

I. L. R. (2009) M.P.



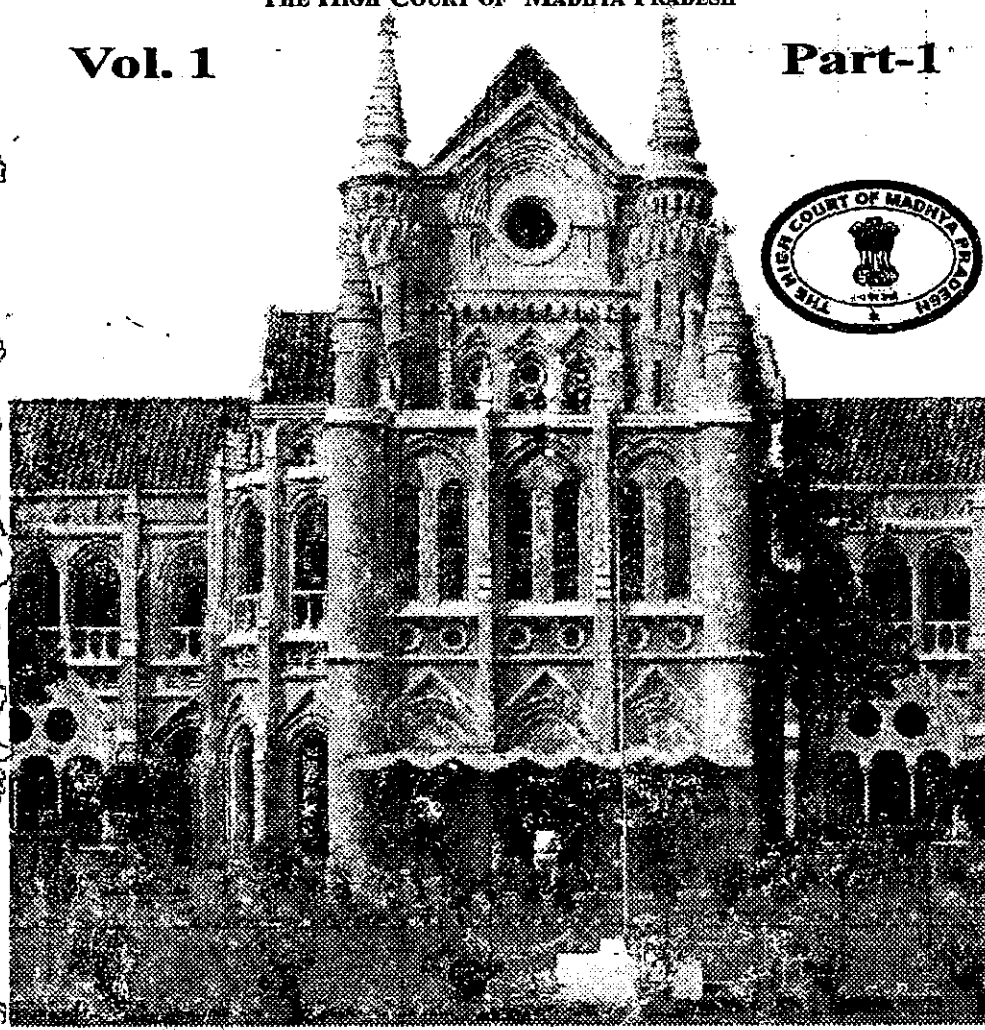
THE INDIAN LAW REPORTS

M. P. SERIES

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

Vol. 1

Part-1



January (Single copy Rs.30)
(pp. 1 to 326) * (All Rights Reserved)

2009

LAW REPORTING COMMITTEE OF ILR, M. P. SERIES

2009

PATRON

Hon'ble The Chief Justice Shri A. K. PATNAIK

PRESIDENT

Hon'ble Justice Shri ARUN MISHRA.

MEMBERS

Shri Ravi Nandan Singh, Advocate General, (*ex-officio*)

Shri Surendra Singh, Senior Advocate

Shri P. R. Bhawe, Senior Advocate

Shri Rohit Arya, Senior Advocate

Shri G.S. Ahluwalia, Advocate (*ex-officio*)

Shri Anil Kumar Sharma, Registrar (Judl.), (*ex-officio*)

SECRETARY

Shri G. S. Ahluwalia, Advocate, Editor, (*Part-time*), (*ex-officio*)

Shri Ramesh Shrivastava, Advocate, Reporter (*Part-time*)

Shri Akhilesh Jain, Advocate, Reporter (*Part-time*)

Shri Girish Prakash Kekre, Advocate, Reporter (*Part-time*)

Shri J. K. JAIN, REGISTRAR, (ILR)

TABLE OF CASES REPORTED

(Note An asterisk (*) denotes Note number)

Abdul Hasan Qureshi v. State of M.P.	...	165
Anand Kumar Chouksey v. M.P. Board of Middle Education.	...	127
Anita Karope (Smt.) v. Smt. Geeta Uikey	...	31
Basant Kumar Verma v. State of M.P.	...	16
Bhanu Singh v. State of M.P.	...	224
Chandu Singh v. State of M.P.	...	*1
Dwarkadas Mahajan v. State of M.P.	...	67
Executive Engineer, M.P. Housing Board v. Shri Kant Mishra	...	21
Gomti Bai Tamrakar (Smt.) v. State of M.P.	...	136
Harshil Paper and Board Mill Ltd. v. Union of India	...	55
In Reference v. Alok Singhal	...	264
In Reference v. Deepak Agrawal	...	272
Kailash v. State of M.P.	...	*2
Kalam Scooter Service v. Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj	...	41
Kamla Bai (Smt.) v. State of M.P.	...	*3
Kanchan Upadhyay (Ku.) v. State of M.P.	...	155
Kanta Raikwar (Smt.) v. Kailash Chandra Verma	...	197
Krishna Kumar Pateriya v. State of M.P.	...	47
Mahaveer Traders (M/s.) v. M/s Gangadhar Sharma & Sons	...	286
Manager U.P. State Road Transport Corp. Jhansi v. Halkibai	...	*4
Mohammad Yunus @ Annu v. State of M.P.	...	246
Mohd. Abdul Saeed v. Union of India	...	70
Munnalal Basore v. State of M.P.	...	*5
Nanhe Bhai Raikwar v. District & Sessions Judge	...	107
Narayan (Deceased) Through L.Rs. v. Sobhagmal Rakhachand	...	*6
Narmada Bachao Andolan v. State of M.P.	...	112
P.G. Kshatriya v. State of M.P.	...	10
Pawas Shrivastava v. State of M.P.	...	131
Prakash Kanthed v. M/s Maheshwari Proteins Ltd	...	259
Qasam Khan v. State of M.P.	...	*7
R.B. Dubey v. State of M.P.	...	100
Rahul Patel v. State of M.P.	...	78
Rahul Singh v. State of M.P.	...	186
Rajaram v. State of M.P.	...	*8
Rajbabu v. State of M.P.	...	1

TABLE OF CASES REPORTED

3

Rajesh Gupta v. Bharat Sanchar Nigam Ltd.	103
Raju @ Raj Kishore Yadav v. State of M.P.	*9
Rakesh v. State of M.P.	*10
Ram Kishor Saket v. State of M.P.	270
Ramesh Chandra v. State of M.P.	255
Ramesh v. State of M.P.	218
Rampal Singh v. State of M.P.	321
Ratan Kumar Banjara v. Kantabai	251
S.R. Bagwaiya v. State of M.P.	*11
Sadhan Nayak @ Deepak v. State of M.P.	234
Sant Kumar Agrawal v. Laxmibai national Institute of Physical Education...	144
Santosh v. State of M.P.	241
Saroja (Smt.) v. Supersonic Plastics Pvt. Ltd.	204
Shabana Bano (Smt.) v. Imran Khan	276
Shamim Modi (Ms.) v. Ms. Sudha Chowdhary, District Collector Betul	84
Sharad Kumar v. State of M.P.	229
Shiv Dayal Singh v. General Manager, Indian Oil Corporation	176
Shrinivas Verma v. State of M.P.	195
State of M.P. v. Dilip Bankar	309
State of M.P. v. Koushal Prasad Jaiswal	292
Syscon Computer Shiksha Samiti v. State of M.P.	72
Vinod Dixit v. Satish Mishra	317
Yuvraj v. State of M.P.	214

INDEX

(Note An asterisk (*) denotes Note number)

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) -
Suit for eviction - Tenant failed to deposit arrears of rent and monthly rent despite receipt of demand notice - But, suit filed within 2 months from date of receipt of notice - Held - Suit was premature - Decree u/s 12(1)(a) can not be granted. [Saroja (Smt.) v. Supersonic Plastics Pvt. Ltd.] ...204

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) -
Suit for eviction filed by NRI landlady - Tenant alleging that landlady entered into agreement to sell suit accommodation with him - Tenant failed to prove agreement - Held - The act of tenant in claiming an agreement to sell in his favour and failed to prove, itself adversely affects the interest of landlady - Trial court erred in dismissing suit for eviction u/s 12(1)(c) - Appeal allowed. [Saroja (Smt.) v. Supersonic Plastics Pvt. Ltd.] ...204

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e) -
Landlady, a NRI doctor required suit property to settle in India - Landlady did not come in witness box but her power of attorney was examined - Held - Landlady herself was not required to prove bonafide - Long persuasion of 18 years for getting the possession of suit accommodation itself shows that landlady requires suit accommodation bonafidely - There is no justification in denying decree of eviction - Appeal allowed. [Saroja (Smt.) v. Supersonic Plastics Pvt. Ltd.] ...204

Civil Procedure Code (5 of 1908), Section 34 - See - Money Lenders Act, M.P. 1934, Section 7 [Narayan (Deceased) Through L.Rs. v. Sobhagmal Rakhabchand]; ...*6

Civil Procedure Code (5 of 1908), Section 115 - See - Constitution, Article 226 & 227 [Kalam Scooter Service v. Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj] ...41

Civil Procedure Code (5 of 1908), Order 6 Rule 4 - Executing court held that the eviction decree is tainted with fraud and is unexecutable - Alleging fraud has grave consequences and when relied upon as a cause of action or defence, fraud must be specifically alleged with all material particulars - Objectors knew about the execution and registration of the sale deed but they did not take any steps to challenge the sale deed - There is no foundation in the pleadings or evidence to sustain the charge of fraud - Executing court acted beyond jurisdiction - Revision allowed. [Ratan Kumar Banjara v. Kantabai] ...251

Civil Procedure Code (5 of 1908), Order 29 Rule 1 - Suit against Corporation - Appellant's plea that offending bus was neither registered nor belonging to appellant No.1 in fact such bus was belonging to some other depot of appellant No.2 - Held - It is undisputed fact on record that the appellant No.2 is the main authority of U.P. State Road Transport

(Note An asterisk (*) denotes Note number)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) - बेदखली के लिए वाद - किरायेदार माँग का सूचनापत्र प्राप्त करने के बावजूद बकाया भाड़ा और मासिक भाड़ा जमा करने में असफल - किन्तु, वाद सूचनापत्र की प्राप्ति की तारीख से 2 माह के भीतर पेश किया गया - अभिनिर्धारित - वाद समयपूर्व था - धारा 12(1)(ए) के अन्तर्गत डिक्री प्रदान नहीं की जा सकती। (सरोजा (श्रीमति) वि. सुपर सोनिक प्लास्टिक्स प्रा. लि.) ...204

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) - एनआरआई भूस्वामिनी द्वारा बेदखली का वाद पेश - किरायेदार ने यह अभिकथन किया कि भूस्वामिनी ने उसके साथ वादग्रस्त स्थान विक्रय करने का करार किया - किरायेदार करार साबित करने में विफल रहा - अभिनिर्धारित - किरायेदार का अपने पक्ष में विक्रय करार का दावा करने और साबित करने में विफल रहने का कृत्य स्वमेव भूस्वामिनी के हित को प्रतिकूल रूप से प्रभावित करता है - विचारण न्यायालय ने धारा 12(1)(सी) के अन्तर्गत बेदखली का वाद खारिज करने में त्रुटि की - अपील मंजूर। (सरोजा (श्रीमति) वि. सुपर सोनिक प्लास्टिक्स प्रा. लि.) ...204

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ई) - एनआरआई चिकित्सक भूस्वामिनी को भारत में बसने के लिए वादग्रस्त सम्पत्ति की आवश्यकता - भूस्वामिनी ने बयान नहीं दिया बल्कि उसके मुख्यालय की परीक्षा करायी गई - अभिनिर्धारित - स्वयं भूस्वामिनी को वास्तविकता साबित करना अपेक्षित नहीं था - वादग्रस्त स्थान का कब्जा प्राप्त करने के लिए 18 वर्ष का लम्बा आग्रह स्वतः यह दर्शाता है कि भूस्वामिनी को वादग्रस्त स्थान की वास्तविक आवश्यकता है - बेदखली की डिक्री से इंकार करना न्यायोचित नहीं - अपील मंजूर। (सरोजा (श्रीमति) वि. सुपर सोनिक प्लास्टिक्स प्रा. लि.) ...204

सिविल प्रक्रिया संहिता, (1908 का 5), धारा 34 - देखें - साहूकार अधिनियम, म.प्र., 1934, धारा 7, (नारायण (मृतक) द्वारा विधिक प्रतिनिधि वि. सौभागमल राखवचंद) ---*6

सिविल प्रक्रिया संहिता, (1908 का 5), धारा 115 - देखें - संविधान, अनुच्छेद 226 व 227, (कलाम स्कूटर सर्विस वि. श्री श्री 1908 जगन्नाथ गुरु शंकाराचार्य स्वामी स्वरूपानंद जी महाराज) ...41

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 4 - निष्पादन न्यायालय ने अभिनिर्धारित किया कि बेदखली की डिक्री कपट से दूषित और निष्पादन योग्य नहीं - कपट का अभिकथन करने के गंभीर परिणाम और जब वाद कारण या प्रतिरक्षा के रूप में इस पर विश्वास किया जाता है तो कपट का सभी तात्त्विक विशिष्टियों के साथ विनिर्दिष्ट रूप से अभिकथन करना चाहिये - आपत्तिकर्ताओं को विक्रयपत्र के निष्पादन और रजिस्ट्रेशन के बारे में जानकारी थी परन्तु उनके द्वारा विक्रयपत्र को चुनौती देने के लिए कोई कदम नहीं उठाये गये - अभिवचनों या साक्ष्य में ऐसा कोई आधार नहीं है जिससे कपट का आरोप कायम रखा जाए - निष्पादन न्यायालय ने क्षेत्राधिकार से परे कार्य किया - पुनरीक्षण मंजूर। (रतन कुमार बंजारा वि. कांता बाई) ...251

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 29 नियम 1 - निगम के विरुद्ध वाद - अपीलार्थी का अभिवचन कि उल्लंघनकारी बस न तो पंजीकृत थी और न अपीलार्थी क्र. 1 की थी वास्तव में ऐसी बस अपीलार्थी क्र. 2 के किसी अन्य डिपो की थी - अभिनिर्धारित - अभिलेख पर यह अविवादित तथ्य है कि अपीलार्थी क्र. 2 उ.प्र. राज्य सड़क परिवहन निगम, झाँसी और अन्य

Corporation, Jhansi and also the other depot, hence after impleading it as party in the case in view of the provisions of Order 29 of the Code, the presence of any other subordinate officer or its manager was not necessary in the claim petition. [Manager U.P. State Road Transport Corp. Jhansi v. Halkibai] ...*4

Civil Procedure Code (5 of 1908), Order 41 Rule 22 - See - Motor Vehicles Act, 1988, Section 173 [Manager U.P. State Road Transport Corp. Jhansi v. Halkibai] ...*4

Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rules 14(5) & 30 - See - Service Law [Nanhe Bhai Raikwar v. District & Sessions Judge] ...107

Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 15 - See - Service Law [Nanhe Bhai Raikwar v. District & Sessions Judge] ...107

Commission of Inquiry Act (60 of 1952), Section 3, Constitution, Article 226 - Enforcement of fundamental right - Apex Court treating a letter to be a PIL passed certain observations and appointed panel of advocates as Commissioner - Held - These observations of Shri P.N. Bhagwati, J of the Supreme Court equally apply to the exercise of jurisdiction of the High Court under Article 226 for enforcement of fundamental rights - Therefore, Shri Justice S.S. Jha, retired Judge of High Court of M.P., has been appointed as a Commission to inquire into and submit a report. [Narmada Bachao Andolan v. State of M.P.] ...112

Constitution, Article 21 - Arrest of accused - No violation of fundamental rights stated in Article 21 as arrest or detention is under a procedure established by law. [Shamim Modi (Ms.) v. Ms. Sudha Chowdhary, District Collector Betul] ...84

Constitution, Article 21 - Handcuffing - Handcuffing of undertrials during their transit from prison to court and back to prison - No valid justification given - No order obtained from SDM in whose court they were produced - Held - Fundamental right violated - State Government directed to pay compensation of Rs.10,000 to each of three undertrials - State Government given liberty to recover compensation from guilty personnel in disciplinary proceedings. [Shamim Modi (Ms.) v. Ms. Sudha Chowdhary, District Collector Betul] ...84

Constitution, Article 21 & 226 - Public Interest Litigation - Right to livelihood - Maintainability - Large scale corruption alleged in distribution of compensation in Sardar Sarovar Project - Respondents stated that single man commission appointed to look into the grievance and thus PIL was not maintainable - Held - If a large number of Project Affected Families (PAFs) whose 25% or more land was submerged has not actually been able to get a

डिपो का भी मुख्य प्राधिकारी है इसलिए संहिता के आदेश 29 के उपबंधों को दृष्टि में रखते हुए मामले में उसे पक्षकार बनाने के बाद, दावा राशिका में किसी अन्य अधीनस्थ अधिकारी या उसके प्रबंधक की उपस्थिति आवश्यक नहीं थी। (मेनेजर, यूपी स्टेट रोड ट्रांसपोर्ट कारपोरेशन, झांसी वि. हलकी बाई)

---*4

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 22 - देखें - मोटर यान अधिनियम, 1988, धारा 173, (मेनेजर, यूपी स्टेट रोड ट्रांसपोर्ट कारपोरेशन, झांसी वि. हलकी बाई)

---*4

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 14(5) व 30 - देखें - सेवा विधि (नन्हे भाई रैकवार वि. डिस्ट्रिक्ट एन्ड सेशन जज)...

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 15 - देखें - सेवा विधि (नन्हे भाई रैकवार वि. डिस्ट्रिक्ट एन्ड सेशन जज)

...107

जॉच आयोग अधिनियम (1952 का 60), धारा 3, संविधान, अनुच्छेद 226 - मूलभूत अधिकारों का प्रवर्तन - शीर्ष न्यायालय ने एक पक्ष को लोक हित वाद मानकर कतिपय टीका-टिप्पणियों की और कमिशनर के रूप में वकीलों का पैनल नियुक्त किया - अभिनिर्धारित - उच्चतम न्यायालय के न्यायमूर्ति श्री पी.एन. भगवती की ये टीका-टिप्पणियाँ मूलभूत अधिकारों के प्रवर्तन के लिए अनुच्छेद 226 के अन्तर्गत उच्च न्यायालय की अधिकारिता के प्रयोग को समान रूप से लागू होती हैं - इसलिए, जॉच कर रिपोर्ट पेश करने के लिए म.प्र. उच्च न्यायालय के सेवानिवृत्त न्यायाधीश न्यायमूर्ति श्री एस.एस. झा को आयोग के रूप में नियुक्त किया गया। (नर्मदा बचाओ आंदोलन वि. म.प्र. राज्य)

...112

संविधान, अनुच्छेद 21 - अभियुक्त की गिरतारी - अनुच्छेद 21 में कथित मूलभूत अधिकारों का कोई अतिक्रमण नहीं क्योंकि गिरतारी और निरोध विधि द्वारा स्थापित प्रक्रिया के अधीन हैं। (शमीम मोदी (श्रीमति) वि. श्रीमति सुधा चौधरी, डिस्ट्रिक्ट कलेक्टर, बैतूल)

...84

संविधान, अनुच्छेद 21 - हथकड़ी लगाना - विचाराधीनों को उनके कारागार से न्यायालय और वापस कारागार अभिवहन के दौरान हथकड़ी लगाना - कोई वैध न्यायोचित्य आधार नहीं बताया - एस.डी.एम. से कोई आदेश अभिप्राप्त नहीं किया गया जिनके न्यायालय में उन्हें पेश किया गया - अभिनिर्धारित - मूलभूत अधिकार अतिक्रमित - राज्य सरकार को प्रत्येक विचाराधीन को 10,000 रुपये प्रतिकर अदा करने का निदेश दिया गया - राज्य सरकार को दोषी कर्मचारी वर्ग से अनुशासनिक कार्यवाहियों में प्रतिकर वसूल करने की स्वतंत्रता दी गई। (शमीम मोदी (श्रीमति) वि. श्रीमति सुधा चौधरी, डिस्ट्रिक्ट कलेक्टर, बैतूल)

...84

संविधान, अनुच्छेद 21 व 228 - लोकहित वाद - जीविकोपार्जन का अधिकार - पोषणीयता - सरदार सरोवर परियोजना में प्रतिकर का वितरण करने में बड़े पैमाने पर भ्रष्टाचार अभिकथित - प्रत्यर्थियों ने कथन किया कि शिकायत की जाँच पड़ताल करने के लिए एक सदस्यीय आयोग नियुक्त किया गया और इस प्रकार लोकहित वाद पोषणीय नहीं था - अभिनिर्धारित - यदि बड़ी संख्या में परियोजना प्रभावित परिवार, जिनकी 25 प्रतिशत या उससे अधिक भूमि जलमग्न हो गई थी, वास्तव में न्यूनतम दो हेक्टेयर कृषि योग्य भूमि भी प्राप्त करने में समर्थ नहीं

minimum of two hectares of cultivable land and the civic amenities in the Resettlement & Rehabilitation (R&R) sites are of substandard quality because of large scale corruption, then the High Court, whose duty is to ensure enforcement of fundamental right in exercise of powers under Article 226 cannot remain indifferent - The High Court will have to find out through a Commission on which it has confidence and trust that the oustees have not been duped by fake registrations of sale. - Deeds for purchase of land for cultivation and the public money spent for construction of civic amenities in the R&R sites have not been misused for extraneous purposes. [Narmada Bachao Andolan v. State of M.P.] ...112

Constitution, Article 226 - Appointment of operator - Appointment of operator of Kisan Seva Kendra to sell diesel and lubricating oils - Petitioner applied but was not selected as he had not submitted attested copies of the documents along with the application form - Action challenged on the ground that in the policy, there was no requirement of submitting attested copies of the documents and such a requirement could not have been incorporated in the advertisement - Held - The incorporation of condition of submission of attested copies of the documents is not contrary to but in addition to the policy documents - Corporation was competent to incorporate the additional condition while issuing the advertisement -Application was submitted by the petitioner in response to the advertisement -Petitioner was required to fulfill the conditions mentioned in the advertisement. [Shiv Dayal Singh v. General Manager, Indian Oil Corporation] ...176

Constitution, Article 226 - Delay in filing a writ petition - Respondent No.3 got appointment as operator of Kisan Seva Kendra to sell diesel and lubricating oils - Taking loan and spending huge amount over the project - Petitioner challenging his appointment after a period of 5 months - Held - As the position of respondent No.3 has altered after grant of appointment in his favour - In the facts of the case, no relief can be granted to the petitioner for making a delay in filing the writ petition. [Shiv Dayal Singh v. General Manager, Indian Oil Corporation] ...176

Constitution, Article 226 - Scope - Cannot order for prosecution - Petitioner having apprehension that police may not register F.I.R. and investigate against police and forest officers - High Court in exercise of power under Article 226 cannot direct prosecution of such persons - Complainant has recourse to file complaint before concerned magistrate. [Shamim Modi (Ms.) v. Ms. Sudha Chowdhary, District Collector Betul] ...84

Constitution, Article 226 - Scope - It is settled law that High Court, while exercising the jurisdiction under Article 226 of the Constitution, does not sit in appeal while examining challenge to administrative or quasi-judicial decisions and interference is required only when the action of the

हैं और पुनर्व्यवस्थापन एवं पुनर्वास स्थलों में नागरिक सुख सुविधाएँ बड़े पैमाने पर भ्रष्टाचार के कारण अवमानक किस्म की हैं, तब उच्च न्यायालय, जिसका कर्तव्य अनुच्छेद 226 के अन्तर्गत शक्तियों के प्रयोग में मूलभूत अधिकार का प्रवर्तन सुनिश्चित करना है, उदासीन नहीं रह सकता — उच्च न्यायालय को आयोग, जिस पर उसे विश्वास और भरोसा हो, के माध्यम से यह पता लगाना होगा कि बेदखल व्यक्ति नकली विक्रय के रजिस्ट्रेशनों द्वारा प्रवंचित न हो गये हों — कृषि के लिए भूमि क्रय करने के विलेखों और पुनर्व्यवस्थापन एवं पुनर्वास स्थलों में नागरिक सुख सुविधाओं के निर्माण के लिए खर्च लोकधन का असंगत प्रयोजनों के लिए दुरुपयोग न किया गया हो। (नर्मदा बचाओ आंदोलन वि. म.प्र. राज्य)

...112

संविधान, अनुच्छेद 226 — संचालक की नियुक्ति — किसान सेवा केन्द्र के संचालक की डीजल और ल्यूब्रीकेटिंग ऑयल विक्रय करने के लिए नियुक्ति — याची ने आवेदन किया किन्तु चयनित नहीं हुआ क्योंकि उसने आवेदन पत्र के साथ दस्तावेजों की अनुप्रमाणित प्रतिलिपियाँ पेश नहीं की थीं — कृत्य को इस आधार पर चुनौती दी गई कि पॉलिसी में दस्तावेजों की अनुप्रमाणित प्रतिलिपियाँ पेश करने की कोई अपेक्षा नहीं थी और ऐसी अपेक्षा विज्ञापन में समाविष्ट नहीं की जा सकती थी — अभिनिर्धारित — दस्तावेजों की अनुप्रमाणित प्रतिलिपियाँ पेश करने की शर्त समाविष्ट करना पॉलिसी दस्तावेजों के प्रतिकूल नहीं है बल्कि उनके अतिरिक्त है — निगम विज्ञापन जारी करते समय अतिरिक्त शर्त समाविष्ट करने के लिए सक्षम था — याची द्वारा आवेदन विज्ञापन के प्रत्युत्तर में पेश किया गया था — याची को विज्ञापन में उल्लिखित शर्त पूरी करना आवश्यक था। (शिव दयाल सिंह वि. जनरल मनेजर, इंडियन ऑयल कारपोरेशन)

...176

संविधान, अनुच्छेद 226 — रिट याचिका पेश करने में विलम्ब — प्रत्यर्थी क्रमांक 3 को डीजल और ल्यूब्रीकेटिंग ऑयल विक्रय करने के लिए किसान सेवा केन्द्र के संचालक के रूप में नियुक्त किया — ऋण लेकर और परियोजना पर बड़ी रकम खर्च की — याची ने 5 माह पश्चात् उसकी नियुक्ति को चुनौती दी — अभिनिर्धारित — चूंकि प्रत्यर्थी क्रमांक 3 की स्थिति उसके पक्ष में नियुक्ति दिये जाने के बाद परिवर्तित हो गई है — मामले के तथ्यों में, रिट याचिका पेश करने में विलम्ब करने के कारण याची को कोई अनुतोष प्रदान नहीं किया जा सकता। (शिव दयाल सिंह वि. जनरल मनेजर इंडियन ऑइल कारपोरेशन)

...176

संविधान, अनुच्छेद 226 — विषयक्षेत्र — अभियोजन का निदेश नहीं दिया जा सकता — याची को यह आशंका कि पुलिस और वन अधिकारियों के विरुद्ध पुलिस एफ.आई.आर. दर्ज कर अनुसंधान नहीं करेगी — अनुच्छेद 226 के अधीन शक्तियों के प्रयोग में उच्च न्यायालय ऐसे व्यक्तियों के अभियोजन के लिए निदेश नहीं दे सकता — परिवादी को सम्बन्धित मजिस्ट्रेट के समक्ष परिवाद पेश करने का आश्रय लेना चाहिए। (शामीम मोदी (श्रीमति) वि. श्रीमति सुधा चौधरी, डिस्ट्रिक्ट कलेक्टर, बैतूल)

...84

संविधान, अनुच्छेद 226 — विषयक्षेत्र — यह स्थापित विधि है कि उच्च न्यायालय, संविधान के अनुच्छेद 226 के अन्तर्गत अधिकारिता का प्रयोग करते समय, जब चुनौती दिये हुए प्रशासनिक या अर्ध-न्यायिक विनिश्चयों की परीक्षा कर रहा हो, अपील प्राधिकारी के रूप में कार्य नहीं करता और हस्तक्षेप केवल तब अपेक्षित है जब प्रशासनिक प्राधिकारी का कृत्य इतना अनुचित या

administrative authority is so unfair or unreasonable that no reasonable person would have taken that action - In the case, no such unreasonableness of action is found in the action of the respondents. [Shiv Dayal Singh v. General Manager, Indian Oil Corporation] ...176

Constitution, Article 226 - See - Commission of Inquiry Act, 1952, Section 3 [Narmada Bachao Andolan v. State of M.P.] ...112

Constitution, Article 226 - See - Service Law [P.G. Kshatriya v. State of M.P.] ...10

Constitution, Article 226 & 227, Civil Procedure Code, 1908, Section 115 - Alternative Remedy - Maintainability of Writ Petition - Order challenged before High Court under Article 226 & 227 - Objection raised that alternative remedy u/s 115 of Code is available, therefore, writ under Article 227 would not lie - Learned Single Judge without deciding the question of maintainability decided the writ petition - Order challenged in W.A. - Held - Matter remanded back to learned Single Judge for deciding the issue relating to maintainability of writ petition under Article 227. [Kalam Scooter Service v. Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj] ...41

Contempt of Courts Act (70 of 1971), Sections 10 & 12, Criminal Procedure Code, 1973, Section 340 - Pleadings - False affidavit - When somebody swears on affidavit on the basis of official record then not only he has to go through the records and understand the contents of the record but he also has to understand the meaning of what he is writing in the pleading and affidavit - He is also required to understand that what would be the consequences of his wrong reporting or wrong filing of an affidavit - To obtain a favourable order in favour of the State Government and the other persons, the officer-in-charge raised concocted and false pleadings and had also sworn a false affidavit - This action on the part of the officer-in-charge is punishable under the provisions of the Act and is also punishable under the common law. [Anita Karope (Smt.) v. Smt. Geeta Uikey] ...31

Criminal Practice - Duty of applicant - It is not possible to entertain any bail application unless full particulars of person who has given instructions, and the fact pertaining to earlier attempts and pendency of application, if any, are placed on record. [Chandu Singh v. State of M.P.]...*1

Criminal Procedure Code, 1973 (2 of 1974), First Schedule, Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005), Section 42(f)(iii), Penal Code, 1860, Section 324 - Bailable - Section 324 of IPC continues to be bailable as provisions of Section 42(f)(iii) of Code of Criminal Procedure (Amendment) Act, 2005 has not been brought into effect. [Raju @ Raj Kishore Yadav v. State of M.P.] ...*9

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Order

अयुक्तियुक्त हो कि कोई युक्तियुक्त व्यक्ति वह कार्य नहीं करता — मामले में प्रत्यर्थियों के कृत्य में ऐसी कोई अयुक्तियुक्तता नहीं पायी गयी। (शिव दयाल सिंह वि. जनरल मेनेजर इंडियन ऑइल कारपोरेशन) ...176

संविधान, अनुच्छेद 226 — देखें — जाँच आयोग अधिनियम, 1952, धारा 3, (नर्मदा बचाओ आंदोलन वि. म.प्र. राज्य) ...112

संविधान, अनुच्छेद 226 — देखें — सेवा विधि (पी.जी. क्षत्रिय वि. म.प्र. राज्य) ...10

संविधान, अनुच्छेद 226 व 227, सिविल प्रक्रिया संहिता, 1908, धारा 115 — वैकल्पिक उपचार — रिट याचिका की पोषणीयता — आदेश को अनुच्छेद 226 व 227 के अन्तर्गत उच्च न्यायालय के समक्ष चुनौती दी गई — यह आपत्ति उठाई गई कि संहिता की धारा 115 के अन्तर्गत वैकल्पिक उपचार उपलब्ध है, इसलिए अनुच्छेद 227 के अन्तर्गत रिट याचिका नहीं की जा सकती — विद्वान एकल न्यायाधीश ने पोषणीयता का प्रश्न विनिश्चित किये बिना रिट याचिका विनिश्चित की — आदेश को रिट अपील में चुनौती दी गई — अभिनिर्धारित — मामला अनुच्छेद 227 के अन्तर्गत रिट याचिका की पोषणीयता से सम्बंधित विवादक का विनिश्चय करने के लिए विद्वान एकल न्यायाधीश को प्रतिप्रेषित किया गया। (कलाम स्कूटर सर्विस वि. श्री श्री 1008 जगत गुरु शंकराचार्य स्वामी स्वरूपानंद जी महाराज) ...41

न्यायालय अवमानना अधिनियम (1971 का 70), धाराएँ 10 व 12, दण्ड प्रक्रिया संहिता, 1973, धारा 340 — अभिवचन — मिथ्या शपथ पत्र — जब कोई व्यक्ति कार्यालयीन अभिलेख के आधार पर शपथ पत्र देता है तब उसे न केवल अभिलेख पढ़ना और उसकी अन्तर्वस्तु को समझना होता है बल्कि उसे उसका अर्थ भी समझना होता है कि वह अभिवचन और शपथ पत्र में क्या लिख रहा है — उसे यह भी समझना आवश्यक है कि उसके गलत सूचना देने या गलत शपथ पत्र पेश करने के क्या परिणाम होंगे — राज्य सरकार और अन्य व्यक्तियों के पक्ष में अनुकूल आदेश अभिप्राप्त करने के लिए, भारसाधक अधिकारी ने मनगढ़ंत या मिथ्या अभिवचन उठाये और मिथ्या शपथ पत्र भी दिया — भारसाधक अधिकारी का यह कृत्य अधिनियम के उपबंधों के अन्तर्गत दण्डनीय है और सामान्य विधि के अन्तर्गत भी दण्डनीय है। (अनीता करोपे (श्रीमति) वि. श्रीमति गीता उइके) ...31

दाण्डिक पद्धति — आवेदक का कर्तव्य — यह संभव नहीं है कि किसी जमानत आवेदन को ग्रहण किया जाए, जब तक उस व्यक्ति की, जिसने अनुदेश दिये हैं, पूर्ण विशिष्टियाँ और पूर्व प्रयासों तथा आवेदन के लम्बित रहने से सम्बंधित तथ्य, यदि कोई हो, अभिलेख पर नहीं रखे जाते। (चन्दू सिंह वि. म.प्र. राज्य) ---*1

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), प्रथम अनुसूची, दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2005 (2005 का 25), धारा 42(एफ)(iii), दण्ड संहिता, 1860, धारा 324 — जमानतीय — भा.द.सं. की धारा 324 जमानतीय होना जारी रखी जाती है क्योंकि दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2005 की धारा 42(एफ)(iii) प्रभाव में नहीं लायी गई है। (राजू उर्फ राजकिशोर यादव वि. म.प्र. राज्य) ---*9

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 — संतान के भरण-पोषण

for maintenance of children - Divorced Muslim wife can file maintenance application u/s 125 of the Code before the Magistrate for maintenance of children. [Shabana Bano (Smt.) v. Imran Khan] ...276

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - See - Muslim Women (Protection of Rights on Divorce) Act, 1986, Sections 3 & 4 [Shabana Bano (Smt.) v. Imran Khan] ...276

Criminal Procedure Code, 1973 (2 of 1974), Section 154 - Delay in F.I.R. - Delay explained - Not fatal to the case of prosecution - The delay in lodging the F.I.R. was explained by the facts brought on record that when the matter came to light and was discovered, it was reported to the police - The delay of 5 days in lodging the F.I.R. in the case does not cause any doubt on the prosecution case. [Santosh v. State of M.P.] ...241

Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - Cognizable offence - Magistrate directed the police station to register F.I.R. if cognizable offence is found to have been committed - Held - Magistrate ought to have expressed in the order, if he prima facie found the complaint disclosing cognizable offence - However, every mistake does not necessarily call for correction. [In Reference v. Alok Singhai] ...264

Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) & 190 - Investigation - Magistrate can direct investigation u/s 156(3) only at pre-cognizance stage. [In Reference v. Deepak Agrawal] ...272

Criminal Procedure Code, 1973 (2 of 1974), Sections 173 & 210, Penal Code, 1860, Section 394, Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. 1981, Section 11/13 - Conditions for invoking powers u/s 210 of Code - Held - (1) There must be a complaint pending for inquiry or trial; (2) Investigation by the police must be in progress in relation to the same offence; (3) A report must have been made by the police officer u/s 173 of Code; and (4) The Magistrate must have taken cognizance of an offence against a person who is accused in the complaint case - Petition allowed with the direction to consider the application and on being satisfied that above conditions are fulfilled then passed a reasoned order. [Vinod Dixit v. Satish Mishra] ...317

Criminal Procedure Code, 1973 (2 of 1974), Section 190 - Cognizance - Complaint presented on 06.10.2007 - Magistrate fixed the case, on 06.11.2007 and further, for recording preliminary evidence - Held - Magistrate had taken cognizance of offences on 06.10.2007 itself by applying his mind and fixing a date for recording of preliminary evidence. [In Reference v. Deepak Agrawal] ...272

Criminal Procedure Code, 1973 (2 of 1974), Section 197, Penal Code, 1860, Section 420 - Sanction for prosecution - Applicant availed the

के लिए आदेश - तलाकशुदा मुस्लिम पत्नी संतान के भरण-पोषण के लिए संहिता की धारा 125 के अन्तर्गत मजिस्ट्रेट के समक्ष भरण-पोषण का आवेदन पेश कर सकती है। (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - देखें - मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986, धाराएँ 3 व 4 (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 - एफ.आई.आर. में विलम्ब - विलम्ब स्पष्ट किया गया - अभियोजन के मामले के लिए घातक नहीं - एफ.आई.आर. दर्ज कराने में विलम्ब अभिलेख पर लाये गये तथ्यों से स्पष्ट किया गया कि जब मामला प्रकाश में आया और पता चला, इसकी रिपोर्ट पुलिस को की गई - मामले में एफ.आई.आर. दर्ज कराने में 5 दिन का विलम्ब अभियोजन के मामले पर कोई संदेह कारित नहीं करता। (संतोष वि. म.प्र. राज्य) ...241

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) - संज्ञेय अपराध - मजिस्ट्रेट ने पुलिस थाने को निदेश दिया कि यदि संज्ञेय अपराध किया जाना पाया जाता है तो एफ. आई.आर. दर्ज की जाए - अभिनिर्धारित - मजिस्ट्रेट को आदेश में अभिव्यक्त करना चाहिए था यदि वह प्रथम दृष्ट्या परिवाद को संज्ञेय अपराध प्रकट करने वाला पाता - तथापि, प्रत्येक मूल में आवश्यक सुधार की माँग नहीं की जा सकती। (इन रेफरेन्स वि. अलोक सिंघई) ...264

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) व 190 - अनुसंधान - मजिस्ट्रेट धारा 156(3) के अन्तर्गत केवल संज्ञान से पहले के प्रक्रम पर अनुसंधान के लिए निदेश दे सकता है। (इन रेफरेन्स वि. दीपक अग्रवाल) ...272

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 173 व 210, दण्ड संहिता, 1860 धारा 394, डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. 1981, धारा 11/13 - संहिता की धारा 210 के अन्तर्गत शक्तियों का अवलंब लेने के लिए शर्तें - अभिनिर्धारित (1) जाँच या विचारण के लिए कोई परिवाद लम्बित होना चाहिए; (2) उस अपराध के सम्बन्ध में पुलिस द्वारा अन्वेषण प्रगति पर होना चाहिए; (3) पुलिस अधिकारी द्वारा धारा 173 के अन्तर्गत एक रिपोर्ट की जाना चाहिए; और (4) मजिस्ट्रेट को किसी व्यक्ति, जो परिवाद मामले में अभियुक्त है, के विरुद्ध अपराध का संज्ञान लेना चाहिए - याचिका इस निदेश के साथ मंजूर की गई कि आवेदन पर विचार किया जाए और यह समाधान हो जाने पर कि उपरोक्त शर्तें पूरी कर दी गई हैं सकारण आदेश पारित किया जाए। (विनोद दीक्षित वि. सतीश मिश्रा) ...317

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 190 - संज्ञान - परिवाद 06.10.2007 को पेश किया गया - मजिस्ट्रेट ने प्रारम्भिक साक्ष्य अभिलिखित करने के लिए मामला 06.11.2007 को और उसके आगे नियत किया - अभिनिर्धारित - मजिस्ट्रेट अपने मस्तिष्क का प्रयोग कर और प्रारम्भिक साक्ष्य अभिलिखित करने के लिए तारीख नियत कर अपराध का संज्ञान 06.10.2007 को ले चुका था। (इन रेफरेन्स वि. दीपक अग्रवाल) ...272

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197, दण्ड संहिता, 1860, धारा 420 - अभियोजन के लिए मंजूरी - आवेदक ने बिना यात्रा के एल.टी.सी. के धन का उपभोग

money of LTC without traveling - No sanction for prosecution necessary as act of applicant was not in discharge of his official duties. [Ramesh Chandra v. State of M.P.] ...255

Criminal Procedure Code, 1973 (2 of 1974), Section 200 - Complaint - *Magistrate has to proceed and pass orders in a case on the basis of material on record of that particular case. - Magistrate is not supposed to remember and pass orders on the basis of facts of any other case. [In Reference v. Alok Singhai] ...264*

Criminal Procedure Code, 1973 (2 of 1974), Sections 200 & 201 - Second/subsequent complaint - *Magistrate returned the first complaint on the ground that he had no jurisdiction to entertain as commission of offence u/s 13(1)(d) of Prevention of Corruption Act alleged - Does not debar magistrate to entertain complaint again, if those allegations are omitted by complainants in second complaint. [In Reference v. Alok Singhai] ...264*

Criminal Procedure Code, 1973 (2 of 1974), Section 216, Penal Code, 1860, Section 420, Negotiable Instruments Act, 1881, Section 138 - *A private complaint filed u/s 138 of the Act and Police Challan u/s 420 IPC was also filed on the basis of complaint for dishonour of cheques - Both cases merged by order of magistrate - No charge was framed u/s 138 of Act - Oral prayer for framing additional charge rejected - After recording of evidence of complainant, application u/s 216 Cr.P.C. for framing additional charge filed - Rejection - Held - Because the prayer was rejected once, the right to approach the court again u/s 216 of the Cr.P.C., is not curtailed as court can alter or add any charge at any time before judgment is pronounced - Court below erred in rejecting application - Revision allowed. [Prakash Kanthed v. M/s Maheshwari Protins Ltd] ...259*

Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228, Penal Code, 1860, Sections 341, 147, 332/149, 333/149 & 353/149 - Discharge - Dismissal of accused's application to discharge - Revision - Held - *At the time of framing of charge, meticulous consideration of evidence and material by court is not required - Court must apply mind to the material placed on record - Court below framed charges on the basis of material placed on record - No interference in revision - Revision dismissed. [Rakesh v. State of M.P.] ...*10*

Criminal Procedure Code, 1973 (2 of 1974), Section 328 - Procedure at time of trial in the case of person of unsound mind - *Act, conduct and conversation which accused had with trial judge on the date he was produced and on two subsequent dates showed that accused was a normal man - Application u/ss 328 & 335 was moved when the case was fixed for evidence - Held - Application was rightly rejected by trial judge as no medical record in respect of mental condition was produced and behavior of accused was quite normal. [State of M.P. v. Koushal Prasad Jaiswal] ...292*

किया - अभियोजन के लिए कोई मंजूरी आवश्यक नहीं क्योंकि आवेदक का कृत्य उसके पदीय कर्तव्यों के निर्वहन में नहीं था। (रमेश चंद्र वि. म.प्र. राज्य) ...255

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 - परिवाद - मजिस्ट्रेट को किसी मामले में उसी विशिष्ट मामले के अभिलेख पर उपलब्ध सामग्री के आधार पर कार्यवाही करनी चाहिए और आदेश पारित करने चाहिए - मजिस्ट्रेट से यह उम्मीद नहीं की जा सकती है कि वह किसी अन्य मामले के तथ्यों को याद रखे और उस आधार पर आदेश पारित करे। (इन रेफरेन्स वि. अलोक सिंघई) ...264

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 200 व 201 - द्वितीय/पश्चात्तर्ती परिवाद - मजिस्ट्रेट ने प्रथम परिवाद इस आधार पर लौटाया कि उसे ग्रहण करने की अधिकारिता नहीं थी क्योंकि ब्रष्टाचार निवारण अधिनियम के अन्तर्गत अपराध करना कथित किया गया - मजिस्ट्रेट को पुनः परिवाद ग्रहण करने से विवर्जित नहीं करती है, यदि परिवादियों द्वारा द्वितीय परिवाद में उन अभिकथनों का लोप कर दिया जाता है। (इन रेफरेन्स वि. अलोक सिंघई) ...264

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216, दण्ड संहिता, 1860, धारा 420, परक्राम्य लिखत अधिनियम, 1881, धारा 138 - चेक अनादृत होने के परिवाद के आधार पर एक परिवाद अधिनियम की धारा 138 के अन्तर्गत पेश और पुलिस चालान भी भा.द. सं. की धारा 420 के अन्तर्गत पेश - दोनों मामले मजिस्ट्रेट के आदेश से विलीन - अधिनियम की धारा 138 के अन्तर्गत कोई आरोप विरचित नहीं - अतिरिक्त आरोप विरचित करने के लिए मौखिक प्रार्थना भी नामंजूर - परिवादी का साक्ष्य अभिलिखित किये जाने के बाद अतिरिक्त आरोप विरचित करने के लिए द.प्र.सं. की धारा 216 के अन्तर्गत आवेदन पेश - नामंजूर - अभिनिर्धारित - क्योंकि एक बार प्रार्थना नामंजूर कर दी गई, द.प्र.सं. की धारा 216 के अन्तर्गत न्यायालय से पुनः निवेदन का अधिकार कम नहीं होता है क्योंकि न्यायालय निर्णय सुनाये जाने के पूर्व किसी भी समय कोई आरोप परिवर्तित या परिवर्धित कर सकता है - अधीनस्थ न्यायालयों ने आवेदन नामंजूर करने में त्रुटि की - पुनरीक्षण मंजूर। (प्रकाश कांथेड वि. मे. माहेश्वरी प्रोटीन्स लि.) ...259

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228, दण्ड संहिता, 1860, धाराएँ 341, 147, 332/149, 333/149 व 353/149 - उन्मोचन - उन्मोचित करने के लिए अभियुक्त का आवेदन खारिज - पुनरीक्षण - अभिनिर्धारित - आरोप विरचित करते समय न्यायालय द्वारा साक्ष्य और सामग्री का पूरी बारीकी से विचार करना अपेक्षित नहीं - न्यायालय को अभिलेख पर लायी गई सामग्री पर मस्तिष्क का प्रयोग अवश्य करना चाहिए - अधीनस्थ न्यायालय ने अभिलेख पर लाई गई सामग्री के आधार पर आरोप विरचित किये - पुनरीक्षण में कोई हस्तक्षेप नहीं - पुनरीक्षण खारिज। (राकेश वि. म.प्र. राज्य) ---*10

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 328 - विकृत-चित्त व्यक्ति के मामले में विचारण के समय प्रक्रिया - कृत्य, आचरण और वार्तालाप जो अभियुक्त का उसको पेश करने की तारीख पर और दो पश्चात्तर्ती तारीखों पर विचारण न्यायाधीश के साथ था, दर्शाता है कि अभियुक्त एक सामान्य पुरुष था - जब मामला साक्ष्य के लिए नियत किया गया, धारा 328 व 335 के अन्तर्गत आवेदन पेश किया गया - अभिनिर्धारित - विचारण न्यायाधीश ने आवेदन उचित रूप से नामंजूर किया क्योंकि मानसिक दशा के सम्बन्ध में कोई चिकित्सीय अभिलेख पेश नहीं किया गया और अभियुक्त का आचरण बिलकुल सामान्य था। (म.प्र. राज्य वि. कौशल प्रसाद जायसवाल)....292

Criminal Procedure Code, 1973 (2 of 1974), Sections 329 & 331 - Resumption of enquiry or trial - Trial of accused postponed on account of his unsoundness of mind u/s 329 - Trial can be resumed by trial court only if accused ceases to be of unsound mind - It is incumbent upon trial court to record its satisfaction that accused is ceased to be insane and is capable of making his defence - Charges were framed without recording such finding by trial court - Entire trial vitiated - Judgment of conviction set-aside - Matter remitted back to trial court to record its satisfaction that accused is of sound mind and then to put to trial - Appeal allowed. [State of M.P. v. Dilip Bankar] ...309

Criminal Procedure Code, 1973 (2 of 1974), Section 340 - See - Contempt of Courts Act, 1971, Sections 10 & 12 [Anita Karope (Smt.) v. Smt. Geeta Uikey] ...31

Criminal Procedure Code, 1973 (2 of 1974), Sections 354(3) & 366 - Death reference - Offence was committed under influence of extreme mental or emotional disturbances - Accused offered no such traumatic threat to the survival of social order - Present case also not rarest of rare cases - Death reference rejected - Accused sentenced to imprisonment to life. [State of M.P. v. Koushal Prasad Jaiswal] ...292

Criminal Procedure Code, 1973 (2 of 1974), Sections 354 & 482 - Judgment - Adverse remarks - Against I.O. should not be passed without providing him opportunity of hearing. [S.R. Bagwaiya v. State of M.P.]...*11

Criminal Procedure Code, 1973 (2 of 1974), Section 397 - Scope of powers of revision - Since applicant is also prosecuting the non-applicant u/s 138 of the Act and no charge has been framed by the trial court under that section - Therefore, even High Court can direct to frame the charge while exercising the jurisdiction u/s 397 of the Code. [Prakash Kanthed v. M/s Maheshwari Protins Ltd] ...259

Criminal Procedure Code, 1973 (2 of 1974), Section 407 - Transfer of case - Where even allegation of nexus between magistrate and complainant appears to be baseless and unfounded, yet in peculiar circumstances it is appropriate for High Court to transfer case from that court to some other court. [In Reference v. Alok Singh] ...264

Criminal Procedure Code, 1973 (2 of 1974), Sections 407, 186, 178(c) - Transfer of case - Continuance of offence - Allegations of demand of dowry made at Shivpuri - Charge-sheet filed in the court of JFMC, Ashoknagar - Two other cases pending in the courts of Shivpuri - Application for transfer of case to Shivpuri - Held - Wife stated in her statement recorded u/s 161 of Code and in F.I.R. lodged by her that all alleged demands of dowry were made by applicants at Shivpuri - There is no whisper of allegations about any demand of dowry or commission of any act of cruelty at Ashoknagar - That being so, the logic of Sec.178(c) of Code relating to 'continuance of

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 329 व 331 — जाँच या विचारण को पुनः चालू करना — अभियुक्त का विचारण धारा 329 के अन्तर्गत उसकी चित्त-विकृति के कारण मुलतवी किया गया — विचारण न्यायालय द्वारा विचारण केवल तभी पुनः चालू किया जा सकता है जब अभियुक्त विकृतचित्त नहीं रह जाता है — विचारण न्यायालय पर यह बध्यता है कि वह अपना समाधान अभिलिखित करे कि अभियुक्त उन्मत्त नहीं रहा है और अपना बचाव करने में सक्षम है — विचारण न्यायालय द्वारा ऐसे निष्कर्ष अभिलिखित किये बिना आरोप विरचित किये गये — सम्पूर्ण विचारण दूषित — दोषसिद्धि का निर्णय अपास्त — मामला विचारण न्यायालय को अपना यह समाधान अभिलिखित करने कि अभियुक्त स्वस्थचित्त का है और तब विचारण करने वापस भेजा गया — अपील मंजूर। (म.प्र. राज्य वि. दिलीप बनकर) ...309

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 — देखें — न्यायालय अवमानना अधिनियम 1971, धाराएँ 10 व 12, (अनीता करोपे (श्रीमति) वि. श्रीमति गीता उइके) ...31

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 354(3) व 366 — मृत्यु निर्देश — अपराध नितांत मानसिक या संवेगात्मक विक्षोभ के प्रभाव के अधीन किया गया — अभियुक्त ने सामाजिक व्यवस्था के बने रहने के लिए ऐसी कोई अभिघातजन्य आशंका प्रस्तावित नहीं की — वर्तमान मामला विरल से विलरतम मामला भी नहीं — मृत्यु निर्देश नामंजूर — अभियुक्त आजीवन कारावास से दण्डादिष्ट। (म.प्र. राज्य वि. कौशल प्रसाद जायसवाल) 292

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 354 व 482 — निर्णय — प्रतिकूल टिप्पणी — अनुसंधानकर्ता अधिकारी के विरुद्ध उसे सुनवाई का अवसर दिये बिना पारित नहीं की जानी चाहिए। (एस.आर. बगवैया वि. म.प्र. राज्य) ---*11

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 — पुनरीक्षण की शक्तियों का क्षेत्र — चूंकि आवेदक अनावेदकों को अधिनियम की धारा 138 के अन्तर्गत भी अभियोजित कर रहा है और विचारण न्यायालय द्वारा इस धारा के अन्तर्गत कोई आरोप विरचित नहीं किया गया है — इसलिए, उच्च न्यायालय भी संहिता की धारा 397 के अन्तर्गत अधिकारिता का प्रयोग करते समय आरोप विरचित करने का निदेश दे सकता है। (प्रकाश कांधेड वि. मे. माहेश्वरी प्रोटीन्स लि.) ...259

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 407 — मामले का अंतरण — जहाँ मजिस्ट्रेट और परिवादी के मध्य सम्बन्ध का अभिकथन बेबुनियाद और निराधार भी प्रतीत हो, तो भी विशिष्ट परिस्थितियों में उच्च न्यायालय के लिए यह समुचित है कि मामला उस न्यायालय से किसी अन्य न्यायालय में अंतरित कर दिया जाए। (इन रेफरेन्स वि. अलोक सिंघई) ...264

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 407, 186, 178(सी) — मामले का अंतरण — अपराध का जारी रहना — दहेज की माँग के अभिकथन शिवपुरी में किये गये — आरोप-पत्र जेएमएफसी, अशोकनगर के न्यायालय में पेश किया गया — दो अन्य मामले शिवपुरी के न्यायालयों में लम्बित — मामला शिवपुरी में अंतरित करने के लिए आवेदन — अभिनिर्धारित — पत्नी ने संहिता की धारा 161 के अन्तर्गत अभिलिखित उसके कथन में और उसके द्वारा दर्ज करायी गई एफ.आई.आर. में यह कथन किया है कि आवेदकों द्वारा दहेज की सभी कथित माँगें शिवपुरी में की गई — दहेज की कोई माँग या क्रूरता का कोई कृत्य अशोकनगर में करने के बारे में अभिकथनों की कोई फुसफुसाहट नहीं है — इसलिए 'अपराध का जारी रहना' से सम्बन्धित संहिता की धारा

*offence' cannot be applied - Case directed to be transferred to Shivpuri from Ashoknagar. [Kamla Bai (Smt.) v. State of M.P.] ...*3*

Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439, Penal Code, 1860; Sections 409 & 465 - Regular Bail - Competent Court - Applicant granted anticipatory bail for offences punishable u/s 409 & 465 of IPC with direction that applicant may move application for regular bail before competent court - Held - Offence u/s 409 IPC is punishable with life therefore, court of Sessions would be competent court for the purposes of regular bail - A.S.J. should not have dismissed application for regular bail as not maintainable. [Ram Kishor Saket v. State of M.P.] ...270

Criminal Procedure Code, 1973 (2 of 1974), Section 439 - Repeat bail application - First bail application rejected on merits by High Court - Applicant obtained temporary bail from trial court by suppressing rejection of his bail application by High Court - Held - Taking into consideration the nature of allegations as well as the misconduct - Applicant not entitled to bail. [Chandu Singh v. State of M.P.] ...*1

Criminal Procedure Code, 1973 (2 of 1974), Section 457 - Seizure - Procedure - Applicant's vehicle seized by the financier for default of non-payment of instalments - Court releasing the vehicle with one of the conditions for payment of loan amount - Action challenged - Held - While deciding application u/s 457 of Code with respect to interim custody of vehicle, the court has to pass appropriate orders and custody is to be given to the registered owner of the vehicle on furnishing requisite security or bond/Supurdginama - While dealing with such application, it is not necessary at all to impose any condition for payment of instalments alleged to be due from the applicant as it is purely a civil matter - If the instalments are due, then the financier can take civil recourse for recovery of same. [Rampal Singh v. State of M.P.] ...321

Criminal Procedure Code, 1973 (2 of 1974), Section 464 - Effect of omission to frame, or absence of, or error in charge - Whether an accused charged with Sec.302 r/w Sec.149 IPC can be convicted u/s 302 IPC without specific charge being framed against him - Held - No; law explained. [Rajaram v. State of M.P.] ...*8

Criminal Procedure Code (Amendment) Act, 2005 (25 of 2005), Section 42(f)(iii) - See - Criminal Procedure Code, 1973, First Schedule [Raju @ Raj Kishore Yadav v. State of M.P.] ...*9

Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. (of 1981), Section 11/13 - See - Criminal Procedure Code, 1973, Sections 173 & 210 [Vinod Dixit v. Satish Mishra] ...317

Evidence Act (1 of 1872), Section 3 - Appreciation of evidence - Husband of deceased declared hostile - Husband was not in the house, he was not an eye witness of incident and was summoned by his daughter - No

