification' in the amendment to Section 17(4).

23. In the case at hand, the notification for acquisition of the land under Section 4(1) read with Section 17(1) was published in M.P. Rajpatra dated 18.8.2006. The notification under Section 6 of the Act was published in M.P. Rajpatra on 25.8.2008. The same is clearly evincible from Annexures R-5 and R-6 brought on record by the respondent State.

24. The next aspect that requires to be dwelled upon is whether there has been wide publication of the notifications and causation of public notice by the Collector with regard to the notifications. Section 4(1) stipulates that whenever it appears to the appropriate Government that land in locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. In the case at hand, the notifications issued under Section 4(1) read with Section 17(1) was published in the Official Gazette and published in two State level newspapers, namely, Nav-Bharat and Dainik Bhaskar. Section 6(2) of the Act stipulates that every declaration shall be published in the Official Gazette and in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language. Needless to say, the other conditions are attached to it. We have already indicated that the notification was published in the Official Gazette. The notification issued under Section 6 of the Act has been published in Dainik Bhaskar and Choutha Sansar. Thus, it is manifest that there has been wide publication of the preliminary notification and the declaratory notification.

25 In *Radhey Shyam Nigam and others* (supra), the Apex Court held that simultaneous publication of notification under Section 4(1) and declaration under Section 6 is invalid after the amending Act 68 of 1984. As has been pointed out, the notification under Section 4(1) read with Section 17(1) was issued on 8-8-06 and the same was published in the Official Gazette on 18-8-06 and the declaration under Section 6 has been published on 25-8-06. As has been stated above, there has been publication in two widely circulated daily newspapers. Thus, it is quite clear that the notification under Section 4(1) and the declaration under Section 6(2) of the Act were not simultaneous to attract the law laid down in the case of *Radhe Shyam Nigam* (supra). That apart, there has been wide publication as per the assertions made in the counter-affidavit and the document brought on record.

26. The next ground of attack by the learned Senior Counsel for the appellant is that the State Government should have granted sanction for invoking the urgency clause but the same has not been done. The learned Single Judge has adverted to the same and come to hold that the State Government by notification dated 15-02-99 published in the M.P. Gazzette dated 5-3-99 has already delegated the powers to the Commissioner of the Division and, therefore, the notification issued by the Commissioner cannot be treated as invalid as he has the delegated powers to grant such permission. The learned Single Judge has also discussed in detail how the Commissioner has dealt with the matter and not the Collector and hence, we do not find any substance in the said assail.

27. The other two planks of challenge are that there has been no prior survey, and that the constructions exist on the area and, therefore, the Government was under obligation to exclude the said area from acquisition. In Annexure-P/4, as alleged, payment was made to the Surveyor but no survey was done. A reply was filed stating, inter alia, that a notice inviting applications for pre-qualification and the tender forms clearly stipulated that the scope of work would include the work of survey, design, preparation of plans and estimates, etc. Thus, the challenge that there was no survey melts into insignificance.

28. The next question that arises for consideration is when there is construction on the land of the petitioners, the land should have been excluded. In this regard, reliance has been placed on the decisions rendered in *Jagdish Chanda* (supra). In the said case, a three-Judge Bench of the Apex Court was not dealing with a case under Section 4(1) of the Act wherein the emergency clause was invoked. That apart, their Lordships referred to the decision rendered in *Sube Singh vs. State of Haryana,* (2001)7SCC 545 and opined that the directions given in *Sube Singh* (supra) should be given effect to subject to certain restrictions to take care of the planned development of the area. In the case of *Sube Singh* (supra), the Apex Court had taken the view that certain structures deserved exclusion from acquisition. Regard being to the said pronouncement of law in *Jagdish Chanda* (supra) their Lordships directed that as far as possible, the respondents shall try to retain the structure unless it becomes difficult for them to have a planned development without removing the same. Their Lordships observed that directions were issued on the peculiar facts of the case and not founded in general application. The said decision is distinguishable inasmuch as in the case at hand, a canal has to be constructed and, therefore, structure standing on the land would definitely cause impediment since the course of the canal cannot be diverted to suit the interest of an individual. Our attention has been invited to the decision rendered in *Ramkrishan Mahajan* (supra). In the said case, their Lordships were dealing with a batch of appeals under the provisions of the Punjab Municipalities Act, 1911. The question that arose for consideration was whether certain land ought to be released from acquisition under Section 48 of the Land Acquisition Act. Their Lordships opined

that such exclusion does not itself satisfy that there was discrimination in the matter of acquisition of land. Their Lordships have noted certain facts to find out that the lands which were exempted from acquisition in exercise of powers conferred by Section 48 of the Act was based on appropriate factual base. In the case at hand, the challenge is not the same and, in fact, the singular grievance that has been agitated is that once structures have been raised, the same should have been excluded from the purview of acquisition. The submission is made on the foundation as if the said principle operates on absolute terms for the purpose of exclusion. It depends on various facts. In the present case, as we perceive, a canal has to be dug to facilitate irrigation and, therefore, acquisition of constructions of an individual interest has to yield to a larger public interest. The said concept has to be given priority. That apart, no case is made out that the canal has been diverted at any point of time for some individual interest. In any case, the course of the canal is a matter to be adverted to by the experts and not by the Court. Mere bald assertions would not even remotely attract the concept of discrimination.

29. In view of the foregoing analysis, we do not perceive any merit in any of the submissions put forth by the learned Senior Counsel appearing for the appellants, and accordingly, the writ appeals, being sans substratum, stand dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

Appeal dismissed.

I.L.R. [2009] M. P., 359
WRIT PETITION
Before Mr. Justice R.S. Jha
28 August, 2008*

SUBODH SHUKLA ... Petitioner
Vs.
UNION OF INDIA & ors. ... Respondents

Service Law - Army Act, 1950, Sections 27, 84 & 87, Army Rules, 1954, Rules 22, 23 & 26 - *Punishment - Loss of seniority of one year in the rank - Court Martial - Natural Justice - Petitioner was court marshaled and was not supplied with the relevant documents relied in the court martial as well as was not permitted to examine defence witness - Held - Denial of documents to petitioner in spite of specific provisions of Rule 23 & 26(2) and request for examining the defence witness rejected by simply stating that they were irrelevant - Petitioner has been punished without giving him due and proper opportunity to defend himself - Total violation of procedure prescribed by law - Petition allowed.* (Paras 20 & 23)

सेवा विधि – सेना अधिनियम, 1950, धाराएँ 27, 84 व 87, सेना नियम, 1954,

*W.P. No.13408/2004(S) (Jabalpur)

नियम 22, 23 व 26 – दण्ड – श्रेणी में एक वर्ष की वरिष्ठता की हानि – कोर्ट मार्शल – नैसर्गिक न्याय – याची का कोर्ट मार्शल किया गया और उसे सुसंगत दस्तावेज, जिन पर कोर्ट मार्शल में विश्वास किया गया, प्रदत्त नहीं किये गए और प्रतिरक्षा साक्षियों की परीक्षा कराने की अनुमति भी नही दी गई – अभिनिर्धारित – नियम 23 व 26(2) के विनिर्दिष्ट उपबंधों के होते हुए भी, याची को दस्तावेजों की इंकारी और प्रतिरक्षा साक्षी की परीक्षा कराने की प्रार्थना साधारण रूप से यह कथन करते हुए नामंजूर की गई कि वे असंगत थे – याची को उसे स्वयं की प्रतिरक्षा करने का सम्यक् और उचित अवसर दिये बिना दण्डित किया गया है – विधि द्वारा विहित प्रक्रिया का पूर्ण उल्लंघन – याचिका मंजूर।

K.C. Ghildiyal, for the petitioner.
Brian D'Silva with *Gaurav Sharma*, for the respondents.

O R D E R

R.S. JHA, J. :–The petitioner has filed this petition being aggrieved by order dated 1-10-2003 by which a punishment of loss of seniority of one year in the rank has been imposed upon the petitioner. The petitioner has also challenged order dated 27-9-2004 by which his review petition has been rejected.

2. The brief facts leading to the filing of the petition are that the petitioner who, at the relevant time, was posted as a Major at Sagar in 36 Infantry Division Ordinance Unit and was officiating as the Second-in-Command, submitted a complaint to his higher authorities on 30-3-2001 bringing to their notice several irregularities and illegalities committed by his commanding officer and one Major R.S.Dudee. On receiving no response thereon he filed another statutory complaint under Section 27 of the Army Act 1950 again bringing to the notice of the higher authorities the illegalities committed by his commanding officer, Col. Devinder Yadav and Major R.S.Dudee. On 23-5-2001 the petitioner was called for a personal interview by the Divisional Commander, respondent No. 4, however, it is alleged that when the petitioner attended the office of the Divisional Commander, he found his commanding officer sitting there with him and, therefore, being disillusioned he again wrote a Demi Official letter to the Chief of Army Staff on 26-5-2001 bringing to his notice the illegalities and irregularities committed by Col. Devinder Yadav and Major R.S.Rudee. He again sent the same complaint to the Chief of Army Staff on 7-9-2001.

3. It is alleged that being aggrieved by the complaints made by the petitioner against him, his commanding officer issued as many as six show cause notices to him with a view to harass and intimidate the petitioner. In addition, a tentative charge sheet was issued to the petitioner on 9-10-2001 in which six charges were levelled against him by his commanding officer, Col. Devinder Yadav. Subsequently, the petitioner was attached to 77, Medium Regiment and by withdrawing the previous charge sheet a fresh charge sheet leveling the same charges was again issued to him in May, 2002. During the intervening period another charge sheet was issued to him on 24-3-2002 on a single charge of submitting a complaint

directly to the General Officer Commanding-in-chief, Central Command, on 9-11-2001 in violation of paragraph 557 of the Regulations of the Army which requires that such complaints should be submitted through the proper channel only.

4. Thereafter, proceedings for hearing upon the charge sheet were taken up against the petitioner in May, 2002 in respect of the six charges under Rule 22 of the Army Rules 1954 upon which the commanding officer, being of the opinion that certain charges were made out against the petitioner, issued a regular charge sheet to the petitioner on 26-9-2003 levelling four charges against him.

5. The first charge related to an allegation of impersonating as officiating commanding officer between 6th and 12th May, 2001 and despatching letters in spite of the fact that the commanding officer, Col. Devinder Yadav was present in the Unit during the period. The second, third and fourth charges related to the complaints made by the petitioner on 10-4-2001, 26-5-2001 and 7-9-2001, respectively, directly to the Head Quarter, Southern Command and Chief of Army Staff contrary to paragraph 557 of the Regulations of the Army which expressly provides that correspondence with the Chief of Army Staff on official or service matters should be made only through the authorized channel. The summary of evidence as provided by Rule 23of the Army Rules was conducted between 25-5-2002 and 1-5-2003 in which the statements of the prosecution witnesses and the petitioner's defence was considered. The opinion of the Deputy Judge, Advocate General Branch was also obtained and on that basis a summary trial under Section 84 of the Army Act and Rule 26 was held against the petitioner and thereafter the impugned order dated 1-10-2003 was passed imposing a punishment of loss of seniority in the rank of Major as if his appointment as Major bore the date 14-12-1997. The petitioner being aggrieved filed a statutory review under section 87 which also suffered dismissal vide order dated 27-9-2004.

6. The petitioner being aggrieved by the order imposing the aforesaid punishment and rejection of his review has filed this petition alleging that the entire action initiated against him is vitiated by mala fides on the part of his commanding officer, Col. Devinder Yadav and is a result of the complaints filed by him before the superior authorities bringing to their notice the illegalities and irregularities committed by him along with one Major R.S.Dudee. The petitioner further submits that he was constrained to make complaints to the higher authorities as his request for taking action made to the immediately superior officers fell on deaf ears and because he was disillusioned when he found the commanding officer sitting in the office of the Divisional Commander where he was called for personal interview on 23-5-2001. The petitioner has also challenged the summary of evidence and summary trial proceedings on the ground that the respondents have not followed the procedure as prescribed by law as a result of which he has been deprived of proper opportunity to defend himself inasmuch as the documents sought by him were not supplied to him and witnesses requested by him to be summoned

in his defence were not called and without giving him any opportunity to adduce proper evidence in his defence the impugned order has been passed by the respondent-authorities contrary to the provisions of Rules 22, 23 and 26 of the Army Rules.

7. Additionally, the petitioner has also contended that in a parallel enquiry initiated against the petitioner by issuance of the charge sheet on 24-3-2002 in respect of the petitioner's complaint to the General Officer, Commander-in-chief, Central Command dated 9-11-2001 on the allegation that it was contrary to paragraph 557 of the Regulations of the Army as it was not routed through the proper channel, the petitioner having pleaded guilty and having given an undertaking to the effect that he would not repeat such mistake which was done inadvertently, the charge sheet was dismissed vide order dated 27-3-2002 and, therefore, once the charge of a similar nature regarding filing of a complaint directly to the superior officers without going through the proper channel had been dropped on acceptance of the petitioners apology, the petitioner could not have been punished for the same charges namely, charges No. 2, 3 and 4 by the impugned order dated 1-10-2003.

8. The petitioner also assails the impugned order on the ground that the authorities have passed the impugned orders without assigning any reason for holding the petitioner guilty of the charges and without recording a finding on the basis of the evidence on record. It is submitted that in the absence of such a reasoned order or a finding based on the evidence on record the impugned order being contrary to the principles of natural justice deserves to be quashed. Apart from the above, the petitioner has also prayed for a direction to the respondents to take action against Col. Devinder Yadav, respondent No.6 who was his commanding officer at the relevant time, for having illegally detained and arrested the petitioner and for physically and mentally harassing him on account of the petitioner having filed complaints against him and on that count the petitioner has also claimed compensation.

9. It is emphatically stated by the petitioner and not denied by the respondents that the aforesaid action has been taken up by the respondents against the petitioner in spite of the fact that the complaints filed by him against his commanding officers, Col. Devinder Yadav and against Major R.S.Dudee, were found to be true on examination and, therefore, disciplinary action was taken against Col. Devinder Yadav as well as Major R.S.Dudee, who, in fact, has been cashiered from the army as a result thereof.

10. The respondents have filed a return and have stated that the army is a disciplined force and requires strict adherence to the procedure prescribed by the Act and the Rules by officers of the army. It is submitted that paragraph 557 of the Regulations of the Army as published in the revised edition in the year 1987 enjoins that under no circumstances would any correspondence be addressed to

the Chief of Army Staff by any officer in respect of any official or service matter except through the authorized channel but the petitioner, in gross violation of the aforesaid Army Regulations and in a blatant display of indiscipline made as many as four complaints directly to his higher officers i.e. to the General Officer Commanding-in-Chief, Central Command, head quarters, Southern Command and the Chief of Army Staff. That apart, the petitioner got carried away with his personal vendetta against his commanding officer and by impersonating himself as a commanding officer between 6th and 12th of May, 2001 signed a letter on 6-5-2001 by designating himself as officiating commanding officer and got the letters dispatched in spite of the fact that his commanding officer, Col. Devinder Yadav was present in the Unit during the aforesaid period.

11. It is submitted by the learned counsel for the respondents that the petitioner has not denied the fact that he had written the complaints to the superior officers and, therefore, in view of this admission of the petitioner no fault can be found with the finding recorded by the concerned authorities in respect of charges No. 2, 3 and 4. In respect of charge No.1 it is submitted by the respondents that there is evidence on record to indicate that the petitioner projected himself to be officiating commanding officer and personally went and got the aforesaid correspondences dispatched on 12-5-2001 though Col. Devinder Yadav was very much present in the Unit. In the aforesaid circumstances, it is submitted that the contention of the petitioner being misplaced and misconceived deserves to be rejected and the petitioner deserves to be dismissed.

12. On a perusal of the documentary evidence on record it is apparent that the petitioner had made complaints before his superior officers. The first one was dated 10-4-2001 and was addressed directly to the Head Quarter, Southern Command, the second one is dated 26-5-2001, addressed to the Chief of Army Staff, the third one is dated 7-9-2001 and was also addressed to the Chief of Army Staff and the fourth one is dated 9-11-2001, addressed to the General Officer Commanding-in-chief, Central Command. It is also clear from a perusal of the documents that while charges in relation to the first three complaints made by the petitioner were made subject-matter of the final charge sheet dated 26-9-2003 issued to the petitioner after recording the summary of evidence, a separate charge sheet in respect of the last complaint made by the petitioner, dated 9-11-2001 was issued to the petitioner on 24-3-2001.

13. During hearing of the petition, the respondents have produced the record of the proceedings in respect of the charge sheet dated 24-3-2001 relating to the complaint sent by the petitioner on 9-11-2001. A perusal thereof indicates that the petitioner admitted filing of complaints and tendered his unconditional apology for the same and also gave an undertaking that he would not repeat the mistake in future. It is also apparent that he pleaded that he be given one last chance to improve and become a good army officer and the concerned authority, recording

the aforesaid statement of the petitioner, dropped the charges by order dated 27-3-2002. From a perusal of the record it is also clear that the petitioner in his written submissions filed against the second charge sheet has specifically raised this issue before the authorities that as the charge against the petitioner of directly corresponding with the superior authorities in contravention of paragraph 557 of the Regulations having been considered and dropped by the authorities by order dated 27-3-2002 the petitioner cannot be charged with or punished for the same offences subsequently.

14. A perusal of the record of summary of evidence as well as the summary trial, which has been produced for scrutiny of this Court by the respondents, also indicates that while the prosecution witnesses were examined and were permitted to be cross examined by the petitioner and he was also given an opportunity to submit his oral and written statements in defence, the defence witnesses requested by the petitioner to be summoned in his defence and the documents sought by him in his defence were denied to him. The proceedings dated 1-5-2003 of the summary evidence clearly establish the fact that the accused i.e. the petitioner had submitted a list of defence witnesses which he desired to examine in his defence but the concerned officer disallowed his request by recording an opinion that none of the witnesses had any relevance to the case. It is also recorded in the proceedings that the request made by the accused for examining the defence witnesses was disallowed and the summary of evidence was closed. The same recital finds place in the summary trial proceedings wherein while ultimately recording the conclusions in the format prescribed by Form 2, Appendix IV, the authority has stated that the list of witnesses submitted by the accused in his defence was found irrelevant to the four charges and accordingly his request for examining defence witnesses was not acceded to.

15. From a reading of the provisions of Rule 22 of the Army Rules, 1954 which prescribes the procedure to be adopted while hearing of charges against a person on whom a charge sheet has been served, it is clear that the authority, while hearing the delinquent officer on the tentative charges, is required to hear the evidence of the prosecution witnesses as well as the defence witnesses and thereafter if it is of the opinion that further proceedings in respect of the charge need be taken up it would proceed to record the summary of evidence under Rule 23 whereunder the statements of the prosecution witnesses as well as the defence witnesses are required to be taken down in writing. Rule 23(3) provides that after recording of evidence of each witness the accused would be asked whether he wishes to make any statement and whatever he states would be taken down in writing as his evidence. The sub-rule further provides that the accused can then call his witnesses and their statements would be recorded and added to the record. On the basis of the summary of evidence charges would be framed against the petitioner and depending upon the gravity of the charges further proceedings are taken up against the officer.

16. In the instant case, after recording of summary of evidence the case was referred to the Judge Advocate General Branch for its comments which have been filed by the respondents as Annexure R-11 along with the record . From a perusal of conclusion recorded by the Deputy Judge Advocate General in paragraphs 33 and 34 of the comments, it is clear that the Judge Advocate General has given an opinion that four charges should be levelled against the petitioner relating to good order and military discipline which are not serious enough warranting adjudication by court martial and while giving his opinion that the proper procedure for the petitioner's case would be a summary trial under Section 84, in paragraph 34 the Deputy Judge Advocate General has specifically stated that the summary trial proceedings would be conducted as per Form 2, Appendix IV of the Army Rules with a further note that the authority should hear the prosecution witnesses as contained in the summary of evidence.

17. Rule 23 and Rule 26 of the Army Rules which are of special relevance to the present petition are in the following terms :-

> "23. Procedure for taking down the summary of evidence.—(1) Where the case is adjourned for the purpose of having the evidence reduced to writing, at the adjourned hearing evidence of the witnesses who were present and gave evidence before the commanding officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the commanding officer or such officer as he directs.
>
> (2) The accused may put in cross-examination such questions as he thinks fit to any witness, and the questions together with the answers thereto shall be added to the evidence recorded.
>
> (3) The evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name shall be attested by his mark and witnesses as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked : "Do you wish to make any statement ? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence. Any statement thereupon made by the accused shall be taken down and read to him, but he will not be cross-examined upon it. The accused may then call his witnesses, if he so desires, any witnesses as to character.

(4) The evidence of the witnesses and the statement (if any) of the accused shall be recorded in the English language. If the witness of accused, as the case may be, does not understand the English language, the evidence or statement, as recorded, shall be interpreted to him in a language which he understands.

(5) If a person cannot be compelled to attend as a witness, or if owing to the exigencies of service or any other grounds (including the expense and loss of time involved), the attendance of any witness canoe in the opinion of the officer taking the summary (to be certified by him in writing), be readily procured, a written statement of his evidence purporting to be signed by him may be read to the accused and included in the summary of evidence.

(6) Any witness who is not subject to military law may be summoned to attend by order under the hand of the commanding officer of the accused. The summons shall be in the form provided in Appendix III."

"**26. Summary disposal of charges against officer, Junior Commissioned Officer or Warrant Officer**–(1) Where an officer, a Junior Commissioned Officer or a Warrant Officer is remanded for the disposal of a charge against him by an authority empowered under section 83, 84 or 85 to deal summarily with that charge, the summary of evidence shall be delivered to him, free of charge, with a copy of the charge as soon as practicable after its preparation and in any case not less than-twenty four hours before the disposal.

(2) Where the authority empowered under section 83, 84 or 85, decides to deal summarily with a charge against an officer, junior commissioned officer or warrant officer, he shall unless he dismisses the charge, or unless the accused has consented in writing to dispense with the attendance of the witnesses, hear the evidence in the presence with the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witness and make a statement in his defence.

(3) The proceedings shall be recorded as far as practicable in accordance with the form in Appendix IV and in every case in which punishment is awarded, the proceedings together with the conduct sheet, summary of evidence and written consent to dispense with the attendance of witnesses (if any) of the accused, shall be forwarded through the proper channel to the superior military authority as defined in section 88."

18. In spite of the fact that the statutory procedure as prescribed by the rules was required to be followed by the authorities, it is apparent from the record of the case that though the petitioner gave a list of documents and witnesses which he wanted to examine in his defence during recording of the summary of evidence under Rule 23 as well as during summary trial under Rule 26, the authorities rejected his prayer on the ground that the witnesses were not considered relevant. As a result of this serious infarction of the procedure prescribed by law on the part of the respondents, the petitioner has been denied the right to adduce evidence in his defence, denied the right to defend himself due to non-supply of documents and the statements of the defence witnesses which, on being recorded in writing and added to the record during the summary of evidence proceedings, would have been available on record for proper adjudication in accordance with law are totally absent.

19. The learned counsel for the petitioner has specifically pointed out that on the basis of his applications for the documents sought by him it would have been conclusively established that the petitioner's commanding officer Col. Devinder Yadav was on leave from 29-4-2001 to 7-5-2001 and that during this period i.e. up to 6-5-2001 the petitioner was officiating commanding officer and that the letter dated 6-5-2001 was written by him in that capacity. The learned counsel for the petitioner on the basis of the documents has also submitted that he specifically requested the authorities to examine Nayak Devi Prasad Hawaldar and P.C. Swain in his defence and his commanding officer Col. Devinder Yadav in cross examination to establish the fact that the petitioner was the commanding officer from 29-4-2001 to 6-5-2001 and that he was personally not involved in despatching the letter on 12-5-2001. The petitioner had also sought to examine witnesses in support of his defence to establish that on a previous occasion when an officer had directly corresponded with the Chief of Army Staff and his complaints had been found true, that officer had in fact been appreciated for bringing to the notice of the higher authorities illegalities and irregularities committed by his immediate superior and fellow army officer. In spite of such a specific request made by the petitioner repeatedly, the respondent-authorities rejected his request for examining his defence witnesses and for producing the documents though they were statutorily bound to do so under Rule 23(3) and (4) and Rule 26(2).

20. In view of the aforesaid facts and circumstances it is apparent that the rejection by the authorities of the petitioner's request for examining the witnesses in his defence by simply stating that they were irrelevant and denial of documents to him in spite of the aforesaid specific provisions of Rules 23 and 26(2) and the clear opinion of Deputy Judge Advocate General in paragraph 34 of his comments, vitiates the entire proceedings and renders them illegal and unsustainable in the eyes of law as the petitioner has been denied his valuable statutory right to defend himself, in fact, in the instant case the petitioner has been punished without giving

him due and proper opportunity to defend himself in total violation of the procedure prescribed by law.

21. It is also clear from a perusal of the record of the summary trial that though the petitioner repeatedly submitted before the authorities that the charges relating to violation of paragraph 557 of the Army Regulations could not be proceeded with any further against the petitioner as he had already been exonerated of the charges on his pleading guilty and submitting an unconditional apology, vide order dated 27-3-2002 the authorities have totally ignored this aspect. I am of the considered opinion that this aspect was also relevant as all the aforesaid complaints made by the petitioner related to the same irregularities and illegalities said to have been committed by his commanding officer, Col. Devinder Yadav and Major R.S.Dudee and all the four complaints made by him were practically identical and, therefore, once the authority had already discharged the petitioner in respect of the last complaint made by him on 9-11-2001 and had already accepted his apology and dropped the charges, they were required to take into consideration the impact of the aforesaid order of discharge dated 27-3-2002 while considering charges No. 2, 3 and 4 levelled against the petition in the charge sheet dated 26-9-2003, with all the material therein and the conclusion recorded by the authority. However, on a perusal of the record of the summary trial, I do not find any consideration of this aspect by the concerned authority. In fact, the order dated 27-3-2002 discharging the petitioner is not even on record in the proceedings of the summary trial. Moreover, as the charges against the petitioner had been dropped by the order, dated 27-3-2002, there was no adverse entry in the petitioner's service record which would have reflected that the petitioner had been discharged and, therefore, though a certificate in respect of the petitioner's service record finds place in the record of the summary trial, in the absence of any adverse entry or mention of the fact that the petitioner had been discharged vide order dated 27-3-2002 on a similar charge the authority concerned had no occasion to apply his mind to the aforesaid aspect.

22. For the aforesaid reasons the contention of the learned counsel for the respondents that the petitioner had admitted the writing of complaints and, therefore, even in the absence of any evidence the finding of guilt in respect of the charges No. 2, 3 and 4 cannot be found fault with, deserves to be rejected as the authorities were bound to take into consideration the fact that the petitioner had already been discharged in respect of submitting the complaints regarding the same incident on the basis of which he was being prosecuted and the fact that subsequent to his discharge, in accordance with the undertaking, he had not filed any complaint thereafter or repeated the alleged mistake and as his defence witnesses and documents in respect of these charges were also denied to him.

23. In view of the aforesaid analysis and discussion, I am of the considered opinion that the respondent-authorities have failed to follow the procedure

prescribed by Rules 23 and 26 of the Army Rules by denying the petitioner the right to summon and get the statements of the defence witnesses recorded and by not supplying copies of the documents in support of his defence as a result of which the entire proceedings taken up against him is vitiated and rendered illegal as the petitioner has been deprived of his valuable statutory right to defend himself during the summary of evidence and summary trial. I am of the considered opinion that failure of complying with the procedure prescribed by Rules 23 and 26 of the Army Rules which provide for giving an opportunity to the accused-officer to ask for documents and get the statements of his defence witnesses reduced to writing and to produce them during the summary trial, resulted in rendering the petitioner defenceless and as a consequence the entire disciplinary proceedings being illegal and the order of punishment and the review order being perverse, illegal and suffering from non-application of mind deserve to be quashed.

24. At this stage, it is relevant to take note of the fact that the petitioner has been subsequently promoted as a Lieutenant Colonel and, therefore, the summary trial cannot be held against him under the provisions of Section 84. That apart, as three years from the date of incident have elapsed a fresh trial against the petitioner is also not permissible in view of the provisions of Section 122 of the Army Act and, therefore, at this stage there is no provision in the Army Act or Rules which could permit recording of the statements of the defence witnesses in the summary of evidence afresh or fresh hearing of the defence witnesses during the summary trial nor is there any provision or justification for remitting the matter back for recording the statements of defence witnesses after such a long lapse of time. At this juncture, I may also take note of the specific fact as stated by the learned counsel for the petitioner and not denied by the respondents that on the basis of the petitioner's complaints action was taken by the respondent-authorities by passing appropriate orders against his commanding officer, Col. Devinder Yadav and have also initiated proceedings against Major R.S.Dudee who has thereafter been cashiered from Army services.

25. In the backdrop of the aforesaid facts and circumstances, I am of the considered opinion that the impugned order dated 1-10-2003 and the order passed in review, dated 27-9-2004 deserve to be and are hereby quashed.

26. The petition stands allowed accordingly. In the facts and circumstances of the case, there shall be no order as to costs.

Petition allowed.

CHANDRA PRAKASH SONI Vs. DWARKA PRASAD SONI

I.L.R. [2009] M. P., 370

WRIT PETITION

Before Mr. Justice Sanjay Yadav

05 September, 2008*

CHANDRA PRAKASH SONI ... Petitioner

Vs.

DWARKA PRASAD SONI & ors. ... Respondents

Registration Act (16 of 1908), Section 17(2)(i) - *Whether family settlement requires registration - Held - A former oral partition was amongst the family members in metes and bounds and respective members were placed in possession - Therefore, the document did not evidence any partition by metes and bounds - But is a mere recital of former oral partition - Registration not required - Petition dismissed.* (Paras 6 & 8)

रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17(2)(i) – क्या पारिवारिक व्यवस्थापन का रजिस्ट्रीकरण आवश्यक है – अभिनिर्धारित – परिवार के सदस्यों के मध्य पूर्व में मौखिक बँटवारा मीट्स एण्ड बाउंड्स से हो गया था और सदस्यों को उनके हिस्से का कब्जा दे दिया था – इसलिए दस्तावेज किसी मीट्स एंड बाउंड्स से हुए बँटवारे को साक्ष्यांकित नहीं करता है – बल्कि पूर्व में हुए मौखिक बँटवारे का केवल लेख है – रजिट्रीकरण आवश्यक नही – याचिका खारिज।

Cases referred:

1970 MPLJ 371, (2007) 8 SCC 361, AIR 2004 SC 4130, AIR 1988 SC 881.

Sheel Nagu, for the Petitioner.

None, for the Respondents.

O R D E R

SANJAY YADAV, J. :– Being aggrieved of the order dated 1.8.2008 passed in Civil Suit N0.69-A/2008 by IIIrd Civil Judge, Class-II Narsinghpur the petitioner has preferred present writ petition under Article 227 of the Constitution of India. By the impugned order the objection raised by the petitioner/defendant in respect of the admissibility of the partition deed on the ground that the same is not registered under Registration Act, 1908 came to be rejected.

2. The facts in nutshell are that the respondent no. 1 has filed a suit for declaration of the entitlement of his share in family property on the basis of family partition, the claim is objected to by other brother i.e. the petitioner. The case of the respondent/plaintiff before the trial Court is that the house property and the immovable property situated at Mouja Kandeli Narsinghpur was a joint hindu undivided property and as per family settlement, the respective members were placed in physical possession of their respective shares in the year 1988-89. In year 1995 the aforesaid settlement was reduced in writing under the

*W.P. No.10330/2008 (Jabalpur)

nomenclature family settlement. Some dispute however, arose in the year 1997 between the petitioner and respondent in respect of partition wall but the matter came to be settled in family panchayat on 8.11.1997, whereby, both the parties agreed to remain in occupation of their respective shares. Thereafter, in December 2002 the respondent/plaintiff approached the petitioner requesting him to construct the partition wall as agreed; however, since the petitioner did not accede to the request, the respondent/plaintiff filed the suit in question seeking the declaration to that effect. In said suit an objection was raised by the petitioner/defendant that the family arrangement relied upon by the respondent/ plaintiff since was not registered under the Registration Act, 1908, the same cannot be taken in to evidence. The trial Court, however, while relying upon the judgment of the Apex Court rendered in the case of *Devchand and others V. Shviram and others:* 1970 MPLJ 371 over ruled the objection by his order dated 1.8.2006. It is this order which is under challenge in this writ petition under Article 227 of the Constitution of India.

3. Challenging the order it is urged by the learned counsel for the petitioner/ defendant that since the partition in metes and bound was by virtue of partition deed dated 23.2.1995, Annexure P/3, was thus compulsorily registrable, it is urged that the trial Court was not justified in holding that the deed dated 23.2.1995 was only a memorandum or acknowledgment of a former partition orally made and therefore the non-registration thereof will not be a bar to accept the same in evidence.

4 Considered the submission put forth by the learned counsel for the petitioner.

5. A jurisprudential title to a property, as observed in the case of *Syndicate Bank Vs. Estate Officer and Manager, APHC Ltd:* (2007)8 SCC361 paragraph 29, "may not be a title of an owner. A title which is subordinate to an owner and which need not be created by reason of a registered deed of conveyance may at times create title." It was further observed by their lordships in paragraph 40 that "A person may acquire a title to a property irrespective of the nature thereof by several modes e.g. a lease of land which does not require registration; (ii) by partition of a joint family property by way of family settlement, which does not require registration."

Section 17(l)(b) and 17(2)(i) of the Registration Act, 1908 stipulates:-

> "17 Documents of which registration is compulsory-(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act.No.XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to-

(i) any composition deed;

6. Thus when a deed of partition reduced in writing in a formal document intended to be an evidence of partition is compulsory registrable under the Registration Act 1908. However, if it does not evidence any partition in metes and bounds, but is a mere recital of a former partition orally made, it would be outside the purview of Section 17(l)(b) of the Act of 1908.

7. In the case of *K.G.Shivalingappa v. G.S. Eswarappa:* AIR 2004 SC 4130, their Lordships were pleased to observe."

"13. In *Nani Bai.v.Gita Bai Kom Rama Gunge* (AIR 1958 SC 706), it has been held by this Court that though partition amongst the Hindus may be effected orally but if the parties reduce it in writing to a formal document which is intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted in partition and thus the document would be required to be compulsory registered under S.17(l)(b) of the Registration Act. However, if the document did not evidence any partition by metes and bounds, it would be outside the purview of S.17(l)(b) of the Indian Registration Act. This decision was followed in *Shiromani and others v. Hem Kumar and others* AIR 1968 SC 1299 and *Roshan Singh v. Zile Singh,* AIR 1988 SC 881.In *Sk. Sattar Sk. Mohd.Choudhari v. Gundappa Ambadas Bukate,* 1996 (6)SCC 373 , after analyzing the judgments, referred to above, this Court observed:

"Partition, specially among the coparceners, would be a "Transfer" for purposes of Registration Act, 1908 or not has been considered in *Nani Bai v. Gita Bai Kom Rama Gunge* (AIR 1958 SC 706) and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted (by partition) and thus the document would fall within the mischief of S. 17(l)(b) of the Registration Act under which the document is compulsorily

registrable. If, however, that document did not evidence any partition by metes and bounds, it would be outside the purview of that section. This decision has since been followed in *Siromani v. Hemkumar*: (AIR 1968 SC 1299) and *Roshan Singh v. Zile Singh* (AIR 1988 SC 881)".

8. A perusal of family partition deed, Annexure P/3 reveals that there was a former oral partition amongst the family members in metes and bounds and the respective members were placed in physical possession, and therefore, the same was not registrable under Section 17(2)(i) of the Act of 1908.

9. Having thus considered this Court does not find any substance in the petition and the same is hereby dismissed.

10. It is however, made clear that this Court has not expressed its view on the merit of the case which is to be decided on its own facts. Any observation made hereinabove to substantiate the reasonings will not bind the trial Court to decide the suit on its own merit.

11. With the above observation, the petition stands disposed of in limine.

Petition dismissed.

I.L.R. [2009] M. P., 373
WRIT PETITION
Before Mr. Justice R.S. Jha
5 September, 2008*

SUNIL KUMAR JAIN ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Service Law - Constitution, Article 226 - *Departmental Enquiry - Charge-sheet - Writ jurisdiction - Writ petition should not be entertained against a mere charge-sheet - Issuance of charge-sheet does not amount to an adverse order effecting rights of any party or giving rise to cause of action - Writ petition should be entertained in some very rare exceptional case where charge-sheet is found to be wholly without jurisdiction.*

(Para 5)

क. सेवा विधि – संविधान, अनुच्छेद 226 – विभागीय जाँच – आरोप पत्र – रिट अधिकारिता – रिट याचिका मात्र आरोप पत्र के विरुद्ध ग्रहण नही की जानी चाहिए – आरोप पत्र का जारी किया जाना किसी पक्षकार के अधिकार को प्रभावित करने वाले या वाद कारण उत्पन्न करने वाले प्रतिकूल आदेश की कोटि में नही आता है – रिट याचिका किसी अति विरल आपवादिक मामले में, जहाँ आरोप पत्र सर्वथा अधिकारिता विहीन पाया जाए, ग्रहण की जानी चाहिए।

B. Service Law - Constitution, Article 226 - *Departmental Enquiry*

*W.P. No.10008/2008 (Jabalpur)

- *Charge sheet - Quashing of - High Court cannot go into the merits of allegations on the basis of which charge-sheet has been issued and record finding that no merit in the charges.* (Para 6)

क. सेवा विधि – संविधान, अनुच्छेद 226 – विभागीय जाँच – आरोप पत्र – का अभिखण्डन – उच्च न्यायालय अभिकथनों, जिनके आधार पर आरोप पत्र जारी किया गया है, के गुणदोषों की परख नही कर सकता और यह निष्कर्ष अभिलिखित नही कर सकता कि आरोपों में कोई सार नही है।

Cases referred :

(2006) 12 SCC 28, (1997) 11 SCC 368, (1996) 11 SCC 498, (1995) Supp (1) SCC 180.

D.K. Tripathi, for the petitioner.

ORDER

R.S. JHA, J. :–The petitioner has filed this petition against the charge sheet issued to the petitioner on 25-10-2007. It is submitted by the learned counsel for the petitioner that the petitioner had been transferred from Panna to Chhatarpur vide order dated 10-7-2007. He had filed petitions before this Court wherein it had been directed that his representation against the order of transfer as well as the application for grant of interim relief be decided by the concerned authority in accordance with the policy of the State.

2. It is submitted that though the petitioner had taken up proceedings before this Court against the impugned order of transfer, the respondent-authorities have issued a charge sheet to the petitioner in respect of retaining records and public money in his possession and not handing it over to the person who took over charge from the petitioner.

3. The learned counsel for the petitioner further submits that the impugned charge sheet could not have been issued as the petitioner was proceedings with his case before this Court during the interim period and in spite of directions from this Court the respondent-authorities did not decide the petitioner's representation expeditiously in accordance with law and in such circumstances, the impugned charge sheet deserves to be quashed.

4. From a perusal of record it is evident that no interim order of stay in respect of the transfer order of the petitioner was granted by this Court and, therefore, there is prima facie material on record on the basis of which the charge-sheet has been served upon the petitioner. It is also evident that the petitioner had been served with a charge sheet dated 25-10-2007 pursuant to which he has filed a reply and after considering the same the respondent-authorities have instituted a regular departmental enquiry against the petitioner by order dated 26-2-2008 which order has not been assailed by the petitioner in this petition. It is apparent from the aforesaid that the petitioner shall be given full opportunity in the departmental proceedings to establish his innocence.

5. The law relating to the scope of interference by this Court in exercise of its power of judicial review, into the merits or validity of a charge-sheet, has been settled and laid down by the Supreme Court in a series of cases wherein it has been held that the discretionary jurisdiction of the High Court under Article 226 of the Constitution of India should not ordinarily be exercised by quashing a charge-sheet nor should a writ petition be entertained against a mere charge-sheet as at that stage the writ petition is premature as issuance of a charge-sheet does not amount to an adverse order effecting the rights of any party or giving rise to a cause of action except in some very rare exceptional case where the charge-sheet is found to be wholly without jurisdiction or illegal. In the case of *Union of India and Another vs. Kunisetty Satyanarayana*, (2006) 12 SCC 28, it has been held as under:-

> "13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh, Special Director v. Mohd. Ghulam Ghouse, Ulagappa v. Divisional Commr., Mysore, State of U.P. v. Brahm Datt Sharma, etc.
>
> 14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.
>
> 15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.
>
> 16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

6. In the case of *State of Punjab and Others vs. Ajit Singh,* (1997) 11 SCC 368, the Supreme Court while setting aside the order of the High Court, wherein it had quashed the charge-sheet, has gone on to observe that the High Court cannot go into the merits of the allegations on the basis of which the charge-sheet has been issued and record a finding that there is no merit in the charges levelled against the person specifically in cases where the allegations are based on admitted facts or documents which have to be produced as evidence to establish the charges in the disciplinary proceedings and has held as under:-

> "3. .... We are, however, of the view that the High Court was in error in setting aside the charge-sheet that was served on the respondent in the disciplinary proceedings. In doing so the High Court has gone into the merits of the allegations on which the charge-sheet was based and even though the charges had yet to be proved by evidence to be adduced in the disciplinary proceedings. The High Court, accepting the explanation offered by the respondent, has proceeded on the basis that there was no merit in the charges levelled against the respondent. We are unable to uphold this approach of the High Court. The allegations are based on documents which would have been produced as evidence to prove the charges in the disciplinary proceedings. Till such evidence was produced it could not be said that the charges contained in the charge-sheet were without any basis whatsoever."

7. Similar view has also been taken by the Supreme Court in the cases of *Dy. Inspector General of Police vs. K. S. Swaminathan,* (1996) 11 SCC 498 and *Union of India and Another vs. Ashok Kacker,* (1995) Supp (1) SCC 180.

8. In the present case it has not been demonstrated by the learned counsel for the petitioner that the charge-sheet has been issued by an incompetent authority, is without jurisdiction or is illegal. That apart, the present case is also not one where no charge is made out on the basis of admitted facts or documents and, therefore, the charges cannot be said to be wholly illegal. Additionally, the petitioner has already filed his reply to the charge-sheet and after considering it, the authorities have instituted a regular departmental proceedings in which the correctness of the charges would be decided after giving due opportunity to the petitioner to adduce evidence.

9. In the facts and circumstances of the case, I am not inclined to interfere in the charge-sheet at this stage in view of the law laid down by the Supreme Court in the aforementioned cases. The petition being meritless is, accordingly, dismissed.

Petition dismissed.

BHOLA Vs. STATE OF M.P.

I.L.R. [2009] M. P., 377

WRIT PETITION

Before Mr. Justice Sanjay Yadav

22 September, 2008*

BHOLA ... Petitioner

Vs.

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

A. Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Sections 3(2), 5 & 6 - *Externment - Opportunity of hearing - Show cause notice issued to petitioner who filed his Vakalatnama - But, no one appeared for petitioner and statements of witnesses were recorded in his absence - Notice sent to petitioner to show cause as to why an order of externment be not passed - After considering reply of petitioner order of externment was passed - Held - No substance in the claim that there was no fair trial and petitioner was not afforded any opportunity of hearing.* (Para 8)

क. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धाराएँ 3(2), 5 व 6 – निर्वासन – सुनवाई का अवसर – याची को कारण बताओ सूचना पत्र जारी किया गया उसने अपना वकालतनामा पेश किया – किन्तु याची की ओर से कोई उपस्थित नही और उसकी अनुपस्थिति में साक्षियों के कथन अभिलिखित किये गये – याची को सूचना पत्र भेजा कि कारण दर्शाये क्यों न निर्वासन का आदेश पारित किया जाए – याची के जवाब पर विचार करने के बाद निर्वासन का आदेश पारित किया गया – अभिनिर्धारित – दावे में कोई सार नही कि न्याययुक्त विचारण नही था और याची को सुनवाई का कोई अवसर नही दिया गया।

B. Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 6(c) [as amended w.e.f. 05.09.2006] - *Externment - Whether bar contained in Article 20 of Constitution of India would bar action to be taken on past conduct and whether such action would tantamount to retrospective operation of statute - Petitioner convicted for five times u/s 4A of Public Gambling Act, 1867 between the period 1997-2000 - Section 6(c) of Adhiniyam 1990 amended in the year 2006 - Held - Penal statute which create disabilities and authorize some action based on past conduct may be interpreted retrospectively - Consideration of conviction of petitioner prior to amendment - Cannot be said that Section 6 of Adhiniyam 1990 as it existed after amendment has been applied retrospectively - Petition dismissed.* (Paras 13 to 17)

ख. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 6(सी) [05.09.2006 से यथा संशोधित] – निर्वासन – क्या भारत के संविधान के अनुच्छेद 20 में अन्तर्विष्ट रोक पूर्व आचरण पर की जाने वाली कार्यवाही पर रोक लगायेगी और क्या ऐसी कार्यवाही कानून के भूतलक्षी प्रवर्तन के तुल्य होगी – याची को 1997–2000 की कालावधि के मध्य सार्वजनिक द्यूत अधिनियम, 1867 की धारा 4ए के अधीन पाँच बार दोषसिद्ध किया

*W.P. No.7996/2008 (Jabalpur)

गया – अभिनिर्धारित – दाण्डिक संविधि जो निर्योग्यता उत्पन्न करती है और पूर्व आचरण पर आधारित किसी कार्यवाही को प्राधिकृत करती है भूतलक्षी रूप से निर्वचित की जा सकेगी – संशोधन के पूर्व याची की दोषसिद्धि पर विचार – यह नही कहा जा सकता कि अधिनियम 1990 की धारा 6 जैसी वह संशोधन के बाद अस्तित्व में है भूतलक्षी रूप में लागू की गई है – याचिका खारिज।

Cases referred :

2007(3) MPLJ 115, AIR 1961 SC 307, AIR 1965 SC 1206, (2004) 8 SCC 1, (2007) 7 SCC 396.

Maninder Singh Bhatti, for the petitioner.

G.P. Singh, G.A., for the respondent.

O R D E R

SANJAY YADAV, J. :–Challenge in this petition under Article 226/227 of the Constitution of India is to an order of externment passed by District Magistrate on 2.5.2008 in a Criminal Case No. 3/2007 and the order dated 24.6.2008 by the Divisional Commissioner, Sagar, division Sagar whereby the order of externment dt. 2.5.2008 has been affirmed. The order of externment has been passed in exercise of power under Section 3 (2) and Sections 5 and 6 of Madhya Pradesh Rajya Suraksha Adhiniyam 1990 (referred to as Adhiniyam).

2. The brief facts culled out from the pleadings put forth by the petitioner are that the petitioner is a resident of Sukhchain Ward Tahsil Deori district Sagar. The petitioner was served a show cause notice on 2/4.2.2008 under the Adhiniyam as to why an action be not taken against him under the Adhiniyam and be externed from the territorial limits of district Sagar and its surrounding districts. As many as 23 cases were reported to be registered against the petitioner under Section 4 A of Public Gambling Act, 1867 (for short the Act of 1867) read with Section 120 B Indian Penal Code and under Section 107, 110, 116 and 151 of the Criminal Procedure Code and was convicted under Section 4 A of the Act of 1867 on five occasions. The petitioner filed his objection mainly on the ground that the inclusion of the convictions under Section 4 A of Public Gambling Act which was prior to year 2000 could not be taken into consideration, because, the same was substituted in the Adhiniyam in the year 2006 vide the Madhya Pradesh Rajya Suraksha (Sanshodhan) Adhiniyam, 2006 w.e.f. 5.9.2006 and that he was leading a peaceful life along with his family. The petitioner sought an opportunity of hearing. The authority concerned on receiving the reply and being not satisfied with the explanation registered a case and after recording evidences passed an order of externment on 2.5.2008 which was subsequently affirmed in an appeal preferred by the petitioner by the appellate order dated 24.6.2008. These orders which are being challenged in this petition.

3. The legal validity of the impugned orders is questioned on the following grounds:

(i) that the authorities failed to afford reasonable opportunity of hearing as contemplated under Section 8 of the Adhiniyam;

(ii) that none of the ingredients of Sections 3 (2), 5 or 6 of the Adhiniyam have been attracted;

(iii) that there is lack of objective consideration to the extent that even those cases in which the petitioner has been acquitted taken into consideration

(iv) that there is no fair trial that none of the residents of Sukhchain Ward where the petitioner resides were examined and the persons who were examined were either police personnel or those who were not the residents of the ward where petitioner resides

(v) that no cognizance of the offence under Section 4 A of the Act of 1867 could have been taken into consideration because this provision was substituted in the Adhiniyam w.e.f. 5.9.2006 and was not effective from a retrospective date.

4. In furtherance of the aforesaid submission the learned counsel for the petitioner has placed reliance on the orders passed by this Court in W.P. No. 2969/2002 decided on 4.7.2002, Annexure P/2, *Pappu @ Dinesh Gupta vs. State of M.P. & ors:* 2007 (3) MPLJ 115, and *Jagannath Prasad Wasudeo Prasad vs. State of M.P. and others :* 1968 MPLJ 402.

5. The learned Govt. Advocate on his turn, placing reliance on the return filed on behalf of the respondent State has to urge that the order of externment and its confirmation by the appellate authority are just and proper. It is contended that the petitioner is a habitual criminal having series of cases in which he was convicted and the cases are still pending against the petitioner. It is stated that the order of externment is in larger public interest and the same has been passed only after affording an opportunity of hearing to the petitioner. Relying upon the chart furnished along with the return as Annexure R-1, it is contended, inter alia that the petitioner was convicted for an offence under Section 4 A of the Act of 1867 for five times between the period from 1997 to 2000 and thereafter also, cases were registered against him under Section 4 A of the Act of 1867 in the year 2007 bearing Crime No. 294/2007 and the cases under Sections 107, 110, 16 and 151 of the Code of Criminal Procedure were also registered against the petitioner, indicating therein the antecedents of the petitioner and the threat to public tranquility. It is further urged that besides cases under the Act of 1867, the cases under Excise Act are also registered against the petitioner. In respect of the applicability of the provision of Section 4 A for the purpose of Section 6, the learned Govt. Advocate contends that since the Section 4 A has been substituted in the enactment of 1990, it was well within the power of competent authority to have taken into

cognizance the conviction of the petitioner under Section 4 A of the Act of 1867. It is further urged that an opportunity of hearing was afforded to the petitioner by issuing a show cause notice to him and after receiving the reply further notice was issued to the petitioner to participate in the proceedings initiated after the issue of show cause notice. The learned Govt. Advocate relies upon the proceedings drawn on respective dates. It is accordingly contended that there being no substance in the petition the same is liable to be dismissed.

6. Heard the learned counsel for the parties at length and perused the original record of Case No. 03/2007 wherein the externment order was passed.

7. In respect of the submissions put-forth by learned counsel for the petitioner that there was a denial of fair opportunity of hearing and the entire proceeding was drawn behind the back of the petitioner, the same does not get support from the record which has been produced by the respondents. It is observed from the record that on 3.8.2007 the District Magistrate received a report from the Superintendent of Police Sagar for initiating action against the petitioner under the provision of Adhiniyam 1990. The District Magistrate thereafter registered a case with a direction that a show cause notice be issued to the petitioner. The show cause notice which was issued, was served on the petitioner's wife and a Vakalatnama was filed on behalf of the petitioner on 30.8.2007, which was the date fixed for the show cause. On 30.8.2007, the matter was posted for 22.9.2007 for recording of the evidence of prosecution witnesses. This order sheet was duly noted by learned counsel for the petitioner, however, on 22.9.2007 no one appeared on behalf of the petitioner. Therefore, the matter was posted for 22.11.2007 when the prosecution witnesses were examined. Thereafter the matter was posted for 30.11.2007 for recording of evidence of independent witnesses. Thereafter the matter was taken up on 31.1.2008 when the following order sheet was drawn:

"31–01–2008 प्रकरण प्रस्तुत।

(2) साक्षी रूपसिंह ठाकुर, सहायक उप निरीक्षक, शहजाद खान, ड्रायवर एवं नारायण उप. इनके कथन लिये गये।

(3) प्रकरण में प्राप्त रिकार्ड एवं कथनों का अवलोकन किया। अनावेदक पर 1997 से सट्टा खिलाने के प्रकरण दर्ज हुए है। इसके साथ ही अनावेदक पर 107X116, 151, 170 में भी कार्यवाहियाँ हुई है।

(4) उक्त कार्यवाहियों एवं आपराधिक रिकार्ड की पुष्टि कथनों से हुई है कि अनावेदक सट्टे खिलाने के साथ ही अपराधिक गतिविधियों वाले लोग से संपर्क बनाये है तथा उसका आतंक बढ़ता जा रहा है। प्रतिबंधात्मक कार्यवाही के बावजूद वह अपराधों में लिप्त है।

(5) उपरोक्तानुसार स्पष्ट है कि अनावेदक के विरूद्ध राज्य सुरक्षा अधिनियम में कार्यवाही हेतु पर्याप्त आधार हैं। अतः अनावेदक के विरूद्ध कारण बताओ नोटिस जारी करे कि क्यों न उसे एक वर्ष के लिए निष्कासित किया जाये।"

8. Consequent thereof notices were sent to the petitioner on 4.2.2008, Annexure P-4 calling upon the petitioner to show cause as to why an externment order be not passed against the petitioner and the matter was posted on 6.3.2008. Subsequently a reply was filed on 7.3.2008 on behalf of the petitioner, the authority not convicted with the reply passed final order on 2.5.2008 in exercise of power under Section3 (2) and Sections 5 and 6 of the Adhiniyam, 1990, Annexure P-6. Having regard to the aforesaid proceedings adhered to by the District Magistrate, this Court does not find any substance in the claim put-forth by the petitioner that there was no fair trial and that the petitioner was not afforded any opportunity of hearing.

9. Section 8 of Adhiniyam 1990 makes a provision for hearing to be given before order under Sections 3, 4, 5 or 6 is passed. It stipulates:

> **"8. Hearing to be given before order under Sections 3, 4, 5 or 6 is passed.** - (1) Before an order under Sections 3, 4, 5 or 6 is passed against any person, the District Magistrate shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them.
>
> (2) If such person makes an application for the examination of any witness produced by him, the District Magistrate shall grant such application and examine such witnesses unless for reason to be recorded in writing, the District Magistrate is of opinion that such application is made for the purpose of vexation or delay.
>
> (3) Any written statement put in by such person shall be filed with the record of the case and such person shall be entitled to appear before the District Magistrate by any legal practitioner for the purpose of tendering his explanation and examining the witnesses produced by him.
>
> (4) The District Magistrate proceeding under sub-section (1) may, for the purpose of securing the attendance of any person against whom any order is proposed to be made under Sections 3, 4, 5 or 6 require such person to appear before him and to execute a security bond with or without sureties for such attendance during the inquiry.
>
> (5) If the person fails to execute the security bond as required or fails to appear before the District Magistrate during the inquiry, it shall be lawful for the District Magistrate to proceed with the enquiry exparte and thereupon such order, as was proposed to be passed against him, may be passed."

10. Principles of natural justice are based on two basic pillars, namely, (i) Nobody

shall be condemned unheard (audi alteram partem), and (ii) Nobody shall be judge of his own cause *(nemo debet esse judex in propria sua causa).*

11. In the case at hand it is seen that there being an effective compliance of stipulations contained in Section 8 of Adhiniyam 1990 it cannot be perceived that the petitioner has been deprived of right of hearing and that there was no fair trial. It is the petitioner and his counsel who have chosen to remain away from the proceedings for the reasons best known to them. Therefore, the first limb of arguments put forth by learned counsel for the petitioner that the petitioner was not afforded a reasonable opportunity of hearing fails. It is also observed from the record that independent witnesses who were examined were of the same vicinity where the petitioner resides and the contention of the petitioner they were not of the same ward will not be of any consequence unless the petitioner alleges that they were had inimical terms with the petitioner, such allegation is conspicuously missing in the petition.

12. In respect of the arguments put-forth by learned counsel for the petitioner that till 5.9.2006 an offence committed under Section 4 A of the Act of 1867 was not to be taken into consideration while construing an offence under Section 6 (c) of the Adhiniyam 1990. It is contended that a substitution in clause (c) of Section 6 in place of words 'Section 3 or 4' by 'Section 3 or 4 or 4-A' came into effect from 5.9.2006 by virtue of Madhya Pradesh Rajya Suraksha (Sanshodhan) Adhiniyam, 2006. Therefore, as contended by the learned counsel for the petitioner, an offence committed under Section 4-A prior to coming into force of the aforesaid amendment ought not to have been taken into consideration while construing clause (c) of Section 6 of the Adhiniyam 1990. The learned counsel for the petitioner places reliance on judgment rendered by Single Bench of this Court in the case of *Pappu @ Dinesh Gupta v. State of M.P. and others* : 2007 (3) MPLJ 115 wherein paragraph 10 it is observed:

> "10. This Court finds it proper to mention at this juncture that the Rajya Suraksha Adhiniyam has been amended and the conviction for three times within a period of three years under section 4-A of the Public Gambling Act has also been made a ground for externment vide Notification in the Extraordinary Gazette of Madhya Pradesh dated 5.9.2006. Thus, obviously, the legislature did not intend to keep the conviction under section 4-A of the Public Gambling Act as a basis of externment. It was only the conviction for three times within a period of three years under section 3 or 4 of the Public Gambling Act, which could have provided a basis for externment under section 6 © of Rajya Suraksha Adhiniyam. Amendment in section 6 of Rajya Suraksha Adhiniyam would, obviously, operate in prospective manner."

13. Penal statutes which create offences or which have the effect of increasing penalties for existing offences will be prospective by reason of constitutional restriction imposed by Article 20 of Constitution of India. Article 20 (1) of Constitution of India stipulates:

> "Art. 20 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

14. The question which falls for consideration is as to whether the prohibition of Article 20 of Constitution of India would bar an action to be taken on past conduct and whether such action would tantamount to a retrospective operation of a statute under which an action is taken.

15. In the case of State of *Bombay (now Maharashtra) v. Vishnu Ramchandra* (AIR 1961 SC 307) their Lordships of the Supreme Court while dealing with the aforesaid proposition in the context of Section 57 of the Bombay Police Act which was in the following terms:

> (4) Section 57 of the Bombay Police Act reads as follows:
>
> "Removal of persons convicted of certain offences:-
>
> If a person has been convicted -
>
> (a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code (XLV of 1860), or
>
> (b) twice of an offence under S. 9 or 23 of the Bombay Beggars Act, 1945 (Bom XXIII of 1945), or under the Bombay Prevention of Prostitution Act, 1923 (Bom XI of 1923), or
>
> (c) thrice of an offence within a period of three years under S. 4 or 12 A of the Bombay Prevention of Gambling Act, 1887 (Bom. IV of 1887), or under the Bombay Prohibition Act, 1949 (Bom XXV of 1949) the Commissioner, the District Magistrate or the Sub Divisional Magistrate specially empowered by the State Government in this behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction, by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself."

were pleased to observe in paragraph 6 of *State of Bombay (now Maharashtra) v. Vishnu Ramchandra* (supra) that

"penal statutes which create new offences are always prospective. But penal statutes which create disabilities or statutes which create no new punishment but authorize some action based on past conduct may be interpreted retrospectively when there is a clear intendment that they are to be applied to past events."

It was further observed in paragraphs 7 and 8 that

'an Act designed to protect the public against acts of a harmful character may be construed retrospectively, if the language admits of such an interpretation, even though it may equally have a prospective meaning"

And while observing such, their Lordships were pleased to hold in paragraph 12 in the following term:

"(12) Now, S.57 of the Bombay Police Act, 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from the activities of undesirable persons to have been convicted of offences of a particular kind. The section only enables the authorities to take note of their convictions and to put them outside the area of their activities, so that the public may be protected against a repetition of such activities. As observed by Phillimore J. in Rex v. Austin 1913-1 KB 551 at P. 556.

'No man has such a vested right in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatever be had to his previous history."

An offender who has been punished may be restrained in his acts and conduct by some legislation, which takes note of his antecedents; but so long as the action taken against him is after the Act comes into force, the statute cannot be said to be applied retrospectively. The Act in question was thus not applied retrospectively but prospectively."

16. Similarly in the case of *Bashiruddin Ashraf v. The Bihar Subai Sunni Majlis-Awaqf and another* (AIR 1965 SC 1206) their Lordships of the Supreme Court were pleased to observe in paragraph 10 in the following terms:

"(10) .... A statute is not necessarily used retrospectively when the power conferred by it is based on conduct anterior to its enactment, if it is clearly intended that the said power must reach back to that conduct. It would be another matter if there was a vested right which was taken away."

And as observed by *Phillimore J. in Rex v. Austin* 1913-1 KB 551 at P. 556 and

approved by the Supreme Court in *State of Bombay (now Maharashtra) v. Vishnu Ramchandra* (supra):

> 'No man has such a vested right in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatever be had to his previous history."

17. Thus in the present case it cannot be said that Section 6 of the Adhiniyam 1990 as it existed after amendment has been applied retrospectively.

18. There is another aspect of the matter. Section 2 of the Madhya Pradesh Rajya Suraksha (Sanshodhan) Adhiniyam, 2006 is in the following terms:

> "2. Amendment of Section 6 - In Section 6 of the Madhya Pradesh Rajya Suraksha Adhiniyam, 1990 (No. 4 of 1991), in clause (c), for the words and figures "Section 3 or 4" the words, figures and letter "Section 3 or 4 or 4-A" shall be substituted."

18A. The object and purport of Section 3 or 4 or 4-A has been with the object to authorize the competent authority to take action based on past conduct and as has been held by the Supreme Court in the case of *Zile Singh vs. State of Haryana and others* [(2004) 8 SCC 1] wherein their Lordships were pleased to observe in paragraphs 24 and 25 in the following terms:

> "24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision.
>
> 24. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory Interpretation, ibid., p. 565). If any authority is needed in support of the proposition, it is to be found in *West U.P. Sugar Mills Assn. v. State of U.P., State of Rajasthan v. Mangilal Pindwal, Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. and A.L.V.R.S.T. Veerappa Chettiar v. S. Michael. In West U.P. Sugar Mills Assn.* Case a three Judge Bench of this Court held that the State Government by substituting the new rule in place the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was the distinction between "supersession" of a

rule and "substitution" of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

19. Similarly in the case of *Govt. of India and others vs. Indian Tobacco Association* [(2007) 7 SCC 396] their Lordships of the Supreme Court were pleased to observe in paragraph 27 in the following terms:

> "27. There is another aspect of the matter which may not be lost sight of. Where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute relates back to the time when the prior Act was passed. [See *Attorney General v. Pougett* : (1816) 2 Price 381 : 146 ER 130]

20. Having thus considered this Court does not find any substance in the challenge put-forth by the petitioner to the action taken by the respondents taking into consideration the conviction suffered by the petitioner under Section 4-A of the Act of 1867 prior to its substitution in Section 6 of the Adhiniyam 1990.

21. In the result the petition fails and is hereby dismissed. However, no costs.

Petition dismissed.

I.L.R. [2009] M. P., 386
WRIT PETITION
Before Mr. Justice Rajendra Menon
22 September, 2008*

SANJAY SINGH BAGHEL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - *Recruitment - Qualification - Recruitment process for appointment on various posts started in the year 2002 in pursuance of advertisement issued by State Government - Advertisement challenged before SAT - Recruitment process was stayed - Petition allowed with direction to issue fresh advertisement - Petitioners had applied for appointment and were eligible to appear in 2002 became ineligible having crossed the upper age limit - No recruitment to post in question taken place in between - Held - Petitioners have a right to participate in selection process initiated in the year 2007 by virtue of the right, which was existing in their favour in the year 2002.* (Paras 16 & 17)

सेवा विधि – भर्ती – अर्हता – राज्य सरकार द्वारा जारी विज्ञापन के अनुसरण में विभिन्न

*W.P. No.2249/2008(S) (Jabalpur)

पदों पर नियुक्ति के लिए भर्ती प्रक्रिया वर्ष 2002 में प्रारम्भ – विज्ञापन को राज्य प्रशासनिक अधिकरण के समक्ष चुनौती – भर्ती प्रक्रिया रोक दी गई – याचिका नया विज्ञापन जारी करने के निदेश के साथ मंजूर – याची, जिन्होंने नियुक्ति के लिए आवेदन दिया और वे वर्ष 2002 में नियुक्ति के लिए योग्य थे, उच्च आयु सीमा पार कर अयोग्य हो गये – इस बीच प्रश्नगत पद के लिए कोई भर्ती नही हुई – अभिनिर्धारित – याचियों को उस अधिकार के आधार पर, जो वर्ष 2002 में उनके पक्ष में विद्यमान था, वर्ष 2007 में प्रारम्भ की गई चयन प्रक्रिया में भाग लेने का अधिकार है।

Cases referred :

(2006) 10 SCC 261, (2008) 1 SCC (L&S) 885, (2006) 9 SCC 507, AIR 2007 SC 1771, (1990) 3 SCC 157, AIR 1966 SC 1942, (1990) 1 SC 411.

Aditya Adhikari, Malti Dadariya, Sanjeev Singh, B.D. Pandey, Rajesh Chand, Sanjay Singh, Akhil Singh, Sandeep Singh, R.B. Pandey, Manoj Chansoriya, Yogesh Mishra, Nikhil Tiwari, Vikram Singh, P.K. Shroti and *Rahul Pandey,* for the petitioners.

Vinod Mehta, G.A., for the respondent Nos.1 & 2.

Shobha Menon with *Rahul Choubey,* for the respondent No.3.

ORDER

RAJENDRA MENON, J. :–As questions involved in all these petitions are identical, they are being disposed of by this common order. For the sake of convenience pleadings and documents available in Writ Petition Nos. 2249/2008(S) and 2247/2008(S) are referred to in the order.

2. Petitioners were candidates who had applied for appointment on the posts of Subedar; Sub Inspector; Sub Inspector (Special Branch); Platoon Commander; and, Sub Inspector (Finger Print, Photo and Radio); in the pay scale of Rs. 5000-150-8000 and Rs. 4500-125-7000 respectively, in pursuance to an advertisement issued by the State Government in the year 2002, vide Annexure R/3. At that point of time, in all 167 posts were advertised. The recruitment to the said posts were to be held in accordance to the Madhya Pradesh Police Executive (Non-Gazetted) Service Recruitment Rules, 1997 (hereinafter referred to as 'Rules of 1997').

As per the Recruitment Rules, the recruitment was to be conducted in two stages. The 'First Stage' as per Rule 2(d) was to consist of measurement of physical standard followed by written examination; and, the 'Second Stage' as per Rule 2(k) consisted of physical proficiency test followed by interview. The 'Method of Recruitment' and the procedure for selection as per these stages are contemplated under Rule 6 and sub-rule (8) thereof. The conditions of eligibility for recruitment are contained in Rule 8, wherein the age criteria is fixed. According to the aforesaid Rule, the candidates should have attained the age of 18 years and should not be beyond the age of 28 years as on the first day of January next following the date of commencement of the examination. Sub-rule (b) onwards of

Rule 8 provides for relaxation in age to various categories of employees; these included relaxation for candidates belonging to the Scheduled Caste, Scheduled Tribe, Other Backward Caste categories; Employees of Madhya Pradesh State Government, who have been in service; employees temporary in nature whose services have been retrenched; Ex-servicemen, so also Widows, Destitutes or Divorced Women; Persons who have undergone Family Welfare Programme operation and are 'Green Card Holders' and various other categories of Employees, like those who have been awarded 'Vikram Award'; and, who were employees of various State Corporations and Boards.

3. The 'First Stage' of Examination in pursuance to advertisement (Annexure P/3) commenced, the physical measurement examination was over and just before the written examinations were to be held, challenge to the selection process was made by various persons, by filing applications under section 19 of the Administrative Tribunal Act, 1985 before the State Administrative Tribunal. These applications were registered and the proceedings for selection were stayed in the year 2002. Thereafter, due to winding up of the State Administrative Tribunal, matters were transferred to this Court and vide order-dated 19.1.2005 the transferred case registered as writ petition was allowed and the advertisement issued vide Annexure R/3 was quashed. A copy of the order passed in one of the writ petitions being Writ Petition No.19668/2003 is available in the record of Writ Petition No.2249/2008(S), as Annexure R/1 and the order-dated 19.1.2005 reads as under:

> "Ms. Aparna Singh, learned counsel for the petitioner.
>
> Shri Ashok Agrawal, learned Government Advocate, for the respondents.
>
> It has been contended by the learned counsel for the parties that the present advertisement Annexure A-1 be quashed and the respondents may be directed to issue fresh advertisement following the reservation policy.
>
> The prayer is accepted.
>
> Accordingly, advertisement Annexure A-1 is quashed and the respondents are hereby directed to issue fresh advertisement by adopting the reservation policy.
>
> C.C as per rules."