178(सी) का तर्क लागू नहीं हो सकता — मामला अशोकनगर से शिवपुरी अंतरित करने का निदेश दिया गया। (कमला बाई (श्रीमति) वि. म.प्र. राज्य) ---*3

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439, दण्ड संहिता, 1860, धाराएँ 409 व 465 — नियमित जमानत — सक्षम न्यायालय — आवेदक को भा.द.सं. की धारा 409 व 465 के अन्तर्गत दण्डनीय अपराधों के लिए अग्रिम जमानत इस निदेश के साथ प्रदान की गई कि आवेदक सक्षम न्यायालय के समक्ष नियमित जमानत के लिए आवेदन पेश कर सकेगा — अभिनिर्धारित — भा.द.सं. की धारा 409 के अन्तर्गत अपराध आजीवन कारावास से दण्डनीय है, इसलिए सेशन न्यायालय नियमित जमानत के प्रयोजन के लिए सक्षम न्यायालय होगा — अपर सेशन न्यायाधीश को नियमित जमानत का आवेदन पोषणीय न होना मानते हुए उसे खारिज नहीं करना चाहिए था। (राम किशोर साकेत वि. म.प्र. राज्य) ...270

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 — जमानत पुनरावेदन — प्रथम जमानत आवेदन उच्च न्यायालय द्वारा गुणदोषों पर नामंजूर — आवेदक ने, अपने जमानत आवेदन की उच्च न्यायालय द्वारा नामंजूरी छिपाते हुए, विचारण न्यायालय से अस्थायी जमानत अभिप्राप्त की — अभिनिर्धारित — आरोपों की प्रती और दुराचरण को विचार में लेते हुए — आवेदक जमानत का हकदार नहीं। (चंदू सिंह वि. म.प्र. राज्य) ---*1

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 457 — अभिग्रहण — प्रक्रिया — आवेदक का वाहन किशतों की अदायगी न करने के व्यतिक्रम के लिए फायनेंसर द्वारा अभिग्रहीत किया गया — न्यायालय ने ऋण राशि की अदायगी की शर्त के साथ वाहन को मुक्त किया — कार्यवाही को चुनौती दी गई — अभिनिर्धारित — वाहन की अंतरिम अभिरक्षा के सम्बन्ध में संहिता की धारा 457 के अन्तर्गत आवेदन का विनिश्चय करते समय, न्यायालय को समुचित आदेश पारित करना चाहिए और अभिरक्षा अपेक्षित प्रतिभूति या मुचलका/सुपुर्दगीनामा दे देने पर वाहन के रजिस्टर्ड स्वामी को दी जाना चाहिए — ऐसे आवेदन का निराकरण करते समय, यह बिल्कुल आवश्यक नहीं है कि आवेदक की ओर कथित रूप से बकाया किशतों की अदायगी की कोई शर्त अधिरोपित की जाए क्योंकि यह बिल्कुल सिविल मामला है — यदि किशतें बकाया हैं, तब फायनेंसर उनकी वसूली के लिए सिविल कार्यवाही का आश्रय ले सकता है। (रामपाल सिंह वि. म.प्र. राज्य) ...321

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 464 — आरोप विरचित न करने या उसके अभाव या उसमें गलती का प्रभाव — क्या भा.द.सं. की धारा 302 सहपठित धारा 149 से आरोपित किसी अनियुक्त को उसके विरुद्ध विनिर्दिष्ट आरोप विरचित किये बिना भा.द.सं. की धारा 302 के अन्तर्गत दोषसिद्ध किया जा सकता है — अभिनिर्धारित — नहीं, विधि स्पष्ट की गई। (राजाराम वि. म.प्र. राज्य) ---*8

दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2005 (2005 का 25), धारा 42(एफ)(iii) — देखें — दण्ड प्रक्रिया संहिता, 1973, प्रथम अनुसूची (राजू उर्फ राजकिशोर यादव वि. म.प्र. राज्य) ---*9

डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का), धारा 11/13 — देखें — दण्ड प्रक्रिया संहिता, 1973, धाराएँ 173 व 210 (विनोद दीक्षित वि. सतीश मिश्रा) ...317

साक्ष्य अधिनियम (1872 का 1), धारा 3 — साक्ष्य का अधिमूल्यन — मृतक का पति पक्षद्रोही घोषित — पति घटना के समय घर के अन्दर नहीं था और उसे तो उसकी पुत्री ने बुलाया

dent was caused in the dying declaration of the deceased - Held - Hostility of husband of deceased is of no consequence. [Yuvraj v. State of M.P.]...214

Evidence Act (1 of 1872), Section 3 - See - Penal Code, 1860, Section 376 [Bhanu Singh v. State of M.P.] ...224

Evidence Act (1 of 1872), Sections 3 & 9 - Test identification parade - Failure to hold - Effect - Incident took place in broad day - One of eye witness actually chased accused for some distance - Accused named in dying declaration and Dehati Nalishi - There was no necessity to hold identification parade. [State of M.P. v. Koushal Prasad Jaiswal] ...292

Evidence Act (1 of 1872), Section 32 - Dying declaration - Evidentiary value - Deceased had suffered 70-80% burns however was in a position to speak - No motive on part of deceased to falsely implicate accused - Difference of 5-10 minutes interval between Dehati Nalishi and dying declaration not sufficient ground to hold the dying declaration to be suspicious. [State of M.P. v. Koushal Prasad Jaiswal] ...292

Evidence Act (1 of 1872), Section 32(1) - See - Penal Code, 1860, Sections 449 & 302 [Yuvraj v. State of M.P.] ...214

Evidence Act (1 of 1872), Section 106, Negotiable Instruments Act, 1881, Sections 138 & 141 - Dishonour of cheque - Partnership firm - In charge of and were responsible to the firm - Burden of proving fact especially within knowledge - Partner of the firm who signed the cheque died - No notice issued to other partners - Complaint filed against the other partners - Maintainability - Held - Other partners were in charge of and were responsible to the firm for the conduct of it's business in the context of Sec. 141 of the Act of 1881 could be decided only during the trial - On perusal of Ss. 138 & 141 of the Act of 1881 it is revealed that if other elements of the offence u/s 138 are satisfied - The burden would be on the partners of the firm to show that they were not liable to be convicted - Any restriction on their power or existence of any special circumstance exonerating them would be the fact exclusively within their knowledge; therefore, it would be for them to establish at the trial that at the relevant time they were not in charge of the affairs of the firm. [Mahaveer Traders (M/s.) v. M/s Gangadhar Sharma & Sons] ...286

Evidence Act (1 of 1872), Section 113-A, Penal Code, 1860, Section 306 - Presumption - When invoked - The mere fact that a woman committed suicide within 7 years of her marriage and that she had been subjected to cruelty by her husband or any other relative of her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband or by any relative of her husband - The court is required to look into all the other circumstances of the case - One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature as was likely to derive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. [Raj Babu v. State of M.P.] ...1

था, वह घटना का प्रत्यक्षदर्शी साक्षी नहीं — मृतक के मृत्युकालिक कथन को कोई क्षति कारित नहीं — अभिनिर्धारित — मृतक के पति के पक्षद्रोही होने का कोई परिणाम नहीं। (युवराज वि. म.प्र. राज्य)...214

साक्ष्य अधिनियम, (1872 का 1), धारा 3 — देखें — दण्ड संहिता, 1860, धारा 376 (मानू सिंह वि. म.प्र. राज्य) ...224

साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 9 — शिनाख्त परेड — करने में विफलता — प्रभाव — घटना दिन में खुले रूप से हुई — एक प्रत्यक्षदर्शी साक्षी ने कुछ दूरी तक वास्तविक रूप से अभियुक्त का पीछा किया — मृत्युकालिक कथन और देहाती नालिशी में अभियुक्त नामित — शिनाख्त परेड करने की कोई आवश्यकता नहीं थी। (म.प्र. राज्य वि. कौशल प्रसाद जायसवाल) ...292

साक्ष्य अधिनियम (1872 का 1), धारा 32 — मृत्युकालिक कथन — साक्ष्यिक मूल्य — मृतक 70-80 प्रतिशत जल गया था तथापि बोलने की स्थिति में था — मृतक द्वारा अभियुक्त को मिथ्या आलिप्त करने का कोई हेतु नहीं — देहाती नालिशी और मृत्युकालिक कथन के मध्य 5-10 मिनट का अंतर मृत्युकालिक कथन को शंकास्पद नहोना अभिनिर्धारित करने के लिए पर्याप्त आधार नहीं। (म.प्र. राज्य वि. कौशल प्रसाद जायसवाल) ...292

साक्ष्य अधिनियम, (1872 का 1), धारा 32(1) — देखें — दण्ड संहिता, 1860, धाराएँ 449 व 302 (युवराज वि. म.प्र. राज्य) ...214

साक्ष्य अधिनियम (1872 का 1), धारा 106, परक्राम्य लिखत अधिनियम, 1881, धाराएँ 138 व 141 — चेक का अनादरण — भागीदारी फर्म — फर्म का भारसाधक और उसके लिए उत्तरदायी — विशेषतः ज्ञात तथ्य को साबित करने का भार — फर्म के भागीदार, जिसने चेक हस्ताक्षरित किया, की मृत्यु हो गई — अन्य भागीदारों को कोई सूचनापत्र जारी नहीं किया गया — परिवाद अन्य भागीदारों के विरुद्ध पेश किया — पोषणीयता — अभिनिर्धारित — 1881 के अधिनियम की धारा 141 के संदर्भ में अन्य भागीदार फर्म के कारोबार के संचालन के लिए फर्म के भारसाधक और उसके लिए उत्तरदायी थे, यह केवल विचारण के दौरान विनिश्चित किया जा सकता है — 1881 के अधिनियम की धारा 138 व 141 के परिशीलन पर यह प्रकट होता है कि यदि धारा 138 के अन्तर्गत अपराध के अन्य तत्व पूरे हो जाते हैं — यह दर्शित करने का भार फर्म के भागीदारों पर होगा कि वे दोषसिद्ध किये जाने योग्य नहीं थे — उनकी शक्ति पर कोई रोक या उन्हें दोषमुक्त करने वाली किसी विशेष परिस्थिति के अस्तित्व का तथ्य, अनन्य रूप से उनके ज्ञान में होगा, इसलिए उन्हें विचारण पर यह स्थापित करना होगा कि वे सुसंगत समय पर फर्म के कार्यों के भारसाधक नहीं थे। (महावीर ट्रेडर्स (मे.) वि. मे. गंगाधर शर्मा एन्ड सन्स) ...286

साक्ष्य अधिनियम (1872 का 1), धारा 113—ए, दण्ड संहिता, 1860, धारा 306 — उपधारणा — कब अवलंब लिया जा सकता है — केवल यह तथ्य कि महिला ने अपने विवाह के 7 वर्ष के भीतर आत्महत्या की और उसके साथ उसके पति या उसके पति के किसी रिश्तेदार द्वारा क्रूरता की गई, स्वतः यह उपधारित नहीं करता कि आत्महत्या के लिए उसके पति या पति के किसी रिश्तेदार द्वारा दुष्टेरित किया गया था — न्यायालय को मामले की अन्य सभी परिस्थितियों की भी जाँच-पड़ताल करना आवश्यक है — इन परिस्थितियों में से एक परिस्थिति, जिस पर न्यायालय द्वारा विचार किया जाना है, यह है कि क्या कथित क्रूरता ऐसी प्रकृति की थी जो महिला को आत्महत्या करने या उसके जीवन, अंग या स्वास्थ्य को गंभीर क्षति या खतरा कारित करने के लिए संभाव्य थी। (राज बाबू वि. म.प्र. राज्य) ...1

Evidence Act (1 of 1872), Section 113-A, Penal Code, 1860, Section 306 - Presumption - When not invoked - The presumption is not mandatory and the court shall have to have regard to all the other circumstances of the case - Deceased died because of burn injuries received by her in her matrimonial home - A letter which was allegedly written by the deceased - The letter reflects the attitude of the in-laws towards the deceased - In the said letter, there was no reference of any act or incident whereby the appellants were alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased to commit suicide - On such slender evidence, presumption u/s 113-A of the Act cannot be invoked to find the appellant guilty of the offence u/s 306 IPC. [Raj Babu v. State of M.P.] ...1

Family Courts Act (66 of 1984), Section 7(1)(f) - See - Muslim Women. (Protection of Rights on Divorce) Act, 1986, Sections 3 & 4, [Shabana Bano (Smt.) v. Imran Khan] ...276

Forest (Conservation) Act (69 of 1980), Section 2 - Excavation of forest land - No forest land can be broken by excavation without approval of Central Government - State to ensure that no illegal excavation takes place and also to prosecute those doing illegal excavation. [Shamim Modi (Ms.) v. Ms. Sudha Chowdhary, District Collector Betul] ...84

Hindu Marriage Act (25 of 1955), Sections (13)(1)(i-a) & (i-b) - Cruelty - Desertion - Pleadings - Evidence - Trial court dismissed the suit of divorce for lack of proper evidence - Held - The grounds of cruelty and desertion are specifically pleaded and in support of the same the elaborate evidence has been adduced at trial by the wife - As per settled proposition, the material facts are required to be pleaded and not the evidence - Appeal allowed. [Kanta Raikwar (Smt.) v. Kailash Chandra Verma] ...197

Hindu Marriage Act (25 of 1955), Sections (13)(1)(i-a) & (i-b) - Pleadings & Proof - Facts pleaded by the wife are denied by the husband in his WS - On recording the deposition of wife, wife and her witnesses have neither been cross-examined by the husband nor any evidence in support of the objection taken in the WS was adduced by the husband - Mere pleadings of the parties are not sufficient to draw any inference unless the same is supported by adducing the evidence - In the lack of ocular evidence, the husband was not entitled to get any relief merely on the basis of pleadings - Appeal allowed. [Kanta Raikwar (Smt.) v. Kailash Chandra Verma] ...197

Interpretation of Statutes - Illustration - Unlike marginal note, an illustration is to be considered as part of Section itself - It is to be accepted as being both relevant and valuable for construction of section. [Sharad Kumar v. State of M.P.] ...229

Judicial Discipline - Conflicting judgments - If learned Single Judge was of the opinion that the judgment in the matter of Shakuntala Singh

साक्ष्य अधिनियम (1872 का 1), धारा 113-ए, दण्ड संहिता, 1860, धारा 306 - उपधारणा - कब अवलंब नहीं लिया जा सकता - उपधारणा आज्ञापक नहीं है और न्यायालय को मामले की अन्य सभी परिस्थितियों को भी ध्यान में रखना होगा - मृतक की मृत्यु उसके दाम्पत्य निवास में उसे जलने से आयी क्षतियों के कारण हुई - एक पत्र जो कथित रूप से मृतक द्वारा लिखा गया - पत्र मृतक के प्रति ससुराली जनों के रवैये का आभास कराता है - उक्त पत्र में किसी कृत्य या घटना का कोई हवाला नहीं है जिससे अपीलार्थियों ने कथित रूप से जानबूझकर कोई कार्य या लोप किया या मृतक को आत्महत्या करने के लिए साशय सहायता की या उकसाया - ऐसी अपर्याप्त साक्ष्य पर अपीलार्थी को भा.द.सं. की धारा 306 के अन्तर्गत दोषी ठहराने के लिए अधिनियम की धारा 113-ए के अन्तर्गत उपधारणा का अवलंब नहीं लिया जा सकता। (राज बाबू वि. म.प्र. राज्य) ...1

कुटुंब न्यायालय अधिनियम, (1984 का), धारा 7(1)(एफ) - देखें - मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986, धाराएँ 3 व 4 (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

वन (संरक्षण) अधिनियम (1980 का 69), धारा 2 - वन भूमि का उत्खनन - कोई वन भूमि केन्द्र सरकार के अनुमोदन के बिना उत्खनित नहीं जा सकती - राज्य यह सुनिश्चित करे कि कोई अवैध उत्खनन न हो और अवैध उत्खनन करने वालों को अभियोजित भी करे। (शमीम मोदी (श्रीमति) वि. श्रीमति सुधा चौधरी, डिस्ट्रिक्ट कलेक्टर, बैतूल) ...84

हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ (13)(1)(i-a) व (i-b) - क्रूरता - अभिव्यजन - अभिवचन - साक्ष्य - विचारण न्यायालय ने विवाह विच्छेद का वाद समुचित साक्ष्य के अभाव के कारण खारिज किया - अभिनिर्धारित - क्रूरता और अभिव्यजन के आधार विनिर्दिष्ट रूप से अभिवचित किये गये और उसमें समर्थन में पत्नी द्वारा विचारण में विस्तृत साक्ष्य पेश की गई - स्थापित प्रतिपादना के अनुसार, महत्वपूर्ण तथ्यों का अभिवचन किया जाना अपेक्षित है साक्ष्य का नहीं - अपील मंजूर। (कांता रैकवार (श्रीमति) वि. कैलाश चंद्र वर्मा) ...197

हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ (13)(1)(i-a) व (i-b) - अभिवचन और सबूत - पत्नी द्वारा अभिवचित किये गये तथ्यों से पति द्वारा अपने लिखित कथन में इंकार किया गया - पत्नी के बयान अभिलिखित करने पर, न तो पति द्वारा पत्नी और उसके साक्षियों का प्रतिपरीक्षण किया गया और न ही पति द्वारा लिखित कथन में उठायी गई आपत्ति के समर्थन में कोई साक्ष्य पेश की गई - पक्षकारों के मात्र अभिवचन कोई अनुमान निकालने के लिए पर्याप्त नहीं हैं जब तक उनका समर्थन साक्ष्य पेश करके न किया गया हो - प्रत्यक्ष साक्ष्य के अभाव में मात्र अभिवचनों के आधार पर पति कोई अनुतोष प्राप्त करने का हकदार नहीं - अपील मंजूर। (कांता रैकवार (श्रीमति) वि. कैलाश चंद्र वर्मा) ...197

कानूनों का निर्वचन - दृष्टांत - पार्श्व टिप्पणी के असदृश एक दृष्टांत को स्वयं धारा के भाग के रूप में विचारित करना होता है - इसे धारा के निर्माण के लिए सुसंगत और मूल्यवान होने के रूप में स्वीकार करना होता है। (शरद कुमार वि. म.प्र. राज्य) ...229

न्यायिक अनुशासन - अन्तर्विरोधी निर्णय - यदि विद्वान एकल न्यायाधीश की यह राय हो कि शकुंतला सिंह [2003(3) एमपीएलजे 414] के मामले में दिया गया निर्णय सही विधि

[2003(3) MPLJ 414] was not deciding correct law or did not take into consideration all provisions of law then he should refer the matter to the Chief Justice for constituting a larger bench - A judgment by coordinate bench cannot be ignored on the ground that the judgment though takes a legal view but is not binding because it does not take into consideration the other legal aspects or provisions of law. [Kalam Scooter Service v. Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj]. ...41

Land Acquisition Act (1 of 1894), Section 4(1) - Publication of Preliminary Notification - Requirements - Only locality is required to be mentioned and not the survey numbers or the names of the owners of the land. [Executive Engineer, M.P. Housing Board v. Shri Kant Mishra] ...21

Land Acquisition Act (1 of 1894), Sections 4(1) & 6 - Acquisition of Land - Notification challenged on the ground of it being vague and not specific in respect of the public purpose - Held - Land acquired for Khirhahi Railway Over-bridge - Such a purpose is covered within the meaning of expression "public purpose" contained in Section 3(f) of the Act - Thus, public purpose has been disclosed in Section 4(1) notification with sufficient clarity - Petition is without any substance. [Gomti Bai Tamrakar (Smt.) v. State of M.P.] ...136

Land Acquisition Act (1 of 1894), Sections 4(1) & 6 - Delay in Challenge - Held - The land is being acquired for constructing a railway over-bridge which itself is a public purpose - Petitioners were aware of the acquisition proceedings and before filing of the writ petition substantially progress had taken place in the acquisition proceedings - Petitioners were not prompt in approaching the court - No other person has approached this court challenging the acquisition proceedings except for the petitioners - No interference can be made. [Gomti Bai Tamrakar (Smt.) v. State of M.P.]...136

Makhanlal Chaturvedi Rashtriya Patrakarita Vishwavidyalaya "Association of Study Institutes" Clause 17 - Post Graduate Diploma in Computer Application (PGDCA) & Diploma in Computer Application (DCA) - Cancellation of Association - Petitioner Institute associated with the University to run two courses namely, PGDCA & DCA with intake capacity of 50 students - Petitioner Institute changing the location without informing the University and admitting more student than its capacity - Association cancelled - **Held** - An institute which gets associated to the University can not be allowed to proceed to change its location at his own pleasure and leisure even without applying as per the prescribed norms - Such a proclivity of the institute is not only to be deprecated but condemned from all spectrums so that realisation would dawn upon it that it can not take law unto its own hands - No error or fallacy in the order of cancellation - The extra student admitted who have not studied in the Petitioner Institute their result directed not to published with a direction for refund of their fees along with a compensation of Rs. 20,000 each - Petition disposed of. [Syscon Computer Shiksha Samiti v. State of M.P.] ...72

विनिश्चित नहीं कर रहा था या विधि के सभी प्रावधानों को विचार में नहीं लिया गया, तब उन्हें मामला वृहत्तर न्यायपीठ का गठन करने के लिए मुख्य न्यायाधीश को निर्दिष्ट करना चाहिए - समकक्ष न्यायपीठ द्वारा दिये गये निर्णय की इस आधार पर उपेक्षा नहीं की जा सकती कि यद्यपि निर्णय का विधिक अवलोकन किया जाता है किन्तु बंधनकारी नहीं है क्योंकि यह अन्य विधिक पहलूओं या विधि के उपबंधों को विचार में नहीं लेता है। (कलाम स्कूटर सर्विस वि. श्री श्री 1008 जगत गुरु शंकाराचार्य स्वामी स्वरूपानंद जी महाराज) ...41

भूमि अर्जन अधिनियम (1894 का 1), धारा 4(1) - प्रारम्भिक अधिसूचना का प्रकाशन - अपेक्षाएँ - केवल परिक्षेत्र का उल्लेख करना अपेक्षित, सर्वे क्रमांक या भूमि के स्वामियों के नामों का नहीं। (एग्जीक्यूटिव इंजीनियर, एम.पी. हाउसिंग बोर्ड वि. श्रीकांत मिश्रा) ...21

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1) व 6 - भूमि का अर्जन - अधिसूचना को अस्पष्ट और लोक प्रयोजन की दृष्टि से विनिर्दिष्ट न होने के आधार पर चुनौती - अभिनिर्धारित - भूमि खिरहानी रेलवे ओवर ब्रिज के लिए अर्जित की गई - ऐसा प्रयोजन अधिनियम की धारा 3(एफ) में अन्तर्विष्ट शब्द "लोक प्रयोजन" के अर्थ के अन्तर्गत आच्छादित होता है - इस प्रकार अधिसूचना की धारा 4(1) में लोक प्रयोजन स्पष्टता के साथ प्रकट किया गया है - याचिका सारहीन है। (गोमती बाई ताम्रकार (श्रीमति) वि. म.प्र. राज्य) ...136

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1) व 6 - चुनौती देने में विलम्ब - अभिनिर्धारित - भूमि रेलवे ओवर ब्रिज का निर्माण करने के लिए अर्जित की जा रही है, जो स्वमेव एक लोक प्रयोजन है - याची को अर्जन कार्यवाहियों का ज्ञान था और रिट याचिका पेश करने के पूर्व अर्जन कार्यवाहियों में सारवान प्रगति हो चुकी थी - याची न्यायालय में पहुँचने में तत्पर नहीं थे - याचियों के अतिरिक्त कोई अन्य व्यक्ति अर्जन कार्यवाहियों को चुनौती देते हुए इस न्यायालय में नहीं पहुँचा है - कोई हस्तक्षेप नहीं किया जा सकता। (गोमती बाई ताम्रकार (श्रीमति) वि. म.प्र. राज्य) ...136

माखनलाल चतुर्वेदी राष्ट्रीय पत्रकारिता विश्वविद्यालय "एसोसियेशन ऑफ स्टडी इंस्टीट्यूट्स", खण्ड 17 - पोस्ट ग्रेजुएट डिप्लोमा इन कम्प्यूटर एप्लीकेशन (पीजीडीसीए) व डिप्लोमा इन कम्प्यूटर एप्लीकेशन (डीसीए) - एसोसियेशन का रद्दकरण - याची संस्थान 50 छात्रों की प्रवेश संख्या के साथ दो पाठ्यक्रमों अर्थात् पीजीडीसीए व डीसीए संचालित करने के लिए विश्वविद्यालय से सम्बद्ध - याची संस्थान ने विश्वविद्यालय को सूचना दिये बिना स्थान परिवर्तित किया और क्षमता से अधिक छात्रों को प्रवेश दिया - एसोसियेशन रद्द किया गया - अभिनिर्धारित - एक संस्थान जो विश्वविद्यालय से सम्बद्धता प्राप्त करता है, को विहित मानदण्डों के अनुसार आवेदन किये बिना उसकी स्वयं की इच्छा और स्वतंत्रता से उसका स्थान परिवर्तित करने की इजाजत नहीं दी जा सकती - संस्थान की ऐसी प्रवृत्ति न केवल निन्दनीय है बल्कि सभी प्रतिबिम्बों से दोषी ठहराने योग्य है जिससे उसे बोध कराया जा सके कि वह कानून को अपने हाथों में नहीं ले सकता - रद्दकरण के आदेश में कोई त्रुटि या भ्रान्ति नहीं - दाखिल किये गये अतिरिक्त छात्र जिन्होंने याची संस्थान में अध्ययन नहीं किया, उनका परीक्षा परिणाम प्रकाशित न करने का निदेश प्रत्येक को 20,000 रुपये प्रतिकर सहित उनकी फीस वापस करने के निदेश के साथ दिया गया। (सिसकॉन कम्प्यूटर शिक्षा समीति वि. म.प्र. राज्य) ...72

Medical and Dental Undergraduate Entrance Examination Rules, M.P. 2007, Rules 2.5, 2.6, 9.9, 9.9(a) & 9.14 - Admission in MBBS course - Petitioner belonging to OBC category - On option in the first counselling he was admitted in BDS course as against a General seat - In the second counselling, he was not permitted to opt as against OBC seat for pursuing MBBS course - Held - The person still remains of the category to which he belongs, he does not lose it by exercising option at first counselling as per merit with respect to seat which was offered - The petitioner has been wrongfully deprived of admission in the MBBS course in the year 2007 - The petitioner to be given admission in MBBS course in the year 2008-09 against a OBC category seat without counselling - Petition allowed. [Rahul Patel v. State of M.P.] ...78

Medical and Dental Undergraduate Entrance Examination Rules, M.P. 2007, Rule 9.14 - Counselling - The word 'counselling' has been used in Rule 9.14 not at the time of first counselling, thus it is apparent that operation of Rule 9.14 is not confined to first counselling only - The option is available to ST/SC/OBC category candidate at the stage of second counselling to stake the claim as per his standing in the waiting list of his own reserved category or from unreserved category. [Rahul Patel v. State of M.P.] ...78

Money Lenders Act, M.P. (8 of 1934), Sections 3(1)(a), 3(1)(b), 7(b) & 7(c) - Maintenance of account by money lender for each debtor separately and furnishing statement of accounts every year to debtors, as prescribed, is mandatory - On failure to comply with either of requirements, court can disallow interest - Lower court was not justified in awarding interest - Appeal allowed. [Narayan (Deceased) Through L.Rs. v. Sobhagmal Rakhachand] ...*6

Money Lenders Act, M.P. (8 of 1934), Section 7, Civil Procedure Code, 1908, Section 34 - Discretion of court to award interest - Held - Section 7 of the Act has overriding effect - Court can not grant interest u/s 34 of the Code in case of breach of Section 7 of the Act. [Narayan (Deceased) Through L.Rs. v. Sobhagmal Rakhachand] ...*6

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Enhancement - Wife aged 25 years and two children aged 5 and 1 year are dependent on the deceased, who was of 35 years of age - By maintaining the dependency of the claimants on the deceased - The sum awarded by the tribunal is further enhanced by Rs.1,20,000 considering the facts of the case. [Manager U.P. State Road Transport Corp. Jhansi v. Halkibai] ...*4

Motor Vehicles Act (59 of 1988), Section 173, Civil Procedure Code, 1908, Order 41 Rule 22 - Compensation - Enhancement - When in the absence of appeal or cross-objection by claimant, compensation can be enhanced - Law explained. [Manager U.P. State Road Transport Corp. Jhansi v. Halkibai] ...*4

चिकित्सा और दंत पूर्वस्नातक प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 2.5, 2.6, 9.9, 9.9(ए) व 9.14 - एमबीबीएस पाठ्यक्रम में प्रवेश - याची ओबीसी श्रेणी का था - प्रथम काउंसिलिंग में विकल्प पर उसे सामान्य सीट पर बीडीएस पाठ्यक्रम में प्रवेश दिया गया - द्वितीय काउंसिलिंग में उसे एमबीबीएस पाठ्यक्रम के लिए ओबीसी सीट का चयन करने की अनुमति नहीं दी गई - अभिनिर्धारित - व्यक्ति उस श्रेणी का रहता है जिससे वह सम्बन्धित है, वह उस सीट के सम्बन्ध में जिसका उसे प्रस्ताव दिया गया मेरिट के आधार पर प्रथम काउंसिलिंग में विकल्प का प्रयोग करके उसे खो नहीं देता - याची को वर्ष 2007 में एमबीबीएस पाठ्यक्रम में प्रवेश से अनुचित रूप से वंचित किया गया - याची को बिना काउंसिलिंग के ओबीसी श्रेणी की सीट पर एमबीबीएस पाठ्यक्रम में वर्ष 2008-09 में प्रवेश दिया जाए - याचिका मंजूर। (राहुल पटेल वि. म. प्र. राज्य) ...78

चिकित्सा और दंत पूर्वस्नातक प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 9.14 - काउंसिलिंग - नियम 9.14 में शब्द 'काउंसिलिंग' का प्रयोग प्रथम काउंसिलिंग के लिए ही नहीं किया गया है, इसलिए यह स्पष्ट है कि नियम 9.14 का प्रवर्तन केवल प्रथम काउंसिलिंग तक सीमित नहीं है - एसटी/एससी/ओबीसी श्रेणी के अभ्यर्थी को द्वितीय काउंसिलिंग के प्रक्रम पर विकल्प उपलब्ध है कि स्वयं की आरक्षित श्रेणी की या अनारक्षित श्रेणी से प्रतीक्षा सूची में अपनी स्थिति के अनुसार दावा करे। (राहुल पटेल वि. म.प्र. राज्य) ...78

साहूकार अधिनियम, म.प्र. (1934 का 8), धाराएँ 3(1)(ए), 3(1)(बी), 7(बी) व 7(सी) - साहूकार द्वारा प्रत्येक ऋणी के लिए पृथक लेखा रखना और प्रत्येक वर्ष लेखा विवरणी ऋणियों को देना, जैसा विहित किया गया है, आज्ञापक है - इन अपेक्षाओं में से किसी का पालन करने में विफल हो जाने पर, न्यायालय ब्याज नामंजूर कर सकता है - अधीनस्थ न्यायालय द्वारा ब्याज अधिनिर्णीत करना न्यायोचित नहीं - अपील मंजूर। (नारायण (मृतक) द्वारा विधिक प्रतिनिधि वि. सौभागमल राखवचंद) ---*6

साहूकार अधिनियम, म.प्र. (1934 का 8), धारा 7, सिविल प्रक्रिया संहिता, 1908, धारा 34 - ब्याज अधिनिर्णीत करना न्यायालय का विवेकाधिकार - अभिनिर्धारित - अधिनियम की धारा 7 अध्यारोही प्रभाव रखती है - न्यायालय अधिनियम की धारा 7 के मंग के मामले में संहिता की धारा 34 के अन्तर्गत ब्याज नहीं दिला सकता। (नारायण (मृतक) द्वारा विधिक प्रतिनिधि वि. सौभागमल राखवचंद) ---*6

मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - वृद्धि - 25 वर्ष उम्र की पत्नी और 5 व 1 वर्ष उम्र के दो बच्चे मृतक पर आश्रित, जो 35 वर्ष की उम्र का था - दावेदारों की मृतक पर आश्रितता को बनाये रखते हुए - मामले के तथ्यों को विचार में लेकर अधिकरण द्वारा अधिनिर्णीत रकम में 1,20,000 रुपये की और वृद्धि की गई। (मेनेजर, यूपी स्टेट रोड ट्रांसपोर्ट कारपोरेशन, झांसी वि. हलकी बाई) ---*4

मोटर यान अधिनियम (1988 का 59), धारा 173, सिविल प्रक्रिया संहिता, 1908, आदेश 41 नियम 22 - प्रतिकर - वृद्धि - कब दावेदार द्वारा अपील या प्रत्याक्षेप के अभाव में प्रतिकर में वृद्धि की जा सकती है - विधि स्पष्ट की गई। (मेनेजर, यूपी स्टेट रोड ट्रांसपोर्ट कारपोरेशन, झांसी वि. हलकी बाई) ---*4

M.P. Board of Secondary Education Directions for Academic Session 2006-07, Clause 2 - Admission - Regular student - *In earlier petition, High Court had merely directed to admit the petitioner in the school as a special case - Board accepted examination form of the petitioner and allowed to appear in the examination as a regular student, but withheld the result/mark-list - Held - The school as well as the Board having treated the petitioner at their own as a regular student cannot be permitted to deny the status of regular student - More so, for the reason that petitioner did not earn any disqualification even under clause 2 of directions issued by the Board for academic session 2006-07 - Petitioner is entitled to the status of regular student and his result is liable to be declared with the status of regular student - Petition allowed.* [Anand Kumar Chouksey v. M.P. Board of Middle Education] ...127

Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3, Criminal Procedure Code, 1973, Section 125 - Muslim wife can file the application under both the provisions before Magistrate for maintenance against the husband - If the claim of the husband about divorcing the wife is accepted, then after the date of divorce, the rights of the wife can be considered by the Magistrate in the same application - In that case the Magistrate can decide the rights of the divorced wife on the basis of provisions of the Act - Thus, filing of a new application by the wife under the provisions of the Act is not required. [Shabana Bano (Smt.) v. Imran Khan] ...276

Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3 - Divorce - Effective date - *If pronouncement of Talaq on a particular date is disputed - Then proof is required to establish this fact and once it is proved it will be effective from the actual date of Talaq and not from the date of its establishment in court.* [Shabana Bano (Smt.) v. Imran Khan] ...276

Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Sections 3 & 4, Criminal Procedure Code, 1973, Section 125 - Maintenance - *After coming into force of the Act, the provisions of Section 125 of Code are available to a Muslim wife, but not available to a divorced Muslim wife.* [Shabana Bano (Smt.) v. Imran Khan] ...276

Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Sections 3 & 4, Criminal Procedure Code, 1973, Section 125 - Right of maintenance after the expiry of period of Iddat - *The liability of the Muslim husband to his divorced wife arising u/s 3(1)(a) of the Act to pay maintenance is not confined to Iddat period only - He has to make reasonable and fair provisions within the period of Iddat for the future of the divorced wife i.e. even for post Iddat period also, which obviously includes her maintenance as well.* [Shabana Bano (Smt.) v. Imran Khan] ...276

Muslim Women (Protection of Rights on Divorce) Act (25 of 1986),

म.प्र. माध्यमिक शिक्षा मण्डल के शैक्षणिक सत्र 2006-07 के लिए निदेश, खण्ड 2 - प्रवेश - नियमित छात्र - पूर्ववर्ती याचिका में उच्च न्यायालय ने विशेष मामले के रूप में याची को केवल विद्यालय में प्रवेश देने का निदेश दिया था - मण्डल ने याची का परीक्षा आवेदन स्वीकार किया और नियमित छात्र के रूप में परीक्षा में बैठने की अनुमति दी, किन्तु परीक्षा परिणाम/अंकसूची रोक ली - अभिनिर्धारित - विद्यालय और मण्डल को, याची को नियमित छात्र के रूप में मानने से, नियमित छात्र की प्रस्थिति से इंकार करने की अनुमति नहीं दी जा सकती - इसके अतिरिक्त इस कारण से भी कि याची ने मण्डल द्वारा शैक्षणिक सत्र 2006-07 के लिए जारी निदेशों के खण्ड 2 के अन्तर्गत भी कोई अयोग्यता प्राप्त नहीं की - याची नियमित छात्र की प्रस्थिति का हकदार है और उसका परीक्षा परिणाम नियमित छात्र की प्रस्थिति के साथ घोषित किये जाने योग्य है - याचिका मंजूर। (आनंद कुमार चौकसे वि. एम.पी. बोर्ड ऑफ मिडिल एजुकेशन) ...127

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3, दण्ड प्रक्रिया संहिता, 1973, धारा 125 - मुस्लिम पत्नी पति के विरुद्ध भरण-पोषण के लिए मजिस्ट्रेट के समक्ष दोनों उपबंधों के अन्तर्गत आवेदन पेश कर सकती हैं - यदि पति का पत्नी को तलाक देने का दावा स्वीकार कर लिया जाता है, तब तलाक की तारीख के बाद पत्नी के अधिकारों पर मजिस्ट्रेट द्वारा उसी आवेदन में विचार किया जा सकता है - उस मामले में मजिस्ट्रेट अधिनियम के उपबंधों के आधार पर तलाकशुदा पत्नी के अधिकारों का विनिश्चय कर सकता है - इस प्रकार अधिनियम के उपबंधों के अन्तर्गत पत्नी द्वारा नवीन आवेदन पेश करना अपेक्षित नहीं है। (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3 - विवाह विच्छेद - प्रभावित होने की तारीख - यदि किसी विशिष्ट तारीख पर तलाक दिया जाना विवादित है - इस तथ्य को साबित करने के लिए सबूत अपेक्षित है और एक बार जब यह साबित हो जाता है तब तलाक की वास्तविक तारीख से यह प्रभावी होगा तलाक को न्यायालय में साबित करने की तारीख से नहीं। (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धाराएँ 3 व 4, दण्ड प्रक्रिया संहिता, 1973, धारा 125 - भरण-पोषण - अधिनियम के प्रवृत्त होने के बाद संहिता की धारा 125 के उपबंध मुस्लिम पत्नी को उपलब्ध हैं, किन्तु तलाकशुदा मुस्लिम पत्नी को उपलब्ध नहीं। (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धाराएँ 3 व 4, दण्ड प्रक्रिया संहिता, 1973, धारा 125 - इदत की अवधि के समाप्त हो जाने के बाद भरण-पोषण का अधिकार - मुस्लिम पति का उसकी तलाकशुदा पत्नी के प्रति अधिनियम की धारा 3(1)(ए) के अन्तर्गत उद्भूत भरण-पोषण अदा करने का दायित्व केवल इदत की अवधि तक सीमित नहीं है - उसे इदत की अवधि के भीतर तलाकशुदा पत्नी के भविष्य के लिए अर्थात् इदत के बाद की अवधि के लिए भी युक्तियुक्त और उचित उपबंध करना पड़ते हैं, जिसके अन्तर्गत स्पष्टतः उसका भरण-पोषण भी शामिल है। (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25),

Sections 3 & 4, Family Courts Act, 1984, Section 7(1)(f) - Jurisdiction - *The cases u/s 3 & 4 of the Act of 1986 are required to be decided by a Magistrate alone and not by the Family Court.* [Shabana Bano (Smt.) v. Imran Khan] ...276

Negotiable Instruments Act (26 of 1881), Section 138 - See - *Criminal Procedure Code, 1973, Section 216,* [Prakash Kanthed v. M/s. Maheshwari Protins Ltd.] ...259

Negotiable Instruments Act (26 of 1881), Sections 138 & 141 - *See - Evidence Act 1872, Section 106* [Mahaveer Traders (M/s.) v. M/s. Gangadhar Sharma] ...286

Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - See - *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993, Sections 69(1), 70, 91 & 95* [Abdul Hasan Qureshi v. State of M.P.] ...165

Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - See - *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993, Section 85(1) & (2)* [Basant Kumar Verma v. State of M.P.] ...16

Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 5 - See - *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69(1), 70, 91 & 95* [Abdul Hasan Qureshi v. State of M.P.] ...165

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69(1), 70, 91 & 95, Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - Appeal - Appointment of Panchayat Karmi by resolution of majority of votes of Panchas - Appointment challenged in appeal - An objection was raised that against a resolution no appeal lies - Held - If the resolution is followed by an order of appointment then validity of minutes of such a resolution can be challenged in an appeal and not otherwise. [Abdul Hasan Qureshi v. State of M.P.] ...165

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69(1), 70, 91 & 95, Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 5 - Revision - Whether the proceeding of Gram Panchayat in matter of appointment of Panchayat Karmi can directly be challenged in revision u/r 5 - Held - Gram Panchayat is an authority within the meaning of Rule 5, it not an authority subordinate to any of the revisional authorities within the meaning of this rule - A resolution merely selecting thereby a person as Panchayat Karmi would not be revisable u/r 5 despite being proceedings of Gram Panchayat. [Abdul Hasan Qureshi v. State of M.P.] ...165

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69(1), 70, 91 & 95, Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 5 - Second Revision - A second revision before the State Government against the revisional order of the officers mentioned in Rule 5

धाराएँ 3 व 4 कुटुंब न्यायालय अधिनियम, 1984, धारा 7(1)(एफ) - अधिकारिता - अधिनियम 1986 की धारा 3 व 4 के अन्तर्गत मामले केवल मजिस्ट्रेट द्वारा विनिश्चित किया जाना अपेक्षित हैं, कुटुंब न्यायालय द्वारा नहीं। (शबाना बानो (श्रीमति) वि. इमरान खान) ...276

परक्राम्य लिखत अधिनियम (1881 का), धारा 138 - देखें - दण्ड प्रक्रिया संहिता, 1973, धारा 216; (प्रकाश कांथेड वि. मे. माहेश्वरी प्रोटीन्स लि.) ...259

परक्राम्य लिखत अधिनियम (1881 का), धाराएँ 138 व 141 - देखें - साक्ष्य अधिनियम, 1872, धारा 106 (महावीर ट्रेडर्स (मे.) वि. मे. गंगाधर शर्मा) ...286

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 - देखें - पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 धाराएँ 69(1), 70, 91 व 95; (अब्दुल हसन कुरैशी वि. म.प्र. राज्य) ...165

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 - देखें - पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993, धाराएँ 85(1) व (2), (बसंत कुमार वर्मा वि. म.प्र. राज्य) ...16

पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5 - देखें - पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993, धाराएँ 69(1), 70, 91 व 95, (अब्दुल हसन कुरैशी वि. म.प्र. राज्य) ...165

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69(1), 70, 91 व 95, पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 - अपील - पंचों के बहुमत के प्रस्ताव द्वारा पंचायत कर्मों की नियुक्ति - नियुक्ति को अपील में चुनौती दी गई - यह आपत्ति उठाई गई कि प्रस्ताव के विरुद्ध कोई अपील नहीं की जा सकती - अभिनिर्धारित - यदि प्रस्ताव के अनुसरण में नियुक्ति का आदेश पारित किया जाता है तब ऐसे प्रस्ताव के कार्यवृत्त की वैधता को अपील में चुनौती दी जा सकती है अन्यथा नहीं। (अब्दुल हसन कुरैशी वि. म.प्र. राज्य) ...165

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69(1), 70, 91 व 95, पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5 - पुनरीक्षण - क्या पंचायत कर्मों की नियुक्ति के मामले में ग्राम पंचायत की कार्यवाही को नियम 5 के अन्तर्गत पुनरीक्षण में सीधे चुनौती दी जा सकती है - अभिनिर्धारित - ग्राम पंचायत नियम 5 के अर्थान्तर्गत एक प्राधिकारी है, यह इस नियम के अर्थान्तर्गत पुनरीक्षण प्राधिकारियों में से किसी के अधीनस्थ प्राधिकारी नहीं है - एक प्रस्ताव जिससे केवल पंचायत कर्मों के रूप में एक व्यक्ति का चयन किया गया वह पंचायत की कार्यवाही होने के बावजूद नियम 5 के अन्तर्गत पुनरीक्षित नहीं किया जा सकेगा। (अब्दुल हसन कुरैशी वि. म.प्र. राज्य) ...165

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69(1), 70, 91 व 95, पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5 - द्वितीय पुनरीक्षण - नियम 5 में उल्लिखित अधिकारियों के पुनरीक्षण आदेश के विरुद्ध राज्य सरकार के समक्ष द्वितीय पुनरीक्षण ऐसे अधिकारियों द्वारा नियम 5 के उपनियम (2) के खण्ड (ii)

would lie after final disposal by such officers by virtue of clause (ii) of sub-rule (2) of Rule 5. [Abdul Hasan Qureshi v. State of M.P.] ...165

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85(1) & (2), Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - Resolution of Gram Panchayat - Appeal - Maintainability - Resolution of Gram Panchayat to appoint appellant on the post of Panchayat Kar'mi - SDO held the resolution to be illegal in an appeal preferred before him - Held - Against a resolution passed by the Panchayat, an appeal would not lie to the SDO - SDO can only exercise powers u/s 85(1) of the Adhiniyam subject to the rider fixed by Section 85(2) and he has to forward the resolution to the State Government within 10 days which otherwise would lose the efficacy of order passed by him - Appeal allowed. [Basant Kumar Verma v. State of M.P.] ...16

Panchayat (Upsarpanch, President and Vice President) Nirvachan Niyam, 1995, Rule 21(1) - Election process - Adjournment - By invoking emergency clause - The proceedings of election should be interrupted or obstructed by any riot or open violence at a meeting then Presiding Officer can adjourn the election process by invoking emergency clause. [Anita Karope (Smt.) v. Smt. Geeta Uikay] ...31

Penal Code (45 of 1860), Section 116, Illustration (a) - See - Prevention of Corruption Act, 1988, Sections 7, 11 & 12 [Sharad Kumar v. State of M.P.] ...229

Penal Code (45 of 1860), Section 295A - Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs - Cognizance cannot be taken except with sanction of Central or State Government. [In Reference v. Deepak Agrawal] ...272

Penal Code (45 of 1860), Section 302 - Murder - Accused was insisting the deceased, who was a counsellor in Medical College, again and again to provide medicines of HIV - Every time deceased was refusing because the accused was not the patient of HIV - On date of incident accused threw kerosene on deceased when he was sitting in his chamber and then threw a burning match stick and thus set him on fire - Death occurred due to septicemia on account of burn injuries after 6 days of incident - Held - Septicemia may occur from various causes including burn injuries - Act of setting another person on fire is so imminently dangerous on act that the wrong doer must be credited with knowledge that he was in all probability likely to cause death of another person - Act of accused would fall within clause fourthly to Section 300 and not u/s 326 IPC. [State of M.P. v. Koushal Prasad Jaiswal] ...292

Penal Code (45 of 1860), Section 306 - See - Evidence Act, 1872, Section 113-A, [Rajbabu v. State of M.P.] ...1

के आधार पर अंतिम निपटारा किये जाने के बाद की जा सकेगी। (अब्दुल हसन कुरेशी वि. म.प्र. राज्य) ...165

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 85(1) व (2): पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 — ग्राम पंचायत का प्रस्ताव — अपील — पोषणीयता — अपीलार्थी को पंचायत कर्मों के पद पर नियुक्त करने का ग्राम पंचायत का प्रस्ताव — एस.डी.ओ. ने उसके समक्ष पेश अपील में प्रस्ताव को अवैध होना अभिनिर्धारित किया — अभिनिर्धारित — पंचायत द्वारा पारित प्रस्ताव के विरुद्ध एस.डी.ओ. को अपील नहीं की जायेगी — एस.डी.ओ. अधिनियम की धारा 85(1) के अन्तर्गत शक्तियों का प्रयोग केवल धारा 85(2) द्वारा नियत शर्त के अध्यक्षीन कर सकता है और उसे प्रस्ताव 10 दिन के भीतर राज्य सरकार को अग्रहित करना चाहिए अन्यथा उसके द्वारा पारित आदेश का प्रभाव समाप्त हो जायेगा — अपील मंजूर। (बसंत कुमार वर्मा वि. म.प्र. राज्य) ...16

पंचायत (उप सरपंच, अध्यक्ष और उपाध्यक्ष) निर्वाचन नियम, 1995, नियम 21(1): — निर्वाचन प्रक्रिया — स्थगन — आपातकालीन खण्ड का अवलंब लेकर — निर्वाचन की कार्यवाहियाँ किसी सभा में किसी दंगे या खुली हिंसा द्वारा अवरुद्ध या बाधित होनी चाहिए तब पीठासीन अधिकारी आपातकालीन खण्ड का अवलंब लेकर निर्वाचन प्रक्रिया स्थगित कर सकता है। (अनीता करोपे (श्रीमति) वि. श्रीमति गीता उइके) ...31

दण्ड संहिता (1860 का 45), धारा 116, दृष्टांत (ए) — देखें — भ्रष्टाचार निवारण अधिनियम 1988, धाराएँ 7, 11 व 12 (शरद कुमार वि. म.प्र. राज्य) ...229

दण्ड संहिता (1860 का 45), धारा 295ए — विमर्शित और विद्वेषपूर्ण कार्य जो किसी वर्ग के धर्म या धार्मिक विश्वासों का अपमान करके उसकी भावनाओं को आहत करने के आशय से किये गये हों — केन्द्र और राज्य सरकार की मंजूरी के बिना संज्ञान नहीं लिया जा सकता। (इन रेफरेन्स वि. दीपक अग्रवाल) ...272

दण्ड संहिता (1860 का 45), धारा 302 — हत्या — अभियुक्त ने एचआईवी की दवाई दे देने के लिए मृतक, जो चिकित्सा महाविद्यालय में परामर्शदाता था, से बार-बार आग्रह किया है — प्रत्येक बार मृतक ने मना कर दिया क्योंकि अभियुक्त एचआईवी का रोगी नहीं था — घटना की तारीख को अभियुक्त ने मृतक पर, जब वह अपने कक्ष में बैठा हुआ था, केरोसीन फेंका और तब एक जलती हुई माचिस की तीली फेंकी और इस प्रकार उसको आग लगा दी — जलने से हुई क्षतियों के कारण सेप्टिसीमिया होने से घटना के 6 दिन बाद मृत्यु हुई — अभिनिर्धारित — सेप्टिसीमिया जलने से हुई क्षतियों सहित विभिन्न कारणों से हो सकता है — दूसरे व्यक्ति को आग लगाना इतना आसन्न रूप से खतरनाक कृत्य है कि दोषकर्ता को इस ज्ञान का आकलन अवश्य होना चाहिए कि उसके कृत्य से दूसरे व्यक्ति की मृत्यु कारित होने की पूरी अधिसंभाव्यता थी — अभियुक्त का कृत्य भा.द. सं. की धारा 300 के चौथे खण्ड में आयेगा धारा 326 के अन्तर्गत नहीं। (म.प्र. राज्य वि. कौशल प्रसाद जायसवाल) ...292

दण्ड संहिता (1860 का 45), धारा 306 — देखें — साक्ष्य अधिनियम, 1872, धारा 113-ए; (राजबबू वि. म.प्र. राज्य) ...1

Penal Code (45 of 1860), Sections 323 & 304 Part II - Punishment - Parity - All other accused convicted u/s 323 IPC - Appellant convicted u/s 304 Part II on the same set of evidence - Ground raised in appeal that on the same set of evidence appellant alone cannot be convicted u/s 304 Part II - Held - Appellant gave the fatal blow by Gupti - Keeping in view the part played by appellant in committing this offence he has been so convicted. [Mohammad Yunus @ Annu v. State of M.P.] ...246

Penal Code (45 of 1860), Section 324 - See - Criminal Procedure Code, 1973, First Schedule [Raju @ Raj Kishore Yadav v. State of M.P.]... *9

Penal Code (45 of 1860), Sections 341, 147, 332/149, 333/149 & 353/149 - See - Criminal Procedure Code, 1973, Sections 227 & 228, [Rakesh v. State of M.P.] ...*10

Penal Code (45 of 1860), Sections 363 - Kidnap - Minor girl - Age - Father of prosecutrix deposed that his daughter is 12 years of age - In support school transfer certificate produced - Head Master has proved the entries of school transfer certificate - Prosecutrix also deposed her age to be of 13 years - No effective cross-examination has been done to these witnesses on the point of age - Accused himself admitted prosecutrix age of 12 years in his statement recorded u/s 313 of Cr.P.C. - Therefore, irresistible conclusion is that prosecutrix was minor at the time of incident. [Qasam Khan v. State of M.P.] ...*7

Penal Code (45 of 1860), Section 363 - Kidnap - Minor girl - Consent of a minor girl - Prosecutrix was minor at the time of incident - Therefore, her consent, if any, was of no value. [Qasam Khan v. State of M.P.] ...*7

Penal Code (45 of 1860), Section 366 - Abduction - Appellant took a 10-years-old girl with consent of her guardian for purchasing something for her from the shop - Appellant instead of taking her to shop, threatened and took her to forest for commission of illicit intercourse - No offence for kidnapping made out - Offence u/s 366 for abduction made out. [Ramesh v. State of M.P.] ...218

Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Appreciation of evidence - Rape - Absence of injuries - Absence of visible marks of the injuries of the prosecutrix would not necessarily mean that she had not suffered any injury or that she had not offered any resistance at the time of commission of rape - Absence of injury is not necessarily an evidence of falsity of allegations or an evidence of consent on the part of the prosecutrix. [Bhanu Singh v. State of M.P.] ...224

Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Appreciation of evidence - Rape - Held - It does not appeal to reason that rustic villagers like prosecutrix, her husband and his brother would concoct

दण्ड संहिता (1860 का 45), धाराएँ 323 व 304 भाग II - दण्ड - समानता - अन्य सभी अभियुक्तों को भा.दे.सं. की धारा 323 के अन्तर्गत दोषसिद्ध किया गया - अपीलार्थी को धारा 304 भाग II के अन्तर्गत समान साक्ष्य पर दोषसिद्ध किया गया - अपील में यह आधार उठाया गया कि समान साक्ष्य पर केवल अपीलार्थी को धारा 304 भाग II के अन्तर्गत दोषसिद्ध नहीं किया जा सकता - अभिनिर्धारित - अपीलार्थी ने गुप्ती से घातक प्रहार किया - अपराध करने में अपीलार्थी की भूमिका को दृष्टिगत रखते हुए उसे इस प्रकार दण्डित किया गया। (मोहम्मद यूनुस उर्फ अन्नू वि. म.प्र. राज्य) ...246

दण्ड संहिता (1860 का 45), धारा 324 - देखें - दण्ड प्रक्रिया संहिता, 1973; प्रथम अनुसूची (राजू उर्फ राज किशोर यादव वि. म.प्र. राज्य) ---*9

दण्ड संहिता (1860 का 45), धाराएँ 341, 147, 332/149, 333/149 व 353/149 - देखें - दण्ड प्रक्रिया संहिता, 1973, धाराएँ 227 व 228, (राकेश वि. म.प्र. राज्य)---*10

दण्ड संहिता (1860 का 45), धारा 363 - व्यपहरण - अप्राप्तवय बालिका - आयु - अभियोक्त्री के पिता का बयान कि उसकी पुत्री की आयु 12 वर्ष है - इसकी पुष्टि में विद्यालय स्थानांतरण प्रमाण पत्र पेश किया - प्रधानाध्यापक ने विद्यालय स्थानांतरण प्रमाण पत्र की प्रविष्टियों को सिद्ध किया - अभियोक्त्री ने भी उसकी आयु 13 वर्ष होने का बयान दिया - इन साक्षियों का उम्र के बिन्दु पर कोई प्रभावी प्रतिपरीक्षण नहीं किया गया - द.प्र.सं. की धारा 313 के कथन में स्वयं अभियुक्त ने अभियोक्त्री की आयु 12 वर्ष होना स्वीकार किया - इसलिए, निर्विवादित निष्कर्ष यह है कि घटना के समय अभियोक्त्री अप्राप्तवय थी। (कासम खान वि. म.प्र. राज्य) ---*7

दण्ड संहिता (1860 का 45), धारा 363 - व्यपहरण - अप्राप्तवय बालिका - अप्राप्तवय बालिका की सम्मति - घटना के समय अभियोक्त्री अप्राप्तवय थी - इसलिए उसकी सम्मति, यदि कोई हो, का कोई महत्व नहीं है। (कासम खान वि. म.प्र. राज्य) ---*7

दण्ड संहिता (1860 का 45), धारा 366 - अपहरण - अपीलार्थी एक 10 वर्ष की बालिका को उसके लिए दुकान से कुछ खरीदने के लिए उसके माता-पिता की सहमति से ले गया - अपीलार्थी ने उसे दुकान ले जाने के बजाय धमकाया और अयुक्त संमोग करने के लिए उसे जंगल ले गया - व्यपहरण का कोई अपराध नहीं बनता - धारा 366 के अन्तर्गत अपहरण का अपराध बनता है। (रमेश वि. म.प्र. राज्य) ...218

दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 - साक्ष्य का अधिमूल्यन - बलात्संग - क्षतियों का अभाव - अभियोक्त्री की क्षतियों के स्पष्ट निशानों के अभाव का अर्थ अनिवार्य रूप से यह नहीं होगा कि उसे कोई क्षति नहीं हुई या यह कि उसने बलात्संग करने के समय कोई प्रतिरोध नहीं किया था - क्षतियों का अभाव अनिवार्य रूप से आरोपों की असत्यता का या अभियोक्त्री की ओर से सहमति का साक्ष्य नहीं है। (भानू सिंह वि. म. प्र. राज्य) ...224

दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 - साक्ष्य का अधिमूल्यन - बलात्संग - अभिनिर्धारित - यह मानने योग्य नहीं है कि अभियोक्त्री, उसके पति और उसके भाई के समान सीधे-सादे ग्रामीण, दो घण्टे की अल्प अवधि में अपीलार्थी के

or manipulate the story of rape against the appellant within short span of two hours - Even otherwise, upon close scrutiny of entire evidence on record, the incident of rape as narrated by the prosecutrix does not appear to be false and concocted. [Bhanu Singh v. State of M.P.] ...224

Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Appreciation of evidence - Rape - Prosecutrix was meticulously cross-examined, but nothing has been elicited so as to distrust her version - The mere fact that she had gone to police station with her husband, his brother and two other prominent persons of the village, does not vitiate her testimony. [Bhanu Singh v. State of M.P.] ...224

Penal Code (45 of 1860), Section 376 - Rape - Assessment of age of prosecutrix - Parents of the prosecutrix were not knowing the date of birth - Basis for recording date of birth in school transfer certificate is not established - Identity of the prosecutrix with the entry in school register is also not established - In affidavit, prosecutrix mentioning her age 25 years and she has also admitted affixing her photograph on the affidavit - Court on perusal of the affidavit and photograph found that from the photograph prosecutrix is not appearing minor girl below 18 years of age - Prosecutrix has specifically stated that before 5-7 years she was married and at that time she was aged about 18 or 19 years - This fact remained unchallenged and fortified her age 25 years in her affidavit - Prosecution has failed to prove that prosecutrix was minor on the date of incident. [Kailash v. State of M.P.] ...*2

Penal Code (45 of 1860), Section 376 - Rape - Prosecution has failed to prove that prosecutrix was minor on the date of incident - Prosecutrix moved freely with the appellant from one place to another and passed more than month time - She also visited court, executed affidavit and marriage agreement - Her photographs were also taken during the course of all these activities - If she was not a consenting party - She could have disclosed her forcible taking or taking by inducement or fraud to police, advocate and citizen of that area - Looking to the totality of the circumstances, there cannot be two opinion that prosecutrix was a consenting party - Conviction and sentence u/ss 363, 366, 376(1) set-aside - Appeal allowed. [Kailash v. State of M.P.] ...*2

Penal Code (45 of 1860), Section 376(2)(f) - Rape of a minor girl - Appellant alleged to have committed offence of rape on a minor girl aged 8 years old - Trial court convicted the appellant - A defence was raised that there was no offence of rape as there was no rupture of hymen - Held - Rupture of hymen is not necessary, penetration, however slight, is sufficient to constitute the offence of rape - Appeal dismissed. [Santosh v. State of M.P.] ...241

Penal Code (45 of 1860), Section 376/511 - Attempt to commit rape - Appellant did not remove the cloth of prosecutrix - Did not expose his male

विरुद्ध बलात्संग की कहानी गढ़ेंगे या हेरफेर करेंगे - अन्यथा भी अभिलेख की सम्पूर्ण साक्ष्य की सूक्ष्म जाँच करने पर, अभियोक्त्री द्वारा बतायी गई बलात्संग की घटना मिथ्या और मनगढ़ंत होना प्रतीत नहीं होती है। (भानू सिंह वि. म.प्र. राज्य) ...224

दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 - साक्ष्य का अधिमूल्यन - बलात्संग - अभियोक्त्री की प्रतिपरीक्षा पूरी बारीकी से की गई, किन्तु उसके बयान पर अविश्वास करने के लिए कुछ भी प्राप्त नहीं हुआ - केवल यह तथ्य कि वह पुलिस थाने अपने पति, उसके माई और गाँव के दो अन्य प्रतिष्ठित व्यक्तियों के साथ गयी थी, उसके अभिसाक्ष्य को दूषित नहीं करता है। (भानू सिंह वि. म.प्र. राज्य) ...224

दण्ड संहिता (1860 का 45), धारा 376 - बलात्संग - अभियोक्त्री की उम्र का निर्धारण - अभियोक्त्री के माता-पिता को जन्मतिथि की जानकारी नहीं - शाला स्थानांतरण प्रमाण-पत्र में जन्मतिथि अभिलिखित करने का आधार स्थापित नहीं - अभियोक्त्री की पहचान भी शाला रजिस्टर में की गई प्रविष्टियों से स्थापित नहीं - शपथपत्र में अभियोक्त्री ने अपनी उम्र 25 वर्ष उल्लिखित की और शपथपत्र पर अपना फोटो चिपकाना भी स्वीकार किया - न्यायालय ने शपथपत्र और फोटो के परिशीलन पर पाया कि फोटो से अभियोक्त्री 18 वर्ष से कम आयु की अवयस्क बालिका प्रतीत नहीं होती - अभियोक्त्री ने विनिर्दिष्ट रूप से कथन किया कि 5-7 वर्ष पहले उसकी शादी हुई और उस समय उसकी उम्र 18 या 19 वर्ष थी - इस तथ्य को चुनौती नहीं दी गई और शपथपत्र में बतायाई गई आयु 25 वर्ष की पुष्टि होती है - अभियोजन यह साबित करने में असफल रहा कि अभियोक्त्री घटना तारीख को अवयस्क थी। (कैलाश वि. म.प्र. राज्य) ---*2

दण्ड संहिता (1860 का 45), धारा 376 - बलात्संग - अभियोजन यह साबित करने में असफल रहा कि घटना तारीख को अभियोक्त्री अवयस्क थी - अभियोक्त्री अपीलार्थी के साथ स्वतंत्रतापूर्वक एक स्थान से दूसरे स्थान पर गयीं और उसके साथ एक माह से अधिक समय व्यतीत किया - वह न्यायालय भी गयी, वहाँ शपथपत्र और विवाह का अनुबंध निष्पादित किया - इन सभी कार्यवाहियों के दौरान उसके फोटोग्राफ भी लिये गये - यदि वह सहमत पक्षकार नहीं थी - वह उसे बलपूर्वक या प्रवचनापूर्ण या कपटपूर्वक लाये जाने के तथ्य को पुलिस, अधिवक्ता और उस क्षेत्र के नागरिकों को प्रकट कर सकती थी - परिस्थितियों की सम्पूर्णता को देखते हुए, इसमें दो राय नहीं हो सकती है कि अभियोक्त्री सहमत पक्षकार थी - धारा 363, 366, 376(1) के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर। (कैलाश वि. म.प्र. राज्य) ---*2

दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) - अवयस्क बालिका का बलात्संग - अपीलार्थी ने कथित रूप से 8 वर्ष की अवयस्क बालिका के साथ बलात्संग करने का अपराध किया - विचारण न्यायालय ने अपीलार्थी को दोषसिद्ध किया - यह बचाव लिया गया कि बलात्संग का कोई अपराध नहीं हुआ क्योंकि हायमन नहीं फटा था - अभिनिर्धारित - बलात्संग का अपराध गठित करने के लिए हायमन फटना आवश्यक नहीं, अल्प प्रवेशन ही पर्याप्त है - अपील खारिज। (संतोष वि. म.प्र. राज्य) ...241

दण्ड संहिता (1860 का 45), धारा 376/511 - बलात्संग करने का प्रयत्न - अपीलार्थी ने अभियोक्त्री के कपड़े नहीं हटाये - अपना नर अंग अभिदर्शित नहीं किया - अपने नर

organ - Did not try to penetrate his male organ - He sat on her chest and stood up the moment she raised cry - No offence u/s 376/511 made out - Appellant guilty of committing offence u/s 354. [Ramesh v. State of M.P.]...218

Penal Code (45 of 1860), Section 394 - See - Criminal Procedure Code, 1973, Sections 173 & 210 [Vinod Dixit v. Satish Mishra] ...317

Penal Code (45 of 1860), Section 394 r/w 397, 302 - Murder - Circumstantial Evidence - Complainant was in her office on 13.05.1998 - Her domestic servant deceased was murdered at her house and her cash and valuables were robbed - On the date of occurrence, deceased was last seen in the company of the appellant at the house of complainant and the appellant was also found going towards the house of complainant and thereafter seen with black bag, a suitcase and other things - On the same day, appellant gave Rs.2000 on credit to PW3 - And PW3 escorted the appellant to the railway station - Appellant had boarded in train for Howrah - On the morning of 14.05.1998, appellant was apprehended from Howrah coach and was found in possession of various items robbed from the place of complainant, which were identified by the complainant at the identification parade - These circumstances formed a complete chain and were sufficient to conclude that it was the appellant and none else, who committed robbery and murder - Appeal dismissed. [Sadhan Nayak @ Deepak v. State of M.P.] ...234

Penal Code (45 of 1860), Sections 409 & 465 - See - Criminal Procedure Code, 1973, Sections 438 & 439 [Ram Kishor Saket v. State of M.P.] ...270

Penal Code (45 of 1860), Section 420 - See - Criminal Procedure Code, 1973, Section 197, [Ramesh Chandra v. State of M.P.] ...255

Penal Code (45 of 1860), Section 420 - See - Criminal Procedure Code, 1973, Section 216, [Prakash Kanthed v. M/s Maheshwari Protins Ltd] ...259

Penal Code (45 of 1860), Sections 449 & 302, Evidence Act, 1872, Section 32(1) - Dying declaration - Reliability - Prosecution relying on three dying declarations - Defence plea that there are material contradictions in dying declarations - Deceased was not sure and was changing her version time to time - Not be safe to rely upon dying declarations - Held - On reading of all the three dying declarations conjointly, do not find any contradictions much less substantial one - Appellant Yuvraj came to the spot, deceased went inside the house to save herself - Yuvraj followed her, poured kerosene oil on her and set her ablaze - The role of Yuvraj is consistent in all the three dying declarations - No iota of doubt that the facts mentioned in dying declarations are correct and can be acted upon. [Yuvraj v. State of M.P.]...214

Prevention of Corruption Act (49 of 1988), Sections 7, 11 & 12, Penal Code, 1860, Illustration (a) to Section 116 - Sections 161, 165 and

अंग को प्रवेश कराने का प्रयत्न नहीं किया - वह उसके सीने पर बैठा और वह चिल्लाई उसी समय खड़ा हो गया - धारा 376/511 के अन्तर्गत कोई अपराध नहीं बनता - अपीलार्थी, धारा 354 के अन्तर्गत अपराध करने का दोषी। (रमेश वि. म.प्र. राज्य) 218

दण्ड संहिता (1860 का 45), धारा 394 - देखें - दण्ड प्रक्रिया संहिता, 1973, धाराएँ 173 व 210, (विनोद दीक्षित वि. सतीश मिश्रा) 317

दण्ड संहिता (1860 का 45), धारा 394. सहपठित धारा 397, 302 - हत्या - परिस्थितिजन्य साक्ष्य - परिवारी 13.05.1998 को अपने कार्यालय में थी - उसके घरेलू नौकर मृतक की उसके घर पर हत्या कर दी गई और उसकी नगदी और मूल्यवान वस्तुएँ लूट ली गई - घटना तारीख को मृतक को आखिरी बार अपीलार्थी के साथ परिवारी के घर पर देखा गया और अपीलार्थी परिवारी के घर की ओर जाता हुआ भी पाया गया और उसके बाद काले थैले, एक सूटकेस और अन्य वस्तुओं के साथ देखा गया - उसी दिन अपीलार्थी ने 2000 रुपये अ.सा. 3 को उधार दिये - और अ.सा. 3 अपीलार्थी के साथ रेलवे स्टेशन गया - अपीलार्थी हावड़ा के लिए ट्रेन में सवार हुआ - 14.05.1998 की सुबह, अपीलार्थी को हावड़ा बोगी से गिरतार किया गया और वह परिवारी के यहाँ से लूटी गई विभिन्न वस्तुओं के कब्जे में पाया गया, जिनकी शिनाख्त परिवारी द्वारा शिनाख्त परेड में की गई - इन परिस्थितियों से एक पूरी कड़ी तैयार होती है और यह निष्कर्ष निकालने के लिए पर्याप्त है कि वह अपीलार्थी ही था न कि अन्य कोई जिसने लूट व हत्या कार्रवाई की - अपील खारिज। (साधन नायक उर्फ दीपक वि. म.प्र. राज्य) 234

दण्ड संहिता (1860 का 45), धाराएँ 409 व 465 - देखें - दण्ड प्रक्रिया संहिता, 1973, धाराएँ 438 व 439, (राम किशोर साकेत वि. म.प्र. राज्य) 270

दण्ड संहिता (1860 का 45), धारा 420 - देखें - दण्ड प्रक्रिया संहिता, 1973, धारा 197, (रमेश चंद वि. म.प्र. राज्य) 255

दण्ड संहिता (1860 का 45), धारा 420 - देखें - दण्ड प्रक्रिया संहिता, 1973, धारा 216, (प्रकाश कांधेड वि. मे. माहेश्वरी प्रोटीन्स लि.) 259

दण्ड संहिता (1860 का 45), धाराएँ 449 व 302, साक्ष्य अधिनियम, 1872, धारा 32(1) - मृत्युकालिक कथन - विश्वसनीयता - अभियोजन तीन मृत्युकालिक कथनों पर निर्भर - प्रतिरक्षा का अभिवचन कि मृत्युकालिक कथनों में तात्त्विक विरोधाभास है - मृतक को विश्वास नहीं था और वह समय-समय पर अपना बयान बदल रही थी - मृत्युकालिक कथनों पर निर्भर करना सुरक्षित नहीं होगा - अभिनिर्धारित - तीनों मृत्युकालिक कथनों को संयुक्त रूप से पढ़ने पर कोई तात्त्विक विरोधाभास नहीं पाया गया - अपीलार्थी युवराज घटना स्थल पर आया, मृतक स्वयं को बचाने के लिए घर के अन्दर गयी - युवराज ने उसका पीछा किया, उसपर मिट्टी का तेल डाला और उसे आग लगा दी - युवराज की भूमिका तीनों मृत्युकालिक कथनों में संगत है - इसमें रत्ती भर भी संदेह नहीं है कि मृत्युकालिक कथनों में उल्लिखित तथ्य सही हैं और उन पर कार्यवाही की जा सकती है। (युवराज वि. म.प्र. राज्य) 214

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 11 व 12, दण्ड संहिता, 1860, धारा 116 का दृष्टांत (ए) - भा.द.सं. की धाराएँ 161, 165 व 165-ए

165-A of IPC replaced by Sections 7, 11 and 12 of Act - *No implied repeal of illustration (a) to Section 116 IPC - Cases falling u/s 7, 11 and 12 of Act may be decided by taking aid of illustration (a) of 116 IPC - Case of Rajaram Vs. State rightly decided - Reference answered accordingly.* [Sharad Kumar v. State of M.P.] ...229

Regularization of Ad hoc Appointment Rules, M.P. 1986, Rule 12 - See - *Service Law* [Dwarka Das Mahajan v. State of M.P.] ...67

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007), Sections 3 & 4 - *Claims be decided in accordance with provisions of Act and till then claimants would not be evicted from forest land under their occupation till the recognition and verification procedure is completed.* [Shamim Modi (Ms.) v. Ms. Sudha Chowdhary, District Collector Betul] ...84

Service Law - *Charge-sheet - Quashment - Merely because, a charge-sheet has been issued that does not give rise to any cause of action, until and unless a final order has been passed in the matter after evaluating the material established on record by the competent disciplinary authority - However, if any adverse order is passed by the competent disciplinary authority, the petitioner shall be at a liberty to challenge the same in accordance with law - Resultantly, no case for interference with the charge-sheet is made out.* [Sant Kumar Agrawal v. Laxmibai national Institute of Physical Education] ...144

Service Law - *Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rules 14(5) & 30 - Departmental Enquiry - Copy of charge sheet with documents supplied by enquiry officer - Petitioner repeatedly sought time but did not file any reply nor adduce any evidence in defence - Held - Petitioner did not object to proceedings and accepted notice of charge sheet - Contention of petitioner regarding Rules 14(5) & 30 cannot be considered.* [Nanhe Bhai Raikwar v. District & Sessions Judge] ...107

Service Law - *Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 15 - Punishment - 48 hours notice given by disciplinary authority to file reply to findings recorded by enquiry officer - Charges which were neither stated in charge sheet nor communicated to petitioner also taken into consideration while imposing punishment of dismissal - Held - Order of punishment violates principle of natural justice - Matter remitted back to disciplinary authority for reconsidering the order of punishment after giving due and proper opportunity of filing reply to inquiry report - Petition partly allowed.* [Nanhe Bhai Raikwar v. District & Sessions Judge] ...107

Service Law - *Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 29(2) - Power of Appellate Authority to enhance the penalty - Disciplinary Authority giving lesser punishment - The appellate authority*

अधिनियम की धाराओं 7, 11 व 12 द्वारा प्रतिस्थापित कर दी गई हैं - भा.द.सं. की धारा 116 के दृष्टांत (ए) का कोई विवक्षित निरसन नहीं - अधिनियम की धारा 7, 11 व 12 के अन्तर्गत आने वाले मामले भा.द.सं. की धारा 116 के दृष्टांत (ए) की सहायता लेकर विनिश्चित किये जा सकते हैं - राजाराम वि. राज्य का मामला उचित रूप से विनिश्चित - निर्देश तदनुसार उत्तरित। (शरद कुमार वि. म.प्र. राज्य) 229

तदर्थ नियुक्ति का नियमितीकरण नियम, म.प्र. 1986, नियम 12 - देखें - सेवा विधि (द्वारका दास महाजन वि. म.प्र. राज्य) 67

अनुसूचित जनजाति और अन्य परम्परागत वन निवासी (वन अधिकारों की मान्यता) अधिनियम, 2006 (2007 का 2), धाराएँ 3 व 4 - दावे अधिनियम के उपबंधों के अनुसार विनिश्चित किये जाएँ और तब तक दावेदारों को उनके अधिमोग की वन भूमि से बेदखल नहीं किया जाएगा जब तक मान्यता और सत्यापन प्रक्रिया पूर्ण नहीं हो जाती है। (शमीम मोदी (श्रीमति) वि. श्रीमति सुधा चौधरी, डिस्ट्रिक्ट कलेक्टर, बैतूल) 84

सेवा विधि - आरोप-पत्र - अभिलेखण्डन - केवल इसलिए कि आरोप-पत्र जारी किया गया है जो कोई वाद कारण उत्पन्न नहीं करता है, जब तक कि सक्षम अनुशासनिक प्राधिकारी द्वारा अभिलेख पर स्थापित सामग्री का मूल्यांकन करने के बाद मामले में अंतिम आदेश पारित न कर दिया गया हो - तथापि, यदि सक्षम अनुशासनिक प्राधिकारी द्वारा कोई प्रतिकूल आदेश पारित किया जाता है, तो याची को इसे विधि अनुसार चुनौती देने की स्वतंत्रता होगी - परिणामस्वरूप आरोप-पत्र में हस्तक्षेप के लिए कोई मामला नहीं बनता। (संत कुमार अग्रवाल वि. लक्ष्मी बाई नेशनल इंस्टीट्यूट ऑफ फिजिकल एजुकेशन) 144

सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 14(5) व 30 - विभागीय जाँच - जाँच अधिकारी द्वारा आरोप पत्र की प्रतिलिपि दस्तावेजों सहित प्रदाय की गई - याची ने पुनरावृत्त रूप से समय चाहा किन्तु कोई जवाब पेश नहीं किया और न प्रतिरक्षा में कोई साक्ष्य प्रस्तुत की - अभिनिर्धारित - याची ने कार्यवाहियों पर आपत्ति नहीं की और आरोप पत्र का सूचनापत्र स्वीकार कर लिया - नियम 14(5) व 30 के सम्बन्ध में याची के प्रतिवाद पर विचार नहीं किया जा सकता। (नन्हे भाई रैकवार वि. डिस्ट्रिक्ट एन्ड सेशन जज) 107

सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 15 - दण्ड - जाँच अधिकारी द्वारा अभिलिखित निष्कर्षों का जवाब पेश करने के लिए अनुशासनिक प्राधिकारी ने 48 घण्टे का सूचनापत्र दिया - आरोप, जो न तो आरोप पत्र में कथित किये गये और न याची को संसूचित किये गये, भी पदच्युति का दण्ड अधिरोपित करते समय विचार में लिये गये - अभिनिर्धारित - दण्ड का आदेश नैसर्गिक न्याय के सिद्धांतों का उल्लंघन करता है - मामला, जाँच रिपोर्ट का जवाब पेश करने का सम्यक् और उचित अवसर देने के बाद दण्ड का आदेश पुनर्विचारित करने के लिए, अनुशासनिक प्राधिकारी को वापस भेजा गया - याचिका अंशतः मंजूर। (नन्हे भाई रैकवार वि. डिस्ट्रिक्ट एन्ड सेशन जज) 107

सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29(2) - अपीलीय प्राधिकारी की दण्ड में वृद्धि करने की शक्ति - अनुशासनिक प्राधिकारी ने न्यूनतम दण्ड दिया - अपीलीय प्राधिकारी ने दण्ड को सेवा से पदच्युति

enhanced the punishment to dismissal from service - Action challenged as the appellant is acquitted in criminal appeal, the appellate authority could not have enhanced the punishment - Held - In exercise of its powers under Rule 29, the appellate authority has power to enhance the penalty after giving an opportunity of hearing. [Krishna Kumar Pateriya v. State of M.P.] ...47

Service Law - Compassionate appointment - Deceased Government Servant was a Hindu and has contracted second marriage during subsistence of first marriage - Children born out of second marriage - They were legitimate though the marriage itself was void - Legitimate children were entitled for family pension and compassionate appointment. [Rahul Singh v. State of M.P.] ...186

Service Law - Compassionate appointment - Grant of annual increments - Entitlement - The petitioner having obtained advantage of the special benefit under the compassionate appointment scheme and having accepted appointment subject to the condition of passing the typing examination - Held - The petitioner cannot be permitted to turn around and assail the clauses of the scheme for compassionate appointment or the condition in his appointment order as he is prohibited from doing so on the principle of acquiescence and estoppel. [Pawas Shrivastava v. State of M.P.]...131

Service Law - Constitution, Article 226 - Damages for malicious prosecution - Criminal proceedings instituted against the appellant obviously was in accordance with the procedure established by law - There is no violation of right of the appellant under Article 21 of the Constitution - Therefore, High Court cannot, in exercise of its powers under Article 226 of the Constitution, award compensation to the appellant. [P.G. Kshatriya v. State of M.P.] ...10

Service Law - Departmental enquiry - May be continue after acquittal by criminal court - Appellant in criminal appeal acquitted by the appellate court giving him the benefit of doubt - The departmental enquiry continued - Action challenged - Held - There is no bar in proceeding with the departmental enquiry even after the acquittal by the criminal court. [Krishna Kumar Pateriya v. State of M.P.] ...47

Service Law - Departmental enquiry - Misappropriation - Absence from duty - Dismissal - Departmental enquiry instituted against the appellant for misappropriation of government money and absence from duty for 4 years 7 months - For the charge of misappropriation, criminal court acquitted the appellate - However, departmental enquiry continued and appellant dismissed from service - Action challenged as the appellant is acquitted by criminal court - Held - Even though the appellant has been acquitted by the criminal court for the charge of misappropriation, then the penalty of dismissal has also been imposed on the appellant for the charge that he remained absent without any justified reason for a period of 4 years 7 months - No right has accrued in favour of appellant for reinstatement - Writ appeal dismissed. [Krishna Kumar Pateriya v. State of M.P.] ...47

तक बढ़ाया — कृत्य को चुनौती दी गई क्योंकि अपीलार्थी दाण्डिक अपील में दोषमुक्त हो गया, अपीलीय प्राधिकारी, दण्ड में वृद्धि नहीं कर सकता था — अभिनिर्धारित — अपीलीय प्राधिकारी को नियम 29 के अन्तर्गत अपनी शक्तियों के प्रयोग में सुनवाई का अवसर देने के बाद दण्ड में वृद्धि करने की शक्ति है। (कृष्ण कुमार पटेरिया वि. म.प्र. राज्य) 47

सेवा विधि — अनुकम्पा नियुक्ति — मृतक शासकीय सेवक हिन्दू था और पहले विवाह के बने रहने के दौरान उसने दूसरा विवाह कर लिया — दूसरे विवाह से संतान पैदा हुई — वे धर्मज संतान हैं यद्यपि विवाह स्वमेव शून्य था — धर्मज संतान परिवार पेंशन और अनुकम्पा नियुक्ति पाने की हकदार। (राहुल सिंह वि. म.प्र. राज्य) 186

सेवा विधि — अनुकम्पा नियुक्ति — वार्षिक वेतन वृद्धियाँ प्रदान करना — हकदारी — याची ने अनुकम्पा नियुक्ति स्कीम के अन्तर्गत विशेष लाभ का फायदा प्राप्त करने के बाद मुद्रलेखन परीक्षा उत्तीर्ण करने की शर्त के अध्वधीन नियुक्ति स्वीकार की — अभिनिर्धारित — याची को अनुकम्पा नियुक्ति की स्कीम के खण्डों या उसके नियुक्ति आदेश की शर्त से मुक्त करने या उन्हें चुनौती देने की अनुमति नहीं दी जा सकती क्योंकि उपमति और विबंध के सिद्धांत पर वह ऐसा करने से प्रतिषिद्ध है। (पावस श्रीवास्तव वि. म.प्र. राज्य) 131

सेवा विधि — संविधान, अनुच्छेद 226 — विद्वेषपूर्ण अभियोजन के लिए क्षतिपूर्ति — अपीलार्थी के विरुद्ध संस्थित दाण्डिक कार्यवाहियां प्रत्यक्षतः विधि द्वारा स्थापित प्रक्रिया के अनुसार थी — अपीलार्थी के संविधान के अनुच्छेद 21 के अन्तर्गत अधिकार का कोई अतिक्रमण नहीं — इसलिए, उच्च न्यायालय, संविधान के अनुच्छेद 226 के अन्तर्गत अपनी शक्तियों के प्रयोग में, अपीलार्थी को प्रतिकर नहीं दिला सकता। (पी.जी. क्षत्रिय वि. म.प्र. राज्य) 10

सेवा विधि — विभागीय जाँच — दाण्डिक न्यायालय द्वारा दोषमुक्त किये जाने के बाद जारी रह सकेगी — अपीलार्थी को दाण्डिक अपील में अपीलीय न्यायालय द्वारा उसे संदेह का लाभ देते हुए दोषमुक्त किया गया — विभागीय जाँच जारी रखी गई — कार्यवाही को चुनौती दी गई — अभिनिर्धारित — दाण्डिक न्यायालय द्वारा दोषमुक्त किये जाने के बाद भी विभागीय जाँच में कार्यवाही करने में कोई रोक नहीं है। (कृष्ण कुमार पटेरिया वि. म.प्र. राज्य) 47

सेवा विधि — विभागीय जाँच — दुर्विनियोग — सेवा से अनुपस्थिति — पदच्युति — अपीलार्थी के विरुद्ध सरकारी धन के दुर्विनियोग और 4 वर्ष 7 माह कर्तव्य से अनुपस्थित रहने के लिए विभागीय जाँच संस्थित की गई — दुर्विनियोग के आरोप के लिए दाण्डिक न्यायालय ने अपीलार्थी को दोषमुक्त किया — तथापि, विभागीय जाँच जारी रखी गई और अपीलार्थी को सेवा से पदच्युत किया गया — कृत्य को चुनौती दी गई क्योंकि दाण्डिक न्यायालय द्वारा अपीलार्थी को दोषमुक्त कर दिया गया था — अभिनिर्धारित — यद्यपि अपीलार्थी को दाण्डिक न्यायालय द्वारा दुर्विनियोग के आरोप के लिए दोषमुक्त कर दिया गया, तब भी बिना किसी युक्तियुक्त आधार के 4 वर्ष 7 माह की अवधि तक अनुपस्थित रहने के आरोप के लिए सेवा से पदच्युति का दण्ड दिया गया — अपीलार्थी के पक्ष में पुनर्स्थापना हेतु कोई अधिकार प्राप्त नहीं होता — रिट अपील खारिज। (कृष्ण कुमार पटेरिया वि. म.प्र. राज्य) 41

Service Law - Employees' State Insurance Act (34 of 1948), Section 75(2-B) - Constitutional validity challenged being unreasonable and oppressive - Act is beneficial piece of legislation intended to provide benefit to employees - Adjudication by ESI Court u/s 75 is not an adjudication in the first instance to make the requirement of pre-deposit as arbitrary, unreasonable and oppressive - Beneficial legislation should not be allowed to be frustrated by adopting pedantic approach to Article 14 of Constitution - Constitutional validity of Section 75(2-B) upheld - Petition dismissed. [Harshal Paper and Board Mill Ltd. v. Union of India] ...55

Service Law, Fundamental Rules, Rules 24 & 26 - Compassionate appointment - Grant of annual increments - Entitlement - Petitioner appointed on compassionate ground and was not granted annual increments on account of not passing the Hindi typing examination - Held - FR 24 provides that increment would be granted as a matter of course unless they are withheld - It deals with case of a regular employee who has been appointed after following the due procedure prescribed by law - FR 24 & 26 would not be attracted to the petitioner's case as he was not a regular member of the service and as his increments were deemed to be withheld in view of the policy and the specific condition in his appointment order which clearly makes a stipulation to that effect. [Pawas Shrivastava v. State of M.P.] ...131

Service Law - Natural Justice - Petitioner granted compassionate appointment as child constable on 29.08.2001 but by the order dated 06.11.2002 the order has been withdrawn - While issuing the order, the respondents have not granted any opportunity of hearing to the petitioner - Held - In case an order is passed recalling another administrative order, an opportunity of show cause to the adversely affected person has to be given in the matter - Petition allowed. [Rahul Singh v. State of M.P.] ...186

Service Law - Panchayat Samvida Shala Shikshak (Employment and Condition and Contract) Rules, M.P. 2005, Rules 9, 10 & 11 - Appointment of Shiksha Karmi - Termination - Natural Justice - Petitioner applied for being appointed as Shiksha Karmi - Even being more meritorious not selected - Action challenged - Mass irregularities found in the entire selection process - Held - It is well settled principle of law that when the entire selection is being cancelled due to writ large irregularities hearing to individually candidates is not necessary - Respondents directed to conduct fresh recruitment process in pursuance to the aforesaid order shall be limited to on such candidates who had applied and participated in the previous selection process and the same be completed within a period of 3 months. [Kanchan Upadhyay (Ku.) v. State of M.P.] ...155

Service Law - Railways Services (Pension) Rules, 1993, Rules 9(3), 10(1)(c) - Gratuity - Entitlement - Gratuity of petitioner withheld after his superannuation due to pendency of a criminal case against him - Held -

सेवा विधि - कर्मचारी राज्य बीमा अधिनियम (1948 का 34), धारा 75(2-बी) - संवैधानिक वैधता को अयुक्तियुक्त और अन्यायपूर्ण होने से चुनौती - अधिनियम कर्मचारियों को लाभ देने के लिए आशयित विधायन का लाभप्रद हिस्सा है - कर्मचारी राज्य बीमा न्यायालय द्वारा धारा 75 के अन्तर्गत न्यायनिर्णयन पूर्व निक्षेप की आवश्यकता को मनमानी, अयुक्तियुक्त और अन्यायपूर्ण बनाने के लिए प्रथम बार न्यायनिर्णयन नहीं है - लाभप्रद विधायन को संविधान के अनुच्छेद 14 का आडम्बरी दृष्टिकोण अपनाकर विफल होने की इजाजत नहीं दी जानी चाहिए - धारा 75(2-बी) की संवैधानिक वैधता को मान्य ठहराया गया - याचिका खारिज। (हर्शल पेपर एन्ड बोर्ड मिल लि. वि. यूनियन ऑफ इंडिया) ...55

सेवा विधि, मूलभूत नियम, नियम 24 व 26 - अनुकंपा नियुक्ति - वार्षिक वेतन वृद्धियाँ प्रदान करना - हकदारी - याची को अनुकंपा के आधार पर नियुक्त किया गया और हिन्दी मुद्रलेखन परीक्षा उत्तीर्ण करने के कारण वार्षिक वेतन वृद्धियाँ प्रदान नहीं की गईं - अभिनिर्धारित - मूलभूत नियम 24 उपबंधित करता है कि वेतन वृद्धियाँ स्वभावतया प्रदान की जाएंगी जब तक कि उन्हें रोका नहीं जाता - यह कार्यवाही नियमित कर्मचारी के मामले में है जो विधि द्वारा विहित सम्यक् प्रक्रिया का पालन करने के बाद नियुक्त किये गये हैं - मूलभूत नियम 24 व 26 याची के मामले में आकृष्ट नहीं होंगे क्योंकि वह सेवा का नियमित सदस्य नहीं था और पॉलिसी और उसके नियुक्ति आदेश में विनिर्दिष्ट शर्त जो स्पष्ट रूप से ऐसा प्रभाव अनुबंधित करती है, को दृष्टिगत रखते हुए उसकी वेतन वृद्धियाँ रोकी गईं ऐसा माना जाएगा। (पावस श्रीवास्तव वि. म.प्र. राज्य) 131

सेवा विधि - नैसर्गिक न्याय - याची को बालक आरक्षक के रूप में अनुकम्पा नियुक्ति तारीख 29.08.2001 को दी गई किन्तु तारीख 06.11.2002 के आदेश द्वारा उसे वापस ले लिया गया - प्रत्यर्थियों ने आदेश जारी करने के पूर्व याची को सुनवाई का कोई अवसर नहीं दिया - अभिनिर्धारित - यदि कोई आदेश पारित किया जाता है और उस आदेश को वापस लेकर कोई अन्य प्रशासनिक आदेश दिया जाता है तो प्रतिकूल रूप से प्रभावित होने वाले व्यक्ति को उस विषय में कारण दर्शाने का अवसर दिया जाना चाहिए - याचिका मंजूर। (राहुल सिंह वि. म.प्र. राज्य) ...186

सेवा विधि - पंचायत संविदा शाला शिक्षक (रोजगार और शर्तें और संविदा) नियम, म.प्र. 2005, नियम 9, 10, 11 - शिक्षा कर्मों की नियुक्ति - समाप्ति - नैसर्गिक न्याय - याची ने शिक्षा कर्मों के रूप में नियुक्त किये जाने के लिए आवेदन पेश किया - अधिक योग्यताधारी होकर भी चयनित नहीं हुआ - कृत्य को चुनौती दी गई - सम्पूर्ण चयन प्रक्रिया में बड़े पैमाने पर अनियमितताएँ पायी गईं - अभिनिर्धारित - विधि का यह सुस्थापित सिद्धांत है कि जब स्पष्ट रूप से बड़ी अनियमितताओं के कारण सम्पूर्ण चयन रद्द किया जा रहा हो अन्त्यर्थियों की वैयक्तिक रूप से सुनवाई आवश्यक नहीं है - प्रत्यर्थियों को निदेश दिया गया कि पूर्वोक्त आदेश के अनुपालन में नवीन भर्ती प्रक्रिया संचालित की जाए जो ऐसे अन्त्यर्थियों तक सीमित होगी जिन्होंने पूर्व चयन प्रक्रिया में आवेदन किया और भाग लिया और यह 3 माह के भीतर पूरी की जाए। (कंचन उपाध्याय (कुमारी) वि. म.प्र. राज्य) ...155

सेवा विधि - रेलवे सेवा (पेंशन) नियम, 1993, नियम 9(3), 10(1)(सी) - उपदान - हकदारी - याची का उपदान उसकी सेवानिवृत्ति के बाद उसके विरुद्ध एक दाण्डिक मामला लम्बित होने के कारण रोका गया - अभिनिर्धारित - 1993 के नियमों का नियम 10(1)(सी)

Rule 10(1)(c) of the Rules of 1993 lays a postulate that no gratuity shall be paid under to the railway servant until the conclusion of departmental or judicial proceedings and issue of final orders thereon - Petition dismissed. [Mohd. Abdul Saeed v. Union of India] ...70

Service Law - Recovery - Petitioner's date of birth in mark-sheet was 20.02.1942 - But, it was entered as 15.01.1948 in the service-book - Petitioner continued in service on the strength of judgment passed by the High Court in earlier writ petition - Pay and allowances already drawn by the petitioner shall not be recovered from the petitioner as he has worked for respondents during the aforesaid period - However, terminal dues of the petitioner shall be calculated treating 28.02.2002 as the date of retirement for all purposes. [Sant Kumar Agrawal v. Laxmibai national Institute of Physical Education]... 144

Service Law - Recovery - Petitioner granted pay scale as per salary mentioned in the appointment order - Order of recovery issued on the ground that petitioner appointed in the work charged and contingent establishment and thus would be entitled to salary as per the rates fixed by the Collector - Held - Petitioner was given compensate appointment on the regular pay scale without any misrepresentation on his part - The recovery of excess payment would cause grave hardship to him - Therefore, it is directed that no steps be taken against the petitioner to recover or to adjust any excess amount paid to him due to the fault of respondents. [Shrinivas Verma v. State of M.P.]... 195

Service Law - Regularization of Ad hoc Appointment Rules, M.P. 1986, Rule 12 - On 23.09.1980 petitioner was appointed on ad hoc basis as Lecturer - Regularized on 10.03.1987 with the condition that on the date of regular appointment he shall be placed below the persons who have been appointed under Recruitment Rules prior to him - Claim for senior pay scale after completion of 8 years from 23.09.1980 - Held - Rule provides entitlement of seniority from date of regularization - Petitioner once accepted regularization with condition, can not claim senior pay scale prior to regularization - Petition dismissed. [Dwarkadas Mahajan v. State of M.P.]...67

Service Law - Reimbursement of legal and travelling expenses - Appellant was trapped allegedly taking bribe while he was collecting fine - Appellant acquitted by trial court - Appellant entitled for reimbursement of legal expenses and travelling expenses as criminal case was in respect of matters arising out of or connected with official duties or official position. [P.G. Kshatriya v. State of M.P.] ... 10

Service Law - Transfer - Malafide - Petitioner General Manager in BSNL - Transfer before completion of 3 years at location - Transferred out of M.P. circle when he was nearing completion of eight years in circle - Alleged that to accommodate private respondents he has been transferred - Held - Clause of transfer policy providing for minimum period of 3 years at location is not applicable as policy provides for tenure of 8 years in a circle

यह अभिधारणा रखता है कि इसके अन्तर्गत रेलवे कर्मचारी को विभागीय या न्यायिक कार्यवाहियों की समाप्ति और उन पर अन्तिम आदेश जारी किये जाने तक कोई उपदान संदत्त नहीं किया जाएगा — याचिका खारिज। (मोहम्मद अब्दुल सईद वि. यूनियन ऑफ इंडिया) ...70

सेवा विधि — वसूली — अंकसूची में याची की जन्मतिथि 20.02.1942 थी — किन्तु सेवा-पुस्तिका में यह 15.01.1948 प्रविष्ट कर दी गई — याची उच्च न्यायालय द्वारा पूर्ववर्ती रिट याचिका में पारित निर्णय के आधार पर सेवा में बना रहा — याची द्वारा पहले से निकाले जा चुके वेतन और भत्ते याची से वसूल नहीं किये जायेंगे क्योंकि उसने उपर्युक्त कालावधि के दौरान प्रत्यर्थियों के लिए कार्य किया है — तथापि, याची के सेवांत बकाया की गणना सभी प्रयोजनों के लिए सेवानिवृत्ति की तारीख 28.02.2002 मानकर की जायेगी। (संत कुमार अग्रवाल वि. लक्ष्मी बाई नेशनल इंस्टीट्यूट ऑफ फिजिकल एजुकेशन) ...144

सेवा विधि — वसूली — याची को नियुक्ति आदेश में उल्लिखित वेतन अनुसार वेतनमान प्रदान किया गया — वसूली का आदेश इस आधार पर जारी किया गया कि याची को कार्यभारित तथा आकस्मिक स्थापना में नियुक्त किया गया और इस प्रकार कलेक्टर द्वारा नियत दरों के अनुसार वेतन के लिए हकदार होगा — अभिनिर्धारित — याची को अनुकंपा नियुक्ति नियमित वेतनमान पर उसकी ओर से बिना किसी दुर्व्यपदेशन के दी गई — अतिरिक्त अदायगी की वसूली उसे गंभीर कठिनाई कारित करेगी — इसलिए, यह निदेश दिया गया कि याची के विरुद्ध उसे प्रत्यर्थियों की त्रुटि के कारण अदा गई किसी अतिरिक्त राशि को वसूल करने या समायोजित करने की कोई कार्यवाही न की जाए। (श्रीनिवास वर्मा वि. म.प्र. राज्य) ...195

सेवा विधि — तदर्थ नियुक्ति का नियमितीकरण नियम, म.प्र. 1986, नियम 12 — 23.09.1980 को याची तदर्थ आधार पर व्याख्याता के पद पर नियुक्त किया गया — 10.03.1987 को इस शर्त पर नियमित किया गया कि नियमित नियुक्ति की तारीख को उसे उन व्यक्तियों से नीचे रखा जायेगा जो भर्ती नियमों के अन्तर्गत उससे पूर्व नियुक्त किये गये हैं — 23.09.1980 से 8 वर्ष पूर्ण करने के बाद वरिष्ठ वेतनमान का दावा — अभिनिर्धारित — नियम नियमितीकरण की तारीख से वरिष्ठता की हकदारी का उपबंध करता है — याची ने एक बार शर्त के साथ नियमितीकरण स्वीकार कर लिया, नियमितीकरण के पूर्व वरिष्ठ वेतनमान का दावा नहीं कर सकता — याचिका खारिज। (द्वारकादास महाजन वि. म.प्र. राज्य) 67

सेवा विधि — विधिक और यात्रा खर्चों की प्रतिपूर्ति — अपीलार्थी को जब वह जुर्माना संग्रहीत कर रहा था, कथित रूप से रिश्वत लेते हुए पकड़ा गया — अपीलार्थी को विचारण न्यायालय द्वारा दोषमुक्त किया गया — अपीलार्थी विधिक खर्चों और यात्रा खर्चों की प्रतिपूर्ति का हकदार क्योंकि दाण्डिक मामला कार्यालयीन कर्तव्यों या कार्यालयीन स्थिति से संसक्त विषयों के संबंध में उत्पन्न हुआ था। (पी.जी. क्षत्रिय वि. म.प्र. राज्य) 10

सेवा विधि — स्थानांतरण — असदभाव — याची बीएसएनएल में महाप्रबंधक — स्थान पर 3 वर्ष पूर्ण होने के पूर्व स्थानांतरण — म.प्र. वृत्त के बाहर स्थानांतरित किया गया जब वह वृत्त में आठ वर्ष पूर्ण करने के निकट था — यह अभिकथित किया गया कि प्रायवेत प्रत्यर्थियों को उपकृत करने के लिए उसे स्थानांतरित किया गया है — अभिनिर्धारित — स्थान पर न्यूनतम 3 वर्ष का उपबंध करने वाली स्थानांतरण पॉलिसी का खण्ड लागू नहीं होता क्योंकि पॉलिसी एक वृत्त में 8 वर्ष की अवधि

...103

...100

1... *5

...*5

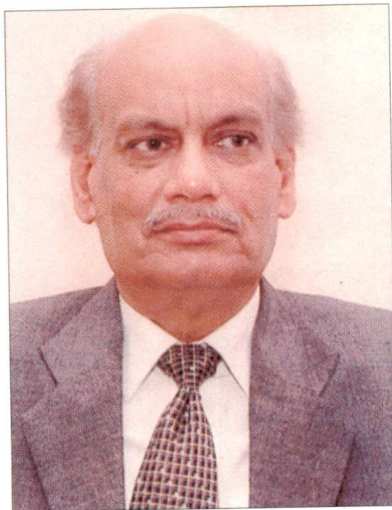
[illegible]

का उपबंध करती है - प्रायवेत प्रत्यर्थी की नियुक्ति उसके अभ्यावेदन पर विचार करने के बाद उसे होने वाली असुविधा का परिहार करने के लिए - याची असदभाव या कानूनी नियम का भंग स्थापित करने में असफल हुआ - स्थानांतरण आदेश में कोई हस्तक्षेप नहीं - याचिका खारिज। (राजेश गुप्ता वि. भारत संचार निगम लि.) 103

सेवा विधि - स्थानांतरण - अवचार - दण्डात्मक या कलंकात्मक - नैसर्गिक न्याय - याची स्थानांतरित - स्थानांतरण आदेश में अवचार के अभिकथन उपदर्शित किये गये - यह कथित किया गया कि नैसर्गिक न्याय के सिद्धांतों के उल्लंघन में स्थानांतरण के आदेश द्वारा याची को दण्डित किया गया - अभिनिर्धारित - यदि स्थानांतरण के आदेश में कुछ तथ्य अन्तर्विष्ट हैं जो आरोप या कर्मचारी द्वारा किये गये अवचार की कोटि में आते हैं यही प्रशासनिक कारण हैं जिन्होंने स्थानांतरण करने के लिए नियुक्ता को विवश किया और ऐसा करने में स्थानांतरण का आदेश दण्डात्मक या कलंकात्मक होना नहीं कहा जा सकता - प्रत्यर्थियों ने कारण उपदर्शित किये जिन्होंने याची को स्थानांतरित करने के लिए उन्हें विवश किया और ऐसा करने में उन्हें याची को चुना जाना आवश्यक नहीं था - जब इसका नियुक्ति के निबंधनों और शर्तों पर कोई प्रतिकूल प्रभाव नहीं है और जब स्थानांतरण स्वयमेव नियुक्ति की एक शर्त है - कोई हस्तक्षेप आवश्यक नहीं - याचिका खारिज। (आर.बी. दुबे वि. म.प्र. राज्य) 100

सेवा विधि - पशु चिकित्सा विभाग आकस्मिकता संदत्त कर्मचारी भर्ती और सेवा की शर्तें नियम, म.प्र. 1979, नियम 7(2-डी) - समाप्ति - नैसर्गिक न्याय - याची को अंशकालीन सफाई कर्मी के रूप में चयन प्रवृत्ति विहित किये बिना नियुक्त किया गया - नैसर्गिक न्याय के सिद्धांतों का अनुसरण किये बिना नियुक्ति रद्द की गई - अभिनिर्धारित - याची ने इससे इंकार नहीं किया कि उसकी नियुक्ति कानूनी नियमों के विपरीत की गई थी, इसलिए नियुक्ति प्रत्यक्षतः अवैध है - नैसर्गिक न्याय का अनुपालन करवाने के लिए कोई रिट जारी करना निरर्थक होगा। (मुन्ना लाल बसोरे वि. म.प्र. राज्य) ---*5,

पशु चिकित्सा विभाग आकस्मिकता संदत्त कर्मचारी भर्ती और सेवा की शर्तें नियम, म.प्र. 1979, नियम 7(2-डी) - देखें - सेवा विधि (मुन्ना लाल बसोरे वि. म.प्र. राज्य) ---*5



JUSTICE WAJAHAT ALI SHAH

Born on 31st December, 1946 at Gwalior, after practicing in the Gwalior Bench of M.P. High Court for a brief period, joined M.P. State Judicial Service as Civil Judge, Class-II on 06.04.1970, promoted as Civil Judge, Class-I on 14.06.1982, as Chief Judicial Magistrate on 01.12.1982 as Officiating District Judge on 29.04.1987 and worked as District & Sessions Judge at Gwalior, Chhatarpur and Bhind. While was District & Sessions Judge also handled an important Judicial Inquiry Commission as Sole Commissioner and promptly submitted report with recommendations all of which were accepted by the Government of Madhya Pradesh. Also worked as Additional Registrar, High Court of M.P. at Gwalior Bench from June, 1994 to October 1994 and as Legal Advisor to Lokayukt of M.P. from April, 1998 to June, 2003. Elevated as Additional Judge, High Court of M.P. on 13th April, 2005. Took oath as permanent Judge on 02.02.2007. Ever since elevation has been working on multifarious Benches.

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

Farewell

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

As you all know we have assembled here to bid an affectionate farewell to Justice W. A. Shah, who will be demitting office on 31st December, 2008 after an illustrious career spanning close to four decades.

After practicing for a year and half in the bench at Gwalior, on civil side, His Lordship joined Judicial Service as Civil Judge, Class II, on 06.04.1970. After progressing swiftly through various stages of judicial career, His Lordship was promoted as District Judge. Before His Lordship's elevation to the High Court, he also worked as Additional Registrar, in the Bench at Gwalior and Legal Advisor to Lokayukt. He was elevated as Additional Judge of High Court of Madhya Pradesh on 13th April, 2005 and became permanent Judge of this Court on 02.02.2007.

His Lordship was known for his quick grasp of complexities of law. His long years in District Judiciary filled him with rare insight enabling him see quickly through the labyrinthine maze of confusing facts. This solid base ensured that His Lordship could work smoothly on both Civil and Criminal sides with effortless ease. His Lordship's judgments were characterised by amazing economy of expression. During his tenure as a Judge of this Court, he delivered several notable judgments. His pleasant demeanour, his concern for litigants, Members of the Bar, Subordinate Judiciary and Staff endeared him to one and all. Above all, His Lordship won the hearts of every one who came in his contact because of his simplicity and humbleness in character. A quality which every human being would like to emulate in his character. Mrs. Shah deserves a word of compliment because she too is gifted with these rare qualities.

It is said in Geeta and I quote :

“कर्मण्येवाधिकारस्ते मा फलेषु कदाचन ।
मा कर्मफलहेतुर्भूर्मा ते संगोऽस्तवकर्मणि ॥”
meaning thereby

seek to perform your duty but lay not claim to its fruits. Be you not the producer of the fruits of karma, neither shall you lean towards inaction”.

Unquote.

If I may be permitted to say so, Mr. Justice Shah through out his life followed this principle of Geeta while discharging the duties assigned and accordingly rewarded by the almighty.

I and my brother & sister Judges will certainly miss him in the days to come.

I am sure that vast legal knowledge and experience of Justice Shah will be utilized by appropriate authorities.

I, on my behalf and on behalf of brother and sister Judges wish Hon'ble Mr. Justice W. A. Shah to whom I always address out of sheer respect, being elder brother, as “**Bhai Jaan**”, and Mrs. Shah and family members, happiness, peace, success and good health in the years to come.

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

आज हम माननीय न्यायमूर्ति श्री बजाहत अली शाह साहब की विदाई के लिए उपस्थित हैं। विदाई के पल हमेशा भावुक होते हैं। लेकिन एक न्यायाधीश की विदाई की बेला और भी अद्भुत होती है। उनका पूरा कार्यकाल चल-चित्र की भांति हमारे मन में कौंधता है। उनके पूरे कार्यकाल को इस दिन कंसौटी पर परखा जाता है। इसे यूँ भी कहा जा सकता है कि यह दिन निर्णय देने वाले न्यायाधीश पर निर्णय सुनाने का होता है।

न्यायमूर्ति श्री शाह आप एक निर्मल, सहज, मृदुभाषी एवं निष्ठावान न्यायाधीश रहे। आपके एवं अभिभाषकों के मध्य हमेशा ही परस्पर आदर एवं स्नेह के संबंध रहे। आपके मन में हमेशा अपराध, अपराधी एवं समाज पर उसके पड़ने वाले प्रभाव की चिंता रही। आपकी विस्तृत गहन गंभीरता और व्यापकता का आंकलन हम नहीं कर सकते। लेकिन आपने हमारे मन पर अपने कार्यों की अमिट छाप छोड़ी है।

आप एक न्यायिक परिवार से रहे। आपका परिवार न्यायाधीशों एवं अभिभाषकों का रहा है। साथ ही आपने विभिन्न न्यायिक पदों पर अपने दायित्वों का निर्वहन सफलतापूर्वक किया। इसलिये आपने इससे जुड़े प्रत्येक घटक की मजबूरियों को समझने का प्रयास किया। आपने हमेशा उच्च न्यायिक मापदंडों का पालन किया।

व्यक्ति के कार्यों से उसके व्यक्तित्व का आंकलन किया जाता है। व्यक्ति रहे ना रहे लेकिन उसके कार्य हमेशा स्मृतियों में विद्यमान रहते हैं। इस संबंध में एक विद्वान ने कहा है— प्रकृति से परे कार्यों का स्वरूप अग्न्य है। तू नित्य है। जन्म मरण का प्रभाव इन पर नहीं होता है। “आपका कार्यकाल हमेशा हमारी स्मृतियों में विद्यमान रहेगा।”

मैं अपनी स्वयं की ओर से भारत सरकार की ओर से एवं अपने साथियों की ओर से आपकी सेवानिवृत्ति के इस अंतिम कार्य दिवस पर आपके प्रति अपनी सद्भावना एवं शुभकामनाएँ व्यक्त करता हूँ। हम अपना आदर भाव एवं शुभकामनाएँ श्रीमती शाह एवं परिवारजनों के प्रति भी व्यक्त करते हैं। आपका भावी जीवन प्रसन्नता से परिपूर्ण, स्वस्थ, सक्रिय एवं सुखमय हो यही कामना है।

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

Life revolves in circular orbit. Ushering in and moving out of any office is a great leveler. Person, when moves out of office, although goes to his original position, when he started the tenure. But with a lot of experience, memories and appraisals.

Same is happening to-day.

My Lords, Justice W.A. Shah is demitting his office to-day, because of attaining the age of superannuation. His departure is the loss of a Gentleman in Robes for the Institution because his impeccable integrity, through legal acumen and subtle gestures would be missed by the Institution. True, he may not have been a very liberal judge but certainly he was an asset for his qualities as mentioned above.

My Lord was born on 31.12.1946 at Gwalior in the Lawyer's family. His father has been the eminent lawyer as well as Mayor of Gwalior for a considerable period of time. His uncle Shri Mazhar Ali Shah also adorned the chair and was a Judge of this Hon'ble High Court and posted at Jammu and Kashmir. In 1968, My Lord has started practicing the legal profession with his father for some time and then joined the judicial services as Civil Judge

My Lord, retirement is not an end in itself. It is the beginning of a New Life also. It is opening a new window from where person can see the "World and Life" with different and new perspectives.

My Lord has big family with sons and daughters. All are educated and well placed.

At this juncture, I fully associate with the views expressed by My Lord the Administrative Judge and the President High Court Bar Association.

I, on behalf of my self, and on behalf of Colleagues and Staff and the Govt. of M. P. hereby extend my good wishes to him, Mrs. Shah and their family to lead a Happy, Healthy and Peaceful retired life.

**On behalf of Senior Advocates, Shri P. K. Saxena, Sr. Advocate,
bids farewell :-**

Today, we have assembled to bid fare well to your career as a Judge of this Court. You are last person borne in erstwhile Gwalior State who is demitting this office. Erstwhile Gwalior State has produced illustrious judges who have adorned Bench in the erstwhile Gwalior State, erstwhile Madhya Bharat High Court and this High Court beginnig from Chief Justice Shinde, Chief Justice Dixit, Chief Justice Shivdayal and Justice Naolekar, Justice Mishra, Justice SK Dubey, Chief Justice RC Lahoti and others. Without fear of contradiction I can say that you have upheld throughout your career the dignity of this office with exemplary behavior with the Bar. You belong to a very cultured family of one of the stalwart of the Bar Shri Hamid Ali, Senior Advocate. Your father had emphasized on firm but courteous manner of life and imbibed these qualities in your uncle late Justice Mazahar Ali Shah and yourself. The Bar expects no favour from a Judge but expects a good hearing and an enlightened atmosphere. Your court was filled with these qualities and everybody at the bar admired it. Due to the towering personality of your father, you chose to join the judiciary because to assist him was your uncle late Justice Mazahar Ali Shah and that is why to the surprise of late Justice H.R. Krishnan when you appeared in interview before him in Civil Judge selection, you politely answered that because of the towering personality of your father and your uncle you have decided to go in the judiciary and not continue in the Bar. You have amply justified your decision by conducting yourself so well in the judiciary that ultimately you have reached the pinnacle of judicial career in the State which was not foreseeable in seventies when elevation from subordinate judiciary was rarity.

On behalf of myself and other senior members of the bar I pray God that he bestows his kindness on you in the future good health and peaceful life. I trust that God Almighty will keep you healthy and happy and you will enjoy your well earned rest fully.

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

आलीजनाब जस्टिस शाह साहब, आप आज हमसे विदा ले रहे हैं, हम महसूस कर सकते हैं कि इस बिदाई की मुश्किल घड़ी में आपको जो जेहनी तकलीफ हो रही होगी क्योंकि आपने अपनी जिन्यगी के सुनहरे 40 साल हम लोगो के बीच गुजारे हैं आप हमारे परिवार के एक हिस्सा बन गये थे। खैर यह भी दस्तूरे दुनिया है हम आपको यकीन दिलाते हैं कि हम सब भी यही तकलीफ महसूस कर रहे हैं।

आप निहायत ही शरीफ नेक ईमानदार और भले इंसान हैं आप ग्वालियर के आला खानदान से तालुक रखते हैं। आप नमाजी और इबादतगुजार होकर सूफी सिफले के इंसान हैं। आपके उसूल पसंदगी की एक मिसाल देना चाहूंगा। खबर फैली कि आप हज करने तशरीफ ले जा रहे हैं। फिर मालूम हुआ आप नहीं जा रहे हैं और उसके पीछे एक बात समझ में आयी कि आप इसलिये नहीं गये कि आप जानते थे कि असली हज अपने खर्च से और आम आदमी की तरह यहां जाकर बगैर किसी मदद के इबादत करना ही असली हज है जबकि ओहदे पर रहते हुये आपको वी. आई. पी. फसेलिटीज मिल सकती थी। आपकी राष्ट्रियता की भी मिसाल है यह भी मालूम हुआ के बान्बे बम ब्लास्ट पर आपकी राय थी कि यह टेररिस्ट मुसलमान हो ही नहीं सकते जिस काम को इस्लाम मुमानियत करता है वह काम इन्होंने किया है इसलिये इनका तो हमारे वतन की पाक सरजमीन में से दो गज जमीन दफनाने के लिये नसीब नहीं होना चाहिये। यह बात आपने बंबई के लोगों के फैसला लेने के पहले ही कह दी थी।

आप अपनी कोर्ट में बड़ी संजीदगी से काम करते थे अगर आप किसी वकील की बंहरस से सहमत नहीं होते थे तो बड़ी शाइस्ता जवान में कह देते थे कि वकील साहब आई डोन्ट एग्री में तो खारिज कर रहा हूँ आप चाहे तो विथड्रा या नाट प्रेस कर लें। कभी ऐसी बात नहीं की जिससे वकीलों की इगो या फिलिंग्स को हर्ट हुआ हो। भले ही आप रिलीफ देने के मामले में कुछ ज्यादा ही सख्त रहे और उससे वकीलों को दुख तो हुआ लेकिन आपके व्यवहार और बुलन्द अखलाक को देखते हुये कभी नाराज नहीं हुये।

मैं बार काउन्सिल ऑफ इंडिया और स्टेट बार काउन्सिल की तरफ से खुदा से दुआ करता हूँ कि खुदा आपको ताउम्र सेहतमंद और सुकुन की जिंदगी अता करे।

आप रहें आबाद यही हमारी तमन्ना है।

आप रहें सेहतयाब यही हमारी तमन्ना है।

आप रहें खुशहाल यही हमारी तमन्ना है।

बस कुछ मिनिट हमे भी याद कर लिया करना,

यही हमारी तमन्ना है

जेड. ए. खान
सिनियर एडवोकेट
मेम्बर बार काउन्सिल ऑफ इंडिया
मेम्बर स्टेट बार काउन्सिल

Shri B. I. Mehta, President High Court Bar Association, Indore, bids farewell :-

Today, we are here to give warm farewell to Hon'ble Mr. Justice W.A. Shah. My lord Justice Shah was born on 31/12/1946 in a renowned family with high traditions. After completing L.L.B in 1968 from Gwalior. My Lord started practice with his father Late Shri Hamid Ali Shah and uncle Late Shri M.A. Shah who was later

appointed as Judge of Jammu and Kashmir High Court. On 06/04/70 My Lord joined Judicial Service and was appointed a Civil Judge in 1982. My Lord was promoted as Chief Judicial Magistrate and later promoted as Additional District Judge. My Lord was later appointed as Additional Registrar at Gwalior Bench and in October appointed as District and Sessions Judge from 1998 to 2003. My Lord was legal adviser to Lokayukt, Bhopal and your lordship was District Judge at the time of elevation on 13/04/2005. By and large your lordship is a Judge of great temperament, competence and believe in maintaining dignity, decorum and etiquettes towards all Courts.