From a perusal of the aforesaid order, it is seen that both the parties agreed that the advertisement (Annexure A/1) be quashed and a fresh advertisement following the reservation policy be issued. Accordingly, this prayer was accepted and the petition was allowed, respondents were directed to issue fresh advertisements by conducting the Policy of Reservation. After 19.1.2005, no process was held for adopting the selection process and it was only in March

2008 that a fresh advertisement (Annexure P/5) was issued, this advertisement-contemplated appointment to the same posts, which were advertised, vide Annexure R/3, in the year 2002. However, instead of 167 posts, the total posts now advertised were 319 in various categories. The power to conduct the recruitment process in pursuance to the advertisement is conferred upon the M.P. State Professional Examination Board, respondent No.3. Grievance of the petitioners now in these petitions are that in the advertisement for process of selection initiated for the M.P. Police Department Recruitment Examination 2007 (Annexure P/5), the age limit is fixed at 28 years as on 1.1.2008 and petitioners, who were eligible when the advertisement was issued in the year 2002 for the same selection/recruitment process are now ineligible, having crossed the upper age limit prescribed in the advertisement (Annexure P/5). It is the case of the petitioners that if the selection process initiated in the year 2002 was completed they would have participated in the selection process, but because of the stay granted by the State Administrative Tribunal and subsequent cancellation of the selection process, their right to participate in the selection process is being taken away. Interalia contending that the recruitment now initiated vide Annexure P/5 is a continuation of the earlier recruitment and petitioners have a right to participate in the fresh recruitment by granting age relaxation, interference into the matter is sought for.

4. Shri Aditya Adhikari, learned counsel for the petitioner, taking me through the various provisions as contained in the Rules of 1997 and the principles laid down in the case *of Pitta Naveen Kumar and others Vs. Raja Narasaiah Zangiti and others,* (2006) 10 SCC 261; *Madan Mohan Sharma and another Vs. State of Rajasthan and others,* (2008) 1 SCC (L&S) 885; and, in the case of *Malik Mazhar Sultan and another Vs. U.P. Public Service Commission and Others,* (2006) 9 SCC 507, argued that petitioners were eligible to appear and participate in the examination in view of the fact that recruitment in the year 2002 even though had commenced, but was not completed and it is now being conducted again in the year 2007 for the same vacancies that were notified in the year 2002 i.e.. 167 posts and, therefore, petitioners have a right to appear and participate in the process of selection, by claiming age relaxation as their right to appear and participate in the earlier examination was taken away for no fault on their part, but due to lapses on the part of the State Government in not issuing the advertisement properly, interference into the matter is sought for.

5. Ms. Malti Dadariya, Shri B.D. Singh, Shri Rahul Rawat and Shri Sanjeev Singh, learned counsel appearing for some of the petitioners, inviting my attention to Annexure P/7, filed in Writ Petition No.2247/2008(S), argued that in an examination conducted by the MP Public Service Commission known as the MP Civil Services Examination, 2003, certain age relaxations were granted to candidates who were eligible in the MP Civil Services Examination, 2001, in view of certain Circulars issued by the State Government, it is argued that in the case

of the present petitioners also, similar benefit should be granted and all the petitioners, who were eligible to appear in the examination and recruitment process which was initiated in the year 2002, should be granted age relaxation as was done in the case of M.P. Civil Services Examination 2001.

6. Shri Aditya Adhikari and Ms. Malti Dadariya, learned counsel for the petitioners, argued that if the recruitment process for 167 posts that was initiated in the year 2002 was continued, petitioners would have a right to participate in the process of selection and by adopting a fresh recruitment process, by issuing fresh advertisement, prescribing conditions which are detrimental to the interest of the petitioners, their right to participate in the examination and process of selection is being curtailed, which is nothing but a malafide and arbitrary exercise of power by the State Government. Accordingly, submitting that petitioners have a right to participate in the process of selection for the posts, which were advertised in the year 2002, all the petitioners seek for interference into the matter.

7. Shri Vinod Mehta, learned Government Advocate, refutes the aforesaid and submits that once the earlier advertisement (Annexure R/3) issued in the year 2002 was quashed by this Court, all the proceedings that were held in pursuance to the said advertisement came to an end; the present advertisement is a fresh recruitment process being conducted in accordance to the Rules of 1997 and, therefore, petitioners are required to fulfil all the eligibility criteria prescribed in the statutory recruitment Rules of 1997 and as petitioners do not fulfil the age criteria laid down in Rule 8, of the said Rules, Shri Vinod Mehta argues that no case is made out for granting any relief. It is submitted by Shri Vinod Mehta, learned Government Advocate, that all the cases relied upon by Shri Aditya Adhikari are distinguishable and will not apply to the facts and circumstances of the present case. It is emphasized by him that the present recruitment process is not a continuation of the earlier recruitment process, it is a process initiated afresh after quashment of the earlier recruitment process and, therefore, petitioners are required to fulfil all the criteria laid down in the recruitment rules and in absence thereof, the State has not committed any error in disallowing the petitioners from appearing in the examination.

8. Smt. Shobha Menon, learned Senior Advocate, with Shri Rahul Choubey, learned counsel for respondent No.3, submit that once the statutory recruitment rules prescribed the upper age limit to appear in the examination, no **mandamus** can be issued permitting the petitioners to appear in the examination contrary to the aforesaid Rules. It is emphasized by them that the earlier advertisement was quashed by this Court and once the earlier advertisement is quashed and a fresh recruitment process is initiated by issuing fresh advertisement, all the conditions contemplated in the advertisement read alongwith the requirements of the recruitment rules are to be fulfilled by the petitioners and in the absence of the same being fulfilled, no relief can be granted to the petitioners. Placing reliance

on a judgment of the Supreme Court in the case of *Tirumala Tirupati Devasthanams Vs. K. Jotheeswara Pillai (D) by LRs and others* [AIR 2007 SC 1771], learned counsel for respondent No.3, submitted that in the matter of prescribing the policy and criteria for selection as per the recruitment rules, **mandamus** cannot be issued by this Court exercising jurisdiction in a petition under Article 226 of the Constitution, which runs contrary to the requirement of the recruitment rules. Emphasizing that respondents are conducting the recruitment process in accordance to the criteria and eligibility conditions laid down in the Rules of 1997, learned counsel seeks for dismissal of this petition.

9. Having heard learned counsel for the parties and on a perusal of the facts that have come on record it is clear that the only dispute in this petition is as to whether petitioners are entitled to participate in the selection process now initiated in pursuance to the advertisement (Annexure P/5) and whether the claim made by them for age relaxation can be granted?

10. For answering the aforesaid question, it would be appropriate to consider the rights that are available to the petitioners by virtue of the earlier process initiated and which remained incomplete because of the intervention and stay order passed by State Administrative Tribunal.

11. In the case of *Pitta Naveen Kumar* (supra) the principles laid in the case of *N.T. Devin Katti Vs. Karnataka Public Service Commission* (1990) 3 SCC 157, is followed and it is held that a candidate making an application for appointment on a post pursuant to an advertisement does not acquire any vested right of selection. However, if it is found that he is eligible and otherwise qualified in accordance with the relevant rules, he acquired a vested right of being considered for selection in accordance with the rules that were in existence. In the case of *N.T. Devin Katti* (supra), it has been held by the Supreme Court that a person does not have any vested right to seek selection, but a person has a right vested in nature to seek participation in a process of selection.

12. The aforesaid principle is laid down on the basis of an earlier judgment of the Supreme Court in the case of *B.N. Nagrajan Vs. State of Mysore* [1966 AIR SC 1942]. In these cases it has been so held by the Supreme Court:

> "11. .. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing Rules or Government Orders, and if it further indicates the extent of reservations in favour of 'Various categories, the selection of candidates in such a case must be made in accordance with the then existing Rules and Government Orders. Candidates who apply, and undergo written or viva voce test acquire vested

right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication, if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant Rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant Rules and the terms contained in the advertisement, he does acquire a vested right for being considered for selection in accordance with the Rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of Rules during the pendency of selection unless the amended Rules are retrospective in nature.

13. In *Y. V. Rangaiah v. J. Sreenivasa Rao,* (1983) 3 SCC 284: (AIR 1983 SC 852) similar question arose relating to recruitment by promotion. The question was whether promotion should be made in accordance with the Rules, in force on the date the vacancies occurred or in accordance with the amended Rules. The Court observed as under (para 9 of AIR):

"The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of SubRegistrar Grade 11 will be according to the new rules on the zonal basis and not on the Statewise basis and, therefore, there was no question of challenging the new rules. But the question

is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

The same view was taken in *P. Ganeshwar Rao v. State of Andhra Pradesh,* 1988 Supp SCC 740: (AIR 1988 SC 2068). Similar view was taken in *A. A. Calton v. Director of Education,* (1983) 3 SCC 33: (AIR 1983 SC 1143). It is a well accepted principle of construction that a statutory rules or Government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government orders and any amendment of the rules or the Government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections." (Emphasis supplied)

13. In the case of P. *Mahendran and others Vs. State of Karnataka and others* [(1990) 1 SCC 411], the petitioners were eligible to appear in the examination conducted by the Government of Karnataka for appointment on the post of Assistant Engineers. At the relevant time when the advertisement was issued, the qualification prescribed was Diploma in Mechanical Engineering. Candidates submitted their application with Karnataka Public Service Commission, which scrutinized the application and on the basis of the qualification prescribed selection process was held. The entire selection was challenged before the High Court and interim orders were passed by the High Court staying the selection process. In the meanwhile, the recruitment rules were amended and the criteria was changed. According to the amended criteria only Graduates in Mechanical Engineer were eligible to participate in the process of selection. When the recruitment rules were amended, High Court disposed of the petition directing for conducting fresh selection as per the subsequent amended rules. While considering the aforesaid question, the Supreme Court has laid down the principle that once a selection process is initiated then any subsequent amendment to the rules of selection will not adversely affect the right of a person who is eligible to participate in the process of selection as per the criteria laid down previously prior to amendment of the recruitment rules. the principle laid down is that even though a person does not have any

vested right to seek appointment or selection to a particular post, but a person has a right to seek participation in a process of selection which is initiated and if he is eligible to participate in the process of selection at a particular point of time, any change in the process of selection or the eligibility criteria subsequently will not operate to his disadvantage.

14. Even though Smt. Shobha Menon, learned Senior Advocate, appearing for respondent No.3, may be right in submitting that in the present case there is no amendment to the recruitment rules, detrimental to the interest of the petitioners, and the respondents are only insisting upon fulfillment of the criteria laid down by the present recruitment rule, this court is of the considered view that once the law laid down is that a person has a vested right to atleast participate in the process of selection, the rights which accrued to the petitioners and which were available to them in the year 2002, has to be protected. Any action, which renders them ineligible to participate in the process of selection, detrimental to their interest, cannot be permitted. The entire matter has to be evaluated by this Court taking note of the fact that in the year 2002 when 167 posts were advertised, petitioners were eligible. They participated in the process of selection, the selection process was stayed in the year 2003 by the State Administrative Tribunal and after three years, the entire selection process was quashed by this Court. After 2005, no process of selection was held, but the process is now initiated in the year 2007 by issuing the advertisement. Petitioners have come out with a case that after 2002 and till issuance of the fresh advertisement no recruitment to the posts in question, have taken place. It is their specific case that 319 posts now advertised by the advertisement (Annexure P/5), includes the 167 posts for which they had submitted their candidature and for which the selection process was initiated in the year 2002. In the return filed by the State Government this fact is not refuted. It is not the case of the State Government that the 167 posts for which recruitment process were held in the year 2002 have been filled up and are not included in the 319 posts, now being advertised by the impugned advertisement (Annexure P/5). That being so, it is a case where the recruitment to the 167 posts, which was initiated earlier in the year 2002, are being continued again in the year 2007. That being so, when petitioners were eligible in the year 2002 to participate in the selection process and when the Supreme Court lays down the principle that right to participate in the selection is a vested right, this right cannot be taken away by the State Government by depriving the petitioners from appearing and participating in the process of selection.

15. This Court cannot be oblivious of the fact that if the earlier selection was not interfered with by this Court, the process of selection would have been concluded and the right of the petitioners to participate in the said selection would have been fulfilled. The said right is now being curtailed by imposing restrictions

on age, as contemplated in the recruitment rule. That being so, the same principle which is applicable with regard to amendment in the recruitment rule during the process of selection can be applied in the present case also, the cause for justice, equity and the requirement of Article 14 compels this Court to take the aforesaid view. If the right of the petitioners to participate in the process of selection is not protected, it would cause serious prejudice to the petitioners, which cannot be redressed, repaired or compensated in any manner whatsoever, they would be rendered ineligible to participate in the selection process permanently. Petitioners are not to be blamed for the unforeseen circumstances that came into existence due to institution of proceedings by certain persons.

16. Respondents, being a State, a Model Employer, should act in a manner so as to protect the rights of the petitioners, by permitting them to participate in the process of selection, by treating them to be eligible in view of the fact that the earlier examination process, which was initiated in the year 2002 remained incomplete. That apart, Rules of 1997 contemplates various provisions for granting relaxation in the age criteria. Even though under Rule 8, the minimum age limit fixed is 18 years and the maximum age limit prescribed is 28 years, but relaxation to various categories of employees have been provided. In the case of Scheduled Caste, Scheduled Tribe and Other Backward Categories candidates, 5 years' relaxation is provided; a permanent government employee is eligible to appear upto the age of 36 years. Similarly, candidates holding temporary posts have been granted exemption upto the age of 36 years. It is, therefore, clear from the Rules that for various categories of persons the upper age limit fixed is 36 years and when the service rules itself contemplates eligibility for appointment to certain special categories of persons upto the age of 36 years, a pragmatic approach in the peculiar circumstances is required to be taken, to do complete justice and in the light of the facts that have come on record in the present case, so also considering the injustice that may fall on the petitioners if they are not permitted to appear in the examination. This Court is of the considered view that petitioners' should be granted permission to appear in the examination taking note of the fact that they were eligible when the initial examination and selection process was held in the year 2002, which remained incomplete due to reasons beyond the control of all concerned.

17. Considering these circumstances, this Court is of the considered view that petitioners have a right to participate in the selection process now initiated vide advertisement (Annexure P/5). The said right is available to the petitioners by virtue of the right, which was existing in their favour in the year 2002, when the earlier advertisement (Annexure R/3) was issued and continues till the recruitment process is finally concluded.

18. Accordingly, finding petitioners eligible to participate in the process of selection now initiated by the advertisement (Annexure P/5), all these petitions

are allowed. It has been brought to the notice of this Court that vide interim orders passed in all these petitions, petitioners have been permitted to appear in the process of selection, but their results are not to be declared till final disposal of this petition. Respondents are directed to declare the results of the petitioner and if they are otherwise eligible to seek appointment treating them to have been granted relaxation in the age criteria, process their claim in accordance to the Rules and grant them appointment if they are found successful in the selection process.

19. Petitions stand allowed and disposed of with the aforesaid, without any order so as to cost.

Petition allowed.

I.L.R. [2009] M. P., 396
WRIT PETITION
Before Mr. Justice Rajendra Menon
24 September, 2008*

KALYAN SINGH ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Panchayat Samvida Shala Shikshak (Appointment and Conditions of Service) Rules, M.P. 2001, Rule 5.8(b) - ***Marks for teaching experience - Petitioner working in 100% Government aided School - He was not awarded marks for teaching experience as his salary was not withdrawn from Government treasury - Held - Rule simply means experience gained by working in school receiving grant in aid without any further qualification - Refusal to award marks for teaching experience on the ground that his salary was not withdrawn from Government treasury unsustainable - Petition allowed.*** (Para 11)

पंचायत संविदा शाला शिक्षक (नियुक्ति और सेवा की शर्तें) नियम, म.प्र. 2001, नियम 5.8(बी) – शैक्षणिक अनुभव के लिए अंक – याची 100 प्रतिशत शासकीय अनुदान प्राप्त विद्यालय में कार्यरत – उसे शैक्षणिक अनुभव के लिए अंक प्रदान नही किये गये क्योंकि उसका वेतन शासकीय कोषालय से प्रत्याहृत नही किया गया था – अभिनिर्धारित – नियम का साधारण अर्थ बिना किसी अतिरिक्त योग्यता के सहायता अनुदान प्राप्त कर रहे विद्यालय में कार्य कर अर्जित अनुभव से है – इस आधार पर कि उसका वेतन शासकीय कोषालय से प्रत्याहृत नही किया गया, शैक्षणिक अनुभव के लिए अंक प्रदान करने से इंकारी न टिक सकने योग्य – याचिका मंजूर।

Malti Dadariya, for the petitioner.

Shailesh Mishra, G.A., for the respondent Nos.1 to 6.

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*W.P. No.16142/2005(S) (Jabalpur)

ORDER

RAJENDRA MENON, J. :–Challenging the orders passed by the Sub-Divisional Officer, the Collector and the Commissioner in proceedings initiated by the petitioner in the matter of awarding marks for 'experience' for having worked in a School pertaining to appointment of Samvida Shala Shikshak, petitioner has filed this petition.

2. Petitioner claims to be a holder of B.Com and M.Com Degree and after passing the B.Ed Examination it is stated that he was working as a Upper Division Teacher in SBBP Naveen Vidya Bhawan Higher Secondary School, Barman, District Narsinghpur (hereinafter referred to as 'School'). It is stated that the School is receiving 100% grant from the State Government and is an aided institute within the meaning of Madhya Pradesh Panchayat Samvida Shala Shikshak (Appointment & Conditions of Service) Rules, 2001 (hereinafter referred to as 'Rules of 2001'). When the Janpad Panchayat, Sagar issued an advertisement for various Janpad Panchayats, including Janpad Panchayat Deori, for appointments on the post of Samvida Shala Shikshak Class I, II and III, petitioner submitted his candidature for appointment to the said post.

On the basis of marks obtained by the petitioner in the qualifying examination and the experience for working in the School, his claim was considered and following marks were awarded to him, for the qualifying examination, petitioner was awarded 38.55 marks; for the five years' experience of working in the School, 20 marks were awarded; and, for the B.Ed Degree obtained, 10 marks were awarded. Accordingly, petitioner received 68.55 marks and was placed at Serial No.1 in the select list. However, the aforesaid selection was challenged by one Raghuveer Prasad Dubey in Writ Petition No.3517/2003, on the ground that until and unless requisite amendments are made in the recruitment rule, awarding marks on the basis of a Circular issued by the School Education Department on 14.3.2002 is not permissible.

3. It was the case of the petitioner Shri Raghuveer Prasad Dubey in the said petition that without amending the Rules of 2001, awarding of marks as per the Circular is unsustainable. Initially an interim order was passed in the said writ petition, but subsequently after the amendments were made in the recruitment rules, the petition was disposed of as having been rendered infructuous.

4. After the Rules were amended and particularly Rule 5(8) was incorporated with regard to grant of marks, the selection process was undertaken afresh and in this process 20 marks earlier awarded to the petitioner for the 5 years' experience was not granted. It was denied to the petitioner on the ground that he is not entitled to the aforesaid marks, because he has not worked in a post for which payment is made from the Government treasury. Holding that marks for working in a Government aided institute can only be granted to such of the teachers, who

are paid salary through treasury and in the light of the directives issued by the Collector, District Sagar in the Circular Annexure P/4, dated 25.8.2003, 20 marks which was initially granted to the petitioner for experience was deleted, as a result petitioner's name came below in the merit list and he was not appointed. Challenging the aforesaid order refusing appointment to the petitioner, petitioner preferred appeals and revisions before the Sub Divisional Officer, Additional Collector and Commissioner, and on rejection of the same, he has filed this petition. The order passed by the Sub Divisional Officer is Annexure P/1 dated 16.12.2003; order passed in appeal by the Collector is Annexure P/2 dated 23.6.2004; order passed by the Commissioner is Annexure P/3 dated 10.11.2005; and, the Circular issued by the Collector, Sagar on 25.8.2003, Annexure P/4, fixing the criteria and the method of awarding marks is also challenged in this petition.

5. Ms. Malti Dadariya, learned counsel for the petitioner, emphasized that the Rules in question were amended from time to time and by virtue of the amendments incorporated on 30.7.2003, Rule 5(8) and Explanation thereto reads as under:

> **"5.8(b)** For the teaching experience in a school, maximum 20 marks shall be awarded. For experience of one year, two years, three years, four years and five years respectively 04, 08, 12, 16 and 20 shall be awarded.
>
> **Explanation:** Educational experience means teaching experience in Government Schools, Government aided schools, Education Guarantee Scheme Centres and Non-formal education centres. Experience for previous teaching includes teaching in schools which receive grant from the Government and Non-Formal Education Centre, the experience marks shall be awarded on the basis of the certificates issued by the District Education Officer/ Block Education Officer for the Government School/Government Aided School and Non-formal Education Centre and for the Education Guarantee Scheme Centres Certificates issued by District Co-ordinator of Rajiv Gandhi Education Mission."

Emphasizing that the Explanation appended to the aforesaid Rule is very clear, 'experience' means 'experience gained' by working in a government aided school, it is argued by learned counsel that the Circular (Annexure P/4) dated 25.8.2003 issued by the Collector is contrary to the legislative intent and is unsustainable. That apart, it is pointed out by the learned counsel that in the additional return filed by the respondents an additional ground is now taken for the first time to the effect that the certificate of experience is not issued by the District Education Officer, it is only issued by the Principal of the Institute and, therefore, not a valid certificate. Ms. Malti Dadariya, learned counsel, submits that once the District Education Officer (for short 'DEO') has counter-signed the certificate of experience issued by the Principal, it tantamounts to issuance of

certificate by the District Education Officer and on the grounds raised in the additional return, it is emphasized by her that claim of the petitioner cannot be rejected.

6. Shri Shailesh Mishra, learned Government Advocate, refutes the aforesaid and submits that the experience for working in a government aided institute necessarily implies working in a post for which grant is made by the State Government and in the present case the Principal of the School by his communication (Annexure R/1-B) dated 18.12.2003 has clearly informed the authorities that petitioner's name is not included in the list of staff, who are paid from the grant received from the State Government, that being so, Shri Shailesh Mishra argues that experience gained in such a manner in a school even though receiving grant-in-aid, but to a teacher, who is not paid salary from the grant received from the State Government, but is paid from the funds of the society is not entitled to be counted in accordance to the requirement of Rule 5(8)(b) and Explanation thereof. Accordingly, contending that the experience gained by the petitioner for the work in a post which is not aided by the State Government, cannot be counted, respondents refute the aforesaid.

7. It is also argued by Shri Shailesh Mishra, learned Government Advocate, that the requirement of the Explanation to the Rule is that the certificate of experience should be issued by the District Education Officer or the Block Education Officer and in the present case as the certificate is issued by the Principal of the Institute concerned, it is not a certificate in accordance to the requirement of the Rules and, therefore, on the basis of the said certificate no marks for experience can be granted to the petitioner.

8. I have heard learned counsel for the parties and perused the record. The moot question requiring consideration in this petition is as to whether experience gained by the petitioner by working in the institute in question can be counted for grant of marks in accordance to the provisions of Rule 5, sub-rule 8(b) and the Explanation thereof. A perusal of the Rule in question indicates that for teaching experience in a school, maximum 20 marks are awarded. The aforesaid provision is contemplated under Sub-rule 8(b) of Rule 5. Explanation to the aforesaid Rule as reproduced hereinabove, clarifies the meaning of 'educational experience' and according to the aforesaid explanation, the same means teaching experience in a government school, government aided school, an education guarantee scheme centre and a non-formal education centre. From the aforesaid Explanation it is clear that the Rules speak about 'educational experience' gained and teaching in the category of institutes indicated therein. Admittedly, the school in question namely; SBBP Naveen Vidya Bhawan Higher Secondary School, Barman, District Narsinghpur, where the petitioner has taught, is a government aided institute. The aforesaid fact is not disputed.

9. The Explanation to the Rule speaks about teaching experience in the school

and does not contemplate anything with regard to experience in a particular school with reference to a post held in the said school. If the clarification issued by the Collector, as contained in Annexure P/4, is taken note of, it is clarified by the Collector that experience for working in a government aided school shall be granted only to such of the teachers whose salary are drawn from the government treasury, meaning thereby that a teacher, who has worked in a grant-in-aid school has to be on a post which is approved by the State Government and for which aid is given by the State, then only the person is entitled to the marks for experience and not otherwise. The import of the objections raised by the respondents and which was emphasized by Shri Shailesh Mishra is also to the aforesaid fact as is evident from the additional return filed by the State. It is stated by the respondents that petitioner has experience of teaching in the school receiving grant-in-aid, but on verification from the Principal, the Principal has informed vide Annexure R/1-B dated 18.12.2003 that petitioner's name is not included in the list of staff receiving grant-in-aid, on the contrary salary to the petitioner is being paid from the funds of the society. Accordingly, respondents are co-relating the working in a grant-in-aid school to a post for which aid is granted by the State Government. This interpretation of the Rule by the Collector and the respondents seems to be wholly misconceived. The legislative intent as is evident from the Explanation indicates that 'educational experience' means teaching experience in the schools indicated therein. The category of schools are government schools, government aided schools, education guarantee scheme centres and non-formal education centres. There is nothing in this Explanation or the Rules to indicate that the experience is further for working in a particular post in the institutes as indicated in the Rule. In the absence of anything to suggest that experience gained in the school indicated in the Rule has to be in relation to a post receiving grant-in-aid, the contention of the respondents cannot be accepted.

Infact if the contention of the respondents are accepted and upheld, the same would amount to reading something more into the Rules, which is not contemplated in the Rule itself. When the Rule only speaks about experience gained by working in a school receiving grand-in-aid, the Rule cannot be read to mean that the experience has to be in a particular school that also in a post for which payment is made by the State Government or grant is received. There is nothing in the statutory rule to so suggest. That being so, this Court is of the considered view that the interpretation given by the Collector and indicated by him in the Circular (Annexure P/4) dated 25.8.2003 is not borne out from the Rule in question. The Rule as it reads is very simple and crystal clear. It only means experience gained by working in a school receiving grant-in-aid without any further qualification with regard to working in a particular post or a particular nature of post, that being so, the first ground of objection of the respondents and their refusal to award 20 marks to the petitioner is wholly unsustainable. The experience gained

by the petitioner by working in the school in question, which is receiving grant-in-aid, has to be counted as the same is contemplated in the Rules in question.

10. The next question which requires consideration is as to whether the certificate (Annexure P/5) issued to the petitioner is sufficient to award the marks for experience or the same has to be denied on the ground that the certificate is not issued by the DEO or the BEO, who are the prescribed authorities as per the statutory rules.

11. When the facts of the case are evaluated, it is seen that the certificate is issued by the Principal of the School and it is counter-signed by the DEO, Narsinghpur. Initially when the certificate was produced and the selection process was held, before it was challenged in Writ Petition No.3517/2003, on the basis of the same certificate 20 marks were awarded to the petitioner. Thereafter, in the subsequent selection, the marks were denied only because of the clarifications issued by the Collector in the Circular (Annexure P/4) dated 25.8.2003. Now, respondents have come out with an additional ground in the return with regard to validity of the certificate issued in the present case. The Rules in question contemplates that marks for experience shall be awarded on the basis of a certificate to be issued by the DEO or the BEO. In the present case, in the additional return filed by the respondents, they themselves have stated that they have clarified the position from the Principal of the School and the Principal has verified that the petitioner has worked in the School and the Certificate is issued by the Principal. But, it is only stated that petitioner has not worked in a post for which grant was made by the Government. Once the certificate is issued by the Principal of the Institute and it is counter-signed by the DEO, the aforesaid would be compliance with the requirement of the Rules in question. On the aforesaid ground, marks for experience cannot be denied to the petitioner.

12. In the additional return filed by the respondents, it is stated by them that the petitioner's certificate was not issued by the DEO, it was issued by the Principal of the Institute and counter-signed by the DEO. Once the respondents admit counter-signature on the certificate by the DEO, the requirement of the Rule can be held to be complied with in this case. Counter signature by the DEO amounts to verification of the facts mentioned in the certificate and in the absence of any material being adduced to show that the certificate was improperly issued, or the facts stated in the certificate are not true, the aforesaid certificate cannot be rejected on the technical ground raised in this petition, more so, when the DEO has counter signed the same and when initially the certificate was accepted and marks awarded.

13. Accordingly, this Court is of the considered view that in refusing to award 20 marks to the petitioner, for the experience gained by him, respondents have committed grave error which requires consideration.

14. Accordingly, this petition is allowed. Orders impugned as contained in Annexures P/1, P/2, P/3 and P/4 are quashed. It is directed that 20 marks for experience be awarded to the petitioner and after awarding such marks, petitioner's name be placed at an appropriate place in the merit-list and consequential action be taken for granting appointment to the petitioner in accordance to his merit in the select list. The aforesaid exercise be completed within a period of two months from the date of receipt of certified copy of this order.

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

Petition allowed.

I.L.R. [2009] M. P., 402
WRIT PETITION
Before Mr. Justice Sanjay Yadav
13 October, 2008*

RAJESH KUMAR ... Petitioner
Vs.
RAKESH KUMAR & anr. ... Respondents

A. Stamp Act (2 of 1899), Art. 5(b) of Schedule I - *Agreement - To constitute document to be agreement there has to be copulation and conjunction of two or more minds in anything done or to be done and a compact between parties who are thereby subjected to the obligation or to whom the contemplated right is thereby served - Panch Faisla not signed by any of the parties - Cannot treated as agreement.* (Para 9)

क. स्टाम्प अधिनियम (1899 का 2), अनुसूची I का अनुच्छेद 5(बी) – अनुबन्ध – दस्तावेज को अनुबन्ध बनाने के लिए दो या अधिक मस्तिष्कों का कुछ करने या किये जाने में संयोग और संयोजन और उन पक्षकारों के मध्य समझौता होना चाहिए जो उसके द्वारा आभारों के अध्यधीन हैं या जिनको उसके द्वारा अपेक्षित अधिकार दिये गये हैं – पंच फैसला पक्षकारों में से किसी के द्वारा हस्ताक्षरित नही – अनुबन्ध के रूप में नही माना जा सकता।

B. Evidence Act (1 of 1872), Sections 63 & 65 - *Secondary evidence - Unless the existence of original is proved, secondary evidence of a document cannot be given as a matter of course - Signatory of document has denied the existence of original - Secondary evidence cannot be led.* (Para 12)

ख. साक्ष्य अधिनियम (1872 का 1), धाराएँ 63 व 65 – द्वितीयक साक्ष्य – जब तक मूल का अस्तित्व साबित नही हो जाता, स्वभावतया किसी दस्तावेज का द्वितीयक साक्ष्य नही दिया जा सकता – दस्तावेज के हस्ताक्षरकर्ता ने मूल के अस्तित्व से इंकार किया – द्वितीयक साक्ष्य नही दी जा सकती।

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*W.P. No.3217/2004 (Jabalpur)

Case referred :

AIR 1971 SC 1070.

Ravish Agrawal with *Abhishek Singh,* for the petitioner.

Sheel Nagu, for the respondents.

ORDER

SANJAY YADAV, J. :–'Panch Faisla' dated 14.12.2000, treated nor as a panch award and neither a recital of a past family partition in metes and bound, but as an "agreement" by the trial court which allowed the respondent/defendant to prove the same by leading secondary evidence by order dated 9.7.2004, which is being questioned in the present writ petition filed under Article 227 of the Constitution of India.

2. The background facts necessary for the adjudication of the issue whether the existence, contents and conditions of document in question could have been allowed to be proved by leading secondary evidence, are that, the petitioner brought a suit for declaration of his title over the suit lands situate at Mouja Kandeli and Khamaria, Tahsil and District Narsinghpur and permanent injunction restraining respondent/defendant No. 1 from interfering with plaintiff's possession over the suit lands and from alienating the same in favour of third party. The claim, inter alia, rested on the averment that the suit land among other lands and house are the joint Hindu family properties of the petitioner and the respondent No. 1 and after the death of father Premchand Jain in 1994 and mother Pushpabai in 1993, there was an oral partition in 1999 between the petitioner and the respondent No. 1 and the suit land carved out to the share of the petitioner which was duly acknowledged by the respondent No. 1 on 26.4.1991 and since he was not adhering to the same, therefore, the suit has been filed. The respondent No. 1 denied the very existence of the partition by filing written statement. The petitioner led his evidence and closed the same.

3. That, while the respondent No. 1 was being examined, an application on 24.6.2004 came to be filed on his behalf, seeking the leave of the Court to bring a 'Panch Faisla' dated 14.12.2000 on record and to prove the same by leading secondary evidence on the anvil that one Dr. Sudhir Singhai, a signatory of said 'Panch Faisla', in his evidence has denied his signature and the execution of the said Panch Faisla.

4. The trial court taking cognizance of the said application purportedly under Order 8 Rule 1 A (3) of the Code of Civil Procedure read with Section 65 of the Evidence Act and construing the same to be an agreement allowed it to be proved by leading secondary evidence. The trial court opined:

> "Document under consideration is alleged to be either an arbitration award or a Deed of Partition and accordingly is said to be insufficiently stamped. The plaintiff, therefore, resist the admissibility of said document for "any purpose".

However, from the perusal of the contents of document it seems that same is in the nature of "giving recognizance to the earlier partition between the parties. The Panchas have not decided the manner in which the properties are to be partitioned between the parties. On the contrary it seems that parties recognized their earlier partition by giving written consent. It is, therefore, mentioned in page 2 of deed "Apne Apne Hisse Ko Manya Karte Hue likhit Sahmati dee aur tadanusar ...."

Thus, in the opinion of this Court document is neither a Panch Award nor a Partition deed but seems to be an "agreement" written on Stamp Paper worth Rs.75/- and thus is sufficiently stamped as per Art. 5 (b) of Schedule I u/s 3 of the Indian Stamp Act unregistered Document is therefore, admissible in evidence as provided u/s 49 of Registration Act."

According to def. The original is not in his possession. Ion reply to interrogations dt. 10.1.2002, the plaintiff has denied the existence & possession of the original person summoned to produce original, i.e., Dr. Sudhir Singhai has failed to produce the original.

Defendant is, therefore, given permission to prove the existence, conditions or contents of the document by leading secondary evidence."

5. The two fold challenge is being put forth by the learned Senior Counsel for the petitioner, that, the document dated 14.12.2000 'Panch Faisla', cannot be construed as an 'agreement' because neither the petitioner nor the respondent were signatory of the said document and the 'agreement' would exist either where a promise is made on one side and asserted to on the other, or where two or more persons enter into an agreement with each other by a promise on either side. It is urged, that since the document dated 14.12.2000 did not fulfill the basic element of an agreement, the trial court fell into patent error in construing the same as an agreement. It is further contended that even if the said document dated 14.12.2000 is construed to be an agreement, then also the same is not admissible in evidence because the existence of its original is not proved, nor it is proved that the same was properly stamped and therefore not admissible under Section 35 of the Stamp Act, 1899. The learned Senior Counsel relies upon the judgment rendered by the Apex Court in the case of *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao and others* (AIR 1971 SC 1070). It is further contended that even if the document is taken to be a 'Panch Faisla' the same cannot be allowed to be proved by leading secondary evidence, because the existence of its original has not been proved. Under these submissions, learned Senior Counsel seeks the quashment of the impugned order.

6. Countering the assail, the learned counsel appearing for the respondent supports the impugned order being just and proper. It is contended, inter alia, that the trial court is justified in treating the document dated 14.12.2000 to be an agreement and since contents whereof have been permitted to be proved rather than admitting the document, the order under challenge cannot be faltered with. It is further contended that no prejudice is shown to have been caused to be petitioner and, therefore, also the impugned order needs not be interfered with.

7. Considered the rival submissions.

8. The trial court, as noted supra, has construed the document dated 14.12.2000, which is styled as "Panch Faisla", an agreement. The expression 'agreement' as defined in the Black's Law Dictionary: Fifth Edition: West: means:-

> "Agreement A coming together of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition. In law, a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances. The consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation."

9. The essential elements to constitute document to be agreement that there has to be (i) copulation and conjunction of two or more minds in anything done or to be done, (ii) a compact between parties who are thereby subjected to the obligation or to whom the contemplated right is thereby served. In the case at hand the document in question when tested on the touchstone of the expression noted supra, does not, in the considered opinion of this Court, fulfill the criteria because neither the petitioner nor the respondent are the signatory and therefore, the trial court grossly erred in holding the 'Panch Faisla' an "agreement". The finding is accordingly set aside. Since this Court has come to a conclusion that the document dated 14.12.2000 is not an agreement, therefore, the arguments about its inadmissibility under Section 35 Stamp Act and judgment in *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao and others* (supra) is not gone into.

10. Now coming into the aspect as to whether the 'Panch Faisla" dated 14.12.2000 can be proved by leading secondary evidence, for an answer, we have to turn to Sections 63, 65 and 67 of the Evidence Act (Act No. I of 1872):

Section 63 stipulates:

> 63. Secondary evidence means and includes-
>
> (1) certified copies given under the provisions hereinafter contained;
>
> (2) copies made from the original by mechanical processes

which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it."

ILLUSTRATIONS

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy, compared with a copy of a letter, made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original."

11. For our purpose clause (2) read with illustration (b) would be relevant for the document dated 14.12.2000 to be proved by leading secondary evidence, meaning thereby, that if the respondent is able to prove the existence of the original from which the copy is prepared, the same can certainly be proved by leading secondary evidence; however, in the case at hand it is observed that the signatory of the document, viz., Dr. Sudhir Singhai, examined as respondent/defendant's witness No.2, categorically denied the existence of the original.

Section 65 of the Evidence Act stipulates:

65. Secondary Evidence may be given of the existence, condition or contents of a document in the following cases:-

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original

have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily moveable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is te general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

12. The section is illustrative and categorizes seven cases in which secondary evidence of a document is admissible. Section 67 of the Evidence Act requires proof of signature and handwriting of person alleged to have signed on written document produced. Thus, unless the originals are proved to be in existence, the secondary evidence of a document cannot be given as a matter of course. In the case at hand no evidence is brought on record to prove the existence of original of which the document dated 14.12.2000 has been prepared and in absence of such evidence, the same cannot be proved by secondary evidence.

13. Having thus considered, the impugned order, whereby, the respondent was permitted to prove the existence, contents and condition of document dated 14.12.2000 by leading Secondary evidence deserved to be set aside and is hereby quashed.

14. The petition is accordingly allowed. However, no costs.

Petition allowed.

SIYARAM Vs. DALIA BAI

I.L.R. [2009] M. P., 408

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

13 October, 2008*

SIYARAM & anr. ... Petitioners

Vs.

DALIA BAI & ors. ... Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 170-B - *Presumption raised u/s 170-B(2) is rebuttable presumption - The presumption u/s 170-B(2) is confined to only one aspect i.e. whether the possession is without lawful authority - Therefore, if the person in possession shows that he is in possession with lawful authority the presumption stands rebutted.* (Para 10)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170–बी – धारा 170–बी(2) के अधीन की गई उपधारणा खण्डनीय है – धारा 170–बी(2) के अधीन उपधारणा केवल एक पक्ष तक सीमित है अर्थात् क्या कब्जा विधिपूर्ण प्राधिकार के बिना है – इसलिए यदि कब्जाधीन व्यक्ति दर्शित करता है कि वह विधिपूर्ण प्राधिकार से कब्जे में है तो उपधारणा खण्डित हो जाती है।

B. Land Revenue Code, M.P. (20 of 1959), Section 170-B - *Provision applies to agricultural land in respect of members of tribal, which was declared to be aboriginal tribal as per Section 165(6) of Code.* (Para 10)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170–बी – उपबंध जनजातीय सदस्यों के सम्बन्ध में कृषि भूमि को लागू होते हैं, जिसे संहिता की धारा 165(6) के अधीन आदिम जनजाति होना घोषित किया गया था।

C. Land Revenue Code, M.P. (20 of 1959), Section 170-B - *Reversion of land - Presumption raised u/s 170-B(2) is a rebuttable presumption - Final order under Sub-section (3) has to be passed even if no information is given within stipulated time - Show cause notice and enquiry is necessary - Orders of revenue authorities directing reversion of land to original holders who were members of aboriginal tribe on the ground of non-furnishing of information set-aside - Matter remanded back to SDO to conduct enquiry by giving opportunity to petitioner and to pass speaking order.* (Paras 10 & 11)

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170–बी – भूमि का प्रत्यागम – धारा 170–बी(2) के अधीन की गई उपधारणा खण्डनीय है – उपधारा (3) के अधीन अंतिम आदेश पारित करना होता है यद्यपि नियत समय के भीतर कोई सूचना नही दी गई हो – कारण बताओ सूचना पत्र और जाँच आवश्यक है – सूचना पेश न करने के आधार पर मूल धारकों, जो आदिम जनजाति के सदस्य थे, को भूमि का प्रत्यागम करने का निदेश देने वाले राजस्व प्राधिकारियों

*W.P. No.16556/2006 (Jabalpur)

के आदेश अपास्त – मामला याची को सुनवाई का अवसर देकर जाँच करने और सकारण आदेश पारित करने के लिए एसडीओ को प्रतिप्रेषित।

D. **Land Revenue Code, M.P. (20 of 1959), Section 170-B** - *Appeal preferred before Collector against the order of SDO - Appellant had raised specific ground in appeal that no fraud had been committed on any tribal and the land is not the agricultural land but Abadi land and after purchasing the land house was constructed on the land by spending considerable amount - Plea not considered by Collector and revisional authority - Therefore, the orders passed by the Collector and revisional authority cannot be sustained - Matter remanded back to SDO.* (Paras 12 & 13)

घ. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170–बी – एसडीओ के आदेश के विरुद्ध कलेक्टर के समक्ष अपील पेश – अपीलार्थी ने अपील में विनिर्दिष्ट आधार उठाया कि किसी जनजातीय के साथ कोई कपट नही किया गया था और भूमि कृषि भूमि नही है बल्कि आबादी भूमि है और भूमि क्रय करने के बाद बड़ी राशि खर्च कर भूमि पर गृह का निर्माण किया गया – कलेक्टर और पुनरीक्षण प्राधिकारी द्वारा इस तर्क पर विचार नही किया गया – इसलिए कलेक्टर और पुनरीक्षण प्राधिकारी द्वारा पारित आदेश कायम नही रखे जा सकते – मामला एसडीओ को प्रतिप्रेषित।

Cases referred :

AIR 1986 MP 122, 1995 MPLJ 633, AIR 1999 MP 91.

Naman Nagrath, for the petitioners.
Sanjay Patel, for the respondent Nos.1, 2, 3, 5 and 6.
N.K. Tiwari, Panel Lawyer, for the respondent No.11.

O R D E R

PRAKASH SHRIVASTAVA, J. :–This writ petition has been filed challenging the order dated 6.11.2006, annexure P/6, passed by the Commissioner, Rewa Division, dismissing the revision petition filed by the petitioner and affirming the order of the Additional Collector dated 28.12.1996 and the Sub Divisional Officer dated 31.1.1996.

2. The case of the petitioners is that they had purchased a house built on the land situated at Patwari Halka no.65 Tahsil Pushprajgarh, district Shahdol, having an area of 0.06 decimal from Darbar Singh, father of the respondents who had executed a document of sale on 19.12.1979 in their favour. The land was recorded as Abadi land. Since then the petitioners are continuously living in the said house. After the death of Darbar Singh at the instance of the respondents proceeding was initiated under section 170-B of the Land Revenue Code (for short 'the Code') on the ground that the land originally belong to a member of aboriginal Tribe. The petitioners appeared before the S.D.O. and the Sub Divisional Officer passed the order dated 31.1.1996 holding that in terms of the provisions of 170-B(1) of the Code, the petitioners had failed to inform the Sub Divisional Officer as to how they came in possession of the disputed land. The S.D.O. issued a direction for

restoration of possession of the land to the respondents. Appeal preferred by the petitioners before the Additional Collector was dismissed by order dated 28.12.1996, against which the petitioners preferred revision before the Commissioner, who dismissed the revision petition by order dated 6.11.2006. Aggrieved with these orders, petitioners have filed the present writ petition.

3. Learned counsel appearing for the petitioners submitted that petitioners are bonafide purchasers. The Sub Divisional Officer has passed the order without conducting any inquiry and without calling for the report as required by section 170-B of the Code. Learned counsel for the petitioners further submitted that the house is constructed on the land in question, therefore, provisions of section 170-B(3)(b) should be invoked in the matter and that the land in question is Abadi land, therefore, the provisions of section 170-B would not be attracted and that the order passed by the original as well as appellate authority are cryptic orders, which cannot be sustained.

4. Learned counsel appearing for respondents no.1 to 10 submitted that the alleged sale was without obtaining permission under section 165(6) of the Code, therefore, the transaction is bad in law and the courts below have not committed any error in invoking the provisions of section 170-B of the Code and directing restoration of possession to the respondents.

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

6. Section 170-B of the Code provides for reversion of land of members of aboriginal Tribe, which was transferred by fraud, and also provides the procedure for deciding such cases. Section 170-B provides as under :

> **170-B. Reversion of land of members of aboriginal tribe which was transferred by fraud.**-(1) Every person who on the date of commencement of the Madhya Pradesh Land Revenue Code (Amendment) Act, 1980 (hereinafter referred to as the Amendment Act of 1980) is in possession of agricultural land which belonged to a member of a tribe which has been declared to be an aboriginal tribe under sub-section (6) of section 165 between the period commencing on the 2nd October, 1959 and ending on the date of the commencement of Amendment Act, 1980 shall, within (two years) of such commencement, notify to the Sub Divisional Officer in such form and in such manner as may be prescribed, all the information as to how he has come in possession of such land.
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> (2) If any person fails to notify the information as required by sub-section (1) within the period specified therein it shall be presumed that such person has been in possession of the agricultural land without any lawful authority and the agricultural land shall, on the expiration of the period aforesaid revert to the person to

whom it originally belonged and if that person be dead, to his legal heirs.

(2-A) If a Gram Sabha in the Scheduled area referred to in clause (1) of Article 244 of the Constitution finds that any person, other than a member of an aboriginal tribe, is in possession of any land of a Bhumiswami belonging to an aboriginal tribe, without any lawful authority, it shall restore the possession of such land to that persons to whom it originally belonged and if that person is dead to his legal heirs :

Provided that if the Gram Sabha fails to restore the possession of such land, it shall refer the matter to the Sub Divisional Officer, who shall restore the possession of such land within three months from the date of receipt of the reference.

(3) On receipt of the information under sub-section (1), the Sub Divisional Officer shall make such enquiry as may be deemed necessary about all such transactions of transfer and if he finds that the member of aboriginal tribe has been defrauded of his legitimate right he shall declare the transaction null and void and pass an order revesting the agricultural land in the transferer and, if he is dead, in his legal heirs.

(3) On receipt of the information under sub-section (1) the Sub Divisional Officer shall make such enquiry as may be necessary about all such transactions of transfer and if he finds that the member of aboriginal tribe has been defrauded of his legitimate right he shall declare the transaction null and void and -

(a) Where no building or structure has been erected on the agricultural land prior to such finding pass an order revesting the agricultural land in the transferer and if he be dead, in his legal heirs.

(b) Where any building or structure has been erected on the agricultural land prior to such finding, he shall fix the price of such land in accordance with the principles laid down for fixation of price of land in the Land Acquisition Act, 1894 and order the person referred to in sub-section (1) to pay to the transferer the difference, if any, between the price so fixed and the price actually paid to the transferer :

Provided that where the building or structure has been erected after the 1st day of January, 1984, the provisions of clause (b) above shall not apply :

Provided further that fixation of price under clause (b) shall

be with reference to the price on the date of registration of the case before the Sub Divisional Officer.

7. The Division Bench of this Court in the matter of *Dhirendra Nath Sharma V. State of M.P.* AIR 1986 MP 122, while upholding the constitutional validity of section 170-B has considered the scheme of that section and has held that :

> 12. Section 170-B was inserted later for the same purpose with a view to cover the remaining transfers of agricultural land belonging to tribals under which they had been exploited resulting from their unequal bargaining capacity at the time of the transaction. By enacting S. 170-B, a duty was cast on every person in possession of agricultural land, which belonged to a tribal at any time between 2nd Oct. 1959 and the date of commencement of the amendment Act of 1980 to notify the Sub-Divisional Officer within the period specified in the prescribed manner all the information as to how he had come in possession of such land. Obviously, the provisions enacted in S. 170-A for initiation of the proceedings was not found sufficient and, therefore, such a provision became necessary to ensure that every such transaction of transfer of land belonging to a tribal at any time after 2nd Oct. 1959 when the M. P. Land Revenue Code. 1959 came into force was brought to the notice of the Sub-Divisional Officer to enable examination of its validity on the basis of information supplied by the person in possession. Sub-sec. (3) provides that on the receipt of such information, the Sub-Divisional Officer shall make such enquiry as may be deemed necessary about all such transactions of transfer and if he finds that the tribal transferor has been defrauded, the transaction shall be declared null and void and an order would be made revesting the agricultural land in the tribal transferor or his legal heirs, as the case may be. The order contemplated by sub-sec. (3) is to be passed only as a consequence of a finding reached after due enquiry that in the transaction of transfer, the tribal transferor had been defrauded of his legitimate right. Unless such a conclusion is reached, no question arises of declaring the transaction null and void and passing an order revesting the agricultural land in the tribal transferor or his legal heirs.
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> 13. Sub-sec. (2) of S. 170-B merely lays down a rule of evidence. It says that where the person in possession fails to notify the information, as required by sub-sec. (1) within the specified period, it shall be presumed that such person has been in possession of the agricultural land without any lawful authority and the land

shall revert to the transferor or his legal heirs, as the case may be. Obviously, the presumption arising by virtue of sub-sec. (2) is based on the ground that if the person in possession has nothing to say nor show that his possession is under any lawful right and that the same is not derived as a result of a transaction defrauding the tribal transferor, the logical consequence must follow to presume that the transfer was void. The rule of evidence contained in sub-sec. (2) providing for such a presumption obviously dispenses with any further enquiry in such a case and the final order contemplated by sub-sec. (3) is required to be made taking into account this presumption arising under sub-sec. (2).

14. It is obvious that in all cases including those in which a presumption arises under sub-sec. (2), a final order contemplated by sub-sec. (3) has to be made and it is only the making of such an order which results in the declaration that the transaction is null and void and the agricultural land revests in the transferor or his legal heirs. Unless such an order is made even in cases in which the presumption under sub-sec. (2) arises, there, would be no order for implementation to bring about the desired result. The contention on behalf of the petitioners that no order is contemplated in a case covered by sub-sec. (2), has no merit and the further argument, based thereon does not, therefore, require any consideration.

The Division Bench of this court has further held that :

19. The main challenge in S. 170-B is to sub-sec. (2) thereof. It was contended that the effect of sub-sec. (2) is to usurp the judicial function. It was also urged that there is repugnancy between Central enactments like the Limitation Act, Transfer of Property Act and Contract Act, for sub-sec. (2) it was also argued by some counsel that its effect results in deprivation of means of livelihood necessary for existence with dignity of a non-tribal transferee without any enquiry, which contravenes Art. 21 of the Constitution. In short, the argument is that the procedure prescribed by sub-sec. (2) is not fair and reasonable and, therefore, it also offends Art. 21. In substance, these are the arguments to assail S. 170-B and particularly sub-sec. (2) therein.

20. The construction we have made earlier of S. 170-B including sub-sec. (2) therein is sufficient to repel most of the arguments advanced to assail its validity. The mere fact that an order contemplated by sub-sec. (3) has to be passed even in cases falling within the ambit of sub-sec. (2), as practice which is

admittedly being followed, is sufficient to indicate that there is no usurpation of judicial function thereby and there is no arbitrariness in the procedure nor is there the vice of absence of enquiry. In fact, none of the counsel appearing for the petitioners was in a position to make any serious challenge even to sub-sec. (2) of S.17-B on the above construction made thereof by us and indicated even by the learned Additional Advocate General of the hearing of these petitions.

8. The position has been further made clear in subsequent Division Bench judgment in the matter of *Atmaram Rohulla and others V. State of Madhya Pradesh,* 1995 MPLJ 633, wherein it has been held :

> 9. As explained in *Dhirendra Nath Sharma's* case even in a case governed by sub-section (2) of section 170-B of the Code, there must be show cause notice and enquiry. In reply to show cause notice, it is open to the vendee in possession to aver that his possession is by lawful authority. It must be open to him to adduce evidence in support of his contention that his possession is by lawful authority. If the S.D.O. is satisfied on the materials before him either produced by the vendee or received from other sources that the vendee's possession is based on lawful authority, the presumption is rebutted. That is the end of the operation of sub-section (2). It is important to know that the presumption has nothing to do with the aspect whether the document is obtained by fraud or other unfair means or whether the document is substantially unfair and constitutes fraudulent transaction affecting legitimate rights of the tribals. The presumption is confined only to one aspect in a narrow compass namely, whether the possession is without lawful authority.

9. The same view has been reiterated in the matter of *Baldeo Singh v. Shukka,* AIR 1999 MP 91. Thus, the presumption under section 170B(2) is rebuttable presumption and in all cases including those in which a presumption arises under section 170B(2) a final order contemplated under section 170B(3) has to be passed. Looking to the object of the provision show cause notice and enquiry is necessary in such cases.

10. A perusal of sub section (1) of section 170-B also shows that the provision applies to agricultural land in respect of members of the Tribe, which was declared to be the aboriginal Tribe as per section 6 of section 165. Sub section (3) of section 170-B provides that the Sub Divisional Officer will make the necessary enquiry about transaction of transfer. In the case of *Atmaram* (supra) it has been held that presumption under section 170-B(2) is confined to only one aspect i.e. whether the possession is without lawful authority. Therefore, if the person in

possession shows that he is in possession with lawful authority the presumption stands rebutted.

11. In the present case, a perusal of the order passed by the Sub Divisional Officer indicates that no show cause was given and no enquiry was conducted by the Sub Divisional Officer. There is no discussion of any facts or law and the Sub Divisional Officer by a short order has directed for restoration of possession to the respondents.

12. A perusal of the memo of appeal preferred before the Collector (annexure P/3) shows that in the appeal, the petitioner had raised specific ground that they had not obtained the possession by committing any fraud on any tribal and that the land in question is not an agricultural land but Abadi land and petitioners are bonafide purchaser and after purchasing the land they had constructed the house by spending considerable amount. The Collector while deciding the appeal has also not examined any of these grounds and rejected the appeal by short order by simply mentioning that he disagreed with the submissions.

13. The revisional authority has also rejected the submissions without assigning any cogent reasons and without looking into the requirements of section 170-B of the Code. Therefore, the orders passed by the S.D.O., Collector and the revisional authority cannot be sustained.

14. In view of the aforesaid, the writ petition is allowed. The orders passed by the S.D.O., Collector and revisional authority are set aside and the matter is remitted back to the Sub Divisional Officer to conduct an enquiry into the matter by giving an opportunity to the petitioner and pass a fresh reasoned and speaking order keeping in mind the requirements of section 170-B of the M.P. Land Revenue Code, 1959. No orders as to costs.

Petition allowed.

I.L.R. [2009] M. P., 415
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
13 October, 2008*

VIMLA BAI CHOUDHARY (SMT.) & anr. ... Petitioners
Vs.
BOARD OF REVENUE & ors. ... Respondents

A. Land Revenue Code, M.P. (20 of 1959), Sections 190 & 251 - ***Bhumiswami rights - Determination of question of Bhumiswami rights lies within the province of civil court except in cases falling u/s 257 of the Code - Section 257(o) gives limited jurisdiction to revenue authorities to decide the claim of occupancy tenant for conferral of Bhumiswami rights - Therefore,***

*W.P. No.2565/2002 (Jabalpur)

in cases where the status of claim as occupancy tenant is in dispute, Section 190 of the Code cannot be invoked. (Para 16)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 190 व 251 – भूमिस्वामी अधिकार – भूमिस्वामी अधिकारों के प्रश्न का अवधारण सिविल न्यायालय के कार्यक्षेत्र के भीतर आता है सिवाय उन मामलों के जो संहिता की धारा 257 के अन्तर्गत आते हैं – धारा 257(ओ) भूमिस्वामी अधिकार प्रदान करने के मौरूसी कृषक के दावे का विनिश्चय करने के लिए राजस्व प्राधिकारियों को सीमित अधिकारिता प्रदान करती है – इसलिए उन मामलों में जहाँ मौरूसी कृषक के रूप में दावे की प्रास्थिति प्रश्नगत है, संहिता की धारा 190 का अवलंब नहीं लिया जा सकता।

B. Constitution, Article 227 - *Jurisdiction - Where subordinate court assumes jurisdiction, which it does not have - High Court can step in and exercise its supervisory jurisdiction.* (Para 20)

ख. संविधान, अनुच्छेद 227 – अधिकारिता – जहाँ अधीनस्थ न्यायालय अधिकारिता मान लेता है, जो वह नही रखता – उच्च न्यायालय कार्यवाही कर अपनी पर्यवेक्षण अधिकारिता का प्रयोग कर सकता है।

Cases referred:

(2003) 6 SCC 675, 1969 MPLJ 470, AIR 1982 MP 195, 1991 RN 114, 2001(3) MPHT 255, 1997 RN 100.

Gagandeep Singh, for the petitioner.
V.P. Nema, G.A., for the respondent Nos.1 to 4.
Alok Aradhe with *Avinash Jargar,* for the respondent No.5.

O R D E R

PRAKASH SHRIVASTAVA, J. :–This writ petition has been filed against the order of the Board of Revenue dated 4.10.2001 by which the Board of Revenue allowed the revision of the respondent no.5 and set aside the order of the Additional Commissioner dated 28.12.1999.

2. The facts in brief as stated in the writ petition are that the respondent no.5 had moved the application dated 15.11.1984 before the Tahsildar under section 190 of the M.P. Land Revenue Code (for short 'the Code') stating that the petitioner who was the Bhumiswami of the land in question had given the land on lease for agricultural purposes in 1977 to the respondent no.5 on 'Munafa' of Rs.1,000 and he continued in possession from 1977-78 to 1984-85 as Cultivator in possession in his capacity as 'Munafedar', therefore, Bhumiswami rights accrued to him. Petitioner filed reply to the application denying the averments made in the application and taking the stand that the respondent no.5 is his cousin brother and since the petitioner was suffering from diabetes and was taking treatment in Mumbai from 1977 to 1980, therefore, he had given the land to the respondent no.5 for cultivation and no 'Munafa' was received by him. The petitioner denied that any Bhumiswami right accrued to the respondent no.5 under section 190 of the Code.

3. The Additional Tahsildar passed the order dated 10.12.1986 holding that the

rights of occupancy tenant had accrued to the respondent no.5 under section 185(1)(1)(c) of the Code. The Tahsildar also found that case of the petitioner did not fall under section 168(2) of the Code since disability alleged by the petitioner was not proved. The Tahsildar finally held that since the rights of occupancy tenant accrued to the respondent no.5 under section 159 of the Code, therefore, on deposit of the stipulated amount Bhumiswami rights would accrue to the respondent no.5.

4. The appeal filed by the petitioner against the order of the Tahsildar was dismissed by the Sub Divisional Officer by order dated 26.10.87 against which the petitioner preferred second appeal before the Additional Commissioner. The Additional Commissioner by order dated 28.12.99 allowed the second appeal filed by the petitioner holding that in the Khasra there is no lawful entry about the respondent no.5 being the occupancy tenant nor status of the respondent no.5 as occupancy tenant has been admitted. The Additional Commissioner relying upon one of the judgment of this court took a view that provisions of section 190 of the Code can be invoked when a person claiming Bhumiswami status is admittedly an occupancy tenant because there is no provision in the Code giving power to any revenue officer to confer status of occupancy tenant. Against this order the respondent no.5 filed revision petition before the Board of Revenue. The Board of Revenue by the impugned order dated 4.10.2001 allowed the revision petition inter alia holding that the view of the Additional Commissioner that section 190 can be invoked only where the status of a person as occupancy tenant is admitted is incorrect.

5. Learned counsel appearing for the petitioner submitted that since under the M.P. Land Revenue Code the revenue authorities have not been conferred with any power to determine the status as occupancy tenant, therefore, under section 190 Bhumiswami rights can be conferred only in cases where the status of occupancy tenant is not in dispute. In support of this preposition he has relied upon some of the judgments of this court. He further submitted that it is a case covered by section 168. Since the petitioner was suffering from diabetes, therefore, he had given the land for cultivation to the respondent no.5 without any consideration. He submitted that the doctor's evidence, which was adduced by the petitioner in respect of the disability, has not been properly appreciated and the status of the respondent no.5 was only that of a caretaker. There is also no receipt showing that he had made any payment to the petitioner.

6. Learned counsel appearing for the respondent no.5 submitted that the order of the Board of Revenue is a well-reasoned order by which the order of the S.D.O. has been restored. He submitted that in exercise of limited jurisdiction under Article 227, no interference in the order of the Board of Revenue is called for. In support of his submission he has placed reliance upon the judgments of the Supreme Court in the matter of *Surya Dev Rai v. Ramchandra Rai and others*, (2003)6 SCC 675. He has also placed reliance upon the judgments of this court reported in the case of *Gutti V. Mohanlal and others*, 1969 MPLJ 470, and

Balaji and others V. Derha and others, AIR 1982 MP 195, in support of his claim relating to conferral of Bhumiswami rights under section 190.

7. The core question that arises for consideration is whether in a case where the status of the claimant as occupancy tenant is disputed, the revenue authorities can examine the merits of the claim and record a finding about the status as occupancy tenant and pass an order conferring the Bhumiswami rights under section 190 of the Code?

8. Section 190 of the Code deals with conferral of Bhumiswami right on occupancy tenant. Under section 190 Bhumiswami rights can be conferred on occupancy tenant but status of a person as occupancy tenant cannot be decided. Therefore, section 190 can be attracted only when the status of a person as occupancy tenant is not in dispute. Section 190 of the Code reads as under :

> **190. Conferral of Bhumiswami rights on occupancy tenants.-** (1) Where a Bhumiswami whose land is held by an occupancy tenant belonging to any of the categories specified in sub-section (1) of section 185 except in items (a) and (b) of clause (i) thereof fails to make an application under sub-section (1) of section 189 within the period laid down therein, the rights of a Bhumiswami shall accrue to the occupancy tenant in respect of the land held by him from such Bhumiswami with effect from the commencement of the agricultural year next following the expiry of the aforesaid period.
>
> (2) Where an application is made by a Bhumiswami in accordance with the provisions of sub-section (1) of section 189, the rights of a Bhumiswami shall accrue to the occupancy tenant in respect of the land remaining with him after resumption if any allowed to the Bhumiswami with effect from the commencement of the agricultural year next following the date on which the application is finally disposed of.
>
> (2-A) Where the land of a Bhumiswami is held by an occupancy tenant other than an occupancy tenant referred to in sub-section (1), the rights of a Bhumiswami shall accrue to the occupancy tenant in respect of such land -
>
> (a) in the case of occupancy tenants of the categories specified in items (a) and (b) of clause (i) of sub-section (1) of section 185, with effect from the commencement of the agricultural year next following the commencement of the Principal Act;
>
> (b) in any other case, with effect from the commencement of the agricultural year next following the date on which the rights of an occupancy tenant accrue to such tenant.

(3) Where the rights of a Bhumiswami accrue to an occupancy tenant under sub-section (1), sub-section (2) or sub-section (2-A) such occupancy tenant shall be liable to pay to his Bhumiswami compensation equal to fifteen times the land revenue payable in respect of the land in five equal annual instalments, payable under section 188 for the corresponding year falls due, and if default is made in payment, it shall be recoverable as an arrear of land revenue :

Provided that if from any cause the land revenue is suspended or remitted in whole or in part in any area in any year, the annual instalment of compensation payable by an occupancy tenant holding land in such area in respect of that year shall be suspended and shall become payable one year after the last of the remaining instalments.

(4) Any occupancy tenant may at his option pay the entire amount of compensation in a lump sum and where an occupancy tenant exercises this option, he shall be entitled to a rebate at the rate of ten percent.

(5) The amount of compensation, whether paid in lump sum or in annual instalments, shall be deposited in such manner and form as may be prescribed by the occupancy tenant with the Tahsildar, for payment to the Bhumiswami.

(6) Where the rights of a Bhumiswami in any land accrue to an occupancy tenant under this section, he shall be liable to pay the land revenue payable by the Bhumiswami in respect of such land with effect from the date of accrual of such rights.

9. Section 257 of the Code deals with exclusive jurisdiction of the revenue authorities and section 257(o) provides that :

257. Exclusive jurisdiction of revenue authorities.- Except as otherwise provided in this Code, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board, or any Revenue Officer is by this Code, empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters :-

.....

(o) claims by occupancy tenants for conferral of the rights of Bhumiswami under section 190;

Under section 257(o) revenue authorities have exclusive jurisdiction to decide claim of occupancy tenant for conferral of Bhumiswami right but under section 257(o) read with section 190 the status as Occupancy tenant itself cannot be decided by revenue authorities.

10. This court in the matter of *Rawala v. Dettia and others*, 1978 RN 12, has held as under :

> 4. The lower appellate Court felt that under section 257(o) of the M.P. Land Revenue Code the claims by an occupancy tenant for conferral of the rights of Bhumiswami fall within the exclusive jurisdiction of the Revenue Tribunal under section 190 of the M.P. Land Revenue Code. Section 190 of the Code no doubt empowers the Revenue Tribunal to confer the rights of a Bhumiswami; but it contemplates that these rights could only be conferred on an occupancy tenant but whether a person claiming the rights of a Bhumiswami is an occupancy tenant or not, is not within the jurisdiction of Revenue Tribunal to determine under section 190 of the Code. That question therefore will be for the Civil Court to decide and section 257(o) of the Code will therefore not come into operation restricting jurisdiction of the Civil Court to entertain the suit for declaration of title.

11. This court while examining the same issue in the matter of *Sanwal and others v. Laxmibai and others*, 1991 RN 114, has held as under :

> "27. In the instant case the real dispute between the parties centers round the question whether the defendants No.1 and 3 had acquired the status of occupancy tenants in respect of the suit lands. There is no provision in the Code which empowers any Revenue Officer to determine the status of occupancy tenant. Section 190 which deals with conferral of Bhumiswami rights on occupancy tenants can operate only when the person who claims to have acquired Bhumiswami rights under section 190 of the Code is admittedly an occupancy tenant. But that is not the situation in the present case.
>
> 33. In the instant case defendants no.1 and 3 claimed to have acquired status of occupancy tenants and consequently the status of Bhumiswami in respect of the suit-lands under section 190 of the Code. The jurisdiction for deciding such a claim is vested in the civil court and not in the Revenue Authority and the decision in the case of Rawala (supra) is on all fours applicable to the facts of the instant case. As such, it is held that the civil suit filed by the plaintiff challenging the defendants claim of status as occupancy tenant in respect of the suit-land, is maintainable".

12. In the case of *Reshma Bai (Smt.) and others v. Kanchansingh and others,* 1996 RN 144, the Division Bench of this Court again reiterated the view that an occupancy tenant may approach the revenue authority under section 190 when there is no dispute of status as occupancy tenant.

13. The Full Bench of this Court in *State of M.P. and others V. Balveer Singh and others,* 2001(3) MPHT 255, has held that :

> 66.(3) The determination of question of bhumiswami rights lies within the province of the Civil Court excepting the cases falling within the ambit of those specified under Section 257 of the Code.

14. In *Halimanbai & others v. Narain & others,* 1997 RN 100, this Court has held that conferral of Bhumiswami rights under section 190 is automatic and right is acquired by operation of law.

15. Judgments in the matter of *Gutti* (supra) and Balaji (supra) do not help the respondents as they do not lay down anything contrary to what has been held in the matters of *Rawala* (supra) and *Sanwal* (supra).

16. Thus, it can be safely held that determination of question of Bhumiswami rights lies within the province of the Civil Court except in cases falling under section 257 of the Code. Section 257(o) gives limited jurisdiction to revenue authorities to decide the claims of occupancy tenant for conferral of Bhumiswami rights, therefore, in cases where status of claimant as occupancy tenant is in dispute, section 190 of the Code cannot be invoked.

17. In the present case an application under section 190 of the Code was filed by the respondent no.5 claiming the status of occupancy tenant on the basis of cultivation and possession as 'Munafedar' from 1977-78 to 1984-85. The petitioners had filed reply dated 18.2.85 / 26.3.85 to this application denying the facts stated in the application and denying that the respondent no.5 remained in possession upto 1985 as 'Munafedar'. Before the Additional Tahsildar the matter was contested by the petitioner and the issue no.3 was framed about attaining the status of occupancy tenant by the respondent no.5 under section 185 of the Code. This issue was contested by the petitioner and the Tahsildar held that the respondent no.5 obtained the status of occupancy tenant under section 185 of the Code. The Tahsildar then examined the question of conferral of Bhumiswami rights on the respondent no.5 under section 190 of the Code and held the respondent no.5 is entitled for such right on the basis of the findings about the respondents status as occupancy tenant.

18. A perusal of the order of the Tahsildar indicates that the status of the respondent no.5 as occupancy tenant was in dispute. The Tahsildar had no jurisdiction to go into the question and record a finding about the status of occupancy tenant under section 185. Proper remedy in such a case was to relegate

the parties to avail the remedy of civil suit. The Additional Commissioner had rightly placed reliance upon the judgments of this court reported in *Sanwal* (supra) while taking a view that in the facts of the case the revenue court had no jurisdiction to confer the status of occupancy tenant to the respondent no.5. Clear error of law was committed by the Board of Revenue in reversing the order of the Additional Commissioner while exercising the revisional jurisdiction. The Board of Revenue has not noted the judgments of this court which were relied upon by the Additional Commissioner. The order of the Board of Revenue cannot be sustained since view taken by the Board of Revenue on this issue is contrary to the judgments of this court.

19. Next question that arises for consideration is whether such an order of the Board of Revenue is open to interference in exercise of jurisdiction under Article 227. Counsel for respondent no.5 has placed reliance upon the judgment of the Supreme Court in the matter of *Suryadev Rai* (supra), which lays down as under :

> 38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as here-under-:-
>
> (1) Amendment by Act No. 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.
>
> (2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.
>
> (3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.
>
> (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted

by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error, which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of

supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

20. It has been held in the aforesaid judgment that in a case where the subordinate court assumes jurisdiction, which it does not have, the High Court can step in and exercise its supervisory jurisdiction. Present is also a case where the revenue courts had no power to confer the status of occupancy tenant to a person in disputed cases but the Board of Revenue by restoring the order of the Tahsildar has conferred status of occupancy tenant to respondent no.5.

21. In view of the aforesaid the writ petition is allowed. The order dated 4.10.2001 passed by the Board of Revenue is set aside and the order of the Additional Commissioner dated 28.12.1999 is restored. No orders as to costs.

Petition allowed.

I.L.R. [2009] M. P., 424

WRIT PETITION

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava

4 November, 2008*

RAJENDRA KUMAR KHANDELWAL & ors. ... Petitioners

Vs.

SMT. RAJKUMARI KHANDELWAL & ors. ... Respondents

A. Rewa State Registration Act, 1917, Section 21, Registration Act, 1908, Section 49, Merged States (Laws) Act, 1949, Sections 5 & 6 - *Repeal - Repeal by Section 5 of any corresponding law in force in the new Provinces or merged States immediately before the commencement of this Act shall not affect the previous operation of any such law - Partition deed executed on 01.01.1934 - Provisions of Act, 1917 will be applicable and not provisions of Act, 1908.* (Para 5)

क. रीवा राज्य रजिस्ट्रीकरण अधिनियम, 1917, धारा 21, रजिस्ट्रीकरण

*W.P. No.609/2005 (Jabalpur)

अधिनियम, 1908, धारा 49, विलयित राज्य (विधियाँ) अधिनियम, 1949, धाराएँ 5 व 6 – निरसन – इस अधिनियम के प्रारम्भ के अव्यवहित पूर्व नए प्रांतों और विलीन राज्यों में प्रवृत्त किसी तत्समान विधि का धारा 5 द्वारा निरसन ऐसी किसी विधि के पूर्व प्रवर्तन को प्रभावित नही करेगा – विभाजन विलेख 01.01.1934 को निष्पादित – अधिनियम 1917 के उपबंध लागू होंगे, अधिनियम 1908 के उपबंध नही।

B. Rewa State Registration Act, 1917, Section 21, Registration Act, 1908, Section 49 - *Effect of non-registration of document - Section 21 of Act 1917 provides that document which is required to be compulsorily registered cannot be received in evidence with respect to the property in any of litigation - No provision made for its admissibility for collateral purposes - Unregistered partition deed executed in 1934 cannot be received in evidence even for collateral purposes in view of Section 21 of Act, 1917.*

(Para 6)

ख. रीवा राज्य रजिस्ट्रीकरण अधिनियम, 1917, धारा 21, रजिस्ट्रीकरण अधिनियम, 1908, धारा 49 – दस्तावेज रजिस्ट्रीकृत न होने का प्रभाव – अधिनियम 1917 की धारा 21 उपबंधित करती है कि दस्तावेज, जिसका रजिस्ट्रीकृत होना आवश्यक रूप से अपेक्षित है सम्पत्ति के संबंध में किसी वाद में साक्ष्य में प्राप्त नही किया जा सकता – सांपार्श्विक प्रयोजनों के लिए इसकी ग्राह्यता के लिए कोई उपबंध नही किया गया है – 1934 में निष्पादित अरजिस्ट्रीकृत विभाजन विलेख अधिनियम 1917 की धारा 21 को दृष्टि में रखते हुए सांपार्श्विक प्रयोजनों के लिए भी साक्ष्य में प्राप्त नही किया जा सकता।

Cases referred :

1980(I) MPWN 283, 1975 MPLJ 633.

K.N. Agrawal, for the petitioners.

R.P. Agrawal with *Pravin Dubey,* for the respondent Nos. 1.B, 1.C, 1D, 1.E & 5.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The question agitated in the present writ petition is about the admissibility of deed dated 1.1.1934 which dealt with the property worth at least to Rs.4,000/- at the relevant time. It was not registered nor it was stamped. The document was executed at Satna which fell within the erstwhile state of Rewa. The provision of the Rewa State Registration Act, 1917 were applicable at the relevant time.

2. Before the trial court an interlocutory application was filed u/s 33 of Indian Stamp Act, the document was not stamped nor it was registered. Prayer was made to impound it and to receive the penalty along with stamp duty. It was prayed that document be sent to the Collector for Stamp. Prayer was objected by the defendant. The plaintiff submitted that property was partitioned by the document in question. The trial court has held that registration of the document was necessary, as such it cannot be used so as to prove the title being unregistered

one. The requisite stamp duty has been ordered to be paid along with the penalty. It has also been held that document can be received in evidence for the collateral purposes after payment of the requisite stamp duty and penalty. Aggrieved by the order the writ petition has been preferred.

3. Shri K.N. Agrawal, learned counsel for the defendant-petitioners, has submitted that the order passed by the trial court inasmuch as document can be read in evidence for collateral purpose is illegal. He has placed reliance on single Bench's decision of this Court in *Laxman Prasad v. Yagya Narain,* 1980 (1) MPWN 283 and section 21 of Rewa State Registration Act, 1917. He has submitted that bare reading of section 21 of the Rewa State Registration Act, 1917 makes it clear that the document cannot be admitted in evidence even for collateral purpose. There is difference between the language used in the provision of section 49 of the Indian Registration Act and of section 21 of the Rewa State Registration Act, 1917.

4. Shri R.P. Agrawal, learned counsel for the respondents, has submitted that conjoint reading of section 6 and section 21 of the Rewa State Registration Act, 1917 makes it clear that in case parties to the document do not object as to its execution, the document can be received in evidence in a lis in which document has to be used. He has submitted that section 6 has to be read harmoniously with section 21 of the Rewa State Registration Act which makes it clear that document can be admitted in evidence for collateral purpose. He has also placed reliance on section 5 of the Merged States (Laws) Act, 1949 to submit that after Repeal of corresponding laws by the Merged States (Laws) Act, 1949 the provision of section 49 of Indian Registration Act would come into play to the rescue of the plaintiff so as to use the document as evidence for the collateral purpose. He has placed reliance on Full Bench's decision of this Court in *Sardar Amar Singh and another v. Surinder Kaur,* 1975 MPLJ 633.

5. First we come to the question whether the provisions of section 49 of the Indian Registration Act, 1908 would be applicable or the provisions of the Rewa State Registration Act, 1917 would be applicable in the instant case ?

Shri R.P. Agrawal, Sr. counsel appearing for aforesaid respondents, has placed reliance on section 5 of the Merged States (Laws) Act, 1949 which provides Repeal of corresponding laws to the Merged States (Laws) Act and applicability of the law mentioned in the Schedule. Section 5 is quoted below :

> " **5. Repeal of corresponding laws :-** If immediately before the commencement of this Act there is in force in any of the new Provinces or merged States an Act, Ordinance, Regulation or other law corresponding to an Act, Ordinance or Regulation specified in the Schedule, whether such Act, Ordinance or Regulation is in force by virtue of an Order under the Extra -

Provincial Jurisdiction Act, 1947, or by virtue of any other legislative power, such corresponding law shall upon the commencement of this Act, -

(a) in a new Province, stand repealed, and

(b) in a merged State, stand repealed to the extent to which the law relates to matters with respect to which the Dominion Legislature has power to make laws for a Governor's Province."

However, section 6 of the Merged States (Laws) Act, 1949 makes it clear that the repeal by section 5 of any corresponding law in force in the new Provinces or merged States immediately before the commencement of this Act shall not affect the previous operation of any such law or any penalty, forfeiture or punishment incurred in respect of any offence committed against any such law or any investigation, legal proceeding or remedy in respect of any such penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed. Sub section (1) of Section 6 of the Merged States (Laws) Act, 1949 is quoted below :-

"6(1) The repeal by section 5 of this Act of any corresponding law in force in the new Provinces or merged States immediately before the commencement of this Act shall not affect :-

(a) the previous operation of any such law, or

(b) any penalty, forfeiture or punishment incurred in respect of any offence committed against any such law, or

(c) any investigation, legal proceeding or remedy in respect of any such penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed.

The aforesaid provision of section 6(1) make it clear that the provisions of Rewa State Registration Act, 1917 are applicable not that of the Indian Registration Act, 1908, thus, we do not agree with the submission raised by learned Sr. counsel appearing on behalf of the aforementioned respondents that the provisions of section 49 of the Indian Registration Act would apply as the document is sought to be adduced in evidence after enforcement of the Indian Registration Act. In our opinion, in view of clear use of language of section 6 of the Merged States (Laws) Act, 1949 even in the legal proceedings instituted after enforcement of Indian Registration Act, the investigation or legality has to be judged in accordance with the law which was prevailing at the time when document was executed in the year 1934 i.e. Rewa State Registration Act, 1917.

6. Now we come to the submission as to interpretation of provisions of the Rewa State Registration Act, 1917. Section 21 of the Act is quoted below :

"दस्तावेजात जिनकी रजिस्ट्री लाजिमी है बिलासमातर रजिस्ट्रीन होंगे /

दफा 21 कोई दस्तावेज जिस्की रजिस्ट्री बमूजिब दफा 1 लाजिमी है किसी जायदाद गैर मनकूला पर जो उसमें दाखिल हो असर न करेगा और न शहादत में निस्बत किसी मामले के जो उस जायदाद के बाबत हो कबूल होगा तावक्ते कि उस्की रजिस्ट्री बमूजिब इस नियमावलीके न हुई हो।"

A bare reading of the aforesaid section 21 makes it clear that the documents which are required to be compulsorily registered as per section 1, in case it has not been registered, shall not be received in evidence with respect to the property in any of the litigation. There is no provision made for its admissibility for collateral purposes. Bare reading of section 21 makes it clear that there is difference between section 21 and the proviso of section 49 of the Indian Registration Act. The proviso to section 49 of Indian Registration Act makes the document admissible for collateral purposes notwithstanding it has not been registered whereas there is clear embargo created by section 21 of the Rewa State Registration Act, 1917 to receive the unregistered document in evidence for any purpose whatsoever.

The section 49 of Indian Registration Act is quoted below :

"49. Effect of non-registration of documents required to be registered -No document required by section 17, Added by Act 21 of 1929, Sec. 10, (or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall -

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), Now see the Specific Relief Act, 1963 (47 of 1963), Certain words omitted by Act 48 of 2001, Sec.6 (w.e.f. 24-9-2001) or as evidence of any collateral transaction not required to be effected by registered instrument.]

Bare reading of the aforesaid and proviso to section 49 of Indian Registration Act makes it clear that document which has not been registered can be received in evidence for collateral purpose. Whereas such documents cannot be used even for that purpose as provided u/s 21 of the Rewa State Registration Act, 1917.

7. Coming to the submission raised by Shri R.P. Agrawal, Sr. counsel appearing for respondents with respect to section 6 of the Rewa State Registration Act, 1917, section deals with the period of the Limitation Act for getting the document registered. Section 6 as contained in Chapter 2 is quoted below :-

अध्याय 2

"मियाद वास्ते रजिस्ट्री कराने की –

4 माह या 8 माह के अन्दर दस्तावेजका रजिस्ट्री के लिये पेश होना /

दफा 6 तारीख लिखने दस्तावेज से अन्दर चार माह के मामूली फीस रजिस्ट्री की ली जावेगी व 4 माह के बाद तारीख लिखने से पेश होवै तो बाद उस्के चार माह दीगरतक डबल फीस ली जावैगी जो आठ माह तक तारीख लिखने से पेश होवै तो लेख की रजिस्ट्री न होगी बल्कि नबीन दस्तावेज लिखना जरूरी होगा ऐसे दस्तावेज बिला रजिस्ट्री शुदा नालिश नम्बरी में समायत न होगी अगर तकमील कुनिन्दा दस्तावेज को लिखने से एकवाल हो तो काबिल समाअत होगी –(क)

Bare reading of section 6 of the Rewa State Registration Act, 1917 makes it clear that the document shall be charged for the ordinary fee payable, in case it is presented for registration within 4 months of its execution and thereafter after 4 months two times fee shall be recovered and in case the document is not presented within 8 months, shall not be registered. It shall be necessary to reduce in writing fresh document in order to get it registered. It is also provided that such document which is not registered, its entry shall not be made in the unregistered documents until & unless parties thereto agree with respect to execution. Section 21 has different field to operate than Section 6. Section 21 deals with admissibility of document which has not been registered. Section 6 deals with period during which document can be registered. Thus, in our opinion, plain reading of section 21 makes it clear that the compulsory registrable documents cannot be admitted in evidence even for collateral purpose. In case Indian Registration Act is applicable, such documents are admissible for collateral purpose as per proviso to section 49 but that is not applicable in the instant case. Consequently, the decision of the Full Bench of this Court in *Sardar Amar Singh and another v. Surinder Kaur's* case based on section 49 is not applicable.

Resultantly, writ petition is allowed. We hold that the document deed dated 1.1.1934 being compulsorily registered cannot be admitted in evidence even for collateral purpose as provided in section 21 of the Rewa State Registration Act, 1917. The impugned order to the extent holding it admissible for collateral purpose is hereby set aside. Trial Court is directed to proceed expeditiously with trial of the case. No costs.

Petition allowed.

I.L.R. [2009] M. P., 430

WRIT PETITION

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

5 November, 2008*

K.N. SHUKLA ... Petitioner

Vs.

UNION OF INDIA & ors. ... Respondents

A. Constitution, Articles 3, 4, 245 & 246, Entry 41 of List II of 7th Schedule, Madhya Pradesh Reorganisation Act, 2000, Sections 68, 69 & 70 - *Petitioner challenging the vires of the provisions contained in Ss. 68, 69 & 70 of the Act on the ground that only State Legislature has jurisdiction to frame guideline regarding the conditions of service of public servants - Held - Law made by the Parliament under Articles 3 & 4 of the Constitution forming a new State by separating any State and providing therein supplemental, incidental and consequential provisions will be within the competence of Parliament - Even if it encroaches upon a matter within the exclusive legislation competence of the State Legislature under Articles 245 & 246 of the Constitution - Ss. 68, 69 & 70 of the Act are not ultra vires.* (Para 4)

क. संविधान, अनुच्छेद 3, 4, 245 व 246, अनुसूची 7 की सूची II की प्रविष्टि 41, मध्य प्रदेश पुनर्गठन अधिनियम, 2000, धाराएँ 68, 69 व 70 – याची ने अधिनियम की धाराएँ 68, 69 व 70 में अन्तर्विष्ट उपबंधों की शक्तिमत्ता को इस आधार पर चुनौती दी कि केवल राज्य विधान मंडल को लोक सेवकों की सेवा की शर्तों के सम्बन्ध में मार्गदर्शक सिद्धांत विरचित करने की अधिकारिता है – अभिनिर्धारित – संसद द्वारा, किसी राज्य को पृथक कर नये राज्य का निर्माण करते हुए और उसमें अनुपूरक, आनुषंगिक और पारिणामिक उपबंधों का उपबंध करते हुए, संविधान के अनुच्छेद 3 व 4 के अन्तर्गत बनायी गई विधि संसद की अधिकारिता के भीतर होगी – यद्यपि यह राज्य विधान मंडल की संविधान के अनुच्छेद 245 व 246 के अन्तर्गत अनन्य विधायन अधिकारिता के विषय पर अतिक्रमण करती हो – अधिनियम की धाराएँ 68, 69 व 70 अधिकारातीत नही हैं।

B. Constitution, Articles 3, 4, 245 & 246, Entry 41 of List II of 7th Schedule - *The exclusive power of State Legislature under Articles 245 & 246 of the Constitution to make law in respect of any matter enumerated in List II of 7th Schedule of the Constitution including a law on "State Public Services" in the State is subject to Articles 3 & 4 of the Constitution.* (Para 4)

ख. संविधान, अनुच्छेद 3, 4, 245 व 246, अनुसूची 7 की सूची II की प्रविष्टि 41 – राज्य में "राज्य लोक सेवाओं" पर विधि को सम्मिलित करते हुए संविधान की अनुसूची 7 की सूची II में प्रगणित किसी विषय के सम्बन्ध में राज्य विधान मंडल की संविधान के अनुच्छेद 245 व 246 के अन्तर्गत विधि बनाने की अनन्य शक्ति संविधान के अनुच्छेद 3 व 4 के अध्यधीन है।

*W.P. No.12639/2008(S) (Jabalpur)

C. **Constitution, Article 310(1), Madhya Pradesh Reorganisation Act, 2000, Sections 68, 69 & 70** - *Except as expressly provided by the Constitution - Every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State - Held - The contention is misconceived because Article 310(1) of the Constitution starts with the expression "except as expressly provided by the Constitution" - Under Article 4 of the Constitution, Parliament has powers to make supplemental provisions while forming a new State comprising territories of an erstwhile State in exercise of its powers under Article 3 of the Constitution - The provisions in Ss. 68, 69 & 70 of the Act are not ultra vires Article 310(1) of the Constitution.* (Para 6)

ग. संविधान, अनुच्छेद 310(1), मध्य प्रदेश पुनर्गठन अधिनियम, 2000, धाराएँ 68, 69 व 70 – संविधान द्वारा अभिव्यक्त रूप से यथा उपबंधित के सिवाय – प्रत्येक व्यक्ति जो किसी राज्य की सिविल सेवा का सदस्य है या राज्य के अधीन कोई सिविल पद धारण करता है, राज्यपाल के प्रसादपर्यन्त पद धारण करता है – अभिनिर्धारित – प्रतिवाद का गलत अर्थ लगाया गया है क्योंकि संविधान का अनुच्छेद 310 (1) अभिव्यक्ति "संविधान द्वारा अभिव्यक्त रूप से यथा उपबंधित के सिवाय" से प्रारम्भ होता है – संविधान के अनुच्छेद 3 के अन्तर्गत अपनी शक्तियों के प्रयोग में भूतपूर्व राज्य के राज्यक्षेत्रों को सम्मिलित करते हुए एक नये राज्य का निर्माण करते समय संविधान के अनुच्छेद 4 के अन्तर्गत संसद को अनुपूरक उपबंध बनाने की शक्तियाँ हैं – अधिनियम की धारा 68, 69 व 70 के उपबंध संविधान के अनुच्छेद 310(1) के अधिकारातीत नही।

V. Jayaraman, for the petitioner.
Dharmendra Sharma, Asstt.S.G., for the respondent Nos.1 to 4.

ORDER

The Order of the Court was delivered by
A. K. PATNAIK, C. J. :–The petitioner has been holding the post of Joint Director, Directorate of Agriculture, Bhopal in the State of Madhya Pradesh since 2.8.1996. Parliament enacted the Madhya Pradesh Re-organisation Act, 2000 (for short '2000 Act') forming some of the erstwhile territories of the existing State of Madhya Pradesh as a separate State of Chhattisgarh on and from the "appointed day". In Section 2(a) of the 2000, "appointed day" was defined as the date which the Central Government may, by notification in the Official Gazette, appoint. The Central Government appointed 1st of November, 2000 as the appointed day. Sub-section (1) of Section 68 of the 2000 Act provided that every person who immediately before the appointed day is serving in connection with the affairs of the existing State of Madhya Pradesh shall, on or from that day provisionally continue to serve in connection with the affairs of the State of Madhya Pradesh unless he is required, by general or special order of the Central Government to serve provisionally in connection with the affairs of the State of Chhattisgarh. Sub-section (2) of Section 68 of the 2000 Act further provided that as soon as after the appointed day, the Central Government shall, by general or special order,

determine the successor State to which a person referred to under sub-section (1) shall be finally allotted for service and the date with effect from which such allotment shall take effect or be deemed to have taken affect. On 8.8.2002, an order was issued under Section 68 of the 2000 Act provisionally allocating the petitioner to the State of Chhattisgarh. Section 69 of the 2000 Act provided that nothing in Section 68 shall be deemed to affect on or after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to determination of the conditions of service of the persons serving in connection with the affairs of the Union or the State. Section 70 of the 2000 Act further provided that every person who immediately before the appointed day is holding or discharging duties of any post or office in connection with the affairs of the existing State of Madhya Pradesh in any area which on that day falls within any other successor State shall continue to hold the same post or office in that successor State and shall be deemed on or from that day duly appointed to the post or office by the Government or any other authority in that successor State. The petitioner has filed this petition under Article 226 of the Constitution praying *inter alia* for declaring the provisions of Sections 68, 69 and 70 of the 2000 Act as *ultra vires* the Constitution.

2. Mr. V. Jayaraman, learned counsel, appearing on behalf of the petitioner, submitted that under Article 246(3) of the Constitution, the Legislature of a State has exclusive power to make laws for the State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule of the Constitution and under entry 41 of List II of the Seventh Schedule of the Constitution therefore the State Legislature has exclusive power to make law in respect of State Public Services and hence the provisions of Sections 68, 69 and 70 of the 2000 Act are beyond the legislative competence of Parliament.

3. Articles 3, 4, 245 and 246 of the Constitution are quoted hereinabove:

> **3. Formation of new States and alteration of areas, boundaries or names of existing States.**
>
> Parliament may by law-
>
> (a) Form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
>
> (b) Increase the area of any State;
>
> (c) Diminish the area of any State;
>
> (d) Alter the boundaries of any State;
>
> (e) Alter the name of any State:
>
> [Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of

the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

[Explanation I.- In this article, in clauses (a) to (e), State includes a Union territory, but in the proviso, State does not include a Union territory.

Explanation II. The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.

4. Laws made under articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.

(1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

245. Extent of laws made by Parliament and by the Legislatures of States.

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

246. Subject-matter of laws made by Parliament and by the Legislatures of States.

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the

matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List.

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List.

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the State List.

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

4. A reading of Clause (1) of Article 245 of the Constitution makes it clear that the powers of the Legislature of the State to make law for whole or part of the State is subject to the provisions of the Constitution. Clause (3) of Article 246 only enumerates the matters in List II in the Seventh Schedule of the Constitution in respect of which the Legislature of a State has power to make law but such power of the State Legislature is 'subject to the provisions of the Constitution'. Hence we have to look into other provisions of the Constitution to find out whether there are any limitation on the power of the State Legislature to make law with regard to entry 41 in List II of the Seventh Schedule of the Constitution, namely 'State Public Service'. Article 3 of the Constitution provides that Parliament may by law form a new State by separation of territories from any State and Article 4 of the Constitution further provides that any law referred to in Article 3 shall contain such supplemental, incidental and consequential provisions, as Parliament may deem necessary. Thus, the exclusive power of the State Legislature under Articles 245 and 246 of the Constitution to make law in respect of any matter enumerated in List II of the Seventh Schedule of the Constitution including a law on "State Public Services" in the State is subject to Articles 3 and 4 of the Constitution. In other words, law made by Parliament under Articles 3 and 4 of the Constitution forming a new State by separating any State and providing therein supplemental, incidental and consequential provisions will be within the competence of Parliament even if it encroaches upon a matter within the exclusive legislative competence of State Legislature under Articles 245 and 246 of the Constitution. There is thus no merit in the contention of Mr. Jayaraman that Sections 68, 69 and 70 of the 2000 Act which affect the State Public Services are beyond the legislative competence of the Parliament.

5. Mr. Jayaraman next submitted that under Article 310(1) of the Constitution, every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State and therefore by the 2000 Act, Parliament cannot make a provision by which a member of a civil service of a State or holding a civil post in the State ceases to hold office during the pleasure of the Governor of that State. He submitted that as a consequence of the provisions of Section 68 of the 2000 Act, the petitioner who was a member of a civil service in the State of Madhya Pradesh and was holding a civil post under the State of Madhya Pradesh ceases to hold office during the pleasure of Governor of Madhya Pradesh.

6. This contention of Mr. Jayaraman is also misconceived because Article 310(1) of the Constitution starts with the expression "except as expressly provided by the Constitution". As we have seen, under Article 4 of the Constitution Parliament has powers to make supplemental provisions while forming a new State comprising territories of an erstwhile State in exercise of its powers under Article 3 of the Constitution. In exercise of such powers conferred by the Constitution, Parliament has made the provisions in Section 68, 69 and 70 of the 2000 Act. The provisions in Section 68, 69 and 70 of the 2000 Act are also not *ultra vires* Article 310(1) of the Constitution.

7. Mr. Jayaraman next submitted that Section 69 of the 2000 Act makes it abundantly clear that nothing in Section 68 of the 2000 Act shall be deemed to affect on or after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to determination of conditions of service of the persons serving in connection with the affairs of the Union or State Legislature. He further submitted that Part XIV of the Constitution is titled "Services under the Union and the States" and contains *inter alia* Articles 309 which provides that conditions of service of persons serving in connection with the affairs of the State will be regulated by the State Legislature by law and until such law is made, the Governor of the State may make rules regarding the conditions of service of the persons. He submitted that in case the petitioner who was serving in connection with the affairs of the State of Madhya Pradesh is allotted the State of Chhattisgarh, his conditions of service and in particular his chances of promotion will be affected.

8. Section 69 of the 2000 Act which protects the conditions of service of all persons serving in connection with the affairs of Union or any State is part of the 2000 Act. The petitioner had filed W.P. No.998/2003 before this Court and by order dated 19.4.2004, a learned Single Judge of this Court has disposed of the writ petition with the direction that the authorities shall consider the case of the petitioner for promotion year-wise in accordance with rules, if permissible within a period of four months. Hence in case the petitioner is entitled for promotion in accordance with the rules, his case will have to be considered for such promotion

in accordance with the rules and in the event the petitioner is not granted promotion it is always open for him to move this Court separately challenging the denial of promotion.

9. We therefore do not find any merit in the contention of the petitioner that the provisions of Sections 68, 69 and 70 of the 2000 Act are *ultra vires* the Constitution. In case the petitioner has any grievance other than the grievance that Sections 68, 69 and 70 of the 2000 Act are *ultra vires* the Constitution, it is open for him to file a separate petition before this Court and if any such petition is filed the same shall be considered on its own merit.

10. Mr. Jayaraman also stated that the petitioner has not been paid salary for about six years after the allocation order was passed. It is open for the petitioner to file a separate petition raising the aforesaid grievance and, if such a petition is filed the same shall be considered on its own merit.

The writ petition is dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 436
WRIT PETITION
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh
11 November, 2008*

O.P. PANDEY ... Petitioner
Vs.
STATE OF M.P. & anr. ... Respondents

Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 29 - *Review - The word 'any order' in Rule 29 is not confined to an original order of disciplinary authority - But includes the order of appellate authority also - Circular dated 20.01.2000 stating that no review is permissible against appellate order - Circular quashed - Petition allowed.*

In the context of Rule 29 of the Rules, the word 'any' is wide enough to cover all and every order from which an appeal is allowed, but from which no appeal has been preferred or from which no appeal has been allowed and the word 'any order' in Rule 29 of the Rules is not confined to an original order by the disciplininary authority under the Rule. Against an order passed by the appellate authority admittedly no appeal is allowed under the Rules. Hence, a review is available against an order passed by the appellate authority. (Paras 9 & 10)

सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 29 – पुनर्विलोकन – नियम 29 में शब्द 'कोई आदेश' अनुशासनिक प्राधिकारी के मूल आदेश तक सीमित नही है – बल्कि अपीलीय प्राधिकारी के आदेश को भी सम्मिलित करता है –

*W.P. No.12356/2008 (Jabalpur)

परिपत्र तारीख 20.01.2000 उल्लेख करता है कि अपीलीय आदेश के विरुद्ध कोई पुनर्विलोकन अनुज्ञेय नही है – परिपत्र अभिखण्डित – याचिका मंजूर।

Case referred :

(1987) 2 SCC 707.

Manoj Sharma, for the petitioner.

V.K. Shukla, Dy.A.G., for the respondent Nos.1 & 2.

O R D E R

The Order of the Court was delivered by A. K. PATNAIK, C. J. :–The petitioner was initially appointed as Commercial Tax Officer in the Commercial Tax Department, Government of Madhya Pradesh in the year 1990. He was promoted as Assistant Commissioner in the year 2007. A disciplinary proceeding was initiated against him and a penalty of censure was imposed on him under Rule 16 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (for short "the Rules").

2. Against the order of censure passed by the Commissioner, Commercial Tax Department, the petitioner filed an appeal before the Principal Secretary, Commercial Tax Department. The Principal Secretary, Commercial Tax Department dismissed the appeal by order dated 27.1.2001. The petitioner then filed a review against the order of the appellate authority before the Governor on 29.6.2001. The review has not been disposed of as yet and is still pending. The petitioner has stated in the writ petition that his review petition has not been entertained because of a circular issued by the General Administrative Department of Government of Madhya Pradesh on 20.1.2000 that no review can be entertained against an order passed by the appellate authority. Aggrieved, he has filed this writ petition under Article 226 of the Constitution praying for inter alia quashing the circular dated 20.1.2000 issued by the General Administrative Department of Government of Madhya Pradesh and for direction to the respondents to decide the review petition of the petitioner.

3. On 23.10.2008, after hearing the learned counsel for the petitioner the court directed notice to be issued to the respondents and called upon Mr.V.K.Shukla, learned Deputy Advocate General appearing on behalf of the State to obtain instructions in the matter. Although Mr.Shukla prayed for some time to file a reply, we are of the considered opinion that the question raised in this petition being purely one of law involving interpretation of Rule 29 of the Rules which provides for review, a reply on facts is not necessary and the matter can be disposed of on an interpretation of Rule 29 of the Rules.

4. Rule 29 of the Rules is quoted herein below:

> "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 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."

5. It will be clear on a plain reading of Rule 29 of the Rules quoted above that (i) the Governor (ii) the head of a department (iii) the appellate authority (iv) any other authority specified in this behalf by the Governor by a general or special order, either on his or its own motion or otherwise call for the records of any inquiry and review any order made under the rules from which an appeal is allowed but from which no appeal has been preferred or from which no appeal is allowed. The word 'any' before the word inquiry and the word 'any' again before the word order would show that a review can be entertained against any order made under the rules.

6. The word 'any' arose for interpretation in *Shri Balaganesan Metals Vs. M.N.Shanmugham Chetty and others* (1987) 2 SCC 707 and the Supreme Court relying on Black's Law Dictionary observed :

> "The word "any" has the following meaning:
>
> some ; one of many ; an indefinite number. One indiscriminately of whatever kind or quantity.
>
> Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute.
>
> It is often synonymous with "either", "every" or "all". Its generality may be restricted by the context; (Black's Law Dictionary, 5th edn)."

7. Again in *Lucknow Development Authority Vs. M.K.Gupta* (1994) 1 SCC 243, the Supreme Court had the occasion to deal with the word 'any' and relying on Black's Law Dictionary held :

> "In Black's Law Dictionary it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute"."

8. The authorities on the interpretation of the word 'any' are thus clear that the word 'any' has diverse meanings and what meaning it will have in a particular statute will depend upon the context and the subject of the statute in which it is used. We will, therefore, have to understand the word 'any' used in Rule 29 of the Rules by looking at Rule 29 of the Rules.

9. As we have seen from the language of Rule 29 of the Rules quoted above, the four reviewing authorities can call for the records of any inquiry and review

any order made under the Rules from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed. As we have seen in the two Supreme Court decisions Black's Law Dictionary has been relied upon to say that the word 'any' may also indicate all or every order depending on the context in which it is used. In the context of Rule 29 of the Rules, we hold that the word 'any' is wide enough to cover all and every order from which an appeal is allowed but from which no appeal has been preferred or from which no appeal has been allowed and the word 'any order' in Rule 29 of the Rules is not confined to an original order by the disciplinary authority under the rules. Against an order passed by the appellate authority admittedly no appeal is allowed under the Rules. Hence, a review is available against an order passed by the appellate authority.

10. In the result, we quash the impugned circular dated 20.1.2000 in so far as it states that no review under Rule 29 of the Rules is permissible against an appellate order. The respondents will now entertain the review and place it before the reviewing authority, namely, the Governor, for a final decision. We hope and trust that the reviewing authority will decide the review as early as possible preferably by the end of December 2008.

Order accordingly.

I.L.R. [2009] M. P., 440
WRIT PETITION
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh
11 November, 2008*

SIDDHARTH SHRIVASTAVA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Rules, 1996, Rule 4 - *Medical Board - Medical Board constituted under Rule 4 with composition mentioned therein can issue a disability certificate - No Medical Board constituted so far - Sate Government directed to immediately constitute Medical Boards under Rule 4.*

(Paras 10 & 11)

क. निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) नियम, 1996, नियम 4 – चिकित्सा बोर्ड – नियम 4 के अन्तर्गत उसमें उल्लिखित संरचना के साथ गठित चिकित्सा बोर्ड निःशक्तता प्रमाण पत्र जारी कर सकता है – अब तक कोई चिकित्सा बोर्ड गठित नही – राज्य सरकार को निदेशित किया गया कि नियम 4 के अन्तर्गत तुरन्त चिकित्सा बोर्डों का गठन करे।

B. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Clauses (i), (o) & (t)

*W.P. No.6722/2008 (Jabalpur)

of Section 2 - *Disability - Petitioner selected for the post of Civil Judge Class II as Orthopaedically Handicapped candidate - State Government declined to appoint petitioner as he was not found to be suffering 40% disability - Held - Only Medical Board constituted under Rule 4 can issue disability certificate - Duly constituted Medical Board will examine candidates who have been placed in merit list for appointment - Petitioner can place all materials in support of his claim of 40% disability - Petition allowed.*

(Paras 11 & 12)

ख. निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 2 के खण्ड (आई), (ओ) व (टी) – निःशक्तता – याची का ऑर्थोपेडिकली हेंडीकेप्ड अभ्यर्थी के रूप में सिविल न्यायाधीश वर्ग–2 के पद के लिए चयन किया गया – राज्य सरकार ने याची को नियुक्त करने से इनकार किया क्योंकि वह 40 प्रतिशत निःशक्तता से पीड़ित नही पाया गया – अभिनिर्धारित – केवल नियम 4 के अन्तर्गत गठित चिकित्सा बोर्ड निःशक्तता प्रमाण पत्र जारी कर सकता है – सम्यक रूप से गठित चिकित्सा बोर्ड अभ्यर्थियों की परीक्षा करेगा जिन्हें नियुक्ति के लिए मेरिट लिस्ट में रखा गया है – याची 40 प्रतिशत निःशक्तता के अपने दावे के समर्थन में सभी सामग्री पेश कर सकता है – याचिका मंजूर।

V.S. Shroti, for the petitioner.
V.K. Shukla, Dy.A.G., for the respondents.
K.S. Wadhwa, for the M.P.P.S.C.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, C. J. :–These writ petitions are being disposed of by this common order because common questions of law arise for decision in all these writ petitions.

2. The relevant facts briefly are that the Madhya Pradesh Public Service Commission (for short 'the MPPSC') published an advertisement dated 4.3.2007 inviting applications for recruitment to 240 posts of Civil Judge Class-II. In the advertisement, it was indicated that 2% of the 240 posts advertised, which works out to 5 posts, are reserved for orthopaedically handicapped persons. In response to the advertisement, the petitioners who claim to be orthopaedically handicapped persons filed applications along with certificates showing the percentage of disability suffered by them. After the written test and interview, they were selected and placed in the merit list of orthopaedically handicapped candidates by the MPPSC. The MPPSC then sent merit list of orthopaedically handicapped candidates along with other merit lists to the State Government for appointment. When the recommendations of the MPPSC of the selected candidates were before the State Government, representations were received that some of the petitioners were not entitled to be appointed to the posts reserved for orthopaedically handicapped persons considering the percentage of disability suffered by them.

3. Out of the first five candidates in the merit list of orthopaedically handicapped candidates, Siddharth Shrivastava and Krishna Gopal Rathore were found by the State Government to be not suffering 40% disability whereas the remaining three candidates were found to be suffering from more than 40% disability.. As a consequence, the State Government declined to appoint Siddharth Shrivastava and Krishna Gopal Rathore to the post of Civil Judge Class-II reserved for orthopaedically handicapped persons and Siddharth Shrivastava and Krishna Gopal Rathore have filed W.P. No.6722/2008 and W.P. No.8751/2008(S), respectively challenging the aforesaid decision of the State Government. Abhilash Jain and Ku. Babita Hora have filed W.P. No.1777/2008 and W.P. No.9114/2008 respectively claiming that in the event Siddharth Shrivastava and Krishna Gopal Rathor are not appointed against two posts of Civil Judge Class-II reserved for orthopaedically handicapped persons, the State Government should appoint them in the two posts as they are orthopaedically handicapped persons with 40% disability. Ashish Persai has also filed W.P. No. 12405/2008 and his case is that on account of interim order passed by this Court restraining the State Government from making any appointment to the post reserved for physically handicapped persons, he has not been issued with appointment order although his position is 133 in the merit list. Mohd. Aslam Dehalvi has filed W.P. No.3 74/2008 claiming that considering the marks secured by him in the selection conducted by the MPPSC, he is entitled to be appointed on a post reserved for orthopaedically handicapped person. Dharam Pal Singh Punia has filed W.P. No. 10337/2008 making a similar claim that he is entitled to be appointed to one of the posts reserved for orthopaedically handicapped persons.

4. We have heard Mr. V.S. Shroti, learned senior counsel for the petitioner in W.P. No-6722/2008, Mr. Satish Bagadia, learned senior counsel for the petitioner in W.P. No. 1777/2008, Mr. R.K. Samaiya, learned counsel for the petitioners in W.P. No.9114/2008 and W.P. No.10337/2008(S), Mr. Aditya Sanghi, learned counsel for the petitioners in W.P. No.374/2008(S) and W.P. No. 12405/2008 and Mr. Dileep Pandey, learned counsel for the petitioner in W.P. No.8751/2008(S). We have also heard Mr. V.K. Shukla, learned Deputy Advocate General and Mr. K.S. Wadhwa, learned counsel appearing for the MPPSC.

5. We find that in the advertisement dated 4.3.2007 published by the MPPSC, the candidates applying to the posts of Civil Judge Class-II reserved for orthopaedically handicapped persons were required to submit certificate of the Chief Medical Officer/Civil Surgeon in support of their claims that they were orthopaedically handicapped persons and the MPPSC on being satisfied on the basis of such certificates issued in favour of the candidates has treated them as orthopaedically handicapped persons and placed them in the merit list of candidates for appointment to the posts reserved for orthopaedically handicapped persons. We further find that because of representations submitted to the State

Government by some of the candidates belonging to orthopaedically handicapped person category, the State government has cancelled the appointments of Siddharth Shrivastava and Krishna Gopal Rathore on the basis of materials that were available to the State Government. Thereafter, the State Government has got the candidates examined by a State Medical Board comprising experts and found that out of five candidates, Siddharth Shrivastava and Krishna Gopal Rathore did not have 40% disability and therefore they are not entitled to be appointed to the posts reserved for orthopaedically handicapped persons. The petitioners, on the other hand, have relied upon certificates that they furnished to the MPPSC to show that they suffered from 40% disability and have claimed that they are entitled to be appointed to the posts of Civil Judge Class-II reserved for orthopaedically handicapped persons. We are, however, of the considered opinion that neither the certificates furnished by the petitioners nor the opinions of the Medical Board relied upon by the State Government can be considered for appointing persons to posts reserved for orthopaedically handicapped candidates for the reasons which we will now give.

6. Under clause (1) of Article 16 of the Constitution, the right to equality of opportunity is guaranteed to all citizens in matters relating to employment or appointment to any office under the State. The State could however make a reservation of a percentage of posts for persons with disability in any establishment of a State. Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act') makes such reservation in favour of persons with disability, but to ensure that such provisions of reservation in favour of persons with disability are not abused and only persons with disability as defined in the Act are appointed to such posts reserved for persons with disability various provisions have been made in the Act. Persons who do not satisfy the requirements of the Act therefore cannot be treated as persons with disability and cannot be considered for appointment to post reserved for persons with disability.

7. Clauses (i), (o), (p), (s) and (t) of Section 2 and sub-section (1) of Section 73 of the Act which are relevant for deciding this batch of cases are quoted hereinbelow:

> "(i) Disability means.
> (i) Blindness;
> (ii) Low vision;
> (iii) Leprosy.cured;
> (iv) Hearing impairment;
> (v) Locomotor disability;
> (vi) Mental retardation;
> (vii) Mental illness;

(o) "Locomotor disability" means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy;

(p) "Medical authority" means any hospital or institution specified for the purposes of this Act by notification by the appropriate Government;

(s) "Notification" means a notification published in the Official Gazette;

(t) "Person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority;

73. Power of appropriate Government to make rules.

(1) The appropriate Government may, by notification, make rules for carrying out the provisions of this Act.

8. Thus, Clause (i) of Section 2 defines "disability" and locomotive disability has been included in such definition of disability. Clause (o) of Section 2 defines "locomotor disability" to mean disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy. Orthopaedically handicapped persons are thus persons with locomotor disability. Clause (t) of Section 2 of the Act defines "persons with disability" to mean a person suffering from not less than 40% of any disability as certified by a medical authority. Clause (p) of Section 2 of the Act defines "medical authority" to mean any hospital or institution specified for the purposes of the Act by notification by the appropriate Government. Clause (s) of Section 2 of the Act states that notification means a notification published in the Official Gazette. Sub-section (1) of Section 73 of the Act provides that the appropriate Government may, by notification, make rules for carrying out the provisions of the Act. For reservation of posts for persons with disability and appointment to such posts by the State Government, the State Government has to make the rules by notification and in such rules the State Government can specify the hospital or the institution as the medical authority which will certify persons suffering from not less than 40% of any disability. Such medical authority as indicated in (p) of Section 2 of the Act may be either a hospital or an institution.

9. In accordance with these provisions of the Act, the State Government has made the Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Rules, 1996 (for short **'the Rules'**). Rule 4 of the Rules which is relevant, is quoted hereinbelow:

"4. Authorities to give Disability Certificate

(1) Disability Certificate shall be issued by a Medical Board

duly constituted by the Central and the State Government.

(2) The State Government may constitute a Medical Board consisting of at least three members out of which at least one shall be a specialist in the particular field for assessing locomotors/ Visual including low vision/hearing and speech disability, mental retardation and leprosy cured, as the case may be."

It is clear from Rule 4 quoted above that a disability certificate has to be issued by different Medical Boards constituted by the State Government consisting of District Health Officer, two medical specialists nominated by the Civil Surgeon (with atleast one specialist from the field of concerned impairment) and the Medical Officer of the municipal authority. Thus Medical Board though not a hospital is an institution and is specified as medical authority for the purposes of the Act under the Rules duly notified by the State Government.

10. It is not disputed by the State Government that after enactment of the Act and after making of the Rules, Medical Boards with the composition as indicated in Rule 4 of the Rules have not been constituted by the State Government in any of the districts in the State of Madhya Pradesh. But as we have seen from Clauses (p) and (t) of Section 2 of the Act and Rule 4 of the Rules, it is only a Medical Board as constituted under Rule 4 with the composition stated therein which can issue a disability certificate to a person and it is only such persons suffering from not less than 40% disability as certified by Medical Board who can claim to be a person with disability entitled to be considered for appointment to a post reserved for persons with disability.

11. We are thus of the opinion that the State Government should immediately constitute Medical Boards under Rule 4 of the Rules and such Medical Boards will examine the candidates who have been placed in the merit list for appointment to the posts of Civil Judge Class-II reserved for orthopaedically handicapped persons. Candidates will be entitled to place all materials available with them before the Medical Board in support of their claim of 40% disability. In case any of the five selected candidates is examined and not certified by the Medical Board to be suffering from 40% of disability, a candidate whose merit positions is below the first five candidates will be accordingly examined by the Medical Board so constituted under rule 4 of the Rules and considered by the State Government for appointment to such post reserved for the orthopaedically handicapped person.

12. We accordingly dispose of this batch of writ petitions with a direction to the State Government to constitute Medical Boards in accordance with Rule 4 of the Rules within a period of one month of receipt of certified copy of this order and thereafter for the selected candidates and, if necessary, the wait listed candidates amongst the orthopaedically handicapped persons examined by the Medical Boards so constituted and after considering the reports of the Medical Boards take a final

decision on the recommendations made by the MPPSC within a period of two months from receipt of a certified copy of this order. It is needless to say that as and when any orthopaedically handicapped person is appointed pursuant to these directions, he will be given his seniority in accordance with his placement in the merit list dated 17.12.2007 issued by the MPPSC and in accordance with the relevant rules and he will not be denied his seniority on the ground that his appointment was delayed because of pendency of the case before this Court.

Petition disposed of.

I.L.R. [2009] M. P., 446
WRIT PETITION
Before Mr. Justice Ajit Singh
20 November, 2008*

DEVILAL TANWAR ... Petitioner
Vs.
REGISTRAR GENERAL and ors. ... Respondents

A. Service Law - Constitution, Article 309 - *Termination of temporary employee - Petitioner temporary appointed on the post of Process Writer - His services were terminated on the findings arrived at by Resp. No.3 holding him guilty of misappropriating process fee - Order challenged - Held - Findings arrived at by Resp. No.3 were definitive and punitive in nature not like preliminary report - No opportunity of hearing was given - Order of termination was passed in violation of principles of Natural Justice - Order of termination quashed - Petitioner reinstated without backwages - However, respondents may proceeds against petitioner afresh with departmental enquiry - Petition allowed.* (Para 8)

क. सेवा विधि – संविधान, अनुच्छेद 309 – अस्थायी कर्मचारी की सेवा समाप्ति – याची आदेशिका लेखक के पद पर अस्थायी नियुक्त – प्रत्यर्थी क्रंमाक 3 द्वारा आदेशिका फीस का दुर्विनियोग करने का दोषी पाते हुये दिये गये निष्कर्ष पर उसकी सेवायें समाप्त कीं – आदेश को चुनौती – अभिनिर्धारित – प्रत्यर्थी क्रंमाक 3 द्वारा दिये निष्कर्ष निश्चायक और दण्डात्मक प्रकृति के थे प्रारंभिक रिपोर्ट के सदृश नहीं – सुनवाई का कोई अवसर नही दिया गया – सेवा समाप्ति का आदेश नैसर्गिक न्याय के सिद्धान्तों के उल्लंघन में पारित किया – सेवा समाप्ति का आदेश अभिखंडित – याची को पूर्व के वेतन के बिना पुनर्स्थापित किया – तथापि प्रत्यर्थी याची के विरूद्ध नये सिरे से विभागीय जाँच कर सकते हैं – याचिका मंजूर।

B. Service Law - Constitution, Article 311 - *If, the order of termination is punitive and based on the finding of misconduct - Even a temporary government servant can not be terminated without complying with the provisions of Art. 311.* (Para 9)

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*W.P. No.2929/1998(S) (Jabalpur)

ख. सेवा विधि – संविधान, अनुच्छेद 311 – जब, सेवा समाप्ति का आदेश दण्डात्मक और कदाचार के निष्कर्ष पर आधारित हो – तब एक भी अस्थाई लोक सेवक की सेवायें अनुच्छेद 311 के उपबंधों का अनुपालन किये बिना समाप्त नहीं की जा सकती है।

C. **Service Law** - *Backwages when not entitled - There is no material on record to suggest that the petitioner is not gainfully employed - Therefore, not be entitle for any backwages.* (Para 10)

ग. सेवा विधि – कब पूर्व वेतन का हकदार नहीं – अभिलेख पर ऐसी कोई सामग्री नहीं है जो यह सुझाती हो कि याची किसी लाभप्रद नियोजन में नहीं रहा – इसलिये पूर्व का कोई वेतन पाने का हकदार नहीं।

Case referred :

AIR 1999 SC 609.

Shailendra Verma, for the petitioner.

P.R. Bhave with *Bhanu Yadav,* for the respondents.

ORDER

AJIT SINGH, J.:– By this petition, filed under Article 226 of the Constitution, the petitioner has prayed for quashing of the order of termination dated 8.11.1997, Annexure A10, passed by the District Judge Mandsaur (respondent no.2) whereby his services have been terminated with effect from 12.12.1997. The petitioner has also prayed for quashing of the order dated 31.3.1998, Annexure A12, passed by the Registrar General (respondent no.1) whereby his appeal has been dismissed.

2. Briefly stated the facts giving rise to this petition are that by order dated 6.6.1995 District Judge, Mandsaur (respondent no. 2) appointed the petitioner on the post of Process Writer and posted him in the Court of Civil Judge, Class II, Neemuch. Condition No. 7 of the appointment order of petitioner provided that his services could be terminated without any prior notice if he was found either undisciplined or negligent in work. During the relevant period, the petitioner was posted in the Court of Second Additional District Judge, Neemuch (respondent no. 3). On 3.9.1997 respondent no. 2 sent a letter, Annexure A2, to the petitioner asking him to offer his explanation on the following three allegations of misconduct: (a) that despite payment of Rs.79/- as process fee in Civil Suit No. 18A/90 to him on 31.7.1997 by Shri Bhatnagar, Advocate, he neither deposited that amount nor issued the process (b) that he did not issue the process in Civil Suit No. 38A/96 despite submission of papers by Shri Bhatnagar, Advocate, on 29.7.1997 for issuing process and (c) similarly he did not issue the process in Civil Suit No. 24B/93X7/95 despite submission of papers for the same on 25.4.1997. The petitioner, after receiving the letter, deposited Rs.79/- on 8.8.1997 in the Court and issued the process in Civil Suit No. 18A/90. On that day he also issued the process in Civil Suit No. 24B/93X7/95. Thereupon, the petitioner submitted his reply, Annexure A3, on the same day and gave an explanation that he could not deposit the amount earlier because of the extra workload of another Court on him. Respondent no. 3

by letter dated 9.9.1997, Annexure R1, informed respondent no. 2 that the petitioner was guilty of misappropriating a sum of Rs.79/- and recommended for his demotion. He also sought permission from respondent no. 2 to lodge a police report against the petitioner. In reply to this letter, respondent no. 2 by communication dated 17.9.1997, Annexure A9, authorized respondent no. 3 to take action against the petitioner in accordance with law. In the said communication respondent no. 2 also stated that he had separately ordered for a departmental enquiry against the petitioner. Respondent no. 3 then lodged a written report on 18.9.1997, Annexure A8, at Police Station, Neemuch, alleging that the petitioner had temporarily misappropriated a sum of Rs.79/- between 31.7.1997 and 8.9.1997 and this act of his was punishable under section 409 of the Indian Penal Code. In the report respondent no. 3 also stated that it was being lodged after prior approval from respondent no. 2.

3. On 4.10.1997 respondent no. 2 issued a charge sheet, Annexure A5, against the petitioner on the charge that he did not deposit Rs.79/- in Civil Suit No. 18A/90 despite having paid that amount by Shri Bhatnagar, Advocate, on 31.7.1997. In the charge sheet the names of respondent no. 3, clerk of Shri Bhatnagar, Advocate, and Reader were cited as witnesses and the list of documents, apart from other documents, referred to a letter dated 9.9.1997 of respondent no. 1, statement dated 9.9.1997 of the clerk of Shri Bhatnagar and also the first information report.

4. On 5.11.1997 the petitioner submitted an application, Annexure A6, and requested respondent no. 2 to supply him the copies of the statements of witnesses recording during the preliminary enquiry so that he may file a suitable reply. Respondent no. 2, instead, dropped the enquiry and passed the impugned order of termination dated 8.11.1997, Annexure A10, stating simply that the services of petitioner were no longer required with effect from 12.12.1997. The petitioner filed an appeal against the termination order but the same was dismissed by respondent no. 1 vide order dated 31.3.1998, Annexure A12.

5. The case of petitioner is that though the termination order appears to be innocuous, it is punitive in nature as it was based on an ex-parte report of enquiry by respondent no. 3. According to the petitioner, the allegation of temporary misappropriation of a sum of Rs.79/- was not merely the motive but the very foundation of the order of his termination. The petitioner, therefore, submitted that since he has been terminated without any opportunity of hearing, the termination order deserves to be quashed. The petitioner has also alleged malafides against respondent no. 3. The respondents, in their return, have stated that there was sufficient material to indicate the unsatisfactory work and conduct of the petitioner and hence it was decided to terminate his temporary service in terms of condition no. 7 of the order of appointment which permitted such termination. In the return the respondents apart from referring to letter dated 9.9.1997, Annexure R1, have also referred to letters Annexures R3, R4 and R5 written by different judicial

officers complaining against the unsatisfactory working of the petitioner. The petitioner in his rejoinder has filed the judgments of his acquittal as Annexures A13 and A14 which includes the case of misappropriation of Rs.79/-.

6. In view of the above pleadings and submissions made by the respective learned counsel for the parties, the main question which calls for consideration is whether the order of termination though innocuous is punitive in nature.

7. It is now well settled that in cases where the termination of the services of a temporary employee is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the employee and where on the basis of such a report, the termination order is issued, such an order will be violative of principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. See, *Radheyshayam Gupta Vs. U. P. State Agro Industries Corporation Limited* AIR 1999 SC 609.

8. In the case at hand, respondent no. 3 in his letter dated 9.9.1997 held the petitioner guilty of temporary misappropriating Rs.79/- and recommended for his demotion. On this finding, respondent no. 3 even sought permission from respondent no. 2 to lodge a police report against the petitioner which was duly accorded. Thereupon, respondent no. 3 lodged the first information report on 18.9.1997 against the petitioner wherein he again held the petitioner guilty for an offence under section 407 of the Indian Penal Code. Based on these findings of respondent no. 3 against the petitioner, respondent no. 2 decided to hold a departmental enquiry and even issued the charge sheet. In the charge sheet respondent no. 3 was cited as one of the witnesses and his letter and first information report against the petitioner were part of the charge sheet. Not only this, the statements of clerk of Shri Bhatnagar, Advocate, and Court Reader recorded by respondent no. 3 against the petitioner were also the part of the charge sheet. Respondent no. 2 dropped the proceedings of departmental enquiry when the petitioner asked for the copies of the statements recorded behind his back as well as the documents referred to in the charge sheet and passed the impugned order of termination. The findings arrived at against the petitioner by respondent no. 3 holding him guilty of misappropriating Rs.79/- are definitive in nature. They are not like preliminary report where some facts are gathered and a recommendation is made for a departmental enquiry. No opportunity of hearing was given to the petitioner by respondent no. 3 before giving findings against him. It is to be noted that respondent no. 3 vide Annexure R3 dated 15.10.1997 made a similar complaint against the petitioner in respect of another civil suit. All these facts lead to only one conclusion that the termination order was founded on the findings of respondent no. 3 against the petitioner and hence it is punitive in nature. Moreover, the order of termination

having been passed in violation of principles of natural justice, it is liable to be quashed. Letters of complaint, Annexures R4 and R5, were made by different judicial officers against the working of petitioner much after his termination and, therefore, they are of no consequence.

9. According to my finding reached above, the termination of the petitioner's service was punitive and also violated Article 311 of the Constitution. It is well settled that if the order of termination is punitive and based on the finding of misconduct, even a temporary Government servant cannot be terminated without complying with the provisions of Article 311 of the Constitution.

10. For these reasons the orders dated 8.11.1997, Annexure A10, and 31.3.1998, Annexure A12, passed by respondent nos. 2 and 1 respectively are quashed and they are directed to reinstate the petitioner. There is no material on record to suggest that the petitioner is not gainfully employed. He shall, therefore, not be entitled for any back wages. The petitioner will, however, be entitled for other consequential benefits such as continuity in service, etc. which are permissible under the rules. It is also made clear that this decision will not preclude the respondents from proceeding afresh with the departmental enquiry from the stage it was dropped but before proceeding with the same due regard will be paid to the acquittal of petitioner on the same charge by a Criminal Court vide Annexure A14.

11. The petition succeeds and is allowed but without any order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 450

WRIT PETITION

Before Mr. Justice Subhash Samvatsar & Mrs. Justice S.R. Waghmare

5 December, 2008*

PRATAP SINGH HARDIA (DR.) ... Petitioner

Vs.

SANJAY CHAWREKAR ... Respondent

A. Arbitration and Conciliation Act (26 of 1996), Sections 2(1)(e), 42, 34, Civil Courts Act, M.P., 1958, Sections 7, 8 & 15 - *In Madhya Pradesh, Additional District Judge is also Principal Civil Court of original jurisdiction - Hence, competent to hear application u/s 34 of the Arbitration and Conciliation Act.* (Para 17)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 2(1)(ई), 42, 34, सिविल न्यायालय अधिनियम, म.प्र., 1958, धाराएँ 7, 8 व 15 – मध्य प्रदेश में अपर जिला न्यायाधीश भी आरम्भिक अधिकारिता वाला प्रधान सिविल न्यायालय है – इसलिए माध्यस्थम् और सुलह अधिनियम की धारा 34 के अन्तर्गत आवेदन सुनने के लिए सक्षम है।

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*W.P. No.5787/2008 (Indore)

B. Arbitration and Conciliation Act (26 of 1996), Sections 2(1)(e) & 42 - *Intention of Legislature in enacting Sections 2(1)(e) and 42 of the Act is that once a Judge who is empowered to function as principal civil court of original jurisdiction - He should alone decide the matter and subsequent proceedings arising out of the said agreement and not that the District Judge alone is empowered to hear the case.* (Paras 17 & 18)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 2(1)(ई) व 42 – अधिनियम की धारा 2(1)(ई) व 42 को अधिनियमित करने में विधायिका का आशय यह है कि जब एक बार कोई न्यायाधीश, जो आरम्भिक अधिकारिता वाले प्रधान सिविल न्यायालय के रूप में कार्य करने के लिए सशक्त है – केवल उसे ही मामला और कथित अनुबंध से उत्पन्न पश्चात्वर्ती कार्यवाहियाँ विनिश्चित करना चाहिए, यह नही कि केवल जिला न्यायाधीश मामला सुनने के लिए सशक्त है।

Cases referred:

AIR 1998 All 313, AIR 2006 Chhattisgarh 12, (2003) 8 SCC 245.

Vijay Asudani, for the petitioner.

N.K. Dave, for the respondent No.1.

ORDER

The Order of the Court was delivered by SUBHASH SAMVATSAR, J. :–This writ petition is filed by the defendant under Article 227 of the Constitution of India, being aggrieved by the order dated 11th August, 2008 passed by Seventh Additional District Judge, Indore in Misc. Judicial Case No.13/03 whereby the learned Additional District Judge has dismissed the application filed by the present petitioner under Section 2(l)(e) of the Arbitration and Conciliation Act, 1996.

2. Brief facts of the case giving rise to this writ petition are that there was some agreement between the petitioner and the respondents, in execution of which certain dispute arose between the parties and the matter was referred to Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 (for brevity the "Arbitration Act"). The Arbitrator passed award on 11/4/2003.

3. Respondent No. 1 filed an application under section 34 of the Arbitration Act for setting aside the award dated 11/4/2003. The said application was registered as Arbitration Case No. 13/03 before the Seventh Additional District Judge, Indore.

4. During the pendency of these proceedings, an application under Section 2(l)(e) of the Arbitration Act was filed by the present petitioner stating that the Seventh Additional District Judge, Indore has no jurisdiction to entertain the said application. According to him, application under Section 34 of the Arbitration Act is maintainable only before the principal Civil Court of original jurisdiction. He invited attention of this Court to the definition of the "Court" as defined in Section 2(1)(e) of the Arbitration Act which reads as under:-

> "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or to any Court of Small Causes.

Learned counsel for the petitioner thus contends that as per the definition of the "Court" as per definition under section 2(1) (e) of the Arbitration Act, the "Court" means the principal Civil Court of original jurisdiction in the district and therefore, the Additional District Judge has no jurisdiction.

5. Learned counsel for the petitioner has referred to the provisions of Section 42 of the Arbitration Act which reads as under :-

> 42 **Jurisdiction.**- Notwithstanding anything contained elsewhere in this Part or any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Thus, as per the provisions of Section 42 of the Arbitration Act, if any application is filed under the Arbitration Act in a particular court, then that Court alone has jurisdiction to deal with the subsequent application and no other Court has jurisdiction to decide the same.

6. According to the learned counsel for the petitioner, principal Civil Court means the District Judge alone. To buttress his contention, he lay hands on a decision of Allahabad High Court in the case of *M/s I.T.I. Ltd. Allahabad vs. District Judge,Allahabad,* AIR 1998 ALLAHABAD 313 and the judgment of the Chhattisgarh High Court in the case of *Raipur Development Authority vs. M/s Sarin Construction Company, Raipur,* AIR 2006 Chhattisgarh J2.1n both these cases, the Allahabad High Court and the Chhattisgarh High Court respectively have taken a view that the District Judge has no jurisdiction to transfer application under Section 34 of the Arbitration Act to Additional District Judge and the Additional District Judge hearing the application under section 34 of the Arbitration Act has no jurisdiction to decide the same. As such, according to the learned counsel for the petitioner, the impugned order is without jurisdiction.

7. Learned counsel for the petitioner also contended that the objector i.e. respondent No. 1 Sanjay Chawrekar has already accepted the amount awarded, hence, he has no right to file objection under section 34 of the Arbitration Act. In support of this contention, he relied upon a decision of the Apex Court in the case of *Pooran Chand Nangia vs. National Fertilizers Ltd.,* (2003) 8 SCC 245.

8. So far as second contention of the learned counsel for the petitioner that once the amount awarded by the Arbitrator is accepted by a party, then it has no right to challenge the award by filing application under section 34 of the Arbitration Act is concerned, there is no dispute about this proposition advanced by the learned counsel for the petitioner. However, in the present case, the fact remains that the objector has denied to have received the amount awarded by the Collector in its application filed under section 34 of the Arbitration Act. Thus, the question whether or not the amount is received by the objector is to be determined after recording evidence and assessing the same.

9. Learned counsel for the petitioner tried to demonstrate that in the present case, the defendant in his cross-examination has admitted to have accepted the amount. Even if it is so, it is for the court below to decide the said question at the time of final disposal after assessing the evidence on record. At this stage, without appreciating the evidence, it is not possible for the court to come to a conclusion that any amount is received by the objector before filing of the application under section 34 of the Arbitration Act. The Said question has to be ultimately decided by the court below at the time of final judgment.

10. So far as first contention about the jurisdiction of the Additional District Judge is concerned, Allahabad High Court in the case of *I.T.I. Ltd* (supra) has held that the District Judge has no jurisdiction to transfer application under Section 34 of the Arbitration Act to Additional District Judge. For arriving at this conclusion, the Allahabad High Court in para 7 of its judgment has considered the language of Bengal,Agra and Assam Civil Courts Act, 1887 and held that the expression "in the discharge of those functions they shall exercise the same power as a District Judge" used in sub-section (2) of Section 8 of the Bengal, Agra and Assam Civil Courts Act, 1887 is not potent enough to confer in the Court of an Additional District Judge the status of "the principal Civil Court of original jurisdiction in a district".

11. Section 8 of the Bengal, Agra and Assam Civil Courts Act, 1887 is also taken note of in the aforesaid judgment by the Allahabad High Court and as per Section 8 of the Bengal,Agra and Assam Civil Courts Act, 1887, the District Judge can take aid of additional Judges for speedy disposal of the cases before him and the State Government, may having consultation with the High Court appoint such additional Judges as may be requisite. Sub-section (2) of Section 8 of the Bengal,Agra and Assam Civil Courts Act, 1887 provides that the Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them and in discharge of those functions, they shall exercise the same power as the District Judge. Considering this language, the Allahabad High Court has held that the expression " in the discharge of those functions they shall exercise the same power as a District Judge" used in sub-section (2) of Section 8 of the Bengal, Agra and and Assam Civil Courts Act,

1887 is not potent enough to confer in the Court of an Additional District Judge the status of 'the principal Civil Court of original jurisdiction in a district'.

12. This is not the situation in the State of Madhya Pradesh, In the State of Madhya Pradesh, M.P. Civil Courts Act, 1958 is applicable. Section 7 of the M.P. Civil Courts Act, 1958 (hereinafter, referred to as "Civil Courts Act") defines the words "Principal Civil Court of original jurisdiction. It means that the Court of the District Judge shall be the Principal Civil Court or original jurisdiction in the civil district. Sub-section (2) of section 7 of the Civil Courts Act further provides that an Additional District Judge shall discharge any of the functions of a District Judge including the functions of Principal Civil Court of original jurisdiction, which the District Judge may, by general or special order, assign to him and in the discharge of such functions he shall exercise the same powers as the District Judge. Thus, this sub-section clearly confers powers upon the Additional District Judge to discharge the functions of Principal Civil Court or original jurisdiction.

13. Section 8 of the Civil Courts Act deals with the appointment of additional judges. As per this section, the Additional District Judge shall exercise the jurisdiction of the court to which he is appointed and the powers of the Judge thereof, subject to any general or special orders of the authority by which he is appointed as to the Class or Value of the suit which he may try, hear or determine.

14. Section 15 of the Civil Courts Act empowers the District Judge to prepare memo to distribute his business.

15. In the case in hand, respondent No, 1 objector has filed his objection under Section 34 of the Arbitration Act showing the cause title as "Before the Learned District Judge, Indore". The Presentation Section of the District Court had fixed the case before the Additional District Judge as per the distribution memo prepared by the District Judge. Hence, the judgment of the Allahabad High Court relied upon by the learned counsel for the petitioner in the case of *I.T.I. Ltd. Allahabad* (supra) is quite distinguishable.

16. So far as another judgment relied upon by the learned counsel for the petitioner on this point in the case of *Raipur Development Authority* (supra) is concerned, it dealt with the provisions of the Civil Courts Act which are applicable in the present case. Having perused the said judgment, we are unable to agree with the reasonings given by the Chhattisgarh High Court. As per the requirement of the Arbitration Act, application has to be filed before the principal Civil Court of original jurisdiction.

17. A co-joint reading of Section 2 (1) (e) and Section 42 of the Arbitration Act makes it clear that the application is to be heard by the principal Civil Court of original jurisdiction and the Court which has entertained the first application shall decide the subsequent applications. As per Civil Courts Act prevailing in the State of Madhya Pradesh, Additional District Judge is a Court of principal Civil Court

of original jurisdiction by virtue of Sections 7 and 8 of the Civil Courts Act and as per Section 15 of the Civil Courts Act, the District Judge is empowered to prepare distribution memo. Thus, intention of the Legislature in enacting Sections 2 (1) (e) and 42 of the Arbitration Act is that once a Judge who is empowered to function as principal Civil Court of original jurisdiction, he should alone decide the matter and subsequent proceedings arising out of the said agreement and not that the District Judge alone is empowered to hear the case.

18. In the instant case, first application is filed by the petitioner by mentioning cause title "Before the Learned District Judge, Indore". But the same was fixed by the Presentation Section of the District Court before the Additional District Judge and the Additional District Judge dealt with the case. In the case in hand, there is nothing on record to show that any other court has heard any previous application or dealt with it. Thus under section 7 of the Civil Courts Act, the Additional District Judge is also a principal Civil Court of original jurisdiction. Hence, he had powers to hear the application in question and it cannot be said that he has no jurisdiction to proceed with the application in question.

19. Resultantly, finding no merit in the writ petition, we dismiss the same.

Petition dismissed.