I on my behalf and on behalf of our Bar Association wish your Lordship and Smt. Shah a long healthy and cheerful life.

Jai Hind.

Farewell Speech delivered by Hon'ble Mr. Justice Wajahat Ali Shah :-

By the grace of "God" at the completion of almost 39 years of Judicial Service including a little less than 4 years tenure as a Judge of this Court, I will be retiring on 30th December, 2008. All the eminent speakers have spoken high about me; as it is customary to highlight only the qualities of a person demitting the office. However, I know my short comings and I wish I should have had atleast some of those good qualities in me.

My taking practice of law was intentional as my father Late Hamid Ali Shah was an Advocate of repute who practiced at Gwalior in the High Court for over 40 years. But soon after joining the profession and learning only a few preliminary lessons from my revered father, I any how developed a fancy for Judgeship. At the age of 23 as I then was I could appear only in the selection for the post of Civil Judge, Class-II. I was lucky to get selected and thus on 6th April, 1970 I joined as Class-II; Civil Judge. Thereafter getting usual promotions I ultimately reached up to my present position. During my tenure as a Judge of this Court, I was lucky enough to work for a substantial period under the kind guidance of My Lord the Chief Justice Hon'ble Shri Patnaik who had always been extremely kind towards me. I was lucky getting lot of affection of my esteemed colleague of this Court, The High Court Bar Association Indore has its own tradition and I have always been co-operated by Members of the Bar. With their co-operation I had a smooth sailing through out in my Court. During my stay here, I received all the co-operation of Members of the Registry specially the staff posted to my Court. I am thankful for the above to all concerned.

Here I will not hesitate in expressing that if any time I did cause hurt to the feelings of anybody that was never intended and I may be excused for the same.

Best wishes showered today will in future help us and I am grateful for the same too.

THE INDIAN LAW REPORTS

Journal, Acts, etc. SECTION

CHAT ABOUT PENDENCY

Generally people talk about pendency of cases. No doubt thousands of cases are pending in the High Court and subordinate Courts. Matters are not decided or kept in abeyance at the place where they are supposed to be decided. This situation begets unrest amongst masses. Consequently people knock the doors of the Courts as a last hope. This situation increases number of litigation. Dearth of funds and infrastructure also play a roll of manure, thus pendency flourishes in the Courts. Situation is grim but under Control. Steps are being taken time to time to clear the pendency.

Computerisation, to some extent, has augmented the speed of disposal. Another step is Lok Adalat. In the year 2008 total 36 Lok Adalats were organised in the High Court of M.P. out of which 17 at Jabalpur 10 at Indore and 9 at Gwalior. Total 2269 cases were disposed of. 1297 at Jabalpur, 657 at Indore and 315 at Gwalior. Total Sum of Rs. 23,62,88,623/- were awarded in these Lok Adalats. Besides, 6 Mega Adalats were organised 2 each at Jabalpur, Indore and Gwalior and 5217 cases at Jabalpur 2804 at Indore and 1809 at Gwalior, total 9830 Cases were disposed of.

Following statement reveals position of Institution. Disposal and Pendency of the High Court of M.P. as on 31st of December, 2008.

MAIN SEAT AND BENCHES	PENDING ON 01/01/2008	INSTITUTED IN 2008	TOTAL	DISPOSAL	PENDENCY AT THE END OF YEAR	Increased Or Decreased
Jabalpur	105262	48847	154109	41939	112170	+6908
Indore	42512	27498	70010	31258	38752	-3760
Gwalior	33851	21683	55534	23432	32102	-1749
Total	181625	98028	279653	96629	183024	1399

(2)

Judicial Accountability*

Justice K.G. Balakrishnan,
Judge, Supreme Court of India

The concept of accountability is derived from an old French equivalent for 'competes a render' meaning the rendering of accounts. The standard definitions of accountability emphasise both information and sanctions. Governments are accountable if citizens can discern representative from unrepresentative governments and can sanction them appropriately.

Judiciary is the branch of Government that interprets the laws or says what the laws mean. Democracy means a form of government in which citizens share the power. The Indian Constitution accepts the Montesquiean theory of division of powers. Judiciary within the sphere of its activities enjoys independence which enables it to make free and fearless decisions. The problem arises where this judicial independence is misused resulting in hue and cry all over the world. Forget judicial independence, it is time for judicial accountability. Judges in some parts of the country are becoming increasingly nervous claiming that their judicial independence is being threatened. The real problem is that they are afraid of judicial accountability and the ever increasing demands by the public that the judiciary be held accountable for their actions, to cease their judicial activism and the wrongful rulings which are unjustly ruining peoples' lives. Recently, a critic Tom De Lay commenting on the American judges said ;

"It is the judges in this country who have become tyrannical and irrational, despots in black robes, enamored with themselves "

Members of the judiciary nationwide claimed that they were intimidated by De Lay. This dispute arose when a woman by name Terri Schindler- Schiavo died 13 days after the court ordered for withdrawal of her feeding tube. The critic said that the federal judiciary was " responsible" for Schiavo's death. De Lay said that the Congress retains oversight of the federal courts and should use it to hold judges accountable. But the judges from Maine to California cried that the doctrine of separation of powers gave them independence and they should not be accountable to anyone. De Lay wrote a book " Men in Black; How the Supreme Court is destroying America" and in the book he alleges that nine justices were engaged in an activist agenda that oversteps the bounds of the Constitution.

This case evoked widespread comments from the legal fraternity . The former Supreme Court Justice Sandra Day' O' Connor, in her speech on

*Late justice Hargovind Mishra and Late Shri Puttural Dubey Memorial Law :Delivered on 8 th April, 2006 by Justice K.C. Balakrishnan. Judge, Supreme Court of India at Gwalior .

Georgetown University, criticised the efforts of lawmakers to save the life of Terri Schiavo, and, complained about the harsh criticism of the courts. In response to Sandra Day O' Connor's speech. Fr. Frank Pavone, National Director of Priests for life, declared. "Justice O' Connor has it backwards. Dictatorships begin with the idea that government can deprive people of their fundamental rights. That is what happened to Terri, who was neither terminally ill, nor comatose, nor on life support" and "When Supreme Court Justices get such fundamental points wrong, we have got a problem, and they deserve all criticism we can muster."

At least in the United States, more and more members of the public feel that it is time to be vigilant against the members of the judiciary who are strong-arming the public, who make up the law as they go along, thumb their noses at the Constitution and establish case laws and then claim that they have followed the rule of law. They exhort people and say the public has an obligation and duty to speak up too and to hold the judiciary accountable, just as accountable, if not more than the executive and legislative branches of the Government. There is no separation of powers when it comes to governmental accountability. The press and some judicial activists said that the judiciary must cease their intimidation of the public. For some unknown reasons the members of the judiciary seem to think that a black robe and gavel allows them to play God and that is just not so.

We cannot simply ignore the new wave of criticism that is coming against the judiciary from all sides. An effective functioning of the judicial system depends not only on justice in fact being administered but also on the feeling of citizens that they are being provided fair treatment and just decisions. The ultimate reason for any type of judicial discipline is to maintain public confidence in the judiciary. A legal system can function only as long as the public accepts and abides by the decisions rendered by the Courts and the public will accept and abide by these decisions only if it is convinced that the judges are fair and impartial: anything which tends to weaken that conviction should be avoided. The age old rule often cited is that justice must not only be done, but it must also be perceived to be done.

The service rendered by judges demands the highest qualities of learning, training and character. These qualities are not to be measured according to the quantity of the work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from judges, and, though unwritten, has mostly been observed. But recently there were series of criticisms and some remedial measures were also taken. Accountability of the judiciary in respect of its judicial functions and orders is to be met with provisions for appeal, revision and review of orders.

(4)

In view of the failure of the present mechanism for removal of Judges for serious misconduct and proved misbehaviour, some legislations is on the anvil. I do not propose to discuss the provisions of the proposed Act in detail.

There has been tremendous progress in the field of administrative law. The process of judicial review often pitted the judiciary against the executive leading to charges of government by the judiciary. An unelected judiciary overruling the laws passed by the elected representatives of the people has been considered undemocratic and violative of the principles of majoritarianism. This argument is conceptually incorrect. The governmental authorities especially politicians dislike being told publicly that they were wrong and they acted contrary to law. Sometimes while striking down the Governmental action, some strong language is used and even motives attributed. There is also a pernicious tendency on the part of some to attack judges if the decision does not go the way they want or if it is not in accordance with their views. There is nothing wrong in critically evaluating the judgment. The improper and intemperate criticism of judges owing to dissatisfaction with their decisions constitutes a serious inroad into the independence of the judiciary. It is essential in a country governed by the rule of law that every decision must be made under the rule of law and not under the pressure of one group or another. Those who indulge in such improper and intemperate attack on judges little realise what serious damage they are doing to the institution of the judiciary.

In Australia, where the native title case provoked unprecedented criticism against the High Court. Prof. H. P. Lee of Monash University wrote as follows:

"Scurrilous abuse of particular members of the judiciary or attacks which question the integrity of judicial institutions undermine public confidence in the courts and acceptance of their decisions. This is not to suggest that courts should be immune from criticism. On the contrary, the judgment of the courts should be scrutinized and critically evaluated. But those who hold positions of power and influence in the country have a responsibility to ensure that the line between measured criticism of judgments and denigration of judges is not traversed. Constitutionalism in Australia is not enhanced by hostility directed against the judiciary which plays such a pivotal role in maintaining the rule of law."

In the case of *D.C. Saxena and Dr. D.S. Saxena vs. Hon'ble the Chief Justice of India*¹, the Supreme Court of India also expressed its views in the following lines.

"----- administration of Justice and Judges are open to public criticism and public scrutiny, Judges have their accountability to the

society and their accountability must be judged by the conscience and oath to their office, i.e., to defend and uphold the Constitution and the laws without fear and favour. Thus the Judges must do, in the light given to them to determine, what is right. Any criticism about Judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of the Judges and brings administration of justice to ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgments can be criticized. Motives to the Judges need not be attributed. It brings the administration of justice into disrepute. Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. In the free market place of ideas criticism about the judicial system or judges should be welcome so long as such criticism does not impair or hamper the administration of justice. This is how the courts should exercise the powers vested in them and Judges to punish a person for an alleged contempt by taking notice of the contempt suo motu or at the behest of the litigant or a lawyer... Law is not in any doubt that in a free democracy everybody is entitled to express his honest opinion about the correctness or legality of a judgment or sentence or an order of a court but he should not overstep the bounds. Though he is entitled to express that criticism objectively and with detachment in a language dignified and respectful tone with moderation, the liberty of expression should not be a license to violently make personal attack on a Judge. Subject to that, an honest criticism of the administration of justice is welcome since justice is not a cloistered virtue and is entitled to respectful scrutiny. Any citizen is entitled to express his honest opinion about the correctness of the judgment, order or sentence with dignified and moderate language pointing out the error or defect or illegality in the judgment, order or sentence. That is after the event as post-mortem."

At the same time, there must be open justice which, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The Judges sit in open Court, publish reasons, accord fair procedure and avoid perceived bias and ensure fairness in trial. All are important things as part of judicial accountability. It is also important that the Judges should strive for higher standards. It is the Judges professional duty to do all that is reasonably possible to equip himself or herself to perform judicial duties with a high degree of competence. Competency is not an ethical issue. But it touches ethics in two ways. There is a duty

(6)

to admit that one has to perform confidently and this includes a continuing duty to improve confidence in areas where weakness is detected. There is also a moral obligation to participate in suitable forms of judicial education and once the Judge realises that he or she is incurably incompetent there is a duty to resign. The continued professional development is the only way to improve the performance standard.

The words of Lord McCluskey are worthy of recollection :

" He has been elevated to a position in which he wields a royal authority. The apparatus of State lies ready to enforce his orders. The visible symbols of his office, the way he dresses, the place in which he sits, the manner in which he is addressed, the respect which he is accorded, all are designed to buttress that authority to intimidate those who might wish to challenge or evade it "

According to Lord McCluskey the temptations a new Judge is exposed to include arrogance, self-esteem and impatience. A Judge is never answerable to his fellow Judges, or to Parliament or to public opinion for his decision. His grosser excesses may be curbed on appeal. But he cannot be called to account in the way an elected representative is. According to Learned Hand:

" His authority and immunity depend upon the assumption that he speaks from the mouth of others, he must present his authority by cloaking himself in the majesty of an over shadowing past. "

Judicial independence and accountability of Judges are closely connected subjects and the question usually raised is whether accountability of Judges can be achieved without sacrificing the independence of the judiciary. "The concept of independence of the Judiciary is a noble concept which inspires the Constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle that runs through the entire fabric of the Constitution, it is the principle of the rule of law under the Constitution. It is the Judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective", *S. P. Gupta vs. Union of India*².

The idea of judicial independence is embodied in our Constitution through various provisions. Undoubtedly, the judiciary, the third branch of the Government, cannot act in isolation. The thrust of this principle is to ensure that adjudications are untrammelled by external pressures or controls and the courts and tribunals are insulated from executive control. However, judicial independence is not an absolute thing and one should not give too much importance to the independence of the judiciary.

The Chief Justice of Tasmania said about judicial independence:

"It is the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the

extent that it is constitutionally possible, free from actual or apparent dependence upon any person or institution, including in particular, the executive arm of the Government over which they do not exercise direct control”.

Patrick Devlin in his book 'The Judge' opined:

“The social service which the Judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure.....”

Patrick Devlin also draws distinction between the activist and dynamic lawmaking. In activist lawmaking the idea is taken from the consensus and demands utmost sympathy from the lawmaker. In dynamic lawmaking the idea is created outside the consensus and, before it is formulated, it has to be propagated. This needs more than sympathy; it needs enthusiasm. Enthusiasm is not and cannot be a judicial virtue. It means taking sides and, if a judge takes sides on such issues on controversial subjects, he loses the appearance of impartiality and quite possibly impartiality itself.

Both judicial independence and judicial accountability are vital for maintaining the rule of law in the democratic system of Government. The call for judicial accountability is gaining momentum and the judiciary is no longer a sacrosanct and inviolable sanctuary of its occupants. Lord Atkin said years back that justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

“Judges exercise power. With power comes responsibility. In a rationally organised society, there will be proportion between the two. The question of judicial responsibility accordingly becomes more or less significant, depending on the power of the Judge in question”.

The above words of Prof. Merryman is applicable to Indian courts also. Since last few years, the powers of the Indian courts have increased in manifold ways. In view of the unprecedented expansion of the Judges' procedural and substantive responsibilities, it is quite natural that the powers of the courts have increased. Litigation is no longer a pure affair 'between the parties' and the Judge is no longer a passive referee having no power. The powers of superior courts also have increased due to the expansive and variegated forms of litigation. Expansive interpretation of the various provisions of the Constitution has also vested the courts with multifarious jurisdiction, e.g., the wide interpretation given to Article 21 of the Constitution widens the origin of litigation surrounded with

(8)

the various forms of Right to Life embodied in the Constitution. The narrow interpretation adopted by the Supreme Court in *A.K. Gopalan's case* was given a go-bye in *Menaka Gandhi's case* and various other subsequent decisions. The commencement of Public Interest Litigations also gave rise to different types of litigations. Citizens came to court when the public authorities failed to discharge their statutory and constitutional obligations. When there were blatant violations of law, the Court started giving directions ignoring the age old principle of 'Locus Standi'. The traditional rule regarding Locus Standi that judicial remedy is available to a person who has suffered legal injury by reason of violation of his legal right has drastically changed and it was held that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any legal right or any burden is imposed in contravention of Constitutional or legal provisions or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or a determinate class of persons by reason of poverty, helplessness or disability is unable to approach the Court for relief, then any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right before the Supreme Court under Article 32.

The various forms of public interest litigations resorted to in the superior courts also led to the increase of the power of the courts. This also led to the growing need of public accountability. The public accountability of Judges was demanded for various reasons. Some of the reasons could be classified as :

(i) Growth in size and complexity of the judiciary in the modern welfare state and more and more citizens approaching the court for redressal of their grievances.

(ii) educated citizens wanted Judges to be accountable

(iii) Judges are appointed or selected and the public have no direct control over them

(iv) Judges could be removed only through constitutional procedure and the procedure for removal is difficult.

(v) There are no provisions for remedying minor misbehaviour such as maltreatment of witness or party

(vi) Judges commit mistake but there is no remedy. Many times, misbehaviour or mistake is not corrected by the superior court and there is a feeling that the Judges of the superior court protect their own men and it is useless to make complaints. There is no constitutional or statutory mechanism by which the aggrieved litigant can get redressal of his grievances.

Justice Jackson of the US Supreme Court once said, "Judges sometimes exhibit vanity, irascibility, narrowness, arrogance and other weakness to which the human flesh is heir".

The real problem is the non-availability of mechanics to which the average complainant and litigant can resort to. In the American State of California, there is a commission by name 'Commission on judicial performance'. This commission has got the power to recommend to the State for removal of a Judge. In Philippines, it is said a Judge who has not delivered a judgment within three months runs the risk of suspension of his salary till judgment is delivered. In Sweden and Finland, the Ombudsman is empowered to supervise the courts.

In England, the Crown had been taking steps to exercise control over the judiciary. One of the extreme forms of control was the removal of Judges. James I removed Chief Justice Coke in 1660 for his refusal to submit to his wishes. Coke and all other Judges refused to accept the advice of the King. When the Parliament became supreme, it also sought to control the judiciary. An earlier English Act prescribed an oath that Judges shall not receive any fee or present from a party to a case. The doctrine of pleasure was also introduced and it was laid down that the Judges could hold office during good behaviour. The security of judicial tenure was finally established in 1700 by an Act of Settlement and the Act provided that the Judges of the highest court could be removed only upon an address by both houses of Parliament. Still the independence of Judges was not complete and the Judges used to continue only for six months after the death of the King. There was unlimited discretion to remove the Judges or to allow them to continue. In 1925, an Act was passed, namely, Supreme Court of Judicature (Consolidation) Act, which provided that all Judges of the Court of Appeal, with the exception of Lord Chancellor, shall hold office during good behaviour, subject to a power of removal by His/Her Majesty on an address to His/Her Majesty by both houses of Parliament.

Judicial independence and integrity carry different meanings depending upon social values, economic and political environment. Judges should have security of tenure and their appointment should be free from political pressure and other irrelevant considerations. After the 1925 Act, only one Judge was removed from office by address, though there were several instances where Judges had to resign due to informal pressure.

Removal of Judges after an address in the Parliament also is under severe criticism. In England, there is an elaborate procedure established by Parliamentary practices. But there is a thinking that this process also should change. The legislative removal is coloured by political partisanship. The initiation of the process and its ultimate result may be dictated by political considerations. The process of fact finding also may suffer from partisanship. It is quite observable

(10)

that the members of the political parties take a partisan attitude in such proceedings. In the case of one Judge, the Tory group voted for acquittal while all the Whigs joined in condemnation. The move to impeach Justice Douglas of the US Supreme Court was also sought to be politically motivated. In these times of Parliamentary Government, the legislature is effectively controlled by the Executive. The practice of address in the Parliament was introduced to protect Judges from interference, but the Government has got considerable control over the Parliamentary proceedings and the legislative procedure is not adequate for fact finding. Moreover, members of the legislature are also not adequately qualified for making assessment or taking decisions regarding the impropriety or other judicial misbehaviour allegedly done by the Judge. In India also, we have observed the same scenario when the solitary impeachment proceedings took place in our Parliament. The observations of the committee appointed to reform this practice in England is relevant to be quoted:

"The real dangers of this archaic procedure are more serious than the practical problems it would involve. The mere fact that it is so difficult to initiate, so cumbersome to operate and so unlikely to produce satisfactory result i.e., a decision which is just and seen to be just must mean that there are two dangers, indirect pressure will be put on a Judge probably by the Executive to resign, simply in order to circumvent the procedures and that a Judge determined not to give way may be able to continue in office for longer than is desirable. It has been well said that the main purpose of the parliamentary procedure was not to provide method of removing Judges but rather to safeguard them against removal."

Justice Fortas resigned from the U.S. Supreme Court when the Attorney General met the Chief Justice and told him that unless Fortas resigned, the Justice Department would release damaging Information.

Suffice it to say that unless there is an effective mechanism for removal, the aberrant Judges are likely to remain on the bench longer than is desirable.

Generally, the common litigant is aggrieved by complaints mainly of three categories (i) objectionable utterances either in court or outside and not sitting regularly or not maintaining punctuality (ii) administrative acts of the Chief Justice such as making appointments to suit his convenience (iii) certain acts relating to judicial functioning such as lenient sentences, disregard of established guidelines, unwillingness to write and deliver judgments, favoritism to lawyers or parties. Of course, the correction of purely judicial error should remain in the domain of the appellate system. Failure to follow certain accepted guidelines and law sometimes causes serious problems. It is true that many such

cases come to the superior courts. The Judges taking decisions should give their reasons and should follow the accepted legal principles. If a Judge leaves the law and makes his own decisions, 'he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism' and if the Judge is able to lay the responsibility for the decision at the door of the law itself, he saves himself from criticism and the decision 'leaves no sense of individual injustice'. If the Judge acknowledges his responsibility in creative decision-making, he must be willing to accept criticism. If, on the other hand, he folds his hands and disclaims all creative power, he may console his conscience with the thought that he has no responsibility for the consequences.

The Judicial responsibility and value-laden concepts depend on the social values. Social values are not the same in all societies, they differ from time to time and from place to place. There may be written or unwritten guidelines which Judges are bound to follow.

In *K. Veera Swami vs. Union of India and Others*³, the Constitution Bench of the Supreme Court held that Sections 5 and 6 of the Prevention of Corruption Act are applicable to Judges of the High Courts and Supreme Court including the Chief Justice of India. That does not mean that any sort of allegation should be made against the Judges of the superior courts.

As all of you know, the Judges of the superior court had accepted a code of ethics and also formalized an in-house procedure. The in-house mechanism was to deal with the various complaints and acts of misdemeanour. The in-house mechanism, however, does not enjoy a high degree of capability. There is also an allegation that there is no transparency in that system. A legislation known as "Judges Enquiry Bill 2005" is in the offing. The Law Commission has made its recommendations on 31st January, 2006. As per the provisions contained in the Bill, there would be a machinery to investigate into any matter involved in, arising from, or connected with any allegation of misbehaviour or incapacity, made in a complaint against a Judge of the Supreme Court or High Court. The Council would be called "National Judicial Council" consisting of the Chief Justice of India and other members. This Council would have a Secretary and any person can make a complaint in writing involving allegation of misbehaviour or incapacity in respect of a Judge to the Council. The Council would conduct an investigation into any complaint and if the complaint is frivolous or vexatious or is not made in good faith, or if there are no sufficient grounds for investigation into the complaint, the same would be dismissed, and if the complaint is proved to be true, further steps would be taken to remove the judge in accordance with the constitutional provisions. Detailed procedure has been prescribed for the

(12)

investigation and the entire investigation shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code. The provisions of the 2005 Bill would enable the Judicial Council to impose minor measures including stopping of assignment of judicial work to the judge. There is also a provision of medical examination of the judge in case there is an allegation that the judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and if the allegation is denied, the Council may arrange for medical examination of the judge by a medical board.

The Law Commission has given some recommendations to make certain cosmetic changes to the Bill and the legislation is likely to be enacted shortly. We hope that the legislation would take the right shape and prescribe as to how the various problems could be dealt with. It is the practice followed by English Judges that whenever a legislation is contemplated, the judges do not participate openly in any discussion on such proposed legislation.

It is a fact that often the allegations are made without understanding the facts of the case or reading the relevant judgment. The reports that come in the media are either fictional, incorrect or bereft of relevant details. Some of the publications only give wrong ideas to its readers. Even then the courts are taking a very lenient view in these matters. There is a great clamour for amending the provisions of the Contempt of Courts Act stating that it is an archaic piece of legislation. Many of the disgruntled litigants want to prosecute the Judges and raise unnecessary allegations to denigrate the judiciary. That will cause serious erosion of the values of the judiciary which will affect their independence. Independence of the judiciary is to be protected and at the same time the principle of accountability of judges should be nurtured. In recent times, some of the judges, against whom serious allegations were made, resigned from service the moment the Chief Justice of India suggested them to do so.

But, nevertheless, we must admit one fact that the reputation of the judiciary for independence and impartiality is indisputably a national asset and one Government after another has tried to plunder it. There are instances wherein baseless allegations and criticisms have been hurled against the Judges of the superior courts. Within moments, the very same legislature or the executive demands the services of a sitting judge to inquire into allegations or incidences of public importance. Independence of the judiciary is to be protected and at the same time, Judges of the superior courts should be accountable and they must discharge their functions to imbibe the spirit of constitutional values and abiding faith in the letter and spirit of the oath they have taken in assuming the charge.

[THE INDIAN] LAW REPORTS ACT, 1875

(ACT 18 OF 1875)

[The text of the Act printed here is as on 30-4-1996]

CONTENTS

SECTIONS

1 Short title.

Local extent.

Commencement.

2. [Omitted]

3. Authority given only to authorised ports.

4. Authority of judicial decisions.

STATEMENT OF OBJECTS AND REASONS

"The second section of the India Law Reports Act (II of 1875) declares that every judgment of any High Court established under Ss. 24 and 25 Vic, c. 104 shall, if reported in the authorised reports, have the same authority in all subordinate Courts beyond the limits of its appellate jurisdiction as, independently of the Act, such judgment would have within such limits.

The Secretary of State for India objects to this provision and suggests that Act 2 of 1875 should be repealed and re-enacted with the omission of the second section.

The present Bill has been prepared to give effect to this suggestion."- Gaz. of Ind., 1875, Pt. V, p. 139.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

-Amended by Acts 38 of 1920; 32 of 1925; 34 of 1926; 3 of 1951.

-Adapted by A.O., 1937; A.L.O., 1950; 2 A.L.O., 1956

-Extended by Acts 59 of 1949; 30 of 1950; Regns. 6 of 1963; 8 of 1965.

-Extended in Bombay by Act 4 of 1950.

-Extended in Tamil Nadu by Act 35 of 1949.

[THE INDIAN] LAW REPORTS ACT, 1875

(ACT 18 OF 1875)^a

[13th October, 1875]

An act for the improvement of Law Reports.

b[*

*

*

*]

[a] The Act has been declared, by notification under the Scheduled Districts Act, 1874 (14 of 1874), sec. 3(a) to be in force in the following Scheduled Districts, namely:-

(14)

The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dalbhum and the Kolhan in the District of Singhbhum. (The District of Lohardaga included at this time the present District of Palamau, which was separated in 1894; Lohardaga is now called the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p.44)- See Gazette of India, 1881, Pt. I, p. 504. All these areas are in Bihar State.

The Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), sec.3(1-1-1950) and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), sec. 3 (16-4-1950). Manipur and Tripura are Union territories now but Vindhya Pradesh has merged with the State of Madhya Pradesh.-See Act 37 of 1956, sec. 9 (1) (e).

It has also been extended to States merged in the States of-

Bombay : see Bom. Act 4 of 1950, sec. 3 (30-3-1950);

Madras : see Mad. Act 35 of 1949, sec. 3 (1-1-1950).

It is now extended to the Union territories of Dadra-Nagar Haveli and Laccadive, Minicoy and Amindivi-Islands by Regns. 6 of 1963 and 8 of 1965 respectively.

[b] Preamble repealed by A.O., 1937.

1. Short title-This Act may be called The Indian Law Reports Act, 1875.

Local extent.

It extends to the whole of India ^a[except the State of Jammu and Kashmir];

Commencement.

And it shall come into force on such day ^b as the ^c[Central Government] notifies in this behalf in the ^d[Official Gazette].

[a] Substituted for "except Part B States", by Part B States (Laws) Act, 1951(3 of 1951), sec. 3 and Sch. (1-4-1951).

[b] The Act came into force on 1-1-1876 : see Notification No. 22, D/- 23-11-1875, Gaz. of India, 1875, Pt. I, p. 589.

[c] Substituted for "Governor-General in Council" by A.O., 1937.

[d] Substituted for "Gazette of India", ibid.

2. Repeal of Act 2 of 1875.-[Repealed by the Repealing Act, 1876 (12 of 1876)]

3. Authority given only to authorised reports.-No Court shall be bound the hear cited, or shall receive or treat as an authority binding on it, the report of any case ^a[decided by any High Court for a ^b State]], other than a report published under the authority of ^c[any State Government].

[a] Substitute for "decided on or after the said day by any High

Court for a Part A State" by Part B States (Laws) Act, 1951 (III of 1951), sec. 3 and Sch. (1-4-1951).

[b] Substituted for "Part A or Part B State" by 2 A.L.O., 1956.

[c] The original words "the Governor-General in Council" have successively been amended by the Devolution Act, 1920 (38 of 1920), A.O., 1937 and A.L.O., 1950 to read as above.

4. Authority of judicial decisions-Nothing herein contained shall be construed to give to any judicial decision any further or other authority than it would have had if this Act had not been passed.

Section 3

(1) All that the Law Reports Act does is to ensure that Judges who have no access to the decisions themselves shall be provided with accurate copies of them. AIR 1944 Nag 44 (51) (DB) to an unauthorised report of the decision of the Privy Council and if they are satisfied that it is a correct report, they are bound to follow it. AIR 1926 Mad 20(23).

(2) Section 3 does not prevent the Court from looking at an unreported Judgment of other Judges of the same Court. (1901) 28 Cal 289 (292).

(3) A view expressed in a Judgment of a High Court not officially published is entitled to respect, but is not to be followed blindly, like one that is officially published, though good reasons must be found for not following it. AIR 1925 Nag 414 (414)** AIR 1930 Nag 270 (270)** AIR 1926 Rang 164 (165) (FB). (Decision reported in private publication not absolutely binding.)

(4) The Court in exercising its discretion in the matter of following a decision reported in an unauthorized report should give weight to the prevailing practice in the Courts with reference to any particular report from which a decision is sought to be cited. AIR 1931 Mad. 71 (72).

(5) The Indian Law Reports Act has no application to a decision of the Privy Council, and therefore the Courts can refer

(6) The language of S.3 is quite clear that it is only when a report other than the one published under the authority of a State Government is cited before a Court that such a Court is not bound to hear such a report cited or to receive or treat it as an authority binding upon it. There is nothing in the language of S. 3 that a certified copy of a decision of the High Court is not to be treated as binding upon a lower Court. What is binding is the decision of the High Court and not merely a report. AIR 1958 Bom 381 (385): 1958 Cri LJ 1296.

(7) Cases reported in 1980 Bombay Cases Reporter 503 not shown to be based on certified copy of the judgment- Report not allowed to be cited before the Court. AIR 1982 Bom 538 (538): 1982 Cri LJ 2147.

(8) Certified copy of the judgment of the High Court could be taken note of. Merely because the said decision have not been reported in an authorised journal it could not be rejected. (1976)2 All LR 501 (504).

(16)

(9) Notes of cases in law journals- Placing reliance on them may often lead to misunderstanding of case and may result in misleading the court. AIR 1995 Bom 351.

(10) Practice of relying upon unreported judgments suddenly in Court room is objectionable. Practice of suddenly taking out a copy of unreported judgment without supplying its copies to other side advocates and court in advance, results in lot of inconvenience to every one. Party who is thus taken by surprise can legitimately insist that time should be given to him to get acquainted with facts of the judgment and to see whether it really takes different view or is distinguishable from facts of case. Therefore an unreported judgment of the same court could be cited before Bench of that court but in such case it is duty of Advocates who want to rely on it to prepare copies of same in advance and supply same to other side and also to Court. (1986) 88 Bom LR 308 (319) : ILR (1986) Bom 645.

Section 4

(1) A Court can refer to reports of cases as precedents but where an order is meant to be operative in a particular case the Court cannot refer to the report for such order or take cognizance of such an order as is said in the report to have been passed. The Court cannot act upon the order unless it has been produced and filed in the record of that case. (1901) 28 Cal 171 (176).

(2) Decision printed elsewhere than in authorised reports stands on the same footing as unreported cases. AIR 1921 Oudh 257 (257).

(3) The Act is little more than an addendum to S.78 of Evidence Act which provides for the manner in which public documents may be proved. The fact that a certified copy of a decision of a Court of Record is to be supplied neither enhances nor detracts from the authority and binding force of the decision. A lower Court is bound by an unpublished ruling of its own High Court. AIR 1944 Nag 44 (46,51) (FB). (Single Judge of High Court is bound to follow the decision of the Division Bench even though it has not been reported.) ** 28 Cal 289 (292). (A judgment is still an authority even though not reported.)

[See AIR 1926 All 346 (350).]

[See however (1900) 4 Cal WN 732 (734). (A Judge is not bound to follow and treat an unreported case as binding on him.)]

(4) A subordinate Court is not entitled to compare the soundness or otherwise of the views on a question of law contained in a decision reported in an unauthorized series of the High Court to which it is subordinate with those of other High Courts. AIR 1931 Mad 71 (72).

(5) Management of certain Textile Mills taken over by Central Government- Competency of State Government to refer disputes relating to the Mills - Not lost. 1979 Lab IC-1024 (1027) (DB) (All).

GOVERNMENT OF MADHYA PRADESH LAW DEPARTMENT NOTIFICATION

No. 5043-812/XXI.B.

Bhopal, dated the 1st April, 1957

In Supersession of all previous notification issued on the subject by any authority prior to the 1st November, 1956, the Government of Madhya Pradesh is pleased to make the following rules in regard to the publication of the Indian Law Reports, Madhya Pradesh Series, namely :-

1. The staff for editing the Indian Law Reports, Madhya Pradesh Series, shall consist of an Editor and a Reporter.

2.(1) The Editor and the Reporter shall work under the control and supervision of a Committee to be constituted as follows :-

(i) One Puisne Judge of the High Court of Madhya Pradesh :
Jabalpur to be nominated by the Chief Justice :

(ii) Three Advocates practicing in the High Court to be nominated
by the Chief Justice;

(iii) The Advocate General ;

(iv) The Editor (ex officio)

(v) The Editor shall be the Secretary of the Committee.

3. The Reporter shall work under the Supervision of the Editor.

3(1) The Editor and the Reporter shall be appointed by the Governor on the recommendation of the Chief Justice.

(2) The term of office of the Editor shall be five years, but he shall be eligible for re-employment thereafter for successive terms of five years each on the recommendation of the Chief Justice. Ordinarily no person shall be appointed as an Editor after the age of sixty.

(3) The Reporter may be appointed on part-time or full-time basis. He shall ordinarily hold his appointment for a period of three years but shall be eligible for reappointment for successive periods of three years each on the recommendation of the Chief Justice. Ordinarily no person shall be appointed as Reporter after the age of sixty.

(4) The Editor and the Reporter shall be entitled to such pay as may from time to time be fixed by the Governor, The Governor may at any time on the recommendation of the Chief Justice dispense with the services of the Editor and the Reporter after giving them one month's notice.

(18)

4. The Reporter shall select :-

(i) All cases marked 'AFR' by the Presiding Judge or Judges.

(ii) Cases considered by him as suitable for reporting and bring them to the notice of the Editor who will then select cases out of them for reporting.

Cases in clause (i) shall be circulated amongst the members of the Committee, if a majority of the members approve reporting the cases, they shall be reported; but if they do not, the cases shall be submitted to the Judge or Judges concerned with their opinion; and the opinion of the Judge or Judges concerned shall be final. Cases in class (ii) shall be circulated amongst the members of the Committee and only such cases as are recommended by a majority of them and approved by the Judge or Judges concerned shall be reported.

5. The Committee may with the previous approval of the Chief Justice make rules for the conduct of business of the Committee.

6. The reports shall be published under the authority of the State Government and the Committee is hereby empowered to publish them under such authority.

BY ORDER OF THE GOVERNMENT
MADHYA PRADESH

Sd/- J.S. Dave
SECRETARY TO GOVERNMENT OF
MADHYA PRADESH, LAW DEPARTMENT

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

(1)

R.C. Mishra, J

CHANDU SINGH,

Vs.

STATE OF M.P.

A. Criminal Procedure Code, 1973 (2 of 1974), Section 439 - Repeat bail application. - *First bail application rejected on merits by High Court - Applicant obtained temporary bail from trial court by suppressing rejection of his bail application by High Court - Held - Taking into consideration the nature of allegations as well as the misconduct - Applicant not entitled to bail.* (Para 6)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 - जमानत पुनरावेदन - प्रथम जमानत आवेदन उच्च न्यायालय द्वारा गुणदोषों पर नामंजूर - आवेदक ने, अपने जमानत आवेदन की उच्च न्यायालय द्वारा नामंजूरी छिपाते हुए, विचारण न्यायालय से अस्थायी जमानत अमिप्राप्त की - अमिनिर्धारित - आरोपों की प्रकृति और दुराचरण को विचार में लेते हुए - आवेदक जमानत का हकदार नहीं।

B: Criminal Practice - Duty of applicant - *It is not possible to entertain any bail application unless full particulars of person who has given instructions, and the fact pertaining to earlier attempts and pendency of application, if any, are placed on record.*

ख. दण्डिक पद्धति - आवेदक का कर्तव्य - यह संभव नहीं है कि किसी जमानत आवेदन को ग्रहण किया जाए, जब तक उस व्यक्ति की, जिसने अनुदेश दिये हैं, पूर्ण विशिष्टियाँ और पूर्व प्रयासों तथा आवेदन के लम्बित रहने से सम्बन्धित तथ्य, यदि कोई हो, अभिलेख पर नहीं रखे जाते।

Cases referred :

1986(II) WN 58, 1986 MPLJ 659, 1989 JIJ 323, 1993 MPLJ 310,
2000(1) WN 93.

Ramesh Kumar, for the applicant.

P. Chaubey, P.L., for the non-applicant/State.

*M.Cr.C. No.6300/2008 (Jabalpur), D/- 21 August, 2008.

Short Note

(2)

S.L. Kochar,

KAILASH

Vs.

STATE OF M.P.

A. Penal Code (45 of 1860), Section 376 - Rape - Assessment of age of prosecutrix - Parents of the prosecutrix were not knowing the date of birth - Basis for recording date of birth in school transfer certificate is not established - Identity of the prosecutrix with the entry in school register is also not established - In affidavit, prosecutrix mentioning her age 25 years and she has also admitted affixing her photograph on the affidavit - Court on perusal of the affidavit and photograph found that from the photograph prosecutrix is not appearing minor girl below 18 years of age - Prosecutrix has specifically stated that before 5-7 years she was married and at that time she was aged about 18 or 19 years - This fact remained unchallenged and fortified her age 25 years in her affidavit - Prosecution has failed to prove that prosecutrix was minor on the date of incident.

क. दण्ड संहिता (1860 का 45), धारा 376 - बलात्संग - अभियोक्त्री की उम्र का निर्धारण - अभियोक्त्री के माता-पिता को जन्मतिथि की जानकारी नहीं - शाला स्थानांतरण प्रमाण-पत्र में जन्मतिथि अभिलिखित करने का आधार स्थापित नहीं - अभियोक्त्री की पहचान भी शाला रजिस्टर में की गई प्रविष्टियों से स्थापित नहीं - शपथपत्र में अभियोक्त्री ने अपनी उम्र 25 वर्ष उल्लिखित की और शपथपत्र पर अपना फोटो चिपकाना भी स्वीकार किया - न्यायालय ने शपथपत्र और फोटो के परिशीलन पर पाया कि फोटो से अभियोक्त्री 18 वर्ष से कम आयु की अवयस्क बालिका प्रतीत नहीं होती - अभियोक्त्री ने विनिर्दिष्ट रूप से कथन किया कि 5-7 वर्ष पहले उसकी शादी हुई और उस समय उसकी उम्र 18 या 19 वर्ष थी - इस तथ्य को चुनौती नहीं दी गई और शपथपत्र में बतायी गई आयु 25 वर्ष की पुष्टि होती है - अभियोजन यह साबित करने में असफल रहा कि अभियोक्त्री घटना तारीख को अवयस्क थी।

B. Penal Code (45 of 1860), Section 376 - Rape - Prosecution has failed to prove that prosecutrix was minor on the date of incident - Prosecutrix moved freely with the appellant from one place to another and passed more than month time - She also visited court, executed affidavit and marriage agreement - Her photographs were also taken during the course of all these activities - If she was not a consenting party - She could have disclosed her forcible taking or taking by inducement or fraud to police, advocate and citizen of that area - Looking to the totality of the circumstances, there cannot be two opinion that prosecutrix was a consenting party - Conviction and sentence u/ss 363, 366, 376(1) set-aside - Appeal allowed.

ख. दण्ड संहिता (1860 का 45), धारा 376 - बलात्संग - अभियोजन यह साबित करने में असफल रहा कि घटना तारीख को अभियोक्त्री अवयस्क थी - अभियोक्त्री अपीलार्थी के साथ स्वतंत्रतापूर्वक एक स्थान से दूसरे स्थान पर गयी और उसके साथ एक माह से अधिक समय व्यतीत

4
किया - वह न्यायालय भी गयी, वहाँ शपथपत्र और विवाह का अनुबंध निष्पादित किया - इन सभी कार्यवाहियों के दौरान उसके फोटोग्राफ भी लिये गये - यदि वह सहमत पक्षकार नहीं थी - वह उसे बलपूर्वक या प्रवचनापूर्ण या कपटपूर्वक लाये जाने के तथ्य को पुलिस, अधिवक्ता और उस क्षेत्र के नागरिकों को प्रकट कर सकती थी - परिस्थितियों की सम्पूर्णता को देखते हुए, इसमें दो राय नहीं हो सकती है कि अभियोक्त्री सहमत पक्षकार थी - धारा 363, 366, 376(1) के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर।

Yogesh Purohit, for the appellant.

R.S. Chouhan, Dy.G.A., for the respondent/State.

***Cr.A. No.341/2007 (Indore), D/- 2 July, 2008.**

Short Note

(3)

Mrs. Indrani Datta, J

KAMLA BAI (SMT.) & ors.

Vs.

STATE OF M.P. & anr.

Criminal Procedure Code, 1973 (2 of 1974), Sections 407, 186, 178(c) - Transfer of case - Continuance of offence - Allegations of demand of dowry made at Shivpuri - Charge-sheet filed in the court of JFMC, Ashoknagar - Two other cases pending in the courts of Shivpuri - Application for transfer of case to Shivpuri - Held - Wife stated in her statement recorded u/s 161 of Code and in F.I.R. lodged by her that all alleged demands of dowry were made by applicants at Shivpuri - There is no whisper of allegations about any demand of dowry or commission of any act of cruelty at Ashoknagar - That being so, the logic of Sec.178(c) of Code relating to 'continuance of offence' cannot be applied. - Case directed to be transferred to Shivpuri from Ashoknagar. 2004(2) SCR 135 (ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 407, 186, 178(सी) - मामले का अंतरण - अपराध का जारी रहना - दहेज की माँग के अभिकथन शिवपुरी में किये गये - आरोप-पत्र जेएमएफसी, अशोकनगर के न्यायालय में पेश किया गया - दो अन्य मामले शिवपुरी के न्यायालयों में लम्बित - मामला शिवपुरी में अंतरित करने के लिए आवेदन - अभिनिर्धारित - पत्नी ने संहिता की धारा 161 के अन्तर्गत अभिलिखित उसके कथन में और उसके द्वारा दर्ज करायी गई एफ.आई.आर. में यह कथन किया है कि आवेदकों द्वारा दहेज की सभी कथित माँगें शिवपुरी में की गई - दहेज की कोई माँग या क्रूरता का कोई कृत्य अशोकनगर में करने के बारे में अभिकथनों की कोई फुसफुसाहट नहीं है - इसलिए 'अपराध का जारी रहना' से सम्बन्धित संहिता की धारा 178(सी) का तर्क लागू नहीं हो सकता - मामला अशोकनगर से शिवपुरी अंतरित करने का निर्देश दिया गया। 2004(2) SCR 135 (संदर्भित)।

Arun Pateria, for the applicants.

Mohd. Irshad, Panel Lawyer, for the non-applicant No.1/State.

***M.Cr.C. No.4057/2008 (Gwalior), D/- 24 November, 2008.**

Short Note

(4)

U.C. Maheshwari, J

MANAGER, U.P. STATE ROAD
TRANSPORT CORP. JHANSI

& anr.

Vs.

HALKIBAI & ors.

A. Motor Vehicles Act (59 of 1988), Section 173, Civil Procedure Code, 1908, Order 41 Rule 22 - Compensation - Enhancement - When in the absence of appeal or cross-objection by claimant, compensation can be enhanced - Law explained.

It is true that in normal course, in the absence of the appeal for enhancement or the cross-objection for the same, such prayer could not be considered but, keeping in view the object of the legislature behind enacting the provision of compensation is only the welfare of the victims of the vehicular accident. Thus in such premises, they should be awarded just and proper compensation. In other words, they should not be deprived of their rights because of the mistake of any Advisor or the procedural mistake, otherwise the main object of the scheme would be defeated. In such premises and as per spirit of the provision of Order 41 Rule 22 of the CPC in which the Court is empowered to change the findings of the trial court or the tribunal, if the same is needed in the available circumstances, therefore, I deem fit to consider the prayer of the claimants for enhancing the awarded sum, even in the absence of their cross-objection in writing.

क. मोटर यान अधिनियम (1988 का 59), धारा 173, सिविल प्रक्रिया संहिता, 1908, आदेश 41 नियम 22 - प्रतिकर - वृद्धि - कब दावेदार द्वारा अपील या प्रत्याक्षेप के अभाव में प्रतिकर में वृद्धि की जा सकती है - विधि स्पष्ट की गई।

B. Civil Procedure Code (5 of 1908), Order 29 Rule 1 - Suit against Corporation - Appellant's plea that offending bus was neither registered nor belonging to appellant No.1 in fact such bus was belonging to some other depot of appellant No.2 - Held - It is undisputed fact on record that the appellant No.2 is the main authority of U.P. State Road Transport Corporation, Jhansi and also the other depot, hence after impleading it as party in the case in view of the provisions of Order 29 of the Code, the presence of any other subordinate officer or its manager was not necessary in the claim petition.

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 29 नियम 1 - निगम के विरुद्ध वाद - अपीलार्थी का अभिवचन कि उल्लंघनकारी बस न तो पंजीकृत थी और न अपीलार्थी क्र. 1 की थी वास्तव में ऐसी बस अपीलार्थी क्र. 2 के किसी अन्य डिपो की थी - अभিনিर्धारित - अभिलेख पर यह अविवादित तथ्य है कि अपीलार्थी क्र. 2 उ.प्र. राज्य सड़क परिवहन निगम, झाँसी

और अन्य डिपो का भी मुख्य प्राधिकारी है इसलिए संहिता के आदेश 29 के उपबंधों को दृष्टि में रखते हुए मामले में उसे पक्षकार बनाने के बाद, दावा याचिका में किसी अन्य अधीनस्थ अधिकारी या उसके प्रबंधक की उपस्थिति आवश्यक नहीं थी।

C. Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Enhancement - Wife aged 25 years and two children aged 5 and 1 year are dependent on the deceased, who was of 35 years of age - By maintaining the dependency of the claimants on the deceased - The sum awarded by the tribunal is further enhanced by Rs.1,20,000 considering the facts of the case.

ग. मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - वृद्धि - 25 वर्ष उम्र की पत्नी और 5 व 1 वर्ष उम्र के दो बच्चे मृतक पर आश्रित, जो 35 वर्ष की उम्र का था - दावेदारों की मृतक पर आश्रितता को बनाये रखते हुए - मामले के तथ्यों को विचार में लेकर अधिकरण द्वारा अधिनिर्णीत रकम में 1,20,000 रुपये की और वृद्धि की गई।

A.G. Dhande with D.S. Soni, for the appellants.

Satyam Agrawal, for the respondent Nos.1 to 4.

Service dispensed with of respondent No.5.

***M.A. No.3545/2005 (Jabalpur), D/- 24 July, 2008.**

Short Note

(5)

Ajit Singh, J

MUNNALAL BASORE

Vs.

STATE OF M.P. & ors.

Service Law - Veterinary Department Contingency Paid Employees Recruitment and Conditions of Service Rules, M.P. 1979, Rule 7(2-D) - Termination - Natural Justice - Petitioner appointed as Part Time Sweeper without prescribing to the selection procedure - Appointment cancelled without adhering to the principles of Natural Justice - Held - Petitioner has not denied that his appointment was made contrary to the statutory rules, therefore appointment is illegal on the face of it - It would be futile to issue any writ to compel observance of Natural Justice.

सेवा विधि - पशु चिकित्सा विभाग आकस्मिकता संदत्त कर्मचारी भर्ती और सेवा की शर्तों नियम, म.प्र. 1979, नियम 7(2-डी) - समाप्ति - नैसर्गिक न्याय - याची को अंशकालीन सफाई कर्मी के रूप में चयन पद्धति विहित किये बिना नियुक्त किया गया - नैसर्गिक न्याय के सिद्धांतों का अनुसरण किये बिना नियुक्ति रद्द की गई - अभिनिर्धारित - याची ने इससे इंकार नहीं किया कि उसकी नियुक्ति कानूनी नियमों के विपरीत की गई थी, इसलिए नियुक्ति प्रत्यक्षतः अवैध है - नैसर्गिक न्याय का अनुपालन करवाने के लिए कोई रिट जारी करना निरर्थक होगा।

None, for the petitioner.

Harish Agnihotri, G.A., for the respondents.

***W.P. No.12429/2003 (Jabalpur), D/- 20 October, 2008.**

Short Note

(6)

S.K. Seth, J

**NARAYAN (DECEASED)
THROUGH L.RS.**

Vs.

SOBHAGMAL RAKHABCHAND

A. Money Lenders Act, M.P. (8 of 1934), Sections 3(1)(a), 3(1)(b), 7(b) & 7(c) - Maintenance of account by money lender for each debtor separately and furnishing statement of accounts every year to debtors, as prescribed, is mandatory - On failure to comply with either of requirements, court can disallow interest - Lower court was not justified in awarding interest - Appeal allowed.

The maintenance of account by money lenders for each debtor separately u/s 3(1)(a) and furnishing of statements of accounts u/s 3(1)(b) to the debtors, in the manner prescribed, is made mandatory. The failure to comply with either of these requirements, visits the defaulter money lender with the penalty mentioned u/s 7(b) or 7(c). The language of the Act is clear and explicit and in absence of any ambiguity, it is the duty of the court to give effect to the language used.

क. साहूकार अधिनियम, म.प्र. (1934 का 8), धाराएँ 3(1)(ए), 3(1)(बी), 7(बी) व 7(सी) - साहूकार द्वारा प्रत्येक ऋणी के लिए पृथक लेखा रखना और प्रत्येक वर्ष लेखा विवरणी ऋणियों को देना, जैसा विहित किया गया है, आज्ञापक है - इन अपेक्षाओं में से किसी का पालन करने में विफल हो जाने पर, न्यायालय ब्याज नामंजूर कर सकता है - अधीनस्थ न्यायालय द्वारा ब्याज अधिनिर्णीत करना न्यायोचित नहीं - अपील मंजूर।

B. Money Lenders Act, M.P. (8 of 1934), Section 7, Civil Procedure Code, 1908, Section 34 - Discretion of court to award interest - Held - Section 7 of the Act has overriding effect - Court can not grant interest u/s 34 of the Code in case of breach of Section 7 of the Act.

No doubt, Section 34 of the Code gives general discretion to court to award interest from the date of the suit. However, when it is said that court has discretion, one has always to bear in mind that the court is required to exercise the discretion on sound judicial principles. When Section 7 of the Act having an overriding effect, directs that in case of breach of Section 7, court cannot grant interest either in whole or in part, then court cannot fall back upon general provision of Section 34 of the Code to award interest in a suit for recovery of loan amount between money lender and borrower. Lower appellate court was not justified in law in awarding interest contrary to provision of Section 7 of the Act.

ख. साहूकार अधिनियम, म.प्र. (1934 का 8), धारा 7, सिविल प्रक्रिया संहिता, 1908, धारा 34 - ब्याज अधिनिर्णीत करना न्यायालय का विवेकाधिकार - अभिनिर्धारित -

अधिनियम की धारा 7 अध्यारोही प्रभाव रखती है - न्यायालय अधिनियम की धारा 7 के मंग के मामले में संहिता की धारा 34 के अन्तर्गत ब्याज नहीं दिला सकता।

Cases referred :

AIR 1975 MP 104 (FB).

Ashish Kanungo, for the appellant.

*S.A. No.182/1996 (Indore), D/- 23 September, 2008.

Short Note

(7)

K.S. Chauhan, J

QASAM KHAN

Vs.

STATE OF M.P.

A. Penal Code (45 of 1860), Section 363 - Kidnap - Minor girl - Consent of a minor girl - Prosecutrix was minor at the time of incident - Therefore, her consent, if any, was of no value. (Para 11)

क. दण्ड संहिता (1860 का 45), धारा 363 - व्यपहरण - अप्राप्तवय बालिका - अप्राप्तवय बालिका की सम्मति - घटना के समय अभियोक्त्री अप्राप्तवय थी - इसलिए उसकी सम्मति, यदि कोई हो, का कोई महत्व नहीं है।

B. Penal Code (45 of 1860), Sections 363 - Kidnap - Minor girl - Age - Father of prosecutrix deposed that his daughter is 12 years of age - In support school transfer certificate produced - Head Master has proved the entries of school transfer certificate - Prosecutrix also deposed her age to be of 13 years - No effective cross-examination has been done to these witnesses on the point of age - Accused himself admitted prosecutrix age of 12 years in his statement recorded u/s 313 of Cr.P.C. - Therefore, irresistible conclusion is that prosecutrix was minor at the time of incident.

(Para 7 & 8)

ख. दण्ड संहिता (1860 का 45), धारा 363 - व्यपहरण - अप्राप्तवय बालिका - आयु - अभियोक्त्री के पिता का बयान कि उसकी पुत्री की आयु 12 वर्ष है - इसकी पुष्टि में विद्यालय स्थानांतरण प्रमाण पत्र पेश किया - प्रधानाध्यापक ने विद्यालय स्थानांतरण प्रमाण पत्र की प्रविष्टियों को सिद्ध किया - अभियोक्त्री ने भी उसकी आयु 13 वर्ष होने का बयान दिया - इन साक्षियों का उम्र के बिन्दु पर कोई प्रमावी प्रतिपरीक्षण नहीं किया गया - द.प्र.सं. की धारा 313 के कथन में स्वयं अभियुक्त ने अभियोक्त्री की आयु 12 वर्ष होना स्वीकार किया - इसलिए, निर्विवादित निष्कर्ष यह है कि घटना के समय अभियोक्त्री अप्राप्तवय थी।

Pradeep Sharma, for the appellant.

Deepak Awasthy, G.A., for the respondent/State.

*Cr.A. No.492/1994 (Jabalpur), D/- 7 August, 2008.

2

Short Note
(8)

S. Samvatsar & S.A. Naqvi, JJ

RAJARAM
Vs.
STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Section 464 - Effect of omission to frame, or absence of, or error in charge - Whether an accused charged with Sec.302 r/w Sec.149 IPC can be convicted u/s 302 IPC without specific charge being framed against him - Held - No, law explained. AIR 1955 SC 274, 1995 SCC (Cr) 175, 1993 SCC (Cr) 583 (ref.)

The Apex Court in the case of Nanakchand vs. State of Punjab [AIR 1955 SC 274] and in Surbran alias Subramanion & ors. vs. State of Kerala [1993 SCC (Cr) 583] held that a person charged for an offence u/s 302 r/w Sec.149 of IPC cannot be convicted for substantive offence u/s 302 IPC without a specific charge having been framed against him as envisaged by law.