I.L.R. [2009] M. P., 455
ELECTION PETITION
Before Mr. Justice R.C. Mishra
25 September, 2008*

SAHAB SINGH PATEL ... Petitioner
Vs.
SMT. SHASHI PRABHA ... Respondent

A. **Representation of the People Act (43 of 1951), Section 81(3) -** *Attested copies - Copy of election petition supplied to respondent neither attested nor verified as true copy by petitioner - Report of Registry as to checking of election petition raises presumption though rebuttable that the copy of petition filed by petitioner was a true copy - Copy supplied to respondent was photo copy of petition and cannot be considered as sufficient to mislead a reasonably prudent person in meeting the allegations made therein or prejudicing his defence - Objection not sustainable.* (Para 6)

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) – अनुप्रमाणित प्रतिलिपियाँ – प्रत्यर्थी को प्रदाय की गई निर्वाचन याचिका की प्रतिलिपि न तो अनुप्रमाणित और न ही याची द्वारा सत्य प्रतिलिपि के रूप में सत्यापित – निर्वाचन याचिका की जाँच के सम्बन्ध में रजिस्ट्री की रिपोर्ट से यह खण्डनीय उपधारणा की जाती है कि याची द्वारा पेश की गई याचिका की प्रतिलिपि सत्य प्रतिलिपि थी – प्रत्यर्थी को प्रदाय की गई प्रतिलिपि याचिका की फोटो प्रतिलिपि थी

*Election Petition No.2/2007 (Jabalpur)

और सामान्य प्रज्ञा वाले व्यक्ति को उसमें किये गये अभिकथनों का सामना करने से पथभ्रष्ट करने या उसकी प्रतिरक्षा को पूर्वाग्रह कारित करने के लिए पर्याप्त नही मानी जा सकती – आपत्ति कायम रखने योग्य नही।

B. Representation of the People Act (43 of 1951), Section 81(3) - ***Attested copies - Objection raised after period of 1 month and 8 days - Non-compliance of Section 81(3) does not assume any significance.*** (Para 6)

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) – अनुप्रमाणित प्रतिलिपियाँ – आपत्ति 1 वर्ष 8 माह की कालावधि के बाद उठायी गई – धारा 81(3) का अननुपालन कोई महत्व नही रखता।

C. Representation of the People Act (43 of 1951), Section 83(1) - ***Contents of petition - Affidavit - Where petitioner alleges corrupt practice, the petition shall be accompanied by an affidavit - It does not say that allegation of corrupt practice and particulars thereof should be given in affidavit - Affidavit cannot be termed to be defective.*** (Para 13)

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1) – याचिका की अन्तर्वस्तु – शपथ पत्र – जहाँ याची भ्रष्ट आचरण अभिकथित करता है, याचिका के साथ शपथ पत्र लगाना होगा – यह नही कहा जाता कि भ्रष्ट आचरण के अभिकथन और उसकी विशिष्टियाँ शपथ पत्र में दी जानी चाहिए – शपथ पत्र को दोषपूर्ण होना नहीं माना जा सकता।

D. Representation of the People Act (43 of 1951), Section 123 - ***Corrupt practice - Petitioner quoted certain instances of violation of Code of Conduct by various compaigners canvassing in favour of respondent - Deficiency of particulars as to consent of returned candidate or his election agent may be allowed to be amended or amplified.*** (Para 23)

घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 123 – भ्रष्ट आचरण – याची ने प्रत्यर्थी के पक्ष में चुनाव प्रचार कर रहे विभिन्न समर्थकों द्वारा आचार संहिता के उल्लंघन के कुछ उदाहरण उद्धृत किये – निर्वाचित उम्मीदवार या उसके निर्वाचन अभिकर्ता की संम्मति के सम्बन्ध में विशिष्टियों के अभाव को संशोधित या प्रवर्धित करने की अनुमति दी जा सकती है।

Cases referred :

(2005) 2 SCC 188, (1999) 4 SCC 274, (1977) 1 SCC 511, AIR 1986 SC 1253, (1996) 1 SCC 169, (1999) 1 SCC 666, (1999) 9 SCC 386, (2004) 2 SCC 217, AIR 1995 SC 2284, AIR 1991 SC 1557, (2005) 13 SCC 511, (2004) 11 SCC 196, AIR 2000 SC 16, (1969) 3 SCC 685, AIR 1969 SC 1201, AIR 1972 SC 1302.

Virendra Verma, for the petitioner.

Mrigendra Singh with *A. Patel,* for the respondent.

O R D E R

R.C. MISHRA, J. :–This order shall govern decision of preliminary issues.

2. In this petition, under Section 80 read with S.81 and S.100 of the Representation of the People Act, 1951 (for brevity 'the Act'), election of the

returned candidate viz. the respondent to the Udaipura Legislative Assembly Constituency has been challenged *inter alia* on the ground of corrupt practices. The corresponding notice was served on Durgesh, the son of the respondent, on 18.05.2007. Thereafter, on 13.08.2007 along with written statement, the respondent filed an application, under Order VII Rule 11 of the Code of Civil Procedure (hereinafter referred to as 'the Code') read with Section 86 of the Act, for rejection of the election petition due to non-compliance with various statutory requirements. However, taking into consideration the nature of objections and the legislative mandate contained in Section 86(7) of the Act to conclude election trial within a specified period, vide order-dated 10.01.2008, direction was given to treat the objections raised by the respondent in her written statement and re-projected in the application as preliminary issues. Accordingly, the following questions were framed. The corresponding answer is noted against each one of them :-

No.	Issue	Finding
(1)	Whether the election petition as framed and filed lacks in statement of material facts and particulars ?	the petition lacks in material facts as to the corruptpractice relating to excess expenditure but is maintainable in respect of the other corrupt practices as alleged:
(2)	Whether the petition alleges the respondent to have resorted to corrupt practices or to have been undertaken with her consent ?	No
(3)	Whether the petition as framed and filed is in compliance of Section 83 of the Representation of Peoples Act, 1951 (for short 'the Act') ?	the petitionis defective only as to the corrupt practice relating to excess expenditure
(4)	Whether the copy of the election petition supplied to the respondent, complies with the requirements of Section 81(3) of the Act ?	Yes
(5)	Whether there is contradiction in the verification clause and the affidavit vis-à-vis the allegations made relying upon the "information received" or "the petitioner's knowledge" fatally affecting the affidavit filed in support of the petition ?	No

(6)	Whether the petition deserves to be dismissed at the outset, without trial, for the aforesaid latent and patent defects, & non-fulfillment of mandatory requirements of law ?	No

REASONS FOR THE FINDINGS

ISSUE NO.4

3. According to the respondent, the copy of the petition, as supplied to her, is neither attested nor verified as true copy by the petitioner. For this, attention has been invited to the fact that amongst the copies of the petition and affidavits annexed thereto, the certification 'T.C.' is available only on the photocopy of the affidavit in Form 25, appended to the Conduct of the Election Rules, 1961 (for short 'the Rules'). However, the fact of the matter is that the petition was entertained only after perusing the report of the officer of the Registry to the effect that it was found free from any noticeable defect. The relevant Rule made by this Court, in exercise of the powers conferred by Article 225 of the Constitution of India, reads : -

> Every Election Petition shall be -
>
> (a) typewritten or printed fairly and legibly on white foolscap size paper of reasonable quality, one side of the paper only being used, leaving a quarter margin on the left and at least ½ inches open space on the top and bottom of each sheet;
>
> (b) written in the English language, numbering separately the paragraphs thereof;
>
> (c) couched in proper language, and in conformity with section 81, 82 and 83 of the Representation of the People Act, 1951".

4. Sub-section (3) of Section 81 of the Act mandates that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

5. The report of the Registry as to checking of the petition raises a presumption, though rebuttable, that the copy of the petition as filed by the petitioner was a true copy (*Chandrakant Uttam Chodankar vs. Dayanand Rayu Mandrakar* (2005) 2 SCC 188 referred to). In that case, the following observations made by the Constitution Bench in *T.M. Jacob vs. C. Poulose* (1999) 4 SCC 274 were quoted :-

> "(a) the expression 'copy' in Section 81(3) of the Act means a copy which is substantially the same as the original, variation if any from the original should not be vital in nature or should not be such that can possibly mislead a reasonable person in meeting the

allegation; (b) if the copy differs in material particulars from the original the same cannot be cured after the period of limitation."

In *T.M. Jacob's case* (supra), the law on the subject was explained in these terms:

> "It is only the violation of Section 81 of the Act, which can attract the application of the doctrine of substantial compliance as expounded in *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore* AIR 1964 SC 1545 and *Ch. Subbarao v. Member, Election Tribunal* (1964) 6 SCR 213. The defect of the type provided in Section 83 of the Act, on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. This clearly emerges from the scheme of Sections 83(1) and 86(5) of the Act.
>
> A certain amount of flexibility is envisaged. While an impermissible deviation from the original may entail the dismissal of an election petition under Section 86(1) of the Act, an insignificant variation in the true copy cannot be construed as a fatal defect. It is, however, neither desirable nor possible to catalogue the defects which may be classified as of a vital nature or those which are not so. It would depend upon the facts and circumstances of each case and no hard and fast formula can be prescribed. The tests suggested in *Murarka Radhey Shyam's case* are sound tests and are now well settled".

6. Applying these principles to the facts of the case on hand, it may be seen that what was supplied to the respondent was a photocopy of the petition that, from any angle, can not be considered as sufficient to mislead a reasonably prudent person in meeting the allegations made therein or prejudicing his defence. Further, as observed in *Chandrakant's case* (supra), the objection as to non-compliance with Section 81(3) of the Act also does not assume any significance in view of the fact that it was raised after a considerable period of 1 month and 8 days.

7. Thus, the objection as to non-compliance with Section 81(3) of the Act is not sustainable. Issue no. 4 is, therefore, answered in affirmative.

ISSUE Nos.1, 2, 3 and 5

8. According to the respondent, the election petition based on the ground mentioned in Section 100(1)(b) of the Act deserves to be rejected at the threshold as it lacks in material facts as well as particulars of the various corrupt practices allegedly committed by her or her election agent or by any other person with her consent or that of her election agent. Validity of the corresponding affidavit has also been questioned on the ground that it is not complete in all respects. Moreover, pleadings as to corrupt practice by expending in excess of the limit prescribed under Rule 90 of the Rules have also been characterized as vague.

9. In response, learned counsel for the petitioner has submitted that the objections have been raised within ulterior motive of causing an unnecessary delay in the trial of election petition. Highlighting the distinction between the material facts and material particulars, he has submitted that pleadings as to corrupt practices contained full and complete statement of material facts and the corresponding affidavit is also inconformity with Form 25 appended to the Rules.

10. In order to appreciate the merits of the rival contentions in a proper prospective, it is necessary to advert to the relevant provisions of law existing in the form of Section 83 of the Act. It reads :-

> 83. Contents of petition.
>
> (1) An election petition-
>
> (a) Shall contain a concise statement of the material facts on which the petitioner relies;
>
> (b) Shall set forth full particulars of any corrupt practice that the petitioner alleged including as full statement as possible of the names of the parties alleged to have commission such corrupt practice and the date and place of the commission of each such practice; and
>
> (c) Shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:
>
> [Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by all affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]
>
> (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same matter as the petition.

11. To substantiate the objections, learned counsel for the respondent has made extensive reference to the contents of the affidavit, filed in support of the alleged corrupt practices with reference to paras 11 to 22 of the petition. He is of the view that, in the affidavit, sources of information as to various corrupt practices ought to have been disclosed and in the petition, express consent of the respondent or her election agent to such practices must have been pleaded. It has also been pointed out that the charge as to corrupt practice is akin to a criminal charge for which a roving and fishing inquiry is not permissible. To buttress the contentions, reliance has been placed on the following precedents : -

(i) *Shri Udhav Singh vs. Madhav Rao Scindia* (1977) 1 SCC 511

(ii) *Azhar Hussain vs. Rajiv Gandhi* AIR 1986 SC 1253.

(iii) *Manohar Joshi vs. Nitin Bhaurao Patil* (1996) 1 SCC 169

(iv) *L.R. Shivaramagowda vs. T.M. Chandrashekar* (1999) 1 SCC 666,

(v) *Jeet Mohinder Singh vs. Harminder Singh Jassi* (1999) 9 SCC 386

(vi) *Mercykutty Amma vs. Kadavoor Sivadasan* (2004) 2 SCC 217

12. As explained by the Apex Court in *Jeet Mohinder's* case (above), an election petition alleging corrupt practice is required to be accompanied by an affidavit in Form 25 (supra) that contemplates particulars as to the corrupt practices mentioned in the election petition to be verified by the petitioner separately under two headings : (i) which of such statements including particulars are true to deponent's own knowledge, and (ii) which of the statements including the particulars are true to information of the deponent. In that case, reference was also made to the following observations made in *Gajanan Krishnaji Bapat vs. Dattaji Raghobaji Meghe* AIR 1995 SC 2284 -

> "the election petitioner is also obliged to disclose his source of information in respect of the commission of the corrupt practice so as to bind him to the charge levelled by him and to prevent any fishing or roving enquiry and also to prevent the returned candidate from being taken by surprise".

13. Coming to the affidavit in question, it may be observed that Para 1 relates to the statements and particulars made in petition's Paras 4, 5, 13 to 19, 23, 24 and 27 to 31 whereas Para 2 concerns petition's Paras 11, 12, 20 to 22, 25 and 26. Further, it has been stated clearly that these paragraphs of the affidavit are based on the petitioner's knowledge and information respectively. The proviso to Section 83(1) lays down that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. But, it does not say that the allegation of corrupt practice and particulars thereof should be given in the affidavit (*Prabhu Narayan vs. A. K. Srivastava* AIR 1975 SC 968 relied on). In that case, while considering the question as to applicability of Rule 9 of the Madhya Pradesh High Court Rules, the Supreme Court held :-

> "The provisions of Rule 9 of the Madhya Pradesh High Court Rules regarding the election petitions framed by the Madhya Pradesh High Court by reference to Rule 7 of the Madhya Pradesh High Court Rules found in Chapter III regarding affidavits cannot be made use of for this purpose. The former set of rules are made under Article 225 of the Constitution and cannot make any substantive law end the rules themselves on a perusal of them would show that they relate merely to procedural matters unlike rules made under Section 122 of the Code of Civil Procedure"

14. The affidavit, therefore, cannot be termed to be defective as the contents and verification are in consonance with the prescribed form. This apart, it is well settled that the defect in verification of an affidavit, being curable, does not merit dismissal of an election petition in limine (See : *K.A. Sapa vs. Singora and others* AIR 1991 SC 1557.)

15. While repelling the objections regarding maintainability of the petition, learned counsel for the petitioner has submitted that he had made disclosure of all the primary facts constituting the ingredients of each one of the corrupt practices and has raised triable issues that may affect the result of the election. To fortify the contention, he has referred to the following excerpts from the decision in *Shri Udhav Singh's case* (above) explaining distinction between the material facts and the material particulars :-

> "Like the Code of Civil Procedure, this section (S.83 of the Act) also envisages a distinction between "material facts" and "material particulars" Cl. (a) of sub-section (1) corresponds to Order 6, Rule 2, while Clause (b) is analogous to Order 6, Rules 4 and 6 of the Code. The distinction between "material facts" and "material particulars" is important because different consequences may flow from a deficiency of such facts or particulars in the pleading. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. If the petition is based solely on those allegations, which suffer from lack of material facts, the petition is liable to be summarily rejected for want of a cause of action. In the case of a petition suffering from a deficiency of material particulars, the court has a discretion to allow the petitioner to supply the required particulars even after the expiry of limitation."

16. According to learned counsel for the petitioner, upon a conspectus of almost all the decisions relied on by learned counsel for the respondent, the scope of enquiry at the stage of determining maintainability of an election petition has been defined by the Supreme Court in *Harkirat Singh v. Amarinder Singh* (2005) 13 SCC 511 in the following terms :-

> "Stepping into prohibited area of appreciating the evidence by entering into merits of the case is permissible only at the stage of trial of the election petition and not at the stage of consideration whether the election petition was maintainable."

17. In his opinion, even if it is assumed for the sake of argument that the pleading suffers from deficiency in material particulars of any corrupt practice, it may be made good by way of amendment. To strengthen the argument, primal reliance has been placed on the decision of the Supreme Court in *Sardar Harcharan*

Singh Brar vs. Sukh Darshan Singh (2004) 11 SCC 196, wherein the following passage from an earlier pronouncement in *Mahendra Pal vs. Ram Dass Malanger* AIR 2000 SC 16 was cited with approval :-

> "Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. In the case of a petition suffering from deficiency of material particulars the Court has the discretion to allow the petitioner to supply the required particulars even after the expiry of limitation. Thus, whereas it may be permissible for a party to furnish particulars even after the period of limitation for filing an election petition has expired, with permission of the Court, no material fact unless already pleaded, can be permitted to be introduced, after the expiry of the period of limitation.".

18. In reply, learned counsel for the respondent has submitted that election petition must not only set forth full particulars of any corrupt practice that the petitioner alleges, including as full statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice but must also contain specific averments as to consent of the returned candidate or his election agent to any corrupt practice in issue. According to him, failure to plead these particulars is a non-curable defect. In support of the contention, the undermentioned passage from *Manohar Joshi's case* (ibid) has been referred to : -

> "If the corrupt practice is committed in the interests of the returned candidate by any other person, even if he be an agent other than his election agent, without the consent of the returned candidate or his election agent, the law provides for the election to be declared void under Section 100(1)(d)(ii) provided it is also pleaded and proved that the result of the election of the returned candidate has been materially affected thereby. Provision is made in the R.P. Act as well as in the general law to punish the makers of incendiary speeches for the offences committed by them in the form of electoral offences e.g. under Section 125 of the R.P. Act and Sections 153A, 153B and 295-A of the Penal Code. Thus even if the acknowledged leaders of a party have committed any corrupt practice which results in benefit to the returned candidate then on proof of the benefit having materially affected the election result in favour of the candidate, his election would be set aside on the ground under Section 100(1)(d)(ii) of the R.P. Act. There is thus no occasion to read into the ground in Section 100(1)(b) or definition of "corrupt practice" the implied consent of the candidate

for any act done by a leader of that party to dispense with a clear pleading and proof of the candidate's or his election agent's consent as a constituent part of the corrupt practice for the ground under Section 100(1)(b).

19. Examining the pleadings of the petitioner in the light of these principles, one may roundly notice the following salient features :-

(i) Paras 1 to 10 of the petition contain the introductory facts.

(ii) Para 4 of the petition contains a reference to the corrupt practice of excess expenditure within the meaning of Section 123(6) of the Act but none of the subsequent Paras contains the material facts.

(iii) Paras 11 to 25 contain allegations as to other corrupt practices and violations of model code of conduct, details of which need not be re-produced here as the corresponding objections center around material particulars.

(iv) The pleadings regarding consent of the respondent or her agent to the alleged corrupt practices are conspicuously absent.

20. Section 123 of the Act enumerates various corrupt practices and electoral offences and the incurring or authorizing of expenditure in contravention of Section 77 would be deemed to be a corrupt practice within the contemplation of Sub-section (6) of S.123. Although, the petitioner has quoted certain instances of violation of Model Code of Conduct by the various campaigners canvassing in favour of the respondent by using a large number of vehicles but it is the contravention of sub-section (3) of Section 77 of the Act that may amount to the corrupt practice under Section 123(6) thereof (*Dalchand Jain vs. Narayan Shankar Trivedi* (1969) 3 SCC 685 referred to). Reaffirming this principle, the Apex Court in *L.R. Shivaramagowda's case* (supra), proceeded to observe that even an averment only to the effect that a true and correct account of expenditure was not furnished in the statement of account would not amount to pleading that excessive expenditure over and above the prescribed limit was incurred. It was further held that absence of material facts couldn't be cured at a later stage by amendment.

21. To sum up, even after making reference (in Para 4 of the petition) to the corresponding provision of Section 123(6) of the Act, the petitioner has not averred as to how the expenditure incurred by the respondent between the date of his nomination and the date of declaration of the result was in excess of the prescribed limit. As elucidated by the Supreme Court in *Samant N. Bala Krishna vs. George Fernandez* AIR 1969 SC 1201 :-

"Section 83 of the Act is mandatory and requires ;

First, a concise statement of material facts and then requires the fullest possible particulars.

Second, omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad.

Third, the function of particulars is to present in full a picture of the cause of action to make the opposite party understand the case he will have to meet.

Fourth, material facts and particulars are distinct matters. Material facts will mention statements of fact and particulars will set out the names of persons with the date, time and place.

Fifth, material facts will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action.

Sixth, in stating the material facts, it will not do merely to quote the words of the section because then the efficacy of the material facts will be lost. The fact which constitutes a corrupt practice, must be stated and the fact must be correlated to one of the heads of corrupt practice, and,

Seventh, an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the obtaining or procuring of assistance unless the exact type and form of assistance and the person from whom it is sought and the manner in which the assistance is to further the prospects of the election are alleged as statements of facts." (emphasis supplied).

22. As an obvious corollary, if the allegations made regarding a corrupt practice do not disclose the constituent parts thereof, the same would not be allowed to be proved and further these allegations cannot be amended after expiry of the period of limitation prescribed for filing an election petition (*Raj Narain vs. Indira Nehru Gandhi* AIR 1972 SC 1302 referred to). Accordingly, the issue nos.9(a) and (b) pertaining to expenditure in excess of that authorized cannot be tried in the election petition.

23. However, keeping in view the criteria for distinguishing material facts from material particulars, it can safely be concluded that the election petition contains material facts in respect of other corrupt practices alleged to have been committed by the respondent. It is true that the allegations suffer from lack of certain material particulars particularly as to the consent of the returned candidate or his election agent but, as explained in *Raj Narain's case* (supra), this Court may allow the deficient particulars to be amended or amplified.

24. In this view of the matter, the election petition can not be rejected in its entirety.

25. It certainly merits trial in respect of the alleged corrupt practices other than one relating to excess expenditure.

26. Consequently, the issue nos.2 and 5 are answered in the negative and the common answer to issue nos.1 and 3 is that the petition lacks in material facts only with regard to the corrupt practice relating to excess expenditure within the meaning of sub-section (6) of Section 123 of the Act.

ISSUE No.6

27. In the wake of the findings of other preliminary issues, the election petition does not deserve dismissal at the threshold. The issue is, therefore answered in the negative.

28. However, as pointed out already, the issue nos.9 (a) and (b) deserve to be deleted as redundant in absence of material facts justifying the allegations as to corrupt practice regarding excess expenditure.

Order accordingly.

I.L.R. [2009] M. P., 466
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
13 August, 2008*

RAKESH DHARAMDAS RAI ... Appellant
Vs.
SMT. LATA @ SHAKUNTALA RAI ... Respondent

Hindu Marriage Act (25 of 1955), Sections 13(1)(ia) & 13(1-A)(ii) - *Husband filed application for decree of divorce on the grounds of cruelty and of non-compliance of the decree for restitution of conjugal rights - Court awarded decree for judicial separation u/s 10 of the Act - Decree challenged by the husband before High Court - Held - When it was not a case of either of the parties before the trial court then in the absence of any positive prayer and pleadings in that regard the trial court did not have any occasion to deviate from the pleadings and the available evidence for passing the decree of judicial separation instead to pass the decree of divorce - Decree passed by the trial court is not sustainable and deserves to be set-aside.* (Para 17)

हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ **13(1)(ia)** व **13(1-A)(ii)** – पति ने विवाह विच्छेद की डिक्री के लिए आवेदन क्रूरता और दाम्पत्य अधिकारों के पुनर्स्थापन की डिक्री के अपालन के आधारों पर पेश किया – न्यायालय ने अधिनियम की धारा 10 के अन्तर्गत न्यायिक पृथक्करण की डिक्री प्रदान की – डिक्री को पति द्वारा उच्च न्यायालय के समक्ष चुनौती दी गई – अभिनिर्धारित – जब विचारण न्यायालय के समक्ष दोनों में से किसी पक्षकार का यह मामला नही था तब किसी सकारात्मक प्रार्थना और उस सम्बन्ध में अभिवचनों के अभाव में विचारण न्यायालय को

*F.A. No.325/2005 (Jabalpur)

विवाह विच्छेद की डिक्री पारित करने के स्थान पर न्यायिक पृथक्करण की डिक्री पारित करने के लिए अभिवचनों तथा उपलब्ध साक्ष्य से विचलित होने का कोई अवसर नही था – विचारण न्यायालय द्वारा पारित डिक्री स्थिर रखे जाने योग्य नहीं और अपास्त किये जाने योग्य है।

R.K. Samaiya, for the appellant.
J.S. Shah, for the respondent.

JUDGMENT

U.C. MAHESHWARI, J. :–This appeal is directed by the petitioner husband under Section 28 of the Hindu Marriage Act 1955, in short "The Act", being aggrieved by the judgment and decree dated 11.3.05 passed by the District Judge, Tikamgarh in Hindu Marriage Case No. 76-A/2003 whereby his petition filed against respondent- wife under Section 13 (1) (i a) and 13 (1 A) (ii) of the Act for decree of divorce on the grounds of cruelty and of non compliance the decree for restitution of conjugal rights has been allowed for judicial separation under Section 10 of the Act, contrary to the prayer made in the petition.

2. The facts giving rise to this appeal in short are that the appellant herein filed the aforesaid petition contending that on 18.6.1998 he got married with the respondent in accordance with rites and rituals of the Hindu Community. The then the appellant was educated unemployed person while the respondent being Shiksha Karmi in education department was earning Rs.3200/- per month. Initially she resided with the appellant in matrimonial home for 4-5 days and left the same without any sufficient cause for her parental home, Damoh. Thereafter she used to visit the matrimonial home only 5 to 6 days at the interval of 6-7 months and lastly she visited and left the matrimonial home alongwith her ornaments and articles on 30.5.2000 saying that she will come back very soon. But she did not turn up, on which he wrote her various letters calling her back and also visited her parental home to bring her back but she did not come. As per further averments while residing in the matrimonial home the respondent deprived the appellant from the enjoyment of marital life and during that period her behaviour was also cruel with the appellant and family members. Apart this she deprived the appellant to enjoy the marital relations. On the contrary she was used to reside freely with her maternal uncle in some relations. She also threatened the appellant to kill him and his family members or involving them by fabricating some false criminal cases. In addition, it is pleaded that earlier he filed a petition under Section 9 of the Act. The same was allowed and decree for restitution of conjugal rights was passed against the respondent on 12.7.2000 by II nd additional District Judge, Tikamgarh in Civil Original Suit NO. 45-A/2000. Inspite such decree the respondent did not turn to the matrimonial home to perform the marital duties, thereby she committed cruelty with the appellant. In such premises, the prayer for dissolution of the marriage is prayed.

3. In the written statements of the respondent by admitting the factum of

marriage, it is stated that subsequent to marriage she was ousted from the matrimonial home by the appellant saying that she should not come again. Thus, under compulsion she is residing with her parents but still she is ready and willing to go and reside with the appellant to perform the marital duties. While residing in the matrimonial home she was always subjected to harassment and cruelty with beatings by the appellant and his parents. In such premises, the prayer for dismissal of the petition is made.

4. In view of the pleadings of the parties as many as five issues were framed by the trial court on which the evidence was recorded. On appreciation of the same by refusing the prayer of divorce the petition of the appellant was decreed under Section 10 of the Act for judicial separation on which the appellant has come forward to this court with the prayer for setting aside the decree of judicial separation and to accept his petition for dissolution of the marriage by allowing the appeal.

5. Shri R.K. Samaiya, learned counsel for the appellant without assailing the findings of the impugned judgment holding that the behaviour of the respondent with the appellant was neither cruel nor she deprived him from the enjoyment of the marital relationship or she was used to reside freely with her some maternal Uncle in relation, argued this appeal only on the ground that after passing the decree for restitution of conjugal rights by the competent court, when the respondent did not turn to reside with the appellant for more than the prescribed period under Section 13 (1 A) of the Act, then the trial court was bound to pass the decree for dissolution of the marriage only on such sole ground. Although the issue no. 3 framed in this regard was concluded by the trial court in favour of the appellant inspite it the decree for dissolution of the marriage, has not been passed and contrary to the case of both the parties the decree of judicial separation was passed under wrong premises. According to his submission there was no occasion to pass such decree of judicial separation after giving the affirmative finding on issue no. 3 in favour of the appellant. In such premises, he prayed for passing the decree of divorce by setting aside the impugned decree of judicial separation by allowing this appeal.

6. On the other hand Shri J.A. Shah, learned counsel for the respondent while responding the aforesaid arguments said that the impugned judgment and decree is based on proper appreciation of the evidence and is also in conformity with law. It does not require any interference at this stage. He further said that even after obtaining the decree for restitution of the conjugal rights against the respondent the appellant did not make any efforts to bring her back with him in the matrimonial home, in such premises by giving the decree of divorce, the appellant could not be benefited by the trial court for his own wrong. He said that on the date fixed for reconciliation proceedings the appellant refused to keep the respondent with him. However, he fairly conceded that instead the repeated directions of the court the

respondent never appeared to assist the court for holding the reconciliation proceedings. With these submissions he prayed for dismissal of this appeal.

7. Having heard the learned counsel after examining the record and perusing the impugned judgment and decree, I am of the considered view that the trial court has committed grave error in passing the decree for judicial separation under Section 10 of the Act while in the available circumstances and in view of finding of issue no. 3 the trial court ought to have passed the decree of divorce under Section 13 (1 A) (ii) of the Act.

8. The Trial Court has framed the issue no. 3 in the following manner and concluded the same as mentioned in front of it :-

वाद प्रश्न कमाक 3	निष्कर्ष
क्या अनावेदिका दाम्पत्य संबंधो की पुर्नस्थापना की याचिका दिनॉक 12/7/2002 को स्वीकार किये जाने के बाद व आवेदक द्वारा प्रयास करने के बावजूद आवेदक के साथ नहीं रह रही है	हॉ

9. It is apparent on record that aforesaid finding of issue no. 3 given by the trial court has not been assailed on behalf of the respondent in any manner either by filing the cross objection, separate appeal or by any other proceedings. Even in the course of arguments on merits of this appeal the same has not been assailed by the respondent's counsel. On the contrary, the appellant's counsel placed his reliance on it. In such premises, I have not found any circumstance to discard or set aside such finding of the trial court as such the same has become final between the parties.

10. According to the record the appellant filed the petition under Section 13 of the Act for giving the decree of divorce against the respondent on the grounds of cruelty committed by her refusing to perform the intercourse with the appellant and by residing freely with her maternal uncle in relation and also of non compliance the aforesaid decree for restitution of conjugal rights, passed by the competent court on dated 12.7.2000. It is apparent from the pleadings of the parties that neither of the parties has prayed for judicial separation under Section 10 of the Act. Thus, the trial court was bound to decide the case only within the fore corners of case pleaded by the parties and the prayers made by him and not beyond that. In such premises the trial court did not have any occasion to pass the decree under Section 10 of the Act for judicial separation. In such premises, the impugned decree for judicial separation is not sustainable and same is hereby set aside.

11. As per findings of the trial court all other issues except the aforesaid issue no. 3 have been decided against the appellant and findings of such other issues have not been challenged by the appellant's counsel in his arguments. He preferred the appeal only to pass the decree of divorce under Section 13 (1 A) (ii) of the Act, in view of unchallenged finding of aforesaid issue no. 3 holding that parties are residing separately for more than one year even after passing the decree for restitution of conjugal rights.

12. In view of the aforesaid before giving any finding, I deem fit to examine the case in view of the provision of Section 13 (1 A) (ii) of the Act. The same is read as under:-

13. Divorce"

(1).....

[(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground:-

(i).....

(ii) That there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of cnjugal rights in a proceeding to which they were parties."

(2).....

13. In view of the aforesaid provision on examining the case at hand, it is apparent that at the instance of the appellant the decree for restitution of conjugal rights was passed on dated 12.7.02. Subsequent to such decree no resumption of cohabitation took place between the parties and the instant petition under Section 13 of the Act was preferred on 24.11.03, i.e. undisputed after more than one year from the date of passing the aforesaid decree for restitution of conjugal rights. In such premises, in view of the aforesaid provision irrespective of the circumstance that no execution of such decree was filed by the appellant,in the absence of any evidence showing that respondent made any effort to comply such decree there was no option with the trial court except to pass the decree of divorce. In such premises, the impugned decree is not sustainable.

14. It appears from the impugned judgment that the trial court has while deciding the case have taken into consideration the following case laws:-

1.AIR 1995 Orissa 180 – *Balbhadra Pradhan Vs. Sundari Mani Devi,*

2.AIR 1988 Kerala 235 *Radha Kumari Vs. Dr. K.M.K. Nayar,*

3.AIR 1980 *Panjab & Hariyana, page 325 – Smt. Santosh Singh Vs. Mohan Lal.*

4.AIR 1972 *Punjab & Hariyana 29 Smt. Shakuntala Tandon Vs. Sardarilal Tandon,*

5.AIR 1962 *Punjab 156, Mrs. Kailash Kumar Vs. Kartarchand Diwakar,*

15. In view of the law laid down in the aforesaid cases the trial court ought to

have passed the decree of divorce. But by deviating such principles the trial court has committed grave error and perversity in passing the decree for judicial separation.

16. In the absence of any cross objection or separate proceedings on behalf of the respondent against the finding of the trial court on issue no. 3 based on appreciation of the evidence and document do not require any interference at this stage. Hence this judgment is being passed without discussing the evidence in elaborate manner only taking into consideration the aforesaid existing provision of Section 13 of the Act and the unrebutted finding of the trial court.

17. Apart the above, I have also gone through the pleadings of the parties, I have not found any facts in them showing that the case of the judicial separation was pleaded by either of the parties. When it was not a case of either of the parties before the trial court then in the absence of any positive prayer and pleadings in that regard the trial court did not have any occasion to deviate from the pleadings and the available evidence for passing the decree of judicial separation instead to pass the decree of divorce. It is apparent that the learned trial court even after mentioning the aforesaid settled legal position for one reason or another, best known to such court contrary to such legal position has passed the impugned decree for judicial separation. The same is not sustainable and deserves to be set aside.

18. Under the aforesaid premises, this appeal is allowed and by setting aside the impugned judgment and decree the petition of the appellant is allowed for dissolution of the marriage under Section 13 (1 A) (ii) of the Act and in such premises the decree of divorce is ordered between the parties. Till this extend the finding of the trial court is modified while the findings given by the trial court on other issues are hereby affirmed as the same are not challenged on behalf of the appellant. Accordingly this appeal is allowed. In the facts and circumstances of the case there shall be no order as to the costs. The decree be drawn up accordingly.

Appeal allowed.

I.L.R. [2009] M. P., 471
APPELLATE CIVIL
Before Mr. Justice K.K. Lahoti
4 September, 2008*

SHANTI (SMT.) & anr. ... Appellants
Vs.
LAKSHMAN & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 1 Rule 10, Order 41 Rule 20 - *Impleadment of necessary party* - *Two plaintiffs and one defendant, who were parties before the first appellate court, have not been impleaded*

*S.A. No.129/1993 (Jabalpur)

as party in second appeal - Order 1 Rule 10 cannot be made applicable and only recourse to Order 41 Rule 20 could be taken by appellant. (Para 6)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10, आदेश 41 नियम 20 – आवश्यकें पक्षकार को पक्षकार बनाना – दो वादियों और एक प्रतिवादी को, जो प्रथम अपीलीय न्यायालय के समक्ष पक्षकार थे, द्वितीय अपील में पक्षकार नही बनाया गया – आदेश 1 नियम 10 के उपबंध लागू नही किये जा सकते और अपीलार्थी द्वारा केवल आदेश 41 नियम 20 का आश्रय लिया जा सकता है।

B. Civil Procedure Code (5 of 1908), Order 1 Rule 10, Order 41 Rule 20 - *Application under Order 1 Rule 10 CPC filed in second appeal after a period of 15 years from the date of filing of the appeal - No application u/s 5 of Limitation Act has been filed alongwith the application for condonation of delay -Application rejected as not maintainable.* (Para 6)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10, आदेश 41 नियम 20 – आवेदन अन्तर्गत आदेश 1 नियम 10 सीपीसी द्वितीय अपील में अपील पेश करने की तारीख से 15 वर्ष बाद पेश किया गया – आवेदन के साथ विलम्ब क्षमा करने के लिए परिसीमा अधिनियम की धारा 5 के अन्तर्गत कोई आवेदन पेश नही किया – आवेदन पोषणीय न होने से खारिज किया गया।

C. Civil Procedure Code (5 of 1908), Order 1 Rule 10, Order 41 Rule 20 - ***Impleadment of necessary party*** - *Two plaintiffs and one defendant, who were parties before the first appellate court have not been impleaded as party in second appeal - Such parties who were contesting the matter before the trial court and first appellate court were necessary parties in second appeal - Because of non-impleading of these necessary parties second appeal cannot proceed - Appeal dismissed without deciding the substantial questions of law.* (Para 11)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10, आदेश 41 नियम 20 – आवश्यक पक्षकार को पक्षकार बनाना – दो वादियों और एक प्रतिवादी को, जो प्रथम अपीलीय न्यायालय के समक्ष पक्षकार थे, द्वितीय अपील में पक्षकार नही बनाया गया – ऐसे पक्षकार जिन्होंने विचारण न्यायालय और प्रथम अपीलीय न्यायालय के समक्ष मामला लड़ा, द्वितीय अपील में आवश्यक पक्षकार थे – इन आवश्यक पक्षकारों को पक्षकार न बनाने के कारण द्वितीय अपील में कार्यवाही नही की जा सकती – अपील विधि के सारवान प्रश्नों को विनिश्चित किये बिना खारिज की गई।

Cases referred :

(1997) 10 SCC 307 (distinguished), (2008) 3 SCC 233; (1971) 3 SCC 889.

S.K. Dwivedi, for the appellants.

Vikram Johri, for the respondents.

J U D G M E N T

K.K. Lahoti, J. :–This is plaintiffs' appeal who succeeded in Civil Suit no.18-A/89 before the Civil Judge Class-II, Ajaygarh on 22.7.1992 but lost in

Civil Appeal no.48-A/1992 on 3.2.1993 by Additional Judge to the Court of District Judge, Panna.

2. This appeal was filed on 17.3.1993 and admitted for final hearing on 30.9.1993, on the following substantial questions of law:

(i) "Whether in view of the judgment and decree passed in Civil Suit No.56-A of 1972 decided on 9.4.1975, the finding that Shanti Bai is not daughter of Maniram is perverse?

(ii) Whether judgment and findings arrived between the predecessor-in-title of the respondent and appellant no.1 in Civil Suit No.56-A/72 (Ex.P/1) will operate as res judicata?"

3. The appellants have filed an application under Order 1 rule 10 C.P.C. (I.A.No.182/2008) on 3.1.2008 praying for impleadment of Smt. Bitti, Mulli and Sunti as respondents in the present appeal. This application was filed on the ground that present appeal was preferred by plaintiffs Smt. Shanti and Kewaldeen, but other co-plaintiffs Smt. Bitti and Smt. Mulli, and defendant Sunti had not chosen to prefer an appeal, so they are required to be impleaded as respondents. Similarly, the State of M.P. was required to be impleaded as respondent, but due to bona fide mistake, it could not be impleaded as respondent. On these grounds, it was prayed that these four be permitted to be impleaded as respondents. In the application, it is stated that their non impleadment was due to bona fide mistake and there was no mala fide on the part of appellants for not impleading them. On 23.10.2007, at the time of hearing, this fact was pointed out and immediately thereafter this application was filed. It was prayed that aforesaid three ladies and State of M.P. be permitted to be impleaded as respondents 8 to 11 in the appeal, in the interest of justice.

4. The aforesaid prayer was opposed vehemently by the learned counsel for the respondents, who submitted that Mst. Bitti and Smt. Mulli, both were plaintiffs before the trial Court, as plaintiffs 3 and 4. Mst. Sunti was defendant no.1 against whom the appellants had prayed a decree. The trial Court had granted decree in favour of plaintiff Mulli and Bitti and against defendant Sunti. Apart from this, State was also a party before the Trial Court. Against the judgment and decree passed by the trial Court, all the respondents filed a Civil appeal No.48-A/1992 in which Mst. Bitti and Mulli and other plaintiffs were respondents. Mst. Sunti was respondent no.5,the State was respondent no.6 before the lower appellate Court.In the appeal, the judgment and decree of the trial Court was set aside. Against it, the appellants/plaintiffs have preferred this appeal. The judgment and decree of the trial Court was in favour of Bitti and Mulli and against Mst. Sunti. In the present appeal, there is non joinder of necessary parties and on this ground, this appeal may be dismissed. So far the State is concerned, it was a proforma/ respondent and though no relief was prayed by any party before the Court below

but it was the proper party which ought to have been impleaded in this appeal. He placed reliance to the Apex Court judgment in *Ram Krishna Ghosh and others Vs. Roop Chand Molla and others* :[(1997)10 SCC 307] and submitted that on this ground, not only the application, the appeal itself may be dismissed.

5. Shri Dwivedi, learned counsel for the appellant, in reply to the aforesaid contention submitted that the plaintiffs pleaded genealogical tree in para 1 of the plaint in which it was stated that Mst. Bitti and Mulli were the daughters of late Chhakodi and their brother is Kewal Deen, who is appellant no.2. Mst. Sunti is a daughter of Puniya. Though in the plaint, she was pleaded as daughter of Mani, but in fact Mst. Puniya was second wife of Mani and mother of Sunti. Mst. Shanti was daughter of Laltiya, second wife of Mani. Kewal Deen, who was representing the branch of Chhate was duly representing the estate of Bitti and Mulli and even if these persons were not impleaded as party in this appeal, there was no non joinder of necessary party. Similarly, Smt. Shanti is representing estate of Sunti , as both are from the branch of Mani. So there was proper representation of estate and in fact there is no non joinder of necessary party even in respect of Sunti also. He has placed reliance to a judgment of Supreme Court in case of *Mohammad Hussain and Others Vs. Gopi bai and others* 2008(3) SCC 233 and submitted that the application filed by the appellants under Order 1 rule 10 may be allowed.

6. So far as application under Order 1 rule 10 C.P.C. is concerned, it was filed on 3.1.2008 nearabout, after a period of 15 years from the date of filing of the appeal . No application under Section 5 of the Limitation Act has been filed along with the application for condonation of delay in filing this application before this Court. A prayer is made for impleading the aforesaid four parties as respondents. In these circumstances, when the aforesaid all the persons were party before the Court below, in the opinion of this Court, provision of Order 1 rule 10 C.P.C.cannot be made applicable and only recourse to Order 41 Rule 20 could be taken by the appellant.

7. Now the contention of the appellants may be seen whether the estate of Bitti and Mulli were duly represented by Kewal Deen and Mst. Sunti was representing the estate of Mulli and Sunti. The aforesaid principle of representing the estate is not applicable where it is a case of non-joinder of necessary party.

8. Another factual position in the present case is that Mst. Bitti and Mulli were co-plaintiffs and sought a specific decree against all the defendants including Mst. Sunti. They claimed 1/3rd share along with Kewal Deen in the disputed properties and also prayed for partition of the lands. The trial Court in the judgment and decree declared plaintiff no.1 Mst. Shanti as owner of 1/3 share in the disputed property and further declared 1/3 share in the disputed properties of plaintiff no.2, Kewal Deen, plaintiff no.3 Bitti and plaintiff Mulli jointly. So far as defendant

no.1 Smt. Sunti is concerned, the trial Court granted decree against her of declaration and joint possession. Against the aforesaid judgment and decree though respondents 1 and 2 alone preferred an appeal and Mst. Sunti had not preferred an appeal or joined the respondents before the lower appellate Court, but Mst. Sunti was made a party as respondent no.5 before the lower appellate Court. Under Order 41 rule 4 C.P.C. one of several defendants was entitled to obtain reversal of whole decree where it was proceeded on ground common to all. The appellate Court allowed the appeal and the entire suit of plaintiff was dismissed. Against which this appeal has been preferred. The effect of the judgment and decree passed by the Courts below are that the trial Court granted decree in favour of Mst. Bitti and Mulli and also granted decree against Mst. Sunti, the appellate Court while reversing the decree of the trial Court set aside the decree in favour of Mst. Bitti and Mulli and also set aside the decree which was against Mst. Sunti, meaning thereby the decree in favour of the plaintiffs by the trial Court was set aside in appeal and the suit of appellants and other co plaintiffs was dismissed. The suit was also dismissed of Mst. Bitti and Mulli and the decree against Mst. Sunit was set aside in the appeal.

9. In the light of the aforesaid facts, the judgment relied upon by the appellants may be looked into. In *Moh. Hussain's* (supra), the Apex Court was considering the question of necessary parties in a suit for declaration of mortgage. In the aforesaid case, the question was that the LRs of mortgagee were not impleaded in the suit and in that circumstances, the Apex Court held that other heir of plaintiffs were representing the estate of non impleaded parties. In the case of mortgage, the aforesaid principle was applied, which is not applicable in the present case. So law laid down by the Apex Court in *Moh. Hussain* is not applicable in the facts of the present case.

10. The Apex Court in *Ram Krishna Ghosh* (Supra) considering the similar question held thus;

> "1. In the original suit Tarak Muchi (Ruidas) and Patasi Dasi were the only two arrayed defendants. Likewise, plaintiffs were two in number, being Subimal Krishna Ghosh and Bijoy Krishna Ghosh. The suit of the plaintiffs was decreed by the trial Court which decree was confirmed by the lower appellate Court. The High Court in second appeal reversed the same. The instant appeal is by the plaintiffs. Surprisingly, in the SLP the two defendants aforesaid have not, by neglect or design, been impleaded as parties. On the contrary, the persons impleaded have pointed out the defect and have moved Civil Miscellaneous Petition No.3151 of 1983 for addition of respondents and for revocation of leave.
>
> 2. On hearing learned counsel for the parties and having gone.

through the records, we find that a grave error has been committed by the appellants in not impleading the original defendants as parties herein who had contested the suit. In the absence of those contesting parties before us, the appeal cannot proceed. We, therefore, not only dismiss Civil Miscellaneous Petition No.3151 of 1983 but also the appeal as well, as no relief can be granted to the appellants in the absence of necessary parties."

11. The factual position in the present case is similar. Two of the plaintiffs and one defendant, who were parties before the appellate Court, have not been impleaded as appellant or respondent. In the opinion of this Court, those were necessary parties and not proper party. Mst. Bittri, Mulli and Sunti who were contesting the matter before the trial Court and before the Appellate Court were necessary parties in this appeal. Because of non impleading of these necessary parties, this appeal cannot proceed.See *Surat Singh vs. Manohar Lal* [(1971)3 SCC 889). So far as the application under Order 1 rule 10 is concerned, it has been found belated and misconceived. Accordingly it is rejected, and in absence of aforesaid contesting parties in this appeal, this appeal cannot proceed and is accordingly dismissed with costs. As this appeal has been dismissed on the aforesaid question of non joinder of necessary parties, it is not necessary for this Court to decide the substantial questions of law as framed by this Court. No order as to costs.

Certified copy as per Rules.

Appeal dismissed.

I.L.R. [2009] M. P., 476
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
16 September, 2008*

GURBEJ SINGH KHANUJA (DR.) ... Appellant
Vs.
UNION OF INDIA & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 21 Rule 54, 66 & 89 - *House valued more than 10 lac rupees auctioned by court in execution of ex parte decree valued Rs.75,305 - Application for setting-aside the sale on the ground of non-compliance of provisions of law - Executing court dismissed the application as barred by time - Held - Applicant was never served either in suit or in execution proceedings - In execution of ex parte decree Court ought to have extra cautions - Mandatory provisions of law were not complied - Sale set-aside on following certain terms and conditions - Appeal disposed of accordingly.*

*M.A. No.1073/2007 (Indore)

द्वारा 75,305 रुपये मूल्य की एकपक्षीय डिक्री के निष्पादन में 10 लाख रुपये से अधिक मूल्य का मकान नीलाम किया गया – विधि के प्रावधानों के अननुपालन के आधार पर विक्रय को अपास्त करने के लिए आवेदन – निष्पादन न्यायालय ने आवेदन समय वर्जित होने से खारिज किया – अभिनिर्धारित – आवेदक पर वाद या निष्पादन कार्यवाही की कभी भी तामीली नही हुई थी – एकपक्षीय डिक्री के निष्पादन में न्यायालय को अतिरिक्त सावधानियाँ बरतनी चाहिए थीं – विधि के आज्ञापक उपबंधों का अनुपालन नही किया गया – कुछ निबंधनों और शर्तों के पालन पर विक्रय अपास्त किया गया – अपील तदनुसार निपटाई गई।

Vijay Assudani, for the appellant.
Yogesh Mittal, for the respondent Nos.1 & 2.
Manohar Dalal, for the respondent No.3.

ORDER

N.K. Modv, J. :–Being aggrieved by the order dated 22/03/07 passed by XIIth Additional District Judge, Indore in Execution Case No.20-B/96, whereby the applications filed by the appellant U/o XXI Rule 89 CPC on 28/11/06 and U/o XXI Rule 26 CPC on 16/01/07 were dismissed, the present appeal has been filed.

2. Facts in brief giving rise in the present appeal are that the respondent Nos. 1 & 2 filed a suit for realisation of a sum of Rs.75,308/- on 27/03/96 alleging that respondent Nos. 1 & 2 provided telephone connection to the appellant of which telephone number was 460443. It was alleged that appellant was supposed to make the payment after every two months, but the appellant failed to make the payment of bills dated 01/05/94 and 1/11/94 amounting to Rs.66,644/-. It was further alleged that a demand notice was given to the appellant on 24/02/95, but inspite of that the amount was not paid. Again notice was issued to the appellant on 16/03/96 but of no avail. In the suit it was prayed that a decree of a sum of Rs.75,305/- be passed against the appellant along with interest.

3. The suit was filed U/o 37 CPC and an ex-parte decree was passed against the appellant on 27/08/98, whereby the appellant was directed to pay a sum of Rs.75,305/- along with interest @ 12% p.a. on Rs.66,644/-. Since the amount was not repaid, therefore, execution petition was filed on 22/01/01 for realisation of a sum of Rs.1,02,264/-. Vide order dated 06/08/01 notice of execution application was issued to the appellant, which was returned unserved with a note that appellant has left Indore and has sold the house. On 12/11/02 an application was filed by respondent Nos. 1 & 2 for issuance of recovery warrant, which was ordered to be issued by the learned Executing Court. However, notice was never issued as no process was paid by respondent Nos. 1 & 2. Thereafter on 03/09/04 an application was filed by respondent Nos. 1 & 2 U/o XXI Rule 54 CPC for attachment of house of the appellant situated at 145 Vidya Nagar, Indore, which was allowed by the learned Executing Court and the property of the appellant was attached. Thereafter on 13/12/04 respondent Nos. 1 & 2 filed another

application for auctioning the attached property and the learned Executing Court directed for issuance of notice of the application. Vide order dated 04/04/05 learned Executing Court directed for issuance of notice by publication in the daily news paper. After publication the learned Executing Court proceeded ex-parte against the appellant and the suit property was sold to respondent No.3 for a sum of Rs.11,00,000/-. After depositing of the sale amount, sell certificate was also issued in favour of respondent No.3 on 24/01/06. Thereafter on 28/11/06 appellant filed an application U/o XXI Rule 89 CPC for setting aside the sale alleging that the appellant was having no knowledge about the decree passed by the learned Court below and was also having no knowledge about the execution proceedings. It was alleged that appellant could not appear before the learned Civil Court and also before learned Executing Court as the appellant was never served with the summons / notice of the suit / execution and was also not having any knowledge of the same. It was alleged that in Court sale a fraud has been played and the property of the appellant worth Rs.40,00,000/- has been sold on a marginal amount on account of default of payment of telephone bills. Along with the application appellant also submitted a demand draft of Rs.1,02,264/- and also a sum of Rs.55,000/- having 5% of the purchased money for the payment of respondent No.3 with a request to set aside the sale, which has been confirmed in favour of respondent No.3.

4. Another application was filed by the appellant on 16/01/07 U/o XXVI Rule 1 CPC for spot inspection as the respondent No. 3 was demolishing the property which was purchased by respondent No.3 in Court sale.

5. The application filed by the appellant was replied by respondent nos. 1 & 2 on 25/01/07, wherein preliminary objection was raised to the effect that the application filed by the appellant is barred by time. It was also alleged that the out standing amount against the appellant is Rs1,65,489/-. Respondent No. 3 also filed the reply of the application, wherein it was alleged that respondent No. 3 is bonafide purchaser with full consideration, hence the application be dismissed.

6. After hearing the parties learned Executing Court dismissed the applications filed by the appellant vide order dated 22/03/07, against which the present appeal has been filed.

7. Mr. Vijay Assudani, learned counsel for the appellant submits that learned Court below committed error in dismissing the application filed by the appellant. It is submitted that since appellant has deposited the entire amount for which Execution Petition was filed along with 5% of the purchased money, therefore, there was no occasion for the learned Executing Court for dismissing the application filed by the appellant. It is submitted that the provisions of order XXI Rule 89 CPC can be used at any stage of the proceedings by the judgment debtor. It is submitted that learned Executing Court failed to appreciate that the appellant was having no knowledge about the proceedings and since the proceedings were

carried out behind the back of the appellant, therefore, it can not be said that the appellant is remedy less. Learned counsel placed reliance on a decision of Calcutta High Court in the matter of *Jyotish Chandra Rakhit Vs. Smt. Prabati Bala,* Reported in AIR 1977 Calcutta 235 , wherein the application was filed by judgment debtor for setting aside the sale on the ground that real value of the property is more than 10 times the value put on the sale proclamation by decree holder and thus played fraud, Calcutta High Court held that the valuation of the property was so grossly inadequate that the Court of law should not allow such fraud to be perpetrated particularly when it is also guilty of gross carelessness in approving the sale proclamation. It is further observed that it is, therefore, nor merely a question of the judgment debtor's being prevented from agitating a point after a long period of time but it is a case where the court would be justified not to uphold the sale on the basis of the evidence of clear fraud and its own carelessness, and no question of limitation arises in the circumstances.

8. Reliance is further placed on a decision in the matter of *Punjab Mercantile Bank Ltd. Vs. Sardar Kishan Singh,* Reported in AIR 1963 Punjab 230, wherein sale was not widely published and approximate value of property was not indicated in proclamation and also very few bidders were present and the property worth more than Rs.20,000/- were sold for Rs.5,000/- only, Punjab High Court held that a sharp practice, as result of a well planned fraud has been practiced on the Court by the persons concerned. It was also observed that the sale can be set aside under Court's inherent powers, even though application under Rule 90 was filed beyond limitation provided for under Art 166 of the Limitation Act.

9. It was also observed that where fraud was perpetrated, length of time would not be admitted to refuse relief. Particularly when decree holder wrongfully concealed facts would not be allowed to take advantage of his own wrong by setting up the law of limitation. It was also observed that even if the the person who brought to light the fraud had no locus standi, either under S. 47 or O. XXI R.90, the Court had an ample reserve of inherent powers to satisfy itself suo motu that its process had been abused. Because the source of information happened to be a person who had no locus standi, the Court could not close its eyes and decline to exercise its inherent powers to set aside the sale on being satisfied that as a result of conspiracy a fraud had been perpetrated and its process had been abused.

10. Reliance was also placed on a decision in the matter of *Varadarajan Vs. Muttu Venkatapathi Reddy,* Reported in AIR 1953 Madras 587, wherein the restoration of a petition under order XXI rule 90 dismissed for default Divisional Bench of Madras High Court has held that dismissal of application for restoration in default would make confirmation of sale already made ineffective and such an order of confirmation may be treated as automatically vacated or even may be considered to be null and void.

11. Reliance was also placed on a decision of this Court in the matter of *Gorelal*

Vs. Motilal, Reported in 1985 MPWN, Note 534, wherein it was held that in a case where no remedy is provided to set aside the sale under order XXI rule 89 to 91, recourse of inherent powers can be taken.

12. Learned counsel further placed reliance on a decision of Hon'ble Apex Court in the matter of *Nani Gopal Paul Vs. T. Prasad Singh,* Reported in AIR 1995 SC 1971, wherein auction sale of Hypothecated property took place, which was conducted by the Court receivor and the application was filed U/o XXI Rule 89, 90 the Hon'ble Apex Court has observed as under:-

> We are of the view that we can take suo motu judicial notice of the illegality pointed out by the Division Bench, committed by the single Judge of the High Court in bringing the properties to sale. Accordingly, we are of the view that the circumstances are sufficient to vitiate the validity of the sale conducted by the Court Receiver as approved by the learned single Judge. Confirmation of sale was illegal. Though, as contended by Sri. Ganesh that normally an application under Order XXI, Rule 89 or 90 or under S. 48, C.P.C. need to be filed within limitation to have the sale conducted by the Court set aside and that procedure need to be insisted upon, we are of the view that this Court or appellate Court would not remain a mute or helpless spectator to obvious and manifest illegality committed in conducting Court sales. We are informed and it is not disputed that the appellant had deposited only Rs.5 lakhs and balance amount was assured to be deposited only after delivery of possession. That also would be illegal.
>
> Accordingly, the sale and confirmation thereof on 29/08/1990 are set aside. The appeal is remanded to the High Court and the appropriate single Judge would proceed to conduct the sale in accordance with law by open auction after due publication of the sale so that all the intending bidder would have opportunity to participate in the sale. Thereafter, it would take action according to law. Since it is a suit for foreclosure and the preliminary decree has become final, it is not open to any party to widen the scope of the suit or sale made pursuant to the preliminary decree. If any party has got any other right or remedy, the same has to be worked out elsewhere, according to law and not in this suit. We are not expressing any opinion with regard to the rights, if any, of respondent Nos. 1 and 2 in the property.

13. Learned counsel for the appellant further submits that the suit itself was not maintainable as summery suitk. Apart from this, appellant was neither served with the summons of the suit nor with the summons of judgment. In execution proceedings also appellant was never served. It is submitted that the estimated

value of the suit property was deliberately shown on lower side by respondent Nos. 1 & 2 and the learned Executing Court also carelessly approved the same. It is submitted that towards default in payment of telephone bills, a valuable property of the appellant was sold for a negligible amount, while the amount could have been recover from the house hold properties lying in the attached property. It is submitted that the appellant was and is ready and willing to pay the decreetal amount without raising any dispute. However the appellant had no occasion to contest the same. Learned counsel further submits that before the learned Executing Court appellant has deposited 5% of the sale amount for the payment to the respondent No.3. It is submitted that from the photographs filed by the appellant, it is evident that the respondent No. 3 has demolished the suit property. It is submitted that the sale of the property has not taken place in accordance with law. It is submitted that no public notice was issued. There was no wide publication that the suit property shall be auction. It is only three persons, who were present at the time of auction and the highest bid was of Rs.11,00,000/- while the suit property was of a higher amount.

14. Mr. Yogesh Mittal, learned counsel for respondent nos. 1 & 2 submits that the respondent Nos. 1 & 2 are an undertaking of Union of India. It is submitted that after following the due process of law the attached property was auctioned. It is submitted that the sale certificate was issued, therefore, at such a belated stage no illegality has been committed by the learned Executing Court in dismissing the application, as the same was barred by time also.

15. Dr. Manohar Dalal, learned counsel for respondent No. 3 submits that respondent No. 3 was the bonafide purchaser, who has purchased the suit property in a Court sale after making payment of full consideration. It was alleged that the bid of respondent No. 3 was accepted on 20/12/05 for a sum of Rs.11,00,000/-, out of which 25% amount was deposited by the respondent No. 3 on 20/12/05 itself and balance amount was deposited by the respondent No. 3 on 02/01/06 i.e. Within 15 days. It is submitted that sale certificate was issued by learned Executing Court on 24/01/06, which was duly registered on 27/01/06, thereafter vide order dated 28/06/06, it was directed by the learned Executing Court to hand over the possession of the suit property by braking lock and in compliance of that the possession was given to respondent No.3 on 09/10/06. It is submitted that thereafter the application was filed by the appellant on 28/11/06, which was barred by limitation prescribed under order XXI Rule 92 CPC. It is submitted that after taking the possession of the auctioned property respondent No. 3 has demolished the purchased property by removing the upper structure. It is submitted that since an application filed by the appellant is barred by time, therefore, no illegality has been committed by the learned Court below in dismissing the application filed by the appellant. Learned counsel submits that appeal be dismissed.

16. From perusal of the record it is evident that appellant was defaulter in not

depositing the telephone bills of Rs.66,644/- for which bills were sent to appellant on 01/05/94 and 01/11/94. Suit was filed on 27/03/98 for Rs.75,308/- under Order XXXVII CPC and ex-parte decree was passed on 27/08/98. Execution was filed on 22/01/01 for Rs.1,02,264/-. Application under Order XXI Rule 54 CPC was filed on 03/09/04 with a prayer to attach the property. Vide order dated 03/09/04 it was directed to issue notice to the appellant and case was adjourned to 13/10/04 for appearance of appellant. On 13/10/04 learned Executing Court fixed the case for 13/12/04 for service of warrant of attachment, as they were not served because of non-payment of process by respondent Nos. 1 & 2. Property in dispute was attached on 09/11/04. In the proceedings of attachment it is mentioned that the value of the property is amounting to Rs.6,00,000/-. No notice of attachment was served on the appellant which is mandatory as per Order XXI Rule 54(1-A) CPC which lays down that the order shall also require the judgment debtor to attend the Court on a fixed date for settling of terms of the proclamation of sale. On 14/01/05 application was filed under Order XXI Rule 66 CPC to serve the appellant by pesting. Case was taken up for consideration of this application on 14/01/05, 08/02/05 and 14/03/05 but no order was passed on the application to serve by pesting and the case was adjourned to 04/04/05. After adjournment of case on 14/03/05 an application was filed to serve the appellant by publication. This application was taken up for consideration on 04/04/05, whereby it was directed to serve the appellant by publication in the news paper Dainik Bhaskar. It was also directed to serve the notice on appellant by pesting and case was adjourned to 16/06/05. On that date learned Executing Court passed an order to the effect that notice under Order XXI Rule 66 CPC was served by publication in the news paper Dainik Bhaskar dated 16/05/05, hence the property be put to auction on 03/08/05, 04/08/05 and 05/08/05. No notice was served by pesting. Notice was issued under Order XXI Rule 66 CPC for 14/07/05, which was never the date fixed by learned Executing Court. This notice was returned unserved with a remark of the Process Server that upon enquiry it was found that property which has to be auctioned is locked since last two years. In the notice which was published in the news paper 16/06/05 was the fixed for settlement of terms.

17. From perusal of the record this court finds number of illegalities and irregularities in auctioning the property of the appellant has been committed, which are as under:-

1. No notice of filing of execution was served on the appellant from 22/01/01 to 09/03/04.

2. No notice of the application filed under Order XXI Rule 54 CPC was ever served on the appellant, as the application was filed on 09/03/04 and was allowed on that very day.

3. No compliance of order XXI Rule 54 (Rule 1-A) of CPC

was made as in the order dated 03/09/04 learned Executing Court did not pass any order to the judgment debtor, who is appellant herein to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the procolmation of the sale.

4. Application filed under Order XXI Rule 66 CPC filed by respondent Nos. 1 & 2 was not in accordance with order XXI Rule 66 Sub-rule 3 CPC, according to which every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-Rule-2 to be specified in the proclamation.

5. In the proclamation, which was published in the News Paper was not in accordance with order XXI Rule 66, Sub-rule-2 CPC, according to which such proclamation must state, (i) the details of the property to be sold, (ii) the house tax assessed on the property, (iii) the amount for the recovery of which the sale was ordered.

6. No notice was served for appearance of appellant on 16/06/05 by pesting.

7. In the report of process server dated 28/07/05 it is evident that the house was locked since last two years and it was found that appellant is not residing there. Inspite of this report no efforts were made by the respondent Nos. 1 & 2 or the Court to find out the change address of the appellant.

8. First date for auction was fixed as 03/08/05, 04/08/05 and 05/08/05 and for these dates no wide publicity was made so as to invite the intending purchaser.

9. Since no auction take place on the date fixed by the learned Executing Court, therefore, again vide order dated 05/08/05 the date of auction was fixed between 21/09/05 to 23/09/05 and it was also directed to issue the advertisement of sale, but the said notice was not served on the appellant.

10. On 21/09/05 Ravindra Savaliya, Avinash Hiran, who is respondent No. 3 herein and Kamal Kumar Chouradiya participated in auction proceedings. These three persons continued to participate in auction proceedings, which took place on 21/09/05, 22/09/05, 23/09/05, 26/09/05, 27/09/05, 28/09/05, 30/09/05, 01/10/05, 03/10/05, 04/10/05 and on 06/10/05 the report of Nazir was that the highest

bid is of respondent No.3 of Rs.11,00,000/-. Thereafter also the auction continued on 07/10/05, 11/10/05, 13/10/05, 14/10/05, 18/10/05, 21/10/05, 24/10/05, 25/10/05, 26/10/05, 07/11/05, 08/11/05, 09/11/05, 10/11/05, 11/11/05, 14/11/05, 16/11/05, 28/11/05, 08/12/05, 09/12/05, 12/12/05, 13/12/05 and 16/12/05. For all these dates no advertisement was made so as to invite the intending purchaser, who can participate in bid and on these dates it is only three persons including respondent No.3, who participated in auction proceedings. After the auction, upon the application filed by the respondent No.3 the order for possession was passed on the application dated 24/03/06 of respondent No.3 on 12/04/06 and the actual possession was handed over to respondent No.3 on 09/10/06 and immediately thereafter the application was filed by the appellant on 28/11/06.

18. In the opinion of this Court mandatory provisions of law were not followed at any point of time. Appellant was never served either in suit or in execution proceedings. Since the decree was passed against the appellant was in ex-parte, therefore, learned Executing Court ought to have extra cautious. In the circumstances this Court would not remain a mute or helpless spectator to obvious and manifest illegality committed in conducting Court sales. It appears that appellant deposited the decreetal amount and also 5% amount payable to respondent No.3 by demand drafts which were never encash. It also appears that after confirmation of sale and also after taking possession, upper structure which was lying on the land was removed by respondent No.3, the amount of upper structure must have been received by the respondent No. 3, but it has not been stated that how much amount has been received by respondent No. 3 on that account.

19. In the facts and circumstances of the case, this Court is of the view that only on account of failure of payment of telephone bills, the valuable property of the appellant can not be snatched. In view of this the appeal filed by the appellant is allowed and the impugned order, whereby the sale was confirmed and also the sale deed which was executed in favour of respondent No. 3 stands set aside on the following terms and conditions:-

1. Appellant shall clear the dues of respondent No.1 & 2 by satisfying the decree passed against the appellant along with interest and litigation expenses within a period of two weeks.

2. The amount which was deposited by the respondent No.3 towards sale of the suit property shall be returned to respondent No.3.

3. Appellant shall pay interest of the amount of sale, which was deposited by the respondent No.3 from the date of depositing the amount till payment @ 12% pa.

4. Appellant shall also pay 5% of the purchased money for payment to the respondent No.3.

5. In case of non-compliance of any of the terms of the order passed hereinabove, the appeal filed by the appellant shall be treated as dismissed.

20. With the aforesaid observations, appeal stands disposed of. No order as to costs.

Appeal disposed of.

I.L.R. [2009] M. P., 485
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
22 September, 2008*

NAGAR PALIKA PARISHAD, MALAJKHAND ... Appellant
Vs.
HINDUSTAN COPPER LTD. ... Respondent

A. Civil Procedure Code (5 of 1908), Order 39 Rule 1 - *Temporary injunction - Open land was given on lease for 20 years by defendent for construction of bus stand and other purposes - Defendant issued notice to handover possession after the expiry of lease period - Application under Order 39 Rule 1 dismissed in a suit filed for injunction against dispossession - Held - Whether plaintiff has acquired status of tenant at will or tenant at sufferance or tenancy continued by holding over and whether the tenancy has been rightly determined is a matter of investigation - As serious questions of law & facts are involved therefore, the possession of plaintiff required to be protected - Defendant restrained from interfering with possession of plaintiff till the suit is decided - Appeal allowed.* (Para 10)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 – अस्थायी व्यादेश – बीस वर्ष के लिए खुली भूमि, प्रतिवादी द्वारा बस स्टेण्ड के निर्माण और अन्य प्रयोजनों के लिए पट्टे पर दी गई – प्रतिवादी ने पट्टा अवधि समाप्त होने के बाद कब्जा सुपुर्द करने के लिए सूचनापत्र जारी किया – बेदखली के विरूद्ध व्यादेश के लिए पेश वाद में आवेदन अन्तर्गत आदेश 39 नियम 1 खारिज – अभिनिर्धारित – क्या वादी ने इच्छाधीन किरायेदार या मूक सम्मति से किरायेदार की हैसियत प्राप्त कर ली है या किरायेदारी धारण किये जाने से चालू रही है और क्या किरायेदारी उचित रूप से अवधारित की गई है, अनुसंधान का विषय है – चूंकि तथ्यों और विधि के गंभीर प्रश्न अन्तर्वलित हैं इसलिए वादी का कब्जा संरक्षित किया जाना अपेक्षित है – प्रतिवादी को वाद के विनिश्चय तक वादी के कब्जे में हस्तक्षेप करने से रोका गया – अपील मंजूर।

B. Civil Procedure Code (5 of 1908), Order 39 Rule 1 - *Temporary injunction - Real thing is to be seen is whether plaintiff's plaint is not frivolous*

*M.A. No.2315/2007 (Jabalpur)

or vexatious - It is not function of court at this stage to resolve disputed questions of fact or difficult questions of law which should be left to be decided at the conclusion of trial. (Para 10)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 – अस्थायी व्यादेश – वास्तविक बात जो देखी जानी है यह है कि क्या वादपत्र तुच्छ और तंग करने वाला तो नही है – इस प्रक्रम पर न्यायालय का कार्य यह नही है कि तथ्य के विवादित प्रश्नों या विधि के कठिन प्रश्नों का निराकरण किया जाए उन्हें विचारण की समाप्ति पर विनिश्चित किये जाने के लिए छोड़ा जाना चाहिए।

Cases referred :

(2007) 5 SCC 745, AIR 2004 SC 2103, (2006) 1 SCC 228, 1978 JLJ 51, (1975) 1 All.E.R. 504, AIR 1965 MP 142, (1999) 3 SCC 161.

C.V. Rao, for the appellant.

A.G. Dhande with *Piyush Jain,* for the respondent.

ORDER

A.K. Shrivastava, J.:–Feeling aggrieved by the order dated 4.5.2007 passed by the First Additional District Judge, Balaghat in Civil Suit No.2-A/2007 dismissing the application under Order XXXIX Rule 2 of CPC filed by the plaintiff/ appellant, this appeal has been filed under Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908.

2. The plaintiff is a lessee of the suit property and has filed a suit before the trial Court for injunction that plaintiff may not be dispossessed by the defendant from the suit property. According to the plaint averments, the suit property which is open land, was given on lease to the plaintiff on 27.4.1987 for 20 years for construction of bus stand and for other purposes mentioned in the Schedule-A annexed to the plaint. Thereafter, the plaintiff constructed the bus stand and godown etc. on the leased suit property. According to the plaint averments, the original lessee was Malajkhand Special Area Development Authority (SADA), however the property of the SADA was merged in Municipal Council, Malajkhand. Hence, the Municipal Council, Malajkhand who is the plaintiff by operation of law became lessee of the defendant.

3. It is further case of the plaintiff that on 14.1.2007, a notice has been received that lease period is going to be expired on 26.4.2007 and therefore after the expiry of the lease period, possession of the suit property be delivered to the defendant. According to plaintiff after having constructed permanent structure of bus stand and godown etc. the nature of lease became permanent. Earlier the defendant filed suit against SADA (from whom plaintiff is deriving right on the suit property) but later on compromised arrived between the parties and by filing an application was filed by both the parties that on account of compromise having been arrived between them, plaintiff i.e. defendant of present case does not want to proceed with the suit as as a result of which the suit was withdrawn. Thereafter, the

plaintiff has also constructed a shopping complex bus stand etc. with the consent of defendant and the maps etc. were also approved by the defendant. Not only this with the consent of defendant Guest house was also constructed and electricity etc. has also been installed.

4. An application for issuance of temporary injunction has also been filed by the plaintiff stating that till the disposal of the suit, defendant be restrained from interfering with plaintiff's possession on the suit property.

5. A reply to the application of the plaintiff under Order XXXIX Rule 1 of CPC has been filed by the defendant/respondent stating therein that the lease period has come to an end on 26.4.2007 and after the expiry of the lease period the possession of plaintiff on the suit property is that of a trespasser. In this regard, the averments made in para 16 of the reply may be seen. Inter alia it has also been contended in the reply by the defendant that the terms of the lease have been violated by the plaintiff and therefore application of issuance of temporary injunction may be dismissed.

6. The learned trial Court by the impugned order has dismissed the application for issuance of temporary injunction of the plaintiff. In this manner, this appeal has been filed by the plaintiff assailing the impugned order.

7. The contention of Ku. C.V. Rao, learned counsel for the appellant is that the plaintiff has raised serious questions of fact and difficult question of law which requires investigation and recording of evidence and therefore plaintiff is having a prima facie case in its favour. Admittedly, plaintiff is in possession of the suit property and therefore if the plaintiff Muncipal Council is dispossessed, it will suffer irreparable loss. She further submits that the balance of convenience is also in favour of the plaintiff and therefore by allowing this appeal, application for issuance of temporary injunction filed by the plaintiff may be allowed.

8. Shri A.G. Dhande, learned senior counsel, appearing for the defendant/ respondent, submitted that the property in dispute was given on lease to the plaintiff and according to the lease deed the lease period was of 20 years and the same was expired on 26.4.2007. By inviting my attention to Section 111(a) of the Transfer of Property Act, 1882 (for short 'the Act'), it has been contended that despite the lease was determined after the expiry of the lease period, by taking abandon precaution, on 14.1.2007 a registered notice was sent on behalf of the defendant to plaintiff determining its tenancy with effect from 26.4.2007. The contention of the learned counsel is that factum of receiving notice is not disputed since it has been admitted by the plaintiff in its plaint as well as in the application for issuance of temporary injunction. Learned Senior counsel has placed reliance on decision of the Supreme Court *B. Arvind Kumar Vs. Government of India and others*, (2007) 5 SCC 745, wherein it has been held that after determination of the tenancy, if the lessee is continuing in possession it cannot be said that tenancy at will is

created in its favour. He also placed reliance on another decision of Supreme Court *C.M. Beena and another vs. P.N. Ramachandra Rao,* AIR 2004 SC 2103 (Para 6 & 9), and argued that what are the rights of the lesser and lessee when the lease is determined. Further placing reliance on the decision of Supreme Court *C. Albert Morris vs. K. Chandrasekaran and others,* (2006) 1 SCC 228, it has been argued that after the tenancy has been determined the possession of the lessee cannot be said to be that of tenant and it cannot be said that tenant is enjoying the tenancy right under the head of holding over the tenancy. On these premised submissions, it has been argued by learned senior counsel that learned trial Court has rightly dismissed the application of the plaintiff holding that there is no prima-facie case in favour of the plaintiff and therefore this appeal deserves to be dismissed.

9. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

10. In the present case, the plaintiff has come up with a case that original lessee was SADA, Malajkhand, however, by operation of law, SADA has been merged in the Municipal Council, Malajkhand. This fact has also been admitted by defendant in its notice dated 14.1.207. According to the plaint averments, the lease deed was executed on certain conditions which are mentioned in the plaint and thereafter the plaintiff by abiding those conditions constructed bus stand, drains, godown, etc. Earlier also, defendant filed one suit in the Court of Civil Judge Class-II, Baihar bearing Civil Suit No.11-A/1989 which was withdrawn on the ground that compromise has been taken place out of the Court between the parties. That suit was filed against present plaintff who was arrayed as defendant. The said civil suit was dismissed as withdrawn on 2.7.1990. According to the plaintiff, even after the dismissal of the said suit filed by the present defendant, the plaintiff continued to possesses the suit property and therefore according to learned counsel for plaintiff the status of plaintiff would become that of permanent lessee. Although acquiring the status of permanent lessee by the plaintiff, has been denied by the defendant but factum of filing of suit in the Court of Civil Judge Class-II, Baihar has not been denied and withdrawing that suit is also not disputed in the reply. Thus, according to me, whether plaintiff has acquired status of a tenant at will of tenant as sufferance of tenancy continued by holding it over, as well as whether the lease has been rightly determined or not, is a matter of investigation and the parties are required to adduce evidence in that regard. This Court in *Shankerlal Rathore vs. State of M.P. and others,* 1978 JLJ 51, has categorically held that although it is said that plaintiff must show a prima-facie case in support of the right claimed by him in the suit before he can be granted temporary injunction, the real thing to be seen only is that plaintiff's plaint is not frivolous or vexatious; in other words, there is a serious question to be tried. It is not the function of the Court at this stage to resolve disputed questions of fact or difficult questions of

law which should be left to be decided at the conclusion of the trial. Thus, where the tenancy has been determined by afflux of time or came to an end by sending notice of termination of lease is a serious question of fact as well as difficult question of law which should be left to be decided at the time of passing of the judgment. What is the status of the plaintiff and whether he can be said to be a tenant at will or tenant at sufferance are the difficult questions of law and they are also disputed questions of fact which requires investigation and recording of evidence and therefore, to me, there is a prima facie case in favour of the plaintiff. This Court in *Shankerlal Rathore vs. State of M.P. and others* (supra), by placing reliance on *American Cyanamid vs. Ethicon,* (1975) 1 All ER 504, has categorically held that while taking into consideration the application of temporary injunction generally the plaintiff is not required to make out a clear legal title but is only satisfy the Court that he has a fair question to raise as to the existence of the legal right claimed by him in the suit is well recognized in India. Therefore, to me, at this stage, it is difficult to say that the plaintiff is a trespasser as argued by learned senior counsel for respondent.

11. Admittedly, the plaintiff is in possession on the date of filing of the suit and therefore his possession is required to be protected. In this context, reliance is placed on a Division Bench judgment of this Court *Durg Transport Co. Private Ltd., Durg vs. Regional Transport Authority, Raipur and others,* AIR 1965 MP 142, wherein in para 4 it has been held that the principle that a stay order or an ad interim injunction is issued to maintain and preserve the status-quo existing at the time of the institution of the proceedings cannot be doubted. The real point, which has to be decided when an application for stay or for a temporary injunction is made, is not how the question ought to be investigated; but it is whether the matter should not be preserved in status-quo until the question can be finally disposed of. As per defendant's own showing the plaintiff is in possession of the suit property, if application for temporary injunction of plaintiff is dismissed, it would amount to giving a licence to the defendant to take possession from the plaintiff by taking the law in their own hands and muscle power which cannot be permitted. The Supreme Court in *C. Albert Morris vs. K. Chandrasekaran and others* (Supra), in para 26 by placing reliance on its decision in *Raptakos Brett & Co. Ltd. vs. Ganesh Property,* (1998) 7 SCC 184, has held that the lessee cannot be thrown out physically by the landlord. It would be apposite to quote para 13 of the decision of *Raptakos Brett & Co. Ltd. Vs. Ganesh Property* (supra) which reads thus:

> "In view of the aforesaid settled legal position, it must be held that on the expiry of the period of lease, the erstwhile lessee continues in possession because of the law of the land, namely that the original landlord cannot physically throw out such an erstwhile tenant by force. He must get his claim for possession

adjudicated by a competent Court as per the relevant provisions of law. The status of an erstwhile tenant has to be treated as a tenant at sufferance akin to a trespasser having no independent right to continue in possession."

The Supreme Court in *Ashwin Kumar K. Patel Vs. Upendra J. Patel and others* (1999) 3 SCC 161 in para 12 has held possessory right was sufficient to permit plaintiff to have an order of temporary injunction in his favour.

12. The decisions which placed reliance on by learned senior counsel for the respondent are not applicable at this stage of consideration of application for issuance of temporary injunction. Those decisions may be relevant at the time of final adjudication of the suit before the trial Court.

13. Thus, on the above said analysis, I am of the view that the plaintiff/appellant is having a prima-facie case and having possession of the suit property, the balance of convenience is also in its favour. Since all the three principles for grant of temporary injunction are in favour of the plaintiff, I am of the view that the learned trial Court erred in law in rejecting the application for temporary injunction.

14. This appeal is accordingly allowed, the impugned order is hereby set aside and the application for issuance of temporary injunction filed by the plaintiff is hereby allowed. The defendant is restrained from interfering with the possession of the plaintiff till the suit is decided. However, looking to the controversy involved in the matter, the learned trial Court is hereby directed to decide the suit as early as possible preferably within a period of one year from today. No costs.

Appeal allowed.

I.L.R. [2009] M. P., 490
APPELLATE CIVIL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
15 October, 2008*

VIJAY JAISWAL ... Appellant
Vs.
SMT. NISHA JAISWAL ... Respondent

A. Hindu Marriage Act (25 of 1955), Sections 12(1)(d) & 12(2)(b) - ***Voidable marriage*** - *Application for dissolution of marriage on ground of Section 12(1)(d) has to be preferred within one year from the date of marriage and not from the date of discovery of the fact that wife was pregnant from someone else at the time of performance of marriage - Application preferred after 19 months from the date of marriage - Application rightly dismissed by trial court as barred by limitation.* (Para 5)

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*F.A. No.742/2005 (Jabalpur)

क. हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 12(1)(डी) व 12(2)(बी) – शून्यकरणीय विवाह – धारा 12(1)(डी) के आधार पर विवाह के विघटन का आवेदन विवाह की तारीख से एक वर्ष के भीतर पेश करना चाहिए न कि इस तथ्य के प्रकटीकरण की तारीख से कि पत्नी विवाह के सम्पादन के समय किसी अन्य से गर्भवती थी – आवेदन विवाह की तारीख से 19 माह बाद पेश किया गया – विचारण न्यायालय द्वारा आवेदन परिसीमा से वर्जित होने से उचित रूप से खारिज किया गया।

B. Hindu Marriage Act (25 of 1955), Sections 12(2)(b)(ii) & 12(2)(b)(iii) - *Section 12(2)(b)(iii) is not independent provision and it has to coexist with the requirement of other sub-clauses of Section 12(2)(b) of the Act - The provision of Section 12(2)(b)(iii) has no effect on the question of limitation dealt with in Section 12(2)(b)(ii).* (Para 5)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 12(2)(बी)(ii) व 12(2)(बी)(iii) – धारा 12(2)(बी)(iii) स्वतंत्र उपबंध नही है और यह अधिनियम की धारा 12(2)(बी) के अन्य उपखण्डों की अपेक्षा से सहवर्ती है – धारा 12(2)(बी)(iii) के उपबंध का धारा 12(2)(बी)(ii) में बतायी परिसीमा पर कोई प्रभाव नही पड़ता है।

Cases referred :

AIR 1979 MP 45, AIR 1962 Bom 190, AIR 1969 Mad 479.

R.D. Hundikar, for the appellant.

None, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the husband aggrieved by dismissal of his application seeking dissolution of marriage filed under Section 12 of Hindu Marriage Act,1955, same has been dismissed as barred by limitation vide impugned order dt. 15.7.05 passed by Family Court, Bhopal in RCS No.66-A/05.

2. The uncontroverted facts relevant for decision of the appeal are that marriage of appellant Vijay was performed with Smt. Nisha on 28.6.03. The application was filed seeking dissolution of marriage on 21.2.05.

3. It was claimed by the husband that he came to know on 15.1.2005 of pregnancy of wife, at the time of solemnization of marriage when he found certain prescriptions in which it was mentioned that wife was carrying pregnancy of 12 weeks on 15.7.2003 from someone else whereas marriage was performed two weeks before. Thus, the application for dissolution was filed under Section 12(1)(d) of Hindu Marriage Act. An application under Order 7 Rule 11 CPC was filed by the wife for dismissing the petition as barred by limitation as petition for dissolution of marriage under Section 12(1)(d) of Hindu Marriage Act could have been preferred within a period of one year from the date of performance of marriage. Application under Order 7 Rule 11 CPC has been allowed. The application filed under Section 12(1)(d) has been dismissed by the Family Court as barred by limitation. Dissatisfied thereby, the appeal has been preferred by the husband.

4. Shri R.D.Hundikar, learned counsel appearing for the appellant has submitted that provisions of Section 12(2)(b)(ii)and 12(2)(b)(iii) have to be read together. He has submitted that it is provided in sub-clause (iii) of clause (b) of sub-section (2) of section 12 of the Act that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground. The respondent,at the time of marriage, was pregnant by some other person than the petitioner. The requirement of discovery of fact has to be imported into, sub-clause (ii) of clause (b) of sub-section (2) of section 12 dealing with limitation as word used between these two sub-clauses is "and" not "or". Consequently, the application preferred after about 19 months of the marriage has to be treated within limitation as the factum of having pregnancy was discovered by the husband on 15th January,2005 though marriage took place in June, 2003. The application presented in the month of February, 2005 was, thus, within limitation from the date of discovery of factum of pregnancy of wife at the time of marriage from someone else.

5. The main question for consideration in view of the uncontroverted facts is about the period of limitation, from which date the period of limitation of one year has to be computed, with effect from the date of marriage or with effect from the date of discovery of the fact that wife was pregnant from someone else at the time of performance of marriage. Section 12(1)(d) of the Act provides exigency in case respondent was at the time of marriage pregnant by some person other than the husband. Such marriage shall be voidable and may be annulled by decree of nullity on such ground. Sub-section (2) of S.12 contains non-obstante clause and provides for limitation and certain other conditions as safeguards to the wife. Since, we are concerned with Section 12(1)(d), the non-obstante protection is provided in clause (b) of sub-section (2) of section 12, firstly that the husband was at the time of marriage was ignorant of the fact of pregnancy from someone else at the time of marriage, secondly the proceedings have been instituted in the case of marriage solemnized after commencement of the Act within one year from the date of marriage and third requirement is that the marital intercourse with the consent of petitioner has not taken place since the discovery by the petitioner of the existence of the factum of pregnancy by some other person. Section 12(1)(d) and 12(2)(b) of the Act are quoted below :-

> "12.Voidable marriages - (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely -
>
> ---
>
> (d) that the respondent was at the time of marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1),no petition for annulling a marriage -

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(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied -

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse within the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

Plain reading of three requirements of clause (b) of sub-section (2) of section 12 of the Act makes it clear that all three have to co-exist at the same time. Husband must not be aware at the time of performance of marriage of the factum of pregnancy from someone else, and in case the marriage has been solemnized after commencement of the Act, the application has to be filed within one year from the date of marriage, and further after the date of discovery of the fact by petitioner marital intercourse with the consent of petitioner has not taken place as would constitute waiver of the ground. Sub-clause (iii) of clause (b) of sub-section (2) of section 12 is not independent provision and it has to coexist with requirement of other sub-clauses of clause (b) of sub-section (2) of Sec.12 of the Act. The provision of sub-clause (iii) of Sec.12(2)(b) has no effect on the question of limitation dealt with in sub-clause (ii) of clause (b) of sub-section (2) of section 12.

6. A Division Bench of this Court in *Nandkishore vs. Smt. Munnibai* AIR 1979 MP 45 has held that petition for annulling of marriage under Section 12(1)(d) of the Act has to be preferred as provided in section 12(2)(b)(ii) of the Act within one year from the date of marriage. Section 5 of Limitation Act is not applicable to such a petition. Action has to be taken within one year from the date of marriage not from the date of discovery of the fact. Division Bench of this Court has held thus :-

"Yet another submission in this regard which remains to be considered is this. S.12(2)(b)(ii) of the Act requires that the petition should be preferred within one year of the date of marriage. Counsel urges that for computing the period of one year the starting point should not be the date of marriage but the date when the fact of pregnancy was revealed to the appellant. According to

him,in construing this clause, equitable considerations applicable to statutes of limitation may be invoked. The counsel invited our attention to Sec.17 of the Indian Limitation Act and urged that the time should not start running until the fraud is discovered. It is not the period of limitation which the Act prescribed in the sense the statutes of limitation do.All that it says is that action beyond specified period cannot be founded upon certain grounds. In *Vellinayagi vs. Subramaniam,* AIR 1969 Mad 479, S.5 of the Limitation Act has not been held applicable to petition under S.12 of the Hindu Marriage Act. Considering like provisions under the Matrimonial Causes Act, 1937, the Court of Appeal in *Chaplin vs. Chaplin,* (1948) 2 All ER 408 held that such equitable principles could not be applied to matrimonial causes. Provisions of S.7(1) of the Matrimonial Causes Act, 1937, appear to be practically similar to those contained in cl. (b) of S.12(2) of the Act. What has been observed in that case is this :-

"One must appreciate the subject matter with which it is dealing viz., proceedings to alter the status of the parties, the result of which will affect the children of the marriage, and that in all the cases specified in the sub-section . Parliament has thought fit to prescribe in the clearest possible language that the court shall not grant a decree unless it is satisfied that proceedings were instituted within a year of the date of the marriage."

It is pertinent to note that in earlier part of the Act, i.e., S.12(2)(a)(i), it is specifically mentioned that the action should be launched within one year of the discovery of the fraud. We cannot read such words even by implication while construing sub-sec.(2)(b)(ii) of S.12. That course is not permissible. This contention of the learned counsel also fails."

Similar is the view taken in *Savlaram Kacharoo Mhatre vs. Yeshodabai Savlaram Mhatre* AIR 1962 Bombay 190 and in *Vellinayagi vs. T.Subramaniam* AIR 1969 Madras 479.

7. In view of the uncontroverted fact that marriage took place 19 months before the date of presentation of application, it has been rightly dismissed as barred by limitation.

Resultantly, we find no merits in the appeal. The appeal being devoid of merits is hereby dismissed. No costs.

Appeal dismissed.

I.L.R. [2009] M. P., 495
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
4 November, 2008*

SUMITRA BAI & anr. ... Appellants
Vs.
SHYAM LAL SEN & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 5 Rule 15, Motor Vehicles Rules, M.P. 1994, Rule 240 - *Where service may be on an adult member of defendant's family - Process Server served the notice of non-applicant on her major son who was not residing with her - Not valid service within the meaning of Order 5 Rule 15 of Code - Ex parte award set-aside with the direction to decide claim case on merits – Appeal allowed.* (Para 8)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 5 नियम 15, मोटर यान नियम, म.प्र. 1994, नियम 240 – जहाँ प्रतिवादी के परिवार के वयस्क सदस्य पर तामील हो सकेगी – आदेशिका तामीलकर्ता ने अनावेदक का सूचनापत्र उसके वयस्क पुत्र पर तामील किया जो उसके साथ नही रहता था – संहिता के आदेश 5 नियम 15 के अर्थान्तर्गत विधिमान्य तामील नही – एकपक्षीय अधिनिर्णय क्लेम मामले का गुणदोषों पर विनिश्चय करने के निदेश के साथ अपास्त – अपील मंजूर।

Ashok Chakraverti, for the appellants.
None, for the respondents.

ORDER

ABHAY M. NAIK, J. :–This miscellaneous appeal has been preferred against the order dated 24.2.2005 passed by the Court of District Judge, Raisen in Miscellaneous Civil Appeal No.14/2004 (Sumitra Bai Vs. Shyamlal and another) rejecting thereby an application of appellants under Order 9 Rule 13 C.P.C. for setting aside ex parte award dated 2.12.2003 passed by M.A.C.T., Raisen in claim case No.82/2002.

2. Case of the appellants is that a claim petition was submitted against the present appellants by the respondents under Motor Vehicle Act, 1988. This claim was decreed ex parte on 2.12.2003.

3. During the execution proceedings, the applicant came to know about the ex parte award during the proceedings of attachment pursuant to the execution of the award. Appellants obtained certified copy of the ex parte award and thereafter within a month submitted an application for setting it aside.

4. Shri Ashok Chakrabarti, learned counsel contended that no notice of the claim case was served upon the appellants. Instead, the notice was served on Jaswant who happens to be the son of appellant No.2 and son of the daughter of

*M.A. No.2074/2005 (Jabalpur)

appelant No.1. Jaswant was a teacher at Raisen whereas the appellants were residing at village Banchhod, District Raisen. According to the appellants' learned counsel, Jaswant was not residing with the appellants, therefore, service on him of the notice addressed to the appellants is not valid. Thus, service on Jaswant could not have been treated as valid service on appellants and no ex parte decree could have been passed on the basis of such service.

5. Order 5 Rule 15 C.P.C. provides :-

> **"15. Where service may be on an adult member of defendant's family** - Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him."

6. Appellant No.2 examined herself before the trial Court. She stated on oath that both the appellants were residing jointly at village Banchhod, District Raisen whereas Jaswant was residing in a different house at district Raisen since, he was holding the post of teacher at district Raisen. Thus, it is a clear case of the appellants that they were residing separately from Jaswant and Jaswant cannot be treated as a person residing with the appellants for the purpose of Rule 15 of Order 5 of C.P.C.

7. I have perused the statement of appellant No.2 as well as Ramesh who was examined by plaintiffs/respondents. Appellant No.2 has categorically stated on oath that Jaswant was residing with his wife at district Raisen whereas the appellants were residing at village Banchhod. Ramesh, the Process Server has also expressly stated that he had gone to the house of appellants to serve them with the notice. They were not present. On the contrary, it was found that Jaswant was residing at Raisen. Thereafter, the Process Server went to Raisen and served Jaswant with the notice of claim case.

From the aforesaid and other material on record, it is clear that Jaswant was residing separately with his family whereas the appellants were residing at village Banchhod separately.

8. Order 5 Rule 15 C.P.C. provides that the service may be effected on any adult member of the family who is residing with the addressee. Words "who is residing with him" are quite significant. An adult member of the family while being served with the notice/summons must be residing with the addressee. In the present case, it is amply clear from the record that Jaswant was residing separately whereas the appellants were residing at village Banchhod independently. Process Server, on not finding Sumitra Bai at her residence mentioned in the

notice went to District Raisen at the residence of her son Jaswant and served upon him the notice. Thus, Jaswant is found to have resided separately and not with Sumitra Bai at the time of service of notice. Process Server was not empowered under Order 15 Rule 5 C.P.C. for serve the notice of Sumitra Bai even on her major son who was not residing with her. In view of this, compliance of Rule 15 does not appear to have been made while effecting service of the notices meant for appellants. This being so, the service of notice on Jaswant was not liable to be taken into consideration as service on appellants. Thus, the service on Jaswant is found to be invalid within the meaning of Order 5 Rule 15 C.P.C. It is further found that in view of absence of service on appellants, there was sufficient cause for their absence at the time of proceedings against them in ex parte manner.

9. Accordingly, the impugned order is not sustainable in law and is hereby set aside. Ex parte award dated 2.12.2003 passed by M.A.C.T., Raisen is hereby set aside. Learned M.A.C.T., Raisen is directed to decide the claim case on merits in accordance with law.

Order accordingly.

I.L.R. [2009] M. P., 497
APPELLATE CIVIL
Before Mr. Justice S.K. Gangele
21 November, 2008*

HARISINGH & anr. ... Appellants
Vs.
KALLOBAI & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 9 Rule 13, Order 5 Rule 9, Motor Vehicles Rules, M.P. 1994, Rule 240 - ***Setting-aside ex parte decree - Presumption of service of summons*** - *In claim case service of summons was made by registered post acknowledgment - Summons were received back with noting of postman that "refused to take notice" - Held - It is not always necessary to produce the postman who tried to effect service - Appellant in his evidence admitted that he had knowledge about the case and also tried to compromise the matter - Looking to the evidence of appellant and conduct of the appellant himself presumed that there was service of notice on appellant and appellants deliberately did not appear before the Claims Tribunal - Lower court has not committed any error in rejecting the application for setting-aside the ex parte award.* (Paras 6, 7 & 8)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13, आदेश 5 नियम 9, मोटर यान नियम, म.प्र. 1994, नियम 240 – एकपक्षीय डिक्री अपास्त करना – समन की तामील की उपधारणा – क्लेम मामले में समन की तामील रजिस्टर्ड डाक मय पावती द्वारा

*M.A. No.360/2006 (Gwalior)

की गयी – समन पोस्टमेन की इस टिप्पणी के साथ वापस प्राप्त हुए कि "सूचनापत्र लेने से इंकार किया" – अभिनिर्धारित – यह हमेशा आवश्यक नही है कि पोस्टमेन, जिसने तामील का प्रयास किया, को पेश किया जाए – अपीलार्थी ने अपनी साक्ष्य में स्वीकार किया कि उसे मामले की जानकारी थी और उसने मामले में समेझौता करने का भी प्रयत्न किया – अपीलार्थी की साक्ष्य और अपीलार्थी के स्वयं के आचरण को देखते हुए यह उपधारणा की गई कि अपीलार्थी पर सूचनापत्र की तामील हुई. और अपीलार्थी जानबूझकर दावा अधिकरण के समक्ष उपस्थित नही हुए – अधीनस्थ न्यायालय ने एकपक्षीय अधिनिर्णय अपास्त करने का आवेदन नामंजूर करने में कोई त्रुटि नही की।

R.K. Upadhyaya, for the appellants.
Diksha Mishra, for the respondents.

ORDER

S.K. GANGELE, J. :–Appellants have filed this appeal against the order dated 14.02.2006 passed by Additional District Judge, Ganj-Basoda, district Vidisha in MJC No. 03/05 rejecting the application filed by appellants under Order 9 Rule 13 CPC for setting aside exparte award passed under the provisions of Motor Vehicles Act.

2. Claimants-respondents, Kallobai, Dularibai and Guddi filed a claim application for compensation before the Claims Tribunal pleading that deceased Kamalsingh had been travelling in a tractor-trolley on 14.05.2004. The tractor was bearing registration No. MP-40-M-9110 and the trolley was bearing registration No. MP-40-M-9111. The aforesaid tractor-trolley was owned by Harisingh and it was being driven by Ganeshram at the relevant time. Due to rash and negligent driving of the tractor by Ganeshram the trolley turned turtle and Kamalsingh fell down from the trolley and died in the accident. A report of the accident was lodged at the police station and an offence was registered. Subsequently, the Widow and daughters of the deceased filed a claim application before the Claims Tribunal. On 29.07.2004 the Claims Tribunal issued notice on the aforesaid Claim-application to non-applicants. The Non-applicants, who were driver and owner of the offending vehicle, refused to take notice. Hence, they were proceeded exparte by the Claims Tribunal vide order dated 25.10.2004. The Claims Tribunal passed an award of Rs.1,89,500/- on 03.01.2005.

3. After passing of the award appellants filed an application under Order 9 Rule 13 CPC for setting aside the exparte award. They pleaded that no summons were served on them and they came to know about passing of the award on 04.03.2005 when the respondents tried to forfeit the tractor. In support of the application appellant Ganeshram examined himself and stated that he had not received any notice from postman and with the collusion with postman notice was sent back. Harisingh also examined himself and he stated the same fact that one Governdhan with the collusion with postman has affixed a false thumb impression and returned back the summons. On behalf of respondents Goverdhan and Baijnath have been examined before the Court. They stated that notices were served on the appellants.

4. The trial Court rejected the application of the appellants on the ground that notices were sent to them by registered A/D post and there is an endorsement of postman that the respondents refused to take notice. Apart from this, Harising in his evidence admitted that he had knowledge about the case and also tried to compromise the matter.

5. Learned counsel for appellants has submitted that no notice was served on the appellants. The exparte award is illegal and the Claimants deliberately with the connivance of the postman sent the notices back with endorsement with regard to refusal of notices. Contrary to this, learned counsel for respondents has submitted that there was a proper service of summons. The appellants deliberately refused to take notice. Apart from this, from the evidence of appellant, Harisingh, it is clear that he had knowledge of the case.

6. From the record of the Claims Tribunal it is clear that registered A/D post notices were sent to the appellants for service and those notices have been returned back with the endorsement that appellants refused to take notice (Lene Se Inkar). Thereafter, Claims Tribunal proceeded exparte against the appellants vide order dated 25.10.2004. Apart from this, appellant, Harisingh, in para 5 of his evidence in cross-examination admitted that Gajrajsingh resides in his village and he knew him. Kallibai's maternal village is at Vidoniya. He had gone to maternal place of Kallibai and he told Kallibai to enter into compromise with Ganeshram and Ganeshram was ready to give Rs.50,000/- to Kallibai. Kallibai is the widow of deceased Kamalsingh. Ganeshram, as per the report, had been driving the tractor at the relevant time. From the aforesaid evidence, it is clear that appellant Harisingh had knowledge about the pendency of the claim case.

7. Hon'ble the Supreme Court in *Puwada Ventateswara Rao v. Chidamana Venkata Ramana,* (1976) 3 SCR 551 has held as under with regard to presumption in case notices were received with noting of postman that "refused to take notice" :-

> "The two decisions are reconcilable. The Calcutta High Court applied a rebuttable presumption which had not been repelled by any evidence. In the Bombay case, the presumption had been held to have been rebutted by the evidence of the defendant on oath so that in meant that the plaintiff could not succeed without further evidence. The Andhra Pradesh High Court had applied the ratio decidendi of the Bombay case because the defendant-appellant before us had deposed that he had not received the notice. It may be that, on a closer examination of evidence on record, the Court could have reached the conclusion that the defendant had full knowledge of the of the notice and had actually refused it knowingly. It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admissions or

conduct. We do not think it necessary to go into this question any further as we agree with the High Court on the first point argued before us."

8. Rule 240 of the Motor Vehicles Rules, 1994 prescribes procedure to be followed by the Claims Tribunal in holding inquiries. Under the aforesaid Rule the provisions of Order 5 Rule 9 CPC have been made applicable with regard to inquiry under the Motor Vehicles Act of claim cases. Order 5 Rule 9 CPC prescribes the procedure for delivery of summons and service of summons. There was amendment in the aforesaid Rule by Code of Civil Procedure (Amendment) Act, 2002. It was made effective w.e.f. 01.07.2002. After the amendment the provisions are as under :-

"9. Delivery of summons by Court .- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, there he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff."

9. It is clear from the aforesaid provision that the Court can serve the notice by registered A/D post at the address of the defendant. In the present case, the summons were sent for service to the appellants by registered A/D post at their addresses. They refused to take the summons. There are endorsements of postman on the summons of refusal to take notice. Looking to the evidence of Harisingh, appellant, this Court from the conduct of Harisingh himself, presume that there was service of notice on appellants and appellants deliberately did not appear before the Claims Tribunal. In such circumstances, in my opinion, the

learned lower Court has not committed any error in rejecting the application filed by the appellants for setting aside the exparte award under Order 9 Rule 13 CPC.

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

Appeal dismissed.

I.L.R. [2009] M. P., 501
APPELLATE CRIMINAL
Before Mr. Justice B.M. Gupta
16 January, 2009*

MEERA BAI & anr. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Sections 302, 304-B & 306 - *When accused can be convicted u/s 306 in absence of charge - Law explained.*

Accused were tried for offence punishable u/s 302 or in alternative u/s 304-B. Charge not established and accused acquitted from these charges, even though accused were convicted u/s 306. Appeal before High Court. High Court held that in these circumstances accused can be convicted u/s 306 provided the ingredients of the offence are established by the evidence and the questions regarding incriminating circumstances with regard to that offence have been put to the accused u/s 313 of Cr.P.C. seeking his explanation. (Paras 5 & 6)

क. दण्ड संहिता (1860 का 45), धाराएँ 302, 304–बी व 306 – कब अभियुक्त को आरोप के अभाव में धारा 306 के अधीन दोषसिद्ध किया जा सकता है – विधि स्पष्ट की गई।

B. Penal Code (45 of 1860), Section 306 - *Death of the deceased on account of burn - Just before the incident some hot talks were heard therefrom - One witness also heard a noise "Bachao Bachao" - Held - No evidence that for hot talks appellants alone were responsible or they were instigating the deceased for commission of suicide - Doctor has not find any external injury over the dead body of deceased and not mentioned that it was case of suicide - In view of these circumstances and also the fact that no material questions were put to the appellants u/s 313 of Cr.P.C., the conviction of the appellants u/s 306 cannot be sustained - Conviction set-aside - Appeal allowed.* (Para 6)

ख. दण्ड संहिता (1860 का 45), धारा 306 – मृतक की मृत्यु जलने के कारण – घटना के कुछ समय पूर्व वहाँ से तेज वार्तालाप सुनाई दिया – एक साक्षी ने "बचाओ–बचाओ" की आवाज भी सुनी – अभिनिर्धारित – कोई साक्ष्य नही कि तेज वार्तालाप के लिए केवल अपीलार्थी जिम्मेदार थे या वे मृतक को आत्महत्या करने के लिए प्रेरित कर रहे थे – चिकित्सक ने मृत शरीर

*Cr.A. No.277/2002 (Gwalior)

पर कोई बाह्य क्षति नही पायी और यह उल्लेख नही किया कि यह आत्महत्या का मामला था – इन परिस्थितियों तथा इस तथ्य को भी देखते हुए कि अपीलार्थियों से द.प्र.सं. की धारा 313 के अन्तर्गत कोई तात्विक प्रश्न नही पूछे गये, धारा 306 के अन्तर्गत अपीलार्थियों की दोषसिद्धि कायम नही रखी जा सकती – दोषसिद्धि अपास्त – अपील मंजूर।"

R.K. Goyal, for the appellants.
Praveen Newaskar, P.P., for the respondent/State.

JUDGMENT

B.M. Gupta, J. :–Feeling aggrieved with the judgment dated 7th June, 2002 rendered by the Additional Sessions Judge, Ganj Basoda, District Vidisha (M.P.) in Sessions Trial No. 34/2002, the appellants have preferred this appeal, whereby the learned Judge while acquitting the appellants from the charge under Section 302 or 302/34 of IPC and under Section 304-B of IPC or 304-B/34 of IPC, has convicted the appellants for the offence punishable under Section 306 of IPC and has imposed 10 years' rigorous imprisonment alongwith fine of Rs. 100/- on each of the appellants,

2. The facts, in brief, are that on 8th November, 2001, Ramkunwar Bai died due to burn injuries. The appellants are mother-in-law and husband respectively. After receiving the information, marg No.71/01 was registered. Upon inquiry thereafter Crime No.725/2001 was registered against the appellants for the offence punishable under Section 304-B/34 of IPC at police station Ganj Basoda, District Vidisha. After completing the investigation, challan was filed. The case was committed and appellants have been tried for the aforesaid offence alongwith offence of murder under Section 302 of IPC or 302/34 of IPC but they have been acquitted by the learned Judge from the aforementioned charges and without there being a charge under Section 306 of IPC, they have been convicted and sentenced as aforesaid.

3. The only contention of Shri R.K.Goyal, learned advocate appearing on behalf of the appellants is that admittedly there was no charge under Section 306 of IPC and the appellants were not tried for the same. The offence under Section 306 of IPC is not minor offence of the offences of murder or dowry death which is punishable under Sections 302 and 304-B of IPC. Hence, even with the aid of the provision mentioned in Section 222 of Cr.P.C., they could not be convicted for the aforementioned offence. He has further submitted that not only no charge was framed for that offence, but no questions or incriminating circumstances in that regard, were put to the appellants during their examination under Section 313 of Cr.P.C. In that way, the appellants have become prejudiced. Hence, they deserve acquittal.

4. Shri Praveen Newaskar, learned Public Prosecutor appearing on behalf of State has frankly admitted that it is true that with regard to this offence, no incriminating circumstances were put to the appellants before the trial Court during

recording of their statements under Section 313 of Cr. P. C. But, at the same time he has submitted that when the charges under Sections 302 and/or 304-B of IPC were framed and the appellants have been tried for the same, they could very well be convicted under Section 306 of IPC, if it is proved. He has also submitted that if the Court comes to the conclusion that the conviction cannot be maintained as there was no charge, the case may be remanded.

5. On perusal of para-41 of the impugned judgment, it appears that the learned Judge has followed the observations of the Apex Court in the case of *Shamnsaheb M. Multtani Vs. State of Karnataka* 2001(1) Supreme 348 and has observed that the Apex Court has considered that if the offence of murder is not proved, then in that case, in absence of charge under Section 304-B of IPC, an accused can be convicted for that offence. On perusal of this judgment, it appears that the Apex Court has observed that when charge under Section 302 of IPC is framed, conviction under Section 304-B of IPC is permissible, provided accused is offered an opportunity to discharge his burden by putting him notice regarding prima facie view of the Court that he is liable to be convicted under Section 304-B of IPC. In that case, the Court further observed that as the accused was not put to notice of that offence, hence, the case was remanded. But here in this case, conviction is not under section 304-B of IPC from the charge under Section 302 of IPC. In the present case, question is different as mentioned herein-above. In the case of *Virendra Kumar Vs. State of U. P.* 2007 AIR SCW 854, it is observed by the Apex Court that when charge under Section 302 of IPC has been framed, conviction under Section 306 of IPC is not improper. Provided circumstances relatable to Section 306 of IPC was clearly put to accused during his examination under Section 313 of Cr. P. C. As admitted on behalf of the State, this aspect is lacking in the present case. In another case of *Harjit Singh Vs. State of Punjab* (2006) 1 SCC 463, it is observed by the Apex Court that the argument that when the charge under Section 304-B of IPC is framed and if the accused cannot be convicted for that offence, he can still be convicted under Section 306 of IPC, cannot be accepted. Such plea cannot be allowed to be raised for the first time before the Court unless charge under Section 306 of IPC is made out from materials on record.

6. Considering the aforementioned observations of the Apex Court in the case of *Harjit Singh* (supra), now it is to be seen whether in the present case, on the basis of evidence available on record, conviction under Section 306 of IPC can be sustained. As further observed by the Apex Court in the same case, before invoking the provisions of Section 306 of IPC, it is necessary to establish that : (I) the deceased committed suicide, and (II) She had been subjected to cruelty within the meaning of Section 498-A of IPC. Only in the event those facts are established, a presumption in terms of Section 113-A of the Evidence Act could be raised. It is observed by the learned Judge in para 16 that prosecution has not proved the fact that the appellants were harassing the deceased regarding demand of dowry. It is

also observed by the learned Judge in para-6 that Lalata Bai (P.W.1) Kadori (P.W.2), Halke Singh (P.W.3), Rajjo Bai (P.W.4) were not present at the time of incident. Hence, they are not material to be considered. Mahesh Dubey (P.W.5) and Rakesh Yadav (P.W.6), who are neighbours, were present at the time of incident. On perusal of the statements, it only appears that just before the incident there was a dispute in the family in between the appellants and the deceased. Some hot talks were heard therefrom but for those hot talks, the appellants alone were responsible or they were instigating the deceased for commission of suicide, it does not appear, because instigation to commit suicide, is also a material aspect required to be proved against the appellants. As stated by Mahesh Dubey (P.W.5) that he heard a noise "bachao bachao", but Dr. K. K. Shrivastava (P.W.7) in para-3 has stated that he did not find any external injury over the dead body of the deceased. This witness opined that the death of the deceased was on account of burn. He has not mentioned that it was a case of suicide. Even in the evidence it does not appear that there was any instigation on the part of the appellants to the deceased for committing suicide. In view of these circumstances and also the fact that no material questions were put to the appellants under Section 313 of Cr.P.C., the conviction of the appellants can not be sustained.

7. Considering the nature of the evidence on record, remanding the case is not required as submitted by Shri Praveen Newaskar on behalf of State.

8. In view of all, as observed herein-above, the appeal is allowed. The conviction of the appellants is set aside.

Appeal allowed.

I.L.R. [2009] M. P., 504
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
22 August, 2008*

PHOOL SINGH TEKAM ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 345(1) & 349 - *Defiance to the order of the court - Appellant was posted as Police Inspector and was directed to produce the case dairy on 18.02.1994 at 11:00 a.m., but he presented the case diary in the court at 1:30 p.m. and explained his difficulty in not reaching in time - Court punished him on 22.02.1994 with fine of Rs.25/- along with sentence till the rising of the court - Held - When any offence as enumerated in Section 345(1) of Code, is committed in the view or presence of any civil, criminal or revenue court, action as provided*

*Cr.A. No.456/1994 (Jabalpur)

u/s 345(1) of Code may be taken before rising of the court on the same day - Order set-aside - Appeal allowed. (Para 7)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 345(1) व 349 – न्यायालय के आदेश की अवज्ञा – अपीलार्थी पुलिस निरीक्षक के रूप में पदस्थ और उसे निदेशित किया गया कि केस डायरी दिनांक 18.02.1994 को प्रातः 11:00 बजे पेश करे, किन्तु उसने केस डायरी दोपहर 1:30 बजे न्यायालय में प्रस्तुत की और समय से न पहुँचने में अपनी कठिनाई स्पष्ट की – न्यायालय ने उसे 25/– रुपये जुर्माने और न्यायालय उठने तक के दण्डादेश से 22.02.1994 को दण्डित किया – अभिनिर्धारित – जब कोई अपराध जैसा कि संहिता की धारा 345(1) में वर्णित है किसी सिविल, दाण्डिक या राजस्व न्यायालय की दृष्टिगोचरता या उपस्थिति में किया जाता है, तब संहिता की धारा 345(1) के अन्तर्गत उपबंधित कार्यवाही उसी दिन न्यायालय के उठने के पूर्व की जा सकती है – आदेश अपास्त – अपील मंजूर।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 349 - ***Imprisonment or committal of person refusing to answer or produce document - Although appellant failed to produce the case diary on 18.02.1994 at the time of call by the court for which a reasonable explanation was also submitted by him, but failure to produce the case diary at a scheduled time fixed by the court cannot be equated with refusal to produce the case diary - It was not a case of refusal to produce the case diary or a document before the court so as to warrant imposition of penalty or action u/s 349 of Code - Order set-aside - Appeal allowed.*** (Para 9)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 349 – उत्तर देने या दस्तावेज पेश करने से इन्कार करने वाले व्यक्ति को कारावास या उसकी सुपुर्दगी – यद्यपि अपीलार्थी केस डायरी तारीख 18.02.1994 को न्यायालय द्वारा बुलाये गये समय पर पेश करने में असफल रहा जिसके लिए उसके द्वारा युक्तियुक्त स्पष्टीकरण भी पेश किया गया, किन्तु न्यायालय द्वारा नियत समय पर केस डायरी पेश करने में असफल रहना केस डायरी पेश करने से इंकारी के बराबर नही माना जा सकता – यह केस डायरी या कोई दस्तावेज न्यायालय के समक्ष पेश करने से इंकारी का मामला नही था ताकि संहिता की धारा 349 के अन्तर्गत शास्ति का अधिरोपण या कार्यवाही की माँग की जा सके – आदेश अपास्त – अपील मंजूर।

Rajesh Tiwari, for the appellant.

Vikas Singh, Panel Lawyer, for the respondent/State.

J U D G M E N T

Smt. Sushma Shrivastava, J. :– Appellant has preferred this appeal under Section 351 of Cr.P.C. against the order dated 22.2.94 passed by First Additional Sessions Judge, Satna in M.J.C. No. 3/94 sentencing him to pay a fine of Rs.25/-, in default simple imprisonment for three days, under Section 349 read with Section 345 of Cr.P.C.

2. The facts of the case lie in a narrow compass. Appellant Phool Singh was posted as Inspector, City Kotwali, Satna at the relevant time. He was directed to

produce the case diary of Crime No.60/94 of P.S. Kotwali, Satna, before First Additional Sessions Judge, Satna on 18.2.94 at 11.00 A.M. for hearing of Bail petition no. 138/94. Appellant, however, could not produce the case diary before the court of First Additional Sessions Judge on 18.2.94 when the case was called for hearing at 1 O'clock. The show cause notice was, therefore, issued to him as to why action should not be taken against him under Section 349 of Cr.P.C. for not producing the case diary before the court on 18.2.94 as directed. Appellant submitted a written reply to the show cause notice on 22.2.94 explaining that due to mechanical failure of jeep and puncture of its tyre appellant could not appear before the court to produce the case diary at the scheduled time. The court below, however, was not satisfied with the explanation and reply submitted by the appellant and found that the appellant deliberately disobeyed the order of the court and failed to produce the case diary on 18.2.94, therefore, vide order dated 22.2.94 passed in Criminal M.J.C. No.3/94 registered against the appellant, sentenced him to pay a fine of Rs.25/-, in default simple imprisonment for three days, under Section 349 read with Section 345 of Cr.P.C., which has been challenged in this appeal.

3. Learned counsel for the appellant submitted that the impugned order sentencing the appellant to pay a fine of Rs.25/- under Section 349 read with Section 345 of Cr.P.C. was bad in law in as much as the appellant never refused to produce the case diary before the Court. Appellant appeared before the Court on 18.2.94 at 1.30 P.M. and also explained that he could not appear at the time of call, but he was served with a notice under Section 349 of Cr.P.C. It was also submitted that appellant had produced the case diary again on 22.2.94 whereupon concerned bail application was disposed of and there was no refusal as such on his part so as to initiate an action under Section 349 of Cr.P.C. Learned counsel for the appellant further submitted that even under Section 345 of Cr.P.C. the court has jurisdiction to proceed and award punishment before rising of the Court on the same day and no action could be taken against the appellant under Section 345 of Cr.P.C. on 22.2.94 in respect of the so-called non-compliance of the order on 18.2.94.

4. Learned counsel for the respondent, however, supported the impugned order.

5. Now, Section 345(1) of Cr.P.C. provides as under:-

> "When any such offence as is described in Section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and **may at any time before the rising of the Court on the same day**, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence

the offender to fine not exceeding two hundred rupees, and in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid."

6. Section 349 of Cr.P.C. reads thus:-

"If any witness or person called to produce a document or thing before Criminal Court refuses to answer such question as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not, after a reasonable opportunity has been given to him so to do, offer any reasonable excuse for such refusal such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment or by warrant under the hand of the Presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal he may be dealt with according to the provisions of section 345 or Section 346."

7. It is apparent from the aforesaid provisions that under Section 345(1) of Cr.P.C. when any offence, as enumerated in this section, is committed in the view or presence of any Civil, Criminal or revenue Court, action as provided under Section 345(1) of Cr.P.C. may be taken before rising of the court on the same day

8. Similarly, Section 349 of Cr.P.C. postulates that if any witness or person called to produce a document or thing before a Criminal Court refuses to answer such question as are put to him or to produce any document or thing in his possession or power, which the Court requires him to produce, and does not, after reasonable opportunity has been given to him so to do, offer any reasonable excuse for such refusal such Court may, for reasons to be recorded in writing, sentence him for a term not exceeding seven days, unless in the meantime such person consents to be examined or to produce the document or thing.

9. However, in the instant case, as the record reveals, appellant never refused to produce the case diary. Although appellant failed to produce the case diary on 18.2.94 at the time of call by the Court, for which a reasonable explanation was also submitted by him, but failure to produce the case diary at a scheduled time fixed by the Court cannot be equated with refusal to produce the case diary. The certified copies of various order-sheets placed on record also indicate that appellant produced the case diary before the Court on 22.2.94, whereupon the concerned bail petition was also disposed of, and the order impugned was also passed on 22.2.94. Thus, it was not a case of refusal to produce the case diary or a document before the Court so as to warrant imposition of penalty or action under Section 349 of Cr.P.C.

10. Similarly, looking to letter and spirit of Section 345 (1) of Cr.P.C., the impugned order passed on 22.2.94 sentencing the appellant to pay a fine of Rs.25/- for his failure to produce the case diary on 18.2.94 was also not warranted by law. Recourse to provision of Section 345 (1) of Cr.P.C. could not be taken on a subsequent date in respect of non compliance of the order on 18.2.94.

11. In the wake of aforesaid, the impugned order cannot be sustained in law and facts and deserves to be set aside.

12. Appeal is, therefore, allowed. The impugned order dated 22.2.94 passed against the appellant under Section 349 read with Section 345 of Cr.P.C. is hereby set aside.

Appeal stands accordingly disposed of.

Appeal disposed of.

I.L.R. [2009] M. P., 508
APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
25 August, 2008*

GOPYA @ GOPAL ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 32(1), Penal Code, 1860, Section 302 - *Trial court convicted the appellant for committing murder of deceased by setting him ablaze - Dying declaration made by the deceased accusing the appellant for commission of offence recorded by the Doctor - Conviction challenged on the ground that identity of appellant was not established from dying declaration - Held - It is undisputed that appellant was known as Gopya - No suggestion or whisper in cross-examination of prosecution witnesses that Gopya was some other person than appellant or any other person in the village known as Gopya - Appellant was familiar and well known to deceased - No room for doubt about the identity of the appellant and his complicity in the crime - Appeal dismissed.*

(Paras 12 & 13)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32(1), दण्ड संहिता, 1860, धारा 302 – विचारण न्यायालय ने अपीलार्थी को मृतक को आग लगाकर हत्या करने के लिए दोषसिद्ध किया – चिकित्सक द्वारा लेखबद्ध मृत्युकालिक कथन में, मृतक ने अपीलार्थी पर अपराध कारित करने का अभियोग लगाया – दोषसिद्धि को इस आधार पर चुनौती दी गई कि अपीलार्थी की पहचान मृत्युकालिक कथन से साबित नही होती – अभिनिर्धारित – यह अविवादित है कि अपीलार्थी गोप्या के नाम से जाना जाता था – अभियोजन साक्षियों की प्रतिपरीक्षा में कोई सुझाव या संकेत नही कि

*Cr.A. No.212/1999 (Jabalpur)

गोप्या अपीलार्थी से भिन्न व्यक्ति था या गाँव में कोई अन्य व्यक्ति गोप्या के नाम से जाना जाता था – अपीलार्थी मृतक से सुपरिचित था और उसे अच्छी तरह जानता था – अपीलार्थी की पहचान और अपराध में उसकी सहपराधिता के बारे में शंका की कोई गुंजायश नही – अपील खारिज।

B. Evidence Act (1 of 1872), Section 32(1) - *Dying declaration - Nothing on record to indicate that the dying declaration was the result of any tutoring or prompting or product of imagination - No reason to doubt or suspect the dying declaration - Conviction based on the dying declaration affirmed by High Court.* (Para 14)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32(1) – मृत्युकालिक कथन – यह उपदर्शित करने के लिए अभिलेख पर कुछ नही कि मृत्युकालिक कथन किसी सिखाने–पढ़ाने या रटाने या कल्पना–शक्ति की उपज का परिणाम था – मृत्युकालिक कथन पर शंका और संदेह करने के लिए कोई कारण नही – मृत्युकालिक कथन पर आधारित दोषसिद्धि की उच्च न्यायालय द्वारा पुष्टि की गई।

C. Evidence Act (1 of 1872), Section 32(1) - *Dying declaration - There is no requirement of law that dying declaration should necessarily be recorded by the Magistrate or it should be in a particular form.* (Para 15)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 32(1) – मृत्युकालिक कथन – विधि की कोई अपेक्षा नही है कि मृत्युकालिक कथन आवश्यक रूप से मजिस्ट्रेट द्वारा अभिलिखित किया जाना चाहिए या यह किसी विशिष्ट प्रारूप में होना चाहिए।

D. Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence of relative witness - Ordinarily, the near relative of the deceased would not falsely named the accused and save the real culprit/assailant of the deceased.* (Para 13)

घ. साक्ष्य अधिनियम (1872 का 1), धारा 3 – रिश्तेदार साक्षी के साक्ष्य का अधिमूल्यन – साधारणतया मृतक का नजदीकी रिश्तेदार अभियुक्त को मिथ्या रूप से नामित नही करेगा और मृतक के हमलावर/वास्तविक दोषी को नही बचायेगा।

Case referred :

AIR 2008 SC 316.

Sharad Verma, for the appellant.

S.K. Rai, G.A., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by SMT. SUSHMA SHRIVASTAVA, J.:–Appellant has preferred this appeal challenging his conviction and order of sentence passed by Additional Sessions Judge, Burhanpur in S.T. No. 202/96, decided on 24.12.98.

2. Appellant has been convicted under Section 302 of IPC and sentenced to imprisonment for life by the impugned judgment.

3. According to prosecution, deceased Bharat (hereinafter referred to as 'deceased') used to live with his father and sister at Kala Bagh, Burhanpur. His mother had illicit relations with the appellant and had started living with him. On 27.6.96 at about 5.30 P.M., appellant Gopya @ Gopal entered into the house of the deceased, uttered filthy abuses, quarrelled with him, poured kerosene oil over him, set him ablaze and fled away. Deceased Bharat was rushed to the Govt. Hospital Burhanpur. On receipt of telephonic information from the Hospital, after preliminary enquiry an offence was registered against the appellant at Police Station Ganpati Naka and was investigated. The dying declaration of the deceased was also recorded. Deceased Bharat, however, succumbed to his burn injuries on 28.6.96 at 5.30 A.M. The intimation of his death was sent to the Police, whereupon merg intimation was recorded and merg inquest report was prepared. The dead body of deceased Bharat was sent for postmortem examination. During investigation kerosene oil container and half burnt clothes of the deceased were seized from the spot. Spot map was drawn. After due investigation, appellant was prosecuted under Section 452, 302, 342 of IPC.

4. Appellant abjured the guilt and pleaded false implication.

5. After trial and upon appreciation of the evidence adduced in the case, learned Additional Sessions Judge acquitted the appellant of the charge under Section 452 of IPC, but found him guilty under Section 302 of IPC for committing murder of Bharat, convicted and sentenced him as aforesaid by the impugned judgment. Hence, this appeal.

6. We have heard the learned counsel for the parties and perused the evidence on record.

7. It was no longer disputed that deceased Bharat died of burn injuries. It is also reflected from the testimony of Dr. Ramesh Somani (P.W-4) that on 27.6.96 deceased Bharat aged about 15 years was brought to Nehru Hospital, Burhanpur with burn injuries over his head, face, neck, both upper arms and left thigh with 55-60% burns and the smell of kerosene was also present over his body. Dr. Pramod Kumar Chaturvedi (P.W-3), who conducted the autopsy on the dead body of deceased Bharat on 28.6.96, also found antemortem superficial and deep burns over his face, neck, chest, both upper limbs including shoulders and other parts of the body. In the opinion of Dr. Pramod Kumar Chaturvedi (P.W-3), the cause of death of deceased Bharat was shock due to extensive burns. The detailed postmortem report (Ex.P-6) of the deceased Bharat is also placed on record.

8. Learned counsel for the appellant, however, submitted that the trial court gravely erred in convicting the appellant by placing implicit reliance on the dying declaration of the deceased recorded by Dr. Ramesh Somani (P.W-4) and the evidence of other partisan witnesses and failed to consider that the identity of the appellant was not established from the dying declaration.

9. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant and submitted that the guilt of the appellant was fully established from the written dying declaration of the deceased as well as the oral dying declaration made by him to the witnesses.

10. The dying declaration of the deceased was recorded by Dr. Ramesh Somani (P.W-4) on 27.6.96. Dr. Ramesh Somani (P.W-4) categorically deposed in his evidence that upon receiving requisition from Police Station Ganpati Naka, he recorded the dying declaration of injured Bharat, son of Bitthal on 27.6.96 at 11.15 P.M. and after recording his statement (Ex.P-9) he had obtained the thumb impression of the deceased and also affixed his own signatures. He also endorsed certification on the dying declaration (Ex.P-9) that the declarant was fully conscious and in a fit state to give the statement. The dying declaration (Ex.P-9) also contains the certification made by Dr. Ramesh Somani (P.W-4) both at the beginning and the foot of the dying declaration (Ex.P-9) that the declarant was in a fit condition to give the statement and remained fully conscious during his statement.

11. There are no reasons to disbelieve the evidence of Dr. Ramesh Somani (P.W.-4) that he recorded the dying declaration (Ex.P-9) of the deceased on being satisfied as to his fitness to give the statement. The evidence of Dr. Ramesh Somani (P.W-4) also indicates that declarant Bharat had not met any of his relatives at the time of recording of his dying declaration.

12. The dying declaration (Ex.P-9) clearly and unequivocally indicated that it was the appellant, who had poured kerosene oil over the deceased and set him ablaze. Learned counsel for the appellant submitted that the identity of the appellant was not established from the dying declaration (Ex.P-9), as his father's name was not mentioned. However, there was no such suggestion or whisper in the cross-examination of any of the prosecution witnesses that the offender named in the dying declaration was some other person than the appellant or there was any other person in the village known as Gopya. It was also not disputed that alias name of the appellant was Gopya and appellant was also known as Gopya.

13. Besides, there is evidence of oral dying declaration of the deceased made to his father Bitthal (P.W-11), brother Shivaji (P.W-14) and sister Kokila (P.W-13) that appellant Gopal had burnt him. These witnesses clearly deposed in their evidence that the deceased had told them that appellant Gopal had burnt him. There are no reasons to disbelieve their version. Ordinarily the near relative of the deceased would not falsely name the appellant and save the real culprit/assailant of the deceased. It also transpires from their evidence on record that Gopal was familiar and well well-known to them and the mother of the deceased also started living with the appellant which had resulted into strained and inimical relations between the appellant and the deceased and his family. Thus, there remains no room for doubt about the identity of the appellant in the dying declaration (Ex.P-9) and his complicity in the crime.

14. There is nothing on record to indicate that the dying declaration (Ex.P-9) was the result of any tutoring or prompting or product of imagination. There are no reasons to doubt or suspect that dying declaration (Ex.P-9) is not a true or voluntary statement made by the deceased.

15. The dying declaration (Ex.P-9) made by the deceased cannot be rejected on the ground, as submitted, that it was not recorded by Magistrate. There is no requirement of law that dying declaration should necessarily be recorded by the Magistrate or it should be in a particular form. The Apex Court in the case of *Balbir Singh & Another Vs. State of Punjab* reported in AIR 2006 Supreme Court page 3221 has observed as under:-

> "The law does not provide that a dying declaration should be made in any prescribed manner or in the form of question and answers. Only because a dying declaration was not recorded by a Magistrate, the same by itself, in our view, may not be a ground to disbelieve the entire prosecution case."

16. However, in the instant case, the dying declaration (Ex.P-9) was recorded in question answer form and it clearly and unequivocally indicated that appellant Gopya, resident of Sindhipura poured kerosene oil over deceased Bharat and set him ablaze. Needless to emphasize, as also reiterated by the Apex Court in the case of *Dashrath @ Champa & Ors. Vs. State of Madhya Pradesh* reported in AIR 2008 Supreme Court page 316 that the dying declaration, if it is true and voluntary can form the basis of conviction without any further corroboration. More so, in the present case, besides the written dying declaration of the deceased, there is also the cogent and credible evidence of the oral dying declaration made by the deceased to his father Bitthal (P.W-11), brother Shivaji (P.W-14) and sister Kokila (P.W-13) to the effect that it was the appellant, who had burnt him.

17. In the wake of aforesaid, we are of the considered opinion that the trial court did not err in relying upon the written dying declaration (Ex.P-9) of the deceased as well as his oral dying declaration made to his father Bitthal (P.W-11), brother Shivaji (P.W-14) and sister Kokila (P.W-13) and rightly held the appellant guilty for intentionally causing the death of Bharat by pouring kerosene oil over him and setting him ablaze.

18. Thus, the conviction of the appellant, as recorded by the trial court under Section 302 of IPC and life sentence awarded to him do not warrant any interference in appeal.

19. Appeal, therefore, fails and is dismissed. The conviction of the appellant and sentence passed on him under Section 302 of IPC are upheld.

Appeal dismissed.

VINOD Vs. STATE OF M.P.

I.L.R. [2009] M. P., 513

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar

2 September, 2008*

VINOD ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. **Penal Code (45 of 1860), Sections 375 & 90** - *Trial court held that appellant obtained consent on false promise and it was not a free consent of prosecutrix and was obtained on misconception of fact - Held - Prosecutrix aged 20 years, has nowhere stated that appellant made a proposal of marriage before her or gave assurance for marriage because of which she allowed to him sexual intercourse with her - Prosecutrix has nowhere stated that appellant committed bad act forcibly or against her cosent or will - Finding of trial court is not based on proper appreciation of evidence - Conviction and sentence set-aside - Appeal allowed.* (Paras 7 & 8)

क. दण्ड संहिता (1860 का 45), धाराएँ 375 व 90 – विचारण न्यायालय ने अभिनिर्धारित किया कि अपीलार्थी ने मिथ्या वचन पर सम्मति अभिप्राप्त की और यह अभियोक्त्री की स्वतंत्र सम्मति नही थी और तथ्य के भ्रम पर अभिप्राप्त की थी – अभिनिर्धारित – 20 वर्ष उम्र की अभियोक्त्री ने कहीं भी कथित नही किया कि अपीलार्थी ने उसके समक्ष विवाह का प्रस्ताव रखा या विवाह का आश्वासन दिया जिसके कारण उसने उसे संभोग की अनुमति दी – अभियोक्त्री ने कहीं भी कथित नही किया कि अपीलार्थी ने बलपूर्वक या उसकी सम्मति या इच्छा के विरुद्ध बुरा कृत्य किया – विचारण न्यायालय का निष्कर्ष साक्ष्य के उचित अधिमूल्यन पर आधारित नही – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर।

B. **Penal Code (45 of 1860), Section 376** - ***Duty of prosecutor and court*** - *Prosecutrix stated that appellant took her to different places and committed bad act with her - It was the duty of the prosecutor as well as the court to clarify from the prosecutrix whether there was any penetration of male organ into her - Held - There is absolutely no evidence on record about commission of sexual intercourse - Offence u/s 376 not made out - Conviction and sentence set-aside - Appeal allowed.* (Para 9)

ख. दण्ड संहिता (1860 का 45), धारा 376 – अभियोजक और न्यायालय का कर्तव्य – अभियोक्त्री ने कथन किया कि अपीलार्थी उसे विभिन्न स्थानों पर ले गया और उसके साथ बुरा कृत्य किया – अभियोजक और न्यायालय का यह कर्तव्य था कि अभियोक्त्री से स्पष्ट कराते कि क्या पुरुष जननांग का कोई प्रवेशन हुआ – अभिनिर्धारित – अभिलेख पर संभोग किये जाने के बारे में कोई निश्चित साक्ष्य नही – धारा 376 के अन्तर्गत अपराध नही बनता – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर।

C. **Penal Code (45 of 1860), Section 366** - ***Kidnapping, abducting***

*Cr.A. No.584/2008 (Indore)

or inducing woman to compel her marriage - Evidence showing that 20 years old prosecutrix took four pair of clothes, jewellery and money and left her house voluntarily - She resided with accused for 10 days - No evidence that at the very inception accused made false promise to marry with intention to seduce to prosecutrix to sexual intercourse - Offence u/s 366 not made out - Conviction and sentence set-aside - Appeal allowed. (Paras 7)

ग. दण्ड संहिता (1860 का 45), धारा 366 – किसी स्त्री को विवाह करने के लिए विवश करने के लिए उसे व्यपहृत, अपहृत या उत्प्रेरित करना – साक्ष्य दर्शित करती है कि 20 वर्ष की अभियोक्त्री ने चार जोड़ी कपड़े, जेवर और रुपये लिए और स्वेच्छया अपना घर छोड़ा – वह अभियुक्त के साथ 10 दिन तक रही – कोई साक्ष्य नही कि प्रारम्भ से ही अभियुक्त ने विवाह करने का झूठा वचन इस आशय से दिया कि अभियोक्त्री को संभोग करने के लिए विलुब्ध करे – धारा 366 के अन्तर्गत अपराध नही बनता – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर।

Cases referred :

(2003) 4 SCC 46, (2005) 1 SCC 88.

Nilesh Sahu, for the appellant.

Mamta Shandhiyal, Panel Lawyer, for the respondent/State.

J U D G M E N T (ORAL)

S.L. Kochar, J. :–The appellant has preferred this appeal against the judgment dated 09.04.2008 of the learned Addl. Sessions Judge, Garoth, district Mandsaur (M.P.) in S.T. No. 73/2007, whereby the appellant has been convicted under Section 376 and 366 of the Indian Penal Code and sentenced for RI of seven years with fine of Rs.2,000/- and RI for five years with fine of Rs. 2,000/- respectively. In default of payment of fine he shall undergo six months RI on each count. However the substantive jail sentences were directed to run concurrently.

2. Briefly stated the prosecution case as unfolded before the Trial Court is that on 18.04.2007 in the noon at 2:00 P.M., prosecutrix, aged about 16 years, was asked by acquitted co-accused Sunita that appellant will marry with her and took her to bus stand, Garoth. Prosecutrix boarded the bus and travelled up to Bhanpura. Prosecutrix was told by Sunita that appellant will met her on Bhanpura bus stand and she may go with him. Sunita paid the travelling charges to the conductor. Appellant met the prosecutrix on bus stand, Bhanpura and took her in a bus to Neemuch. They stayed in a lodge in Neemuch, where name of the prosecutrix was disclosed as Rekha. Prosecutrix was kept in the lodge up to 22.04.2007 and appellant had sexual intercourse with her. On 23.04.2007, appellant went from Neemuch to Udaypur, where they stayed at the house of sister of appellant, there also they had sexual intercourse. Appellant left the prosecutrix at the house of his sister in Udaypur and came back on 24.04.2007 to Garoth. Appellant again reached at Udaypur on 14.05.2007 and told the prosecutrix that her parents had lodged the report, thereafter she was taken to village Nimbaheda at the house of

his aunt Gangabai. Prosecutrix was left there and appellant came to Garoth and returned back with the mother of Sunita named Gayatribai on 15.05.2007. Gayatribai told the prosecutrix not to give any statement against their family. On 16.05.2007, Gayatribai and appellant reached at Mandsaur, where Gayatribai and the prosecutrix alighted from the bus in Mandsaur and appellant reached at Garoth. Appellant threatened the prosecutrix for not to give statement in Police against him. Parents of the prosecutrix had lodged the missing report in P.S. Garoth on 20.04.2007. Prosecutrix appeared before the police Garoth on 17.05.2007, where her recovery Panchnama was prepared and crime no. 173/2007 was registered against appellant and acquitted co-accused Sunita. Prosecutrix was medically examined by PW.1 Dr. Smt. Pramila Nahar, her MLC report is Ex.P/1. Appellant was arrested and also got medically examined by Dr. Kanhaiyalal Rathor (PW7), his MLC report is Ex.P/6.

3. On completion of investigation, charge sheet was filed against accused persons for commission of offence under Sections 376(1), 366 and 363 of the Indian Penal Code.

4. Accused persons denied the charges, therefore, put to trial. Learned Trial Court while acquitting co-accused Sunita, convicted the appellant as described herein-above.

5. Having heard the learned counsel for the parties and after perusing the entire record carefully, this Court is of the view that conviction and sentence of the appellant for the above mentioned offences are not sustainable.

6. Learned Trial Court has given specific finding, in paragraph 11 and 12, that prosecutrix was about 20 years of age on the date of incident and prosecution has failed to establish beyond reasonable doubt that prosecutrix was below 18 years of age. Learned Trial Court acquitted the appellant from the charge under Section 363 of the I.P.C.