In the case in hand, the appellant is charged for commission of offence u/s 302 r/w 149 of IPC, but he is convicted only for commission of offence u/s 302 IPC, hence, we allow this appeal and set-aside the conviction and sentence of the appellant for commission of offence u/s 302 of IPC and remitted the matter back to the trial court for framing charge against the present appellant for commission of offence u/s 302 of IPC and then proceed to re-trial against him in accordance with law.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 464 — आरोप विरचित न करने या उसके अभाव या उसमें गलती का प्रभाव — क्या भा.द.सं. की धारा 302 सहपठित धारा 149 से आरोपित किसी अभियुक्त को उसके विरुद्ध विनिर्दिष्ट आरोप विरचित किये बिना भा.द.सं. की धारा 302 के अन्तर्गत दोषसिद्ध किया जा सकता है — अभिनिर्धारित — नहीं, विधि स्पष्ट की गई। AIR 1955 SC 274, 1995 SCC (Cr) 175, 1993 SCC (Cr) 583 (संदर्भित)

Atul Gupta with Raghuvir Singh, for the appellant.
M.P.S. Bhadoriya, P.P., for the respondent/State.

***Cr.A. No.275/1997 (Gwalior), D/- 20 November, 2008.**

Short Note

(9)

R.C. Mishra, J

RAJU @ RAJ KISHORE YADAV

Vs.

STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), First Schedule, Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005), Section 42(f)(iii), Penal Code, 1860, Section 324 - Bailable - Section 324 of IPC continues to be bailable as provisions of Section 42(f)(iii) of Code of Criminal Procedure (Amendment) Act, 2005, has not been brought into effect.

As an obvious corollary, the offence u/s 324 IPC continues to be bailable. The other offence punishable u/s 294 of IPC is also not a non-bailable offence.

In this view of the matter, anticipatory bail application stands dismiss as not maintainable.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), प्रथम अनुसूची, दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2005 (2005 का 25), धारा 42(एफ)(iii), दण्ड संहिता, 1860, धारा 324 - जमानतीय - भा.द.सं. की धारा 324 जमानतीय होना जारी रखी जाती है क्योंकि दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2005 की धारा 42(एफ)(iii) प्रभाव में नहीं लायी गई है।

Abhishek Arjaria, for the applicant.

S.K. Kashyap, Dy.G.A., for the non-applicant/State.

*M.Cr.C. No.6110/2008 (Jabalpur), D/- 19 August, 2008.

Short Note

(10)

Mrs. S.R.Waghmare, J

RAKESH & ors.

Vs.

STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228, Penal Code, 1860, Sections 341, 147, 332/149, 333/149 & 353/149 - Discharge - Dismissal of accused's application to discharge - Revision - Held - At the time of framing of charge, meticulous consideration of evidence and material by court is not required - Court must apply mind to the material placed on record - Court below framed charges on the basis of material placed on record - No interference in revision - Revision dismissed. AIR 1990 SC 1962, 1997 CrLJ 1846, AIR 1980 SC 52, AIR 1990 SC 121, AIR 2004(1) SC 353 (ref.)

Framing of charge largely depends on the discretion of the trial court, if there is ground for framing that the accused has committed offence, the court can justiciably say that a prima-facie case against the accused exists and then frame a charge against the accused for committing that offence. However, on the basis of material on record, if the court comes to

the conclusion that no material exists for framing of charge, then it can refuse to do so. All that is required is that at the time of framing of charge, the court must apply its judicial mind to the material placed on record.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228, दण्ड संहिता, 1860, धाराएँ 341, 147, 332/149, 333/149 व 353/149 - उन्मोचन - उन्मोचित करने के लिए अभियुक्त का आवेदन खारिज - पुनरीक्षण - अभिनिर्धारित - आरोप विरचित करते समय न्यायालय द्वारा साक्ष्य और सामग्री का पूरी बारीकी से विचार करना अपेक्षित नहीं - न्यायालय को अभिलेख पर लायी गई सामग्री पर मस्तिष्क का प्रयोग अवश्य करना चाहिए - अधीनस्थ न्यायालय ने अभिलेख पर लाई गई सामग्री के आधार पर आरोप विरचित किये - पुनरीक्षण में कोई हस्तक्षेप नहीं - पुनरीक्षण खारिज। AIR 1990 SC 1962, 1997 CrLJ 1846, AIR 1980 SC 52, AIR 1990 SC 121, AIR 2004(1) SC 353 (संदर्भित).

Jai Singh with Rajesh Shukla, for the applicants.

G.S. Chouhan, Dy.G.A., for the non-applicant/State.

***Cr.R. No.1000/2008 (Indore), D/- 19 September, 2008.**

Short Note

(11)

Mrs. Indrani Datta, J

S.R. BHAGWAIYA

Vs.

STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Sections 354 & 482 - Judgment - Adverse remarks - Against I.O. should not be passed without providing him opportunity of hearing. 2000(2) J LJ 135, AIR 2004 SC 1979 (ref.)

At the time of passing judgment Session Court passed stricture against I.O. that the I.O. had not properly investigated the case. Whether he is capable of investigating criminal case properly should be inquired into. S.D.O. (Police) started departmental inquiry against him. Action challenged. It is held by the High Court so far as observation of trial court that I.O. has not conducted investigation properly is concerned, it cannot be said that these observations were not necessary for decision of the case. But considering the fact that no opportunity of hearing was provided to the applicant, it is directed that the petition is disposed of with a direction that stricture passed in the judgment should not be used against applicant in the departmental inquiry.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 354 व 482 - निर्णय - प्रतिकूल टिप्पणी - अनुसंधानकर्ता अधिकारी के विरुद्ध उसे सुनवाई का अवसर दिये बिना पारित नहीं की जानी चाहिए। 2000(2) J LJ 135, AIR 2004 SC 1979 (संदर्भित)

M.K. Jain, for the applicant.

R.D. Agrawal, Panel Lawyer, for the non-applicant/State.

***M.Cr.C. No.7634/2008 (Gwalior), D/- 19 November, 2008**

**I.L.R. [2009] M. P., 1
SUPREME COURT OF INDIA**

Before Mr. Justice R.V. Raveendran & Mr. Justice Mukundakam Sharma
24 July, 2008*

RAJBABU & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 113-A, Penal Code, 1860, Section 306 - Presumption - When invoked - *The mere fact that a woman committed suicide within 7 years of her marriage and that she had been subjected to cruelty by her husband or any other relative of her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband or by any relative of her husband - The court is required to look into all the other circumstances of the case - One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature as was likely to derive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman.*

(Para 15)

क. साक्ष्य अधिनियम (1872 का 1), धारा 113-ए, दण्ड संहिता, 1860, धारा 306 - उपधारणा - कब अवलंब लिया जा सकता है - केवल यह तथ्य कि महिला ने अपने विवाह के 7 वर्ष के भीतर आत्महत्या की और उसके साथ उसके पति या उसके पति के किसी रिश्तेदार द्वारा क्रूरता की गई, स्वतः यह उपधारित नहीं करता कि आत्महत्या के लिए उसके पति या पति के किसी रिश्तेदार द्वारा दुष्टेयित किया गया था - न्यायालय को मामले की अन्य सभी परिस्थितियों की भी जाँच-पड़ताल करना आवश्यक है - इन परिस्थितियों में से एक परिस्थिति, जिस पर न्यायालय द्वारा विचार किया जाना है, यह है कि क्या कथित क्रूरता ऐसी प्रकृति की थी जो महिला को आत्महत्या करने या उसके जीवन, अंग या स्वास्थ्य को गंभीर क्षति या खतरा कारित करने के लिए संभाव्य थी।

B. Evidence Act (1 of 1872), Section 113-A, Penal Code, 1860, Section 306 - Presumption - When not invoked - *The presumption is not mandatory and the court shall have to have regard to all the other circumstances of the case - Deceased died because of burn injuries received by her in her matrimonial home - A letter which was allegedly written by the deceased - The letter reflects the attitude of the in-laws towards the deceased - In the said letter, there was no reference of any act or incident whereby the appellants were alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased to commit suicide - On such slender evidence, presumption u/s 113-A of the Act cannot be invoked to find the appellant guilty of the offence, u/s 306 IPC.* (Paras 16 & 17)

RAJBABU Vs. STATE OF M.P.

ख. साक्ष्य अधिनियम (1872 का 1), धारा 113-ए, दण्ड संहिता, 1860, धारा 306 - उपधारणा - कब अवलंब नहीं लिया जा सकता - उपधारणा आज्ञापक नहीं है और न्यायालय को मामले की अन्य सभी परिस्थितियों को भी ध्यान में रखना होगा - मृतक की मृत्यु उसके दाम्पत्य निवास में उसे जलने से आयी क्षतियों के कारण हुई - एक पत्र जो कथित रूप से मृतक द्वारा लिखा गया - पत्र मृतक के प्रति ससुराली जनों के रवैये का आभास कराता है - उक्त पत्र में किसी कृत्य या घटना का कोई हवाला नहीं है जिससे अपीलार्थियों ने कथित रूप से जानबूझकर कोई कार्य या लोप किया या मृतक को आत्महत्या करने के लिए साशय सहायता की या उकसाया - ऐसी अपर्याप्त साक्ष्य पर अपीलार्थी को भा.द.सं. की धारा 306 के अन्तर्गत दोषी ठहराने के लिए अधिनियम की धारा 113-ए के अन्तर्गत उपधारणा का अवलंब नहीं लिया जा सकता।

Cases referred :

2008(11) SCR 270, 2008(10) SCALE 437, 2008(8) JT 250.

J U D G M E N T

The Judgment of the Court was delivered by **DR. MUKUNDAKAM SHARMA, J.:-** By this Judgment and order we propose to dispose of the appeal filed by the appellants against the judgment and order dated 23-9-2002 of the High Court of Madhya Pradesh at Jabalpur whereby the Learned Single Judge dismissed the appeal filed by the appellants against the judgment and order dated 17-6-1989 of the Learned Additional Sessions Judge, Khurai, convicting the appellants under the provisions of Sections 306 and 498A of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo rigorous imprisonment for three years on each count.

2. The deceased, Shanti Bai, daughter of Janak Rani (PW.1) and Gyan Das (PW.2) was married to Rajbabu-appellant No.1 two years prior to the date of occurrence. On 17.7.1988 Shanti Bai set herself on fire in her matrimonial home and she died because of burn injuries received by her. At the time when the occurrence took place the Appellant No.2, Smt. Munnibai (mother-in-law of the deceased) had gone to fetch water from the well. The husband of Appellant No.2, Shri Jagat Bandhu (father-in-law of the deceased), who was acquitted by the trial court, was away to some other place, whereas Appellant No.1 had gone for cutting wood from the forest. Appellant No.1 immediately coming to know about the incident came back and lodged the first information report at police station Bhangarh which was recorded by the Head Constable Narbada Prasad, who was examined as PW.9 during the trial. The said report which was lodged by the appellant No.1 was exhibited during the trial and was marked as Ex. P.16. The deceased was carried to the railway station Karonda for being taken to the Government Hospital at Bina for treatment. The police station Incharge, Mr. Ashok Chourasia (PW.8), also arrived at the railway station and recorded the dying declaration, wherein it was noted that Shanti Bai died in the accidental fire while cooking food in the house. In the said dying declaration the deceased exculpated all the members of her matrimonial home. Immediately thereafter she died at the railway station itself.

RAJBABU Vs. STATE OF M. P.

The police thereafter sent the body for post mortem examination which was conducted and exhibited as Ex. P.20 during the trial. According to the said post mortem report the deceased suffered 90% burns which were found to be ante mortem. The police thereafter started investigation and on completion thereof, submitted a charge-sheet against Rajbabu-appellant No.1, Smt. Munnibai-appellant No. 2, who is mother of appellant No.1 and Jagat Bandhu, father of the appellant No.1 under Sections 306 and 498A of the IPC. On the basis of the aforesaid charge-sheet, charges were framed against all the three accused-appellants under Sections 306 and 498A of the IPC for treating the deceased with cruelty and abetting her to commit suicide as a result of which allegedly she committed suicide.

3. During the course of the trial, altogether eight witnesses were examined in order to prove the charges against the accused persons. Trial court after hearing the arguments and on appreciation of the evidence on record acquitted accused No.3, the father of the Appellant No.1, whereas an order was passed convicting appellant No.1 and appellant No.2 under Sections 306 and 498A of the IPC after holding that offences against both of them are proved beyond reasonable doubt. The learned trial court thereafter passed an order of sentence, sentencing both the appellants to undergo rigorous imprisonment for three years on each count. Both the sentences were to run concurrently. No fine was imposed. Against the aforesaid judgment both the appellants filed an appeal before the High Court which was dismissed by its judgment on 23rd September, 2002. Being aggrieved by the said judgment this appeal has been filed by the appellants. During the course of the trial they were granted bail. In the present appeal order was passed by this Court enlarging them on bail.

4. We have heard the learned counsel appearing for the appellants. However, counsel for the respondent-State did not appear in the hearing of the appeal although her name was shown in the daily cause list. Counsel appearing for the appellants at the very outset brought to our notice that Appellant No.1, namely, Rajbabu son of Jagat Bandhu had died on 27th September, 2005 at village Sabgah. The said appellant having died, the appeal filed by him stands disposed off having been abated and therefore having been rendered infructuous. This appeal, therefore, survives only so far as accused/appellant No.2, namely, Smt. Munni Bai is concerned.

5. Learned counsel appearing for the appellant, Smt. Munni Bai submitted that the deceased had died of burn injuries received by her while she was cooking food in the kitchen in her matrimonial home and that it is clearly established from the records that all the other members of the family, at the time of occurrence were not present. It was also submitted that the prosecution case itself indicates that appellant No. 2 had gone out of the house for fetching water and, therefore, she could not have been held guilty for an offence either under Section 306 or 498A of the IPC. He further submitted that the only incriminating evidence that

RAJBABU Vs. STATE OF M. P.

could be said to be available against her is the letter which was allegedly written by the deceased and was exhibited as Ex. P.1 and a dying declaration which was recorded by Shri Ashok Choursia, the investigating officer who was examined as PW 8. It was submitted by him that none of the aforesaid documents pin point the guilt of the appellant in the act of commission of suicide by the deceased.

6. We have considered the aforesaid submissions in the light of the record including the evidence adduced on behalf of the prosecution. There is no eye witness to the occurrence of the act of suicide committed by the deceased who was the daughter-in-law as she was the only person available at the relevant time in the matrimonial home. At that point of time she was cooking food for all the members of the family who had gone out of the house. Her husband, appellant No.1 had gone to the forest for collecting wood whereas her father-in-law, who was original accused No.3 had gone out of the house for some other work and whereas the sole appellant before us, had gone out of the house to fetch water. The only evidence that has been produced and was used for leveling accusations against the present appellant was the dying declaration and the contents of Ex. P.1 which is stated to be a letter written by the deceased. Some of the witnesses like PW 1 and PW 3, the family members of the parental home of the deceased have stated in their deposition about the alleged ill-treatment meted out to the deceased by the in-laws family. Let us therefore analyse and appreciate the said pieces of evidence as available on record.

7. The dying declaration was recorded on 17.7.1988 at about 12.45 hrs. by the investigating officer, PW 8 at the railway station from where the deceased was to be taken to the hospital for medical treatment. The incident had taken place at about 10.30 AM. Deceased had stated in the said dying declaration which was recorded in the presence of some of the villagers that while pouring kerosene oil, one end of her sari caught fire as she was cooking food and that in the aforesaid manner she got burnt. It is also stated by her in the said dying declaration that she did not set fire on her own and no body set fire on her and that while preparing meal her sari caught fire accidentally. She has categorically stated in the said dying declaration that no quarrel had taken place and that there was no problem in her matrimonial home. The said statement was read over to her and her thumb impression was put as she could not sign because of the burninjuries received by her.

8. The courts below have questioned the evidentiary value of the said dying declaration. A perusal of the said dying declaration would prove and establish that there is nothing incriminating in the said statement against the appellant and, therefore, the said dying declaration, which was exculpatory in nature, so far as the prosecution is concerned is of no relevance and would rather help the accused appellants. As there is nothing incriminating in the said document against the appellants, neither are we inclined nor are we required to go into the question of evidentiary value of the said document.

RAJBABU Vs. STATE OF M. P.

9. The other incriminating document against the accused appellants is the undated letter exhibited as exhibit P.1. The said letter appears to have been written by the deceased, addressing to father, mother and the younger brothers of the husband. In the said statement the deceased has stated that she is unable to tolerate the atmosphere in the family in her matrimonial home. She also stated that she prefer to live in hell because in-laws have done such acts with her which are of no use to mention. She has also stated that whatever has been done was all-right. In her letter she has stated that she had always considered her father-in-law and mother-in-law more than her parents and that even then they have treated her in such a manner which she never expected. It is mentioned therein that the matrimonial house was ruined after her arrival and that she was treated like an enemy. She has stated that her mother-in-law had told that if she (Shanti Bai) is kept in their house then nothing will remain. In that view of the matter she did not want to become burden on herself nor on her in-laws and that moment was the last time of her life. Of course, in the letter there is no date written but towards the end of the letter it was mentioned that it was the last day of her life. She also stated that she had a long life but the hard words had made her life incomplete and she has no further time to write further. The said letter appears to have been written on the date of occurrence and in the said letter she had given vent to all her expressions, feelings and contempt for the family. The said letter was found in the box seized from the room where the incident occurred.

10. The issue, therefore, that falls for our consideration is whether the conviction can be based against the appellant No. 2 on the basis of the said letter alone.

11. The prosecution has examined the mother of the deceased as PW 1. She had stated in her deposition that her daughter told her that in her in-laws house, her mother-in-law used to ask her to run hand flourmill. She also stated that her son-in-law Rajbabu also used to quarrel with her daughter and used to beat her. She has also stated that her daughter told her that her mother-in-law used to use filthy language for her father and brothers. It is further stated by her that once her husband had gone to bring Shanti Bai, at that time her mother-in-law did not send her rather she was beaten by her in his presence for not cleaning the utensils. Thereafter her husband came back. In her cross examination she stated that her daughter wanted to become educated and wanted to go for employment. Her daughter told her after coming back from the matrimonial home that her husband is not educated and the family is poor for which she had expressed pain. Her daughter told her that her life would be spoiled in that house and on that issue she was very unhappy. It was also stated by her that her daughter never sent any letter from her in-laws house. She further replied in her cross-examination that the deceased never told anything to her relatives and members of the society regarding her troubles because she never wanted to make her life public.

12. We have also on record the deposition of the sister-in-law of the deceased

RAJBABU Vs. STATE OF M. P.

Smt. Kamla Rani who was examined as PW 3. She has also deposed that when Shanti Bai came back from her in-laws house for the first time she told her that her husband and mother-in-law are troubling her very much. She is forced to run hand driven flourmill which she was not habitual and when she was not able to run the flourmill, her mother-in-law and husband used to beat her. It has also been stated in her deposition that after coming back from her in-laws house Shanti Bai told her that once there had been a quarrel between her and her mother-in-law and on the said issue her husband wanted to burn her but at that moment her mother-in-law stopped her husband not to do so at that time. It was further stated in her deposition that Shanti Bai told her not to narrate this story to any of her brothers. The contents of exhibit P.1 were approved by PW 3, stating that the said letter was written by the deceased Shanti Bai.

13. It appears from the statement of PW 1 and also corroborated by the statement of PW 3 (sister-in-law of the deceased) that the deceased studied upto XI standard and wanted to study further and wanted to be employed but since her husband was not literate and since the family was poor, they could not make arrangements for her further studies and they could not have even allowed her to go for employment, for which she was upset. In her statement PW 1 had, of course, brought in some allegations about the mother-in-law but only from that statement it cannot be said that she had directly any hand in the act of commission of suicide. So far as the evidence of PW 1 and PW 3 are concerned, there is only evidence to the extent that at times the deceased was not treated well by the appellant.

14. Of course, reliance is placed by the learned courts below on the provisions of Section 113A of the Indian Evidence Act, 1872 (for short 'the Evidence Act'). Any person who abets the commission of suicide is liable to be punished under Section 306 IPC. Section 107, IPC lays down the ingredients of abetment which includes instigating any person to do a thing or engaging with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or intentional aid by any act or illegal omission to the doing of that thing.

15. In the instant case there is no direct evidence to establish that the appellant either aided or instigated the deceased to commit suicide or entered into any conspiracy to aid her in committing suicide. In the absence of direct evidence the prosecution has relied upon Section 113-A of the Evidence Act, under which the court may presume on proof of circumstances enumerated therein, and having regard to all the other circumstances of the case, that the suicide had been abetted by the accused. The explanation to Section 113-A further clarifies that cruelty shall have the same meaning as in Section 498-A of the IPC. Under Section 113-A of the Evidence Act, the prosecution has first to establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband or any relative of her husband had subjected her

RAJBABU Vs. STATE OF M. P.

to cruelty. Section 113-A gives a discretion to the court to raise such a presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of the word "cruelty" in Section 498-A IPC. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband or any relative of her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband or any relative of her husband. The court is required to look into all the other circumstances of the case. One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. The law has been succinctly stated in *Ramesh Kumar v. State of Chhattisgarh* reported in (2001) 9 SCC 618 wherein this Court observed:

"12. This provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26-12-1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression 'may presume' suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to 'all the other circumstances of the case'. A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain

RAJBABU Vs. STATE OF M.P.

from drawing the presumption. The expression -- 'the other circumstances of the case' used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase 'may presume' used in Section 113-A is defined in Section 4 of the Evidence Act, which says -- 'Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.'

In State of *W.B. v. Orilal Jaiswal* reported in (1994) 1 SCC 73 this Court observed:

"15. We are not oblivious that in a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of Section 498-A IPC and Section 113-A of the Indian Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. Lord Denning in *Bater v. Bater* (1950) 2 All ER 458 (All ER at p. 459) has observed that the doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject-matter."

16. Having regard to the principles aforesaid, we may now advert to the fact of the present case. Here is a case where the evidence on record discloses that the deceased wanted to be married in a literate family. She was not happy with the fact that her husband was illiterate and also with the status and condition of the family of her husband. She was also required to do some domestic work as the

RAJBABU Vs. STATE OF M.P.

family was poor, for which she was not happy. The deceased was of the view point that her life has been spoiled by marrying Appellant No. 1. The letter reflects the attitude of the in-laws of the deceased towards the deceased. In the said letter there was no reference of any act or incident whereby the appellants were alleged to have committed any willful act or omission or intentionally aided or instigated the deceased to commit suicide.

17. On such slender evidence, therefore, we are not persuaded to invoke the presumption under Section 113-A of the Evidence Act to find the appellant guilty of the offence under Section 306 IPC.

18. The next question which remains for our consideration is whether an offence is made out under section 498A of IPC. Though the letter allegedly written by the deceased mentions the fact that the attitude of the family was not good towards the deceased and she was not treated well but there is no mention about any of such incident. PW1 and PW3 in their statements have emphasized that the mother-in-law of the deceased used to ask the deceased to run hand driven flourmill to which she was not habitual. In the year 1988 when the abovementioned incident occurred, the hand driven flourmills were generally used by women in the poor families in the villages and even till today one may find use of the same in some villages in the country. Thus asking one to run the same at that point of time may not amount to an act of cruelty.

19. In the said statements there is also a mention of an incident where the deceased had been beaten by her husband. The mother-in-law (appellant No. 2) cannot be held liable for the said act; rather there is evidence on record of PW3 who had stated that appellant No. 2 had once restrained her son. Though in the statement of PW 1 there is mention of one or two incidents when the present appellant had beaten the deceased but there appears to be possibility of embellishment. The father of the deceased (PW2), in his statement has not made any statement regarding cruelty being committed on his daughter in her in-laws house. After analyzing the said evidence and the statements made by PW1 and PW3 we are of the opinion that the benefit of doubt should be granted to appellant No. 2.

20. We, therefore, set aside the conviction under Sections 306 and 498A of the IPC passed against the appellant No. 2 and acquit her granting her benefit of doubt. The appeal is allowed in so far as appellant No. 2 is concerned. The appeal has abated in so far as appellant No. 1 is concerned. The appellant No. 2 is already on bail. She is released from the terms of her bail bonds.

Appeal allowed.

I.L.R. [2009] M. P., 10

WRIT APPEAL

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

25 July, 2008*

P.G. KSHATRIYA

... Appellant

Vs.

STATE OF M.P. & anr.

... Respondents

A. Service Law - Reimbursement of legal and travelling expenses - *Appellant was trapped allegedly taking bribe while he was collecting fine - Appellant acquitted by trial court - Appellant entitled for reimbursement of legal expenses and travelling expenses as criminal case was in respect of matters arising out of or connected with official duties or official position.*

(Paras 5 to 8)

क. सेवा विधि - विधिक और यात्रा खर्चों की प्रतिपूर्ति - अपीलार्थी को जब वह जुर्माना संग्रहीत कर रहा था, कथित रूप से रिश्वत लेते हुए पकड़ा गया - अपीलार्थी को विचारण न्यायालय द्वारा दोषमुक्त किया गया - अपीलार्थी विधिक खर्चों और यात्रा खर्चों की प्रतिपूर्ति का हकदार क्योंकि दाण्डिक मामला कार्यालयीन कर्तव्यों या कार्यालयीन स्थिति से संसक्त विषयों के संबंध में उत्पन्न हुआ था।

B. Service Law - Constitution, Article 226 - Damages for malicious prosecution - Criminal proceedings instituted against the appellant obviously was in accordance with the procedure established by law - There is no violation of right of the appellant under Article 21 of the Constitution - Therefore, High Court cannot, in exercise of its powers under Article 226 of the Constitution, award compensation to the appellant. (Para 9)

ख. सेवा विधि - संविधान, अनुच्छेद 226 - विद्वेषपूर्ण अभियोजन के लिए क्षतिपूर्ति - अपीलार्थी के विरुद्ध संस्थित दाण्डिक कार्यवाहियां प्रत्यक्षतः विधि द्वारा स्थापित प्रक्रिया के अनुसार थी - अपीलार्थी के संविधान के अनुच्छेद 21 के अन्तर्गत अधिकार का कोई अतिक्रमण नहीं - इसलिए, उच्च न्यायालय, संविधान के अनुच्छेद 226 के अन्तर्गत अपनी शक्तियों के प्रयोग में, अपीलार्थी को प्रतिकर नहीं दिला सकता।

Cases referred :

AIR 1957 Assam 143.

P.G. Kshatriya, appellant in person.

ORDER

The Order of the Court was delivered by **A. K. PATNAIK, C. J.** :- This is an appeal against the order dated 28.9.2005 passed by the learned Single Judge dismissing the Writ Petition No.11567/2003 filed by the appellant.

2. The facts briefly are that the appellant filed an Original Application, O.A.No.1784/1997, before the Madhya Pradesh State Administrative Tribunal,

P. G. KSHATRIYA Vs. STATE OF M. P.

Jabalpur, (for short 'the Tribunal') constituted under the Administrative Tribunals Act, 1985. In the O.A., the case of the appellant was that while he was working as a Tahsildar, Maihar in Satna District, he had recovered a fine amount imposed under Section 248 of the Madhya Pradesh Land Revenue Code, 1959 and had entered such amount in the money receipt book as well as in cash book but the fine amount was seized as a bribe by the Officers of the Madhya Pradesh Lokayukt on 19.12.1985. Thereafter, a criminal case was instituted against him and he was placed under suspension. After investigation, charge-sheet was filed and he was tried by the Special Judge, Satna, and acquitted by order dated 30.1.1995. An appeal was filed by the Lokayukt but was dismissed by order dated 18.10.1995 of the High Court. During pendency of the criminal case, the appellant retired from the service on 30.6.1991. By order dated 5.7.1996 the Commissioner, Jabalpur, treated the period of suspension of the appellant from 28.3.1988 to 30.6.1991 as on duty under Fundamental Rule 54 for all purposes and he was paid arrears of salary for the aforesaid period. Thereafter by an application dated 28.11.1996 to the Revenue Secretary, Government of Madhya Pradesh, the appellant claimed legal expenses of Rs.16,116.50 paise and travelling expenses of Rs.14,106.00 paise, totalling of Rs.30,222.50 paise, for defending himself in a criminal case and requested the Government to reimburse the amount of Rs.30,222.50 paise but the amount was not paid to the appellant. The appellant accordingly prayed that an order be passed by the Tribunal directing the respondents to pay the amount of Rs.30,222.50 paise and to pay 18% compound interest on the amount till the date of actual payment and to further pay Rs.1,000/- as cost of proceedings and to also pay damages of Rs.50,000/- per annum or Rs.6,35,000/- in lump sum.

3. Thereafter the Madhya Pradesh State Administrative Tribunal was abolished and the O.A. was transferred to the High Court and renumbered as Writ Petition No.11567/2003 and heard by a learned Single Judge of the High Court. Before the learned Single Judge, the appellant relied on a circular dated 5.4.1961 of the General Administration Department, Government of Madhya Pradesh, and a circular dated 31.1.1964 of the Finance Department, Government of Madhya Pradesh. But in the impugned order dated 28.9.2005, the learned Single Judge held that these circulars of the State Government are not applicable to a Government servant who is prosecuted in a criminal case and is acquitted and in any case whether the amount was paid to the lawyer by the appellant for his defence was a disputed question of fact and the High Court while exercising jurisdiction under Article 226 of the Constitution cannot decide this question and hence the appellant may claim the amount by filing a civil suit and if such a suit is filed the same will be decided in accordance with law. Regarding the claim of Rs.50,000/- per annum or Rs.6,35,000/- in lump sum towards damages on account of wrongful or malicious prosecution, the learned Single Judge held in the impugned order that as the claim for damages is disputed by the respondents, the appellant may file a civil suit for

P. G. KSHATRIYA Vs. STATE OF M.P.

realization of such damages, if so advised, and if such a suit is filed, the same may be decided on its merits in accordance with law and such claim for damages based on disputed questions of fact is not within the scope of writ petition under Article 226 of the Constitution of India even if his fundamental right under Article 21 of the Constitution of India has been violated.

4. At the hearing of the appeal, the appellant who appeared in person submitted that he was entitled to legal expenses and travelling expenses amounting to Rs.30,222.50 paise for defending himself in the criminal case instituted by the State as per the circular dated 5.4.1961 of the General Administration Department of the State Government and the circular dated 31.1.1964 of the Finance Department of the State Government and as per the provisions of Article 320(3)(d) of the Constitution of India and the learned Single Judge ought not to have dismissed the claim of Rs.30,222.50 paise towards the legal expenses and travelling expenses on the ground that the amounts being disputed should be claimed by the appellant in a civil suit and the High Court cannot consider the claim under Article 226 of the Constitution. The appellant cited a Division Bench decision of the Assam High Court in *Samul Hussain Vs. Union of India* (AIR 1957 Assam 143).

5. We find a lot of force in this submission of the appellant. In *Samul Hussain Vs. Union of India* (supra), Samul Hussain was initially appointed as a clerk in the Postal Department but thereafter appointed as Town Inspector for Gauhati Town. He was prosecuted for having illegally withdrawn Rs.714/- and for attempt to cheat the department by presenting another bill for a sum of Rs.1250-8-0 and pending disposal of these prosecutions he was suspended on 3.4.1951, but eventually acquitted of the charges on 8.9.1953 and reinstated in service. In a writ petition filed under Article 226 of the Constitution, he contended inter alia that he should be allowed the expenses which he had incurred in connection with his defence in the criminal prosecution. The Assam High Court found that the Postal Department had rejected his claim simply on the ground that the reimbursement of the expenses incurred by him in connection with his defence was not admissible under the Rules. The Assam High Court held that while dealing with the question, attention was not drawn to Article 320 of the Constitution and particularly Clause (3) of Article 320 of the Constitution which requires consultation of the Public Service Commission on any claim by or in respect of a person who is serving or has served under the Government in a civil capacity that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty, should be paid out of the consolidated fund of the State. The Assam High Court disposed of the writ petition with a direction that if Samul Hussain makes a proper application to the authorities concerned they will fully consider the matter and if they refer the matter for consideration of the Public Service Commission, in that case the Commission would decide whether or not in the circumstances, the petitioner would be entitled to reimbursement of the amount claimed.

P.G. KSHATRIYA Vs. STATE OF M.P.

6. The case of the appellant before us is that he had incurred legal expenses of Rs.16116.50 paise for defending himself in a criminal case instituted against him by the State Government for recovering fine amount under Section 248 of the Madhya Pradesh Land Revenue Code, 1959, in discharge of his duty as Tahsildar, Maihar, which was seized as a bribe and the criminal case has ended in acquittal and his claim for reimbursement of such legal expenses was covered by the circular dated 5.4.1961 of the General Administration Department of the State Government. Paragraph 2(a) of the Circular dated 5.4.1961 is extracted hereinbelow :

"Proceedings initiated by Government in respect of matters connected with the official duties or position of the Government servant : -- Government will not give any assistance to a Government servant for his defence in any proceedings, civil or criminal instituted against him by the State in respect of matters arising out of or connected with his official duties or his official position. Should, however, the proceedings end in favour of the Government servant, Government will be prepared to entertain his claim for reimbursement of the costs incurred by him for his defence. If Government are satisfied from the facts and circumstances of the case, that the Government servant was subjected to the strain of the proceedings without proper justification they may pay to him the whole or any reasonable proportion of the expenses incurred by him for his defence."

It will be clear from the aforesaid paragraph 2(a) of the Circular dated 5.4.1961 that if a criminal case instituted against the Government servant by the State in respect of the matters arising out of or connected with his official duties or his official position ends in favour of the Government servant, the Government will entertain his claim for reimbursement of the costs incurred by him for his defence and if the Government is satisfied from the facts and circumstances that the Government servant was subjected to the strain of the proceedings without proper justification then the Government may pay him all or any reasonable proportion of the expenses incurred by him for his defence.

7. The case of the appellant is also that he had travelled for his appearance in Court in the criminal case and his claim for reimbursement of expenses on such travel amounting to Rs.14,106.00 was covered by the circular dated 31.1.1964 of the Finance Department of the State Government. The relevant portion of the circular dated 31.1.1964 relating to the travelling allowance for Government servants undertaking journeys for appearing before police officers for investigation or for appearing in a Court of law is quoted herein below :

"1. The State Government have had under consideration the question whether and if so, at what rates, T.A. should be

P. G. KSHATRIYA Vs. STATE OF M.P.

allowed to Government servants in the following two types of cases, --

(i) where a Government servant, whether he is under suspension or not, performs journeys to attend Police/special Police Establishment Enquiry in connection with a case in which he is suspected to be involved.

(ii) where a Government servant undertakes journeys during suspension for appearing in a Court of law, as an accused and is later on acquitted by the court and reinstated in service or would have been reinstated in service but for death or his having attained the age of compulsory retirement or being allowed to retire voluntarily.

2. As regards cases of the first type, it has been decided that T.A. as for a journey on tour may be allowed to a Government servant for such journeys provided that they are performed under the direction of or with the approval of the Head of Office in which he is for the time being employed or was employed before suspension.

3. As regards cases of the second type, it has been decided that T.A. as for journey on tour, based on the grade to which the Government servant belonged before suspension, may be reimbursed by the administrative department concerned, provided the legal expenses incurred by him in defending such proceedings are reimbursed to him, in full or in part under Article 320(3)(d) of the Constitution. In cases where the journeys were performed by the Government servant by rail in a class lower than the class which he was entitled before suspension, the fares of the class actually used, in addition to his other entitlements of T.A. as on tour, may be paid."

It will be clear from para 3 of the circular quoted above that in the second type of cases where a Government servant undertakes journeys during suspension for appearing in a Court of law, as an accused and is later on acquitted by the Court and would have been reinstated in service but for having attained the age of retirement, T.A. for a journey on tour based on the grade to which the Government servant belonged before suspension, may be reimbursed by the administrative department concerned provided the legal expenses incurred by him in defending such proceedings are reimbursed to him in full or in part under Article 302(3)(d) of the Constitution.

8. In our considered opinion, therefore, the view taken by the learned Single Judge in the impugned order that the circular dated 5.4.1961 of the General

P. G. KSHATRIYA Vs. STATE OF M. P.

Administration Department of the State Government and the circular dated 31.1.1964 of the Finance Department of the State Government are prima facie not applicable to the case of the appellant is incorrect. The two circulars dated 5.4.1961 and 31.1.1964 are clearly applicable to the case of the appellant as a criminal case instituted against him by the State in respect of matters arising out of or connected with his official duties or his official position as Tahsildar, Maihar, ended in his favour and the Government must therefore consider his claim for reimbursement of costs of Rs.16,116.50 paise for his defence and if the Government is satisfied from the facts and circumstances of the case that the appellant was subjected to strain of the proceedings without proper justification, the Government may pay to him the whole or any reasonable proportion of the expenses incurred by the appellant. Further if the Government reimburses the whole or proportion of the legal expenses incurred by the appellant for defending himself in a criminal case, the Government must consider reimbursing the travelling allowance for undertaking journey during suspension for appearing in the Court in a criminal case in accordance with the circular dated 31.1.1964. From the Return and Additional Return filed by the respondents in the OA, it appears that instead of considering the claim of the appellant for reimbursement of the legal expenses and travelling expenses, the State Government has taken a view that the two circulars are not applicable to a Government servant who is prosecuted for offences, particularly offences under the Prevention of Corruption Act. Appropriate writ or directions will therefore have to be issued under Article 226 of the Constitution to the respondents to consider the claim for reimbursement of the expenses of Rs.30,222.50 paise to the appellant.

9. Regarding the claim for damages of Rs.50,000/- per annum or Rs.6,35,000/- in lump sum for malicious prosecution, however, the remedy for the appellant is a civil suit against the respondents in which the ingredients of malicious prosecution and the quantum of damages are factually established by evidence. The High Court in exercise of power under Article 226 of the Constitution can only grant compensation for breach of fundamental right under Article 21 of the Constitution, which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The criminal proceedings instituted against the appellant obviously was in accordance with the Prevention of Corruption Act and the Criminal Procedure Code and in case the appellant was arrested and tried, the same was in accordance with the procedure established by law. There is, thus, no violation of the right of the appellant under Article 21 of the Constitution and therefore, the High Court cannot in exercise of its power under Article 226 of the Constitution, award compensation to the appellant. The learned Single Judge was right in holding that the appellant, if so advised, may file a civil suit for damages of Rs.50,000/- per annum or Rs.6,35,000/- in lump sum towards damages for malicious prosecution.

BASANT KUMAR VERMA Vs. STATE OF M.P.

10. In the result, this appeal is partly allowed and the respondents are directed to consider the claim for reimbursement of legal expenses and travelling allowance incurred by the appellant in defending himself in the criminal case before the Court and undertaking journeys to the Court while he was under suspension, totalling to Rs.30,222.50 paise in accordance with the circular dated 5.4.1961 of the General Administration Department of the State Government and the circular dated 31.1.1964 of the Finance Department of the State Government and take decision within a period of two months from the date of receipt of the certified copy of the order. No costs.

Appeal partly allowed.

I.L.R. [2009] M. P., 16

WRIT APPEAL

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

7 August, 2008*

BASANT KUMAR VERMA

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85(1) & (2), Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - Resolution of Gram Panchayat - Appeal - Maintainability - Resolution of Gram Panchayat to appoint appellant on the post of Panchayat Karmi - SDO held the resolution to be illegal in an appeal preferred before him - Held - Against a resolution passed by the Panchayat, an appeal would not lie to the SDO - SDO can only exercise powers u/s 85(1) of the Adhiniyam subject to the rider fixed by Section 85(2) and he has to forward the resolution to the State Government within 10 days which otherwise would lose the efficacy of order passed by him - Appeal allowed. (Paras 10 & 12)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 85(1) व (2), पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 - ग्राम पंचायत का प्रस्ताव - अपील - पोषणीयता - अपीलार्थी को पंचायत कर्मों के पद पर नियुक्त करने का ग्राम पंचायत का प्रस्ताव - एस.डी.ओ. ने उसके समक्ष पेश अपील में प्रस्ताव को अवैध होना अभिनिर्धारित किया - अभिनिर्धारित - पंचायत द्वारा पारित प्रस्ताव के विरुद्ध एस.डी.ओ. को अपील नहीं की जायेगी - एस.डी.ओ. अधिनियम की धारा 85(1) के अन्तर्गत शक्तियों का प्रयोग केवल धारा 85(2) द्वारा नियत शर्त के अधीन कर सकता है और उसे प्रस्ताव 10 दिन के भीतर राज्य सरकार को अग्रप्रेषित करना चाहिए अन्यथा उसके द्वारा पारित आदेश का प्रभाव समाप्त हो जायेगा - अपील मंजूर।

B.P. Sharma, for the appellant.

Jaideep Singh, for the respondent Nos.1 to 3.

BASANT KUMAR VERMA Vs. STATE OF M.P.

None, for the respondent Nos.4 & 5.

Manish Jain, for the respondent No.6.

ORAL J U D G M E N T

The Judgment of the Court was delivered by **R.S. GARG, J.** :-It is not in dispute before us that Gram Panchayat Sihora, Tahsil Kareli, District Narsinghpur, invited applications for appointment to the post of Panchayat Karmi and the appellant/petitioner came to be appointed as Panchayat Karmi vide resolution dated 17.8.07. The said resolution passed by the Gram Panchayat was challenged by the present respondent no.6 before the Sub Divisional Officer Gadarwara. It appears that some enquiry report was filed by Chief Executive Officer, Janpad Panchayat, Chanwarpatha, District Narsinghpur, before the Sub Divisional Officer, Narsinghpur, who after receiving the report and hearing the parties came to the conclusion that the resolution dated 17.8.07 was illegal; in accordance with the findings recorded by him, he set aside the resolution.

2. Being aggrieved by the said order passed by the Sub Divisional Officer, dt. 24.3.08 (Annexure P.1 to the petition), the present appellant filed WP No. 4618/08 before this Court with a submission that the order passed by the Sub Divisional Officer was contrary to the provisions of Section 85 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993.

3. It is also contended that in view of the authoritative pronouncements made by this Court, an appeal before the SDO challenging the correctness, validity and propriety of the resolution passed by the Gram Panchayat was not maintainable.

4. The learned single Judge on facts found that no appeal was preferred against the resolution dated 17.8.07 and the Sub Divisional Officer had no suo-moto power to cancel the order of appointment. However, being persuaded by the arguments of the learned Government Advocate, placing reliance upon Section 85 of Adhiniyam 1993, the learned single Judge directed that the prescribed authority/Sub Divisional Officer would forward the matter to the State Government or the officer nominated by the State Government for purposes of Section 85 and the authority may confirm, set aside, reverse or modify the order after giving reasonable opportunity of being heard to the parties concerned.

5. Shri Sharma, learned counsel for the appellant in support of the appeal submitted that so far as Section 85(1) is concerned, it clearly says that a prescribed authority would be entitled to suspend the execution of any resolution passed, order issued, licence or permission granted or prohibit the performance of any act by Panchayat but after passing such an order suspending the execution of the resolution, the prescribed authority would be obliged to refer the matter to the State Government or the officer so that the State Government or the officer

BASANT KUMAR VERMA Vs. STATE OF M. P.

nominated may confirm the order etc. According to him, such a reference is required to be made within 10 days from the order passed by the prescribed authority and if reference is not forwarded in accordance with Section 85(2), then the order passed by the prescribed authority would lose its efficacy.

6. Shri Jaideep Singh and Shri Manish Jain, learned counsel for respondents on the other hand contended that from a perusal of the order passed by the learned single Judge it would clearly appear that the appointment of the petitioner was contrary to the scheme and in such a case if the High Court directed SDO to forward the order to the State Government or the officer concerned then this Court in its appellate jurisdiction should not interfere.

7. We have heard the parties at length and have perused the pleadings, order passed by the learned single Judge and the provisions contained in Section 85 of the Act.

Section 85 of the Adhiniyam 1993 reads as under :-

85. Power to suspend execution of orders, etc.-(1) The State Government or the prescribed authority may by an order in writing and for reasons to be stated therein suspend the execution of any resolution passed, order issued, licence or permission granted or prohibit the performance of any act by a Panchayat, if in his opinion-

(a) such resolution, order, licence, permission or act has not been legally passed, issued, granted or authorized;

(b) such resolution, order, licence, permission or act is in excess of the powers conferred by this Act or is contrary to any law; or

(c) the execution of such resolution or order, or the continuance in force of such licence or permission or the doing of such act is likely--

(i) to cause loss, waste or misapplication of any money or damage to any property vested in the Panchayat;

(ii) to be prejudicial to the public health, safety or convenience;

(iii) to cause injury or annoyance to the public or any class or body of persons; or

(iv) to lead to a breach of peace.

[(2) Whenever an order is made by the prescribed authority under sub-section (1) it shall forthwith in no case later than ten days from the date of order, forward to the State Government or

BASANT KUMAR VERMA Vs. STATE OF M. P.

the officer nominated by the State Government for this purpose, copy of the order with the statement of reasons for making it, and the State Government or the officer nominated by it [may confirm, set aside, revise or modify the order] or direct that it shall continue to be in force with or without modification permanently or for such period as may be deemed fit.

Provided that no order of the prescribed authority passed under sub-section (1) shall be confirmed, [set aside], revised or modified by the State Government or the officer nominated by it without giving the Panchayat concerned a reasonable opportunity of being heard against the proposed order].

8. From a perusal of sub Section (1) of Section 85 it would clearly appear that on availability of the factual foundation and on recording of the opinion, the State Government or the prescribed may by an order in writing and for the reasons to be stated therein suspend the execution of any resolution passed, order issued, licence or permission granted or prohibit the performance of any act by Panchayat.

9. In case the State Government passes the order, then such order would attain finality but in case order is passed by the prescribed authority, then according to sub-section (2) of Section 85, the prescribed authority would be obliged to forthwith in no case, later than 10 days from the date of the order forward to the State Government or the officer nominated by the State Government for the purpose, so that the State Government or the officer nominated by it may confirm, set aside, reverse or modify the order or direct that it shall continue to be in force with or without modification permanently or for such period as may be deemed fit.

10. The Scheme of sub-section (2) of Section 85 appears to be to put the prescribed authority under a check and control. The Legislature has given certain powers to the prescribed authority so that looking to the urgency, emergency and exigency of the situation, it may immediately suspend the execution of the order etc. but may not finally set aside but forward the matter to the State Government or the officer so nominated so that the State Government or such officer after going through the order and after being stock of the situation decide that whether order should be confirmed, set aside, revised, or modified. The Scheme of sub-section (2) of Section 85 clearly clothes the prescribe authority, the Sub Divisional Officer in this case, with the power to take immediate action but does not authorize him to pass final orders. The final orders on the reference are to be made by the State Government which in its own satisfaction may modify, confirm, set aside etc. The rider put by Section 85 is to see that such prescribed authority does not usurp the jurisdiction of the State Government or the nominated officer or does not sit over resolution etc. after suspending the execution of the same, for no good reasons. The period of 10 days fixed in

BASANT KUMAR VERMA V. STATE OF M.P.

Section 85(2) of the Adhiniyam is to remind the authority that if he does not forward the case within the period so prescribed, then his order would lose its efficacy. In such a case, the prescribed authority would not be entitled to rely upon the order which has lost its efficacy. A prescribed authority has to act in accordance with its powers and jurisdiction. Unfortunately the prescribed authority u/s 85, in general is sitting aside the resolution passed by the Panchayat, which power it does not have. This Court has reminded the authorities that an appeal against the resolution would not lie to the SDO but despite such authoritative pronouncements by this Court the SDOs are exercising the appellate powers. Should we remind them that if they do not observe the spirit of law as interpreted by this Court, they are inviting risk.

11. Undisputedly, the order impugned (Annexure P.1 to the petition) was passed by the SDO Gadawara, on 24.3.08 but for the reasons best known to him and in violation of sub-section (2) of Section 85 the said SDO did not forward the matter/order to the State Govt or the officer nominated by the State Govt for further action. If an action is to be taken in a particular manner, then such an action must be taken in that manner only and not at all. If the SDO, without reading the provisions of Section 85 thought that he was entitled to set aside the resolution then he was belabouring under a misconception and was assuming the authority which he did not possess.

12. It is trite to say that against a resolution passed by the Panchayat, an appeal would not lie to the SDO. The SDO as already observed can only exercise powers u/s 85(1) of the Adhiniyam subject to the rider fixed by the sub section (2) of Section 85 of the Adhiniyam.

13. In the present case as the order was not forwarded or the reference was not made to the State Govt or the officer nominated by the State Govt within 10 days, the order dated 24.3.08 lost its efficacy and became nonest. Once an order loses its efficacy, becomes nonest loses its life then such order cannot be revived even for purposes of its forwarding to the State Govt.

14. The learned single judge in our humble opinion should not have exercised his powers under Article 226 of the Constitution of India contrary to the provisions contained in Section 85(2) of the Adhiniyam.

15. The order dated 9.5.08 passed by the learned single Judge in WP No. 4618/08 deserves to and is accordingly set aside. The order dated 24.3.08 passed by the Sub Divisional Officer Gadawara, is also held to be a dead letter and it is further observed that as order dated 24.3.08 passed by the SDO has lost its efficacy and has run out of its life, it cannot now be forwarded to the State Govt or the officer so nominated u/s 85(2) for its confirmation etc.

16. As the order passed by the learned single judge and the SDO are being set aside, the position of the petitioner would be restored back.

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRI KANT MISHRA

17. It is further made clear that if the law still permits the Sub Divisional Officer/ prescribed authority to take an action in accordance with law, then he would certainly be free to proceed with the matter but, however, in accordance with law.

18 The appeal is allowed. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2009] M. P., 21

WRIT APPEAL

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

8 August, 2008*

EXECUTIVE ENGINEER, M.P. HOUSING BOARD & anr. ... Appellants

Vs.

SHRI KANT MISHRA & ors. ... Respondents

Land Acquisition Act (1 of 1894), Section 4(1) - Publication of Preliminary Notification - Requirements - Only locality is required to be mentioned and not the survey numbers or the names of the owners of the land. (Paras 5, 6 & 15)

भूमि अर्जन अधिनियम (1894 का 1), धारा 4(1) - प्रारम्भिक अधिसूचना का प्रकाशन - अपेक्षाएँ - केवल परिक्षेत्र का उल्लेख करना अपेक्षित, सर्वे क्रमांक या भूमि के स्वामियों के नामों का नहीं।

Cases referred :

(1970) 1 SCC 125, (1992) 2 SCC 168, (2005) 10 SCC 306, (1961) 1 SCR 128, AIR 1978 SC 515, AIR 1979 SC 1713, ILR (1967) I Calcutta 157, ILR (1974) II Delhi 81, ILR (1976) I Delhi 375, AIR 1980 All 106, AIR 1971 Cal 458, AIR 1975 All 9.

R.K. Samaiya, for the appellants.

Samdarshi Tiwari, G.A., for the State of MP.

Dilip Pandey, for the respondent No.1.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :-The writ petitions were preferred before the Single Bench assailing acquisition of the land at village Padara, Tehsil Huzur, District Rewa. The land was acquired for the purpose of residential scheme by M.P. Housing Board. Notification under section 4(1) of the Land Acquisition Act, 1984, (hereinafter referred to as the Act), was issued on 26.9.2005 by the Collector cum Ex-Officio, Dy. Secretary, Govt. of M.P., Revenue Department. The following notification under section 4(1) was issued :

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRI KANT MISHRA**SCHEDULE**

Description of land			Officer authorized under sub-section (2) 3 of Section 4		Detail of public purpose
District	Tehsil	City Village	Aprox. area in Hectares		
1	2	3	4	5	6
Rewa	Huzur	Padra Suaran Tola	10.594 Hectares	Executive Engineer M.P.Housing Board Division Rewa	Construction work of Residential Scheme

2. The notification was challenged on the ground that it is vague and consequently, illegal. The learned Single Judge has allowed the writ petitions holding that neither the Khasra numbers nor the names of the land owners, whose lands are sought to be acquired in the village, are mentioned in the notification. At the same time it has been held by the learned Single Judge that section 4(1) does not require the "identity of the land" which may ultimately be required to be specified with too many details but it casts upon the Government a duty to specify the locality in which the land is needed. The notification under section 4 of the Act and the acquisition proceedings pursuant thereto have been quashed. Dissatisfied thereby the M.P. Housing Board has preferred these writ appeals.

3. It is submitted by Shri R.K.Samaiya, learned counsel appearing for appellants that in the notification which was issued not only the name of village i.e. "Padara" was mentioned but name of the locality "Suarentola" has also been mentioned beside Tehsil "Huzur", District "Rewa", thus the notification is in compliance of Section 4(1) of the Act, it cannot be said to be vague. There is no requirement to mention the survey numbers or name of owners of lands at the stage of issuance of notification under section 4 of the Act, as the very purpose of issuance of notification under section 4 is to make survey for the purpose of assessing the suitability and to make the mind finally "which land would be suitable in the locality for the purpose of acquisition". Counsel has further submitted that in *Narendrajit Singh v. State of U.P.* - 1970 (1) SCC 125, the notification issued under section 4 of the Act did not contain the name of the locality, Tehsil or District and in

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRI KANTMISHRA

Madhya Pradesh Housing Board v. Mohd. Shafi and others - (1992) 2 SCC 168, there is wrong quoting of the notification under section 4 of the Land Acquisition which was not quashed by the Apex Court in the case of *Narendrajit Singh* (supra). In the later decision also *Om Prakash Sharma and others Vs. M.P. Audyogik Kendra Vikas Nigam and others* - (2005) 10 SCC 306, aforesaid decisions have been followed in which it has been laid down that it is not possible to give the survey numbers at the stage of notification under section 4 of the Act.

4. Shri A.M. Trivedi, Sr. Counsel with Shri S.K. Mishra, and Shri Dilip Pandey, counsel for respondents/owners of land, have submitted that notification has been rightly quashed as similar notification was quashed in *Narendrajit Singh's case* (supra) and in *Mohd. Shafi's case* (supra) which decisions have been followed by the Apex Court in *Om Prakash Sharma and others* (supra). The notification issued is quite vague and has been rightly quashed by the learned Single Judge relying upon the aforesaid decisions.

5. The first question which arises for consideration is whether it is possible to give the specific survey numbers and the name of the owners at the stage of issuance of notification under section 4 of the Act. Section 4 of the Act is quoted below :-

4. Publication of preliminary notification and powers of officers thereupon.- (1) Whenever it appears to the appropriate Government that land in any 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 (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification).

(2) Thereupon it shall be lawful for any officer, either generally or specially authorised by such Government in this behalf, and for his servants and workmen, -

to enter upon and survey and take levels of any land in such locality; to dig or bore into the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;

to mark such levels, boundaries and line, by placing marks and cutting trenches; and

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRIKANT MISHRA

Where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crops, fence or jungle:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling-house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days notice in writing of his intention to do so.

It is apparent from sub-section (1) of Section 4 of the Act that only locality in which the land was likely to be needed for any public purpose, is required to be mentioned. Sub-section (2) of Section 4 provides that thereupon after issuance of notification under sub-section (1) of Section 4, it shall be lawful for any officer to enter upon and survey and take levels of any land in such locality; to dig or bore into the sub-soil; to do all other acts necessary to ascertain whether the land is adapted for such purpose; to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon; to mark such levels, boundaries and line, by placing marks and cutting trenches; and where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crops, fence or jungle. Thus, section 4 provides a first step towards acquisition of land. The main purpose of the notification is to take the preliminary proceedings. The notification is of exploratory character and discloses tentative intention. After discharging the functions under section 4, the authorised officer is required to make report under sub-section 4 of Section 4. At the stage of section 4 Govt. may not in fact possessing all the necessary details which are dependent upon the survey on which it can decide which land in the locality would be suitable for the public purpose. Investigation into necessary data provided under section 4(2) empowered the entry to carry out various operations mentioned therein on any land in such locality. Only after such survey is made, Govt. can decide, which particular land in the locality is adapted or suitable for the public purpose.

6. The Apex Court in *Babu Barkya Thakur v. The State of Bombay*, (1961) 1 SCR 128(9) has also observed that the purpose of the notification under S.4 is to carry on a preliminary investigation with a view to finding out whether land is suitable for the purpose of execution. It is only under S.6 that a firm declaration has to be made with proper description and area so as to be identifiable. The Apex Court has laid down thus :-

The purpose of the notification under S.4 is to carry on a preliminary investigation with a view to finding out after necessary survey and taking of levels, and, if necessary, to adapt the land for the purpose for which it was sought to be adapted for the purpose for which it was sought to be acquired. It is only under S.6 that a firm

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRIKANT MISHRA

declaration has to be made by Government that land with proper description and area so as to be identifiable is needed for a public purpose or for a company. What was a mere proposal under S.4 becomes the subject matter of a definite proceeding for acquisition under the Act."

At the stage of Section 4 land is not particularized, but only the locality is mentioned in which the land is or likely to be acquired. Section 4 specifies the locality followed by objections and working of the mind by the Government, what particular land, out of that locality would it needs. The Apex Court in *Babu Barkya Thakur* (supra) has further observed thus :-

"Section 4 specified the locality in which the land is acquired and provides for survey to decide what particular land out of the locality would be needed."

"The notification under section 4(1) thus informs the public that land is required or would be required in a particular locality and thereafter the members of the public owning land in that locality have to make objections under Section 5-A"

"But as we read these three sections together we can only find that the scheme is that S.4 specified the locality,... followed by objections and making up of its mind by the government what particular land out of that locality it needs;"

" At the stage of section 4 the land is not particularised but only the locality is mentioned.

Thus it is clear that at the stage of notification under section 4 only locality is required to be mentioned not the survey numbers or the names of the owners of the land, as it is not possible to meet these particulars without entering into the exercise contemplated in sub-section(2) of Section 4.