7. Prosecutrix (PW-8) has been married after incident with one Shabbir in the month of June 2007, before recording of her statement on 20.12.2007. She has stated this fact in paragraph-5 of her deposition. According to the prosecutrix, on the date of her going from her house; she was alone in her house, at that moment in the noon at 2:00 P.M., Sunita came to her house and took her to bus stand. Sunita got her boarded the bus for going to Bhanpura and told her that appellant will met her at Bhanpura. Prosecutrix alone travelled from Garoth to Bhanpura in a bus and alighted from the bus at Bhanpura bus stand, where appellant met her. Sunita told the prosecutrix that appellant will marry with her. Prosecutrix, in her whole statement, has nowhere stated that appellant made a proposal of marriage before her or gave assurance for marriage because of which she allowed him to have sexual intercourse with her. According to prosecutrix, appellant took her from Bhanpura to Neemuch and they stayed in a lodge in Neemuch; where appellant had bad act with her. She has nowhere stated that the appellant committed

bad act forcibly or against her consent or will. Further say of the prosecutrix is that after two days she was taken from Neemuch to Udaypur and they stayed at the house of sister of appellant for twenty days, there also appellant committed bad act with her. Again prosecutrix was taken from Udaypur to Nimbaheda at the hosue of aunt (Mausi) of the appellant, there they stayed for a day and thereafter went to Mandsaur; where appellant told her that he was telling lie and he would not marry with her. He also threatened her not to give statement against him and left her on the bus stand, from where she boarded the bus and reached at Garoth and went to Police Station. In cross-examination paragraph-6, she has admitted that Sunita was their neighbour but she was not having talk with her mother since 8 to 10 years and they were not having visiting terms. She further stated that prior to date of incident, she was not knowing the appellant and had not talked with him. If this is correct, then appellant had not extended any promise to prosecutrix to leave her parents' house for marriage with him. In paragraph-7, she has deposed that she left her village having four pair clothes, two pair of "Paijeb" and Rs. 2,00/-, and at that time her mother was not in the house and she did not leave any message with their neighbour. In her whole statement she has nowhere deposed that appellant committed sexual intercourse with her or there was penetration of his male organ into her. She has stated only this much that bad act was committed with her. There is no evidence that bad act was committed by the appellant against her consent or will or after promise for marriage. What acquitted co-accused Sunita had told to the prosecutrix, can not be relied upon against the appellant. The prosecutrix remained in the company of the appellant and moved from one village to another village and from one town to another town for about one month and did not complain anything against the appellant to anybody. She has nowhere stated that she submitted herself because of promise made by the appellant to marry with her and she was having full belief and faith upon the appellant that he will marry with her. It has also come in the statement of the prosecutrix that in Udaypur she was residing in the house of sister of the appellant and appellant had gone out of Udaypur for 8-10 days. According to the prosecution case, when prosecutrix left her house without leaving any information for her parents and without obtaining their consent, the matter was reported to police on 20.04.2007 and parents of the prosecutrix started search of the prosecutrix and when prosecutrix and appellant came to know about this fact; appellant left the prosecutrix for going to Garoth from Mandsaur. It is not a case that after knowing lodging of report by the parents of the prosecutrix, prosecutrix asked the appellant to marry and appellant refused to marry with her. The learned Trial Court has held without any cogent and reliable evidence on record, in paragraph-21 of the impugned Judgment, that appellant obtained consent on false promise and it was not a free consent of the prosecutrix, therefore, appellant would be liable for commission of offence of rape and consent was obtained on misconception of fact.

8. In case of *Uday V/s State of Karnataka* [2003 (4) Supreme Court Cases],

the Supreme Court has considered in detail the definition of rape under Section 375 along with provision of Section 90 of the I.P.C. regarding consent given under fear or misconception of fact and held that "for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, there is no straitjacket formula and each case has to be decided, considering the evidence and surrounding circumstances of that case". Supreme Court has taken into account the following facts for acquittal of the appellant :-

> (i) the prosecutrix (aged 19 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage with the appellant was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix.

9. All the four above mentioned factual aspects are available in the instant case. There is no evidence on record that at the very inception appellant made a false promise with intention to seduce the prosecutrix to sexual intercourse. As a matter of fact, there is absolutely no evidence on record about commission of sexual intercourse and it was the duty of the Prosecutor as well as the Court to clarify from the prosecutrix, whether there was any penetration of male organ into her. It is pertinent to mention here that the Supreme Court has issued directions for recording of the statement of the prosecutrix in camera so that she may give statement freely without any hesitation and shyness.

10. The statement of prosecutrix regarding her going without knowing the appellant, only on simple saying by acquitted co-accused Sunita, from Garoth to Bhanpura in a bus is not believable, specially when she took four pairs of clothes, "Paijeb" and money with her, shows that she left the house with pre-plan. Prosecutrix has nowhere stated that when she was left at bus stand Mandsaur, she requested the appellant not to leave her and marry with her. She and her parents have also nowhere stated that they tried their level best to marry the prosecutrix with the appellant but he refused. In the light of these facts and circumstances, it can not be said that prosecutrix gave her consent on the basis of the promise of marriage made by the appellant and thereafter he refrained from fulfilling his promise, though prosecutrix tried her level best to marry with the appellant. It appears that after knowing the fact of lodging of report by the parents of the prosecutrix, they were in fear and appellant left her to go to her parents' house and she had also gone voluntarily without any complaint against the appellant and after reaching in the company of her parents she started levelling allegations against the appellant.

11. In the case of *Deelip Singh alias Dilip Kumar V/s State of Bihar* [(2005) 1 Supreme Court Cases], while considering the provision of Section 375 and Section 90 of the I.P.C., whether consent was given under fear of injury or misconception of fact, the Supreme Court has held as under :-

> The question is: What is the meaning and content of the expression "without her consent" in Section 375 secondly, IPC? Whether the consent given by a woman believing the man's promise to marry her is a consent which excludes the offence of rape?
>
> Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorises these two expressions under separate heads in order to be as comprehensive as possible. Further, it is not easy to find a dividing line between submission and consent except in the situation contemplated by clause fifthly of Section 375 IPC. Yet, the evidence has to be carefully scanned. The ultimate conclusion depends on the facts of each case.

12. Applying the aforementioned ratio decidendi in both the Supreme Court pronouncements in case of *Uday V/s State of Karnataka and Deelip V/s State of Bihar* (supra), this Court reached to ultimate conclusion that the findings of the Trial Court is not based on proper appreciation of evidence available on record and interpretation of Section 375 as well as Section 90 of the I.P.C. regarding misconception of fact, has not been correctly done, therefore, this appeal is allowed, conviction and sentence of the appellant are hereby set aside. The learned Trial Court is directed to release the appellant forthwith, if not wanted in any other criminal case.

Office is directed to send a copy of this Judgment along with the record to the Trial Court for immediate compliance.

Appeal allowed.

I.L.R. [2009] M. P., 518
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
4 September, 2008*

IBRAHIM & ors. ... Appellants
Vs.
UNION OF INDIA (CBN) ... Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Section 391 - *Accused filed application for adducing additional evidence by calling the seized opium in court and its fresh weightment at appellate stage - Held -*

*Cr.A. No.780/2008 (Indore)

Accused did not avail several opportunities, which were available to them during trial - Application filed after 20 years from seizure of opium with the expectation to get some sort of favour by weightment - Accused failed to explain the delay - Application is filed deliberately with mala fide intention - Provision cannot be invoked - Application dismissed. (Paras 7, 8 & 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 391 – अभियुक्तों ने अभिग्रहीत अफीम न्यायालय में आहूत करके और उसकी नवीन तौल कर अतिरिक्त साक्ष्य पेश करने के लिए आवेदन अपीलीय प्रक्रम पर पेश किया – अभिनिर्धारित – अभियुक्तों ने विचारण के दौरान उन्हें उपलब्ध विभिन्न अवसरों का लाभ नही उठाया – आवेदन अफीम के अभिग्रहण के 20 वर्ष बाद इस प्रत्याशा में पेश किया कि तौल कराने से किसी प्रकार की कोई सहायता मिल सकती है – अभियुक्त विलम्ब स्पष्ट करने में असफल – आवेदन जानबूझकर असद्भावी आशय से पेश – उपबंध का अवलंब नही लिया जा सकता – आवेदन खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 391 - *The provision cannot be invoked lightly - Power should be used sparingly - It is mandatory for the appellate court to record reasons while allowing the application filed u/s 391 of the Code.* (Para 8)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 391 – उपबंध का अवलंब हल्के रूप में नही लिया जा सकता – शक्ति का प्रयोग कभी–कभार करना चाहिए – अपीलीय न्यायालय के लिए यह आज्ञापक है कि संहिता की धारा 391 का आवेदन स्वीकार करते समय कारण अभिलिखित करे।

Cases referred :

AIR 1965 SC 1987, 1986(2) Crimes 537, 1994(2) Crimes 137, (1998) 9 SCC 23, (2001) 4 SCC 759, 2005 SCC (Cri) 276, 1999 CrLJ 3071, 1999 CrLJ 1297.

C.R. Joshi, for the appellants.

Manoj Soni with *Jain*, for the respondent/State.

ORDER (ORAL)

S.L. KOCHAR, J.:– Heard on the application filed on behalf of the appellants under section 391 of the Code of Criminal Procedure (For short the 'Code') for adducing additional evidence in the way of calling the seized opium in Court and its fresh weighment.

2. Learned counsel for the appellants has submitted that the appellants had filed an application for weighment of the seized opium in Court on 24.06.08 an the same was dismissed by the trial Court on the same day without assigning any cogent reason merely on the ground of delay in filing the application before the trial Court. Learned counsel has submitted that the delay cannot be a ground even for invoking the provision under section 391 of the Cr.P.C. For adducing additional evidence at the appellate stage. He has placed reliance on the judgments rendered by the learned Single Judge of the High Court of M.P. Bench at Gwalior

in the case of *Hindustan Food Products V/s State of M.P.*(2008 Cri.L.R (MP) 599) and in the case of *State of Gujrat V/s Mohanlal and others* (AIR 1987 SC 1321). Learned counsel for the respondent filed reply and opposed the application. He submitted that allowing the application of the appellants would be nothing but an abuse of process of Court of law. The appellants/accused had several opportunities during the course of trial when the case was fixed for adducing defence evidence from 23.09.06 till the date of arguments which were heard on 13.06.08.

3. Having heard learned counsel for the parties and after perusing the entire record, this Court is of the considered view that no case is made out for allowing the application of the appellants made under section 391 of the Code for issuing the direction for weighment of the seized narcotic drugs (opium) at this stage.

4. The property was seized on 07.07.88 and also weighed. Thereafter, accused persons were produced before the Court immediately after expiry of 24 hours. They could have filed an application for fresh weighment of the seized narcotic drug (opium). The complaint was thereafter filed on 04.02.89. On that date also, the accused persons could have filed the application, but they did not do so. The appellants may say that it was not an appropriate stage for filing the application and they were waiting for entering into defence, but this argument is not sustainable, because they were not prohibited from filing the application showing doubt over the weighment got done by the respondent during the course of investigation. During the course of recording of the statements of prosecution witnesses, the entire seized property was produced in Court on 04.01.06. On this date, the property was given article marks. On this date also, an application could have been filed for weighment of the seized narcotic drug. On 06.12.2006, the accused persons/ appellants submitted an application before the trial Court for taking fresh sample and sending the same to the Central Revenue Control Laboratory (for short CRCL). This application was allowed on 02.03.2007 and the property was again produced in Court on 20.06.07 for taking sample. Out of the seized quantity, samples were taken before the Court and were sent for analysis to CRCL. On this date, the appellants could have filed the application and prayer could have been made for weighment of the seized narcotic drug (opium), especially when the trial was going on for adducing defence evidence, after recording of the accused statement on 28.09.06 as per provision under section 313 of the Code. The application could have been filed on 30.06.07 when the property was ;produced and sample was taken for sending it to the CRCL, but no such application was filed and final arguments were heard on 13.06.08 and case was fixed for pronouncement of judgment on 26.06.08 after hearing arguments of both the parties. Before pronouncement of judgment on 24.06.08, application was filed under section 243 read with section 311 of the Code. Provision of section 243 thereof could not be attracted, because it was not the defence stage and the defence case was closed as well as final arguments were also heard.

5. Learned trial Court, after hearing both the parties on this application, dismissed the same by passing a detailed order assigning reason that the application was filed at a belated stage just to delay the proceedings with an ulterior motive especially when the appellants/accused persons had got ample opportunity to adduce defence evidence after 28.09.06 till the date of final arguments i.e. 13.06.08, i.e. almost one year and nine months.

6. On 24.06.08, after dismissal of the application, no prayer was made before the trial Court either orally or by filing an application for grant of time to challenge the order in revision or under section 482 of the Code before the High Court. The case was fixed for pronouncement of judgment on 26.06.08, but the same could not be pronounced, because the appellants were absent on that day as they were on bail and the case was again adjourned for pronouncement of judgment on 30.06.08. On this date also, the appellants remained absent and the case was adjourned for judgment on 02.07.08. On this date, judgment was pronounced . After dismissal of the application dated 24.06.08 and pronouncement of judgment on 02.07.08, the appellants were having opportunity to challenge the said order, but they have not availed that opportunity and filed this application under section 391 of the Code with this Criminal Appeal.

7. Learned counsel for the appellants has failed to assign any reason as to why the application or prayer could not be made during the course of trial especially when there was no prohibition or any hindrance . In the application before this Court, no reason has been assigned. Learned counsel has argued that only on the ground of delay, application filed before this Court, should not be dismissed. In the considered opinion of this Court, question of delay is always weighed in judicial proceedings and when it appears that same was done deliberately with mala-fide intention, it becomes very alarming. In the instant case, it is as clear as day light that having several opportunities, the appellants did not avail and delay has been caused with an expectation to get some sort of favour by weighment from 1988 to 2008 i.e. after more than 20 years.

8. The provision of section 391 of the Code for recording of additional evidence at an appellate stage, is not meant for such kind of situation. It is mandatory for this Court to record reasons for allowing this application which is not available and also not pointed out by the learned counsel for the appellants. The provision of section 391 of the Code cannot be invoked lightly and the power under this section is to be used sparingly, otherwise in any situation in every case, parties can file application and same has to be allowed.

9. Learned counsel for the appellant has placed reliance on the judgment in the case of *Hindustan Food Products* (supra). In this case, the appellant filed an application under section 391 of the Code for taking on record the nomination order nominating 'A' for the purposes of prosecution as per provision under section 17(2) of the Food Adulteration Act, 1954. The applicant stated specifically

in the application that nomination order was communicated to and acknowledged by Local (Health) Authority and was also given by the applicant to his Advocate to use the same for necessary purpose, but the Advocate concerned did not file the appropriate application during the course of trial. Learned Single Judge, after taking into consideration several Supreme Court and High Court pronouncements wherein it has been held that the intention of law can never be to prosecute and punish such a person who as per provision of law, ought not to be prosecuted and punished, allowed the application and also observed that it was the duty of the prosecution to collect the correct information from the office of the firm, as to who was the correct person to prosecute, whereas in the case at hand, there is no statutory provision in favour of the accused, or document, which may affect the complete complexion of the prosecution case.

10. In the case of *Mohanlal* (supra), report of Mint Master was already on record, but it had not been formally proved. The report completely supporting the case of the prosecution. The application was filed for taking that report on record and same was allowed. The Supreme Court has stated that the lacuna is a technical one and the entire prosecution case, should not suffer the fate of dismissal. In this judgment, the Supreme Court has not issued any mandate that in all cases, application under section 391 of the Code for recording of additional evidence, must be allowed and should not be dismissed on the ground of delay.

11. In the instant case, the question of delay is crucial one, because it has been caused with a vexatious purpose and recording of additional evidence is not a technical formality. There is already weighment evidence adduced by the prosecution available in the case and appellant got ample opportunities to challenge the same. See: *Rajeswar Prasad Misra V/s State of West Bengal* [AIR 1965 SC 1887], *Parachuri Radhakrishna Murthy V/s State SHO Bandar Taluk Police Station* ([1986(2) Crimes 537], *Mansukmhlal Vithaldas V/s State of Gujrat* 1994(2) Crimes 137], *Nishar Ahmed Fajmohmed Kaji V/s State of Gujrat* (1998)9 SCC 23), *Rambhau V/s State of Maharashtra* [(2001)4 SCC 759], *Satyajeet Banerjee V/s State of W.B and others* [2005 SCC (Cri) 276], *Gavedei V/s Subhashdei* [1999 Cri.LJ 3071] and *Thomas V/s State of Kerala* [1999 Cri.L.J. 1297].

12. In view of the foregoing legal and factual discussion, this Court does not find any substance in this application. Therefore, the same is hereby dismissed.

Appeal dismissed.

I.L.R. [2009] M. P., 523
APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mr. Justice U.C. Maheshwari
23 September, 2008*

HARI SINGH & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. **Penal Code (45 of 1860), Sections 149, 302** - *Unlawful assembly - Common object - More than 35 accused persons went to the house of deceased with common object of rioting and setting ablaze the house and other property of deceased - 8 accused persons went inside the house and dragged the deceased out and caused injuries - 8 accused persons who had caused injuries to deceased had formed smaller unlawful assembly on the spot - Not safe to convict all the accused persons for sharing common object for commission of murder - Appeal partly allowed.* (Para 10)

क. दण्ड संहिता (1860 का 45), धाराएँ 149, 302 – विधिविरुद्ध जमाव – सामान्य उद्देश्य – 35 से अधिक अभियुक्त बलवा करने और मृतक के घर और अन्य सम्पत्ति को आग लगाने के सामान्य उद्देश्य से मृतक के घर गये – 8 अभियुक्त घर के अन्दर गये और मृतक को घर से बाहर घसीटा और क्षतियाँ कारित कीं – 8 अभियुक्त व्यक्ति, जिन्होंने मृतक को क्षतियाँ कारित कीं, ने घटना स्थल पर लघु विधिविरुद्ध जमाव का आकार लिया था – सभी अभियुक्त व्यक्तियों को हत्या करने के सामान्य उद्देश्य में भाग के लिए दोषसिद्ध करना सुरक्षित नही – अपील अंशतः मंजूर।

B. **Penal Code (45 of 1860), Sections 302, 149** - *Murder - 34 persons named in Dehati Nalishi - Other 18 persons who were not named in Dehati Nalishi, but named in the statements of the witnesses - Except two witnesses, statements of all other witnesses recorded belatedly after 2½ to 3 months - Presence of 18 persons cannot be said to be established beyond periphery of reasonable doubt - 18 persons acquitted - Appeal partly allowed.* (Para 14)

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 149 – हत्या – देहाती नालिशी में 34 व्यक्ति नामित – अन्य 18 व्यक्ति, जो देहाती नालिशी में नामित नही थे, किन्तु साक्षियों के कथनों में नामित – दो साक्षियों के कथनों के सिवाय अन्य सभी साक्षियों के कथन 2½ से 3 माह बाद विलम्ब से अभिलिखित – 18 व्यक्तियों की उपस्थिति युक्तियुक्त शंका की परिधि से परे साबित हुई नही कही जा सकती – 18 व्यक्ति दोषमुक्त – अपील अंशतः मंजूर।

Cases referred :

AIR 1960 SC 725, AIR 1975 SC 654, AIR 1976 SC 2566, 2004 AIR SCW 1329, (2005) 3 SCC 114.

*Cr.A. No.2296/1999 (Jabalpur)

HARI SINGH Vs. STATE OF M.P.

S.C. Datt with *Imtiyaaz Hussain, Jagat Sher Singh, Y.K. Gupta, Pradeep Bhargav, Manikant Sharma, A. Usmani, Manish Mishra, Sanjay Sanyal* and *G.P. Patel,* for the appellants.

T.K. Modh, Dy.A.G, for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeals have been preferred by the accused/appellants aggrieved by judgment dated 6.8.1999 passed in S.T.No. 97/1997 by Sessions Judge, Raisen. The accused/appellants have been convicted for commission of offence under sections 148, 435 r/w 149, 436 r/w 149, 302 r/w 149 and 323 r/w 149 of IPC. Accused Om Prakash has also been convicted for commission of offence under section 394 IPC. The accused/appellants have been sentenced under section 148 IPC to undergo R.I. for six months, under section 435 r/w 149 IPC to undergo 3 years R.I. & fine of Rs. 500/-, in default to undergo further six months imprisonment, under section 436 r/w 149 IPC to undergo R.I. for 3 years and fine of Rs. 500, in default to undergo further six months imprisonment, under section 302 r/w 149 IPC to undergo life imprisonment and fine of Rs. 2000/-, in default to undergo further two years imprisonment and under section 323 r/w 149 IPC to undergo R.I. for six months. Accused Om prakash has also been sentenced under section 394 IPC to undergo 5 years RI and fine of Rs. 1000/-, in default, to undergo further 6 months imprisonment. Sentences have been ordered to run concurrently. The amount of fine of Rs. 1,54,000/- on being deposited, has been ordered to be paid to Komal Bai, widow of deceased Ramgopal under section 357 Cr.P.C.

2. The prosecution case in short is that on 23.1.1997 at about 8 PM all the accused persons formed unlawful assembly and in furtherance of their common object, came to the house of Ramgopal (deceased). Accused Prem Singh Lodhi, Baijnath Lodhi, Baliram Lodhi, Ramlal Rathore, Netram Rathore, Prakash Rathore, Daulatram Lodhi, Pratap Singh Lodhi, Kamal Singh Lodhi, Shivcharan Lodhi, Harisingh Lodhi, Omprakash Lodhi, Maharaj Singh Lodhi, Kalyan Singh Lodhi, Kamal Singh, Daulat Singh, Halke Singh, Lakhan Lodhi, Hemraj Lodhi, Gourelal Lodhi, Shaitan Singh Lodhi, Bahadur Singh Lodhi, Sardar Singh Lodhi, Jagannath Lodhi, Hansraj s/o Jagannath Lodhi, Devi Lodhi, Ganesh Lodhi, Buddha Lodhi, Somat Singh Lodhi, Phool Singh Lodhi, Narayan Singh Lodhi, Hari Singh s/o Dharamchand Lodhi, Arjun Singh Lodhi, Gappu @ Ghansunder Lodhi, Aashram ka Baba Rambabu Lodhi along with 3-4 others persons came to the house, as mentioned by Badam Singh in Dehati Nalishi lodged at 21.40 pm on 23.1.1997. Initially stones were pelted, thereafter house, motorcycle and tractor were set ablaze. Some of the accused persons entered the house and inflicted injuries on the person of deceased Ram Gopal with sword, katarna, trident, lathi etc. Several other persons Badam Singh, Rekha Bai, Mousam Bai, Sajjan Bai, Nadani Bai,

Teeran Singh, Bharat Singh, Rajesh, Ashok, Sheshram, Mahesh, Kala Bai and Mohan Singh sustained injuries. There was enmity between the parties as to the Patelship of village. Father of complainant Mohan Singh was Patel of village and few days before Shaitan Singh Maina committed rape on the daughter of Badam Singh Lodhi, which were also the cause of the incident. Deceased Ramgopal was initially examined by Dr. Kailash Bihari Bajpai (PW-4) at District Hospital, Raisen at 10.15 PM on 23.1.1997. He has submitted report (Ex.P-23). Autopsy was performed by Dr. S.S.Kushwaha (PW-5) who has submitted report (Ex.P-28). Investigation was done. Accused persons were arrested, seizure was made. After due investigation accused were charge sheeted.

3. The accused abjured the guilt and contended that they have been falsely implicated in the case due to enmity. They have been convicted and sentenced by the Trial Court. Dissatisfied thereby the appeals have been preferred by the accused/appellants.

4. Learned counsel appearing for the accused/appellants have submitted that investigation in the instant case has not been done fairly. Dehati Nalishi (Ex.P-1) cannot be said to be admissible in evidence as investigation was already set in by the time it was lodged. SDO(P),Rewa along with the police force of P.S. Raisen had reached to the spot first in time and then intimation was given at P.S. Sanchi. Thereafter, Anar Singh Yadav (PW-19) had reached to the spot along with the police force. They have further submitted that by the time police of Saanchi reached to the spot, the injured were already sent to the District Hospital Raisen along with ASI Bhadouriya of P.S. Raisen. It was necessary to examine the SDO(P) and the author of medical requisitions of 12 injured persons. There is interpolation as to the timing on which the Dehati Nalishi was in fact recorded, thus the case has been concocted. Though the date on which incident took place was Poornima Day, counsel have submitted relying upon the Modi's Jurisprudence 21st Edition Pg.68 that it would not be possible even in the full Moon night to identify the assailants from the distance of more than 15 meters i.e. 17 yards. Statements of most of the witnesses were recorded after 2-1/2 to 3 months after the date of incident. Compliance of section 157 Cr.P.C. of sending forthwith the intimation to the Magistrate has not been proved. Counsel have also submitted that the witnesses have attributed the injury caused to deceased Ramgopal to 8 of the accused persons namely Shivcharan s/o Ganpat, Hari Singh, Lakhan, Rambabu, Jagannath, Om Prakash, Maharaj Singh and Halke. The aforesaid 8 accused persons entered the house and injuries on the person of deceased have been attributed to them. In the facts and circumstances the other co accused persons could not be said to be responsible for causing death of deceased Ramgopal. Thus the conviction of rest of the accused persons with the aid of section 149 in the facts and circumstances of the instant case deserves to be set aside. They have also submitted that accused persons are entitled to acquittal as the ocular evidence furnished by the witnesses is clearly an after thought.

5. Shri T.K. Modh, learned Dy. Advocate General appearing for State has submitted that it is a case where unlawful assembly was formed by the accused persons. They came armed with deadly weapons and it was not possible to mention in the circumstances name of all the accused persons in the first information report. First SDO(P) along with the police force had reached to the spot but except sending the injured to the District Hospital, Raisen, no further action was taken in the matter of investigation. In the meantime when house was still burning, police of Sanchi also reached to the spot and thereafter Dehati Nalishi (P-1) was recorded on the basis of which at 10.40 PM on 23.1.1997 itself the first information report was reduced in writing at the concerned police station Sanchi. Information was received on wireless by Sanchi Police Station at 8.50 PM of which entry was made in general diary (P-209) and at 8.55 pm Anar Singh Yadav (PW-19) started towards the spot and reached within 15 minutes and had recorded Dehati Nalishi (P-1), thus Dehati Nalishi cannot be said to be inadmissible in the instant case. It was not necessary to examine the SDO(P) as he has not done any part of investigation except reaching the spot earlier in point of time, police force of both the police stations joined together in extinguishing the fire of the house. Though aforesaid 8 accused persons have entered the house as per version of the eye witnesses and inflicted injury on the person of deceased but common object of larger unlawful assembly was to commit murder of Ramgopal as such accused have been rightly convicted for commission of murder of Ramgopal with the aid of section 149 IPC. No case is made out so as to make interference in the appeals.

6. Four of the accused persons have died. Accused Tularam died during the course of trial. Rest three accused persons namely Prakash, Rambabu and Rammoo Lal have died during the pendency of appeal. Thus the appeal stands abated with respect to the aforesaid four accused persons.

7. In the instant case prosecution has examined as many a 14 eye witnesses. In all 21 witnesses have been examined. The police statements of two of the eye witnesses namely Badam Singh (PW-1) and Bharat Singh (PW-6) were recorded on 24th January, 1997 and police statements of remaining witnesses were recorded on 14.2.1997, 3.4.1997, 4.4.1997, 9.4.1997 and 23.4.1997. Though there was some delay in recording statements of the aforesaid witnesses except two however in the instant case presence of injured witnesses on the spot cannot be doubted, similarly the persons who were residing in the house are quite natural witnesses. The fact also remains that immediately the statement of two witnesses whose presence on the spot cannot be doubted namely Badam Singh (PW-1) and Bharat Singh (PW-6) have been recorded without delay.

8. When we consider the statement of Badam Singh (PW-1) he has stated that initially all the accused persons surrounded the house and started pelting stones. Thereafter other accused persons namely Phool Singh, Hari Singh, Suresh, Shivcharan, Kamal and Hemraj poured kerosene oil and set the house ablaze.

Thereafter Phool Singh and Suresh set ablaze the motor cycle and tractor, due to that the loss of property worth several lakhs was caused. Hari Singh and Om Prakash had inflicted injury on his person. He has further stated that accused Shivcharan inflicted injury on the person of Ramgopal with Sang, Rambabu with trident, Hari Singh with Katarna, Maharaj with Katarna, Jagannath with sword, Halke with sword, Om Prakash with Barchhi and Lakhan inflicted injury with the help of axe. The aforesaid 8 accused persons were responsible for inflicting injury on the person of deceased Ramgopal. He has not attributed the injury caused to deceased Ramgopal to any other accused persons. Narayan Singh (PW-2) in Para -2 of his deposition has also attributed the injury caused to the deceased to aforesaid 8 accused persons. Remaining witnesses Pohap Singh Yadav (PW-3), Ravishankar Meena (PW-7), Mohan Singh (PW-8), Komal Bai (PW-9), Mahesh (PW-10),Nandani Bai (PW-16), Teeran Singh (PW-17) and Ashok (PW-18) have also attributed the injuries caused on the person of deceased Ramgopal to the aforesaid 8 accused persons. Thus with respect to the aforesaid 8 accused persons there is no iota of doubt that they were responsible for causing death of deceased Ramgopal by the weapons which they were carrying. With respect to other accused persons there is no difficulty in acquitting them for commission of offence under section 302 read with section 149 IPC as they did not share aforesaid common object of smaller unlawful assembly which had been formed on the spot itself to cause death of Ramgopal.

9. Coming to the question whether the common object of other accused persons was also to cause death of Ramgopal. When we consider statement of complainant Badam Singh (PW-1), it appears that only some of the accused persons namely Phool Singh, Hari Singh, Suresh, Shivcharan, Kamal and Hemraj were responsible for setting ablaze the house. Thereafter, Phool Singh and Suresh set ablaze the motor cycle and tractor, however, it also appears that accused persons whose presence is established on the spot, formed an unlawful assembly and their common object was to cause damage to the property and to commit mischief by firing with intent to destroy the house and property as contemplated under section 435 IPC. Only six or seven person have entered the house, took-out Ramgopal from the house and deceased Ramgopal was beaten upon by the aforesaid 8 accused persons. It appears that common object of larger unlawful assembly of 34 accused persons was to commit offence under sections 148, 435 r/w 149, 436 r/w 149 and 323 r/w 149 of IPC and not to commit murder Ramgopal as apparent from the discussion of evidence made hereinafter.

Badam Singh (PW-1) has not stated that any other co-accused except 8 who participated in beating had exhorted so as to kill Ramgopal. Narain Singh (PW-2) has also stated that only few of the accused persons were involved in setting ablaze the house and beating the injured persons including Ramgopal. He has attributed the injuries on the person of Ramgopal to the aforesaid 8 accused persons.

It is further apparent from Para-5 of his deposition that those very accused persons who had beaten the deceased Ramgopal had taken him out in the outer courtyard. Pohap Singh Yadav (PW-3) in Para 4 of his deposition has stated that only aforesaid 8 accused persons had entered the house, caught hold of deceased Ramgopal and took him to the outer courtyard, they were also responsible to inflict injury to Ramgopal. Presence of other co accused persons in the courtyard has not been stated by the witness. Bharat Singh (PW-6) has stated that all the accused persons surrounded the house, started pelting stones and some of the accused persons set ablaze the house, motor cycle and tractor. He has named accused Prakash, Gappu, Arjun, Devi, Kamal, Kalyan, Bahadur and Badami for setting ablaze the motorcycle and tractor, thereafter some of the accused persons entered the house, they have looted Rs. 5000/- thereafter inflicted injuries on the person of Ramgopal and injured persons. The aforesaid 8 accused persons have inflicted injury on the person of Ramgopal by the weapons which they were carrying, this he has stated in Para-5 of his deposition. Ravishankar (PW-7) has stated that accused initially pelted the stones, aforesaid 8 accused persons have inflicted the injury on the person of deceased Ramgopal, Rambabu had inflicted injury on Mohan Singh, Gorelal and Baijnath poured kerosene oil on Komal Bai, Nadani Bai was also beaten upon by them beside Badam Singh, Ashok and Bharat etc. Om Prakash took away the gold ring of deceased Ramgopal as apparent from Paras 2,3 and 4 of deposition of the witness. He has also stated that police reached to the spot when rioting was going on. Mohan Singh (PW-8) was also in the house. He has stated that Phool Singh, Goura, Shivharan, Shivharan s/o Beeralal, Suresh, Hari Singh s/o Hukumchand, Buddu, Ganesh, Badami, Kamal and Hemram set ablaze the tractor and motorcycle, thereafter some of the accused persons entered the house. Rambabu, Shivcharan s/o Ganpat, Om Prakash, Hari Singh, Lakhan Shivcharan, Halke, Lakhan and Maharaj Singh caught hold of Ramgopal, brought him in the outer courtyard and when he tried to save Ramgopal, Rambabu inflicted injury on him with trident and the aforesaid 8 accused persons inflicted injuries on the deceased. There was enmity between the parties on the appointment of Patel. The injured were sent by the Dy.SP to the hospital. Komal Bai (PW-9) is also an injured witness. She has stated that accused came to the spot, pelted the stones and set ablaze the house, motorcycle and tractor. She has specifically named Kamal, Devi, Pappu, Sardar, Hemraj as the persons responsible for setting ablaze the house. Ramgopal was beaten by aforesaid 8 accused persons. They entered the house, took him out and thereafter had beaten the deceased. She has also stated about the weapons carried by aforesaid 8 accused persons and injuries inflicted. She has not stated that any other accused persons entered the house except named by her. Mahesh (PW-10) is also an injured witness. He has stated that Gorelal, Halke, Phool Singh set ablaze the house and aforesaid 8 accused persons inflicted injury on the person of deceased Ramgopal. Narmada Prasad (PW-14) has not supported the prosecution case. He was declared hostile. Nadani

Bai (PW-16) wife of Mohan Singh has stated that 40-50 persons came to the house, set ablaze the house, tractor, motorcycle and the house. She was unable to name the accused persons who were responsible to set ablaze the motor cycle and tractor, however, she has specifically named the aforesaid 8 accused persons who had inflicted injury on the person of deceased Ramgopal in Para-2 of her deposition. Teeran Singh (PW-17) has stated that 50-60 persons came, out of them he has named certain accused persons, however, he has attributed the injuries to aforesaid 8 accused persons with respect to deceased Ramgopal. Injuries were also inflicted by other accused persons on the person of injured witness. Ashok (PW-18) has also landed support by-and-large to the aforesaid witness. He has attributed the injuries caused to the deceased to aforesaid 8 accused persons.

10. On assessing of the aforesaid evidence, it becomes clear that 8 accused persons caught hold of deceased Ramgopal, they formed a smaller unlawful assembly on the spot, their common object was to kill Ramgopal and in furtherance of their common object they had inflicted injuries on the person of the deceased Ramgopal as stated by the aforesaid witnesses. Most of them are injured. Injuries have been proved by Dr. Kailash Bihari Bajpai (PW-4) on the person of Bharat Singh (PW-6), Teeran Singh (PW-17), Sajjan Bai, Nadani Bai (PW-16), Komal Bai (PW-9), Rekha, Mousam Bai, Mohan Singh (PW-8), Badam Singh (PW-1), Rajesh, Kala Bai . He has proved that simple injuries have been caused to the aforesaid witnesses. Dr. Bajpai has also medically examined deceased Ramgopal and has found as many as 8 injuries, injury Nos. 1,3,5,6 and 7 were caused by sharp edged weapon and injury Nos. 2 and 4 were caused by hard and blunt object. He has also proved injury report (P-23) of Ramgopal, post mortem was performed by Dr. S.S.Kushwaha (PW-5), thus version of the aforesaid eye witnesses including the injured witnesses is medically corroborated with respect to the role played by the aforesaid 8 accused persons who have been specifically named by the witnesses to be responsible for causing death of Ramgopal. It could not be said in the facts of the instant case all the accused person had shared the common object to commit murder of Ramgopal though some of them may have inflicted simple injuries on injured persons. In the instant case it appears large number of persons had gathered, there was party factionalism also. There was dispute on the appointment of Patel and rape was also committed by one of the persons belonging to the community of deceased Ramgopal on the daughter of accused Badam Singh. Thus other accused persons whose presence we have found established beyond periphery of doubt in later part of judgment, they had gathered with the common object of giving lesson, they wanted to find out whereabouts of accused of the rape case and it appears that they shared common object of rioting and further to set ablaze the house and other property, not beyond that. The method and manner in which the narration of incident has been made by the aforesaid witnesses, only 8 accused persons namely Shivcharan s/o Ganpat,

Hari Singh s/o Shivcharan, Lakhan, Rambabu, Jagannath, Om Prakash, Maharaj Singh and Halke formed a smaller unlawful assembly on the spot to further common object to kill Ramgopal. In the facts and circumstances of the case we do not consider it safe to convict the large number of other accused persons for sharing common object for commission of murder of Ramgopal whose presence we have found established on the spot thus we acquit other accused persons for commission of offence under section 302 read with section 149 of IPC except the aforesaid 8 accused persons.

11. Shri S.C.Datt, learned Sr. counsel has relied upon the decision of Apex Court in *Shambhu Nath Singh v. State of Bihar* - AIR 1960 SUPREME COURT 725, in which the Apex Court has observed thus :-

> 6. Section 149 of the Indian Penal Code is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. If an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member who had that knowledge will be guilty of the offence so committed. But "members of an unlawful assembly may have a community of object upto a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of Sec. 149 of the Indian Penal Code may be different on different members of the same unlawful assembly." *Jahiruddin v. Queen Empress,* ILR 22 Cal 306.
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> 7. Therefore a conviction for an offence under Sec. 326 read with Sec. 149 of the Indian Penal Code may be recorded against the members of an unlawful assembly, even if it be established that an offence of murder was committed by a member of that assembly. The offence under Sec. 326 of the Indian Penal Code is in its relation to the offence of murder a minor offence

and the language used in Sec. 149 of the Indian Penal Code does not prevent the court from convicting for that minor offence merely because an aggravated offence is committed. Counsel for the accused however sought to place reliance upon certain authorities in support of his contention. We may briefly deal with those authorities.

The Apex Court has observed that members of an unlawful assembly may have a community of object up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object. Learned Sr. counsel has further relied on the decision of Apex Court in *Santosh v. State of M.P.* - AIR 1975 SUPREME COURT 654, in which the Apex Court has observed thus :-

> 9. In a case such as the one before us, in which there were two factions in a village, one of the oppressors and the other of the oppressed, smarting under the pain of injuries inflicted by their oppressors, the intention of a member of an assembly could be initially quite lawful. His object may not go beyond joining a procession for purposes of protest. We are convinced, on the evidence on record that the participation of the appellant before us went beyond exhibiting a mere intention to protest. It not only embraced knowledge of likelihood of hurt of some kind to members of the party attacked, but it included an attack by the appellant on Baliram, P. W. 1. The nature of that attack was, however, relatively mild. At most, from the concerted action of so many men a member of the unlawful assembly, on the facts and circumstances of the case before us, could be reasonably held to be aware that grievous hurt would result.

Shri Datt Learned Sr. Counsel has also pressed into service decision of Apex Court in *Musakhan v. State of Maharashtra* - AIR 1976 SUPREME COURT 2566, in which the Apex Court has observed that a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus a Court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly

at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages. Such an evidence is wholly lacking in this case where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another. In these circumstances, therefore the accused, who were not present or who did not share the common object of the unlawful assembly at other stages cannot be convicted for the activities of the assembly at those stages. He has also relied upon decision of Apex Court in *Charan Singh and others Vs. State of Uttar Pradesh* - 2004 AIR SCW 1329 in which the Apex Court has observed that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of S. 141. The word 'object' means the purpose or design and, in order to make it 'common, it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in S. 149 have to be strictly construed as equivalent to 'in order to attain the common object.' It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members, of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of S. 149, I.P.C. may be different on different members of the same assembly.

12. We do not find any merit in the submission that provision of Section 157 Cr.P.C. was not complied with. Anar Singh (PW-19) has stated that provision was complied with, intimation was sent to Magistrate. We also do not find merit in the submission that it was not possible to identify the accused persons due to lack of light, it was Poornima day, accused had surrounded the house and also inflicted injuries on the deceased and injured witnesses. It was clearly possible to identify the accused persons.

13. Coming to the question that presence of how many accused persons has been proved beyond reasonable doubt. No doubt about it that large number of

persons had gathered, it may not be possible to mention the name of all of them in the Dehati Nalishi (Ex.P-1) lodged in the instant case. However, reading of first information report makes it clear that in the Dehati Nalishi names of 34 accused persons have been specifically mentioned i.e. 1. Prem Singh 2. Baijnath 3. Baliram 4. Rammoolal, 5. Netram, 6. Prakash, 7. Daulatram, 8. Pratap, 9. Kamal, 10. Shivcharan, 11. Hari Singh, 12. Om Prakash, 13. Maharaj, 14. Kalyan, 15. Kamal, 16. Halke, 17. Lakhan, 18. Hemraj, 19. Gorelal, 20. Shaitan Singh, 21. Bahadur Singh, 22. Sardar Lodhi, 23. Jagannath, 24. Hemraj, 25. Devi Lodhi, 26. Ganesh, 27. Buddu, 28. Somat, 29. Phool Singh, 30. Narayan, 31. Hari Singh s/o Hukumchand (Dharamchand), 32. Arjun, 33. Gappu @ Ghansunder, 34. Ashram ka Baba Rambabu,

14. Other accused persons who were not named in Dehati Nalishi were 1. Vidyanand, 2. Murli Prasad, 3. Naresh Chandra, 4. Ramcharan, 5. Tularam, 6. Bhogiram, 7. Shivcharan s/o Beeralal, 8. Suresh Kumar, 9. Prakash Narayan, 10. Udayram, 11. Laxman Singh 12. Radheshyam @ Meharban Singh, 13. Harcharan, 14. Kailash, 15. Badami Singh, 16. Karan Singh, 17. Madan Lal, 18. Somat.

The names of aforesaid 18 accused persons does not find place in the first version. However at the same time it was mentioned in the Dehati Nalishi that 3-4 persons in addition were present and complainant shall identify them when presented before him, he has not named the remaining 3-4 accused persons whose names were not mentioned in the Dehati Nalishi on the basis of which FIR was reduced in writing. Identification parade with respect to four Babas was held, out of them only 3 could be identified, however, Nayab Tehsildar has not been examined in the instant case. It was necessary to examine Nayab Tehsildar before whom identification parade was held. It also appears that there was possibility of false implication of remaining 18 accused persons as there was enmity due to appointment of Patel as well as there was enmity as rape was committed. In the facts and circumstances of the case except the police statement of two of the witnesses Badam Singh (PW-1) and Bharat Singh (PW-6), the statements of remaining witnesses were recorded belatedly, there was delay in recording the police statements of other witnesses of about 2-1/2 to 3 months. Thus in the facts and circumstances of the case we deem it appropriate to give benefit of doubt to the accused persons whose names were not specifically mentioned in Dehati Nalishi, their presence cannot be said to be established beyond periphery of reasonable doubt, however, with respect to the remaining accused persons, the version mentioned in the FIR on the basis of which FIR was reduced in writing promptly is found to be reliable.

15. Coming to the submission raised by Shri S.C. Datt, learned Sr. counsel that Dehati Nalishi (Ex.P-1) cannot be said to be admissible in the instant case. Investigation was already set in at the time when Dehati Nalishi was lodged. No doubt that initially after reaching the spot by SDO(P) under whose jurisdiction

P.S. Raisen as well as P.S. in question Sanchi fell, except of making the effort of extinguishing the fire as intimation was received by police on telephone on that immediate steps were taken and message at the same time was sent to P.S. at Sanchi. P.S. being nearer and the SDO(P) was first in point of time to reach the spot but at the same time on receiving the wireless information entry was made in general diary P-209 by Anar Singh Yadav (PW-19), that entry has been proved by him. After making entry at 8.50 pm he proceeded towards the spot and spot being 10-15 Kms, he was going on motorcycle, he must have have taken time of about 15-20 mintues to reach the spot. Merely by the fact that in Dehati Nalishi though it was clearly mentioned that it was lodged at 9.30 pm, there was some overwriting in the figure of minutes, there is no overwriting in numerical line, it is not of much consequence that minutes have been amended while reducing the Dehati Nalishi in writing by Anar Singh Yadav (PW-19). As incident has taken place about about 8 pm, immediately police on receiving the information from P.S. Raisen as well as from P.S. Sanchi proceeded towards the spot and thereafter Dehati Nalishi was recorded which was the definite information lodged with respect to the accused persons, it was reduced in writing by Anar Singh Yadav (PW-19). There is nothing on record to indicate that SDO(P) has reduced in writing any other report lodged by anyone else or any report was actually lodged at P.S. Raisen which has been suppressed in the instant case, thus with respect to the accused persons the first information which was lodged which was the definite information which was lodged as per (P-1) and it could not be said to be manufactured document as FIR was also reduced in writing i.e. on 23.1.1997 and statements of two of the eye witnesses Badam Singh (PW-1) and Bharat Singh (PW-6) have been recorded immediately. Sawaliya Singh (PW-11) has stated that entire villagers had vacated the village he had fled away from the village due to party factionalism which prevailed in the village, consequently his statement could be recorded later on. Explanation of I.O. has not been obtained as to the cause of delay in recording the statement. In the facts of the instant case the version of injured witnesses cannot be discarded merely by some delay in recording the statements by police with respect to 8 accused persons who have been found guilty for causing death of Ramgopal under section 302 read with section 149 IPC and with respect to which 33 accused persons including the aforesaid 8 accused persons for comission of offence under section 148, 435 r/w 149, 436 r/w 149, 323 r/w 149 of IPC. It was necessary to seek explanation of IO as laid down by the Apex Court in *State of U.P. Vs. Satish* - 2005 (3) SCC 114. It is not in dispute that at the stage of evidence witnesses have clarified with precision the name of Somat mentioned in Dehati Nalishi as s/o Amar Singh and Hari Singh who had inflicted injury upon the deceased Ramgopal was s/o Shivcharan and Shiv Charan who has inflicted injury on Ramgopal was s/o of Ganpat and Shivcharan who was responsible for riot and has been found guilty for commission of offence

under section 148, 435, 436 and 323 r/w 149 of IPC was son of Beeralal. Somat s/o Tularam is entitled for acquittal and Somat s/o Amar Singh has been found guilty for commission of offence under section 148, 435, 436 and 323 r/w 149 of IPC

16. In view of the aforesaid discussion, out of 8 persons one has died, we uphold the conviction of 7 accused persons namely Shivcharan s/o Ganpat, Hari Singh s/o Shivcharan, Lakhan, Jagannath, Om Prakash, Maharaj Singh and Halke. As Rambabu died during the pendency of this appeal, the appeal stands abated against Rambabu. We uphold the conviction of aforesaid 7 accused persons under section 148 IPC and sentence of R.I. for 6 months. We modify the sentence under section 435 read with section 149, under section 436 r/w section 149 IPC to 2-1/2 years and raise the fine of Rs. 500/- to Rs. 2,500/-, in default of payment of fine they have to undergo further 9 months imprisonment under each section. Under section 302 read with section 149 IPC we uphold the sentence of life imprisonment and fine of Rs. 2000/-. Under section 323 read with section 149 we uphold sentence of R.I. for 6 months. The conviction of Om Prakash under section 394 and sentence imposed thereunder is also affirmed.

17. Out of remaining accused persons namely Prem Singh, Baijnath, Baliram, Netram, Daulatram, Pratap, Kamal, Kalyan, Kamal, Hemraj, Gorelal, Shaitan Singh, Bahadur Singh, Sardar Lodhi, Hemraj, Devi Lodhi, Ganesh, Buddu, Somat s/o Amar Singh, Phool Singh, Narayan, Hari Singh s/o Hukumchand (Dharamchand), Arjun, Gappu @ Ghansunder. We acquit remaining accused persons for commission of offence under section 302 read with section 149 IPC for committing murder of Ramgopal. We uphold their conviction under section 148 IPC and sentence of R.I. for 6 months. We modify the sentence under section 435 r/w section 149, under section 436 r/w section 149 IPC to 2-1/2 years and raise the fine of Rs. 500/- to Rs. 2,500/-, in default of payment of fine they have to undergo further 9 months imprisonment under each section. Under section 323 r/w section 149 of IPC, we uphold sentence of R.I. for 6 months.

18. We acquit the remaining 18 accused persons namely Vidyanand, Murli Prasad, Naresh Chandra, Ramcharan, Devi, Gulab, Shivcharan s/o Beeralal, Suresh Kumar, Prakash Narayan, Udayram, Laxman Singh, Radheshyam @ Meharban Singh, Harcharan, Kailash, Badami Singh, Karan Singh, ,Madan Lal, Somat s/o Tularam, Arjun s/o Narayan, Hemraj @ Hansraj, giving them benefit of doubt from commission of offence under the aforesaid sections.

19. The fine which may have been paid to the wife of the deceased shall not be recovered from her and remaining amount of fine on being deposited shall also be paid and if refund is necessitated due to acquittal, remaining fine to be deposited by convicted accused persons.

20. As stated by counsel on behalf of State that appellants are on bail and in view of the aforesaid judgment 33 accused persons whose conviction have been

upheld they are directed to surrender before the trial court for facing the remaining jail sentence on or before 15.11.2008. Subject to surrender their bail bonds are cancelled. Bail bonds of remaining 18 acquitted persons are hereby discharged.

21. Resultantly, the appeals are hereby allowed in part to the aforesaid extent.

Appeal partly allowed.

I.L.R. [2009] M. P., 536
APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mrs. Justice Sushma Shrivastava
4 November, 2008*

CHHABILAL & anr. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Section 302 - *Murder - Witness - Witnesses stating in court evidence that gun shot was fired from a close range of 3-4 ft - Postmortem report shows that gun shot was fired from close range - However, spot map shows that firing took place from a distance of about 20 ft away - Firing from close range does not find place either in FIR or in 161 statements of eye witnesses - Presence of eye witnesses at the time of occurrence highly doubtful.* (Para 27)

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – साक्षी – साक्षियों ने न्यायालयीन साक्ष्य में कथन किया कि गोली 3–4 फीट की दूरी से मारी गई – शव परीक्षण रिपोर्ट दर्शाती है कि गोली निकट से मारी गई – तथापि घटना स्थल का नक्शा दर्शाता है कि गोली लगभग 20 फीट की दूरी से मारी गई – एफआईआर या प्रत्यक्षदर्शी साक्षियों के धारा 161 के कथनों में निकट से गोली चलाना नही पाया गया – घटना के समय साक्षियों की उपस्थिति अत्यंत शंकास्पद।

B. Penal Code (45 of 1860), Section 302 - *Murder - Witnesses - Source of light - Spot map shows that witnesses had witnessed the incident from a distance of 55 ft - Incident took place in between 7:20 to 9:00 p.m. - No source of light as electric power was cut - Held - It cannot be said that eye witnesses had identified the assailants.* (Paras 28 & 29)

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – साक्षी – प्रकाश का स्त्रोत – घटना स्थल का नक्शा दर्शित करता है कि साक्षियों ने घटना 55 फीट की दूरी से देखी थी – घटना सायं 7:20 से 9:00 बजे के बीच हुई – प्रकाश का कोई स्त्रोत नही था क्योंकि बिजली नही थी – अभिनिर्धारित – यह नही कहा जा सकता कि प्रत्यक्षदर्शी साक्षियों ने हमलावरों को पहचान लिया था।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 154 & 157 - *According to prosecution case, FIR was lodged at 23:30 hours - Author of FIR states that FIR was written by him at 10-11 in morning - FIR was not*

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*Cr.A. No.1108/1999 (Jabalpur)

only ante timed but also antedated - Non-sending of FIR to Magistrate amounts to a serious lapse on the part of I.O. going to the root of matter and hammers the authenticity of prosecution's case - Appeal allowed. (Para 30)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 154 व 157 – अभियोजन के अनुसार एफआईआर 23:30 बजे दर्ज करायी गई – एफआईआर लिखने वाले ने कथन किया कि उसके द्वारा एफआईआर प्रातः 10–11 बजे के बीच लिखी गई – एफआईआर न केवल पूर्व समय की बल्कि पूर्वदिनांकित भी थी – एफआईआर मजिस्ट्रेट को न भेजना अनुसंधान अधिकारी की गम्भीर चूक है जो मामले की जड़ तक जाती है और अभियोजन के मामले की प्रमाणिकता पर प्रहार करती है – अपील मंजूर।

Cases referred :

1999 AIR SCW 380, AIR 1991 SC 4, (2003) 4 SCC 128, AIR 1983 SC 680, AIR 2004 SC 3305, AIR 2006 SC 887, 2006 SAR (Cri) 228 (SC), AIR 1991 SC 1853, (2006) 10 SCC 542, AIR 2005 SC 2110, AIR 1979 SC 1042, AIR 1975 SC 1727, AIR 1978 SC 59.

Jagat Sher Singh, for the appellants.
T.K. Modh, Dy.A.G., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by **A.K. Shrivastava, J.**:–Feeling aggrieved by the judgment of conviction and order of sentence dated 347/1999 passed by learned 2nd Additional Sessions Judge, Tikamgarh in Sessions Trial No.37/95 convicting the appellant Mathura under Section 302, IPC and appellant- Chhabilal under Sections 302/34, IPC and sentencing them to suffer Imprisonment of life and fine of Rs.500/- each, in default of payment of fine, further S.I. of one month each, the appellants have preferred this appeal under Section 374 (2) of Code of Criminal Procedure, 1973.

2. In brief, the case of prosecution is that on 27/7/1994 at 8.00 p.m. in village Tanga, Narendra Singh (hereinafter referred to as 'the deceased') was talking to Harimohan. His brother Devendra and witness Daulat arrived there from village Bamhori Abada to call the labours. All these persons were standing there, at that juncture, one tractor came. The deceased raised his hands to stop this tractor but it did not stop, as a result of which deceased started chasing it. In between appellant came from a Gali (lane) and asked who is there, on this, deceased told that I am Narendra, thereafter it is said that appellant- Chhabilal asked Mathura Maro, as a result of which Mathura fired the gun on the deceased, and eventually deceased fell down. Thereafter appellants fled from the place of occurrence. The persons present there namely Devendra, Harimohan and Daulat uplifted the deceased and brought him inside the house of Harimohan, however, deceased could not survive and he died.

3. It is the further case of prosecution that last election was fought by deceased and appellant Chhabilal and there was election rivalry between them. The brother

of the deceased Devendra got the report written by one Sanjay and the said written report was given in the police station on the date of incident in the night.

4. On lodging of the first information report, criminal law was triggered and set in motion. A case was registered against the appellant. The investigating agency arrived at the spot; prepared Panchayatnama of the dead body and sent it for post-mortem; prepared the spot map; recorded the statement of the witnesses; on the basis of the memorandum statement of appellant-Chhabilal, one empty Cartridge of 12 bore was recovered. The gun and the cartridge were sent to ballistic expert. After the investigation was over, a charge sheet was submitted in the committal Court which, on its turn, committed the case to the Court of Session and from where it was received by the trial Court for its trial.

5. Learned trial Judge, on the basis of the averments made in the charge sheet, framed charge against appellant Mathura under Section 302, IPC while charge under Section 302/34 of IPC was framed against appellant Chhabilal. Needless to emphasis, both the appellants abjured their guilt and requested for trial.

6. In order to bring home the charges, prosecution examined as many as 10 witnesses and placed Ex.P/1 to P/21, the documents on record. The defence of appellants is of false implication on account of election rivalry and in support of their defence, they examined Paltu (D.W.1), Kure (D.W.2), Ramkishore Pathak (D.W.3), Vishwanath Pathak (D.W.4), Kanti Devi (D.W.5), Churbara (D.W.6), Munna (D.W.7), Shivlal (D.W.8) and Ganpat (D.W.9).

7. Learned trial Judge, on the basis of the evidence placed on record, came to hold that appellant Mathura has committed the offence under Section 302, IPC while appellant Chhabilal committed the offence under Section 302/34, IPC, accordingly, learned Trial Court convicted them and passed the sentence which we have already mentioned herein above.

8. In this manner, the present appeal has been filed by the appellants assailing their judgment of conviction and order of sentence.

9. It has been argued by Shri Jagat Sher Singh, learned counsel for the appellants, that Devendra is the brother of the deceased and other eye witnesses Harimohan and Daulat are the chance witnesses. The contention of learned counsel is that if the evidence of these witnesses is taken into consideration in proper perspective, it is difficult to hold that they are the eye witnesses. By inviting our attention to the testimony to Dr. H.N. Nayak (P.W.8) who is the Autopsy Surgeon and his post-mortem report Ex.P/10, it has been argued that five card wad plastic lid and bullet was taken out from the body of the deceased which would mean that the fire was made from a close range and all the eye witnesses are also saying that from the close range gun was fired by Mathura. However, Investigation Officer R.S. Thakur (P.W.9) has stated that the spot map Ex.P/3 was prepared by him and in the spot map the distance from where gun shot was fired is 20 ft

and, thus, the presence of eye witnesses becomes highly doubtful and the appellants have been roped on account of election rivalry. In support of his contention learned counsel has placed heavy reliance on the decision of Supreme Court *Bhola Singh V. State of Punjab*, 1999 AIR SCW 380. By placing reliance on the decision of Supreme Court *Budhwa alias Ramcharan and others V. State of Madhya Pradesh*, AIR 1991 SC 4, it has been argued that if there is sufficient evidence that there is group rivalry and election enmity, presence of accused becomes doubtful. Learned counsel has also invited our attention to the evidence of Investigating Officer R.S. Thakur (P.W.9) para-7 and has submitted that there is no compliance of Section 157, Cr.P.C. In support of his contention, learned counsel has placed reliance on the decision of Supreme Court *Suresh Chaudhary V. State of Bihar*, (2003) 4 SCC 128. Further it has been argued by learned counsel that the incident had taken place at 8.00 p.m.and it was a dark night and there is overwhelming evidence in that regard, therefore, it is difficult to infer that the eye witnesses have seen the incident. By inviting our attention to the evidence of author of FIR Devendra (P.W.1) who is brother of the deceased as well as the scribe of the written report Sanjay Chaturvedi (P.W.5), it has been submitted that if the evidence of these two witnesses is closely scrutinised, it would become as clear like a noon day that the report was lodged on next day in the morning. But, according to prosecution, FIR was lodged on the date of incident viz 27/7/1994 at 23.30 hours and, hence, it can be said that FIR is ante-time and ante-dated and, for this reason compliance of Section 157, Cr.P.C. was not made.

10. By putting emphasis on the role assigned to appellant-Chhabilal, it has been argued that looking to the evidence of the eye witnesses even if his presence is found to be proved, since as per prosecution's own case, this appellant has only stated Maro, his act would not come under the ambit and sweep of Section 34, IPC and it cannot be said that he shared the common intention to kill the deceased and, therefore, he cannot be convicted under Section 302/34, IPC. On these premised submissions, it has been argued by learned counsel that this appeal be allowed by setting aside the impugned judgment of conviction and order of sentence passed against the appellant.

11. On the other hand, Shri Modh, learned Dy. Advocate General, argued in support of the impugned judgment and has submitted that Harimohan (P.W.3) cannot be said to be a chance witness because incident had occurred in front of his house. By inviting our attention to the testimony of other eye witnesses Devendra (P.W.1) and Daulatram (P.W.4), it has been argued that the incident had occurred on the road and if that would be the position the persons who were present there cannot be said to be a chance witness. In support of his contention, learned Dy. Advocate General has placed reliance on the decision of Supreme Court *Rana Pratap and others V. State of Haryana*, AIR 1983 SC 680. On the same point he has also placed reliance on another decision of Supreme Court *State of Andhra Pradesh vs. K. Srinivasula Reddy*, AIR 2004 SC 3305.

12. On the point of alleged non-compliance of Section 157, Cr.P.C., it has been argued by learned Dy. Advocate General that mere delay in sending copy of FIR to Magistrate will not be fatal. To buttress his submission, reliance has been placed on *Rabindra Mahto and another V. State of Jharkhand,* AIR 2006 SC 887. Further it has been argued that if the FIR is registered and investigation was started mere non-compliance of Section 157, Cr.P.C, cannot be said to be fatal and in that context, he has placed reliance on *State of A.P. V. S. Rayappa and others,* 2006 SAR (Criminal) 228 (SC).

13. By inviting our attention to the evidence of Harimohan (P.W.3), it has been argued that application under Section 311, Cr.P.C.was filed on behalf of appellant Mathura after examination of Harimohan (P.W.3) was over and the same was allowed by the trial Court on 10/11/1998 and, therefore, if certain discrepancies have been crept out from his testimony, the same should not be relied upon in view of the decision of Supreme Court *Khujji alias Surendra Tiwari V. State of M.P.*, AIR 1991 SC 1853.

14. On the point of conviction of appellant Chhabilal under Section 302/34, IPC it has been argued that gun was of appellant Chhabilal and, therefore, when the presence of both the appellants have been established by the prosecution witnesses, looking to the circumstances that gun is of Chhabilal, it can be inferred that in order to share the common intention to kill the deceased, appellant Chhabilal handed over his gun to appellant Mathura and, hence, this appellant has been rightly convicted under Section 302/34, IPC.

15. Having heard learned counsel for the parties, we are of the view that this appeal deserves to be allowed.

16. In the present case, a written report Ex.P/1 was submitted by complainant Devendra Singh to Station Officer In-charge, Police Station Jatara, Distt. Tikamgarh which was received on 27/7/1994 at 23.30 hours. Devendra (D.W.1) has categorically proved his written report Ex.P/1 and has also admitted that the same was firstly written by Sanjay Chaturvedi (P.W.5) and thereafter it was submitted in the police station on the basis of which the first information report Ex.P/2 was registered on the date of incident viz 27/7/1994 at 23.30 hours. On going through these two documents, it is revealed that Devendra (P.W.1) who is the brother of the deceased came from his village Bamhori Abada to contact some labours for the construction of his well and arrived in village Tanga at 8.00 p.m.where he found the deceased standing in front of the house of Harimohan and all of them were talking to each other. At that juncture, one tractor came towards the village and the deceased raised his hands to stop the said tractor but it did not stop, as a result of which deceased chased the said tractor. At that time appellants came there. According to this witness appellant-Mathura was having 12 bore gun in his hand and both the appellants came in running condition. On

being asked by them who is there, deceased replied expressing his presence and thereafter appellant Chhabilal told appellant Mathura Maro who immediately fired the gun and thereafter both the appellants ran away. Thereafter this witness, Harimohan and Daulat uplifted the deceased and brought him to the house of Harimohan. This witness thereafter went to village Bamhori Abada to bring the vehicle and before he could return to village Tanga, deceased already died. It has also been stated in the written report that deceased and Chhabilal fought the election against each other and there was election rivalry. Devendra when appeared in the Court as P.W.1, proved his written report Ex.P/1 as well as FIR Ex.P/2 which was written on the basis of Ex.P/1.

17. According to this witness, deceased tried to stop the tractor but when it did not stop, he chased the tractor. Thereafter both the appellants came in running condition. Appellant-Mathura was carrying a 12 bore gun and he raised alarm that who is there, in reply deceased expressed his presence and thereafter appellant Chhabilal asked appellant Mathura by saying Maro Do Goli (fire the gun) thereafter appellant Mathura fired the gun and the bullet struck the right abdominal region of the deceased.

18. In cross-examination, Devendra (P.W.1) has admitted in para-5 that he had passed High School. He has also admitted in para-6 that all of a sudden he came to village Tanga to meet his brother Narendra (deceased) and immediately thereafter within 5-10 minutes he was murdered. In para-9 when he was confronted that why he accompanied other witness Daulat (P.W.4) of his village, this witness has stated that there was no special reason to accompany him. According to this witness, he was going to village Tanga and witness Daulat himself expressed his wishes to accompany him. Further he has stated that Daulat, all of a sudden met him when this witness was going alone to village Tanga. Further he has admitted that the presence of Daulat has not been mentioned in his written report Ex.P/1 and why it has not been so mentioned, he cannot say, although he narrated this fact to the police. Further he has stated that he came to village Tanga to contact the labours to construct the well in his village. However, he has admitted in para-9 that deceased was chasing the Tractor, and when it did not stop this witness also started chasing the Tractor, but, why this fact has not been mentioned in his written report Ex.P/1 and in his case diary statement Ex. D/2, he cannot say though these facts were told by him to the police.

19. In para-11 of his cross-examination, this witness has specifically stated that Investigating Officer prepared the spot map on the next day i.e. 28/7/1994 and he pointed out the place where witness Harimohan and Daulat were standing. According to this witness, the electric light was on at that time. In para-12 of his cross-examination, he has admitted that he did not state the factum that there was any source of light in his written report Ex.P/1. Thereafter this witness has stated that the gun shot was fired at the range of 7-8 ft but the distance between the

barrel of the gun and the deceased was only 3-4 ft and this fact was also stated by him to the Investigating Officer when the spot map was being prepared. This witness has also stated that if the distance of causing gun shot fire has been shown in the spot map to be 20 ft, the same is incorrect. Further this witness has stated that while preparing the spot map why the Investigating Officer has mentioned that he (this witness) saw the incident from a distance 50-55 ft, he cannot say.

20. In para-15 of the cross-examination, this witness has admitted that except appellant Chhabilal, deceased was not having any enmity with anybody. The cause of enmity between Chhabilal and deceased has been stated by this witness that they fought election and appellant Chhabilal won the election. In para-16 of his cross-examination, this witness has stated that in front of Block Office of Jatara, Sanjay Chaturvedi, the scribe of his written report Ex.P/1 met him to whom this witness told the incident. Earlier to it he did not tell anybody except to his father. According to this witness when he met Sanjay Chaturvedi he was perplexing and thereafter Sanjay Chaturvedi also accompanied to the police station and told the incident to T.I. (Town Inspector). The Town Inspector insisted to submit a written report and thereafter report was written by Sanjay Chaturvedi.

21. On marshalling the evidence of this witness, it is gathered that this witness is a resident of other village Bamhori Abada and he came to village Tanga to contact the labours at 8.00 p.m.and all of a sudden he met to Daulat in his village Bamhori Abada and the said witness Daulat also accompanied him to village Tanga. Further 'it is carved out from his testimony that from a close range of 3-4 ft gun shot was fired by appellant Mathura on the insistence of appellant Chhabilal. According to us, the statement given by him in his examination-in-chief Maro goli (fire the gun) is material improvement because this fact has not been stated by this witness either in his written report Ex.P/1 on the basis of which FIR was lodged or in his case diary statement Ex.D/2. In these two documents simply it has been stated by this witness that Chhabilal told Maro and nothing more. It has also been crept out from his testimony that the factum of causing fire by 3-4 ft was stated to the Investigating Officer and if in the spot map 20 ft distance has been shown, the same is incorrect.

22. The other eye witness is Harimohan (P.W.3) and, according to him, on the date of incident he was standing along with the deceased in front of his house. At that time, from village Bamhori Abada, Daulat and Devendra also arrived and all of them were talking to each other. Devendra was saying that he has to arrange the labours to construct his well. Thereafter towards village Tanga a Tractor came and the deceased gave signal to stop but when that Tractor did not stop deceased started chasing the said tractor and this witness, Daulat and Devendra were also chasing the deceased. At that juncture, from another side appellants came there. Appellant Chhabilal asked who stopped the Tractor and in its reply deceased told

that I had stopped. Thereafter appellant Chhabilal asked Mathura Maro Goli (fire the gun) and thereafter Mathura who was carrying the gun fired it. Thereafter both of them went away. According to this witness, Devendra went to village Bamhori Abada to bring a Tractor and before he could return along with the Tractor, deceased already died.

23. In cross-examination, above said witness has admitted that 2-3 months earlier to the incident there was an election of Sarpanch of the Gram Panchayat and the same was contested by the deceased as well as by Chhabilal apart from one Kamlesh. The factum of winning the election by appellant Chhabilal has been admitted by this witness. Further this witness has admitted that earlier to the winning of this election, for last ten years deceased was the Sarpanch. This witness has further stated that although deceased lost the election and appellant Chhabilal won the Said election but the relationship between both of them were cordial. On being confronted to his case diary statement Ex.D/1, this witness has admitted that after the election, the relationship became strained, but earlier to the election the relations were cordial. Hence according to us, on the point of election rivalry this witness is trying to conceal the reality and when he was confronted from his case diary statement, then only he has admitted that there was election rivalry between the deceased and appellant Chhabilal. In para-7 of his cross-examination, this witness has admitted that infront the house of Bihari Bunkar the deceased received gun shot injury. Further he has stated that at a close range of 7-8 ft gun shot was fired and this witness and other eye witnesses namely Devendra and Daulat were 8-10 ft behind the deceased. Further this witness has stated that he did not say to the Investigating Officer that he saw the incident from 50 ft and if the said fact has been mentioned by the Investigating Officer, he cannot state the reason. Further he has stated in para-8 of his cross-examination that he did not say to the Investigating Officer that at a distance of 20 ft, gun shot fire was caused and if the Investigating Officer has written this fact, he has no reason to say. In para-12 of his cross-examination, this witness has admitted that in the election of appellant Chhabilal, appellant Mathura was his supporter. Further in para-13 of his cross-examination, this witness has admitted that the date of incident was a dark night and electric power was off in between 7 to 10 p.m. Thereafter he has stated that specifically he cannot say that who told Mathura to kill the deceased.