7. In *Narendrajit Singh* (supra) which has been followed in *Mohd. Shafi* (supra) and *Om Prakash Sharma* (supra), the notification which was quashed by the Apex Court was mentioned in Para-2 not in Para-4 of the report in 1970(1) SCC 125. The aforesaid notification in Paras 2 and 4 of the *Narendrajit Singh* (supra) contained the notification which came for consideration before their Lordships of the Apex Court, para-2 containing notification under section 4 is quoted below :-

"2. The facts relevant for the disposal of the appeals are as follows. On October 15, 1960 the Government of Uttar Pradesh issued a notification purporting to be one under Section 4(1) of the Land Acquisition Act, 1984 to the effect that "the land mentioned in the schedule is needed for a public purpose". The notification further showed that "the Governor being of opinion that the

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRIKANT MISHRA

provisions of sub-section (1) of Section 17 of the said Act are applicable to the land, is further pleased under sub-section (4) of the said section to direct that the provisions of Section 5-A of the Act shall not apply". The schedule to the notification reads as follows:

8. "SCHEDULE"

District Pargana Mauza	Approximate area.	For what purpose required.
		For the rehabilitation of displaced families from East Pakistan, under the Ministry of Rehabilitation, Government of India

Note .- The plan of the land may be inspected in the office of the Collector, Rampur."

In para 4 of *Narendrajit Singh's case* (supra) their Lordships of the apex court quoted the notification issued under sub-section (1) of section 17 to take possession of the land. The relevant portion of para 4 of *Narendrajit Singh's case* (supra) is quoted below :-

"4. The case being one of urgency the Governor was further pleased under sub-section (1) of Section 17 of the Act to direct the Collector of Rampur, though no award under Section 11 has been made, on the expiration of the notice mentioned in sub-section (1) of Section 9, to take possession of the land, being waste or arable land mentioned in the schedule for a public purpose.

9. "SCHEDULE"

District Pargana Mauza	Approximate area.	For what purpose	Remarks
Rampur Bilaspur Gokal Nagri	125 acres	For the rehabilitation of East Pakistan displaced families under the Ministry of Rehabilitation, Government of India	

The Apex Court in Para-8 of *Narendrajit Singh's case* (supra) dealt with and held the "locality", where the land was needed was not specified. The Pargana, Mouza and approximate area were kept vacant which was the position in the notification issued under section 4 quoted in Para 2 of the *Narendrajit Singh's* report. The notification which is reproduced in Para 4 of the report of *Narendrajit*

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRI KANT MISHRA

Singh's case in 1970(1) SCC 125, was not adversely commented upon by the Apex Court in *Narendrajit Singh's case* as in it District, Tehsil, Mouza and Area were mentioned. The Apex Court in *Narendrajit Singh's case* in Para-8 has dealt with the aforesaid notification under section 4 of the Act mentioned in Para -2 of the report of 1970(1)SCC 125 thus:-

"8. Section 4(1) does not require that the identity of the lands which may ultimately be acquired should be specified but it enjoins upon the Government the duty to specify the locality in which the lands is needed. In the instant case the notifications suffer from a very serious defect in that the locality where the lands were needed was not specified. The notification merely showed that lands mentioned in the schedule were needed. The schedule in its turn though it contained the headings District, Pargana, Mauza and approximate area, gave no particulars of the same and all that was mentioned by way of a note was that the plain of the land might be inspected in the office of the Collector of Rampur. As no details were given, the only indication about the locality of the lands was possibly the locality of the lands was possibly the District of Rampur inasmuch as the plan of the land was to be found in the office of the Collector of the same district. Certainly the Act did not intend that all the persons owning land in a district should rush to the Collector's office to find out whether his lands were covered by the notification."

Obviously, notification which was quashed by the Apex Court in *Narendrajit Singh's case* did not mention the names of District, Pargana, Mouza and area, consequently it was quashed. The Apex Court has laid down that section 4(1) does not require that identity of the land which may ultimately be acquired should be specified only the locality should specified in which the land is needed. Locality does not mean that particulars of the land have to be mentioned.

10. In *Mohd. Shafi's case* (supra) in Para-13, notification issued in *Narendrajit Singh's case* was quoted but it was not the notification which was quashed in the case of *Narendrajit Singh's case*. It was notification under section 17 referred to in Para 4 of *Narendrajit Singh's case* report in 1970 (1) SCC 125. Para-13 of *Mohd. Shafi's case* (1992) 2 SCC 168 (supra) is quoted below :-

13. In *Narendrajit Singh v. State of U.P.*, while dealing with the requirement of a valid notification under Section 4 of the Act, this Court observed that the defect of non-mention of the locality where the proposed land was situate in the notification was a very serious defect vitiating the notification. In that case, the schedule attached to the notification issued under Section 4(1) and 17(1) of the Act read as follows:-

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRI KANT MISHRA

"SCHEDULE"

District	Pargana	Mauza	Approximate area.	For what purpose	Remarks
Rampur	Bilaspur	Gokal Nagri	125 acres	For the rehabilitation of East Pakistan displaced families under the Ministry of Rehabilitation, Government of India.	

This Court opined that though Section 4(1) does not require the identity of the land which may ultimately be acquired to be specified with too many details but it undoubtedly casts upon the government a duty to "specify the locality in which the land is needed". In *Narendrajit Singh* case, this Court also repelled the argument identical to the one raised by Mr. Thakur that since detailed particulars of the land had been given in the notification issued under Section 6(1) of the Act, the absence of those particulars consequence. The Court said:

"In our view the defect in a notification under section 4(1) cannot be cured by giving full particulars in the notification under section 6(1)."

It is apparent from aforesaid Para-13 of *Mohd. Shafi's case* that notification quoted in the para was not quashed by the Apex Court in *Narendrajit Singh's case* but the notification which was quashed was mentioned in Para-2 of the report of *Narendrajit Singh* (supra). The notification of *Narendrajit Singh case* (supra) mentioned in Para 13 of *Mohd. Shafi's case* was not adversely commented upon by the Apex Court in para 8 of the report of 1970(1) SCC 125 in *Narendrajit Singh* (supra) as in it name of District, Tehsil and Mouza and also the area were clearly mentioned. Thus on facts we cannot accept the submission raised by the respondents' counsel that a similar notification was quashed by the Apex Court in *Narendrajit Singh's case*. In *Narendrajit Singh's case* the notification which was quashed under section 4 was quite vague in which names of district, tehsil and mouza were not mentioned, it was quoted in Para-2 of the report.

11. The notification which was quashed by their Lordships in the *Mohd. Shafi's case* is quoted below :-

"2. The schedule to the notification provided as follows :-

SCHEDULE

Particulars of land			Approximate area in Hectares	Authorised Officer under Section 4(2)	Details of Public Purpose
District	Tehsil	City			

EXECUTIVE ENGINEER, M.P. HOUSING BOARD V. SHRIKANT MISHRA

(1)	(2)	(3)	(4)	(5)	(6)
Mand-saur	Mand-saur	Mand-saur	229	Executive Engineer M.P.Housing Construction Board, Ratlam"	Residential

The Apex Court has quashed the aforesaid notification in Mohd. Shafi's case for the reason mentioned in Para-11 and 12 quoted below :-

"11. The High Court found that Mandsaur is no more a small village but a municipal wards having a population of more than 80,000 people and is spread over an area of 25 sq. kms. and the absence of the details of the land or the locality where the same is situate, vitiates the notification for non-compliance with the provisions of the Act."

"12. The description of the land in the notification issued under sections 4(1) and 17(1), in our opinion, is very cryptic. Not only no khasra numbers have been given, even the precise "locality" has not been indicated. Mere mention of Mandsaur, which is spread over an area of 25 sq.kms. and is divided into various Municipal wards, against the "locality" is wholly insufficient description and the respondent or anyone else could not have come to know from that description whether 2.298 hectares of land which was required for acquisition included the land belonging to him or not. The non-disclosure of the "locality" with precision, invalidates the notification and renders the publication of notice a meaningless formality. "

Their Lordships clearly made distinction between small village and a big city district head quarter like Mandsaur divided into 35 wards having large population and area of 25 sq. kms. Consequently, the notification was held to be vague. Mandsaur is a district place, divided into 35 municipal wards, even locality was not mentioned. Mere mention of 'Mandsaur' which was spread over at 25 sq. kms. was held to be insufficient description of locality.

12. The ratio of *Narendrajit Singh's case* and *Mohd. Shafi's case* is that in notification under section 4 of the Act locality with precision should be mentioned not identity of the land. Too many details of land are not to be given. In *Om Prakash Sharma* (supra) also, the decision of *Mohd. Shafi's case* has been relied upon which is based on *Narendrajit Singh's case*. In *Om Prakash Sharma's case* in Para-5 notification of *Mohd. Shafi's case* has been quoted which was with respect to Mandsaur, the district place divided into various municipal wards, locality of Mandsaur was not mentioned. Thus we are unable to agree with the submissions raised by the counsel for respondents/owners of land that similar notification was quashed in *Mohd. Shafi's case*.

EXECUTIVE ENGINEER, M.P. HOUSING BOARD Vs. SHRIKANT MISHRA

13. In *Bai Malimabu etc. v. State of Gujarat and others* - AIR 1978 SC 515, the Apex Court held that when the land is mentioned that includes super-structure, it is not the requirement of law to mention the structure if any in the notification u/s 4. The Apex Court in *Babu Singh and others v. Union of India and others* - AIR 1979 SC 1713 laid down that the statement of public purpose u/s 4(1) notification is more comprehensive setting out details of improvement works, while the one set out under S.6(1) notification is more precise and restricted in terms. U/s 4 broad and understandable statement has to be made of public purpose.
14. Thus the ratio of the decisions of the Apex Court consistently is that locality should be mentioned with precision not the precise identity of the locality at the stage of notification under section 4 of the Act. Similar is the view expressed by several High Courts. In *Abdul Jabbar v. State of West Bengal*, ILR (1967) 1 Calcutta 157 it was laid down that the notification under section 4 is merely exploratory or preliminary in nature and the exact area to be acquired need not be particularised at that stage, but it is otherwise with the declaration under Section 6 which is issued after the Government has applied its mind to the exact area and location of the lands which are needed for the purpose of and are, therefore, acquired. Delhi High Court in *Rajkumar and another v. The Union of India and ors.* - ILR (1974) II Delhi 81 has laid down that at the stage of notification u/s 4(1) it is not absolutely necessary that Government should have particularized the land. In *Bahadur Singh v. Union of India*, ILR (1976) I Delhi 375, it was laid down in para 68 that it is not necessary that each and every items of the land should be mentioned in the notification u/s 4 which means that survey numbers are not required to be mentioned. A Division Bench of Allahabad High Court in *Chandan Singh Gosain v. State of U.P. and anr.* - AIR 1980 Allahabad 106 following the decision of Narendrajit Singh's case held that plot numbers and other details are not necessary to be mentioned in the notification issued u/s 4 of the Act. Only the locality is to be mentioned which by very purpose of section 4 can be mentioned. A Division Bench of Calcutta High Court in *Jogendra Nath Chatterjee and ors. v. State of West Bengal*, AIR 1971 Calcutta 458 held that neither the plots nor their boundary has to be specified in notification u/s 4(1), but, the locality must be stated. In *Nagar Mahapalika, Varanasi v. Durga Shankar and others* - AIR 1975 Allahabad 9, Allahabad High Court held that when the notification u/s 4(1) did not mention the details about the purpose of the plots or their boundaries, the notification could not be held to be vague as other sufficient particulars were mentioned.
15. In the light of the principles laid down in the aforesaid decisions of the Apex Court and other decisions, coming to the notification issued under section 4 in the instant case, it is apparent that name of the village "Padara" has been mentioned, name of Tehsil - Huzur, name of District Rewa has also been mentioned. Not only that 'mohalla' i.e. precise locality where the land is situated at village Padara has also been mentioned as 'suarantola'. Name of village is Padara as

ANITA KAROPE (SMT.) Vs. SMT. GEETA UIKEY

apparent from Bhū Adhikar Evam Rin Pustika and Khasra entry (P-2) filed by the petitioner, in W.P. No. 14387/06 and from certificate of Tehsildar (A-4) placed on record, from documents, it is clear that Suarantola is one of the locality of the village Padara. It is obvious from name itself "Tola" means the smaller place as compared to the village, thus mention of Suarantola in village Padara is for precise locality. In the notification the particulars of the locality enjoined under section 4(1) of the Act, has been mentioned with quite precision in the instant case. It was not possible to give any further details before survey was undertaken and finally mind was made up by the State Government before making the survey under section 4(2) of the Act. Thus the notification issued under section 4 in the instant case mentioning the name of the district, tehsil and village and particularly tola (mohalla) of the village cannot be said to be the vague notification. It was not necessary to give the survey numbers and the names of the owners in the notification issued under section 4 of the Act.

In our opinion the notification issued under section 4 in the instant case is valid, it cannot be said to be vague. Notification and acquisition proceedings taken pursuant thereto cannot be said to be invalid, consequently we have no hesitation in setting aside the impugned order passed by learned Single Judge quashing the notification. Impugned order passed by learned Single Judge is hereby set aside. We hold the impugned notification issued under section 4(1) of the Act and the proceedings taken thereunder to be valid. Writ appeals are hereby allowed. We leave the parties to bear their own costs as incurred.

Appeal allowed.

I.L.R. [2009] M. P., 31

WRIT APPEAL

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

26 August, 2008*

ANITA KAROPE (SMT.)

... Appellant

Vs.

SMT. GEETA UIKEY & ors.

... Respondents

A. Panchayat (Upsarpanch, President and Vice President) Nirvachan Niyam, 1995, Rule 21(1) - Election process - Adjournment - By invoking emergency clause - The proceedings of election should be interrupted or obstructed by any riot or open violence at a meeting then Presiding Officer can adjourn the election process by invoking emergency clause.

(i) Proceedings of election - The entire exercise of voting, opening of ballot papers and counting thereof have already taken place - The only formality to be performed was to issue a declaration in form No. V - If only formality was to be performed then non-observance of the formality would

ANITA KAROPE (SMT.) Vs SMT. GEETA UIKEY

not stretch the election process from the time of submission of the nomination forms beyond declaration of result or beyond that.

(ii) "At a meeting" would simply suggest that any wrong should take place at the meeting and not outside the meeting - The commotion was outside the meeting area and after the election meeting was over number of persons have entered in the election premises - It cannot be said that commotion was at the meeting. (Para 9)

क. पंचायत (उप सरपंच, अध्यक्ष और उपाध्यक्ष) निर्वाचन नियम, 1995, नियम 21(1) - निर्वाचन प्रक्रिया - स्थगन - आपातकालीन खण्ड का अवलंब लेकर - निर्वाचन की कार्यवाहियाँ किसी सभा में किसी दंगे या खुली हिंसा द्वारा अवरुद्ध या बाधित हो तब पीठासीन अधिकारी आपातकालीन खण्ड का अवलंब लेकर निर्वाचन प्रक्रिया स्थगित कर सकता है।

(i) निर्वाचन की कार्यवाहियाँ - वोट डालने, मतपत्रों को खोलने और उनकी गिनती की सम्पूर्ण कवायद पूर्व में ही हो गयी - केवल प्रारूप v में घोषणा जारी करने की औपचारिकता पूरी की जानी थी - यदि केवल औपचारिकता पूर्ण की जानी थी तब औपचारिकता का अनुपालन निर्वाचन प्रक्रिया को नामांकन पत्र पेश करने के समय से परिणाम की घोषणा के परे या उसके परे नहीं बढ़ायेगा।

(ii) "किसी सभा में" साधारणतः यह सुझाव देता है कि कोई दोषपूर्ण कार्य किसी सभा में घटित होना चाहिए सभा से बाहर नहीं - उपद्रव सभा स्थल से बाहर था और निर्वाचन बैठक पूरी हो जाने के बाद कई व्यक्तियों ने निर्वाचन परिसर में प्रवेश किया - यह नहीं कहा जा सकता कि उपद्रव सभा में था।

B. Contempt of Courts Act (70 of 1971), Sections 10 & 12, Criminal Procedure Code, 1973, Section 340 - Pleadings - False affidavit - *When somebody swears on affidavit on the basis of official record then not only he has to go through the records and understand the contents of the record but he also has to understand the meaning of what he is writing in the pleading and affidavit - He is also required to understand that what would be the consequences of his wrong reporting or wrong filing of an affidavit - To obtain a favourable order in favour of the State Government and the other persons, the officer-in-charge raised concocted and false pleadings and had also sworn a false affidavit - This action on the part of the officer-in-charge is punishable under the provisions of the Act and is also punishable under the common law.* (Para 14)

ख. न्यायालय अवमानना अधिनियम (1971 का 70), धाराएँ 10 व 12, दण्ड प्रक्रिया संहिता, 1973, धारा 340 - अभिवचन - मिथ्या शपथ पत्र - जब कोई व्यक्ति कार्यालयीन अभिलेख के आधार पर शपथ पत्र देता है तब उसे न केवल अभिलेख पढ़ना और उसकी अन्तर्वस्तु को समझना होता है बल्कि उसे उसका अर्थ भी समझना होता है कि वह अभिवचन और शपथ पत्र में क्या लिख रहा है - उसे यह भी समझना आवश्यक है कि उसके गलत सूचना देने या गलत शपथ पत्र पेश करने के क्या परिणाम होंगे - राज्य सरकार और अन्य व्यक्तियों के पक्ष

ANITA KAROPE (SMT.) Vs. SMT. GEETA UIKEY

में अनुकूल आदेश अभिप्राप्त करने के लिए, भारसाधक अधिकारी ने मनगढ़ंत या मिथ्या अभिवचन उदाये और मिथ्या शपथ पत्र भी दिया – भारसाधक अधिकारी का यह कृत्य अधिनियम के उपबंधों के अन्तर्गत दण्डनीय है और सामान्य विधि के अन्तर्गत भी दण्डनीय है।

Sharad Verma, for the appellant.

T.R. Pillai, for the respondent No.1.

T.S. Ruprah, Addl.A.G., for the respondent/State.

ORAL J U D G M E N T

The Judgment of the Court was delivered by **R.S. GARG, J.** :- This order shall dispose of Writ Appeal No.1171/2006 (Smt. Anita Karope Vs. Smt. Geeta Uikey and 5 others) and Writ Appeal No.1199/2006 (Smt. Basanti Uikey Vs. Geeta Uikey and 5 others).

2. - Each of the appellant being aggrieved by the order dated 4.11.2006 passed by learned single Judge in Writ Petition No.867/2005 (Smt. Geeta Uikey Vs. M.P. State Election Commission and others) where under the writ application filed by the original petitioner Smt. Geeta Uikey was allowed has filed writ appeal under Section 2 of M.P. Uchha Nyayalaya (Khand Nyapeeth Ko Appeal) Adhiniyam, 2005. The short facts necessary for disposal of these writ appeals are that the original petitioner Smt. Geeta Uikey was elected as the Sarpanch of Gram Panchayat Ghoradongri, District Betul for the period 2000-2005. She contested for the post of Member from Seat No.7 Banspur in respect of Janpad Panchayat Ghoradongri and was elected by a reasonable margin. After the election of the Members, a notice was issued to the elected Members for taking part in the election to the office of the President and the Vice President of Janpad Panchayat and the meeting was scheduled to be held at 11.00 a.m. on 14.2.2005. The election programme is Annexure A/2 to this writ appeal. It provided that from 11.00 to 11.45 a.m the instructions would be issued to the candidates and thereafter nomination forms would be accepted. Between 11.45 to 12.00 noon a scrutiny would be made and thereafter, instructions would be given to the candidates regarding acceptance or rejection of the nominations. Between 12.00 to 12.30 candidates were made entitled to withdraw from the election. Between 12.30 to 1.00 ballot papers were to be prepared and thereafter, between 1.00 to 1.30 p.m elections were to be conducted. In the period between 1.30 to 2.00 p.m. ballot papers were to be counted, results were to be declared and Forms No.V, VI and VII were to be prepared and Form No.VI was to be issued. Between 2.00 to 2.45 p.m procedure for election of Vice President was to be adopted.

3. It is not in dispute before us that the original petitioner Smt. Geeta Uikey contested for the post of President, Janpad Panchayat, the said election meeting commenced at 11.00 a.m as scheduled on 14.2.2005. The nominations were submitted by Smt. Geeta Uikey, Smt. Anita Karope and Smt. Basanti Uikey. From the report submitted by the Returning Officer it appears that at about 12.35 noon

ANITA KAROPE (SMT.) Vs. SMT. GEETA UIKEY

and at about 12.45 noon Smt. Geeta Uikey and Smt. Basanti Uikey submitted an application for withdrawal of their candidature but the said applications for withdrawal was rejected as the time to withdraw from the nomination had already run out. The Election Officer thereafter, prepared the ballots and allowed the voting. The voting was conducted between 1.00 to 1.30 noon and 16 persons had taken part in the voting process. After the voting process was over the ballot box was opened and the votes cast in favour of the different candidates were counted. It was declared publicly that Smt. Anita Karope, appellant in Writ Appeal No.1171/2006 received one vote only while Smt. Basanti Uikey, appellant in Writ Appeal No.1199/2006 received seven votes. The original petitioner/present respondent no.1 Smt. Geeta Uikey received eight votes. After the aforesaid counting of the votes before further ministerial act could be undertaken, at about 2.15 p.m some Members of the Janpad and other persons along with Member of Legislative Assembly came in the voting hall and made an allegation that nine persons of the Janpad were not allowed to enter by the mob standing near the gate and therefore, they could not cast their votes and under the circumstances revoting should be allowed. The other group opposed the said suggestion as a result of which the situation became tense and chaotic. The Returning Officer sought guidance from the Collector who instructed the Returning Officer to do the needful in accordance with the rules/law. The Returning Officer thereafter, recorded the proceedings and observed that as the situation of emergency had emerged and it was not possible to decide that whether the nine voters were in fact restrained/detained by the mob and were not allowed to cast their votes, he however, directed that looking to the chaotic/riot condition it would be in the interest of all the concerned to adjourn the election. Exercising the powers vested in him under Section 21(1) of Madhya Pradesh Panchayat (Upsarpanch, President and Vice President) Nirvachan Niyam, 1995, the process of election of the President and, thereafter the process of election of Vice President was adjourned.

4. The report prepared by the Returning Officer is available on the record of this appeal as Annexure A/1. Smt. Geeta Uikey being aggrieved by the adjournment of the election process/meeting filed Writ Petition No.867/2005 and submitted before the learned single Judge that after the elections to the post of the President were over and the votes were already counted there was no good reason for the Returning Officer to hold that present was a case of emergency and looking to the riot condition, the meeting was required to be adjourned for fresh elections. It was also contended before the learned single Judge that present was not a case for application of Rule 21(1) of the Rules because in accordance with Rule 16 the election had already come to an end and after the results were declared the only ministerial act to be performed was to issue a certificate to the returned candidate in Form No.V. Smt Anita Karope made an application for intervention which was allowed by the Court. She being aggrieved by the order passed by the learned single Judge, has filed Writ Appeal No.1171/2006. Smt. Basanti Uikey who was also not party to the writ petition filed

ANITA KAROPE (SMT.) V& SMT. GEETA UIKEY

this Writ Appeal No.1199/2006 with an application seeking permission to file an appeal with a submission that in the adjourned meeting fresh elections were held and as she came out as returned candidate she was entitled to file the appeal. The application seeking permission to file the appeal was allowed.

5. Shri Sharad Verma, learned counsel for Smt. Anita Kapode in Writ Appeal No.1171/2006 and Shri Deepak Okhade, learned counsel for Smt. Basanti Uikey in Writ Appeal no.1199/2006 have jointly submitted that if the Returning Officer being master of the situation after assessing the circumstances observed that present was a case or exercising power under Sub Rule 1 of Rule 21, exercised the powers and adjourned the meeting then the learned single Judge on basis of the legal interpretation should not have held that the adjournment of the meeting was invalid. It is also submitted that from a complete reading of Annexure A/1 it would clearly appear that declaration of the result and issuance of Form No.V had become impossible, therefore, the Presiding Officer /Returning officer was justified in adjourning the meeting. It is also submitted by the learned counsel for the appellants that from the return filed by the State Government it would clearly appear that the Presiding Officer was justified in adjourning the meeting because he found the case on hand to be a case of emergency.

6. Shri Pillai, learned counsel for respondent no.1 Smt. Geeta Uikey on the other hand submitted that a conjoint and juxtapose reading of Rule 10, 16 and 21 of the Rules would make it clear that the Collector has to fix a date for election, the election is to be conducted in a particular manner as provided in Rule 16 and an election meeting can be adjourned only in case of an emergency where the election is interrupted or obstructed by any riot or open violence or any other sufficient cause. According to him in the present case powers under Rule 21(1) of the rules could not be exercised. It is also submitted by him that the Presiding Officer had to adjourn the meeting and inform about the adjournment to the Collector but in the present case even before adjourning the meeting the Presiding Officer sought instructions from the Collector. According to him the return filed by the State Government under the signatures of Shri H. N. Sharma, Chief Executive Officer of Janpad Panchayat, Ghoradongri, District Betul contains false averments and in fact Shri H. N. Sharma has tried to make a platform in favour of the adjournment of the meeting. It is also submitted by Shri Pillai that perusal of the report (Annexure A/1 to the appeal) and the return filed under signatures of Shri H. N. Sharma it would clearly appear that not only Shri H. N. Sharma was telling lies on oath but he was misreading the report of the Presiding Officer and was trying to mislead this Court.

7. The learned single Judge in paragraph 15 has given a free translation to the necessary part of the return recorded by the Presiding Officer/Returning Officer. We will adopt the said translation in toto. It reads as under :

ANITA KAROPE (SMT.) V. SMT. GEETA UIKEY

"Two applications for withdrawal of the candidature were received. One from Smt. Geeta Uike at 12.35 p.m and second from Ms. Basanti at 12.45 but as per the schedule of the election process, the time for withdrawal of the name was fixed at 12.30 p.m and as both these applications were received after 12.30 p.m. they were rejected. There were three candidates in the process of voting. The process of voting were explained and after preparation of the ballot papers, as per scheduled programme, the voting was conducted between 1.00 to 1.30 p.m. 16 members including the three candidates participated in the voting.

The voting was completed and the result was as under::

Anita :	01 Votes
1. Geeta Uike :	08 Votes
2. Basanti :	07 Votes

Total :	16 Votes

Total number of votes	-	16
Number of rejected votes	-	nothing
Valid votes	-	16

After the aforesaid counting of the votes at 2.15 p.m. some Members of the Janpad and other persons along with an M.L.A. came in the voting hall and made an allegation that nine members of the Janpad were not allowed to enter by the crowd standing near the gate and they could not vote and, hence, revoting should be done. The other group opposed the said suggestion as a result of which the situation became tense and chaotic. A guidance was sought from the Collector who instructed to do the needful as per the provisions of the Rules.

In the situation of emergency on 14.2.2005 there was a probability of open violence and fight at Ghodadogari in the election of President/Vice President of Janpad Panchayat. In the aforesaid circumstances the process of the election could not be completed and the description as per Form - V and was not made, the certificate as per Form VI was not granted and the election of the President could not be notified as per Form VII. It was not ascertained whether the Members who were not allowed to enter at the time of voting were allowed to vote. In the aforesaid fact situation due to interruption in the proceeding of election of President, I, under the provisions of Rule 21(1) of M.P. Panchayat

ANITA KAROPE (SMT.) Vs. SMT. GEETA UIKEY

(Upsarpanch, President and Vice President) Nirvachan Niyam,
1995 the process of election of the President and thereafter the
process of election of Vice-President is adjourned"

8. After going through this order it does not appear that till the point of counting of the votes or oral declaration of the result there was commotion or free violence or any interruption or obstruction in the meeting. A perusal of the report would clearly show that the process of voting went on smoothly between 1.00 to 1.30 p.m. and 16 members including the three candidates participated in the voting. The report further shows that particular candidates received particular votes. According to the report after the counting was over at about 2.15 p.m some members of the Janpad, some other persons came to the voting hall and made an allegation that nine members of the Janpad were not allowed to enter by the mob standing near the gate and as such nine persons could not cast their vote. The members who had entered in the hall raised a demand that revoting should be done. If the report is correct one then we would have no hesitation in holding that the commotion etc. came in existence after the results were declared. From the report it does not appear that at the meeting the proceedings of elections was interrupted by the riot or open violence. From the report it also does not appear that for any sufficient cause the Presiding Officer had announced the adjournment of the meeting. In fact the report clearly shows that after the votes were counted and the results were declared some people entered in the hall and thereafter, started asserting that revoting should be done. Such demand for revoting in fact has been taken as a situation of emergency. In our considered opinion after the elections were over, the results were declared and announced in public, any interruption or obstruction by the third party could not have affected the result of the elections. In the present matter the learned single Judge was absolutely justified in holding that present was not a case for exercising powers under Sub Rule 1 of Rule 21 of the Rules. It is also to be seen that the voting had taken place between 1.00 to 1.30 p.m. Sub Rule 6(1) of Rule 16 clearly provides that immediately after the voting is over, the Presiding Officer shall open the ballot box, take out the ballot papers there from, count them and record the number thereof in a statement. After the counting is over, in accordance with Sub Rule 7 of Rule 16 the Presiding Officer has to declare the candidate who secured the largest number of votes to be duly elected in Form No.V. The declaration in Form No.V, in our considered opinion is a ministerial act. A Presiding Officer is always obliged and duty bound to issue Form No.V declaring that a particular candidate has secured the largest number of votes and is duly elected. In a given case if a declaration is not made in Form No.V then too the result of the election would stand unaffected and unaltered. The fact would always remain that a particular candidate who secured maximum votes is to be declared elected. In the present case from the report of the Presiding Officer (Annexure A/1 to the appeal) it

ANITA KAROPE (SMT.) Vs. SMT. GEETA UIKEY

would clearly appear that ballot box was opened, votes were counted and in accordance with the counting the original petitioner Smt. Geeta Uikey received eight votes and was entitled to be declared as returned candidate.

9. The entire exercise in adjourning the meeting could be taken by the Presiding Officer if during the course of the election he recorded a finding that the election meeting was obstructed or interrupted because of the riot condition or because of the open violence. In the present case circumstances for application of Sub Rule 1 of Rule 21 never came into existence. Sub Rule 1 of Rule 21 if is understood in its proper perspective it would make it clear that the proceedings of the elections should be interrupted or obstructed by any riot or open violence at a meeting. 'At a meeting' would simply suggest that any wrong should take place at the meeting and not outside the meeting. In the present case the commotion was outside the meeting area and after the election meeting was over number of persons had entered in the election premises. The entire exercise of voting, opening of ballot papers and counting thereof had already taken place. The only formality to be performed was to issue a declaration in Form No.V. In our considered opinion, the learned single Judge was not unjustified in holding that after the votes were counted and the report was already prepared, Presiding Officer was required and obliged to issue a declaration in accordance with Form No.V. In our opinion, if only the formality was to be performed then non-observance of the formality would not stretch the election process from the time of submission of the nomination forms beyond declaration of result or beyond that. The Presiding Officer was absolutely unjustified in adjourning the meeting even after knowing that the original petitioner Smt. Geeta Uikey successfully received eight votes and was entitled to a declaration in her favour.

10. In our opinion the learned single Judge was also justified in observing that present was not a case for invoking emergency clause in absence of the requirement under the law. The learned single Judge was also justified in issuing the directions to issue necessary certificates in Form Nos.V and VI in favour of the petitioner.

11. In appeal, we find no force. It deserves to and is accordingly dismissed.

12. For the contesting parties that is the end of the matter but for the administration of justice this is the beginning of the matter. The officer-in-charge Shri H. N. Sharma, has made certain submission in paragraphs 5, 16 and 17 of the return, and has sworn an affidavit in support of the return. The affidavit has been sworn by him is on basis of the information received from the official records. When a person swears an affidavit on basis of the information received from the official records then he has to justify the submissions made in his affidavit or in the pleadings which he is supporting on oath. Paras 5, 16 and 17 read as under :

"5 The answering respondent respectfully submits that in

ANITA KAROPE (SMT.) V. SMT. GEETA UIKEY

the instant case as per Schedule Annexure R-I the election was being conducted. However before a declaration under Sub Rule (7)(1) of Rule 16, at about 2.15 9 elected Janpad Members along with the Member of Legislative Assembly made a representation before the Presiding Officer that they were prevented by the crowd standing outside the office and accordingly they could not cast their votes within the stipulated time between 1.00 p.m. to 1.30 p.m. The Presiding officer after enquiring into the matter and looking to the situation immediately brought this fact to the notice of District Collector and the district collector directed the Presiding Officer to discharge his duties in accordance with the rules. The Presiding Officer since was convinced with the facts that 9 Janpad Members were prevented by the crowd from casting the votes adjourned the election to a date fixed by District Collector. The answering Respondent respectfully submit that the aforesaid proceedings is duly recorded by the Presiding Officer and the same is filed herewith and marked as ANNEXURE R-II.

16. As to Para 5.4.: The answering respondent respectfully submits that on 14.2.2005 after the voting was over a group of 9 elected Janpad Members made a representation before the Presiding Officer at about 2.15 P.M complaining that they have been prevented by crowd standing outside the Office from casting their votes. The Presiding Officer took the cognizance of same and after objectively considering the genuineness of complaint made by 9 elected members adjourned the election in exercise of his power under Rule 21 of the Rules of 1995. As submitted above the action taken by the Presiding Officer was strictly in accordance with the Rules and was subsequently informed to the District Collector.

17. As to Para 5.5 and 5.6: The answering respondent respectfully submits that the Presiding Officer was justified in not declaring the results as is provided under Rule 16(7) (1) of the Rules of 1995 because by that time he was convinced that 9 elected members have been prevented by the crowd. It is, therefore, submitted that the Presiding Officer was justified in not issuing the certificate under Rule 17."

13. From a perusal of the submissions made in these paragraphs it would clearly appear that the officer-in-charge has made false averments in the return. The submission in the return 'The Presiding Officer since was convinced with the fact that nine Janpad Members were prevented by the crowd from casting vote, adjourned the elections to a date fixed by the District Collector'. This statement

ANITA KAROPE (SMT.) Vs. SMT. GEETA UIKEY

is contrary to the report of the Presiding Officer and is a false averment and a false assertion on behalf of the officer-in-charge. In paragraph 16 the officer-in-charge has stated 'The Presiding Officer took the cognizance of same and after objectively considering the genuineness of complaint made by nine elected members adjourned the election in exercise of his power under Rule 21 of the Rules of 1995'. This submission in paragraph 16 runs contrary to the report submitted by the Presiding Officer. The Presiding Officer in his report (Annexure A/1) had submitted that it was not possible to decide that whether such persons were restrained or that it could not be ascertained whether the members who were not allowed to enter at the time of voting were allowed to vote. In fact what the Presiding Officer wanted to say was that it was not ascertainable whether the complainants were not allowed to cast their votes.

14. In paragraph 17 it was submitted by the officer-in-charge that "by that time he (Presiding Officer) was convinced that 9 elected members have been prevented by the crowd". These submissions made in the return not only run contrary to the facts but in fact have been concocted by the officer-in-charge to provide a foundation in support of the action taken by the Presiding Officer. When somebody swears on affidavit on basis of the official record then not only he has to go through the records and understand the contents of the record but he also has to understand the meaning of what he is writing in the pleading and the affidavit. He is also required to understand that what would be the consequences of his wrong reporting or wrong filing of an affidavit. In the present case, we are convinced that to obtain a favourable order in favour of the State Government and the other persons the officer-in-charge raised concocted and false pleadings and had also sworn a false affidavit. This action on the part of the officer-in-charge is punishable under the provisions of the Contempt of Courts Act and is also punishable under the common law.

15. We hereby direct that let a notice be issued to Shri H. N. Sharma, Chief Executive Officer, Janpad Panchayat, Ghoradongari, District Betul to show cause as to why appropriate action be not taken against him under the provisions of Contempt of Courts Act and why he should not be directed to be prosecuted in accordance with the provisions contained in Section 340 of the Criminal Procedure Code. The office shall send copy of the notice to the Collector, Betul for effecting its service on the Chief Executive Officer. If Shri H. N. Sharma, does not continue as Chief Executive Officer of Janpad Panchayat, Ghoradongari then the Collector, Betul shall make enquiries about the whereabouts of Shri H. N. Sharma and shall see that the notice is served upon Shri H. N. Sharma and is returned to this Court before the next date of hearing. Along with the notice a copy of this judgment be also sent to Shri H. N. Sharma.

16. For the private parties the appeal stands disposed of but this appeal shall remain alive so that appropriate action is taken in these very proceedings against

**KALAM SCOOTER SERVICE Vs. SHRI SHRI 1008 JAGAT GURU HANKARACHARYA
SWAMI SWAROOPANAND JI MAHARAJ**

Shri H. N. Sharma. The matter be taken up for consideration on 26.9.2008.

Order accordingly.

I.L.R. [2009] M. P., 41

WRIT APPEAL

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

28 August, 2008*

KALAM SCOOTER SERVICE

... Appellant

Vs.

SHRI SHRI 1008 JAGAT GURU SHANKARACHARYA

SWAMI SWAROOPANAND JI MAHARAJ

... Respondent

A. Constitution, Article 226 & 227, Civil Procedure Code, 1908, Section 115 - Alternative Remedy - Maintainability of Writ Petition - Order challenged before High Court under Article 226 & 227 - Objection raised that alternative remedy u/s 115 of Code is available, therefore, writ under Article 227 would not lie - Learned Single Judge without deciding the question of maintainability decided the writ petition - Order challenged in W.A. - Held - Matter remanded back to learned Single Judge for deciding the issue relating to maintainability of writ petition under Article 227.. (Para 13)

क. संविधान, अनुच्छेद 226 व 227, सिविल प्रक्रिया संहिता, 1908, धारा 115 - वैकल्पिक उपचार - रिट याचिका की पोषणीयता - आदेश को अनुच्छेद 226 व 227 के अन्तर्गत उच्च न्यायालय के समक्ष चुनौती दी गई - यह आपत्ति उठाई गई कि संहिता की धारा 115 के अन्तर्गत वैकल्पिक उपचार उपलब्ध है, इसलिए अनुच्छेद 227 के अन्तर्गत रिट याचिका नहीं की जा सकती - विद्वान एकल न्यायाधीश ने पोषणीयता का प्रश्न विनिश्चित किये बिना रिट याचिका विनिश्चित की - आदेश को रिट अपील में चुनौती दी गई - अभिनिर्धारित - मामला अनुच्छेद 227 के अन्तर्गत रिट याचिका की पोषणीयता से सम्बंधित विवादक का विनिश्चय करने के लिए विद्वान एकल न्यायाधीश को प्रतिप्रेषित किया गया।

B. Judicial Discipline - Conflicting judgments - If learned Single Judge was of the opinion that the judgment in the matter of Shakuntala Singh [2003(3) MPLJ 414] was not deciding correct law or did not take into consideration all provisions of law then he should refer the matter to the Chief Justice for constituting a larger bench - A judgment by coordinate bench cannot be ignored on the ground that the judgment though takes a legal view but is not binding because it does not take into consideration the other legal aspects or provisions of law. (Para 12)

ख. न्यायिक अनुशासन - अन्तर्विरोधी निर्णय - यदि विद्वान एकल न्यायाधीश की यह राय हो कि शकुंतला सिंह [2003(3) एमपीएलजे 414] के मामले में दिया गया निर्णय सही विधि

**KALAMSCOOTER SERVICE Vs. SHRI SHRI 1008 JAGAT GURU HANKARACHARYA
SWAMI SWAROOPANAND JI MAHARAJ**

विनिश्चित नहीं कर रहा था या विधि के सभी प्रावधानों को विचार में नहीं लिया गया, तब उन्हें मामला वृहत्तर न्यायपीठ का गठन करने के लिए मुख्य न्यायाधीश को निर्दिष्ट करना चाहिए – समकक्ष न्यायपीठ द्वारा दिये गये निर्णय की इस आधार पर उपेक्षा नहीं की जा सकती कि यद्यपि निर्णय का विधिक अवलोकन किया जाता है किन्तु बंधनकारी नहीं है क्योंकि यह अन्य विधिक पहलूओं या विधि के उपबंधों को विचार में नहीं लेता है।

Cases referred :

AIR 1964 SC 993, 2003(3) MPLJ 414, 2003(II) MPJR 349, 1991 AILJ 159, AIR 1928 PC 103, AIR 1966 SC 1713.

R.K. Verma, for the appellant.

Neelam Goel, for the respondent.

J U D G M E N T (ORAL)

The Judgment of the Court was delivered by **R.S. GARG, J.** :- This order shall finally dispose of Writ Appeals No. 704/2008 (Kalam Scooter Service Vs Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj), 705/2008 (Kallu Scooter Service Vs Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj), 706/2008 (Siddhu Engineering Works Vs Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj) and 707/2008 (Bhatia Tyres Vs. Shri Shri 1008 Jagat Guru Shankaracharya Swami Swaroopanand Ji Maharaj) as they arise out of common order dated 5.5.2008 passed in Writ Petitions No. 7664/2007, 4993/2008, 4994/2008 and 4995/2008.

2. The short facts necessary for disposal of these Writ Appeals are that the respondent/plaintiff filed number of suits for eviction of the tenants on the ground of arrears of rent and for reconstruction of the dilapidated tenanted premises. Each of the petitioner tenant in the premises filed his written statement and challenged the title of the plaintiff to the property on the ground that the property infact belonged not to the plaintiff but someone else. The matter was adjourned to 25.3.2006 and as none appeared on the said date the Court proceeded exparte in the said matter. The counsel for the defendants appeared in the Court on 15.5.2006 and immediately thereafter each of the tenant on 17.5.2006 filed application under Order 9 Rule 7 of the Code of Civil Procedure for setting aside the exparte order. It was contended in the applications that due to some inadvertence or mistake on the part of the counsel the date was noted as 15.5.2006 instead of 25.3.2006. The application filed under Order 9 Rule 7 of CPC was contested tooth and nail. But it was rejected mainly on the ground that as nothing was required to be done in the matter and matter was closed for orders an application under Order 9 Rule 7 of CPC was not maintainable in light of the judgment of the Supreme Court reported in *Arjun Singh Vs. Mohindra Kumar*, AIR 1964 SC 993. The Court thereafter proceeded to deliver the judgment which was actually delivered on 12.9.2006.

**KALAMSCOOTER SERVICE Vs. SHRI SHRI 1008 JAGAT GURU HANKARACHARYA
SWAMI SWAROOPANAND JI MAHARAJ**

3. Each of the appellant vide their application dated 25.9.2006 applied for the certified copies of the judgment and decree. The same were received on 1.11.2006 and an application for setting aside the *exparte* decree was filed on 16.11.2006. Undisputedly application under Section 5 of the Limitation Act for condonation of delay or setting aside or for extension of the time was not filed. When an objection was raised before the learned Trial Court that the application for setting aside the *exparte* decree was not well within limitation as provided under Article 123 of the Limitation Act, it was contended by each of the appellant that 38 days time spent for obtaining the certified copies of the judgment and decree was required to be excluded and under the circumstances the appeal was filed within 27 days of the *exparte* judgment and decree. It was submitted before the Trial Court that from the date of the *exparte* judgment and decree i.e. 12.9.2006 only 65 days had passed upto 16.11.2006 when application under Order 9 Rule 13 of CPC was filed and therefore, the application was well within limitation and application under Section 5 of the Limitation Act was not required. On opposition by the decree holder/non-applicant, the learned Trial Court upholding the objection held that the application for setting aside *exparte* decree was barred by limitation and in absence of application under Section 5 of the Limitation Act, the delay could not be condoned.

4. Each of the appellant/defendant being aggrieved by the order dated 23.4.2007 preferred Miscellaneous Appeals under Order 43 Rule 1 of the Code of Civil Procedure with a submission that the order passed by the learned Trial Court was patently illegal. The Miscellaneous Appeals were registered as MCA No. 13, 14, 15 and 16 of 2007. After hearing the parties, the learned District Judge allowed each of the appeal and remanded the matter back for trial of the application to the learned Trial Court observing that in view of the judgment of a learned Single Judge of this Court in the matter of *Shakuntala Singh Vs. Basant Kumar Thakur and others* {2003(3) MPLJ 414}), the time spent in obtaining the certified copies of the judgment and decree was required to be excluded and the trial Court was unjustified in dismissing the petitions for setting side the *exparte* judgment and decree. Being aggrieved by the said order passed by the learned Appellate Court, the respondent/petitioner filed Writ Petition No. 7664/2007 and challenged the four orders passed in four different Misc. Civil Appeals. After notice the respondents appeared in the Court and raised a preliminary objection that if there were four suits, four *exparte* decrees, four applications for setting aside *exparte* decree, four Misc. Civil Appeals then one single writ petition was not maintainable. In view of the said objection the present respondent filed three more writ petitions bearing No. 4993/2008, 4994/2008 and 4995/2008. Notices were duly served in these matters and the matters were finally heard. The learned Single Judge vide order dated 5.5.2008 decided all the writ petitions by a common order. Being aggrieved by the said orders, four writ appeals have been filed by the defendants.

**KALAM SCOOTER SERVICE V& SHRI SHRI 1008 JAGAT GURU HANKARACHARYA
SWAMI SWAROOPANAND JI MAHARAJ**

5. Shri R.K. Verma, learned counsel for the appellant raised many fold submissions which can be summarized as under:

(i) That the learned Single Judge despite recording the argument of the appellant that against the order passed by the Appellate Court a revision could lie to the High Court, erred in exercising his powers under Article 226/227 of the Constitution of India;

(ii) That the learned Single Judge if was not agreeing with the judgment in the matter of *Shakuntala Singh* (supra) then he was duty bound and obliged to refer the matter to a larger Bench; and

(iii) That the time spent in obtaining the certified copies of the judgment and decree has to be excluded from the period of limitation.

It is also submitted by him that if this Court is of the opinion that the learned Single Judge was justified in interfering in the matter then he should have remanded the matter back to the learned Trial Court with liberty in favour of the applicant to file an application under Section 5 of the Limitation Act.

6. Ms. Neelam Goel, learned counsel for the respondent contending contrary to the submissions made by Shri Verma, however, submitted that though a revision could lie to this Court under Section 115 of the CPC but in view of the judgment of the Supreme Court in the matter of *Surya Dev Rai Vs. Ram Chander Rai and Others*, 2003 (II) MPJR 349, the High Court was not precluded from exercising its powers under Article 226/227 of the Constitution of India. It was also submitted that the learned Single Judge was absolutely justified in distinguishing the law laid down in the matter of *Shakuntala Singh* (supra) and that the learned Single Judge was absolutely justified in observing that in view of Article 123 read with Section 12 of the Indian Limitation Act, the time spent in obtaining the certified copies could not be excluded.

7. So far as the question relating to maintainability of the petition under Article 226/227 of the Constitution of India is concerned, it is to be seen from the order passed by the learned Single Judge that a question was raised before him submitting that a petition under Article 227 of the Constitution of India was not maintainable but the learned Single Judge did not decide the said question.

8. In the matter of *Surya Dev Rai Vs. Ram Chander Rai and Ors.*, the Supreme Court upholding Full Bench judgment of the Allahabad High Court in the matter of *Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others*, (1991) Allahabad Law Journal 159 observed that every interlocutory order passed in a civil suit is not subject to review under Article 226 of the Constitution of India but if it is found from the order impugned that fundamental principle of law has

**KALAMSCOOTERSERVICE Vs. SHRISHRI 1008 JAGAT GURU HANKARACHARYA
SWAMISWAROOPANAND JI MAHARAJ**

been violated and further such an order causes substantial injustice to the party aggrieved, the jurisdiction of the High Court to issue a writ of certiorari is not precluded. If the observations made by the Full Bench are to be read in their true perspective, it would clearly appear that the Supreme Court was not holding that even on availability of alternative remedy under Section 115 of the CPC, a writ under Article 227 of the Constitution of India would lie. However, the observations made by the Supreme Court would be that in a given case where abuse of the process of law or violation of the fundamental principle of law and substantial injustice to the parties are found then the High Court can exercise its powers under Article 226 of the Constitution of India.

9. In the present matter from the nature of the order passed by the learned Single Judge, it would clearly appear that instead of deciding the question of the maintainability of the writ petition he exercised his powers under Article 226 of the Constitution of India on the foundation that the order passed by the learned District Judge was violating fundamental principle of law and was causing substantial injustice to the petitioners. In any case, the learned Single Judge did not answer the question raised before him that even on availability of an alternative remedy of a civil revision, should the court exercise its powers under Article 227 of the Constitution of India. If the learned Single has exercised his powers under Article 226 of the Constitution of India then an appeal before us under Section 2 of the Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 would be maintainable.

10. It is to be seen from the order passed by the learned Single Judge that he did not agree with the law laid down in the matter of *Shakuntala Singh* (supra) on the ground that the learned Single Judge did not take into consideration the provisions of Article 123 of the Indian Limitation Act. The learned Single Judge was of the opinion that Article 123 of the Limitation Act which relates to setting aside of an *ex parte* decree or to re-hear an appeal heard or decreed *ex parte*, the limitation would start from the date of the judgment and decree and the time spent in obtaining the certified copies of the judgment and decree could not be excluded.

11. The judicial propriety according to the Supreme Court requires every coordinate bench to refer the matter to a larger bench if a bench subsequently hearing a matter is not in agreement with the earlier judgment which was holding the field. The basic principle behind the observation is that the parties at the threshold should know that what is the settled position of law. If the judges take different views in accordance with their own wisdom then not only the Judges of the High Court but even the judges of the Subordinate Judiciary would every time face a difficult or impossible situation. In a given case in the High Court coordinate bench finding that two judgments delivered by the two learned Single Judges are running contrary to each other and cannot be reconciled they may refer the matter to the larger bench but the problem in fact would be with the Judges of the

**KALAM SCOOTER SERVICE V. SHRI SHRI 1008 JAGAT GURU HANKARACHARYA
SWAMI SWAROOPANAND JI MAHARAJ**

Subordinate Courts who would be bound by each of the judgment. In the matter of *Shakuntala Singh* (supra), the learned Single Judge relying upon the judgment of the Privy Council in the matter of *Jijibhoy N. Surty Vs. T.S. Chjettyar*, AIR 1928 Privy Council 103 and in the matter of *Additional Collector of Customs Vs. Best & Co.* AIR 1966 SC 1713 and other judgments observed that the time spent in obtaining the certified copies of judgment and decree have to be excluded and the application for setting aside the exparte order/exparte decree could not be rejected.

12. In the impugned orders, the learned Single Judge instead of referring the matter to a larger Bench simply observed that as the judgment in the matter of *Shakuntala Singh* (supra) did not take into consideration the impact and effect of Article 123 of the Indian Limitation Act, the judgment in the matter of *Shakuntala Singh* (supra) would not apply to the case on hands. In our considered opinion the learned Single Judge if was of the opinion that the judgment in the matter of *Shakuntala Singh* (supra) was not deciding correct law or did not take into consideration all provisions of law then he should refer the matter to the Chief Justice for constituting a larger Bench. As already observed a judgment by coordinate Bench cannot be ignored on the ground that the judgment though takes a legal view but is not binding because it does not take into consideration the other legal aspects or provisions of law.

13. Taking into consideration the totality of the circumstances, we propose to interfere in the matter and set aside the orders passed in the four matters in favour of the respondents and remand the matter to a learned Single Bench for deciding the matter afresh. The learned Single Judge shall take up the issue relating to maintainability of the writ application under Article 227 of the Constitution of India in case a revision is held to be maintainable under Section 115 of CPC. If the learned Single Bench is of the opinion that the judgment in the matter of *Shakuntala Singh* (supra) is not in accordance with law or can be disapproved or can be distinguished then he shall refer the matter to a larger Bench. We make it clear that we are deciding the writ appeals on the preliminary submissions and are not touching the merits of the matter which are still to be decided by the learned Single Judge while exercising his powers either under Article 227 of the Constitution of India or under Article 226 of the Constitution of India.

14. The Registry is hereby directed to restore the writ petitions at their original numbers and place the same before the appropriate Bench on 15.9.2008. The parties present in the Court shall appear before the appropriate Bench on 15.9.2008. The learned Single Judge is requested to provide proper opportunity to the parties to raise their submissions not only on the technical objection or legal ground but even on the merits of the matters. There shall be no orders as to costs.

Order accordingly.

I.L.R. [2009] M. P., 47

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta

25 November, 2008*

KRISHNA KUMAR PATERIA

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

A. Service Law - Civil Services (Classification, Control & Appeal). Rules, M.P. 1966, Rule 29(2) - Power of Appellate Authority to enhance the penalty - Disciplinary Authority giving lesser punishment - The appellate authority enhanced the punishment to dismissal from service - Action challenged as the appellant is acquitted in criminal appeal, the appellate authority could not have enhanced the punishment - Held - In exercise of its powers under Rule 29, the appellate authority has power to enhance the penalty after giving an opportunity of hearing. (Para 6)

क. सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म. प्र. 1966, नियम 29(2) - अपीलीय प्राधिकारी की दण्ड में वृद्धि करने की शक्ति - अनुशासनिक प्राधिकारी ने न्यूनतम दण्ड दिया - अपीलीय प्राधिकारी ने दण्ड को सेवा से पदच्युति तक बढ़ाया - कृत्य को चुनौती दी गई क्योंकि अपीलार्थी दाण्डिक अपील में दोषमुक्त हो गया, अपीलीय प्राधिकारी दण्ड में वृद्धि नहीं कर सकता था - अभिनिर्धारित - अपीलीय प्राधिकारी को नियम 29 के अन्तर्गत अपनी शक्तियों के प्रयोग में सुनवाई का अवसर देने के बाद दण्ड में वृद्धि करने की शक्ति है।

B. Service Law - Departmental enquiry - May be continue after acquittal by criminal court - Appellant in criminal appeal acquitted by the appellate court giving him the benefit of doubt - The departmental enquiry continued - Action challenged - Held - There is no bar in proceeding with the departmental enquiry even after the acquittal by the criminal court.

(Para 8)

ख. सेवा विधि - विभागीय जाँच - दाण्डिक न्यायालय द्वारा दोषमुक्त किये जाने के बाद जारी रह सकेगी - अपीलार्थी को दाण्डिक अपील में अपीलीय न्यायालय द्वारा उसे संदेह का लाम देते हुए दोषमुक्त किया गया - विभागीय जाँच जारी रखी गई - कार्यवाही को चुनौती दी गई - अभिनिर्धारित - दाण्डिक न्यायालय द्वारा दोषमुक्त किये जाने के बाद भी विभागीय जाँच में कार्यवाही करने में कोई रोक नहीं है।

C. Service Law - Departmental enquiry - Misappropriation - Absence from duty - Dismissal - Departmental enquiry instituted against the appellant for misappropriation of government money and absence from duty for 4 years 7 months - For the charge of misappropriation, criminal court acquitted the appellate - However, departmental enquiry continued and appellant dismissed from service - Action challenged as the appellant is

KRISHNA KUMAR PATERIA Vs. STATE OF M.P.

acquitted by criminal court - Held - Even though the appellant has been acquitted by the criminal court for the charge of misappropriation, then the penalty of dismissal has also been imposed on the appellant for the charge that he remained absent without any justified reason for a period of 4 years 7 months - No right has accrued in favour of appellant for reinstatement - Writ appeal dismissed. (Para 9)

ग. सेवा विधि - विभागीय जाँच - दुर्विनियोग - सेवा से अनुपस्थिति - पदच्युति - अपीलार्थी के विरुद्ध सरकारी धन के दुर्विनियोग और 4 वर्ष 7 माह कर्तव्य से अनुपस्थित रहने के लिए विभागीय जाँच संस्थित की गई - दुर्विनियोग के आरोप के लिए दाण्डिक न्यायालय ने अपीलार्थी को दोषमुक्त किया - तथापि, विभागीय जाँच जारी रखी गई और अपीलार्थी को सेवा से पदच्युत किया गया - कृत्य को चुनौती दी गई क्योंकि दाण्डिक न्यायालय द्वारा अपीलार्थी को दोषमुक्त कर दिया गया था - अभिनिर्धारित - यद्यपि अपीलार्थी को दाण्डिक न्यायालय द्वारा दुर्विनियोग के आरोप के लिए दोषमुक्त कर दिया गया, तब भी बिना किसी युक्तियुक्त आधार के 4 वर्ष 7 माह की अवधि तक अनुपस्थित रहने के आरोप के लिए सेवा से पदच्युति का दण्ड दिया गया है - अपीलार्थी के पक्ष में पुनर्स्थापना हेतु कोई अधिकार प्राप्त नहीं होता - रिट अपील खारिज।

Cases referred :

(2006) 10 SCC 572, AIR 1999 SC 1416; (2005) 5 SCC 100, (2005) 13 SCC 709, (2008) 8 SCC 499.

Jitendra Tiwari, for the appellant.

Deepak Awasthy, G.A., for the respondents.

ORDER

The Order of the Court was delivered by **R.K. GUPTA, J.** :- This is an appeal preferred by the original petitioner u/s 2(1) of M.P. Uchha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005 against the order dated 08/07/2008 passed by learned Single Judge in W.P. No. 13474/2003. The learned Single Judge has dismissed the petition.

2. The petitioner was aggrieved by the order dated 11/01/1999 and the order dated 21/09/1999, filed a petition before this Court. By an order dated 11/01/1999 petitioner was dismissed from services and by an order dated 21/01/1999 an amount of Rs. 14,611.40 was directed to be recovered.

3. The petitioner was employed on the post of LDC and a first information report against the petitioner was lodged. The petitioner was prosecuted a criminal case. A charge sheet was also issued against the petitioner. The copy of the charge sheet is filed as Annexure-A-2 wherein the following charges against the petitioner were framed:-

1. आपने शासकीय धनराशि रु 14611.40 कर्मचारियों का माह सितंबर 1978 का वेतन पौध संरक्षण यंत्रों की राशि तथा बैंक ड्राफ्ट की राशि का गबन किया। इस तरह आपने म. प्र. सिविल सेवा आचरण नियमों, 1966 का उल्लंघन किया।

KRISHNA KUMAR PATERIA Vs. STATE OF M.P.

2. आपने शासकीय सामग्री ट्रेजरी बिल रजिस्टर एक शासकीय चमड़े का बैग एवं 1 टोकन अनाधिकृत रूप से अपने कब्जे से अभी तक रखा जो कि म. प्र. सिविल सेवा आचरण नियमों, 1966 का उल्लंघन किया ।

3. आप दिनांक 12/10/1978 से बगैर अनुमति से शासकीय कार्य में अनाधिकृत रूप से अनुपस्थित रहे इस तरह आपने म. प्र. सिविल सेवा आचरण नियमों, 1966 का उल्लंघन किया तथा शासकीय कार्यों के प्रति कर्तव्य परायण नहीं रहे एवं आदेशों की अवहेलना की ।

3. Simultaneously departmental enquiry against the petitioner was conducted. The said criminal case ultimately resulted into the conviction of the petitioner for an offence punishable u/s 409 of the IPC and the petitioner was sentenced by the trial Court to six months imprisonment with a fine of Rs.2,000/-. The petitioner preferred an appeal against the said order of conviction and the Appellate Court passed an order of acquittal dated 24/05/1995 (Annexure-A-7) by giving him the benefit of doubt.

4. In the departmental enquiry earlier a penalty was imposed on the petitioner for charge no.1 recovery of Rs. 14,611.40, for charge no.2 withholding of two annual increments with cumulative effect and, for the charge no.3 censure. The appellate authority after the order of acquittal which was passed by the criminal court giving the petitioner benefit of doubt, decided to enhance the penalty in exercise of its powers under Rule 29(2) of the M.P. Civil Services Classification (Control and Appeal) Rules, 1966 and accordingly a show cause notice was issued to the petitioner as to why the punishment be not enhanced. Subsequently after considering the reply submitted by the petitioner the appellate authority enhanced the penalty by passing an order Annexure-A-14.

5. The appellate authority decided to impose a penalty of removal from services for charge no.1 and 3 for charge no.2 a penalty of withholding two annual increments without cumulative effect was imposed.

6. In view of the factual back drop of the case the learned Single Judge dismissed the petition and held that under Rule 29(2) of the M.P. Civil Services Classification (Control and Appeal) Rules, 1966, the appellate Authority has power to enhance the penalty. With reference to the acquittal, the learned Single Judge came to the conclusion that the acquittal by giving him the benefit of doubt will not necessarily result into the quashing of the order of penalty because even after the acquittal the department has lawful authority to proceed with the disciplinary proceedings.

7. The learned Single Judge relied upon the judgment passed by the Apex Court in 2006(10) SCC 572 (*Suresh Pathrella Vs. Oriental Bank of Commerce*). Learned counsel appearing on behalf of the petitioner submitted that after when the petitioner has been acquitted of the charges the order of penalty has to be set aside. For the said proposition learned Counsel appearing on behalf of the petitioner

KRISHNA KUMAR PATERIA Vs. STATE OF M.P.

relied upon the judgment passed by the Apex Court in AIR 1999 SC 1416. (*Capt M. Paul Anthony Vs. Bharat Gold Mines Ltd and another*).

8. The submission so made by the learned Counsel for the petitioner is considered. The Apex Court has taken into account the right of the employer to continue with the departmental enquiry even after the acquittal. To substantiate the same, learned Single Judge has referred the judgment passed in *Suresh Pathrella* (supra) wherein the Apex Court has held that a departmental enquiry can be proceeded with even after the acquittal of an incumbent. Thus even though on the basis of the law laid down by the Apex Court in case of *M.P. M. Paul Anthony's case* (Supra), now the position is made clear that there is no bar in proceeding with the departmental enquiry even after the acquittal by the criminal court.

9. In the present case it may be seen that the appellate authority while passing the order of enhancement has inflicted a penalty of removal from services with reference to charge no. 1 and 3 and charge no. 1 related to the misappropriation of the amount for which he is acquitted by giving him the benefit of doubt. Thus even though the writ appellant has been acquitted by the criminal court for charge no. 1 then the penalty of dismissal has also been imposed on the present writ appellant for charge no. 3 that he remained absent without any justified reasons for a period from 12/10/1978 till the issuance of charge sheet. The charge sheet was issued on 20th July 1983.

10. In view of the aforesaid fact even assuming that the petitioner has been acquitted by the Criminal Court in relation to charge no. 1 yet for charge no. 3 penalty of removal from services has been imposed on him. Thus even after his acquittal no right is accrued in favour of the writ appellant for reinstatement.

11. The order of acquittal passed in favour of the writ appellant is based upon the benefit of doubt which has been given to the writ appellant. The Apex Court in 2005(5) SC 100 (*Manager, Reserve Bank of India, Bangalore Vs. S. Mani and others*) in paragraphs 12, 13 and 15 has held as under:-

"12. It is trite that a judgment of acquittal passed in favour of the employees by giving benefit of doubt per se would not be binding upon the employer. The employer had no occasion to initiate departmental proceeding against the Respondents. They were not regularly employed. They, according to the Appellant, filed forged and fabricated documents and as such were not found fit to be absorbed in regular service. The effect of a judgment of acquittal vis-a-vis the alleged misconduct on the part of the workmen fell for consideration before this Court in *Bihari Lal Sidhana* (supra) wherein it was held :

"5. It is true that the respondent was acquitted by the criminal court but acquittal does not automatically give him the right to be

KRISHNA KUMAR PATERIA Vs. STATE OF M.P.

reinstated into the service. It would still be open to the competent authority to take decision whether the delinquent Government servant can be taken into service or disciplinary action should be taken under the Central Civil Services (Classification, Control and Appeal) Rules or under the Temporary Service Rules. Admittedly, the respondent had been working as a temporary Government servant before he was kept under suspension. The termination order indicated the factum that he, by then, was under suspension. It is only a way of describing him as being under suspension when the order came to be passed but that does not constitute any stigma. Mere acquittal of Government employee does not automatically entitle the Government servant to reinstatement. As stated earlier, it would be open to the appropriate competent authority to take a decision whether the enquiry into the conduct is required to be done before directing reinstatement or appropriate action should be taken as per law, if otherwise, available. Since the respondent is only a temporary Government servant, the power being available under Rule 5(1) of the Rules, it is always open to the competent authority to invoke the said power and terminate the services of the employee instead of conducting the enquiry or to continue in service a Government servant accused of defalcation of public money. Reinstatement would be a charter for him to indulge with impunity in misappropriation of public money."

13. Recently in *Krishnakali Tea Estate v. Akhil Bharatiya Chah Mazdoor Sangh and Another* [(2004) 8 SCC 200], one of us, Santosh Hegde, J., speaking for a 3-Judge Bench observed : AIR-2004 SC 4647 : 2004 AIR SCW 5256 : 2004 Lab IC 4074

"25: The next contention addressed on behalf of the respondents is that the Labour Court ought not to have brushed aside the finding of the criminal Court which according to the learned Single Judge "honourably" acquitted the accused workmen of the offence before it. We have been taken through the said judgment of the criminal Court and we must record that there was such "honourable" acquittal by the criminal Court. The acquittal by the criminal Court was based on the fact that the prosecution did not produce sufficient material to establish its charge which is clear from the following observations found in the judgment of the criminal court:

"Absolutely in the evidence on record of the prosecution witnesses I have found nothing against the accused persons. The prosecution totally fails to prove the charges under Sections 147, 353, 329 IPC."

KRISHNA KUMAR PATERIA Vs. STATE OF M.P.

26. Learned counsel for the respondents in regard to the above contention relied on a judgment of this Court in the case of *Capt. M. Paul Anthony*. In our opinion, even that case would not support the respondents herein because in the said case the evidence led in the criminal case as well as in the domestic enquiry was one and the same and the criminal case having acquitted the workmen on the very same evidence, this Court came to the conclusion that the finding to the contrary on the very same evidence by the domestic enquiry would be unjust, unfair and rather oppressive. It is to be noted that in that case the finding by the Tribunal was arrived at in an ex parte departmental proceeding. In the case in hand, we have noticed that before the Labour Court the evidence led by the management was different from that led by the prosecution in the criminal case and the materials before the criminal Court and the Labour Court were entirely different. Therefore, it was open to the Labour Court to have come to an independent conclusion dehors the finding of the criminal Court..." It was observed : (SCC P. 212, para 27)

"27 From the above, it is seen that the approach and the objectives of the criminal proceedings and the disciplinary proceedings are altogether distinct and different. The observations therein indicate that the Labour Court is not bound by the findings of the criminal Court."

15. The contention that the Respondents had not produced such certificates or the same have been fabricated at the instance of some officers of the Reserve Bank of India, therefore, does not find our acceptance. It is rejected accordingly."

12. In view of the law laid down by the Apex Court in case of *S. Mani* (supra) it cannot be said to be an hon'ble acquittal to restrict the powers of the employer for not proceeding with the disciplinary action.

13. In view of our aforesaid discussion, we do not find any error into the judgment passed by the learned Single Judge.

14. In the present case according to charge no.3 the petitioner was absent from 12/10/1978 till the issuance of charge sheet. There is nothing on record that the petitioner applied for the grant of leave which was sanctioned. The absence for such a long period by itself is enough to uphold the order of penalty of dismissal. The absence of the petitioner had been for a considerable long period. There is nothing on record that the petitioner applied for leave which was also granted.

15. The Apex Court in *Union of India and Others Vs. Datta Linga Toshatwad*, 2005 (13) SCC 709 has considered the question of removal from services on the

KRISHNA KUMAR PATERIA V.S. STATE OF M.P.

ground of absence and further held that the dismissal on ground of absence as such is a justified disciplinary action and cannot be described as disproportionate to the misconduct alleged. The relevant paragraphs 6, 7 and 8 from the aforesaid judgment are reproduced as under:-

"6. One cannot ignore the large number of cases which come to this Court of members of uniformed forces remaining absent from duty without any reasonable explanation. Whenever action is taken, the usual plea taken is of having been ill or some such false pretext, and even fake or false medical certificates are produced in support of such a plea. We would not have taken a serious view of the matter had it not been a case of a constable belonging to CRPF remaining absent for an indefinite period. Even if we assume that the respondent was suffering from depression and was being treated as an outdoor patient, the medical certificates produced by him show that he was restored to normalcy on 4-4-1998 yet the respondent did not choose to report for duty. The order of dismissal was passed seven months later i.e. on 2-11-1998. This itself discloses the hollowness of the claim of the respondent regarding mental depression and imbalance which he claims to have suffered.

7. Reliance was placed on a judgment of this Court in *Union of India v. Giriraj Sharma* (1994 Supp (3) SCC 755 : 1995 SCC (L&S) 290 : AIR 1994 SC 215), which was also a case of a constable employed in CRPF. In that case the respondent had been punished by an order of dismissal for overstaying on leave by 12 days. The High Court took the view that for such misconduct the punishment of dismissal from service was not justified and was also harsh. This Court, while agreeing with the High Court, dismissed the appeal by holding that in the facts of the case, instead of a major penalty, a minor penalty would have been sufficient.

8. The present case is not a case of a constable merely overstaying his leave by 12 days. The respondent took leave from 16-6-1997 and never reported for duty thereafter. Instead he filed a writ petition before the High Court in which the impugned order has been passed. Members of the uniformed forces cannot absent themselves on frivolous pleas, having regard to the nature of the duties enjoined on these forces. Such indiscipline, if it goes unpunished, will greatly affect the discipline of the forces. In such forces desertion is a serious matter. Cases of this nature, in whatever manner described, are cases of desertion particularly when there is apprehension of the member of the force being called

KRISHNA KUMAR PATERIA Vs. STATE OF M.P.

upon to perform onerous duties in difficult terrains or an order of deputation which he finds inconvenient, is passed. We cannot take such matters lightly, particularly when it relates to uniformed forces of this country. A member of a uniformed force who overstays his leave by a few days must be able to give a satisfactory explanation. However, a member of the force who goes on leave and never reports for duties thereafter, cannot be said to be one merely overstaying his leave. He must be treated as a deserter. He appears on the scene for the first time when he files a writ petition before the High Court, rather than reporting to his Commanding Officer. We are satisfied that in cases of this nature, dismissal from the force is a justified disciplinary action and cannot be described as disproportionate to the misconduct alleged."

16. The Apex Court in 2008(8) SCC 469 (*State of Punjab Vs. Dr. P.L. Singla*) in paragraph 14 has held as under:

"14. Where the employee who is unauthorizedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorized absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence. Where the punishment is either dismissal or removal, it may not be necessary to pass any consequential orders relating to the period of unauthorized absence (unless the rules require otherwise). Where the punishment awarded for the unauthorized absence, does not result in severance of employment and the employee continues in service, it will be necessary to pass some consequential order as to how the period of absence should be accounted for and dealt with in the service record. If the unauthorized absence remains unaccounted it will result in break in service, thereby affecting the seniority, pension, pay, etc. of the employee. Any consequential order directing how the period of absence should be accounted, is an accounting and administrative procedure, which does not affect or supersede the order imposing punishment."

17. In view of the aforesaid it is clear that leave cannot be presumed or inferred, the onus lies on the employee to prove that he had actually sent leave application.

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

The Apex Court in the said judgment further held that for the misconduct of unauthorized absence depends upon the duration of the absence. The Apex Court further held that the employee who is unauthorizedly absent then while making the inquiry the employer has to consider the explanation offered and keeping in view the explanation it may lead to imposition of punishment ranging from major penalty like dismissal or removal from service to a minor penalty. The extent of penalty will depend upon the nature of service, the position held by employee, period of absence and the cause/explanation for the absence. In the present case the explanation which was offered by the petitioner was that he has taken leave on 13/10/1978 and return to duty on 16/10/1978. He further submitted that after 16/10/1978 he was not permitted to join his duties and was falsely implicated in criminal case.

18. The aforesaid defence was not found proved by the Inquiry Officer and the Inquiry Officer held him guilty of the charges. He joined duty after 4 years 7 months on 25/05/1983 when he was suspended. The findings of the Inquiry Officer have been placed on record. The Inquiry Officer relied upon the statement of one witness Shri M.S Yadav (PW-4), who stated that the petitioner does not turn up his duty on 16/10/1978 as he was not seen in the office. With regard to the nature of post though the petitioner was LDC but was carrying out the duties of accounts and because of absence of the petitioner the important work such as account shall certainly suffer.

19. On the basis of the findings recorded by the Inquiry Officer it is not a case where explanation was offered by the petitioner. It appears that the petitioner since came to know that there had a FIR lodged against him, therefore he has chosen to remain absconding by not reporting to his office and subsequently has made out a case that he was not permitted to join in the office.

20. No other point is argued.

21. In view of the aforesaid discussion and the law laid down by the Apex court we do not find any case for interference and the petition stands dismissed.

Appeal dismissed.

I.L.R. [2009] M. P., 55

WRIT PETITION

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

2 July, 2008*

HARSHAL PAPER & BOARD MILL LTD.

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

Service Law - Employees' State Insurance Act (34 of 1948), Section 75(2-B) - Constitutional validity challenged being unreasonable and

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

oppressive - Act is beneficial piece of legislation intended to provide benefit to employees - Adjudication by ESI Court u/s 75 is not an adjudication in the first instance to make the requirement of pre-deposit as arbitrary, unreasonable and oppressive - Beneficial legislation should not be allowed to be frustrated by adopting pedantic approach to Article 14 of Constitution - Constitutional validity of Section 75(2-B) upheld - Petition dismissed.

(Paras 10, 12, 14, 16, 18, 24 & 26)

सेवा विधि - कर्मचारी राज्य बीमा अधिनियम (1948 का 34), धारा 75(2-बी) - संवैधानिक वैधता को अयुक्तियुक्त और अन्यायपूर्ण होने से चुनौती - अधिनियम कर्मचारियों को लाभ देने के लिए आशयित विधायन का लाभप्रद हिस्सा है - कर्मचारी राज्य बीमा न्यायालय द्वारा धारा 75 के अन्तर्गत न्यायनिर्णयन पूर्व निक्षेप की आवश्यकता को मनमानी, अयुक्तियुक्त और अन्यायपूर्ण बनाने के लिए प्रथम बार न्यायनिर्णयन नहीं है - लाभप्रद विधायन को संविधान के अनुच्छेद 14 का आडम्बरी दृष्टिकोण अपनाकर विफल होने की इजाजत नहीं दी जानी चाहिए - धारा 75(2-बी) की संवैधानिक वैधता को मान्य ठहराया गया - याचिका खारिज।

Cases referred :

(2004) 4 SCC 311, AIR 2000 SC 238, (1997) 1 SCC 625, (1937) 5 ITR 170 (PC), (1976) 76 ITR 690 (SC), (1994) 207 ITR 979 (Cal), (1974) 2 SCC 393, AIR 1954 SC 190, AIR 1980 SC 1382.

Rajneesh Gupta, for the petitioner.

Brian D'Silva with Sajid Akhtar, for the respondents.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India though the petitioner has prayed for many a relief, the fundamental and seminal relief from which the other reliefs quintessentially flow is that the mandate contained in Section 75 (2B) of the Employees' State Insurance Act, 1948 (for short 'the Act') requiring an applicant to make a deposit of fifty per cent of the amount due from him before raising the dispute before the Employees' Insurance Court (hereinafter referred to as 'the Court') should be declared ultra vires Article 14 of the Constitution of India.

2. Bereft of unnecessary details, the facts which are necessitous to be stated are that the petitioner being grieved by the orders passed by the authorities under the Act raised a dispute before the Court which by the impugned order dated 25.8.2005, Annexure P-1, insisted for deposit of 50% of the amount demanded by the statutory authority within a period of a fortnight for the purpose of entertaining the matter for adjudication the Court by order dated 22.9.2005 dismissed the application for non-compliance with the order dated 25.8.05. It is obligatory to state here that most of the pleadings pertain to how the proceeding travelled from one forum to others and how the petitioner was not liable to pay the dues under the Act. Needless to emphasise they are of no relevance when the

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

constitutional validity of the provisions is required to be adverted only after adjudication of such issue, other aspects would only gain some kind of signification. Hence, brushing aside such assertions, we proceed to deal with the aspect of constitutional validity and pleadings which have nexus with the same.

3. It is contended that Section 75 (2B) of the Act was brought on the Statute Book with effect from 20th October, 1989 by the amending Act No.29 of 1989. The said provision stipulates a pre-deposit before adjudication by the Court. There is a proviso to the said section which enables the Court, for reasons to be recorded in writing, to waive or reduce the amount to be deposited under the said sub-section. It is contended that such pre-deposit does not stand to reason and in fact is unreasonable and oppressive more so when the demand notices are challenged and they require determination. It is urged that the Court exercises original jurisdiction and not appellate jurisdiction and hence, such pre-deposit as mandate by the statute smacks of arbitrariness when the demand has not yet been determined. The condition as enshrined under the provision is onerous and oppressive. It is set forth that though the proviso has been added empowering the Court to waive or reduce the amount yet it does not cure the inherent infirmity leaning in favour of one party which makes the provision, in a way, arbitrary and unworkable.

4. A counter affidavit has been filed by the respondents 2 and 3, the Corporation and its functionaries contending, inter alia, that a recovery certificate was issued to the M/s Straw Board Products for the period of 1973-1976 and as the amount was not paid, the Corporation initiated recovery proceeding against the petitioner under Section 93A of the Act. The petitioner raised a dispute before the Court which was registered as case No. 34/1993. Initially a temporary injunction was granted but later on the Court directed the petitioner to comply with the statutory requirement under Section 75 (2B) of the Act by depositing fifty per cent of the dispute amount. The petitioner failed to deposit the same which entailed in dismissal of the case by order dated 22.9.2005. The petitioner after availing the statutory remedy of appeal has preferred the present petition assailing the constitutional validity as an afterthought on the ground that the said provision is cumbersome and an illusory remedy and, therefore, arbitrary, unreasonable and violative of Article 14 of the Constitution of India. It is put forth that the ESI Act is a beneficial piece of legislation intended to provide benefit to the employees in case of sickness, maternity, employment injury and certain other matters in relation thereto. An establishment covered under the provisions of the Act is required to pay its contribution and in the event of default is liable to pay simple interest and recovery may be carried out as arrears of land revenue. In a case where a factory or establishment does not file any returns, particulars, registers or records, the authorities as provided under the Act on the basis of information available, can determine the amount of contribution payable in respect of the employees of that factory or establishment. An employer aggrieved by

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

the determination can assail the same under Section 75 of the Act before the Court. The Legislature in its wisdom in order to meet the object of the Act and keeping in view the interest of the beneficiaries, has imposed the condition that the employer is required to deposit fifty per cent of the disputed amount before raising the dispute before the Court. There is also a postulate that the proviso empowers the Court to waive or reduce the pre-deposit and, therefore, the provision, by no stretch of imagination, can be regarded as unreasonable or arbitrary and further the bald asseveration that the provision is oppressive and illusory is neither correct nor sound.

5. We have heard Mr. Rajneesh Gupta, learned counsel for the respondents and Mr. Brian D'Silva learned senior Counsel along with Mr. Sajid Akhtar for the respondents.

6. Mr. Rajneesh, Gupta questioning the constitutional validity of the provision, has raised the following contentions:

(i) The pre-deposit as a condition before entertaining the dispute makes the provision illusory as the Court is the court of first instance for the purpose of adjudication inasmuch as there is no mechanism for prior adjudication under any of the provisions of the Act.

(ii) The provisions contained in Sections 44 and 45 of the Act which deal with the some kind of adjudication are basically one-sided determination and cannot be conferred the status of adjudication by any quasi-judicial authority but demand notices are issued in relation to the contribution payable by the employer and when the employer assails the same by raising a dispute, the command of pre-deposit as engrafted under Section 75 (2B), makes the provision not only arbitrary but effectively takes away the purpose of the real adjudication.

(iii) The principal employer can agitate his grievance before the Court after a demand is made under Section 45 of the Act but he cannot go to the Court prior to such demand being issued and in the absence of effective adjudication, a provision which has been engrafted by Act No.29 of 1989 with effect from 20th October, 1989 despite the fact that the Act had come into force from 1948 makes it totally arbitrary and unreasonable.

(iv) The provision contained in Section 75 of the Act is pari materia to Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity 'the 2002 Act') the constitutional validity of which was assailed before the Apex Court in *Mardia Chemicals Ltd*

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

and Others v. Union of India and Others, (2004) 4 SCC 311 wherein the Apex Court has held that a provision enabling the tribunal to waive or reduce the amount does not cure the inherent infirmity leaning one side in favour of the party and hence, the provision under challenge deserves to be declared as unconstitutional on similar foundation.

(v) The proceeding under Section 45 of the Act is in the nature of best judgment assessment and by no stretch of imagination it can be given the status of adjudication. The decision rendered in *Mardia Chemicals Ltd* (supra) would be fully applicable to the present enactment and further as the provision affects the rights of the parties seeking adjudication to a major extent, it smacks of total arbitrariness and unreasonability.

(vi) In the name of beneficial legislation a hindrance cannot be caused for filing an appeal by the employer requiring him to deposit a certain percentage of the demand made as that essentially affects the rights of a party to have access to justice which is fundamental to the philosophy of the Constitution and a basic facet of human rights.

7. Mr. Brian D'Silva, learned senior counsel, resisting the aforesaid contentions has canvassed as follows:

(a) The object of the amending provision has to be properly appreciated to understand and appreciate the need for incorporation of such a provision and the scheme of the Act has to be scrutinized before comparing it with the 2002 Act inasmuch as the reasons given by the Apex Court for declaring the provision, namely, Sub-section (2) of Section 17 of the 2002 Act, as unreasonable, arbitrary and violative of Article 14 are totally different as in the said case a different kind of enactment was under test but here a different piece of legislation is under assail.

(b) If the avowed purpose of the Act is taken into consideration it would be inapposite to hold that the provision relating to pre-deposit is oppressive, onerous and unreasonable.

(c) The statute itself imposes certain obligations on an employer and the determination made under Section 45A though has been treated as a best judgment assessment yet the Corporation can call upon the employer to deposit the amount with the Corporation and the employer cannot be allowed to contend that there is no primary forum of decision and hence, there cannot be compulsion to deposit before getting an adjudication by the Court.

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

(d) There is no denial of access to justice but it is hedged with a condition and if the said condition is tested on the anvil and touchstone of proportionality and reasonability regard being had to the scheme of the Act the said condition passes the test and hence, is constitutional.

8. To appreciate the submissions raised by the learned counsel for the parties, it is necessary to scan the anatomy and scheme of the Act. The Act was enacted to provide certain benefits to employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. The Act, as the provisions clearly unfold and undrape, is a legislation for self financial social security in which every contributor is a beneficiary. In essence, it is a beneficial legislation and the dictionary clause, in many a facet, covers a wide spectrum. The definition of 'employee' under Section 2 (9) has been incorporated to mean part-time employees, employees on daily wages, casual workers, employees working in show-rooms and employees engaged by contractors, etc. The definitions of 'factory', 'immediate employer' and 'manufacturing process' have also been incorporated to cover a large canvas. Chapter IV deals with contribution. Section 38 occurring therein provides that all employees in the factory and establishment to which the Act applies shall be insured in the manner provided in the Act. In *Transport Corporation of India v. Employees' State Insurance Corporation*, AIR 2000 SC 238, the Apex Court has ruled that the initial and vital endeavour should be to identify the beneficiaries or the employees for insurance, that being the mandate of the Act.

9. It is worth noting that Section 40 casts an obligation on the employer to pay contribution in the first instance. Section 41 provides for recovery of contribution from the immediate employer. Section 43 deals with the method of payment of contribution. Section 44 stipulates that the employers shall submit to the Corporation or to such officer such return in such form and containing such particulars relating to persons employed by him or any factory or establishment in respect of which he is the principal or immediate employer as may be specified in the regulations framed in that behalf. Section 45 provides for appointment of inspectors for the purposes of the Act and prescribes their functions and duties. Section 45A being relevant for the present purpose is reproduced below:

"45A. Determination of contributions in certain cases.

-(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under Section 45, the Corporation may, on the basis of information available to it, by

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

order, determine the amount of contribution payable in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as an arrear of land revenue under Section 45B or the recovery under Sections 45C to 45-I."

10. On a perusal of the aforesaid provisions it is clear as crystal that an order is passed by the Corporation on the information available after affording a reasonable opportunity of being heard to the employer. Section 45B provides for recovery of contribution. Chapter V deals with the benefits which are provided to the insured persons. Section 68 confers rights on the Corporation to take action where the principal employer fails or ignores to pay any contribution. Chapter VI deals with the adjudication of disputes and claims. Section 74 provides for constitution of Employees' Insurance Court. Section 75 provides for matters to be decided by the the Employees' Insurance Court. Section 75 (2B), the constitutional validity of which has been challenged, is as follows :

"75. Matters to be decided by Employees' Insurance Court.-
(2B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent. Of the amount due from him as claimed by the Corporation: Provided that the Court may, for the reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section."

11. Be it noted that Section 75 (3) bars the jurisdiction of Civil Courts. Section 85 which occurs in Chapter VII provides for punishment for failure to pay contribution, etc. Section 85B empowers the Corporation to recover the damages and damages can be levied for delay in payment of contribution.

12. The aforesaid provisions have a definite purpose and an obligation has been cast on the employer. There is a mode of computation and the determination is provided. The principles of natural Justice have statutorily been incorporated before any determination is made. The Corporation has been given ample power to take action to prosecute and to recover damages.

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

13. In *Employees State Insurance Corporation v. F. Fibre Bangalore (P) Ltd.*, (1997) 1 SCC 625, a two-Judge Bench of the Apex Court, after referring to Section 45A of the Act, has held as under:

4. It would thus be seen that the employer, on making the provisions of the Act applicable to the factory or the establishment, as the case may be, is statutorily under an obligation to register itself with the Corporation and keep depositing the employer's and employee's contribution within the period specified therein. The question is: as to who would approach the Insurance Court for adjudication and determination of a dispute whether the establishment of the employer is attracted by the provisions of the Act and/or what is the number of employees it has employed etc.? It is seen that Section 45-A is in the nature of best assessment judgment on the basis of the information collected by the Inspector. In the impugned order the High Court holds that it is for the employer to challenge it and seek adjudication. When there was dereliction of duty on the employer to either register itself with the Corporation under the Act or when there is failure to deposit the contribution with the Corporation under the Act or failure to deposit the contribution with the account of the Corporation towards employer's and employee's contribution as envisaged hereinbefore, the Corporation is empowered to make best assessment judgment under Section 45-A and call upon the employer to deposit the amount with the Corporation.

5. The Full Bench of the High Court has held that in a case where the order under Section 45-A becomes final, there is no need for the Corporation to seek adjudication before the Insurance Court. In all other cases, the Corporation is required to go to the Insurance Court, have it adjudicated and then make a demand. We are of the view that the Full Bench of the High Court is clearly in error to reach that conclusion. Though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act, or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise, the Act would become unworkable and defeat the object and purpose of the Act."

14. Submission of Mr. Gupta, learned counsel for the petitioner, is that it is a

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

best judgment assessment and hence, there is no adjudication. To appreciate the said facet one has to scrutinise the concept, of best judgment assessment. The conception of best judgment assessment has a different connotation. In *Commissioner of Income Tax, Central and United Provinces v. Laxminarain Badridas*, (1937) 5 ITR 170 (PC) it was held by their Lordships that an officer who makes an assessment to the best of his judgment must not act dishonestly, vindictively or capriciously because he must exercise judgment in the matter.

15. In *State of Orissa v. Maharaj Shri B.P. Singh Deo*, (1970) 76 ITR 690 (SC) a two-Judge Bench of the Apex Court ruled that the power to levy assessment on the basis of best judgment is not an arbitrary power. It is an assessment on the basis of best judgment. In other words the assessment must be on some relevant material.

16. In *Commissioner of Income Tax v. Ranicherra Tea Co. Ltd.*, (1994) 207 ITR 979 (Cal.) the Division Bench opined that in making a best judgment assessment the Assessing Officer does not possess absolute arbitrary authority to assess any figure he likes and although he is not bound by strict judicial principles, he should be guided by rules of justice, equity and good conscience.

17. We have referred to the aforesaid decisions to show that best judgment assessment inheres the term judgment and there cannot be any kind of caprice or arbitrariness in the said kind of order. In Section 45A of the ESI Act clearly reveals that the amount is determined on perusal of records and after affording opportunity of being heard to the principal employer or immediate employer or a person in-charge of the factor or establishment. The opportunity that is given has to be reasonable.

18. In view of the aforesaid, it cannot be said that there is no adjudication at all. That apart aforesaid paragraphs would show how their Lordships have viewed the provision and held about the conferral of such statutory powers on the Corporation.

19. Learned counsel for the petitioner has commended us to the decision rendered in *Marida Chemicals Ltd. and Others v. Union of India and Others, etc.* (2004) 4 SCC 311 to highlight that it is an adjudication in the first instance and, therefore, postulation of any kind of deposit is unconstitutional, being arbitrary, as it makes the adjudication totally illusory. It is urged by him that the Apex Court in the said decision referred to *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393 to bring in a distinction between the right of suit and the right of appeal. There is an inherent right of every person to bring a suit of civil nature and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice. A suit for its maintainability does not require authority of law and it is enough that no statute bars the suit but the position in regard to appeals is quite opposite because the right of appeal inheres in no one and, therefore, an appeal for its maintainability

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

must have the clear authority of law and that is why the right of appeal is described as creature of statute. The learned counsel submitted that the Apex Court has made a distinction between the suit and the appeal and thereby the first adjudication and the adjudication at the appellate stage. It is contended by him that any kind of pre-deposit at the first instance of the proceeding makes the adjudication totally illusory and unreasonable and thereby invites the frown of Article 14 of the Constitution of India. To appreciate the said submission, it is worth noting that their Lordships were dealing with the provisions contained in Sections 17 (1) and (2) of the 2002 Act. Under the said Act, Section 13 provides for enforcement of security interest which is enforceable by the secured creditors straight away. Under sub-section (4) of the said Section, the secured creditor is entitled to take possession of secured asset and may transfer the asset by way of lease. Their Lordships in paragraph 33 of the decision posed a question whether the remedy available under Section 17 of the Act is illusory for the reason that it is available only after the action is taken under Section 13(4) of the Act and the appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand. The Apex Court took note of the facts, measures to be taken by the secured creditors, the provisions of the Transfer of Property Act and the fact that a secured creditor may enforce any security interest without the intervention of the court or tribunal. Their Lordships addressed to the issue whether the protection to the borrowers and the appeal provided under the Act and eventually dealt with the concept whether the provision of appeal has been made to regulate the power and to stop abuse of the same by a recalcitrant party. In that context their Lordships observed that the proceedings under Section 17 of the Act are actually not appellate proceedings but constitutes the initial action brought before the forum as prescribed under the Act raising grievance against the action or measures taken by one of the parties. Their Lordships in paragraph 60 of the judgment have expressed the view as under:

"60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on basis of one-sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one-sidedly in favour of the party, who, so far has alone been the party to

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

decide the amount and the fact of default and classifying the dues as NPAs without participation/ association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the concerned authority. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory."

20. Thereafter their Lordships in paragraph 64 expressed the view as under:

"64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed -while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as-yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meagre amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Art. 14 of the Constitution."

21. In paragraph 68 of the judgment, their Lordships opined that the remedy of appeal available under the Act as contained in Section 17 can be availed after measures have already been taken by the secured creditor under sub-section (4) of Section 13 of the Act which includes the sale of the secured assets, taking over its management and all transferable rights thereto.

22. On a perusal of the aforesaid decision it is luminescent that the Apex Court declared the provisions unconstitutional being arbitrary and unreasonable on the grounds or reasons specified in paragraph 64 of the judgment.

23. The provisions of the Employee's State Insurance Act are quite different. We have referred to Sections 40, 45, 45A and 45B to show the obligation cast on the principal employer and the process of computation. The Apex Court in *F. Fibre Bangalore (P) Ltd.* (supra) has expressed the opinion that the Corporation is empowered to best assessment judgment under Section 45A and call upon the employer to deposit the amount with the Corporation. Their

HARSHAL PAPER & BOARD MILL LTD. Vs. UNION OF INDIA

Lordships have opined that it is not for the Corporation to go in each case to the Employee's Insurance Court and have the dispute adjudicated. We have dealt with the concept of best judgment assessment to show it has a different connotation. That apart in contradistinction to the 2002 Act the principal employer is not put in such a position as is the case of borrowers under the 2002 Act. The reasons which have been mentioned in paragraph 64 of *Marida Chemicals Ltd.* (supra) are not applicable in the case of deposit under Section 75 (2B) of the Act. The said provision has a purpose. The principal employer cannot deny the liability for the sake of it. When there is a best assessment judgment upon hearing the employer cannot approach the Court and obtain an interim order as the said forum has power to grant stay.

24. The controversy can be looked from another angle. As we indicated earlier, the provisions of the 1948 Act are beneficial in nature. While testing the constitutional validity of a beneficial legislation on the anvil of Article 14 of the Constitution, a doctrinaire approach cannot be taken recourse to as it might choke all beneficial legislation. It was so stated by the Constitution Bench in *Harman Singh v. RTA, Calcutta Region*, AIR 1954 SC 190. True it is, it was stated in a different context but the beneficial legislation was given a different kind of connotative expanse in the context of constitutional validity.

25. In *V. C. Shukla v. State (Delhi Administration)*, AIR 1980 SC 1382, it has been opined that Article 14 of the Constitution should not be applied with mathematical precision or nicety. It was also held therein that a beneficial legislation should not be frustrated by taking a pedantic approach to Article 14. We are absolutely conscious that the said decision was rendered with regard to the classification facet but in the present case we are concerned with the unreasonableness and arbitrariness.

26. When we have stated so it may not be understood that this Court has expressed an opinion that a beneficial legislation cannot be struck down as unconstitutional even if it offends Article 14 of the Constitution. Needless to emphasise it has to pass the test of reasonability. What is to be perceived is whether the sum required to be deposited by an employer under the Scheme of the Act is so onerous that it makes the provision arbitrary. The condition has to be scrutinised on the parameters of the scheme of the Act. The Corporation has been conferred with certain responsibility to insure the employees. If the money is not collected the scheme of the Act cannot be worked out. If we apply the principles of proportionality or to put it differently whether the provision is weighed on the scale of proportionality, there can be no scintilla of doubt, it satisfies the same because the benefit to the collective is protected. The submission of Mr. Gupta that access to justice is a human right and the same is totally curbed by incorporation of such a pre-deposit is neither sound nor correct as there is no denial of access to justice but is hedged with a condition and the condition as we perceive is

DWARKADAS MAHAJAN Vs. STATE OF M.P.

a reasonable one. Therefore, we are disposed to think that the provision pertaining to pre-deposit as engrafted under Section 75(2B) does not offend Article 14 of the Constitution of India and accordingly, the said provision is treated as intra vires the Constitution. As we have indicated earlier, that there is an adjudication under Section 45A of the Act and the principles of natural justice are expressly provided therein. The adjudication has its own character and contour. The same is distinct from the provisions of the 2002 Act. It does not put the principal employer in such a situation as the 2002 Act put the borrowers. True it is, the principal employer can dispute the claim put forth by the Insurance Corporation but the deposit as stipulated in Section 75 (2B) cannot be said to be harsh, unreasonable and arbitrary or it cannot be said that it is an adjudication at the first instance as if it is a suit. The Parliament in its wisdom has provided many measures to curb and control the principal employer and to make them comply with the provisions of the Act. The determination is not made at the whims and fancies of the Corporation. The Regional Director is authorised to adjudicate, determine and compute before the same is called in question before the Employees' Insurance Court. The pre-deposit in our considered view, cannot be held to be unreasonable and arbitrary. The parity that is sought to be drawn by Mr. Gupta between the provisions of the 1948 Act and that of the 2002 Act, in our considered opinion, is misconceived.

27 Resultantly, we perceive no merit in the writ petition and accordingly, the same stands dismissed without any order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 67

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

9 July, 2008*

DWARKADAS MAHAJAN

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

Service Law - Regularization of Ad hoc Appointment Rules, M.P. 1986, Rule 12 - *On 23.09.1980 petitioner was appointed on ad hoc basis as Lecturer - Regularized on 10.03.1987 with the condition that on the date of regular appointment he shall be placed below the persons who have been appointed under Recruitment Rules prior to him - Claim for senior pay scale after completion of 8 years from 23.09.1980 - Held - Rule provides entitlement of seniority from date of regularization - Petitioner once accepted regularization with condition, can not claim senior pay scale prior to regularization - Petition dismissed.* (Para 6)

DWARKADAS MAHAJAN Vs. STATE OF M.P.

सेवा विधि - तदर्थ नियुक्ति का नियमितीकरण नियम, म.प्र. 1986, नियम 12 - 23.09.1980 को याची तदर्थ आधार पर व्याख्याता के पद पर नियुक्त किया गया - 10.03.1987 को इस शर्त पर नियमित किया गया कि नियमित नियुक्ति की तारीख को उसे उन व्यक्तियों से नीचे रखा जायेगा जो भर्ती नियमों के अन्तर्गत उससे पूर्व नियुक्त किये गये हैं - 23.09.1980 से 8 वर्ष पूर्ण करने के बाद वरिष्ठ वेतनमान का दावा - अभिनिर्धारित - नियम नियमितीकरण की तारीख से वरिष्ठता की हकदारी का उपबंध करता है - याची ने एक बार शर्त के साथ नियमितीकरण स्वीकार कर लिया, नियमितीकरण के पूर्व वरिष्ठ वेतनमान का दावा नहीं कर सकता - याचिका खारिज।

Cases referred :

AIR 1993 SC 1564, (1990) 4 SCC 24.

Gopal Hardia, for the petitioner.

S.P. Joshi, Dy.G.A., for the respondents.

ORDER

SHANTANU KEMKAR, J. :-The petitioner had approached the Madhya Pradesh State Administrative Tribunal Bench at Indore (for short "the tribunal") by filing Original Application No.190/00 seeking grant of senior pay scale from 23.09.80 of Rs.3000/-5000/- (revised to Rs.10000-15200) and interest on the arrears. On abolition of the tribunal the said O.A. has been received by this Court for adjudication.

2. The petitioner's case is that on 23.09.80 he was appointed on the post of Lecturer on Ad hoc basis and was posted at Government Post Graduate College at Khargone. He was regularized under the M.P. Regularization of Ad hoc appointment Rules, 1986 (for short 'Regularization rules', 1986) on 10.03.87 on the post of Assistant Professor vide Annexure A/1. He submits that clause 10 of Appendix I provides for scheme of revision of pay scale framed by the State Government which reads thus:

"Career Advancement-

Every Lecturer will be placed in a senior scale of Rs.3000-5000 if he/she has:

(a) completed 8 years of service after regular appointment, with relaxation as provided in para 9 above.

(b) participated in two refresher courses summer institutes, each of approximately 4 weeks duration or engaged in other appropriate continuing education programmes if comparable quality as may be specified by the UGC.

(c) consistently satisfactory performance appraisal reports.

Explanation : All lecturers in the existing scale of 700-1600 who have completed 8 years of service on 1.1.1986 will be placed through process of screening/selection as indicated in para 19 below, in the scale of Rs.3000-5000. The benefit of service provided in para 9 will be available for the initial placement also.

DWARKADAS MAHAJAN Vs. STATE OF M.P.

3. According to the petitioner, he joined the service as lecturer on ad hoc basis 23.09.80 and thus he was required to have been placed in senior pay scale on completion of 8 years service w.e.f. 23.09.80. He further submitted that he did his two refresher courses and though was fulfilling the criteria provided for career advancement and grant of senior pay scale he was not extended benefits by the respondents.

4. The respondents filed the reply and have stated that the petitioner joined the service as ad hoc lecturer on 23.09.80. His ad hoc appointment with effect from 23.09.80 till regularization was a stop gap arrangement. His regularization was done with effect from 10.03.87 (Annexure A/1) under the Regularization Rules, 1986 with the condition that on the date of his regular appointment he shall be placed below the persons who have been appointed under the Recruitment Rules prior to the appointment of the petitioner under the Regularization Rules, 1986. The respondents stated that rule 12 of the Regularization rules, 1986 under which the petitioner was regularized clearly provides that the person regularized under the Regularization Rules, 1986 shall be entitled for the seniority only from the date of Regularization.

5. Having heard learned counsel for the parties, I am of the view that the petition is having no merit and the same deserves to be dismissed.

6. Admittedly, the petitioner has been regularized vide order dated 10.03.87(Annexure A/1). His appointment prior to 10.03.87 was not a regular appointment but was a stop gap ad hoc appointment. It has also not been disputed that after completion of requisite period of 8 years with effect from 10.03.87, and on his completion of two refresher courses during the period of his service he has been extended the benefit of senior pay scale. The petitioner is not entitled to claim seniority of the period of his ad hoc appointment. The period of 8 years is required to be calculated and has rightly been calculated from 10.03.87 after his regular appointment as per Regularization Rules, 1986. The petitioner having accepted the regularization on the condition mentioned in the appointment order that he shall be placed below the persons who have been appointed prior to the petitioner's regularization by following relevant Recruitment Rules, cannot turn around and contend that he is entitled to claim for counting of the period of ad hoc services prior to the order of regularization of his service. In the case of *Excise Commissioner Karnataka v/s Shrikanta* (AIR 1993 SC 1564) and in *Mosood Akhter Khan v/s State of M.P.* (1990) 4 SCC 24, it has been held that on regularization the employee can claim seniority only from the date of regularization.

7. In the result no case for interference in this petition is made out. Accordingly the petition deserves to be and is hereby dismissed. No orders as to the costs.

Petition dismissed.

I.L.R. [2009] M. P., 70

WRIT PETITION

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

10 July, 2008*

MOHD. ABDUL SAEED

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

Service Law - Railways Services (Pension) Rules, 1993, Rules 9(3), 10(1)(c) - Gratuity - Entitlement - Gratuity of petitioner withheld after his superannuation due to pendency of a criminal case against him - Held - Rule 10(1)(c) of the Rules of 1993 lays a postulate that no gratuity shall be paid under to the railway servant until the conclusion of departmental or judicial proceedings and issue of final orders thereon - Petition dismissed.

(Paras 8 & 9)

सेवा विधि - रेलवे सेवा (पेंशन) नियम, 1993, नियम 9(3), 10(1)(सी) - उपदान - हकदारी - याची का उपदान उसकी सेवानिवृत्ति के बाद उसके विरुद्ध एक दाण्डिक मामला लम्बित होने के कारण रोका गया - अभिनिर्धारित - 1993 के नियमों का नियम 10(1)(सी) यह अभिधारणा रखता है कि इसके अन्तर्गत रेलवे कर्मचारी को विभागीय या न्यायिक कार्यवाहियों की समाप्ति और उन पर अन्तिम आदेश जारी किये जाने तक कोई उपदान संदत्त नहीं किया जाएगा - याचिका खारिज।

Cases referred :

(1999) 9 SCC 44; 1990(3) SLR 5.

R.K. Jain, for the petitioner.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- Invoking the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India the petitioner has prayed for issue of a writ of certiorari for quashment of the order dated 11.4.2008 passed by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur in Original Application No.751/2007.

2. The facts in a nutshell are that the petitioner invoked the jurisdiction of the tribunal under Section 19 of the Administrative Tribunal Act, 1985 stating, inter alia, that though he had been superannuated on 31.12.2006 the amount of gratuity has been withheld by the employer solely on the ground that a criminal case was pending against him for the offences punishable under Sections 408, 420, 120-B and 209 of the Indian Penal Code and the said withholding was done under Rule 9(3) of the Railways Services (Pension) Rules, 1993. It was contended before the tribunal that the Railways could not have withheld the gratuity solely on the base that a criminal case was pending unless the petitioner, a pensioner,

MOHD. ABDUL SAEED Vs. UNION OF INDIA

was found guilty of grave misconduct or negligence. It was urged that no departmental proceeding was initiated against the petitioner and he was not found guilty in any departmental or judicial proceeding and, therefore, withholding of gratuity was unjustified. On the said backdrop a prayer was made to command the respondents to release the amount of gratuity.

3. The Railway Administration resisted the prayer of the petitioner contending, inter alia, that the gratuity has been withheld as a criminal case has been instituted against the petitioner and the controversy in the same has not yet attained finality. It was also put forth that if the petitioner is acquitted in the criminal case the gratuity would be released.

4. The tribunal referred to Rule 10 (1) (c) and taking note of the decision rendered in *R. Veerabhadram v. Government of A.P.*, (1999) 9 SCC 44 rejected the prayer of the petitioner.

5. We have heard Mr. R.K. Jain, learned counsel for the petitioner on the question of admission.

6. Mr. Jain has submitted that as the petitioner has not been found guilty either in any departmental proceeding or in the criminal case and, therefore, the employer could not have withheld the amount of gratuity. To bolster his submission he has placed reliance on the decision rendered in *D.V. Kapoor v. Union of India*, 1990 (3) SLR 5.

7. To appreciate the submission of the learned counsel for the petitioner we have carefully perused the decision rendered in *D.V. Kapoor* (supra). In the said case the Apex Court was dealing with the Rule 8 and 9 of the Civil Services Pension Rules, 1972. The Apex Court referred to Rule 9(1) of the said Rules and expressed the opinion that the power of the President is hedged with a condition precedent that a finding should be recorded either in a departmental enquiry or a judicial proceeding that a pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge and in the absence of such a finding the President is without authority of law to impose penalty of withholding of pension as a measure of punishment, either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee. It was held therein that in the absence of a finding of regarding guilty of misconduct, withholding of pension or gratuity is illegal.

8. In the case at hand Rule 10(1) (c) lays a postulate that no gratuity shall be paid under to the railway servant until the conclusion of the departmental or judicial proceeding and issue of final orders thereon. In *R. Veerabhadram* (supra) their Lordships have held as under :

7. The payment of gratuity was withheld, in the present case, since the criminal prosecution was pending against the appellant

SYSCON COMPUTER SHIKSHA SAMITI Vs. STATE OF M.P.

when he retired. Rule 52(c) of the A.P. Revised Pension Rules, 1980 expressly permits the State to withhold gratuity during the pendency of any judicial proceedings against the employee. In the present case, apart from Rule 52(c), there was also an express order of the Tribunal which was binding on the appellant and the respondent under which the Tribunal had directed that death-cum-retirement gratuity was not to be paid to the appellant till the judicial proceedings were concluded and final orders were passed thereon. In view of this order as well as in view of Rule 52(c), it cannot be said that there was any illegal withholding of gratuity by the respondent in the case of the appellant. We, therefore, do not see any reason to order payment of any interest on the amount of gratuity so withheld."

9. In view of the aforesaid the law laid down in *R. Veerabhadram* (supra) would be applicable to the case at hand as the Rule is different. Thus, we find that the view expressed by the tribunal is absolutely correct and does not warrant any interference by this Court.

10. Resultantly, the writ petition is dismissed in limine.

Petition dismissed.

I.L.R. [2009] M. P., 72

WRIT PETITION

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

10 July, 2008*

SYSCON COMPUTER SHIKSHA SAMITI

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

Makhanlal Chaturvedi Rashtriya Patrakarita Vishwavidyalaya
"Association of Study Institutes" Clause 17 - Post Graduate Diploma in
Computer Application (PGDCA) & Diploma in Computer Application (DCA)
- Cancellation of Association - Petitioner Institute associated with the
University to run two courses namely, PGDCA & DCA with intake capacity
of 50 students - Petitioner Institute changing the location without informing
the University and admitting more student than its capacity - Association
cancelled - Held - An institute which gets associated to the University can
not be allowed to proceed to change its location at his own pleasure and
leisure even without applying as per the prescribed norms - Such a proclivity
of the institute is not only to be deprecated but condemned from all spectrums
so that realisation would dawn upon it that it can not take law unto its own
hands - No error or fallacy in the order of cancellation - The extra student

SYSCON COMPUTER SHIKSHA SAMITI Vs. STATE OF M.P.

admitted who have not studied in the Petitioner Institute their result directed not to published with a direction for refund of their fees along with a compensation of Rs. 20,000 each - Petition disposed of. (Paras 7, 11 & 12)

माखनलाल चतुर्वेदी राष्ट्रीय पत्रकारिता विश्वविद्यालय "एसोसियेशन ऑफ स्टडी इंस्टीट्यूट्स", खण्ड 17 - पोस्ट ग्रेजुएट डिप्लोमा इन कम्प्यूटर एप्लीकेशन (पीजीडीसीए) व डिप्लोमा इन कम्प्यूटर एप्लीकेशन (डीसीए) - एसोसियेशन का रद्दकरण - याची संस्थान 50 छात्रों की प्रवेश संख्या के साथ दो पाठ्यक्रमों अर्थात् पीजीडीसीए व डीसीए संचालित करने के लिए विश्वविद्यालय से सम्बद्ध - याची संस्थान ने विश्वविद्यालय को सूचना दिये बिना स्थान परिवर्तित किया और क्षमता से अधिक छात्रों को प्रवेश दिया - एसोसियेशन रद्द किया गया - अभिनिर्धारित - एक संस्थान जो विश्वविद्यालय से सम्बद्धता प्राप्त करता है, को विहित मानदण्डों के अनुसार आवेदन किये बिना उसकी स्वयं की इच्छा और स्वतंत्रता से उसका स्थान परिवर्तित करने की इजाजत नहीं दी जा सकती - संस्थान की ऐसी प्रवृत्ति न केवल निन्दनीय है बल्कि सभी प्रतिबिम्बों से दोषी ठहराने योग्य है जिससे उसे बोध कराया जा सके कि वह कानून को अपने हाथों में नहीं ले सकता - रद्दकरण के आदेश में कोई त्रुटि या भ्रान्ति नहीं - दाखिल किये गये अतिरिक्त छात्र जिन्होंने याची संस्थान में अध्ययन नहीं किया, उनका परीक्षा परिणाम प्रकाशित न करने का निदेश प्रत्येक को 20,000 रुपये प्रतिकर सहित उनकी फीस वापस करने के निदेश के साथ दिया गया।

A.D. Mishra, for the petitioner.

Amit Verma, for the respondent No.2.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- The writ petitioner, **SYSCON Computer Shiksha Samiti**, a registered society under the **Madhya Pradesh Society Registrickaran Adhiniyam, 1973**, engaged in Computer Education, got itself associated to **Makhanlal Chaturvedi Rashtriya Patrakarita Vishwavidyalaya, Bhopal**, the second respondent herein, under the provisions of "Association of Study Institutes", as per letter dated 05.07.2004, Annexure P/2, which categorically and unequivocally mentions that the institution was conferred the benefit of Association to the University for students with intake capacity of 50 in respect of two courses, namely, Post Graduate Diploma in Computer Application (PGDCA) and Diploma in Computer Application (DCA) with the stipulation that the institution shall be situated at 12, Rajgarh Road, Biaora and would abide by the norms fixed by the University from time to time as is evident from the material brought on record. The petitioner admitted students and they appeared in courses for certain years, but, however, for the year in question, 2007-08, the petitioner submitted a list of 47 students for the purpose of getting admit-cards to appear in the examination in respect of the aforesaid two courses but the same was refused by the University.

2. Being dissatisfied with and aggrieved by the aforesaid action of the Registrar of the University, the petitioner preferred the present writ petition with number of prayers especially to issue a writ of mandamus commanding the respondent-

SYSCON COMPUTER SHIKSHA SAMITI Vs. STATE OF M.P.

University to accept the application dated 17.12.2007 with a demand draft of the petitioner for the purpose of students taking the examination. This Court vide order dated 28.12.2007 directed the students of the Society to appear in the examination with a rider that the result shall not be declared without leave of the Court.

3. A counter affidavit has been filed by the University contending, inter alia, that the inspecting team of the University, on inspection, found that the petitioner-institute was not functional at the address given. On the aforesaid base, a show cause notice was issued on 22.01.2007 but no reply was filed. However, a letter was submitted on 03.02.2007 informing that the Society had changed the place of Institute from the original place to 6, Shyamlal Marg, Bhanwarganj, Rajgarh, Bhaora. The University thereafter cancelled the association as per order dated 09.04.2007 contained in Annexure R/9.

4. A rejoinder affidavit has been filed by the petitioner Society putting forth a stance that the order of cancellation had not been served on the petitioner-institute and, therefore, they were in the dark with regard to the issue of cancellation. Be it noted that various aspects have been highlighted to justify the stand that the order of cancellation was not justified in the obtaining factual matrix.

5. We have heard Mr. A.D.Mishra, learned counsel for the petitioner, and Mr. Amit Verma, learned counsel for the second respondent, the University.

6. At the very outset, we must make it clear that we are not intending to address whether the order of refusal of association had been served on the petitioner-institute or not; whether the institute had played hide and seek; and whether it had suppressed material facts and approached this Court invoking its equitable jurisdiction seeking an interim relief and further whether the petitioner would be entitled to adjudication of the present writ petition when there is asseveration that it had filed a suit. As far as the last aspect is concerned, Mr. A.D.Mishra, learned counsel for the petitioner, fairly stated that the petitioner would withdraw the suit within two weeks hence, and, therefore, the writ petition be dealt with on merits. Hence, we proceed.

7. The fulcrum of the matter is whether the institute has proceeded lawfully while changing the place wherein the institute was functioning to another place. Mr. Amit Verma, learned counsel for the second respondent, has drawn our attention to Clause 17 of the "Association of Study Institutes", which deals with change of Society, Institute Name, Director Name and Location. Learned counsel has especially invited our attention to Clause 17(1). On a perusal of the said clause, it is perceptible that various conditions precedent have been provided for effecting change of location. The prior approval of the University is imperative. The procedure clearly stipulates that a resolution has to be passed by the Governing Body of the Institute and a demand draft of Rs.1000/- in the name of the University

SYSCON COMPUTER SHIKSHA SAMITI Vs. STATE OF M.P.

has to be sent. That apart, many other aspects do find mention in the said clause which we do not intend to refer, for the Institute had only sent a letter on 03.02.2007, as is unmistakably clear, without following any procedure as has been prescribed. Indubitably, the institute arrogated itself to be the master of all procedure and dug the grave of law as if it had the capacity to do so. An institute which gets associated to the University to impart education can not be allowed to proceed to change its location at his own pleasure and leisure. We really fail to fathom how the institute could shift the location without even applying as per the prescribed norms. Such a proclivity of the institute is not only to be deprecated but condemned from all spectrums so that realisation would dawn upon it that it can not take law unto its own hands. The mercurial pronouncement of Mr. A.D.Mishra that the cancellation of Association as passed in Annexure R/9 was not served on the Institute is sans substance because when an application is filed without following the due process of law or due procedure prescribed under the law, the same has to meet with death or extinction. Hence, the submission is only noted to be rejected. Therefore, we do not find any error or fallacy in the order of cancellation passed by the University.

8. The present case, if we allow ourselves to say so, has a different scenario. It is urged by Mr. A.D.Mishra that the Institute is functional and it shall file an application as per the norms prescribed at present within 4 weeks. Learned counsel for the University submitted that the University shall consider the same in a most objective manner. We appreciate the stand put forth by Mr. Amit Verma.

9. Ordinarily, so stating, we would have proceeded to record our conclusions, but, a pregnant one, 47 students who were studying in the institute have appeared in the examination. Mr. Verma does not dispute the said fact. We may hasten to add that this is not a case where there is no recognition from a competent authority or affiliation from the University. The institute had the association but it has been cancelled solely on the ground of change of place. Thus, the case stands on a distinct platform in the sense that there is no recognition and no affiliation and the educational institute had admitted the students. Hence, we direct the results in respect of the 47 students to be published.

10. Another interesting feature which is worth noting in this case is that on the foundation of the order passed by the learned Single Judge by way of interim measure, the petitioner institution got emboldened and sent forms for 56 students. The University accepted the forms and they appeared in the examination. Mr. Verma has drawn our attention to Annexure R/10 dated 02.11.2007 whereby the University had not issued admit-cards in respect of 9 students who claimed to have studied in Genius Computer Education, Rajgarh. After the interim order was passed, the petitioner institute submitted the names of the said students as students of its institute. It is contended by Mr. A.D.Mishra that the said students obtained "No Objection Certificate" from Genius Computer Education on

SYSCON COMPUTER SHIKSHA SAMITI Vs. STATE OF M.P.