24. Last eye witness is Daulat (P.W.4). He has stated that on the date of incident he was sitting on the door of his younger brother, at that juncture, he saw that Devendra (P.W.1) was passing away. On being asked to him where he is going, Devendra replied that he is going to village Tanga. This witness also expressed his desire to go to village Tanga because his sister-in-law resides there. Thereafter both these persons went to village Tanga and reached there at late night. According to this witness, when they reached nearby the house of Harimohan, they saw deceased and Harimohan standing there, at that time, there was sufficient light of

electric power. Thereafter one Tractor came there and deceased tried to stop it but the same did not stop as a result of which deceased chased the said tractor. At that time, from the other side appellants came there. Appellant Chhabilal asked who has stopped the Tractor. On this, deceased told that he had stopped. Thereafter appellant Chhabilal told Mathura Mar Sale Ko and thereafter appellant Mathura fired the gun and bullet struck the abdominal region of the deceased. In para-10 of his cross-examination, this witness has admitted that gun shot was fired at a distance of 3-4 ft of the deceased. The suggestion put to him that it was fired at a distance of 20 ft has been denied by him. Further he has stated that why he stated in the spot map that gun shot was fired at a distance of 20 ft, he cannot say. The omission of stopping Tractor by the deceased was also confronted to him from his case diary statement Ex.D/3. Further this witness has stated that at the time of preparation of the spot map, he pointed out the place of electric light but why that fact has not been mentioned in his statement, he cannot say. He has stated that he saw the incident at a distance of 10-15 ft but why the distance 55 ft has been mentioned in spot map, he cannot say.

25. If we marshal the evidence of the above three eye witnesses, it is gathered that all of them are saying in singular voice that at a close range of 3-4 ft, gun shot was fired by appellant Mathura to the deceased. The factum of causing gun shot from a close range has not at all been stated in the written report Ex.P/1 nor in the case diary statement of any eye witness. Seeing occurrence from the close distance is also doubtful because the presence of eye witnesses seeing the incidence from a place of 50-55 ft has been shown in the spot map and it has been specifically stated by the Investigating Officer R.S. Thakur (P.W.9) in para-11 of his cross-examination that the notes and the identification marks in the spot map Ex.P/3 mentioned by him are on the basis of the information given by the witnesses. On going through the spot map Ex.P/3, it is revealed that Devendra (P.W.1) and Harimohan (P.W.3) are the witnesses to this document apart from other witnesses.

26. Thus, it raises heavy doubt about the presence of eye witness at the time of the occurrence. According to us, all the eye witnesses are saying that gun shot was fired by Mathura from a close range of 3-4 ft in order to fit their testimony to the post-mortem report Ex.P/10. According to Dr.H.N. Nayak (P.W.8), 5 wood cork plastic lid and bullet were taken out from the dead body of the deceased while conducting the post-mortem. Thus it can be inferred that the fire was made from a close range. In this context it would be condign to quote that para of Modi's Medical jurisprudence and Toxicology 22nd Edition Page 356 which reads thus :

> "If an over short card wad is found in the wound, it indicates that the shot was fired from less than two yards, while its absence suggests more than two yards."

27. Neither the Author of FIR Devendra (P.W.1) in his written report Ex.P/1 and in his case diary statement Ex.D/2 nor the other eye witnesses namely

Harimohan (P.W.3) and Daulat (P.W.4) have stated in their case diary statement that from a close range at a distance of 3-4 ft gun was fired by appellant Mathura. Indeed, in spot map Ex.P/3 the distance of causing gun shot fire has been mentioned to be 20 ft and the spot map has been prepared in presence of Devendra (P.W.1) and Harimohan (P.W.3). The Investigating Officer R.S. Thakur (P.W.9) in para-11 of his cross-examination has admitted that the points which are mentioned in the spot map, have been written by him on the information given by the witnesses to the spot map. Thus, on 28/7/1994 when the spot map was prepared it was stated by alleged eye witnesses namely Devendra (P.W.1) and Harimohan (P.W.3) that the gun shot fire was caused from a distance of 20 ft but when along with charge sheet the post-mortem report was filed and in order to fit their testimony in the slot of the post mortem, all the eye witnesses have changed their version by saying that from a close range of 3-4 ft gun shot was fired. The Surpeme Court in *Bhola Singh* (supra) has categorically held that omission of eye witnesses in mentioning the nature of weapon used, their version that accused had used blunt side of weapon was set out to fit in with post-mortem report would make their presence from the scene of occurrence doubtful and the accused is entitled for the benefit of doubt. It will be fruitful to quote that portion of para-5 of the said decision in which the Supreme Court has held as under :

> "5 .....
>
> We have carefully gone through the evidence of Kartar Singh (PW 1) and Didar Singh (PW 2), the two eye-witnesses. If they had really witnessed . the occurrence as had taken place, they would have certainly described the weapons used in causing injuries to the deceased -Saun Singh, leading to his death. It is highly improbable and unlikely that when the accused armed with sharp weapons like Gandasa and Ghop had used only the blunt edged side and not the sharp edged side of the said weapons. We are convinced that these two eye-witnesses had set out his version only to fit in what had been found in the post-mortem report. The normal way in which a Gandasa and Ghop could be used was only from the sharp edged side and not from the blunt edged side. Therefore, it is highly unlikely that the two eye-witnesses PW-1 and PW-2 could have seen the incident as had taken place. It gives rise to serious doubt as to their presence at the time of incident. The trial Court and the High Court did not duly appreciate this aspect of the matter and, therefore, we are of the view that there is an error in this regard. Hence, we accept the case as set forth on behalf of the appellant. We allow this appeal, set aside the conviction passed by the trial Court as confirmed by the High Court and set him at liberty."

28. Yet there is another facet of the matter that why all the witnesses are stating that they have seen the incident from a close distance because on the date of occurrence in between 7.20 to 9.00 p.m.there was no source of light because the electric power was cut and in this regard the testimony of Ramkishore Pathak (D.W.3) who at the relevant point of time was serving on the post of Junior Engineer in M.P. Electricity Board and who, while giving his statement, brought the relevant document has so deposed. According to him in between 7.20 p.m to 9 p.m there was no electric supply and in this regard he submitted the requisite document Ex.D/4. Needless to emphasis the credential value of the evidence of defence is at par with that of prosecution witness. Apart from this, this witness is totally an independent witness. When there was no source of light, it cannot be said that eye witnesses have identified the appellants from a distance of 50-55 ft, since this distance has been mentioned in the spot map Ex.P/3. According to us, all the eye witnesses are showing their presence at a close distance of 10-15 ft because in order to create the evidence that even in the dark night they were able to identify appellant Chhabilal phonetically and as per their statement appellant Chhabilal exhorted Mathura to kill the deceased.

29. At this juncture, we would also like to examine the testimony of Chetram (P.W.7) who is the Patwari and who prepared another spot map Ex.P/9. In this spot map also the place of firing gun, 20 ft has been shown and 55 ft distance has been shown from where the eye witnesses have seen the incident. In cross-examination, this witness has admitted that nearby the place of occurrence there is no electric pole and if there would have been any electric pole certainly it would have been mentioned in the spot map hence, according to us, it can be inferred that at that time there was no source of light. Thus, in the light of the above said evidence placed on record, the decision of *Rana Pratap*(supra) and *K.Srinivasulu Reddy* (supra) are distinguishable. In absence of source of light, it cannot be said that eye witnesses have seen the incident from a distance of 55 ft. In this context we may profitably place reliance on the following decisions :

(i) *Arokia Thomas V. State of T.N.*, (2006) 10 SCC 542 (para 2)

(ii) *Hem Raj and others V. State of Haryana*, AIR 2005 SC 2110 (para 14)

(iii) *Babboo and others V. The State of M.P.*, AIR 1979 SC 1042 (para 8)

(iv) *Ram Narain & others vs. State of Punjab*, AIR 1975 SC 1727 (para 11).

30. If we test the testimony of PW-5, Sanjay Chaturvedi (who is the scribe of the written report of Devendra (P.W.1) on the basis of which FIR Ex.P/2 was registered) on the touch stone and anvil of the testimony of Devendra who is author of FIR and Investigating Officer R.S. Thakur (P.W.9), it can be inferred

that FIR is ante-time and ante-dated. Before we marshal the evidence of this witness, we would like to state that this witness is totally an independent person although he is acquainted to the deceased and his brother Devendra Singh, the author of FIR. According to this witness, written report Ex.P/1 was written by him in Police Station Jatara and the same was written on being dictated by Devendra Singh. This witness has specifically stated in para-2 of his cross examination that the report Ex.P/1 was written by him at 10-11 in the morning. According to him, Devendra Singh (PW-1) met him at the bus stand of Jatara. He was perplexing and was insisting this witness to accompany police station, jatara. The statement of this witness that he wrote the report in the morning in between 10 to 11 somersaults the entire case of prosecution, because, as per prosecution's own case on the basis of the written report received by Station Officer In-charge on 27/7/1994 at 23.30 hours, FIR was registered at 23.30 hours on 27/7/1994 and, therefore, it can be inferred that FIR is ante-time and ante-dated. On going through para-6 of the testimony of Investigating Officer R.S. Thakur (P.W.9), it is revealed that the report was received by him on 27/7/1994 at 23.30 hours. According to us, both the situations cannot exist at one point of time. If the written report Ex.P/1 was written in the morning in between 9-10 as stated by Sanjay Chaturvedi (P.W.5), how it was received by the Investigating Officer on 27/7/1994 at 23.30 hours. Thus, it would mean that in order to cook the case the factum of receiving written report Ex P/1 on 27/7/1994 at 23.30 hours has been added later on by the investigating officer and, accordingly, FIR Ex.P/2 was registered and, therefore, it can be inferred that the FIR Ex.P/2 is not only ante-time but is ante-dated also. In para-6 of his cross- . examination, this witness has admitted that the factum of note 'B' to 'B' in the written report Ex.P/1 was written by him after 5-6 days on the insistence of Town Inspector. The portion marked 'B' to 'B' of Ex.P/1 is "*Ba Kalam Sanjay Chaturvedy S/o Shri Ramcharan Chaturvedi,* Civil Line, Tikamgarh" (Written by Sanjay Chaturvedi S/o Shri Ram Chandra Chaturvedi,Civil Line, Tikamgarh). The truth has come out from the mouth of this witness and, therefore, it can be inferred that after 5-6 days, this witness Sanjay Chaturvedi was called and he was asked to write a written report by the Town Inspector of the Police Station and on the basis of such report ante-time and ante-dated FIR was registered and this is the reason why the compliance of Section 157, Cr.P.C.was not made. In this context, it would be fruitful to analysis the evidence of Investigating Officer para-7 wherein he has specifically admitted that he left the instructions to send the copy of the FIR to the concerning Magistrate and this fact has been mentioned by him in his case diary. On being confronted to him to whom he gave such instructions, this witness has stated that those instructions were given to Head Constable Karnpal. Further he has put his inability that whether Head Constable Karnpal had sent copy of the FIR to concerning Magistrate or not. According to IO this fact has also not been mentioned in the case diary. Further he has admitted that whether

any copy of FIR was sent to the Magistrate or not, he cannot say and this fact can only be stated by Head Constable. The prosecution has not taken any pains to examine Head Constable Karnpal in order to demonstrate that copy of FIR was sent to the concerning Magistrate in terms of Section 157, Cr.P.C. The Supreme Court in *Bir Singh and others V. The State of Uttar Pradesh,* AIR 1978 SC 59 in para-11 has held that a Court cannot take judicial notice of the compliance of Section 157, Cr.P.C., but it has to be proved like any other fact. In this context we may profitably quote that portion of para-11 of the said judgment which reads thus :

> "11..... The High Court indulged in another conjecture that the F.I.R. must have been sent to the P.P.and to the Elaqa Magistrate. This was not however a matter of which judicial notice could be taken but had to be proved like any other fact."

Since copy of FIR has not been sent to the Magistrate and there is no iota of evidence in the case diary in this regard, according to us, this amounts to a serious lapse on the part of the Investigating Agency going to the root of the matter and hammers the authenticity of prosecution's case. In the light of the evidence which has been placed on record, the decisions of Supreme Court *Rabindra Mahto* (supra) and *S. Rayappa and others* (supra), are distinguishable.

31. For the reasons stated herein above, we are unable to uphold the conviction of the appellants. Hence, this appeal succeeds and is hereby allowed. The conviction and sentence of appellants is hereby set aside and they are acquitted from all the charges. Appellant-Mathura is in jail, he be set at liberty forthwith, if not required in any other case. Appellant Chhabilal is on bail, his bail bonds are hereby discharged.

Appeal allowed.

I.L.R. [2009] M. P., 548
CRIMINAL REVISION
Before Mr. Justice R.S. Garg
29 August, 2008*

INDRAVEER SINGH ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

A. Evidence Act (1 of 1872), Section 3 - ***Appreciation of evidence - Departmental witness - The time tested principle that a departmental witness is likely to support the prosecution - In any case, if the departmental witnesses are witnesses of truth then on the qualitative analysis of the statements of a departmental witness the prosecution can rest and ask the court to convict the accused.***

*Cr.R. No.642/1998 (Jabalpur)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – विभागीय साक्षी – समय परीक्षित सिद्धांत है कि विभागीय साक्षी द्वारा अभियोजन का समर्थन करना संभाव्य है – किसी भी परिस्थिति में यदि विभागीय साक्षी सत्य के साक्षी हैं तब विभागीय साक्षी के कथनों के गुणात्मक विश्लेषण पर अभियोजन आधारित हो सकता है और न्यायालय से अभियुक्त को दोषसिद्ध करने का निवेदन कर सकता है।

B. Evidence Act (1 of 1872), Sections 61, 62 & 64, Public Gambling Act, 1867, Section 5 - *Search warrant obtained but not produced before the court - Circumstance explained when it will not affect the prosecution case.*

Documents were available but not proved by primary evidence then the court could not rely upon the oral evidence. Ordinarily the principles would be universally applicable. In the present case despite non-production of the document the non-challenge to the existence of the document would not cut any ice in favour of the applicant. Court unable to hold that prosecution could not proved issuance of a valid warrant u/s 5 of the Act of 1867, search and seizure effected in due execution of the warrant. (Paras 36 & 37)

ख. साक्ष्य अधिनियम (1872 का 1), धाराएँ 61, 62 व 64, सार्वजनिक द्यूत अधिनियम, 1867, धारा 5 – तलाशी वारंट अभिप्राप्त किन्तु न्यायालय के समक्ष पेश नही – परिस्थिति स्पष्ट की गई कि कब यह अभियोजन मामले को प्रभावित नही करेगा।

C. Public Gambling Act (3 of 1867), Section 3 - *A perusal of Section 3 would make it clear that it provides for punishment against a person who is owing or keeping or is having charge of a gaming house - In fact there is no evidence on record that the applicant was owing or keeping or was having charge of a gaming house - The FIR and the other evidence available on the record clearly show that the allegation of the prosecution were that the house was in charge of one Ram Babu Rai who was deducting commission and was providing facilities to the gamblers to enjoy the occupation of the gaming house - There is no material evidence to connect the applicant with the requirement of Section 3 of the Act - Applicant acquitted.* (Para 39 & 40)

ग. सार्वजनिक द्यूत अधिनियम (1867 का 3), धारा 3 – धारा 3 का परिशीलन यह स्पष्ट करता है कि यह उस व्यक्ति के विरुद्ध दण्ड का उपबंध करता है, जो द्यूत गृह का स्वामी हो या उसकी देखरेख कर रहा हो या उसका भारसाधक रहा हो – वास्तव में अभिलेख पर ऐसी कोई साक्ष्य नही है कि आवेदक द्यूत गृह का स्वामी था या उसकी देखरेख कर रहा था या उसका भारसाधक था – एफ.आई.आर. और अभिलेख पर उपलब्ध अन्य साक्ष्य स्पष्ट रूप से दर्शित करते हैं कि अभियोजन के अभिकथन यह थे कि गृह किसी रामबाबू राय के भारसाधन में था जो कमीशन काटता था और द्यूतों को द्यूत गृह के अधिभोग का उपभोग करने के लिए सुविधाएँ उपलब्ध करा रहा था – अधिनियम की धारा 3 की अपेक्षाओं से आवेदक को संसक्त करने के लिए कोई तात्विक साक्ष्य नही है – आवेदक दोषमुक्त।

D. **Public Gambling Act (3 of 1867), Sections 3 & 4** - *Chief Judicial Magistrate convicted the applicant u/s 3 & 4 of the Act and awarded a sentence for Section 3 of the Act - But, no separate sentence has been awarded to the applicant u/s 4 of the Act - Law explained how the High Court can sentence the applicant u/s 4 of the Act.*

Chief Judicial Magistrate convicting the applicant u/s 3 & 4 of the Act and sentencing him to undergo Jail sentence of till rising of the court and pay a fine of Rs.300/- u/s 3 of the Act, but no separate sentence has been awarded to the applicant u/s 4 of the Act. Applicant who was Head Constable of Police, if was engaged in public gambling then he was required to be properly sentenced. The High Court accordingly ordered that notice be issued to applicant that why the sentences be not enhanced and why appropriate sentence be not awarded for offence punishable u/s 4 of the Act. Taking into consideration the totality of the circumstances, High Court awarded sentence of till rising of the court to the applicant for committing the offence u/s 4 of the Act. **(Paras 7 & 42)**

घ. सार्वजनिक द्यूत अधिनियम (1867 का 3), धाराएँ 3 व 4 – मुख्य न्यायिक मजिस्ट्रेट ने आवेदक को अधिनियम की धारा 3 व 4 के अधीन दोषसिद्ध किया और अधिनियम की धारा 3 के लिए दण्डादेश दिया – किन्तु, आवेदक को अधिनियम की धारा 4 के अन्तर्गत कोई पृथक दण्डादेश नही दिया – विधि स्पष्ट की गई कि उच्च न्यायालय कैसे आवेदक को अधिनियम की धारा 4 के अन्तर्गत दण्डादेश दे सकता है।

Cases referred :

2007(III) MPWN Note No.124, 2006(III) MPWN Note No.74, AIR 1936 PC 253(2).

Ramesh Kumar, for the applicant.

T.S. Ruprah, Addl.A.G., for the non-applicant/State.

J U D G M E N T {ORAL}

R.S.GARG, J. :–The applicant being aggrieved by the judgment dated 3.3.1998 passed by the learned Sessions Judge, Sehore in Criminal Appeal No. 88/1997 confirming the judgment dated 2.12.1997 passed by the learned Chief Judicial Magistrate, Sehore in Criminal Case No. 400/1997 convicting the applicant/ appellant under Section 3 and Section 4 of the Public Gambling Act, 1867 {in its application to State of Madhya Pradesh} and sentencing him to undergo jail sentence of till rising of the Court and pay a fine of Rs.300/- under Section 3 of the Act, has come to this Court. It is to be noted even at this stage that no separate sentence has been awarded to the applicant under Section 4 of the Act.

2. Short facts necessary for decision of this criminal revision are that one J.P.Verma {PW-4}, Sub-Inspector posted at Kotwali, Sehore, on 4.5.1997 received an information that in a particular house, people are engaged in gambling. According

to him, the matter was immediately reported to Sub Divisional Officer {Police}, he obtained a warrant of search and thereafter, with the Police Force went to the house No. EWS-16. After peeping from the cracks of the doors, he found that the present applicant and three others, namely, Rajesh S/o.Gendalal, Rambabu S/o. Prithvilal and Trilok Sharma S/o.Rammurti Sharma were engaged in gambling. The door was opened. The accused persons were apprehended. From possession of different accused persons, different amounts were recovered from their pockets, and certain amounts were also recovered, which were lying in front of each accused. A deck of cards was also recovered. A total sum of Rs.7,470/- was recovered and immediately thereafter, the First Information Report {Exhibit P/6} was registered.

3. After completion of the investigation, the Police filed Chalan but as each of the accused denied commission of the offence, they were subjected to trial. The charges levied against the accused were that they committed offences punishable under Section 3 and Section 4 of the Public Gambling Act, 1867.

4. The prosecution in support of its case examined PW-1 Chouthmal a Home Guard {Sepoy}, PW-2 Kamlesh Trivedi a Tractor Mechanic, PW-3 Alok Shrivastava Sub Inspector {Police} and PW-4 J.P.Verma Sub Inspector, Kotwali, Sehore.

5. After hearing the parties, the learned Trial Court held that the prosecution was successful in bringing home the guilt, it accordingly convicted each of the accused under Sections 3 & 4 of the Act but, however, awarded sentences under Section 3 of the Public Gambling Act, 1867 only and did not award any sentence under Section 4 of the Act.

6. The applicant and three others being aggrieved by the said convictions and sentences preferred appeal but as the same proved futile, the present applicant is before this Court.

7. It is to be noted that on 25.3.2008, this Court observing that the present applicant, who was Head Constable of Police, if was engaged in public gambling then he was required to be properly sentenced. The Court accordingly ordered that notice be issued to him that why the sentences be not enhanced to three months rigorous imprisonment and fine of Rs.2000/- and why appropriate punishment/sentence be not awarded to the applicant for the offences punishable Under Section 4 of the Public Gambling Act, 1867.

8. Shri Ramesh Kumar, learned counsel for the applicant after taking me through the evidence and the provisions of law submitted that Section 3 and Section 4 of the Public Gambling Act, 1867 apply to different eventualities. According to him, Section 3 would apply to a case where a particular person is owning or keeping or is having charge of a gaming-house but Section 4 would apply to a case where a particular person is found in a gaming-house. Referring to Section 13, it was

submitted that if any person is indulged in gambling at a public place then a Police Officer may apprehend such person and take search without any warrant.

9. According to learned counsel for the applicant, for a search under Section 3, which would also include search of a person found in the gaming-house, would be governed by Section 5 of the Act. According to him, if there is no proper authorization or the warrant issued by an appropriate competent authority is not proved or produced before the Court then the entry in the gaming-house, search and seizure, all would become illegal and such illegality cannot provide appropriate legal foundation for holding the accused guilty.

10. Learned counsel for the applicant has also placed his strong reliance upon the judgment of this Court in the matter of *Rakesh Rai Versus State of M.P.* {2007 {III} M.P.Weekly Notes, Note No. 124} and on the case of *Ram Bharti & Others Versus State of M.P.* {2006 {III} M.P.Weekly Notes, Note No.74}.

11. It is submitted by the learned counsel for the applicant that as the independent witnesses have not supported the prosecution case, therefore also, the Courts below were unjustified in relying upon the testimony of the departmental witnesses. His submission is that if the document was available in the records then it was required to be produced and if the warrant is not produced in evidence and it is not shown that the competent officer after applying his mind issued the warrant, the warrant could not authorize the Police Officer to make an enquiry in the gaming-house.

12. Learned counsel for the applicant has also submitted, placing reliance upon a judgment in the matter of *Nazir Ahmad Versus King Emperor* {AIR 1936 Privy Council 253 {2} that if a thing is to be done in accordance with the procedure prescribed then it should be done in accordance with the procedure or not at all. Submission infact is that if the warrant is not produced in the Court and the Police Officer did not act in accordance with law, the Courts below could not convict the applicant.

13. In relation to the notice for enhancement of sentence, it is submitted by the learned counsel for the applicant that in case the arguments for acquittal are not accepted then as Sections 3 & 4 provide for alternative sentences and as the jail sentence is not mandatory, this Court after taking into consideration that the matter is pending consideration before different Courts for last eleven years, the jail sentence may not be awarded to the applicant.

14. Shri T.S.Ruprah, learned Additional Advocate General for the State, on the other hand, submitted that in the present case, it was nobody's case that a warrant was not issued and in execution of the warrant or charged with the warrant, search was not taken. According to him, the only dispute before the Courts below was that whether the House No. 16 or House No. 60 or House No. 369 was searched. According to him, J.P.Verma {PW-4} has clarified the totality of the facts and if the stock of the facts are taken into consideration, it would clearly

appear that a search was taken in House No. 16 but due to some inadvertence, House No. 60 was mentioned in the search memo and the other documents.

15. Explaining further, it is submitted by Shri T.S.Ruprah, learned Additional Advocate General for the State that No.369 was given to the house by the Municipality but there is nothing on the record that the said House No. 369 is different from House No. 16, a number given by the Housing Board. It is also submitted by him that even if the accused is acquitted of the charge punishable under Section 3 of the Act, this Court must award appropriate jail sentence to the accused under Section 4 of the Act taking into consideration that a person, who was to maintain Law & Order and show exemplary conduct was engaged in commission of the offences.

16. I have heard the parties at length and have perused the provisions of law and the records.

17. For proper appreciation of the matter, it would be necessary to refer to Section 3, Section 4 and Section 5 of the Public Gambling Act, 1867, which read as under:-

> "3.Penalty for owning or keeping, or having charge of, a gaming-house.-Whoever, being the owner or occupier, or having the use, of any {house, room, tent, enclosure, space, vehicle, vessel or place} situate within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house; and
>
> whoever, being the owner or occupier of any such {house, room, tent, enclosure, space, vehicle, vessel or place} as aforesaid, knowingly or willfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house; and
>
> whoever, has the care or management of , or in any manner assists in conducting, the business or any {house, room, tent, enclosure, space, vehicle, vessel or place} as aforesaid, opened, occupied, used or kept for the purpose aforesaid; and
>
> whoever advances or furnishes money for the purpose of gaming with person frequenting such {house, room, tent, enclosure, vehicles, vessel or place:}
>
> {shall be punished –
>
> {a} for a first offence with imprisonment which may extend to {six months} or with fine which may extend to {one thousand rupees;}
>
> {b} for a second offence with imprisonment which may extend to {one year} and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than {fourteen days} either with or without fine which may extend to {two thousand rupees;} and

{c} for a third or subsequent offence with imprisonment which may extend to {one year} and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than {four months} together with fine which may extend to {two thousand rupees}

4 Penalty for being found in gaming-house – Whoever is found in any such {house, tents, rooms, enclosure, space, vehicle, vessel or place} playing or gaming with cards, dice, counters, money or other instruments of gaming, or is found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise, shall be liable to a fine not exceeding {five hundred rupees} or to imprisonment of either description, as defined in the Indian Penal Code {45 of 1860}, for any term not exceeding {four months}

and any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming.

{4-A Punishment for printing or publishing digits, figures, signs, symbols or pictures relating to Worli Matka or other form of gaming – {1} Whoever prints or publishes in any manner whatsoever any digits or figures or signs or symbols or pictures or combination of any two or more of such digits or figures or signs or symbols or pictures relating to Worli Matka or any other form of gaming under any heading whatsoever or by adopting any form or device, or disseminates or attempts to disseminate or abets dissemination of information relating to such digits or figures or signs or symbols or pictures or combination of any two or more of them shall be punishable with imprisonment which may extend to six months and with fine which may extend to one thousand rupees.

{2} Where any person is accused of an offence under sub-section {1}, any digits or figures or signs or symbols or pictures or combinations of any two or more of such digits or figures or signs or symbols or pictures in respect of which the offence is alleged to have been committed shall be presumed to relate to Worli Matka gaming or some other form of gaming unless the contrary is proved by the accused}.

5. Powers to enter and authorize police to enter and search – If the Magistrate of a district or other officer invested with the full powers of a Magistrate, or the District Superintendent of Police, {or the Deputy or the Assistant Superintendent of Police} upon credible information and after such enquiry as he may think necessary,

has reason to believe that any {house, room, tent, enclosure, space, vehicle, vessel or place} is used as a common gaming house;

he may, either himself enter, or by his warrant authorize any officer of police, not below such rank as the State Government shall appoint in this behalf to enter with such assistance as may be found necessary, by night or by day, and by force if necessary, any such {house, room, tent, enclosure, space, vehicle, vessel or place};

and may either himself take into custody, or authorize such officer to take into custody, all persons whom he or such officer finds therein, whether or not then actually gaming;

and may seize or authorize such officer to seize all instruments of gaming, and all moneys and securities for money, and articles of value, reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein {and also all moneys and securities for money found on the person of such persons as are found playing or gaming or found there present for the purpose of gaming within the meaning of Section 4};

and may search or authorize such officer to search all parts of the {house, room, tent, enclosure, space, vehicle, vessel or place} which he or such officer shall have so entered when he or such officer has reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he or such officer so takes into custody;

and may seize or authorize such officer to seize and take possession of all instruments of gaming found upon such search:

{5-A. Seizure of register, record of writing – If the District Magistrate or the Additional District Magistrate or a Police Officer not below the rank of Assistant Superintendent of Police is of the opinion that any register, record or writing of any kind whatsoever which contains digits or figures or signs or symbols or pictures or combination of any two or more of such digits, figures, signs, symbols or pictures relates to Worli Matka gaming or some other form of gaming, he shall be entitled to seize the same, and such register record or writing shall be presumed to be an instrument of gaming unless it is shown by the person from whom it is seized that it is a register, record or writing of any transaction in connection with a lawful trade, industry, business, profession or vocation or of any lawful personal transaction of any person or it is otherwise not any instrument of gaming}"

18. Section 3 of the Act clearly provides that whoever being the owner or the occupier or having the use of any house, room, tent, enclosure, space, vehicle, vessel or place, situate within the limits to which the act applies, opens, keeps or uses the same as a common gaming-house etc, may be punished as provided under Section 3 of the Act. A perusal of Section 3 would make it clear that it provides for punishment against a person, who is owning or keeping or is having charge of a gaming-house.

19. Section 4 of the Act provides that whoever is found in a gaming-house may be punished in accordance with Section 4 of the Act.

20. Section 5 of the Act provides that if the Magistrate of a district or other officer invested with the full powers of a Magistrate, or the District Superintendent of Police or such officers as described in Section 5 may issue a search warrant provided upon credible information and after such enquiry as he/they may think necessary form an opinion to believe that a particular place etc is used as a common gaming-house.

21. In the present case, J.P.Verma {PW-4} after receiving the information immediately recorded the same and approached the Sub Divisional Officer {Police} and submitted before him that a particular place was being used as a gaming-house. The Sub Divisional Officer {Police} after being satisfied issued the warrant of search. Once the Sub Divisional Officer {Police} recorded his satisfaction and issued the warrant then charged with the authority of the warrant, J.P.Verma {PW-4} and the force accompanying him were entitled to enter in the house. It is proved from the documents and the evidence of PW-3 Alok Shrivastava and PW-4 J.P.Verma that on the authority of a search warrant, search was made at a particular place and cash amount and a deck of cards were seized.

22. Submission made by Shri Ramesh Kumar, learned counsel for the applicant is that if the Investigating Officer is not examined and it is not proved before the Court that the search warrant was issued exercising reasoning powers or the search warrant is not produced before the Court then recovery of the articles would not prove commission of the offence either for purpose of Section 3 or Section 4 of the Act.

23. In the matter of *Rakesh Rai* {supra}, the facts were that the authorization of warrant under Section 5 of the Act was not proved. From the observations made by the learned Single Judge of this Court, it would clearly appear that all through, it was contended before different Courts that warrant was not issued and it was not proved before the Court.

24. In the matter of *Ram Bharti* {supra}, the Court found that the Investigating Officer was not examined and a simple recovery would not connect the accused person with the crime. It was also observed in the said case that though the search warrant was on record but the same has not been proved. In the said case

also, the learned Single Judge of this Court observed that in absence of the positive proof, conviction could not be recorded.

25. In the present case, PW-4 J.P.Verma stated on oath that he received the credible information that the House No. EWS-16 was in possession of one Rambabu Rai and said Rambabu Rai was providing facility to the gamblers to play in the said gaming-house. After recording the said information, he immediately proceeded to the Sub Divisional Officer {Police} Shri P.N.Guru and obtained the search warrant. Immediately thereafter, he took the witnesses with him.

26. In his cross-examination, it has nowhere been suggested to PW-4 J.P.Verma that the search warrant was not obtained by him or the search warrant was not issued in his favour. The only dispute raised before the Court was that the warrant was in relation to House No. 16 but the witness had taken search of House No. 60 or House No. 369.

27. PW-4 J.P.Verma in paragraph 5 clearly stated that the warrant was for search of House No. 16 and due to some inadvertence or mistake, House No. 60 was mentioned in the seizure memo. He had also clarified that the very said house was shown to be House No. 369 in the certificate issued by the Municipality.

28. Present is not a case where nothing has been seized, infact, present is a case where PW-4 J.P.Verma and PW-3 Alok Shrivastava, yet another Police Officer entered in the house with two other witnesses. Simply because the private witnesses have turned hostile, it would not be fair not to rely upon the statements of the departmental witnesses. It is no guarantee that a private witness would always be a witness of truth and the departmental witnesses would not be the witnesses of truth.

29. In the present case, PW-1 Chouthmal and PW-2 Kamlesh Trivedi did not support the prosecution case and from their conduct, it would clearly appear that despite admitting their signatures on Exhibit P/2 the seizure memo, they were trying to support the case and cause of the accused. The possibility of winning over the witnesses by the present applicant cannot be ruled out.

30. PW-1 Chouthmal was a Home Guard {Sepoy} while PW-2 Kamlesh Trivedi was an ordinary Tractor Mechanic. The principle that whether a departmental witness is to be relied upon or not, is not based upon any legal principle of law but is based upon the rule of prudence and the time tested principle that a departmental witness is likely to support the prosecution. In any case, if the departmental witnesses are witnesses of truth then on the qualitative analysis of the statements of a departmental witness, the prosecution can rest and ask the Court to convict the accused.

31. In the present case, the statements of the private witnesses, namely, PW-1 Chouthmal and PW-2 Kamlesh Trivedi, if do not support the case of the prosecution then too the statements of PW-3 Alok Shrivastava and PW-4 J.P.Verma cannot be rejected. They are witnesses of truth and the two Courts below were not unjustified in relying upon them.

32. Shri Ramesh Kumar, learned counsel for the applicant though submitted that the departmental witnesses should not be relied upon but was unable to say that if the witnesses are the witnesses of truth then too they are to be ignored.

33. In our opinion, the learned Courts below were not unjustified in relying upon PW-3 Alok Shrivastava and PW-4 J.P. Verma.

34. So far as principles laid down in the case of *Nazir Ahmad* {supra} are concerned, there can be no dispute but such principles are to be applied looking to the nature of the facts of the case. The character of the evidence produced before the Court and the nature of the allegations in the given case would decide that whether a particular act has been done in accordance with the provisions of law or not. Their Lordships of the Privy Council simply submitted that if a procedure is provided for doing a particular thing then the particular procedure only should be adopted for doing the thing or the act should not be done.

35. In the present case, the provisions of Section 5 of the Act have been observed in accordance with law, therefore, it cannot be said that the Courts below were unjustified in recording the conviction.

36. Placing reliance upon Sections, 61, 62 and 64 of the Indian Evidence Act, it was contended that if the documents were available with the prosecution and those were not proved by primary evidence then the Court could not rely upon the oral evidence.

37. Ordinarily, the principles raised by the learned counsel for the applicant would be universally applicable but in the present case, despite non-production of the document, the non-challenge to the existence of the document would not cut any ice in favour of the applicant. I am unable to hold that the prosecution could not prove issuance of a valid warrant under Section 5 of the Act, search and seizure effected in due execution of the warrant.

38. From the prosecution evidence, I conclude that the prosecution has brought home the charge. The question still would be that whether the applicant could be convicted under Section 3 of the Public Gambling Act, 1867 when there is no evidence on the record that he was owning or keeping or was having charge of a gaming-house and whether this Court should award appropriate punishment to the applicant, who was found gaming in a particular house.

39. After going through the entire evidence, I have no hesitation in agreeing with the learned counsel for the applicant that the applicant could not be convicted under Section 3 of the Public Gambling Act, 1867. Infact, there is no evidence on record that the applicant was owning or keeping or was having charge of a gaming-house. The First Information Report and the other evidence available on the record clearly show that the allegations of the prosecution were that the house was in charge of one Rambabu Rai, who was deducting commission and was providing facility to the gamblers to enjoy the occupation of the gaming-house.

40. In absence of the material evidence to connect the applicant with the requirement of Section 3 of the Public Gambling Act, 1867, I acquit him of the charge but, however, uphold the conviction recorded by the Courts below under Section 4 of the Public Gambling Act, 1867.

41. Now the question of sentence and enhancement. Section 4 of the Act provides that any person, who is found at any gaming-house playing or gaming with cards, shall be liable to a fine not exceeding Rs.500/- or to imprisonment of either description, as defined in the Indian Penal Code for any term not exceeding four months.

42. Taking into consideration the totality of the circumstances and the fact that I am acquitting the accused/applicant of the charges of owning or keeping a gaming-house, I discharge the notice for enhancement of sentence. However, I award sentence of till rising of the Court to the applicant for committing the offence under Section 4 of the Act.

43. The applicant shall appear before the Trial Court on 20th October, 2008 for undergoing the sentence. If he does not appear before the Trial Court for undergoing the sentence the Trial Court shall issue non-bailable warrant against the applicant to secure his attendance for undergoing the sentence. If the accused has deposited fine amount as directed by the Trial Court, the same shall be refunded to him. If he has undergone any sentence awarded to him under Section 3 of the Act, the same shall be given set off in execution of the sentence now awarded to him.

Order accordingly.

I.L.R. [2009] M. P., 559
CRIMINAL REVISION
Before Mr. Justice N.K. Mody
2 September, 2008*

ARUN DUBEY & anr. ... Applicants
Vs.
DISTRICT SMALL SAVING OFFICER ... Non-applicant

A. **Criminal Procedure Code, 1973, (2 of 1974), Sections 468(2)(a) & 473** - *Bar to taking cognizance after lapse of the period of limitation - Non- compliance of provisions of M.P. Lottery (Niyantran Tatha Kar) Adhiniyam, 1973 - Complaint filed after 12 years of offence - Held - Maximum punishment under the Adhiniyam is Rs.500 only - Complaint ought to have been filed within period of 6 months from the date of alleged offence - No reason of delay mentioned - Court below erred in entertaining complaint - Criminal proceedings quashed - Revision allowed.* (Paras 8, 9 & 10)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468(2)(ए) व 473 –

*Cr.R. No.279/2008 (Indore)

परिसीमा की कालावधि बीत जाने के बाद संज्ञान लेने पर रोक – म.प्र. लॉटरी (नियंत्रण तथा कर) अधिनियम, 1973 के उपबंधों का अननुपालन – परिवाद अपराध के 12 वर्ष बाद पेश – अभिनिर्धारित – अधिनियम के अन्तर्गत अधिकतम दण्ड केवल 500 रुपये है – परिवाद कथित अपराध की तारीख से 6 माह की कालावधि के भीतर पेश किया जाना चाहिए था – विलम्ब का कोई कारण उल्लिखित नही – अधीनस्थ न्यायालय ने परिवाद ग्रहण करने में त्रुटि की – दाण्डिक कार्यवाहियाँ अभिखण्डित – पुनरीक्षण मंजूर।

B. Lottery (Niyantran Tatha Kar) Adhiniyam, M.P. 1973 (9 of 1974), Sections 13 & 14 - *Every person promoting lottery shall keep and maintain accounts relating to such lottery and shall submit statement within 7 days to the Collector - On failure, punishable with maximum fine of Rs.500.* (Para 5 & 6)

ख. लॉटरी (नियंत्रण तथा कर) अधिनियम, म.प्र. 1973 (1974 का 9), धाराएँ 13 व 14 – लॉटरी को संप्रवर्तित करने वाला प्रत्येक व्यक्ति ऐसी लॉटरी से संबंधित लेखा रखेगा एवं उनका रख–रखाव करेगा और 7 दिनों के भीतर कलेक्टर को विवरण प्रस्तुत करेगा – असफल रहने पर अधिकतम 500 रुपये के जुर्माने से दण्डनीय होगा।

S.C. Bagadiya with *D.K. Chhabara,* for the applicants.
Manish Joshi, Panel Lawyer, for the non-applicant.

ORDER

N.K. Mody, J. :–Being aggrieved by the judgment dated 29.01.20088 passed by CJM, Indore, in Criminal Case No.98/1998, whereby the application filed by the petitioner under Section 468 (2) (a) ol Cr.P.C., for quashing the complaint filed by the respondent, was dismissed, present revision petition has been filed.

2. Short facts of the case arc that petitioners were prosecuted under Sections 13 and 14 of the M.P. Lottery (Niyantran Tatha Kar) Adhiniyam 1973 (hereinafter referred to as the Adhiniyam 1973) by filing a complaint on 31.3.98, wherein the allegations against the petitioners was that the petitioners failed to submit the return in the prescribed proforma in time in compliance of Section 13 of the Act. It was alleged that the petitioner No.1 was the President of the Lottery committee, Table-Tennis Trust Indore having its office at Khel Prashal, Roshan Singh Bhandari Marg, Indore while Petitioner No. 2 was the President of the Trust at the relevant time. Trust was alloted a land by the State Government for the purpose of indoor stadium on the said land. Vide letter dated 5.4.1984, 8.5.1984 and 26.7.1984, permissions were given to Table-Tennis Trust Indore for opening the three lottery draws for the purpose of construction and development of said stadium. In compliance of the said permissions the lottery draws took place i.e. on 12.7.85, 31.1.1985 and 3.2.1986. Since the returns of the lottery draws were not submitted in time, therefore, prosecution was filed by the Respondent No. I against the petitioners on 31.3.98, wherein it was alleged that petitioners were required to submit the accounts as per Sections 13 and 14 of the Adhiniyam 1973 read with

Rules 11 and 12 of the Rules, which has been framed by the State Government in exercise of powers conferred by Section 29 of the Adhiniyam, 1973. within a period of seven days from the date of draw of the lottery in Proforma - E, which has not been complied with by the petitioners in time, hence petitioners be convicted. In support of the complaint the statement of Dattatray Laxman Vibhute, Senior Retired Small Saving Officer was recorded on 25.10.07. Thereafter an application was filed by the petitioners on 3.12.2007 under Section 468 (2) (a) of Cr.P.C., wherein it was alleged that as per the complaint the alleged offence is between the period of 12.7.85 to 3.2.86 and the complaint has been filed on 31.3.1998 i.e. after a lapse of 12 years. It was alleged that as per the Sections 13 and 14 of the Adhiniyam 1973 read with Rule II and 12 of the Rules, the maximum penalty which can be imposed is Rs.500/-, therefore, the complaint can be filed at the most within a period of six months from the date of commencement of offence. It was alleged that since complaint is filed after 12 years, therefore, complaint be dismissed. The application was opposed by filing reply. After hearing the parties learned Trial Court dismissed the application filed by the petitioners, hence this revision petition.

3. Learned counsel for the petitioners submit that learned Trial Court committed error in not considering that the alleged offence as mentioned in the complaint is from 12.7.85 to 3.2.86. Since under Section 14 of the Adhiniyam 1973 the maximum punishment is Rs.500/- only, therefore, complaint ought to have been filed within a period of six months from the date of alleged offence, but the same was filed on 31.3.1998 i.e. after expiry of 12 years and after the prescribed period of limitation. It is submitted that no cognizance could have been taken by leaned Court below, but inspite of allowing application learned Court below committed error in dismissing the application filed by the petitioners.

4. Learned counsel for the respondent submits that learned Court below after taking into consideration all the facts and circumstances of the case has dismissed the application filed by the petitioner, which requires no interference.

5. Sections 13 and 14 of the Adhiniyam 1973 reads as under :-

> "Section 13 - **Promoters of lotteries to keep and maintain accounts, submit statements** - Every person promoting a lottery shall keep and maintain accounts relating to such lottery and shall submit to the collector statements in such form and within such period as may be prescribed.'
>
> Section 14 - **Penalty for failure to keep accounts, submit statements or keeping false accounts and submitting false statements** - If any promoter of a lottery liable under Section 13 to keep and maintain accounts or to submit statements in the manner and within the period prescribed, fails to keep accounts or so to submit the statements or keeps such accounts or submits

such statements as he knows to be or has reason to believe to be false, he shall, on conviction, be punished with fine which may extend to Rs.500/-."

6. Rule 11 and 12 of the Rules reads as under :-

"Rule II - Every Licensee to furnish return of accounts kent under section 13 - Every licnesee in the case of lotteries shall submit to the Licensinj Officer a statement of account withn seven days o the drawing of the lottery in Form E.

Rule 12 - **Penalty for breach of Rules 7,9,10,11:** - Any licnesee contravening Rules 7,9, 10 or 11 shall, on conviction, be liable to fine which ma; extend to fifty rupees."

7. In the present case permissions to draw the lottery were given by the State on 5.4.84, 8.5.84 and 26.7.84 and lotteries were actually drawn by the petitioners on 12.7.85, 31.1.85 and 3.2.86. The accounts were submitted by the petitioners which is Annexure A-2. There is nothing on record to show that when actually returns were filed. In the returns Annexure A-2, it has been mentioned that the returns could not be filed in time as on the date of draw itself Income Tax Department, Delhi seized the record of the organizing agent.

8. Sub Section 2 (a) of Section 468 of Cr.P.C. lays down the limitation for filing a complaint for an offence which is punishable with fine only, according to which the period of limitation shall be six months. Section 473 of Cr.P.C., authorizes to file prosecution even after expiry of limitation and the Court is empowered to take cognizance of the offence after the expiry of the period of limitation, if it is satisfied from the facts and circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

9. In the present case in the complaint itself no reason of delay has been mentioned. In support of the complaint no application was filed by the respondent under Section 473 of Cr.P.C., for condoning the delay of 12 years. Even after filing of the application by the petitioners for dismissing the complaint respondent did not prefer to move any application under Section 473 of Cr.P.C. On the contrary reply to the petition was filed wherein the reason which was assigned for condoning the delay is departmental procedure, which can hardly be said to be a sufficient ground for condoning the delay in absence of facts and circumstances, which were required to be mentioned by the respondent. In the complaint itself it has been mentioned by the respondent that the inquiry report has been received from the District Magistrate on 19.12.97. However, it is not mentioned that because of delay in receiving inquiry report the complaint could not be filed in time and the delay be condoned. Apart from this neither the inquiry report has been filed by the respondent nor it was stated by Dattatray (AW-I) in his statement that the report of District Magistrate has been received on 19.12.97.

10. In the facts and circumstances of the case there was no justification on the part of the learned Court below in dismissing the application filed by the petitioners and entertaining the complaint filed by the respondent for the purpose of prosecuting the petitioners, wherein the maximum penalty is the fine for which the limitation was only six months.

11. In view of this, this, petition is allowed. The impugned order dated 29.01.2008 passed by CJM, Indore, in Criminal Case No-98/1998 is set aside. Consequently, criminal proceedings against the petitioners are quashed. Petitioners stand discharged.

Petition allowed.

I.L.R. [2009] M. P., 563
CRIMINAL REVISION
Before Mr. Justice Rakesh Saksena
16 September, 2008*

RAKESH YADAV ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 161 & 162(1), Evidence Act, 1872, Section 25 - *Witness being tried as accused in counter case - Witness had made confessional statement in the case in which he is being tried as accused - Defence was not allowed to cross-examine the witness with regard to the confessional statement made by him in cross case - Held - Merely because a witness happens to be an accused in another case or counter case, the accused cannot be deprived of his right in the case against him to cross-examine him with respect to his confessional statement made by him u/s 161 of Cr.P.C. - Revision allowed.* (Paras 9, 11, 12 & 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 161 व 162(1), साक्ष्य अधिनियम, 1872, धारा 25 – साक्षी प्रतिमामले में अभियुक्त के रूप में विचारित – साक्षी ने उस मामले में संस्वीकृति कथन किया जिसमें वह अभियुक्त के रूप में विचारित किया जा रहा है – प्रतिरक्षा पक्ष को साक्षी की उसके द्वारा प्रतिमामले में किये गये संस्वीकृति कथन के सम्बन्ध में प्रतिपरीक्षा करने के लिए अनुज्ञात नही किया गया – अभिनिर्धारित – केवल इसलिए कि कोई साक्षी दूसरे मामले या प्रतिमामले में अभियुक्त है, अभियुक्त को उसके विरुद्ध मामले में उसके द्वारा द.प्र.सं. की धारा 161 के अन्तर्गत किये गये उसके संस्वीकृति कथन के सम्बन्ध में उसकी प्रतिपरीक्षा करने के उसके अधिकार से वंचित नही किया जा सकता – पुनरीक्षण मंजूर।

Case referred :

1934 CrLJ 349.

Akhil Singh, for the applicant.
A.L. Patel, G.A., for the non-applicant/State.

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*Cr.R. No.229/2008 (Jabalpur)

RAKESH YADAV Vs. STATE OF M.P.

ORDER

RAKESH SAKSENA, J. :–Applicant has filed this revision against the order dated 22.01.2008, passed by Sessions Judge, Satna in Sessions Trial No.85/07, sustaining the objection raised by the Public Prosecutor that a prosecution witness of a case cannot be cross-examined and confronted with confessional part of his statement recorded under Section 161 of the Code of Criminal Procedure even if confession pertains to some other case.

2. In short, facts of the case are that applicant/accused is facing trial for an offence under Section 307/34 and Section 323 of the Indian Penal Code in Sessions Trial No. 85/07 before the Court of Sessions Judge, Satna. One Shri Ram Janam Rai is a prosecution witness in the case. There is a counter case also which is Sessions Trial No. 46/2007 under Section 302/34 of the Indian Penal Code. In that trial, Shri Ram Janam Rai is an accused. While recording the statement of Ram Janam Rai under Section 161 of the Code of Criminal Procedure in connection with the case registered under Section 307/34 of the Indian Penal Code, he made a confessional statement that he had also fired a gun at Jhablu Yadav who died.

3. At the time of examination of Shri Ram Janam Rai, as a prosecution witness, in Sessions Trial No. 85/07, a question arose whether he could be confronted with his statement recorded under Section 161 of the Code of Criminal Procedure with respect to his confessional part. Learned Prosecutor raised objection that the defence cannot be permitted to cross-examine the witness with respect to a confessional part of the statement, as it was hit by Section 25 of the Indian Evidence Act, especially because at the time of making such statement the witness was in police custody in the counter case. The contention of the defence counsel was that if the accused was not permitted to cross-examine the witness with his statement recorded under Section 161 of the Code of Criminal Procedure, he would be immensely prejudiced in his defence. If the statement of witness was in the nature of confession pertaining to some other offence, the right of accused could not be curtailed and he could not be debarred from cross-examining the witness in respect to any part of the statement.

4. Learned Sessions Judge upholding the objection of Prosecutor held that it was not necessary for the maker of a confessional statement to police for seeking protection of Section 25 of the Indian Evidence Act, that he should be an accused in that case. Since the police recorded the statement of Shri Ram Janam Rai, under Section 161 of the Code of Criminal Procedure, while in custody of police, wherein he admitted commission of murder of one person, he ultimately became an accused in counter case for an offence punishable under Section 302 of the Indian Penal Code. His confessional statement recorded during investigation of any offence could be used only under Section 27 of the Indian Evidence Act for recovery of certain facts or things, but as Shri Ram Janam Rai, in the so called confessional statement, did not give any information to the police about any weapon or anything,

the part of his statement as it related distinctly to the confession of committing the offence of murder was inadmissible and, therefore, the defence could not be permitted to use this part of statement to contradict or cross-examine the witness. Learned Sessions Judge placed reliance on *Santokhi Beldar vs. Emperor*-1934 Cr.L.J. 349, wherein it was held that as soon as a person states that he had done a certain act, which amounts to an offence, he accuses himself of committing the offence and if the statement is made to a police officer as such, he becomes accused person in the custody of police officer within the Section 27 of the Indian Evidence Act.

5. Learned counsel for the applicant submits that the learned Sessions Judge committed grave error in disallowing the accused to cross-examine the witness and to confront him from his police statement, even though some part of it amounted to confessional statement. On the other hand, learned counsel for the State justifies the impugned order passed by the Sessions Judge.

6. I have heard the counsel of both the parties at length and perused the impugned order.

7. Before dilating on the legal position involved in the present case, it is necessary to look into the provision of Section 162 of the Code of Criminal Procedure, which reads as under:-

> **"162. Statements to Police not to be signed: Use of statements in evidence.-** (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
>
> Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
>
> (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

It is also necessary to examine Section 25 of the Evidence Act, which is quoted hereunder:-

" **Confession to police officer not to be proved.**-No confession made to a police officer, shall be proved as against a person accused of any offence."

8. It has been provided in Section 162 of the Code of Criminal Procedure that no such statement or any record thereof, whether in police diary or otherwise, or any such part of such statement or record, shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872.

9. On close examination of the aforesaid provisions, it would be clear that the bar imposed under sub-section (1) of Section 162 of the Code of Criminal Procedure with respect to statement recorded under Section 161 of the Code of Criminal Procedure relates only to offence under investigation. The words "at any inquiry or trial in respect of any offence under investigation at the time when such statement was made" engrafted in the provision means that the bar imposed by Section 162 (1) of the Code of Criminal Procedure applies only when the statement is given by a person as a witness and not an accused.

10. In the present case, the statement of Shri Ram Janam Rai was recorded under Section 161 of the Code of Criminal Procedure in respect of the offence under Section 307/34 of Indian Penal Code, allegedly committed by the accused person, which is subject matter of Sessions Trial No. 85/07 and not as an accused of offence under Section 302/34 of the Indian Penal Code, which is subject matter of Sessions Trial No. 46/07.

11. Section 25 of the Indian Evidence Act safeguards the interest of a person in respect of the confession made by him to a police officer where he is an accused of any offence. Statement of Shri Ram Janam Rai was not recorded by the police under Section 161 of the Code of Criminal Procedure as an accused of the offence under Section 302/34 of the Indian Penal Code.

12. Merely because a witness happens to be an accused in another case or a

counter-case, the accused cannot be deprived of his right in the case against him to cross-examine him with respect to his confessional statement made by him under Section 161 of the Code of Criminal Procedure even if whole or some part of it is confessional in nature. It is true that the part of statement amounting to confession cannot be proved in the case in which he himself is facing trial as an accused. Since Shri Ram Janam Rai is appearing as a witness (and not as accused) in Sessions Trial No. 85/2007, he cannot be exempted in that case from giving answer to the question put by defence counsel, even in respect to the confessional part of the statement.

13. The position would be different where Shri Ram Janam Rai is being tried as an accused in the counter-case. In that case, the confessional part of his statement recorded under Section 161 of the Code of Criminal Procedure cannot be proved against him in view of the provisions of Section 25 of the Evidence Act. The bar imposed under the provisions of Section 25 of the Indian Evidence Act would not help Shri Ram Janam Rai in the trial where he appears as a witness and not as accused.

14. There is absolutely no conflict between the provisions of Section 162 of the Code of Criminal Procedure and Section 25 of the Indian Evidence Act. Both the provisions act in different fields. Provision of Section 25 of the Indian Evidence Act creates safeguards for an accused in police custody, whereas provision of Section 162 (1) of the Code of Criminal Procedure creates an important right in favour of accused to cross-examine a witness by confronting him with his previous statement reduced into writing by the police during investigation. The pith and substance of the provisions of Section 162 of the Code of Criminal Procedure and Sections 25 and 27 of the Evidence Act, taken together, is that the law provides protection to a person, in a criminal trial against him, from his confessional statement or any part thereof to the Police, excepting the exceptions ingrained in the provision of Section 27 of the Evidence Act.

15. For the foregoing reasons, I am of the considered opinion that the impugned order passed by the Sessions Judge is not legally correct and therefore deserves to be set aside.

16. Accordingly, the order dated 22.1.2008, passed by Sessions Judge, Satna, in Sessions Trial No. 85/07 is set aside. The defence, in cross-examination, may put questions to witness Shri Ram Janam Rai in respect of his statement made to police under Section 161 of the Code of Criminal Procedure and confront him with it, including the confessional part.

17. Revision allowed.

Revision allowed.

I.L.R. [2009] M. P., 568
CRIMINAL REVISION
Before Mr. Justice Rakesh Saksena
18 November, 2008*.

VIVEK AGGARWAL & anr. ... Applicants
Vs.
PREMCHAND GUDDU ... Non-applicant

A. **Criminal Procedure Code, 1973 (2 of 1974), Section 156** - *Powers of officer-in-charge of police station - Section 156(1) confers unrestricted powers on officer-in-charge of police station to investigate cognizable offence without order of Magistrate - He can investigate either on its own motion, on its own knowledge or from any other reliable information - Statutory right to investigate cognizable offence cannot be interfered with or controlled by any court.* (Para 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156 – पुलिस थाने के भारसाधक अधिकारी की शक्तियाँ – धारा 156(1) पुलिस थाने के भारसाधक अधिकारी को मजिस्ट्रेट के आदेश के बिना संज्ञेय अपराध का अन्वेषण करने की अनिर्बन्धित शक्तियाँ प्रदान करती है – वह या तो स्वयं की जानकारी पर स्वप्रेरणा से या अन्य किसी विश्वसनीय सूचना से अन्वेषण कर सकता है – संज्ञेय अपराध का अन्वेषण करने के कानूनी अधिकार में किसी न्यायालय द्वारा हस्तक्षेप या नियंत्रण नही किया जा सकता।

B. **Criminal Procedure Code, 1973 (2 of 1974), Section 156(3)** - *Power of Magistrate - Magistrate has no jurisdiction to order police investigation u/s 156(3), if complaint does not disclose commission of cognizable offence.* (Para 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – मजिस्ट्रेट की शक्तियाँ – यदि परिवाद से संज्ञेय अपराध किया जाना प्रकट नही होता है, तो मजिस्ट्रेट को धारा 156(3) के अन्तर्गत पुलिस अन्वेषण का आदेश देने की कोई अधिकारिता नही है।

C. **Criminal Procedure Code, 1973 (2 of 1974), Section 156(3)** - *Territorial jurisdiction of Magistrate - Magistrate is empowered to direct investigation only by officer-in-charge of police station who has jurisdiction over the local area within his territorial jurisdiction.* (Para 11)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – मजिस्ट्रेट की क्षेत्रीय अधिकारिता – मजिस्ट्रेट केवल उस पुलिस थाने के भारसाधक अधिकारी द्वारा अन्वेषण करने का निदेश देने के लिए सशक्त है, जो उसकी क्षेत्रीय अधिकारिता के स्थानीय क्षेत्र पर अधिकारिता रखता हो।

D. **Criminal Procedure Code, 1973 (2 of 1974), Section 156(3)** - *Power of Magistrate - Even if the Magistrate does not say in so many words about commission of cognizable offence and if it could be gathered on perusal*

*Cr.R. No.906/2008 (Jabalpur)

of order that he applied his mind to the material on record with that view, order u/s 156(3) cannot be held to be without jurisdiction. (Para 12)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – मजिस्ट्रेट की शक्ति – यद्यपि मजिस्ट्रेट ने संज्ञेय अपराध करने के बारे में स्पष्ट रूप से कुछ नही कहा और यदि आदेश के परिशीलन पर यह प्रकट होता है कि उसने अभिलेख की सामग्री पर अपने मस्तिष्क का प्रयोग किया है, इस दृष्टिकोण से धारा 156(3) के अन्तर्गत आदेश अधिकारिता विहीन होना अभिनिर्धारित नही किया जा सकता।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - ***Investigation - Magistrate not justified in ordering investigation by Inspector General of Special Police Establishment, Lokayukt.*** (Paras 13 & 14)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण – मजिस्ट्रेट द्वारा विशेष पुलिस स्थापना, लोकायुक्त के महानिरीक्षक द्वारा अन्वेषण करने का आदेश देना न्यायोचित नही।

F. Criminal Procedure Code, 1973 (2 of 1974), Section 179 - ***Place of trial - Section 179 cannot be stretched to the extent that any act which amounts to an offence committed in any part of State can be inquired into or tried by a Court where the head office of administration of State or head office of investigating agency is situated.*** (Paras 17 & 18)

च. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 179 – विचारण का स्थान – धारा 179 को इस सीमा तक विस्तृत नही किया जा सकता कि कोई कृत्य जो राज्य के किसी हिस्से में किये जाने वाले अपराध की कोटि में आता है, की जाँच या विचारण उस न्यायालय द्वारा किया जा सकता है जहाँ राज्य के प्रशासन का मुख्यालय या अन्वेषण एजेंसी का मुख्यालय स्थित है।

G. Prevention of Corruption Act (49 of 1988), Section 3 - ***Local areas for the court to try cases - Notification dated 24.01.1991 provided that the special courts shall have exclusive jurisdiction for trial of cases - Special Judge, Bhopal has no jurisdiction to entertain any complaint involving an offence under the Act which is said to have taken place at Indore.*** (Para 22)

छ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 3 – मामलों का विचारण करने के लिए न्यायालय के स्थानीय क्षेत्र – अधिसूचना तारीख 24.01.1991 उपबंधित करती है कि विशेष न्यायालयों को मामलों का विचारण करने की अनन्य अधिकारिता होगी – विशेष न्यायाधीश, भोपाल को किसी परिवाद को ग्रहण करने की कोई अधिकारिता नही है जिसमें अधिनियम के अधीन कोई अपराध अन्तर्ग्रस्त हो जो इन्दौर में किया जाना अभिकथित है।

Cases referred :

AIR 2001 SC 668, (2008) 5 SCC 668, (2008) 7 SCC 748, AIR 1961 SC 1629, AIR 1963 SC 447, AIR 1963 SC 447.

A.M. Mathur with *Sanjay Agrawal*, for the applicants.
Imtiyaz Husain with *Rajneesh Trivedi*, for the non-applicant.

ORDER

RAKESH SAKSENA, J. :–Applicants have filed this revision against the order dated 30.04.2008 passed by the Special Judge (Prevention of Corruption Act), Bhopal in M.J.C. No.45/2008, under Section 156(3) of the Code of Criminal Procedure directing the Inspector General, Special Police Establishment, Lokayukt, Bhopal to investigate the matters alleged in the complaint filed by the respondent/complainant and to proceed under the provisions of Chapter-XII of the Code of Criminal Procedure.

2. The facts of the case, in short, are that, applicant No.1 Vivek Aggarwal, an I.A.S. officer belonging to the Madhya Pradesh cadre, was posted as Collector at Indore. Applicant No.2 Smt.Sapna Aggarwal is his wife. Complainant Premchand Guddu, who is a member of the Legislative Assembly, filed a complaint against the applicants in the Court of Special Judge (Prevention of Corruption Act), Bhopal making allegations of corruption in high places of administration attracting the penal provisions of Sections 13(1)(d), 13(1)(e) and 13(2) of the Prevention of Corruption Act r/w Sections 120-B, 420, 467, 471 and other provisions of the Indian Penal Code and praying that a First Information Report be registered and an investigation be ordered against the applicants. According to complainant, applicant No.1 Vivek Aggarwal was appointed as Collector of district Indore on 01.06.2005, since then various builders and other persons were enjoying illegal favours from him. By indulging in illegal activities, Mr.Vivek Aggarwal earned huge property in the name of his wife Smt.Sapna Aggarwal whereby it could be assumed that his income and assets were disproportionate. On 24.03.2008, Mr.Vivek Aggarwal purchased a property situated at 7th Floor, B.C.M. Heights, Indore for huge consideration of Rs.26 Lakhs in the name of his wife, and in the registered sale deed instead of mentioning his Indore address, mentioned the address of Panchkulla, Haryana. In the registry, there was mention of false PAN number which in fact belonged to a person who resided at Pune, Maharashtra. Applicant No.2, who is a house wife, had no income whereby she could have purchased the property worth Rs.26 Lakhs. According to complainant, whole episode was concocted with the story of corrupt favours by Mr.Vivek Aggarwal to the builder of building B.C.M. Heights, who had gifted a flat to him in the name of his wife. Besides the above allegations, other allegations about commission of offences of cheating the State exchequer under the Indian Stamps Act, of committing fraud and of under-valuing of the property were also made.

3. Along with the complaint, an application under Section 156(3) of the Code of Criminal Procedure was also filed by the complainant seeking direction to the Police and other competent authorities to investigate the matter.

4. On 30.04.2008, learned Special Judge, Bhopal heard the counsel of complainant on the question of jurisdiction and holding that in view of the provisions of Section 179 of the Code of Criminal Procedure, an offence can be tried even at a place where a consequence of an act has ensued, despite the fact that the

offence was committed at some other place, entertained the complaint and allowed the said application. Though, even according to him, on perusal of the facts averred in the complaint and the documents annexed with it, it was clear that the alleged act was not done in the territorial jurisdiction of his Court, but, since by that act a loss of State revenue was caused which was the subject matter of inquiry, and the principal administrative office of the State Government and the head office of investigating agency was also situated at Bhopal, the Special Court, Bhopal had territorial jurisdiction to entertain the complaint. It was also considered that though the applicant No.1 was a public servant and cognizance against him could have been taken only if the sanction under Section 19 of the Prevention of Corruption Act is granted, but it did not restrict the jurisdiction of Court to pass an order under Section 156(3) of the Code of Criminal Procedure to direct investigation into the allegations made against him. Learned Special Judge further observed that in the facts and circumstances of the case, it was necessary that there should be a high level inquiry in the matter. Since the head offices of Special Police Establishment, Lokayukt and the State Economic Offences Bureau are situated at Bhopal, they could investigate and probe the realities. For the above reasons, learned Special Judge allowed the application filed by the complainant under Section 156(3), Cr.P.C. and sent the copy of complaint and the documents filed with it, to the Inspector General, S.P.E., Lokayukt to investigate the matter either himself or get it done by any other competent subordinate officer and to proceed under the provisions of Chapter-XII of the Code of Criminal Procedure.

5. Learned senior counsel Shri Mathur for the applicants submits that the learned Special Judge, Bhopal has misinterpreted the provisions of Section 179 of the Code of Criminal Procedure in holding that he had jurisdiction to entertain the complaint filed by the complainant on the ground that a consequence of the act done at Indore ensued at Bhopal. Though the Special Judge had himself noticed that the alleged acts had not been committed within his territorial jurisdiction, yet he assumed the jurisdiction on the ground that there occurred loss of revenue to the Government whose Head Quarter and the Head Quarter of investigating agency was situated at Bhopal. According to Shri Mathur, the view taken by the learned Special Judge is wholly contrary to law and concepts of the criminal jurisdiction. Though it was very well on record that the applicant No.1 was Collector at Indore, the property purchased by his wife is situated in Indore and the concerned Sub-Registrar is also at Indore, even then the learned Special Judge, Bhopal wrongly entertained the complaint. The residence of complainant, the head quarter of the Government or the head quarter of Lokayukt being at Bhopal, cannot be made ground for fixing the territorial jurisdiction for inquiry or trial of an offence under the provision of Section 179 of the Code of Criminal Procedure. He submits that even the complainant himself in paragraph No.31 of the complaint averred that the commission of offence took place at Indore.

6. Shri Mathur further submits that the learned Special Judge, Bhopal before passing the order under Section 156(3), Cr.P.C. did not consider that the facts narrated in the complaint disclose commission of any cognizable offence. As such, the learned Judge passed the order mechanically without application of mind. He placed on record the notification F.No.1-1-88-XXI-B, dated 24.01.1991 issued by the Madhya Pradesh Government in exercise of the powers conferred by sub-section (1) of Section 3 of the Prevention of Corruption Act, 1988, according to which, the State Government after consultation with the High Court of Madhya Pradesh established the Special Courts of the Additional Sessions Judge for different local areas. According to notification, the cases put up by the Lokayukt organization and the State Economic Offences Bureau, are to be tried before the Special Courts notified in the schedule for specified particular local area. In the schedule, the Court of Special Additional Sessions Judge, Indore has been notified to be the Special Court for trial of the offences occurred in local area of Indore. Learned senior counsel submits that under Section 156(3) of the Code of Criminal Procedure, any Magistrate empowered under Section 190 to take cognizance, has jurisdiction to order such investigation as could have been done by the officer in-charge of the Police Station in respect to a cognizable case which the Court having jurisdiction over the local area within the limits of such Police Station would have power to inquire into or try under the provisions of Chapter-XIII, Cr.P.C.. Thus, the Magistrate was empowered to direct the investigation only by the officer in-charge of Police Station who had jurisdiction over the local area within the limits of his territorial jurisdiction. According to him, in view of the provisions of Sections 3 and 4(2) of the Prevention of Corruption Act, learned Special Judge, Bhopal had no jurisdiction to entertain the complaint as neither any part of the said offence was committed within his territorial jurisdiction nor any consequence thereof had ensued in his territorial jurisdiction. In support of his arguments, learned senior counsel for the applicants placed reliance on the following decisions:-

1. *Central Bureau of Investigation through S.P., Jaipur Vs. State of Rajasthan and another,* AIR 2001 S.C. 668;

2. *Maksud Saiyed Vs. State of Gujarath and others,* (2008) 5 SCC 668;

3. *Deepak Agro Foods Vs. State of Rajasthan and others,* (2008) 7 SCC 748;

7. Shri Imtiyaz Husain, learned counsel for the respondent/ complainant, on the other hand, submits that the learned Special Judge, Bhopal did not commit error in entertaining the complaint filed by the complainant and in passing the order under Section 156(3), Cr.P.C. directing the Inspector General, Lokayukt to investigate into the allegations made therein. He submits that in view of the provisions of Section 462, Cr.P.C. it cannot be said that the learned Special Judge, Bhopal had inherent lack of jurisdiction. According to him, since there occurred

no failure of justice, the order passed by the learned Special Judge cannot be set aside. Even if the learned Special Judge did not specifically say that a cognizable offence was disclosed from the facts in the complaint, the order passed by him directing investigation under Section 156(3), Cr.P.C. cannot be said to be illegal. Learned counsel placed reliance on the following decisions :-

1. *Ram Chandra Prasad Vs. State of Bihar,* AIR 1961 SC 1629;

2. *State of West Bengal Vs. S.N.Basak,* AIR 1963 SC 447;

8. Shri Imtiyaz Husain, learned counsel further submits that under the provisions of Section 17 of the Prevention of Corruption Act, since no Police Officer below the rank of Deputy Superintendent of Police or the Police Officer of the equivalent rank is authorized to investigate the offence punishable under that Act, learned Special Judge was fully justified in directing investigation by the Inspector General, S.P.E. or by any officer subordinate to him.

9. I have heard the counsel of both the parties at length and perused the impugned order and the material on record carefully.

10. Before reaching any conclusion, it is necessary to advert to the relevant provisions, section 156 of the Code of Criminal Procedure which reads as under :-

> **"156. Police officer's power to investigate cognizable case:-** (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned."

11. From the wording of the above provision, it is apparent that sub-section (1) of Section 156 confers un-restricted powers on the officer-in-charge of the police station to investigate a cognizable offence without the order of Magistrate. The Police is empowered to investigate a cognizable offence either on the information under Section 154, Cr.P.C. or on its own motion, on its own knowledge or from any other reliable information. This statutory right to investigate a cognizable offence cannot be interfered with or controlled by any Court. The Court's function begins after the charge sheet is filed. Sub-section (3) of Section 156 empowers the Magistrate to refer and direct the Police to investigate a cognizable offence, but there is restriction on the Magistrate before directing the Police to investigate

under sub-section (3) that he should form an opinion that the complaint before him discloses a cognizable offence. When the allegations made in the complaint do not disclose commission of a cognizable offence, the Magistrate has no jurisdiction to order the Police investigation under sub-section (3) of Section 156, Cr.P.C.. If the Magistrate passes any order under sub-section (3) without application of mind, it would be without jurisdiction. Besides that, under Section 156(3) of the Code of Criminal Procedure, any Magistrate empowered under Section 190 to take cognizance, only had jurisdiction to order such investigation as could have been done by the officer-in-charge of the police station in respect to a cognizable case which the Court having jurisdiction over the local area within the limits of such police station would have power to enquire or try under the provisions of Chapter-XIII of the Code of Criminal Procedure. Thus, the Magistrate is empowered to direct the investigation only by the officer-in-charge of the police station who has jurisdiction over the local area within his territorial jurisdiction.

12. In *Maksud Saiyed Vs. State of Gujarat* (supra), the Apex Court held "Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind." It is true that the learned Special Judge did not, in so many words, mention in its order that the complaint disclosed commission of a cognizable offence, but at the same time it can be gathered on perusal of it that he applied mind to the material on record. In paragraphs Nos.2 and 5 of the impugned order, he mentioned that after perusal of the complaint and the documents annexed with the complaint he reached the conclusion that the matter deserved to be investigated at high level. However, he kept on reeling round the point of jurisdiction and made much endeavours to justify that he had territorial jurisdiction to entertain the complaint.

13. As far as the question, whether, a Magistrate under Section 156(3) of the Code of Criminal Procedure can order an investigation by any other or higher police officer than the officer-in-charge of the police station, it stands squarely covered by the decision rendered by the Apex Court in *Central Bureau of Investigation through S.P., Jaipur Vs. State of Rajasthan* (supra), where the Apex Court observed:-

> "6. If the power of a Magistrate to order investigation by the CBI in non-cognizable cases cannot be traced in the above provision, it is not possible to trace such power in any other provision of the Code. What is contained in sub-section (3) of Section 156 is the power to order the investigation referred to in sub-section (1) because the words "order such an investigation as above-mentioned" in sub-section (3) are unmistakably clear as referring to the other sub-section. Thus the power is to order an "officer-in-charge of a police station" to conduct investigation.

7. .....

8. It is clear that a place or post declared by the Government as police station, must have a police officer-in-charge of it and if he, for any reason, is absent in the station-house, the officer who is in next junior rank present in the police station, shall perform the function as officer-in-charge of that police station. The primary responsibility for conducting investigation into offences in cognizable cases vests with such police officer. Section 156(3) of the Code empowers a Magistrate to direct such officer-in-charge of the police station to investigate any cognizable case over which such magistrate has jurisdiction.

9. .....

10. This means any other police officer, who is superior in rank to an officer-in-charge of a police station, can exercise the same powers of the officer-in-charge of a police station and when he so exercises the power he would do it in his capacity as officer-in-charge of the police station. But when a magistrate orders investigation under Section 156(3) he can only direct an officer-in-charge of a police station to conduct such investigation and not a superior police officer, though such officer can exercise such powers by virtue of Section 36 of the Code. Nonetheless when such an order is passed, any police officer, superior in rank of such officer, can as well exercise the power to conduct investigation, and all such investigations would then be deemed to be the investigation conducted by the officer-in-charge of a police station. Section 36 of the Code is not meant to substitute the magisterial power envisaged in Section 156(3) of the Code, though it could supplement the powers of an officer-in-charge of a police station. It is permissible for any superior officer of police to take over the investigation from such officer-in-charge of the police station either suo motu or on the direction of the superior officer or even that of the government.

11. In a decision rendered by the Kerala High Court the complaint was forwarded by a Magistrate to the Inspector General of Police (Crimes) for investigation under Section 156(3) of the Code. When the State challenged the said order of the Magistrate the High Court held that a Magistrate cannot order any police officer, other than one who is in charge of a police station to conduct the investigation, though the Government in exercise of their executive powers can authorize any superior police officer to investigate a case and such direction can be issued by the higher

officer to his subordinate officer in the police department. The said decision is reported in *State of Kerala V. Moosa Haji, Kolakkacan,* (1993) 2 Ker LT 609 and also in 1994 CLJ 1288. A two Judge Bench of this Court (G.N.Ray and G.B.Pattanaik, JJ) has affirmed the said decision of the Kerala High Court as per order dated 8.04.1997 in Criminal Appeal No.410 of 1994. The principle involved in the said case would as well be applicable when the Magistrate is approached to direct the CBI for conducting the investigation.

12. .....

13. .....

14. .....

15. As the present discussion is restricted to the question whether a Magistrate can direct the CBI to conduct investigation in exercise of his powers under Section 156(3) of the Code it is unnecessary for us to travel beyond the scope of that issue. We, therefore, reiterate that the magisterial power cannot be stretched under the said sub-section beyond directing the officer-in-charge of a police station to conduct the investigation."

14. Thus, the submission made by the learned counsel of the complainant cannot be accepted that the learned Magistrate was justified in ordering investigation by the Inspector General of S.P.E. Lokayukt.

15. The submission made by Shri Imtiyaz Husain, learned counsel for the respondent that since under the provisions of Section 17 of the Prevention of Corruption Act, an offence under the said Act can be investigated only by a police officer not below the rank of Deputy Superintendent of Police or police officer of the equivalent rank, the order of learned Magistrate directing investigation by the Inspector General of S.P.E. Lokayukt is not illegal; cannot be accepted. Section 17 of the Prevention of Corruption Act, 1988 reads as under :-

"17. Persons authorised to investigate:- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank-

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank,

shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant: (emphasis supplied by me)

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:

Provided further that an offence referred to in clause (e) of sub-section (1) of Section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police."

16. Perusal of the above provision reveals that no police officer below the rank of Deputy Superintendent of Police or police officer of the equivalent rank is empowered to investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class as the case may be. In my opinion, therefore, it can legitimately be assumed that the officer-in-charge of a police station even if he might be below the rank of Deputy Superintendent of Police, would be empowered to investigate the offence under this Act under the order of a Magistrate of the first class or the Metropolitan Magistrate as the case may be.

17. The argument advanced by Shri Imtiyaz Husain, learned counsel for the respondent that in view of the provision of Section 179 of the Code of Criminal Procedure the present complaint could be entertained and proceeded at Bhopal also because consequence of the acts of accused persons ensued there; in my opinion, is misconceived. Section 179 of the Code of Criminal Procedure reads as under :-

"179. Offence triable where act is done or consequence ensues:- When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

18. In my opinion, the provision of Section 179, Cr.P.C. cannot be stretched to the extent that any act which amounts to an offence resulting in loss or damage to the State, committed in any part of the State, can be inquired into or tried by a Court where the head office of administration of the State or the head office of

investigating agency is situated. Such an interpretation of the provision would be preposterous as it will tend to open a flood-gate for trials of many offences involving the element of loss to State, in the capital town of the State. The words "consequence which has ensued" as occurring in Section 179, Cr.P.C. cannot be interpreted to give such a meaning that all the acts amounting to an offence resulting in loss to the State exchequer shall be triable at Bhopal (capital of State).

19. According to the learned counsel for the respondent, in view of the provisions of Section 462 of the Code of Criminal Procedure, the impugned order passed by the Special Judge cannot be set aside merely on the ground that it was passed on a complaint filed before the Special Judge of a wrong sessions division. According to him, section 462, Cr.P.C. provides that no order, finding or sentence passed by any Criminal Court can be set aside merely on the ground that the inquiry, trial or other proceeding in which the order was passed took place in a wrong sessions division, unless it appears that such error in fact occasioned a failure of justice.

20. Section 462 of the Code of Criminal Procedure provides :-

> **"462. Proceedings in wrong place:-** No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice."

21. In *Deepak Agro Foods Vs. State of Rajasthan and others* (supra), the Apex Court observed "All irregular or erroneous or even illegal orders cannot be held to be null and void as there is a fine distinction between the orders which are null and void and orders which are irregular, wrong or illegal. Where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, non est and void ab initio as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties."

22. By the notification F.No.1-1-88-XXI-B dated 24th January, 1991, issued by the State Government in exercise of the powers conferred by sub-section (1) of Section 3 of the Prevention of Corruption Act, 1988, the State Government prescribed the local areas for the Courts to try the cases put up by the Lokayukt organization and the State Economic Offences Bureau and provided that the said Courts shall have exclusive jurisdiction for trial of such cases. In view of the above notification, in my opinion, the Special Judge, Bhopal lacked inherent jurisdiction to entertain any complaint involving an offence under the Prevention of Corruption Act which is said to have taken place at Indore and was triable exclusively by the Special Additional Sessions Judge, Indore only as per the notification.

23. Learned counsel for the respondent placing reliance on *State of West Bengal Vs. S.N.Basak,* AIR 1963 SC 447, submits that the statutory powers of the police to investigate cannot be interfered with by exercise of the powers under Section 439 of the Code of Criminal Procedure (old) or under the inherent powers of the Court under Section 561(A), Cr.P.C. (old), when there was no case pending at the time excepting that the person against whom the investigation had started had appeared before the Court. There is no dispute about the said principle, but with due respect, the question involved in the case in hand is different. The investigation in the present case was ordered under Section 156(3), Cr.P.C. on the orders of the Special Judge having no territorial jurisdiction with respect to the offences alleged.

24. Lastly placing reliance on the case of *Ram Chandra Prasad Vs. State of Bihar*, (supra), learned counsel for the respondent submits that the provisions of Section 526, Cr.P.C. (old) empowered the High Court to transfer any case from a Criminal Court subordinate to it to any other Court which is competent to try it and that principle also applied to the case in hand. In my opinion, in the peculiar facts and circumstances of the case, an order of transfer of the case would not be just and proper.

25. Taking into consideration all the circumstances, I am of the considered opinion that the learned Special Judge, Bhopal illegally entertained the complaint filed by the respondent for which he had no territorial jurisdiction. For entertaining the complaint he gave extraneous reasons which were not germen for conferring jurisdiction to him. He also acted beyond jurisdiction in ordering investigation by the Inspector General, Special Police Establishment, Lokayukt, Bhopal in exercise of powers under Section 156(3) of the Code of Criminal Procedure. Consequently, the order dated 30.04.2008 passed by the Special Judge (Prevention of Corruption Act), Bhopal in M.J.C. No.45/2008 is set aside. The proceeding of complaint is quashed. The complaint is directed to be returned to respondent/ complainant Premchand Guddu, who if so wishes, may file the same in the appropriate Court at Indore to be dealt in accordance with law.

26. Revision allowed.

Revision allowed.

I.L.R. [2009] M. P., 580

MISCELLANEOUS CIVIL CASE

Before Mr. Justice K.K. Lahoti

23 September, 2008*

M.J. ENGINEERING WORKS (P) LTD. ... Applicant

Vs.

BHARAT HEAVY ELECTRICAL LTD., BHOPAL ... Non-applicant.

Arbitration and Conciliation Act (26 of 1996) - Section 11(6) - *Appointment of Arbitrator - Applicant served request for appointment of arbitrator upon the department - No action taken for several months by department - Applicant filed application u/s 11(6) before Court - Held - Department's right to appoint arbitrator under the terms of the agreement ceased on filing of application u/s 11(6) - Subsequent appointment of arbitrator by the Department is without jurisdiction - Arbitrator appointed by the Court.* (Paras 8 & 9)

माध्यस्थम् और सुलह अधिनियम (1996 का 26) – धारा 11(6) – मध्यस्थ की नियुक्ति – आवेदक ने मध्यस्थ की नियुक्ति के लिये प्रार्थना विभाग पर तामील की – विभाग द्वारा कई महीनों तक कोई कार्यवाही नहीं की – आवेदक ने धारा 11(6) के अन्तर्गत न्यायालय में आवेदन पेश किया – अभिनिर्धारित – अनुबंध के निबंधनों के अधीन मध्यस्थ को नियुक्त करने का विभाग का अधिकार धारा 11(6) के अन्तर्गत आवेदन पेश करने पर समाप्त हो गया – विभाग द्वारा मध्यस्थ की पश्चात्वर्ती नियुक्ति अधिकारिता के बिना है – न्यायालय द्वारा मध्यस्थ नियुक्त किया गया।

Case referred :

2007 (7) SCC 684.

Kunal Thakre, for the applicant.

Ashok Lalwani, for the non-applicant.

O R D E R

K.K. LAHOTI, J. :–This application is directed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for constitution of an Arbitral Tribunal to decide the dispute between the parties.

2. Facts as stated in the application are as under:-

(a) That, the applicant is a company registered under the Companies Act, 1956 engaged in the business of fabrication and supply of G.I. structures etc.

(b) That, respondent invited offers for supply of the G.I. structures, in response of which applicant made offer dated 12.11.2003 for supply of G.I. structures. The respondent issued a purchase order No.4538169 dated 15.11.2003 for fabrication and supply of structures. The total value of the order was stipulated at

*M.C.C. No.2229/2006 (Jabalpur)

Rs.59,40,000/-. Purchase order is on record as Annexure A/1. There were certain disputes in respect of performance of the aforesaid order, in respect of which allegations are made in the application but it is not necessary for this Court to refer all the aforesaid disputes while deciding the application under Section 11(6) of the Act.

(c) Because of the disputes in connection with the contract, the applicant invoked the arbitration clause and vide notice dated 20.2.2006 made a request to the Executive Director of respondent for adjudication and arbitration of the claims and in the alternative to appoint an independent arbitrator and refer the dispute for adjudication to the said arbitrator. A copy of the notice dated 20.2.2006, Annexure A/27 is on record. The notice was sent by registered post on 21.2.2006. A copy of the postal receipt is on record at page 168 of the paper book. Another copy of the notice was sent by UPC also. Copy of the receipt of UPC is on record at page 169 of the paper book.

(d) After waiting for a period of 30 days, when the respondent had not acceded the prayer of the petitioner for adjudication of the dispute or referring the matter to the arbitrator, this application was filed for the constitution of an arbitral tribunal.

3. This application was filed on 23.9.2006 and on 29.9.2006 after admission, a notice was issued to the respondent. Notice was served on the respondent on 23.4.2008. On 26.6.2008 respondent caused appearance and sought time to file reply. The case was adjourned to 27.8.2008 but no reply was filed and the matter was heard finally.

4. Learned counsel for the respondent opposed the application, stating that the respondent had not failed to appoint the arbitrator but had appointed the arbitrator on 30.5.2008. Shri G.Subedar was appointed as an arbitrator, so this application has rendered infructuous and may be dismissed. It was submitted that once arbitrator was appointed, petitioner ought to have filed an application under Section 13(4) of the Act for removal of such arbitrator and by allowing this application arbitrator appointed by the respondent cannot be removed.

5. Aforesaid contention was opposed by the applicant on the ground that after service of notice dated 20.2.2006 on 24.2.2006, respondent had not appointed an arbitrator. This application was filed on 23.9.2006 and the respondent was served on 23.4.2008. After filing of this application, respondent had lost his right to appoint an arbitrator. Reliance was placed by the respondent to the judgment of the Apex Court in *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.* (2007) 7 SCC 684 and submitted that to decide the dispute between the parties, an arbitrator may be appointed.

6. To appreciate the aforesaid contention, firstly, the factual position may be looked into. In this case, arbitration clause between the parties is as under:-

"2.34. ARBITRATION

Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions, herein before mentioned and as to the quality of workmanship or materials, used on the work or 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 completion or abandonment there of shall be referred to the sole arbitration of the Executive Director/General Manager, Bharat Heavy Electricals Ltd. Bhopal and if the Executive Director/General Manager is unable or unwilling to act, then to the sole arbitration of some other person appointed by ED/GM willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of Bharat Heavy Electricals Ltd and that he had to deal with matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred vacating his office or being unable to act for any reason, such Executive Director/General Manager as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the term of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor, it is also a term of this contract that no person appointed by such Executive Director/General Manager as aforesaid should act as arbitrator and if for any reason, that is not possible the matter is not to be referred to arbitration at all. In cases where the amount of the claim in dispute is Rs.50,000/- (Rs.fifty thousand) and above, the arbitrator shall give reasons for the award.

Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or reenactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under

this (clause) together with the amount or amounts claimed in respect to each such dispute.

The arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award.

The work under the contract shall if reasonably possible, continue during the arbitration, proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The arbitrator shall be deemed to have entered on the reference on the date the issues notice to both the parties fixing the date of the first hearings.

The arbitrator shall give a separate award in respect of each dispute or difference to him.

The venue of arbitration shall be such place as may be fixed by the arbitrator in his sole discretion.

The award of the arbitrator shall be final, conclusive and binding all parties to this contract."

It is not in dispute that the aforesaid arbitration clause is applicable between the parties. The arbitration clause specifically provided that in case of any dispute, the matter shall be referred to the sole arbitration of the Executive Director/ General Manager, Bharat Heavy Electricals Ltd, Bhopal and if the Executive Director/General Manager is unable or unwilling to act, then to the sole arbitration of some other person appointed by Executive Director/General Manager, willing to act as such arbitrator.

7. In this case, the letter of request was made to respondent on 20.2.2006 and the aforesaid letter was served on the respondent, as per certificate of Department of Post dated 4.8.2008, on 24.2.2006. Thereafter, this application was filed on 23.9.2006 and notice was served on respondent on 23.4.2008. In the light of aforesaid factual position, the legal position as settled by the Apex Court in *Bharat Battery Mfg. Co. (P) Ltd.* (supra) may be looked into, thus:-

> 12. A three-Judge Bench of this Court in *Punj Lloyd Ltd. v. Petronet MHB Ltd.*3 considered the applicability of Section 11(6) petition and considered the facts which are similar to the facts of the present case and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in *Datar Switchgears Ltd. v. Tata Finance Ltd.*4 wherein at SCC p.158, para 19, this Court held as under:

"19. So far as cases falling under Section 11(6) are concerned-such as the one before us-no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited." (emphasis in original).

As already noticed, the respondent filed Section 11(6) petition on 30-3-2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15-5-2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.

13. We are, therefore, of the view that the order of appointment of Dr. Gita Rawat by the appellant as a sole arbitrator dated 15-5-2006 was passed without jurisdiction. Once Section 11(6) petition is filed by one party seeking appointment of an arbitrator, the other party cannot resurrect the clause of the agreement dealing with the appointment of the arbitrator, in this case Clause 24 of the agreement.

8. The facts of the present case are similar. The applicant filed this application on 23.9.2006, thereafter, the respondent lost its right to appoint an arbitrator in terms of the clause of the agreement. The right to appoint an arbitrator under the aforesaid clause ceased, after section 11(6) of the Act was invoked by the applicant

before this Court, seeking appointment of an arbitrator. In this application, respondent was served on 23.4.2008 and thereafter respondent appointed an arbitrator Shri G.Subedar on 30.5.2008 which was apparently without jurisdiction. So it is not necessary for the applicant to file an application under Section 13(4) of the Act for removal of such an arbitrator. The contention of Shri Ashok Lalwani that after appointment of an arbitrator, applicant ought to have filed an application under Section 13(4) of the Act has no substance. The arbitrator so appointed has no right and jurisdiction to proceed further in the matter and such order can be ignored by this court.

9. In view of above discussion, which finds support by the judgment of Apex Court in *Bharat Battery Mfg. Co. (P) Ltd.* (supra), this application deserves to be allowed, and it is allowed. For deciding the dispute between the parties, an arbitral tribunal is constituted. Shri Justice T.S.Doabia, a former judge of this Court is appointed as an arbitrator to decide the dispute between the parties. Office to communicate this order to Justice Shri Doabia. Considering facts of the case, there shall be no order as to costs.

Application allowed.

I.L.R. [2009] M. P., 585
MISCELLANEOUS CIVIL CASE
Before Mr. Justice Dipak Misra & Mr. Justice K.S. Chauhan
12 November, 2008*

BHOPAL WHOLESALE CONSUMER COOPERATIVE STORE LTD. ... Applicant
Vs.
MADAN LAL GANDHI ... Non-applicant

A. **Civil Procedure Code (5 of 1908), Order 33 Rule 1, Order 44 Rule 1** - *Indigent Person - Whether a Cooperative Society can be permitted to present an application for grant of leave to sue as an indigent person - Held - Body corporate can maintain an application under Order 33 Rule 1 and Order 44 Rule 1of Code.* (Para 16)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 33 नियम 1, आदेश 44 नियम 1 – अकिंचन – क्या एक सहकारी समिति को अकिंचन के रूप में वाद चलाने की अनुमति का आवेदन पेश करने की अनुज्ञा प्रदान की जा सकती है – अभिनिर्धारित – निगमित निकाय संहिता के आदेश 33 नियम 1 व आदेश 44 नियम 1 के अन्तर्गत आवेदन कर सकता है।

B. **Civil Procedure Code (5 of 1908), Order 33 Rule 1, Order 44 Rule 1** - *Accounts of Cooperative Society audited - Society has suffered a loss - Appellant permitted to sue as an indigent person.* (Paras 16 & 17)

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*M.C.C. No.2741/2007 (Jabalpur)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 33 नियम 1, आदेश 44 नियम 1 – सहकारी समिति के लेखा की लेखापरीक्षा की गई – समिति को नुकसान हुआ – अपीलार्थी को अकिंचन के रूप में वाद चलाने की अनुमति दी गई।

Cases referred:

AIR 1918 Mad 362, AIR 1961 Bom 1, AIR 1965 Gujarat 207, AIR 1961 Patna 15, AIR 1969 All 1, AIR 2001 SC 2277, AIR 1993 Kerala 31, AIR 1985 SC 973.

Ankit Saxena, for the applicant.

Kumaresh Pathak, Dy.A.G., for the State.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–This is an application under Order 44 Rule of the Code of Civil Procedure (for short 'the Code') read with Order 33 Rule 1 of the Code seeking permission to prefer an appeal as an indigent person against the judgment and decree dated 24.7.2007 passed by the learned District Judge, Bhopal in Civil Suit No.271-A/2006 whereby the learned trial Judge has decreed the suit tor eviction and realization of rental amount in respect of the suit premises under the. provisions of M.P. Accommodation Control Act, 1961. The learned trial Judge while decreeing the suit tor eviction has directed the defendant to pay the monthly rent of Rs.12,970/- from 01.1.2004 to 30.6.2004 to the plaintiff.

2. Being aggrieved by the aforesaid judgment and decree memorandum of appeal has been presented under section 96 of the Code and alongwith the present application.

3. When this application was taken up for consideration, learned counsel representing the State raised a preliminary objection that the petitioner which is a Cooperative Society would not be covered under Order 44 Rule 1 read with Order 33. Rule 1 of the Code. As an objection was raised we heard the learned counsel for the parties on the same.

4. It is submitted by Mr.Ankit Saxena, learned counsel for the petitioner that the petitioner is a cooperative society and from perusal of the audit conducted by the State Administration it is manifest that the petitioner has sustained loss and, therefore, it is entitled under the law to sue as a pauper. It is also canvassed by him that the language of Order 33 Rule 1 CPC is quite wide to cover a company or the cooperative society which is a juridical person.

5. Mr.Kumaresh Pathak, learned Deputy Advocate General for the State, per contra, propounded that the petitioner, a cooperative society, would not be covered within the ambit and purview of Order 33 Rule 1 of the Code, and for that view of the matter under Order 44 Rule 1 of the Code, to sue as an indigent person regard being had to the language employed under the said provisions.

6. In this context, it is apposite to refer to Order 33 Rule 1 of the Code which reads as under:-

"1. Suits may be instituted by indigent person. - Subject to the following provisions, any suit may he instituted by an indigent person.

Explanation 1.- A person is an indigent person.-

(a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in suit or

(b) where no such fee if prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.

Explanation II.- Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation III.- Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity."

7. Order 44 Rule 1 of the Code of Civil Procedure which is relevant for the present purpose is reproduced below:-

"1. Who may appeal as an indigent person.-(1) Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as an indigent person, subject, in all matters, including the presentation of such application, to the provisions relating to suits by indigent persons, in so far as those provisions are applicable."

8. The question that emerges for consideration is whether a cooperative society can be permitted to present an application for grant of leave to sue as an indigent person.

9. In *Perumal Koudan v. Tirumalrayapuram Jananukoola Dhanasekhara Sanka Nidhi Ltd.*, AIR 1918 Mad. 362 the Division Bench repelled the contention that the company cannot file a suit in forma pauperis. Their Lordships expressed the opinion as under:-

"We are unable to accept this contention. The word 'person'

is not defined in the Code of Civil Procedure and consequently the definition of the word 'person' as including any Company or Association or body of individuals whether incorporated or not, in the General Clauses Act (X of 1897) would apply unless there is something repugnant to the subject or context."

10. In *Gendalal Cotton Mills v. Basant Kumaribai,* AIR 1961 Bombay 1 it has been held that the word 'person' in explanation to Order 33 Rule 1 of the Code includes natural as well as juristic person.

11. In *Chimanlal Bhogilal Panchani v. Chandanben Manchand Shah,* AIR 1965 Gujarat 207 a Division Bench of Gujarat High Court held that a trustee can apply for leave to sue in forma pauperis if he has no sufficient trust money.

12. In *East Indian Coal Co. Ltd, vs. East Indian Coal Co. Ltd, Workers' Union,* AIR 1961 Patna 15 it was ruled that the definition of the term person under the General Clauses Act can be applied to the person occurring in the explanation to Rule I of Order 22 of the Code and, therefore, a body corporate can be permitted to sue as forma pauperis.

13. In *R.P. Oil Mills Vs. Chunni Devi,* AIR 1969 Allahabad 1 the Full Bench has expressed the view as under:-

"A limited Company falls within the meaning of the expression 'person' as used in Rule 10, Order 30 of the Code of Civil Procedure. This would be so even though the Limited Company may have been carrying on business in a name or style other than its own without any attempt to conceal its own corporate name and this fact was known to the party suing."

14. In *Union Bank of India vs. Khader International Construction and others,* AIR 2001 SC 2277 the Apex Court affirmed the view of the High Court of Kerala rendered in *Union of India and others Vs. M/s.Khaders' International Constructions Ltd. and others.* AIR 1993 Kerala 31 and expressed the view that the word 'person' has to be given the meaning in the context in which it has been used and it is a benevolent provision and, therefore, it has to be given the extended meaning and, therefore, a public limited company, which is otherwise entitled to maintain a suit as a legal person, can very well maintain an application under Order 33 Rule 1 of the Code. The word 'person' mentioned in Order 33 includes not only a natural person but other juridical person also.

15. In the case at hand the petitioner is a Cooperative Society. In *Daman Singh v. State of Punjab,* AIR 1985 SC 973 it has been held that a registered society is a body corporate. A body corporate is indubitably a juridical person.

16. In view of the pronouncement of law, as stated hereinabove, we have no iota of doubt that the petitioner, a body corporate, can maintain an application under Order 33 Rule 1 of the Code and thereby an application under Order 44

Rule 1. At this juncture, it is apposite to state that Mr. Kumaresh Pathak, learned Deputy Advocate General had fairly stated that at the time of hearing that if the application is held to be maintainable as the accounts are audited and the society has suffered a loss, the State would not have any objection if permission is granted to it to sue as an indigent person.

17. In view of the aforesaid we allow the application of the petitioner and permit it to suit as an indigent person. Accordingly the Registry is directed to register the memorandum of appeal under Section 96 of the Code and place the matter before the appropriate Bench.

18. The Misc. Civil Case is accordingly allowed.

Order accordingly.

I.L.R. [2009] M. P., 589
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
28 January, 2009*

ANKUSH GOLECHA & ors. ... Applicants
Vs.
STATE OF M.P. & anr. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code, 1860, Section 498-A, Dowry Prohibition Act, 1961, Sections 4 & 6 - ***Quashing of criminal proceedings - When permissible - Law explained.***

Matrimonial dispute resolved by the parties. Thereafter parties entered into compromise and filing application for compounding offence u/s 498-A IPC. Trial court rejected the application on the ground that offence u/s 498-A IPC is non-compoundable. Application u/s 482 Cr.P.C. filed before High Court. High Court held that Section 320 Cr.P.C. does not limit or affect inherent powers u/s 482 Cr.P.C. Criminal proceedings quashed in exercise of inherent powers u/s 482 Cr.P.C. (Paras 4 to 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता, 1860, धारा 498–ए, दहेज प्रतिषेध अधिनियम, 1961, धाराएँ 4 व 6 – दाण्डिक कार्यवाहियों का अभिखण्डन – कब अनुज्ञेय – विधि स्पष्ट की गई।

Cases referred :

AIR 2003 SC 259, CrLJ (NOC) 919.

J.P. Mishra, for the applicant No.1.
D.R. Sihare, P.P., for the non-applicant No.1/State.
Rakesh Gupta, for the non-applicant No.2.

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*M.Cr.C. No.496/2009 (Gwalior)

ANKUSH GOLECHA Vs. STATE OF M.P.

ORDER

MRS. INDRANI DATTA, J. :–Petitioners have filed this petition under Section 482 of Cr.P.C for quashing the entire proceedings with respect to Crime no. 59 of 2006 registered at Thana Padav, District Gwalior for offence punishable under Section 498-A and 323/34 of IPC and Section 4 and 6 of Dowry Prohibition Act initiated against the petitioners and pending before JMFC, Gwalior.

2. As per petitioners, the facts stated in brief are that petitioner no. 1 Ankush Golecha was married with respondent no.2 Smt. Shweta Golecha according to Hindu religion. Their marriage did not last longer and a decree of mutual divorce under Section 13 (B) of Hindu Marriage Act was granted by Principal Judge of Family Court in Case no.86-A of 2007 on the terms of giving Rs.32 lacs for maintenance of Smt. Shweta Golecha and her son Viraj Golecha @ Veer Jain. Criminal trial No.4995 of 2007 was also pending in the Court of JMFC, Gwalior against petitioners. Both the parties thereafter filed compromise applications before learned trial court under Section 320 of Cr.P.C and learned trial court on 13.1.2009 rejected both the applications in respect of Section 498-A and section 4 and 6 of Dowry Prohibition Act on the ground that Section 498A of IPC is non-compoundable offence. Therefore, this petition to invoke inherent powers for quashing the proceedings of Cr.case no.4995 of 2007 in connection with Crime no.59 of 2006.

3. Perused the certified copies of order sheets and impugned order dated 13.1.2009 passed in Cr.case no.4995 of 2007 pending in the Court of JMFC, Gwalior.

4. In case of *B.S.Joshi Vs. State of Haryana and another* AIR 2003 SC 259 Hon. Apex Court has held that in matrimonial disputes when both the parties approached before the High Court and filed application for quashing the FIR, the High Court can quash the criminal proceedings or FIR or complaint and Section 320 of Cr.P.C does not limit or affect inherent powers of High Court granted under Section 482 of Cr.P.C.

5. In *Satyaendra Dharmpal and Others Vs. State of UP* 2008 Cr.L.J (NOC) 919 in that case of matrimonial dispute application was filed U/s 482 of Cr.P.C for quashing criminal proceedings against husband under Section 323, 504, 506 and 498 of IPC and Section ¾ of Dowry Prohibition Act, the parties arrived at compromise, there were no chances of conviction. Considering this, proceedings were quashed.

6. According to the contents of the petition filed under Section 482 of Cr.P.C and other relevant documents on record, it is clear that the parties have resolved their dispute. They are personally present in the Court. Respondent no.2 Shweta Golecha does not want to proceed further against her husband petitioner no. 1 Ankush Golecha and other petitioners with respect to the Criminal Case no.4995 of 2007

7. In the light of above observations and for the foregoing reasons, I allow the

petition and quash the criminal proceedings of Cr.case no.4995 of 2007 in connection with Crime no.59 of 2006 pending in the Court of JMFC, Gwalior,

A copy of this order be sent to the trial court concerned for information.

Order accordingly.

I.L.R. [2009] M. P., 591
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.S. Garg
19 August, 2008*

GENERAL MANAGER & anr. ... Applicants
Vs.
STATE OF M.P. & anr. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code, 1860, Section 420 - *Petition challenging issuance of process by JMFC on complaint of non-applicant - Allegation of cheating - Brochure-cum-advertisement published by company showing length of screen of television larger than the actual length - Held - When a person, relies upon an assurance made by the other parties, pays him money to purchase the articles and later on finds that articles sold to him is not what was assured then an offence punishable u/s 420 of IPC is made out - Issuance of process can not be condemned - Petition dismissed.* (Paras 13, 14 & 16)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता, 1860, धारा 420 – अनावेदक के परिवाद पर से न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा आदेशिका जारी करने को याचिका में चुनौती – छल करने का आरोप – कम्पनी द्वारा प्रकाशित विवरण पुस्तिका सह विज्ञापन में टेलीविजन की स्क्रीन की लम्बाई वास्तविक लम्बाई से अधिक दर्शित – अभिनिर्धारित – जब कोई व्यक्ति, अन्य पक्ष द्वारा दिये गये आश्वासन पर विश्वास करते हुए, वस्तुएँ क्रय करने के लिए उसे रुपये अदा करता है और बाद में पाता है कि उसे विक्रय की गई वस्तुएँ वह नही है जिसका आश्वासन दिया गया था, तब भा.द.सं. की धारा 420 के अन्तर्गत दण्डनीय अपराध बनता है – आदेशिका का जारी किया जाना रद्द नही किया जा सकता – याचिका खारिज।

S.L. Jain, for the applicants.
B.I. Mehta, for the non-applicant/State.

J U D G M E N T

R.S.Garg, J. :–By this petition under Section 482 of the Code of Criminal Procedure, the applicants are challenging the process issued by the Judicial Magistrate First Class, Ratlam against the present applicants on a complaint filed by one Ashok Chaurdia, S/o. Samrathmalji Chaurdia.

2. Short facts necessary for disposal of the present petition are that the complainant filed a complaint under Section 190 of the Code of Criminal Procedure

*M.Cr.C. No.4227/2006 (Indore)

against non-applicant Prabandh Sanchalak Mr.S.S.Lee of Samsung India Electronics Limited submitting interalia that the accused persons had largely advertised their products and had issued brochures in support of their products.

3. According to the complainant, he had purchased a television on 18.4.2003 from one M/s.Ibrahim Brothers, distributor/dealer of M/s. Samsung India Electronics Limited. According to the complainant, the complainant was told that the screen was 29 inches. The complainant, who was possessed a Soni Television of 21 inches was persuaded by the talks and advertisement and purchased a television having screen of 29 inches. After sometime, the complainant found that the screen was not 29 inches, therefore, he measured the screen and found that the screen was only 27 inches. It is to be noted that the length of the screen is measured diagonally and not horizontally. The case of the complainant was that the diagonal dimension of the screen was 27 inches.

4. Immediately after getting the measurement, he issued the notices to the present applicants on 25.5.2003 and on 30.9.2003 but he could not receive any reply, therefore, on 21.1.2004, he sent a legal notice but unfortunately he could not receive any reply. The complainant, therefore, filed the complaint submitting interalia that the Company, Mr.S.S.Lee, the Managing Director have played a fraud upon the general public by advertising that they would be selling 29 inches television while infact they were selling television of 27 inches.

5. In support of the complaint, the complainant stated before the Court that he had purchased 29 inches television after going through the literatures and he had purchased the same from M/s. Ibrahim Brothers. He had measured the screen and found the same to be 27 inches. On a complaint to M/s. Ibrahim Brothers, the seller/dealer informed him that they had supplied him the television as it was received by them from the Company. He also stated that he had issued letters and the legal notice but could not receive any reply. On the basis of the statements, the non-applicant could persuade the Court to issue process against the present applicants.

6. In the petition under Section 482 of the Code of Criminal Procedure, various submissions have been made including a submission that the Prabandh Sanchalak and Managing Director are the same but, however, the present petition under Section 482 of the Code of Criminal Procedure has been filed for and on behalf of the General Manager and the Managing Director without even naming them.

7. I have already noted that the accused No. 2 was Mr.S.S.Lee and he was shown as Managing Director. I do not know that whether Mr.S.S.Lee continues to be Managing Director or not.

8. Shri Jain, learned counsel for the applicants has placed his strong reliance upon Annexure P/1, a brochure issued by the Company and Annexure P/2 a comparison note prepared by the applicants.

9. Placing reliance upon the comparison note, it is submitted that different models of L.G., Phillips and Samsung though are specifying their products as 29 inches but in the catalogue, their viewing area is not specified. The actual viewing area as per the measurement is 26 inches. On strength of this comparison note, it is submitted that every Company is selling a television claiming it to be 29 inches screen while infact the screen is always less than 29 inches because part of the picture tube is covered under the cabinet. It is also submitted that from the brochure Aimexure P/1. it would clearly appear that it is nowhere stated that the actual viewing area would be 29 inches.

10. It is submitted by Shri Jain, learned counsel that the applicants have not committed any offence and registration of the offence, issuance of the process and filing of the complaint are sheer abuse of the process of the Court and the statutory procedure.

11. Shri Mehta, learned counsel for the complainant, however, submitted that the reliance on Annexure P/2 is misconceived because the facts are yet to be proved by the applicants/accused before the Trial Court. Condemning Annexure P/1, it is submitted that when it is contended by the Company that a particular television is of particular measurement and dimension then the television should be of that measurement and dimension. A manufacturer cannot come before the Court and say that the actual size of the picture tube is 29 inches but part of the same is covered under the cabinet. According to him, if the applicants were not cheating the other consumers then they could straightway say that the total length of the picture tube is 29 inches. Part of the same is covered under the cabinet and the actual viewing area is 26-27 inches. It is submitted by him that even otherwise, all these questions are required to be raised in defence and not at this stage under Section 482 of the Code of Criminal Procedure.

12. After hearing learned counsel for the parties and on going through the allegations made in the complaint and the statements of complaint Ashok Chaurdia, it would clearly emerge that he had purchased a television advertised to be 29 inches and infact the same was found to be 27 inches. The question before this Court is whether the brochure-cum-advertisement published by the Company was to mislead the party/purchaser or to create an impression in the mind of consumer that he was purchasing an article as projected in the brochure or advertisement.

13. True it is that in the advertising world, things are sold on the strength of a fact, which is projected in its high spirit but in the consumer world, it would not be so because a consumer would be entitled to the article projected for sale on the price fixed by the seller. Once a Company says that it is selling a particular item/ article then the products so sold must certify to and meet to the standard as provided in the brochure/advertisement. A Company cannot be allowed to say that though they advertised that the product was of 29 inches but they would be entitled to sell

26 inches television with an explanation later that part of the picture tube is covered under the cabinet.

14. The brochure Annexure P/1 on which reliance is placed by the applicants would clearly show that each and every product is shown to be of a particular measurement. On the last page of the brochure, the length of the picture tube is shown to be 74 cm, 64 cm, 53 cm, 43, 38 cm etc but it is nowhere mentioned that that would be the total length of the picture tube and a part of the same would be covered under the cabinet. When a person purchases an article, he relies upon the honesty and sincerity of a Company, which proposes to sell its article in the market. When a Company of the repute submits in the market that they are selling a television, which has 74 centimeter screen then they are obliged to sell a television of 74 centimeter screen and after the sale is over, they cannot be allowed to say that infact the television screen is not 74 centimeter but is only 68/69 centimeter. If they were to sell it honestly, they could have clearly shown in the advertisement/ brochures that 74 centimeter is the total length of the picture tube and atleast 5 centimeter or 2 inches of the picture tube is covered under the cabinet and the covered area would not be showing any picture. When a person, relies upon an assurance made by the other parties, pays him money to purchase the article and later on finds that articles sold to him is not what was assured then obviously an offence punishable under Section 420 of the Indian Penal Code is made out.

15. So far as Annexure P/2 is concerned, this Court at this juncture cannot rely upon the same because it is an ipse dixit in favour of the applicants. The defence of the applicants is yet to be established by leading cogent evidence.

16. In the present case, if the allegations made by the complainant are not rebutted or disproved by the present applicants then the Trial Court would be justified in convicting the applicants. If that be so, issuance of the process cannot be condemned just on the say of the applicants.

17. The application is rejected. The Trial Court shall proceed with the trial immediately. Interim relief, if any is vacated.

Petition dismissed.

I.L.R. [2009] M. P., 594

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice W.A. Shah

12 September, 2008*

MANORAMA (SMT.) ... Applicant

Vs.

STATE OF M.P. & anr. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Stay of*

*M.Cr.C. No.6316/2007 (Indore)

criminal proceeding - Pendency of writ petition against the decision of election petition shall have no bearing on criminal proceedings - Order of postponement of criminal proceeding till disposal of writ petition set-aside - Application allowed. (Para 4)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – दाण्डिक कार्यवाही को रोकना – निर्वाचन याचिका के निर्णय के विरुद्ध रिट याचिका के लम्बित रहने का दाण्डिक कार्यवाहियों पर कोई प्रभाव नही होगा – रिट याचिका के निपटारे तक दाण्डिक कार्यवाही रोकने का आदेश अपास्त – आवेदन मंजूर।

Cases referred :

AIR 1954 SC 397, (2005) 4 SCC 370.

S.R. Saraf, for the applicant.

Manish Joshi, Panel Lawyer, for the non-applicant No.1/State.

Jai Singh with *Vivek Singh,* for the non-applicant No.2.

ORDER

W. A. Shah, J. :–IN applicant/complainant's Private Complaint Case bearing Criminal Case No.212 of 2006 the learned Judicial Magistrate First Class, Sendhwa, District Badwani vide impugned order dated 17.09.2007 has ordered posponement of further proceedings till the disposal of Writ Petition No.2169 of 2006 which pends in this Bench of the High Court, hence this application by the complainant/ applicant under Section 482 of the Code of Criminal Procedure praying that the above order be quashed.

2. In election to the reserved category of Samiti, Sendhwa the applicant lost to the Respondent No.2. She filed private complaint against the Respondent No.2 in the Court of Judicial Magistrate First Class, Sendhwa for proceeding under Section 420 of the Indian Penal Code on the premise that she deceitfully showed her as OBC by birth whereas she was born in Agarwal family and was only married to an OBC Dipak Malviya. The applicant also seems to have filed an election petition touching the same matter. The learned Trial Magistrate taking cognizance of the complaint for offence of Section 420 of the Indian Penal Code issued process to the Respondent No.2. On her entering appearance therein the learned Trial Magistrate proceeded up to the stage of consideration of framing of charge. By that time the election petition mentioned above had been dismissed and against it the above writ petition had been brought and admitted by this Bench for hearing parties. The learned Trial Magistrate formed an opinion that in the said writ petition also the question of social status of the Respondent No.2 was involved, therefore, it was expedient in the interest of justice to pospone further proceedings in the complaint case till the decision of the writ petition, thus he passed the impugned order, feeling aggrieved thereby the present application has been brought by the complainant/applicant.

3. Having heard arguments, I have gone through the record of the case. I

have reached the conclusion that the impugned order cannot survive. My reasons for the same are as below.

4. The Divisional Commissioner as Election Tribunal in the concerned Case No.2004-2005, Election matter, vide order dated 10.03.2006 heard arguments relating to the question of tenability of the election petition. He in the above order held that (a) the election petition was not properly presented; and (b) determination of social status of a candidate was not within the competence of Election Tribunal. The Commissioner, therefore, dismissed the election petition. That order is under challenge in writ petition pending before this Court. Clearly, therefore, in the said writ petition this Court is not required to go into the question whether the Respondent No.2 is an OBC by birth or not. The scope of the writ petition is confined to the questions (a) whether the election petition was properly presented or not (b) whether it is within the competence of Election Tribunal to determine the social status of any candidate. Thus, on facts the order impugned as passed by the learned Trial Magistrate is misconceived.

5. Otherwise also public interests demand that criminal justice should be swift. The concept relating thereto with reference to civil litigation has been stated by the Constitutional Bench of apex Court as under, vide AIR 1954 SC 397 *{M.S.Sheriff and another v/s State of Madras and others}* :-

> "As between the civil and the criminal proceedings the criminal matters should be given precedence. No hard and fast rule can be laid down but the possibility of conflicting decisions in the civil and criminal Courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration is the likelihood of embarrassment. Another factor which weighs with the Court is that a civil suit often drags on for year and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial."

6. Another Constitutional Bench of the apex Court following the case of *M.S.Sheriff* (Supra), vide (2005) 4 Supreme Court Cases 370 *{Iqbal Singh Marwah and another v/s Meenakshi Marwah and another}* further observed :-

> "Findings given in one proceeding – Binding nature of, in the other – Held, civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the

prosecution and proof beyond reasonable doubt has to be given – Findings recorded in one proceeding may not be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein."

7. In view of the above matter, the impugned order is factually misconceived as well as it is bad-in-law. Therefore, it is set-aside since if it is allowed to stand it will be an abuse of the process of Court. The learned Trial Magistrate is consequently directed to resume the hearing of the case under reference and proceed according to law. Parties are directed to remain present before the Trial Court on 13.10.2008. Accordingly this application stands allowed.

Application allowed.

I.L.R. [2009] M. P., 597
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Sinho
5 November, 2008*

MOHD. HASIB ... Applicant
Vs.
RUBINA ... Non-applicant

Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3, Criminal Procedure Code, 1973, Section 421 - *Recovery of Mahr and maintenance - In default of payment, husband already undergone one year imprisonment - Another application for recovery of same amount and on failure to sent him Jail - Held - Since husband has already undergone imprisonment for one year u/s 3(4) of Act, he can not be sent Jail again on same default - However, recovery of balance amount can be made in accordance with law - Application partly allowed.*

A deference has to be withdrawn between a mode of enforcing recovery and sentencing a person to jail. Sentencing a person to jail is a mode of enforcement, it is not a mode of satisfaction of the liability. The liability can be satisfied only after making actual payment of amount to the wife. The only purpose of sending a person to jail is to oblige a person liable to pay the amount who refused to comply with the order. The purpose of sending him to jail is not to exonerate him from the liability of payment. A sentence of jail is no substitute for recovery of amount. This amount is granted to enable the wife and children to maintain themselves. (Paras 8, 9 & 10)

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3, दण्ड प्रक्रिया संहिता, 1973, धारा 421 – मेहर और भरण–पोषण की वसूली – अदायगी में व्यतिक्रम में पति ने पहले से एक वर्ष का कारावास भुगता – उसी राशि की वसूली

*M.Cr.C. No.3148/2008 (Jabalpur)

और असफल रहने पर उसे जेल भेजने हेतु भिन्न आवेदन – अभिनिर्धारित – चूंकि पति अधिनियम की धारा 3(4) के अन्तर्गत पहले से एक वर्ष का कारावास भुगत चुका है, उसे उसी व्यतिक्रम के लिए पुनः जेल नही भेंजा जा सकता – तथापि, विधि अनुसार शेष राशि की वसूली की जा सकती है – आवेदन आंशिक रूप से मंजूर।

Shekhar Sharma, for the applicant.
K.N. Fakruddin, for the non-applicant.

ORDER

S.C. SINHO, J. :–Invoking extraordinary jurisdiction of this Court under Section 482 of the Code of Criminal Procedure Code 1973 (hereinafter referred as the 'code'). Petitioner has filed this petition for quashing the execution proceedings pending in the Court of JMFC, Bhopal, in MJC No. 21/06.

2. Respondent/divorced wife filed a MJC No. 4/03 against her husband under Section 3 of The Muslim Women (Protection of Rights on Divorce) Act 1986 (referred as the 'Act'), before JMFC, Bhopal vide order dated 39.9.2003. Respondent was granted Rs. 25,786/- Maihar amount, Rs.6,000/- maintenance for Iddat period and Rs. 3,00,000/- for reasonable and fair provisions, and maintenance etc. It was also directed that petitioner shall return dowry items. However, the petitioner did not complied the order and respondent moved an application for execution of the order for payment of maintenance as MJC No. 12/05, petitioner was sentenced to one year imprisonment vide order dated 10.8.2005. Petitioner has undergone whole sentence of one year and so far only deposited Rs. 7,200/-.

3. On 22.7.2006 respondent has filed another application for execution of order dated 30.9.03 in MJC No.4/2002 and prayed that the aforesaid amount should be recovered otherwise petitioner should be again sent to imprisonment for one year.

4. Learned counsel for the petitioner submitted that petitioner has already undergone one year imprisonment as provided under Section 3 (4) of the Act and respondent has further moved aforesaid application for execution of order dated 30.9.2003 with a request that petitioner be again sent for imprisonment for one year.

5. The crucial question before me that whether the petitioner is liable to serve further imprisonment for the same default if amount due is not paid or recovered in the execution proceedings. The perusal of the relevant provisions of the Act will be required which are as under:-

Section 3. Mahr or other properties of Muslim woman to be given to her at the time of divorce:-

(1)----------

(2)----------

(3)----------

(4) "If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code."

(Underlined by court)

6. Arrears of maintenance is recoverable in the same manner provided for levying fine under the Code.

7: Section 421 (1) of the Code is about warrant for levy of fine is re-produced. below:-

421. Warrant for levy of fine:- (1) When an offender has been sentenced to pay a fine the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender;

(2) The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realize the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:"Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

8. A deference has to be withdrawn between a mode of enforcing recovery and sentencing a person to jail. Sentencing a person to jail is a mode of enforcement, it is not a mode of satisfaction of the liability. The liability can be satisfied only after making actual payment of amount to the wife. The only purpose of sending a person to jail is to oblige a person liable to pay the amount who refused to comply

with the order. The purpose of sending him to jail is not to exonerate him from the liability of payment. A sentence of jail is no substitute for recovery of amount. This amount is granted to enable the wife and children to maintain themselves.

9. Thus it is clear that petitioner/husband of respondent/wife cannot be absolved from his liability to pay the amount which is still recoverable notwithstanding the fact that he has undergone the imprisonment of jail for failure to same.

10. Thus, it is clear that because the petitioner has already undergone imprisonment for one year under Section 3 (4) of the Act, 1986 therefore, he can not be sent to jail again, but so far as the contention of learned counsel for the petitioner Shri S. Sharma is concerned that petitioner cannot be sent again to jail is to be accepted. However, it is made clear that respondent is free to recover the balance amount in accordance with the law except by seeking an order for petitioner to jail.

11. For the reasons stated above, the petition under section 482 of the Cr.P.C is partly allowed. The learned trial Magistrate, Bhopal shall proceed according to law in the light of observation and execute order dated 30/09/2003 passed in MJC No. 4/2003. However, the respondent will not apply that petitioner be sent to jail again under section 3 (4) of the Act in default of payment.

12. With the aforesaid direction, this petition is partly allowed.

Petition partly allowed.

I.L.R. [2009] M. P., 600
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Sinho
6 November, 2008*

ASHISH RINDEY ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Quashing of charge-sheet* - *Quashing of charge-sheet for the offence u/s 306/34 of IPC on the ground that there is no incitement or direct involvement of applicant in commitment of suicide - Held - Suicide note and statement recorded u/s 161 of Code clearly states that deceased has taken the extreme step because the applicant used to beat and demand money forcefully - A prima facie case u/s 306/34 IPC is made out against the applicant - Application dismissed.* (Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आरोप पत्र अभिखण्डित करना – भा.द.सं. की धारा 306/34 के अधीन अपराध के लिए आरोप पत्र को इस आधार पर अभिखण्डित कराना कि आत्महत्या करने में आवेदक का कोई उद्दीपन या प्रत्यक्ष संसक्त नही है – अभिनिर्धारित – सुसाइड नोट और संहिता की धारा 161 के अन्तर्गत अभिलिखित कथन स्पष्ट रूप

*M.Cr.C. No.6378/2007 (Jabalpur)

से उल्लेख करते हैं कि मृतक ने अंतिम कदम उठाया क्योंकि आवेदक पीटा करता था और बलपूर्वक धन की माँग किया करता था – आवेदक के विरुद्ध भा.द.सं. की धारा 306/34 के अन्तर्गत प्रथम दृष्ट्या मामला बनता है – आवेदन खारिज।

Cases referred :

(2008) 2 SCC 403 (relied upon), AIR 1960 SC 866, 2007(1) MPWN 20, (2005) 2 SCC 2659, 2008(2) MPWN 118 (distinguished).

Vijay Nayak, for the applicant.

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

ORDER

S.C. SINHO, J. :–Applicant has filed this petition under section 482 of the Cr.P.C. for quashing the charge sheet of crime no. 134/07 of police station Kotwardi, Chhindwara for the offence registered under sections 306/34 of the IPC.

2. The factual position in essence is as follows :-

> This fact is not disputed that deceased Prakash committed suicide on 24/02/07 and left a suicide note. The substance of this suicide note is that deceased Prakash alleged that applicant Ashish Rinde alongwith other co-accused used to demand money forcefully and beat him therefore, he is committing suicide. During investigation statements of Satish, Anil, Sahib Rao, Sunil and A.W. Khan were recorded by Investigating Officer. These witnesses have stated that deceased Prakash has informed them that earlier he had taken loan of Rs. 2000/- from applicant and other co-accused and returned the amount even then applicant alongwith other co-accused used to harass, beat and say that either he should pay money or he should die.

3. The suicidal note is as follows :-

> "मेरी मौत का कारण
>
> मैं प्रकाश पवार
>
> मुझे जबरदस्ती पैसा मांगने और मुझे मारने के कारण मै अपनी जान दे रहा हुँ । मुझे मारने वाले का नाम रुपेश चौरसिया – मैन बोस, शेंक्की, बन्टी, आशीश, नवाब, रिन्दे और भी चार लोग ।
>
> प्रकाश पवार
>
> 24.2.2007"

4. The criminal proceeding has been assailed by Shri Vijay Nayak, counsel for the applicant on the ground that in aforesaid suicidal note, deceased has not mentioned that he has returned the amount of loan to the applicant, and if applicant was simply demanding his loan/money from deceased, it cannot be considered as abetment to commit suicide which is a material ingredient for the offence under

section 306 of IPC. In support of his contention, learned counsel for the applicant has drawn attention to the following judgments :-

(1) *Prakashchand Vs. State of M.P.*, 2007 (I) MPWN 20.

(2) *Netai Dutta, Vs. State of W.B.*, (2005) 2 SCC 659.

(3) *Vijay Tiwari, vs. State of M.P.*, 2008 (II) MPWN 118.

5. In response, learned counsel for the State Shri J.K. Jain, submitted that the suicidal note clearly refers that applicant was forcefully and illegally demanding money from deceased and according to the statement of prosecution witnesses recorded u/s 161 of the Cr.P.C deceased has already returned the loan amount even then applicant used to beat him and say that either he should pay the money or should commit suicide. Thus, due to these acts of the applicant and other co-accused an unfortunate step of committing suicide was taken by deceased, therefore, the petition should be dismissed.

6. In *R.P. Kapur Vs. State of Punjab*, AIR 1960 SC 866, the Apex Court summarised some categories of cased where inherent power can and should be exercised to quash the proceedings as under :-

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charges.

7. There are averments in the alleged suicide note that the applicant alongwith other co-accused used to beat him as well as demand money forcefully. Deceased was not supposed to give details in suicide note about loan and repayment. Deceased has specifically alleged in the suicidal note that applicant used to beat and forcefully demand money from him which is further supported by other prosecution witnesses in their statements under section 161 of the Cr.P.C. Prima facie it is clear that present applicant had instigated the deceased to commit suicide and is responsible for abetment of suicide. An offence under Section 306 IPC would stand only if there is an abetment for the commission of the crime. The parameters of the "abetment" have been stated in Section 107 of the Indian Penal Code. Section 107 says that a person abets the doing of a thing, who instigates any person to do that thing; or engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, or the person should have intentionally aided any act or illegal omission. The explanation to Section 107 says that any willful misrepresentation or willful

concealment of a material fact which he is bound to disclose, may also come within the contours of "abetment".

8. In the case of *Netai Dutta* vs. *State of West Bengal*,(2005) 2 SCC 659 Hon'ble Apex Court in para 6 held reads as under :-

> "6. In the suicide note, except referring to the name of the appellant at two places, there is no the reference of any act or incidence whereby the appellant herein is alleged to have committed any willful act or omission or intentionally aided or instigated the deceased Pranab Kumar Nag in committing the act of suicide. There is no case that the appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by deceased Pranab Kumar Nag."

Further, in the case of *Vijay Tiwari* (supra) and *Prakashchand* (supra) the act as alleged against the applicant does not amount the instigation giving by him to the deceased for committing suicide not it can be said that the applicant had intentionally aided in any manner in commission of the suicide by the deceased. Simple act of demanding of loan cannot be considered as an abetment for committing suicide, particularly in the facts of this case.

9. In the suicide note there is clear and cogent reference of the act of the applicant which instigated the deceased for committing suicide. Apart from the suicide note, there are allegations against applicant in the statement of other prosecution witnesses recorded under section 161 of the Cr.P.C. the deceased has returned the loan amount to applicant. Suicide note of applicant clearly states that deceased was taking the extreme step because applicant used to beat and demand money forcefully. In view of suicide note and prosecution witnesses, a prima facie case under section 306/34 of IPC is made out against the applicant. (Relied on *Didigam Bikshapathi and another Vs. State of Andhra Pradesh*, (2008) 2 SCC 403.

10. In the instant case, the suicide note and statement recorded under section 161 of the Cr.P.C of various witnesses clearly refers to the act and the role played by him. Therefore, it is not a fit case to allow this petition under section 482 of the Cr.P.C and accordingly, it is hereby dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 604

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Shantanu Kemkar

26 November, 2008*

JAGDISH KUMAR ARORA ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 438, Penal Code, 1860, Sections 420, 467 & 468 - *Anticipatory Bail - Allegation that by playing fraud in affixing forged holograms the applicants have caused loss of revenue to the Government and irregularities were also found in affixing the holograms on the bottles of liquor and beer - Anticipatory bail rejected by Sessions Court, therefore, filed before High Court - Held - On inquiry, high official committee found that holograms are not fake - In regard to discrepancies, the committee recommended for issuance of show cause notice - Applicants pleaded mala fide as a criminal case has been registered against one official at the instance of applicants and the same official has lodged the report against the applicants instead of issuance of show cause notice to the applicants - Applicants have made out a case for grant of anticipatory bail - Application allowed.* (Paras 14 & 15)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438, दण्ड संहिता, 1860, धाराएँ 420, 467 व 468 – अग्रिम जमानत – यह अभिकथन कि आवेदकों ने कूटरचित होलोग्राम लगाने में कपट करते हुए सरकार को राजस्व की हानि कारित की और मदिरा व बीयर की बोतलों पर होलोग्राम लगाने में भी अनियमितताएँ पायी गयीं – सेशन न्यायालय द्वारा अग्रिम जमानत नामंजूर की गई इसलिए उच्च न्यायालय के समक्ष पेश – अभिनिर्धारित – जाँच पर, उच्चाधिकारी समिति ने पाया कि होलोग्राम जाली नही थे – विसंगतियों के सम्बन्ध में समिति ने कारण बताओ सूचनापत्र जारी करने की अनुशंसा की – आवेदकों ने असद्भाव का अभिवचन किया क्योंकि आवेदकों की प्रेरणा पर एक अधिकारी के विरुद्ध दाण्डिक मामला पंजीबद्ध किया गया और उसी अधिकारी ने आवेदकों को कारण बताओ सूचनापत्र जारी करने के बजाय आवेदकों के विरुद्ध रिपोर्ट दर्ज कराई – अग्रिम जमानत प्रदान करने के लिए आवेदकों के पक्ष में मामला है – आवेदन मंजूर।

Jaisingh & Vivek Tankha with *Viveksingh & Pratul Shandilya,* for the applicants.

Rashmi Pandit, Dy.G.A., for the non-applicant.

ORDER

SHANTANU KEMKAR, J. :–This M.Cr.C. and M.Cr.C. No.6292/08 (Surjeet Lal S/o.Hakim Chand v. State of M.P.) are being decided by this order.

Heard finally with the aid of case diary.

*M.Cr.C. No.6455/2008 (Indore)

The applicants have filed these applications u/S.438 of the Code of Criminal Procedure, 1973 for grant of anticipatory bail in connection with crime no.369/08 registered against them by the police of police station Manpur, Dist. Indore for offence u/S.420, 467 and 468 of the IPC.

2. The applicant Jagdish Kumar Arora claims to be Chairman-cum-Managing Director of Som Distilleries and Beverages Pvt. Ltd. and of Som Distilleries Pvt. Ltd. The applicant Surjeet Lal is one of the Directors of the said companies.

3. On information being received by the Excise Department on 03.05.08 a raid was conducted in the house of Guddu @ Vishnu S/o. Dhanna situated at village Silotiya, police station Manpur. In the raid, large number of liquor and bear bottles were seized from the house of said Guddu without there being any permit for the same. The Excise Officer found irregularities in the hologram affixed on the bottles and discrepancies in the date of hologram and date of manufacture put on the bottles.

4. The FIR of the raid dt.03.05.08 was lodged on 28.08.08 by the Excise Department against the applicants and other co-accused persons including Ajay Kumar Arora, Dy. Managing Director of Som Distilleries and Beverages Pvt. Ltd. and Som Distilleries Pvt. Ltd.

5. The allegation of the prosecution is that by playing fraud in affixing forged holograms the applicants have caused loss of revenue to the government.

6. Apprehending arrest by the police of police station Manpur in the aforesaid crime no.369/08 the applicants are seeking grant of anticipatory bail.

7. The applicants prior to filing of this application had applied for grant of anticipatory bail before the Sessions Court. The said applications were rejected by the Xth Additional Sessions Judge, Indore vide order dt.14.11.08.

8. It has been argued by learned sr. counsel for the applicants that the applicants have been falsely implicated in the said offence at the instance of Vinod Raghuvanshi, Assistant Commissioner, Excise Department, Indore with the object of injuring and humiliating them by having them arrested.

9. The case of the applicants is that on getting the complaint of use of fake holograms and the discrepancies between the date of manufacture and the date of use of the hologram by various distilleries an inquiry was conducted by the committee of the higher officials of the Excise Department including Dy. Commissioner Excise, State Flying Squad, M.P., Dy. Commissioner, Excise Divisional Flying Squad, Bhopal, Dy. Commissioner, Excise Divisional Flying Squad, Indore and Additional Excise Commissioner, M.P. In the report dt.12.07.08 submitted by them it was held that holograms seized in respect of M/s. Som Distilleries and Beverages Pvt. Ltd. and M/s. Som Distilleries Pvt. Ltd. are in order and are not fake. In regard to discrepancies about date of manufacture of

the liquor and the date of fixation of hologram, the committee recommended for issuance of show cause notice to the defaulting distilleries so as to gather the correct facts. In the circumstances the applicants case is that the Excise Department ought to have issued show cause notice to the applicants, however instead of doing so, FIR has been lodged contrary to the recommendations of high official committee of the Excise Department. The applicants have also pointed out that in the case where the committee detected and found the use of forged hologram, like in the case of Gwalior Distilleries the said Distilleries has been imposed upon with penalty to the tune of Rs.One Lac and also a further amount of Rs.11072/- was recovered from the said distillery under the head loss of duty and no FIR has been lodged, whereas in the case of applicants the action of lodging FIR has been taken only at the instance of Vinod Raghuvanshi.

10. According to the applicants the case is of vendetta on the part of Shri Vinod Raghuvanshi, Assistant Commissioner, Excise Indore who acted malafidely in lodging a false complaint through his subordinates against the applicants. In order to support the allegations of malafide on the part of Vinod Raghuvanshi it is stated that Ajay Arora, Dy. Managing Director of Som Distilleries and Beverages and Som Distilleries Pvt. Ltd. had made a complaint on 30.07.03 to the Excise Commissioner to conduct an inquiry into the change of partnership deed in the retail contract of Bhopal District. Since no action was taken by the Excise Department the said Ajay Arora filed a W.P. No.28262/02 and also W.P. No.2617/07 seeking direction to the State Government to initiate departmental proceedings against the Vinod Raghuvanshi. However the W.P. No.2617/07 was decided on 08.04.08 by this Court making no interference in the decision of the State Government not to initiate departmental proceedings against the Vinod Raghuvanshi. However it was observed by this Court that the dismissal of the petition would not come in the way of the criminal complaint filed by Ajay Arora and also in the investigation by Lokayukta. The applicant Jagdish Kumar Arora and the said Ajay Kumar Arora had filed complaint against Vinod Raghuvanshi for offence u/S.420, 467, 468, 471 and 120-B of the Indian Penal Code. On the said complaint the Chief Judicial Magistrate, Bhopal issued process against the said Vinod Raghuvanshi. It is in this background according to the applicants at the instance of Vinod Raghuvanshi the FIR has been lodged against them.

11. The further case of applicant Jagdish Arora is that in identical incident and seizure offence u/S.420 of the IPC has been registered at police station Manpur as crime no.274/08. In the said matter also the allegations are identical and in that case in M.Cr.C. No.271/08 the Additional Sessions Judge, Mhow allowed the applicant Jagdish Arora's application for anticipatory bail u/S.438 of the Cr.P.C. vide order dt.17.07.08 and granted anticipatory bail to him. According to the applicants co-accused Ajay Arora has been granted the bail u/S.439 of Cr.P.C. vide order dt.01.11.08.

12. It is further stated that the applicants are not involved in day to day affairs of the company like production, sales and operation and all the affixture of hologram is done under the strict control and supervision of the officials of the Excise Department who are posted at the Distillery and in the circumstances the implication of applicants without taking any action against the officials of the Excise Department on duty at Distillery clearly demonstrates that Vinod Raghuvanshi has lodged the FIR only to humiliate the applicants.

13. Smt. Rashmi Pandit, learned DGA opposed the applications for grant of anticipatory bail by contending that the applicants are involved in the serious offence of evading the revenue of the government. The holograms which were found on the seized bottles were of subsequent dates then the date of manufacture marked on the seized bottles.

14. Having considered the contentions raised by learned counsel for the parties and after perusal of the case diary in my considered view the applicants have made out the case for grant of anticipatory bail. The inquiry report dt. 12.07.08 submitted by the high officials of the Excise Department reveals that the holograms of seized bottles are genuine and are not fake. The committee recorded a finding that the holograms are genuine and are nod fake. In the cases where the hologram were found to be proper and only the discrepancies in the date of hologram and the date of manufacture of liquor was noticed the committee recommended for issuance of the show cause notice to collect factual position. However against the applicants no show cause notice has been issued as yet, and instead FIR has been lodged. It is also noticed that in the cases in which the hologram are found to be forged penalty was imposed and no FIR was lodged. Thus it is prima facie revealed that since a complaint has been filed against Vinod Raghuvanshi by Jagdish Arora and Ajay Arora before the Chief Judicial Magistrate, Bhopal and summons was issued to him for his appearance on 14.05.08. the FIR has been lodged at the instance of Vinod Raghuvanshi.

15. Having regard to the aforesaid facts and circumstances more particularly the nature of accusation against the applicants, findings of the high official committee of the Excise Department, lodging of the FIR at the instance of Vinod Raghuvanshi without issuing show cause notice as recommended by the high official committee and in the background fact that a case has been registered against Vinod Raghuvanshi at the instance of applicant Jagdish Kumar Arora and Ajay Kumar Arora, I am of the view that the applicants have made out a case for grant of anticipatory bail. Accordingly both the applications are allowed.

16. The applicants in the event of their arrest be released on bail on their furnishing a personal bond in the sum of Rs.One Lakh each with one surety each in the like amount to the satisfaction of the Arresting Officer for their further appearance as and when directed. The applicants shall make themselves available

for interrogation by police officer as and when required and they shall not direc or indirectly make any inducement, threat or promise to any person acquain with the facts of the case so as to dissuade them from disclosing such facts to Court or to any police officer. The applicants shall not leave India without pr permission of the Court.

17. Needless to say that the observations made herein above are only for t purpose of deciding these bail applications.

C.C. today.

Application allow