02.12.2007 as per Annexure R/11 and accordingly, their forms were sent. On a query being made as to what is the period of teaching for a semester, it is fairly stated before us by the learned counsel for the parties that it is six months. It is urged by the learned counsel for the petitioner that the institute admitted the students of Genius Computer Education in its institute in the second semester and forwarded the names to the University for obtaining admit-cards to undertake the admission. The University had refused the same on 02.11.2007. Genius Computer Education might have given No Objection Certificate but it is quite perplexing that how could the present institute sponsor the said names for appearing in the examination when they had not studied six months in this institute and further when the intake capacity of the institute was 50. As is patent, all norms were thrown to winds by the institute while sending the forms of these nine students. It is submitted by Mr. Mishra that the University should not have accepted the forms of these nine candidates and once it had accepted it, it was the obligation of the University to publish the result. Per contra, the submission of Mr. Verma is that the same was done pursuant to the interim order and there was no time to seek any kind of clarification. If we are to appreciate the submission of Mr. Mishra, learned counsel for the petitioner, we may say that an endeavour has been made to construct the superstructure without any kind of infrastructure. The institute has itself not followed the procedure while shifting. It has taken students in the midway whose admission for examination was not allowed by the University. It appears that the institute has not taken any care to understand the norms that have been prescribed by the University. It may look on a first flush that the petitioner institute has been trying to be charitable and merciful but if the mask is unclothed it will be clear that it has a mercenary attitude. The whole game pertains to money making. It is easy to blame the University and stay away but when the veil is lifted it becomes transparent that the institute could not have sponsored the names of certain students to undertake the examination who are not entitled to appear through the petitioner institute.

11. In view of the aforesaid, we are not inclined to command the University to publish the results of those nine candidates who have not studied earlier in the petitioner institute. We warn the institute not to pave an ingenuous and path which mars the marrow of education.

12. In view of the aforesaid, we record our conclusions and directions in seriatim as under:-

(a) The University shall publish the results of 47 students who have studied in the petitioner institute and appeared in the examination in pursuance of the interim order passed by this Court.

(b) The said direction is issued as there is no cavil with regard to grant of any kind of recognition or affiliation.

SYSCON COMPUTER SHIKSHA SAMITI Vs. STATE OF M.P.

(c) The petitioner institute shall apply for change of location as engrafted under the Association of Study Institutes within 4 weeks.

(d) The University shall, on being satisfied with regard to compliance of the norms, permit the change of location and not adopt a hyper technical attitude.

(e) Though there is no illegality in cancellation of the association as there has been non-compliance of sub-clause 17.1, yet as the same only relates to change of location, the University will not give effect to the said order of cancellation unless on further verification on the basis of application submitted by the petitioner institute, it is found that the change of location totally runs counter to the norms fixed in the Association of Study Institutes prevalent as on today. We have said so as we have been apprised by Mr. Verma that guidelines have been changed in the year 2008.

(f) If any deficiency is found, the same shall be pointed out by the University so that the institute can remove the same.

(g) The suit pending in the trial Court shall be withdrawn within a week hence, and the learned trial Judge will be well advised to dismiss the suit.

(h) The institute hence forth shall be guided by the norms prescribed by the University from time to time and not behave like an "enfant terrible" and spoil the atmosphere.

(i) The students whose results are not being allowed to be published can appear in the examination after completing the requisite course. Be it noted, we have not directed the results to be published by the University as the fault, singularly and exclusively, is found with the institute. The petitioner institute shall pay a sum of Rs.20,000/- as compensation to each of the said nine students.

(j) The University shall refund the fee that was collected from the said nine students when approached. Needless to emphasize, this is in addition to the compensation to be paid by the institute.

13. The writ petition stands disposed of accordingly. There shall be no order as to costs.

C.c. as per rules.

Petition disposed of.

I.L.R. [2009] M. P., 78

WRIT PETITION

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

16 July, 2008*

RAHUL PATEL

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Medical and Dental Undergraduate Entrance Examination Rules, M.P. 2007, Rules 2.5, 2.6, 9.9, 9.9(a) & 9.14 - Admission in MBBS course - Petitioner belonging to OBC category - On option in the first counselling he was admitted in BDS course as against a General seat - In the second counselling, he was not permitted to opt as against OBC-seat for pursuing MBBS course - Held - The person still remains of the category to which he belongs, he does not lose it by exercising option at first counselling as per merit with respect to seat which was offered - The petitioner has been wrongfully deprived of admission in the MBBS course in the year 2007 - The petitioner to be given admission in MBBS course in the year 2008-09 against a OBC category seat without counselling - Petition allowed.

(Paras 12 & 13)

क. चिकित्सा और दंत पूर्वस्नातक प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 2.5, 2.6, 9.9, 9.9(ए) व 9.14 - एमबीबीएस पाठ्यक्रम में प्रवेश - याची ओबीसी श्रेणी का था - प्रथम काउंसिलिंग में विकल्प पर उसे सामान्य सीट पर बीडीएस पाठ्यक्रम में प्रवेश दिया गया - द्वितीय काउंसिलिंग में उसे एमबीबीएस पाठ्यक्रम के लिए ओबीसी सीट का चयन करने की अनुमति नहीं दी गई - अभिनिर्धारित - व्यक्ति उस श्रेणी का रहता है जिससे वह सम्बन्धित है, वह उस सीट के सम्बन्ध में जिसका उसे प्रस्ताव दिया गया मेरिट के आधार पर प्रथम काउंसिलिंग में विकल्प का प्रयोग करके उसे खो नहीं देता - याची को वर्ष 2007 में एमबीबीएस पाठ्यक्रम में प्रवेश से अनुचित रूप से वंचित किया गया - याची को बिना काउंसिलिंग के ओबीसी श्रेणी की सीट पर एमबीबीएस पाठ्यक्रम में वर्ष 2008-09 में प्रवेश दिया जाए - याचिका मंजूर।

B. Medical and Dental Undergraduate Entrance Examination Rules, M.P. 2007, Rule 9.14 - Counselling - The word 'counselling' has been used in Rule 9.14 not at the time of first counselling, thus it is apparent that operation of Rule 9.14 is not confined to first counselling only - The option is available to ST/SC/OBC category candidate at the stage of second counselling to stake the claim as per his standing in the waiting list of his own reserved category or from unreserved category. (Para 11)

ख. चिकित्सा और दंत पूर्वस्नातक प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 9.14 - काउंसिलिंग - नियम 9.14 में शब्द 'काउंसिलिंग' का प्रयोग प्रथम काउंसिलिंग के लिए ही नहीं किया गया है, इसलिए यह स्पष्ट है कि नियम 9.14 का प्रवर्तन केवल प्रथम काउंसिलिंग तक सीमित नहीं है - एसटी/एससी/ओबीसी श्रेणी के अभ्यर्थी को द्वितीय काउंसिलिंग के प्रक्रम पर

RAHUL PATEL Vs. STATE OF M.P.

विकल्प उपलब्ध है कि स्वयं की औरकित श्रेणी की या अनारकित श्रेणी से प्रतीका सूची में अपनी स्थिति के अनुसार दावा करे।

Cases referred :

2003(4) MPLJ 497 (distinguished), MCI Vs. G. Uddhaya Bharati & ors. decided on 12.07.2004 and Harshali Vs. State of Maharashtra decided on 26.09.2005.

Mrigendra Singh, for the petitioner.

Kumaresh Pathak, Dy.A.G., for the respondent No.1 & 2.

Indira Nair with Tulika Gulati, for the respondent No.3.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :-The facts lies in narrow compass. It is not in dispute that petitioner appeared in Pre-Medical Test Examination 2007. He was placed in the waiting list of general candidates at Sr. No. 144 and in the waiting list of OBC category at Sr. No. 45. It is also not in dispute that petitioner belongs to OBC category. In the first round of counselling which was held a seat in MBBS course could not be offered to him, considering his standing in the general as well as OBC category. He was offered a seat in the capacity of general category candidate in BDS course during first counselling which he opted. It is also not in dispute that petitioner submitted an option as per rule 9.9 to switch over to MBBS course in case seat remains vacant. It is also not in dispute that petitioner was called for counselling held for MBBS course of OBC category candidate but participation in counselling was declined by the committee on the ground that in the first counselling he had opted the seat of general category of BDS course, thus his case could be considered only against the seat of MBBS course of unreserved (general) category candidates. Consideration as against OBC category seat was declined as per order (R-1) filed with the return by the State of M.P. Consequently, petitioner has come up in the writ petition.

2. Petitioner has submitted that by-virtue of Rule 9.9, 9.9(a) and 9.14 of the Rules (P-6) called Madhya Pradesh Medical and Dental Undergraduate Entrance Examination Rules, 2007 hereinafter to be referred to as the rules of 2007. Petitioner should have been given chance to stake his claim as against seat of MBBS course reserved for OBC category as per his merit in the OBC category candidates, thus meritorious candidates of OBC reserved category has been deprived of the seat and incumbents of OBC category having lesser merit have been given admissions in the MBBS course as against the seat of OBC category. Petitioner has further submitted that name of the petitioner in the waiting list of OBC category was at serial number 45 whereas admission has been given of OBC category candidate in the MBBS course out of the waiting list from serial number 46 to 53. Names of 2 of the candidates namely Ms. M. Sahu at Sr. No. 47 and A. Singh at Sr. No. 49 have also been mentioned.

RAHUL PATEL Vs. STATE OF M.P.

3. Stand of respondents No. 1 and 2 in their return is that considering rule 9.9, 9.9(a) and rule 9.14 of the rules 2007, it was open to the petitioner to avail option only once in unreserved category which he had exercised, thus he could not have given chance as OBC category candidate in the counselling held on 26.8.2007. Action is in accordance with the rules. Petitioner could have exercised the option for MBBS course in unreserved category not as against the seat of reserved OBC category.

4. Stand of MCI in the return is that no seat can be created in case petitioner is held entitled for admission and has been wrongfully deprived of the admission in the last year, he can be admitted only against quota of OBC category of MBBS course of current academic year 2008-09.

5. Shri Mrigendra Singh, learned counsel appearing for petitioner has submitted that action of respondents No. 1 and 2 is contrary to rule 9.9, 9.9(a) and 9.14 of the rules of 2007. He has submitted that as the MBBS course seat remained vacant and were offered at the time of second counselling of OBC category, petitioner who was higher in merit of OBC category, could not have been deprived of chance of staking claim as OBC category candidate of OBC category MBBS course seats. There is nothing in the rules debarring the candidate of participation in reserved category in case he has availed the general category seat at the time of first counselling. As reserved category seat of MBBS course could not be offered to him at the stage of first counselling, rule 9.14 is enabling provision providing the option during each counselling to select the seat either of reserved or unreserved category to the SC/ST/OBC category as per merit position in the lists. Thus it is submitted that rule 9.14 applicability is not confined to first counselling, it applies to second or any other successive counselling. He has further submitted that in the instant case OBC category candidate of higher merit has been deprived of MBBS course seat. At the time of first counselling, none of the seat of OBC category was offered to the petitioner as such he had opted for BDS seat of unreserved category which was the only option available, thus it could not be said that petitioner has exhausted the right to exercise option as OBC category candidate MBBS course seat in case it remained vacant.

6. Shri Kumaresh Pathak, Dy. AG for State has submitted that once the petitioner has opted the seat of unreserved category at the time of first counselling, he could not be allowed to stake claim with the reserved category candidate seats in second counselling as that would have effect of increasing the percentage of reservation for reserved category. He has relied upon Rules 9.9 and 9.9(a) of the Rules of 2007. He has submitted that decision (R-1) has been taken in accordance with the rules. No case for interference in the writ petition is made out.

7. Mrs. Indira Nair, learned Sr. Advocate with Ms. Tulika Gulati appearing for MCI has submitted that in case it is found by the court that petitioner has been

RAHUL PATEL Vs. STATE OF M.P.

wrongfully deprived of the seat of MBBS course in the year 2007, he can only be admitted as against the quota of OBC as against the vacant seat of 2008-09.

8. The main question for consideration in the writ petition is about the interpretation of rules 9.9, 9.9(a) and 9.14. Class and category referred to in the aforesaid rules has been defined in rule 2.5 and 2.6 thus :-

2.5 - "Category" means Scheduled Tribe, Scheduled Caste, Other Backward Classes, and Unreserved category as specified and laid down by the Government of Madhya Pradesh.

2.6 - "Class" means Military Personnel (M.P.) Freedom Fighter (FF) NO CLASS (X) and FEMALE (F) as specified and laid down by Government of Madhya Pradesh. Physically Handicapped (PH) means as specified and laid down by Ministry of Labour, Government of India for vocational Rehabilitation of Physically Handicapped.

9. Rules 9.9, 9.9(a) and 9.14 are also quoted below :

9.9 : During the first counselling allotment of seats of Medical/Dental colleges shall be done. A candidate who has opted a BDS course during the first counselling, if such candidate is desire to re-allocation be admitted to MBBS course, such candidate may submit his application to the Director, Medical Education through Principal of the concerned Dental College within 7 days. All such applicants will be eligible for re-allocation to vacant seats of MBBS course as per merit/category/class at the second counselling. Application received after the due date will not be considered. All such applications must reach to the office of the Directorate of Medical Education before seven days of commencement of second Counselling.

9.9(a) : Re-allocation of MBBS course will be done on merit basis as per availability of vacant seats in category/class of the candidate.

9.14 : A candidate belonging to ST/SC/OBC category, whose name also appear in the merit/waiting list of unreserved category beside the merit/waiting list of his/her own reserved category shall have an option during counselling to select the seat either from reserved category or un-reserved category.

10. It is apparent that word 'category' has reference to SC,ST, OBC and unreserved category whereas 'class' means Military Personnel (M.P.), Freedom Fighter (FF), No Class (X) and female (F) and physically handicapped. It is provided in rule 9.9 that candidate who has opted a BDS course during the first

RAHUL PATEL Vs. STATE OF M.P.

counselling, if such candidate is desire to re-allocation be admitted to MBBS course. It is not in dispute that such application was filed by the petitioner for opting MBBS course. It is also apparent that at the time of first counselling none of the seat of OBC category could be offered to the petitioner of MBBS course or of BDS course as per his merit in the reserved category OBC seats. He was given admission as against the unreserved seat of BDS course. Under rule 9.9 of the Rules of 2007 all such applicants who have opted will be eligible for re-allocation to vacant seats of MBBS course as per merit/category/class at the second counselling. The category mentioned in rule 9.9 is with reference to the category to which a person belongs, that includes category as already mentioned of the candidates of SC/ST/OBC and unreserved category. Thus category is not confined to option exercised at first counselling. A person having dual character of category reserved and unreserved, merely by his participation in the first counselling in unreserved category, he does not assume character exclusively of unreserved category. He can still exercise right as reserved category candidate if seat of such category remains vacant. No such rule pointing out that if a person of SC/ST or OBC category as per his merit in unreserved category stakes his claim as against the seat of unreserved category later on in case any seat of reserved category remains vacant, cannot stake his claim. In the instant case seat of reserved OBC category remained vacant and it could not be earlier offered to the petitioner as per his merit as of OBC category at the time of first counselling. The seat of MBBS course was not offered to him in first counselling. He had no chance of staking his claim to the seat of MBBS course in the category of OBC candidate. Petitioner as per his merit stood at sr. number 45 in the waiting list of OBC category whereas seats of OBC category MBBS course were allotted to the candidates who were lesser in merit at serial number 46 to 53, thus petitioner's merit has been ignored and overlooked by the action of the respondents by not permitting him to stake his claim in MBBS course seat of OBC category as he had joined earlier seat of BDS course of unreserved category.

11. Rule 9.9(a) has been relied upon by Shri Kumaresh Pathak, Dy. AG appearing on behalf of State. Rule 9.9(a) provides that re-allocation of MBBS course will be done on merit basis as per availability of vacant seats in category/class of the candidate. The category of the petitioner was OBC category. It was open to him to stake claim against unreserved seat also, in case it was offered to him, at the time of first counselling. In our opinion Rule 9.9.(a) operation cannot be constricted to the category which option has been exercised at the time of first counselling as suggested by Shri Kumaresh Pathak, Dy. AG. The submission is countered by rule 9.14 of the rules of 2007. Rule 9.14 provides that a candidate belonging to ST/SC/OBC category, whose name also appear in the merit/waiting list of unreserved category beside the merit/waiting list of his/her own reserved category shall have an option during 'counselling' to select the seat either from

RAHUL PATEL Vs. STATE OF M.P.

reserved category or un-reserved category. The word "counselling" has been used in rule 9.14 not at the time of first counselling, thus it is apparent that operation of rule 9.14 is not confined to first counselling only. The option is available to SC/ST, OBC category candidate at the stage of second counselling to stake the claim as per his standing in the waiting list of his own reserved category or from unreserved category, that right was deprived to the petitioner is not in dispute. The lesser meritorious candidates of OBC category have been given the admission as compared to the petitioner, he has been unlawfully deprived of the admission in the MBBS course of OBC category seat by respondents No. 1 and 2.

12. A Division Bench of this Court in *Mayank Jain Vs. State of M.P. and others* - 2003 (4) MPLJ 497 has considered rule 9.3 of M.P. Medical and Dental Graduate Entrance Examination Rules, 2003. It is held that rule 9.3 conferring privilege on the candidate to be entitled to either of the categories, meaning thereby, even if he is qualified and selected in respect of the general category, has the choice to come to the reserved category. The rule is held to be inconsistent with rule 5 of the rules of 2003. But in the instant case petitioner was not offered the seat of MBBS course in the unreserved category of MBBS course at any point of time either in first counselling or in the second counselling. It was not a case similar to instant case which involves interpretation of Rules 9.14, 9.9 or 9.9.(a) of the rules of 2007 at the time of second counselling. In *Mayank Jain* (supra) candidate who was entitled to be admitted against the unreserved seat could change his option and treat the seat availed as that of reserved category seat. That kind of action we are also not permitting as it is clear that at no point of time petitioner was offered MBBS course seat. The seat of BDS course of unreserved category was offered of which change has not been sought in the instant case to that of BDS seat of OBC category. As per rule 9.9 of the Rules of 2007 a candidate of unreserved category was permitted to leave the BDS course and was permitted to stake his claim as against the unreserved seat of MBBS course, in case it remains vacant. The person still remains of the category to which he belongs, he does not lose it by exercising options at first counselling as per merit with respect to seat which was offered. The decision rendered in *Mayank Jain* (supra) was in different context and cannot buttress the submission raised by Shri Kumaresh Pathak, Dy. AG for State that permitting the petitioner to stake claim as OBC candidate during second counselling would have the effect of increasing the percentage of reservation prescribed for reserved category. Percentage of reservation would not have increased by allowing the petitioner to stake his claim against the MBBS course seat of OBC category, hence we have no hesitation in rejecting the submission raised by Shri Kumaresh Pathak, Dy.AG.

13. Since we have come to the conclusion that petitioner has been wrongfully deprived of admission in the MBBS course, the seat of year 2007 cannot be offered to him as it has already been availed by lesser merit candidate of OBC category,

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

thus admission can only be given as against quota of OBC of current year 2008-09. A seat cannot be ordered to be created as rightly submitted by Ms. Indira Nair, learned Sr. Counsel appearing for MCI. She has rightly relied upon the decision of Apex Court in *Medical Council of India Vs. G. Udhaya Bharathi & ors* decided on 12.7.2004 and *Harshali Vs. State of Maharashtra* decided on 26th September, 2005.

Consequently, it is ordered that petitioner to be given admission as against seat of OBC category seat of the year 2008-09 in the MBBS course without counselling. The college to be allotted by 25.7.2008 as prayed by Shri Kumaresh Pathak, Dy. AG. The petition is allowed to the aforesaid extent. No costs.

Petition allowed.

I.L.R. [2009] M. P., 84

WRIT PETITION

*Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Prakash Shrivastava
17 July, 2008**

SHAMIM MODI (Ms.)

... Petitioner

Vs.

Ms. SUDHA CHOWDHARY,

DISTRICT COLLECTOR, BETUL & ors.

... Respondents

A. Constitution, Article 21 - Arrest of accused - No violation of fundamental rights stated in Article 21 as arrest or detention is under a procedure established by law. (Paras 9 to 11)

क. संविधान, अनुच्छेद 21 — अभियुक्त की गिरफ्तारी — अनुच्छेद 21 में कथित मूलभूत अधिकारों का कोई अतिक्रमण नहीं क्योंकि गिरफ्तारी और निरोध विधि द्वारा स्थापित प्रक्रिया के अधीन है।

B. Constitution, Article 226 - Scope - Cannot order for prosecution - Petitioner having apprehension that police may not register F.I.R. and investigate against police and forest officers - High Court in exercise of power under Article 226 cannot direct prosecution of such persons - Complainant has recourse to file complaint before concerned magistrate.

(Para 17)

ख. संविधान, अनुच्छेद 226 — विषयक्षेत्र — अभियोजन का निदेश नहीं दिया जा सकता — याची को यह आशंका कि पुलिस और वन अधिकारियों के विरुद्ध पुलिस एफ.आई.आर. दर्ज कर अनुसंधान नहीं करेगी — अनुच्छेद 226 के अधीन शक्तियों के प्रयोग में उच्च न्यायालय ऐसे व्यक्तियों के अभियोजन के लिए निदेश नहीं दे सकता — परिवादी को सम्बन्धित मजिस्ट्रेट के समक्ष परिवाद पेश करने का आश्रय लेना चाहिए।

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

C. Constitution, Article 21 - Handcuffing - Handcuffing of undertrials during their transit from prison to court and back to prison - No valid justification given - No order obtained from SDM in whose court they were produced. - Held - Fundamental right violated - State Government directed to pay compensation of Rs.10,000 to each of three undertrials - State Government given liberty to recover compensation from guilty personnel in disciplinary proceedings. (Para 23)

ग. संविधान, अनुच्छेद 21 - हथकड़ी लगाना - विचाराधीनों को उनके कारागार से न्यायालय और वापस कारागार अभिवहन के दौरान हथकड़ी लगाना - कोई वैध न्यायोचित्य आधार नहीं बताया - एस.डी.एम. से कोई आदेश अभिप्राप्त नहीं किया गया जिनके न्यायालय में उन्हें पेश किया गया - अभिनिर्धारित - मूलभूत अधिकार अतिक्रमित - राज्य सरकार को प्रत्येक विचाराधीन को 10,000 रुपये प्रतिकर अदा करने का निदेश दिया गया - राज्य सरकार को दोषी कर्मचारी वर्ग से अनुशासनिक कार्यवाहियों में प्रतिकर वसूल करने की स्वतंत्रता दी गई।

D. Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007), Sections 3 & 4 - Claims be decided in accordance with provisions of Act and till then claimants would not be evicted from forest land under their occupation till the recognition and verification procedure is completed. (Para 27)

द. अनुसूचित जनजाति और अन्य परम्परागत वन निवासी (वन अधिकारों की मान्यता) अधिनियम, 2006 (2007 का 2), धाराएँ 3 व 4 - दावे अधिनियम के उपबंधों के अनुसार विनिश्चित किये जाएँ और तब तक दावेदारों को उनके अधिभोग की वन भूमि से बेदखल नहीं किया जाएगा जब तक मान्यता और सत्यापन प्रक्रिया पूर्ण नहीं हो जाती है।

E. Forest (Conservation) Act (69 of 1980), Section 2 - Excavation of forest land - No forest land can be broken by excavation without approval of Central Government - State to ensure that no illegal excavation takes place and also to prosecute those doing illegal excavation. (Paras 32 to 34)

ई. वन (संरक्षण) अधिनियम (1980 का 69), धारा 2 - वन भूमि का उत्खनन - कोई वन भूमि केन्द्र सरकार के अनुमोदन के बिना उत्खनित नहीं जा सकती - राज्य यह सुनिश्चित करे कि कोई अवैध उत्खनन न हो और अवैध उत्खनन करने वालों को अभियोजित भी करे।

Cases referred :

(1983) 4 SCC 141, (1993) 2 SCC 746, (1997) 1 SCC 416, 2000(1) Crimes 196, (1990) 3 SCC 119, (1990) 3 SCC 526, (1991) 2 SCC 373, AIR 1997 SC 1228.

Shamim Modi, petitioner in person.

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

ORDER

The Order of the Court was delivered by
A. K. PATNAIK, C. J. :-The petitioner has filed this Public Interest Litigation to

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

protect the rights of tribals residing in the tribal village Ghorpondmal in Bhaisdehi tahsil in the Mohada forest range in the West Betul Forest Division in the State of Madhya Pradesh.

2. The petitioner is a Psychology graduate from Jesus and Mary College, Delhi and holds a Master's Degree in Psychology from Lada Ram College, Delhi. She did her M.Phil in Social Science from the Tata Institute of Social Science, Mumbai and graduation in Law from the Barkatullah University, Bhopal and thereafter became a Project Officer of OXFAM (India) Trust, a British Funding Agency in 1991-92. She has stated in the writ petition that while working as Project Officer of OXFAM (India) Trust, she got an opportunity to serve in the tribal areas of Madhya Pradesh and she was shocked to find the pathetic conditions in which the tribals are living and she has therefore formed an organisation of the tribals called the Shramik Adivasi Sangathan (for short 'the Sangathan') for the welfare of the tribals.

3. The petitioner has alleged in the writ petition that the Beat Guard, Deputy Ranger and the Ranger of the Forest Department of the Government of Madhya Pradesh have been threatening the tribals of Ghorpodmal village of dire consequences if they do not restrain from participating in the activities of the Sangathan. She has alleged that on 17th July, 2004 at about 11.00 p.m., fifty armed personnel of the Police and the Forest Departments marched through village Ghorpodmal and created havoc. She has alleged that these personnel of the Police and the Forest Departments were armed with rifles and most of them were drunk and they came in 6 to 7 jeeps, 7 to 8 motor-cycles and abused the tribals in foul language. The petitioner has further alleged that these armed personnel of the Police and the Forest Departments entered Soma Korku's hutment and on being told by his wife Sukhiyabai that Soma was not present, the drunk intruders started molesting two tribal women, Sukhiya Bai and Mundli, and when the women protested vehemently, they were beaten up with the butts of rifles. She has further alleged that these assaulters went on rampage and started assaulting anyone and every one in the night and in these circumstances, the villagers got panicky and in self defence started pelting stones at the assaulters and they left the place. The petitioner has also alleged that the Police personnel then registered a false case of dacoity and attempt to murder against 13 tribals. To avoid arrest and fearing further assault, the 13 tribals had to run from pillar to post and could not harvest their crop or do any other labour and also could not handle their responsibilities towards their family members.

4. The petitioner has stated in the writ petition that although complaints of the incidents of 17th July, 2004 were filed before different authorities, no investigation was initiated by any competent authority, and on the other hand, Munji Yadav and two other tribal activists namely Balaram and Bhoota were asked by Thanedar

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

Tripathi on 29th September, 2004 to withdraw the complaints against the Police personnel. The petitioner has also stated that on 21st August, 2004, the Forest personnel went to Chamil Jungle near Kabra village, which is in vicinity of Ghorpodmal village, and arrested 8-10 tribals who were mercilessly beaten up and taken to Mohada Police Station. Of these tribals, Hannu and Shyamlal were beaten the most and were implicated in the offence of dacoity alongwith other tribals of village Ghorpodmal. The petitioner has further stated that Hannu and Shyamlal were arrested on 21st August, 2004 and were kept in custody till 23rd August, 2004 at the Mohada Police Station and produced before the Magistrate on 24th August, 2004 and were remanded to judicial custody, and were denied bail and they languished in Betul Jail for atleast four and half months. The petitioner has, inter-alia, prayed that an enquiry be conducted into the incidents of 17th July, 2004 in the Ghorpodmal village by an independent agency and that the arrest of tribals of Ghorpodmal be stopped immediately.

5. In the preliminary submissions, the respondents 4 (a), (b) and © have stated that approximately 200 families of local tribes live in villages Kabra and Ghorpodmal within the forest ranges of Mohada and Tawdi under West Betul (G) Forest Division and taking advantage of the proximity to forest, some of them on the instigation of the petitioner and her husband are involved in various types of forest offences on regular basis in the nearby compartment Nos.1293, 1304, 1273 and 1283 of West Forest Division, Betul. They have also stated that the Department of Forest has been taking suitable action by registering cases of forest offences, encroachments etc. against the offenders.

6. Regarding the incidents which took place on 17th July, 2004 in village Ghorpodmal, respondents 4(a), (b) & (c) have alleged that Soma and Mer Singh including Hannua and Shyamlal encroached upon the forest land of compartment No. 1293. These respondents have further stated that a Task Force consisting of officials of Forest, Revenue and Police Departments reached the spot where the encroachment was being made at about 2.30 p.m. on 17th July, 2004 and on seeing the Task Force, the encroachers fled from the spot and were chased by the Task Force to the Ghorpodmal-village. They have also alleged that on 17th of July, 2004 at 5.30 p.m., when the members of the Task Force reached Soma's house and directed him to come out so that further legal action could be taken against him, supporters of the petitioner and members of the organisation from surrounding villages Kabra, Keli-Rawang, Malegaon, Batki, Kayada etc. including Soma, Hannu and Shyamlal, who could be 100 to 125 in number, started shouting slogans and attacking and assaulting the members of the Task Force by deadly weapons like Lathi, axe, farsa and stones and as a result, the employees of the Forest Department sustained grievous injuries. They have also stated that these tribals damaged police vehicle No. MP-03/3627 and also took away a wireless set. They have further

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

stated that the Task Force showed tremendous restraint in not taking any coercive action though they were fully equipped and to save their lives, they had to flee in different directions and some of them had to spend the night in the forest and reached safer places only on the next day. They have also stated that a case was registered against Soma and others bearing Crime No.31 of 2004 of P.S. Mohada on 18th July, 2004 and after investigation, challan has also been filed in the Court of Judicial Magistrate First Class, Bhaisdehi against Hannu and Shyamlal and investigation in respect of other persons is still in progress and as they are absconding, challan could not be filed against Soma and others.

7. Regarding the incidents of 21st August, 2004, the respondent Nos.4 (a), (b) and (c) have stated in their preliminary submissions that the Forest Chowkidars made a complaint that some people in the village Kabra, Tamar, Ghorpadmal and Batki were ploughing the field by illegally cutting teak trees, and Kesho Lodhi, Assistant Forest Range Officer, Piparia, Beat Guard Wamanrao and the complainant Forest Chowkidars went to the President of Van Suraksha Samiti, Sullo Bai and village Sarpanch Vishram Singh and informed them about the complaint and about 25-30 persons went to Chimlakheda and saw 20-22 people ploughing the field and some women were sitting and when they did not stop ploughing the field despite warning, POR No.291/03 dated 21st August, 2004 was issued against Hannu Thathia, Shamu Gond, Munnilal, Tulsiram, Prem Gond, Sammal Gond, Mangal Hoji, Shiv and others and getting annoyed they attacked Kesho Lodhi with lathis etc. and tore down his shirt. Thereafter, Kesho Lodhi along with Beat Guard Wamanrao came to the Police Station and lodged a report of the incident and Crime No.36 of 2004 dated 22nd August, 2004 under Sections 147, 353, 186, 332, 342, 506-B and 294 Indian Penal Code was registered against Hannu* Thathia, Shyamlal and others. Thereafter, Hannu, Shyamlal and nine others were arrested and produced before the Judicial Magistrate First Class on 24th August, 2004. Hannu and Shyamlal then filed bail applications before the Judicial Magistrate First Class, Bhensdehi, which was rejected. When they filed a second bail application, the same was allowed by order dated 21 st December, 2004 and Hannu and Shyamlal were released on bail. In the parawise return filed on behalf of the respondent Nos.4 (a), (b) and (c), the averments made in their preliminary submissions have been reiterated with regard to the incidents which took place on 17th July, 2004 and 21st August, 2004.

8. Since there were two divergent versions, one of the petitioner and the other of the respondent Nos.4(a), (b) and (c) regarding the incident of 17th July, 2004, the Court passed an order on 3rd October, 2005 directing the learned District Judge, Betul, within whose jurisdiction village Ghorpadmal is situated to make an enquiry into the incident on 17th July, 2004 and submit a report to this Court within a period of two months. By the order passed by the Court on 3rd October, 2005, the learned District Judge was also directed to hear the petitioner, respondents 4

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

(a), (b), (c) or their representatives, examine witnesses and allow the concerned parties to cross examine the witnesses. Pursuant to the order of the Court, the learned District Judge, Betul conducted the enquiry and submitted a report that if any opinion is given by him, it will affect the interest of the parties in the sessions trial pending in the Sessions Court and also in the Criminal Case pending before the Judicial Magistrate First Class. Thereafter, on 20th July 2006, the Third Additional Sessions Judge, Betul passed an order in Sessions Trial No.65 of 2005 that there was absolutely no evidence to implicate the 13 tribals in offences under Sections 395 and 307 Indian Penal Code and the case has been sent for trial by Magistrate under Sections 147, 148, 149, 332 and 447 I.P.C.

9. At the hearing of the writ petition, the petitioner appearing in person submitted that the order passed by the learned Additional Sessions Judge on 20th July, 2007 would clearly show that 13 innocent tribals were falsely booked for dacoity and attempt to murder by the Forest officials of the State of M. P. She submitted that on account of the false implication of 13 tribals in the offences of dacoity and attempt to murder, they were arrested and two of them, namely Hannu and Shyamlal, were detained in custody for about four and half months and hence, they are entitled to compensation for gross violation of their rights under Art. 21 of the Constitution. She cited *Rudul Shah vs. State of Bihar and another*, (1983) 4 SCC 141 in which the Supreme Court has held that the right to compensation is some palliative for the unlawful acts of instrumentalities in the name of public interest and that the State must repair the damage done by its officers by paying compensation to those whose rights are violated. She also relied on the observations of J.S. Verma, J, as he then was, in *Nilabati Behera vs. State of Orissa and others*, (1993) 2 SCC 746 that the Court should forge new tools and devise new remedies for enforcing the fundamental rights guaranteed by the Constitution and award monetary compensation in appropriate cases. She submitted that in *D.K. Basu vs. State of West Bengal*, (1997) 1 S.C.C. 416, the Supreme Court, relying on the legal maxim "Ubi jus, ibi remedium" has held that monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family.

10. Mr. Kumaresh Pathak, learned Deputy Advocate General appearing for the respondents 4 (a), (b) and (c), on the other hand, submitted that all the tribals were arrested for commission of forest and other offences in accordance with the provisions of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") and the applications for bail of some of the arrested tribals were rejected by the Court, but at the later stage, allowed by the Court in accordance with the Cr.P.C. Hence, the arrest and detention of the tribals were in accordance with the procedure

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

established by law and the rights of these tribals under Art. 21 of the Constitution have not been violated and therefore these tribals are not entitled to compensation for their arrest and detention, as contended by the petitioner.

11. We find full force in the aforesaid submissions of Mr. Pathak. Art. 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to the procedure established by law. The personal liberty of person thus can be taken away by a reasonable procedure laid down in law. The tribals including Hannu and Shyamlal were arrested for various offences alleged to have been committed by them and they were produced before the Court of the Judicial Magistrate First Class, Bhaisdehi on 24th August, 2004. While the bail applications of two tribals were rejected, the other tribals were released on bail. Subsequently, however, the second bail applications of Hannu and Shyamlal were allowed by order dated 21st December, 2004 and Hannu and Shyamlal were released on bail. The arrest and detention of the tribals including Hannu and Shyamlal are therefore in accordance with the procedure laid down in the Cr.P.C. The fundamental rights of the tribals including Hannu and Shyamlal under Art. 21 of the Constitution have not been violated and they are not entitled to award of compensation.

12. In *Rudul Shah vs. State of Bihar* (supra) cited by the petitioner, the facts were that Rudul Shah was acquitted by the Court of Sessions, Muzaffarpur, Bihar on 3rd June, 1968 but he was released from jail on 16th October, 1982, more than 14 years after he was acquitted. On these facts, the Supreme Court held that the detention of Rudul Shah for about 14 years from 1968 to 1982 was unauthorised and illegal and hence his liberty had been taken away for the period of 14 years without following the procedure under the law. The Supreme Court, therefore, granted compensation of Rs.30,000/- in addition to compensation of Rs.5000/- paid to Rudul Shah. In the present case, on the other hand, as we have found, the detention of 13 tribals was in accordance with law and we cannot hold that their personal liberty had been taken away without following the procedure established by law.

13. In *Nilabati Behera vs. State of Orissa and others* (supra) cited by the petitioner, the son of Nilabati Behera, aged about 22 years was killed while in custody and on these facts, the Supreme Court held that the right guaranteed under Art. 21 of the Constitution that no person shall be deprived of his life without following the prescribed procedure of law was violated and accordingly awarded compensation of Rs.1,50,000/- to Nilabati Behera from the State of Orissa. In the present case, none of the tribals has been killed in custody.

14. *D.K. Basu vs. State of West Bengal* (supra) cited by the petitioner was a case registered pursuant to a letter dated 26.8.1986 to the Chief Justice of India

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

by the Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, drawing His Lordship's attention to news items published in The Telegraph dated 20.7.1986, 21.7.1986 and 22.7.1986 and in the Statesman and Indian Express dated 17.8.1986 regarding deaths in police custody and it is in this context that the Supreme Court held that award of compensation for established infringement of the indefeasible rights guaranteed under Art. 21 is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. The present case is not a case of custodial violence or custodial death and there is no violation of the rights of the tribals guaranteed under Art. 21 of the Constitution on account of arrest and detention for commission of alleged offences according to the provisions of the Cr.P.C.

15. The petitioner next submitted that Section 3 (1) (viii) of The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the 1989 Act') provides that any person who is not a member of Scheduled Caste or a Scheduled Tribe and who institutes false, malicious or vexatious suit or criminal or other proceedings against a member of a Scheduled Caste or a Scheduled Tribe is punishable with imprisonment. She submitted that similarly Section 3 (1) (ix) of the 1989 Act provides that any person who is not a member of Scheduled Caste or a Scheduled Tribe and who gives any false or frivolous information to any public servant and thereby causes such public servant to use his lawful power to cause injury or annoyance to a member of a Scheduled Caste or a Scheduled Tribe is punishable with imprisonment. She submitted that the Forest and Police officials are guilty of these offences as they instituted false, malicious or vexatious criminal proceedings or gave false or frivolous information to the Police against the members of the Scheduled Tribes because of which criminal cases were instituted against the members of the Scheduled Tribes. She submitted that the fact that the Third Additional Sessions Judge, Betul passed the order dated 20th July, 2006 saying that there was absolutely no evidence to implicate the accused persons in the offences under Sections 395 and 307 Indian Penal Code would show that a false, malicious and vexatious criminal case had been instituted against the members of the Scheduled Tribes for which the Police and Forest personnel are liable to be prosecuted for the offences under Sections 3 (1) (viii) and 3 (1) (ix) of the 1989 Act.

16. Mr. Pathak, learned Deputy Advocate General, on the other hand, submitted that first an FIR has to be lodged and an investigation has to be carried out by the Police in accordance with the provisions of the 1989 Act and the Rules made thereunder as well as the Cr.P.C. and thereafter, if a charge-sheet is filed with materials to show that the Police or Forest officials have committed the offences

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

under Sections 3(l)(viii) and 3(l)(ix) of the 1989 Act, then only the case can be tried by the Special Court constituted under Section 14 of the Act and the High Court, in exercise of its powers under Art. 226 of the Constitution, cannot direct prosecution of the Police and Forest personnel straightaway on the basis of allegations made by the petitioner in the writ petition.

17. The petitioner, however, submitted if the FIR is lodged against the Police and Forest Officials, the Police will not register the case and if the Police registers the case a fair investigation into the offences alleged to have been committed by the Police and Forest personnel is not possible and for this reason the Court should straightaway direct prosecution of the Police and Forest personnel guilty of the offences under Sections 3 (1) (viii) and 3 (1) (ix) of the 1989 Act.

18. We are unable to accept the submission of the petitioner. The High Court, in exercise of its powers under Art. 226 of the Constitution, cannot direct prosecution of Police and Forest personnel merely on the allegations made by the petitioner in the writ petition that they have committed offences under Sections 3(1) (viii) and 3 (1) (ix) of the 1989 Act. Section 4 (1) of the Cr.P.C. provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with in accordance with the provisions contained in the Cr.P.C. and Section 4 (2) of the Cr.P.C. provides that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with in accordance with the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Hence, the provisions of the Cr.P.C. are applicable to investigation, inquiry and trial of offences under the 1989 Act subject to specific provisions of the 1989 Act regulating the manner or place of investigation, inquiry and trial dealing with the offences under the 1989 Act. Unless, therefore, offences under the 1989 Act are investigated by the Police pursuant to an FIR, or inquired into by the Magistrate pursuant to a complaint and unless an order is passed by the Magistrate committing the case to the Special Court constituted under Section 14 of the 1989 Act as provided in the Cr.P.C., the Special Court cannot take cognizance of the offences. In *Gangula Ashok and another vs. State of A.P.*, 2000 (1) Crimes 196 (SC), the Supreme Court had the occasion to decide the question whether the Special Court constituted under Section 14 of the 1989 Act could straight away take cognizance of offences under the 1989 Act, and referring to the provisions of Cr.P.C. and the 1989 Act as the Code and the Special Act held in paragraphs 15 and 16 :

" This Court, on a reading of Section 5 in juxtaposition with Section 4(2) of the Code, has held that 'it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

short, the provisions of this Code would be applicable to the extent, in the absence of any contrary provision in the special Act or any special provision including the jurisdiction or applicability of the Code', (vide para. 128 in Directorate of Enforcement V. Deepak Mahajan).

Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge sheet cannot straight way be laid before the Special Court under the Act."

19. Thus, in case the petitioner is apprehensive that the Police may not register a case at all pursuant to the FIR lodged against the Police and Forest personnel and investigate into the offences with fairness and impartiality, it is open to the members of the Scheduled Tribes to file complaints before the concerned Magistrate for inquiry in accordance with the Cr.P.C. and in case the Magistrate finds that the case is one for committal to the Special Court, he can pass orders accordingly and only then the Special Court can take cognizance of the offences under the 1989 Act alleged to be committed by the Police and the Forest Personnel.

20. The petitioner has filed written submissions contending that on 16.3.2007, three tribals, namely, Mangal Singh, Phool Singh and Sukhram were arrested, handcuffed and paraded through the public thoroughfare in Betul during their transit to the Court of SDM and made to sit handcuffed outside the Court of the SDM. She submitted that such handcuffing was in clear violation of the judgment of the Supreme Court in *Sunil Gupta and others vs. State of M.P. and others*, (1990) 3 S.C.C. 119. She further submitted that all this was brought to the notice of this Court and on 10.4.2007, the Court, after considering the reply filed by the respondents, passed an order saying that it was not prima-facie convinced with the reply filed on behalf of the respondents and gave an opportunity of hearing to Mr. A.L. Patel, ASI, on whose instructions, Mangal Singh, Phool Singh and Sukhram were handcuffed. Thereafter, Mr. Patel appeared before the Court and he was asked to submit an explanation to the higher authorities why three persons were handcuffed with a long chain contrary to the judgment of the Supreme Court in *Sunil Gupta's case* and Mr. Patel submitted an explanation but the order is yet to be passed by the authorities. She submitted that handcuffing of Mangal Singh, Phool Singh and Sukhram was a clear violation of right to dignity guaranteed under Art. 21 of the Constitution and the Court must award compensation to Mangal Singh, Phool Singh and Sukhram for such violation of their rights.

21. After taking into consideration the observations of the Supreme Court in *Prem Shankar Shukla and others Vs. Delhi Administration* (1990) 3 SCC

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

526, the Supreme Court has held in *Sunil Gupta and others vs. State of M.P. and others* (supra) cited by the petitioner that taking of persons from prison to the Court or back from the Court to the prison by the escort party is only under the judicial orders of the Court and, therefore, even if extreme circumstances necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and intimate the court so that the court considering the circumstances either approve or disapprove the action of the escort party and issue necessary directions. In the aforesaid case of *Sunil Gupta and others vs. State of M.P. and others* (supra), the Supreme Court found that the escort party without any justification had handcuffed the petitioners when taking them from the prison to the Court and then from court to prison and accordingly directed the State Government to take appropriate action against the erring officials who had unjustly and unreasonably handcuffed the petitioners in violation of the rights guaranteed under Art.21 of the Constitution.

22. In *State of Maharashtra and others vs. Ravikant S. Patel*, (1991) 2 S.C.C. 373, the Supreme Court relying on *Sunil Gupta and others vs. State of M.P. and others* (supra) and *Rudul Shah vs. State of Bihar and another* (supra) upheld the award of compensation of Rs.10,000/- by the High Court of Bombay to an under-trial prisoner who had been handcuffed and taken through the streets in a procession by the Police during investigation for violation of his right under Article 21 of the Constitution.

23. The records of the present case reveal that Mr. Patel, ASI, who was heading the Police personnel carrying Mangal Singh, Phool Singh and Sukhram from jail to the Court of SDM, stated before the Court on 3.5.2007 that as per the directions of the SDM, Betul, he brought the three persons from jail to the Court. Mr. Patel did not dispute that the three persons were handcuffed by a long chain when they were brought to the Court of SDM, Betul. The SDM, Betul who appeared before the Court on 16.5.2007, however stated that the three persons were not handcuffed when they were produced before the Court. No valid justification has thus been given for the handcuffing of the three persons when they were brought from jail to the Court and no orders appear to have been passed by the SDM for handcuffing all these three persons. Since no valid justification has been shown in the returns filed by the respondents for handcuffing Mangal Singh, Phool Singh and Sukhram, we award a compensation of Rs.10,000/- (rupees ten thousand) to each one of these three persons, namely Mangal Singh, Phool Singh and Sukhram and the respondent No.4, State of Madhya Pradesh, is directed to pay the compensation within a period of two months from today. It will be open for the State of M.P. to recover the compensation from the police personnel or the officers found guilty in the disciplinary proceedings for such blatant violation of the law laid down by the Supreme Court.

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

24. The petitioner has also contended in her written submissions that the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short 'the 2006 Act') provides in Section 4 for recognition of, and vesting of, forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers and sub-section (5) of Section 4 of the 2006 Act states that save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete. She has submitted that the Court should accordingly direct the respondents not to evict the tribals of village Ghorpodmal from the forest land in their occupation till their claims are settled in accordance with the provisions of the 2006 Act.

25. During the pendency of this case, the petitioner had filed I.A.No-8154 of 2005 praying for an order restraining the Forest authorities of the State Government from taking any coercive steps against any Scheduled Tribe people of village Ghorpodmal, District Betul and along with the I.A. had filed a Draft of Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 and instructions of Government of India, Ministry of Environment & Forest in connection with the Draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. One such instruction was a communication dated 12th May, 2005 issued by the Government of India, Ministry of Environment and Forests to the Principal Secretaries (Forests) to all the States and the Union Territories, in which it was inter alia stated that forest dwellers including tribals who are in continuous possession of forest land at least from prior to 25.10.1980 i.e. the date of enactment of Forest (Conservation) Act, 1980 (for short 'the 1980 Act'), shall be eligible to be considered for settlement of land right including regularisation of encroachment on forest land. The communication dated 12th May, 2005 also contained instructions of the Government of India to the State Governments not to take action for eviction of Scheduled Tribes including tribals who are in occupation of Government land on or after 25th October, 1980. In view of these instructions of the Government of India, by order dated 18th October, 2005, the Court directed as an interim measure that no coercive steps would be taken to evict any of the forest dwellers including tribals who are in continuous possession of forest land prior to 25th October, 1980. In the order dated 18th October, 2005, the Court also made it clear that in any proceedings for eviction of encroachers, the person who is served with show cause notice can take a stand before the authority in writing that he has been in continuous occupation of forest land from a date prior to 25th October, 1980 and if such a stand is taken, the competent authority will consider the same in accordance with law.

26. The Bill has now become the 2006 Act and a notification dated 31st December, 2007 has been issued by the Central Government under Section 1 (3) of the 2006 Act appointing 31st December, 2007 as the date on which the provisions of the

**SHAMIMMODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

2006 Act came into force Section 3(1)(a) and Section 4(1) and (5) of the 2006 Act are quoted hereinbelow :

“3. Forest rights of Forest dwelling Scheduled Tribes and other traditional forest dwellers.—(1) For the purposes of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely :—

(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers.

XXX

XXX

XXX

4. Recognition of, and vesting of, forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers. -

(1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in -

(a) the forest dwelling Scheduled Tribes in States or areas in States where they are declared as Scheduled Tribes in respect of all forest rights mentioned in Section 3;

(b) the other traditional forest dwellers in respect of all forest rights mentioned in section 3.

XXX

XXX

XXX

(5) Save as otherwise provided, no member of a forest dwelling Scheduled Tribes or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.”.

27. It is clear from sub-section (1) of Section 4 of the 2006 Act that notwithstanding anything contained in any other law, the forest rights including the right to hold and cultivate land as mentioned in Section 3(1)(a) of Forest dwelling Scheduled Tribes and other traditional forest dwellers are now recognized. Sub-section (5) of Section 4 of the 2006 Act further provides that save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete. Accordingly, we direct that the claims of the members of the Scheduled Tribe and other traditional forest dwellers of village

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

Ghorpodmal, district Betul will be decided in accordance with the provisions of the 2006 Act and the authorities will not evict a member of a forest dwelling Scheduled-Tribe or any other traditional forest dweller from the forest land under his occupation till the recognition and verification procedure is complete.

28. The petitioner has next submitted in the written submissions that some contractors very close to the ruling party politicians in the State are involved in illegal excavations in the forest areas of districts Betul and Harda and the Police and district administration of Betul and Harda are not taking any action to stop such illegal excavations. She further submitted that by a letter dated 3rd September, 2005 of the Under Secretary, Forest, Government of Madhya Pradesh and by letter dated 5th November, 2005, the Chief Conservator of Forest, Government of Madhya Pradesh have permitted such illegal excavations in contravention of the provisions of the 1980 Act and, therefore, a direction should be given for prosecution of officers under Section 3 (B) of the 1980 Act, who in collusion with politically influential contractors have permitted such illegal excavations in the forest areas.

29. These allegations of illegal excavations were made in I.A. Nos. 8937, 8939 and 9438 of 2005 filed by the petitioner and were denied by the respondent 4 (a), (b) and (c) in their replies. Hence, the Court passed an order on 6.1.2006 directing that an inquiry be conducted by Mr. L.L. Shukla, the then Registrar (Vigilance) of this Court. By the order dated 6.1.2006, the Court directed that Mr. Shukla will visit the concerned areas in Betul district along with a photographer and will submit a report whether or not such illegal excavations have taken place in the Betul District, as alleged in the IAs. The Court further directed that the petitioner and the Government may depute their representatives to the spots at the time Mr. Shukla visits the spot. Thereafter, Mr. Shukla conducted the inquiry and submitted a report dated 1st March, 2006 that illegal excavation has taken place in some of the places. The Court accordingly passed orders on 10th April, 2006 directing the Collector, Betul to ensure that such illegal excavations are stopped immediately and further directed the Collector to exercise all powers under the law to seize any material collected by such illegal excavations.

30. Again an application (IA NO.4185 of 2006) was filed by the petitioner complaining of fresh illegal excavations in the reserved forest and revenue areas in Harda and Betul districts and the respondents in their reply denied such fresh illegal excavations. The Court passed orders on 20th November, 2006 directing the Registrar (Vigilance) to make spot inspection of the areas mentioned in the IA and submit a report to this Court and in the order dated 20th November, 2006, the Court further directed that notice be issued to the petitioner and the Collector about the date and time of the spot inspection so that they may remain present at the time of spot inspection. Pursuant to the order dated 20th November, 2006, the Registrar (Vigilance) Mr. Jayant Chouhan reached the spot, carried out the inspection and submitted a report

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

dated 10.1.2007 in which he has again confirmed illegal excavations in some of reserved forest areas and revenue areas of Harda and Betul districts.

31. Section 2 of the 1980 Act is quoted herein below:

**“SECTION 2 - RESTRICTION ON THE PRESERVATION
OF FORESTS OR USE OF FOREST LAND FOR NON-FOREST
PURPOSE.**

Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing -

(i) that any reserved forest (within the meaning of the expression “reserved forest” in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved.

(ii) that any forest land or any portion thereof may be used for any non-forest purpose.

(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;

(iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.

Explanation: For the purpose of this section “non-forest purpose” means the breaking up or clearing of any forest land or portion thereof for -

(a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants;

(b) any purpose other than reafforestation, but does not include any work relating or ancillary to conservation, development and management of forests and wild life, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes.”

32. It will be clear from a reading of Section 2(ii) of the 1980 Act quoted above, that notwithstanding anything contained in any other law for the time being in force, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose. Clause (b) to the

**SHAMIM MODI (Ms.) Vs. Ms. SUDHA CHOWDHARY,
DISTRICT COLLECTOR, BETUL**

Explanation appended to Section 2 states that for the purposes of this Section, 'non-forest purpose' means the breaking up or clearing of any forest land or portion thereof for any purpose other than reafforestation. Hence, no forest land or portion of forest land can be broken up for any purpose other than reafforestation, without the prior approval of the Central Government. This being the clear position of law, excavations in forest land without the prior approval of the Central Government are prohibited under Section 2 of the 1980 Act.

33. In *T.N. Godavarman Thirumulkpad vs. Union of India and others*, AIR 1997 S.C. 1228, the Supreme Court interpreting Section 2 of the 1980 Act held:

“..... The term ‘forest land’, occurring in Section 2, will not only include ‘forest’ as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof.....”

34. Thus, no land in areas recorded as forest in Government records can be broken up by excavations without the prior approval of the Central Government as provided in Section 2 of the 1980 Act. We accordingly direct the respondents 4 (a), (b) and (c) to ensure that no excavations in land recorded in Government records as forest takes place either by the State or other authorities or private persons including contractors without the prior approval of the Central Government and in case such excavations are conducted by the Government Departments, authorities or by private persons including contractors steps will be taken for their prosecution for the offences under Sections 3A and 3B of the 1980 Act.

35. The petitioner finally submitted that the petitioner and her husband are being harassed by the Forest and Police officials by registration of various criminal cases and appropriate directions be given to the authorities not to harass the petitioner and her husband in any manner. This relief cannot be granted to the petitioner in this PIL, which has been filed for the protection of rights of the tribals. In case, the petitioner or her husband is individually aggrieved by any particular action or order of the authorities, it is open for them to seek their remedies either under the Cr.P.C. or by separate writ petitions under Article 226 of the Constitution, as they may be advised.

36. With the aforesaid directions, the writ petition is disposed of. Interim orders passed by the Court are vacated.

Petition disposed of.

I.L.R. [2009] M. P., 100

WRIT PETITION

Before Mr. Justice Rajendra Menon

4 August, 2008*

R.B. DUBEY

Vs.

STATE OF M.P. & ors.

Petitioner

Respondents

Service Law - Transfer - Misconduct - Punitive or Stigmatic - Natural Justice - Petitioner transferred - Allegations of misconduct indicated in the order of transfer - It is stated that in violation to the principles of Natural Justice, petitioner is punished by the order of transfer - Held - If the order of transfer contains certain facts which amount to allegations or misconduct committed by the employee the same are administrative reasons which compelled the employer to transfer and in doing so the order of transfer cannot be said to be punitive or stigmatic - Respondents have indicated the reasons which compelled them to transfer the petitioner and in doing so they are not required to hear the petitioner - When the same has no adverse effect on the terms and conditions of appointment and when transfer itself is a condition of appointment - No interference is warranted - Petition dismissed.

(Para 8)

सेवा विधि - स्थानांतरण - अवचार - दण्डात्मक या कलंकात्मक - नैसर्गिक न्याय - याची स्थानांतरित - स्थानांतरण आदेश में अवचार के अभिकथन उपदर्शित किये गये - यह कथित किया गया कि नैसर्गिक न्याय के सिद्धांतों के उल्लंघन में स्थानांतरण के आदेश द्वारा याची को दण्डित किया गया - अभिनिर्धारित - यदि स्थानांतरण के आदेश में कुछ तथ्य अन्तर्विष्ट हैं जो आरोप या कर्मचारी द्वारा किये गये अवचार की कोटि में आते हैं यही प्रशासनिक कारण हैं जिन्होंने स्थानांतरण करने के लिए नियोक्ता को विवश किया और ऐसा करने में स्थानांतरण का आदेश दण्डात्मक या कलंकात्मक होना नहीं कहा जा सकता - प्रत्यर्थियों ने कारण उपदर्शित किये जिन्होंने याची को स्थानांतरित करने के लिए उन्हें विवश किया और ऐसा करने में उन्हें याची को सुना जाना आवश्यक लही था - जब इसका नियुक्ति के निबंधनों और शर्तों पर कोई प्रतिकूल प्रभाव नहीं है और जब स्थानांतरण स्वयमेव नियुक्ति की एक शर्त है - कोई हस्तक्षेप आवश्यक नहीं - याचिका खारिज।

Case referred :

2004 AIR SCW 955.

N.S. Ruprah, for the petitioner.

Sailesh Mishra, G.A., for the respondent Nos. 1, 2 & 3.

ORDER

RAJENDRA MENON J. :-Challenging the order of transfer Annexure P/1 dated 13.3.2008, petitioner has invoked the writ jurisdiction of this Court. The petitioner is working as a Range Officer, Forest Department Deori District Sagar. From the aforesaid post the petitioner is transferred to the Division Office at

R.B. DUBEY Vs. STATE OF M.P.

Sagar as Officer on Special Duty and in his place the respondent no.4 Shiv Hari Garg, Deputy Ranger has been asked to temporary charge. Inter alia contending that the transfer of the petitioner is punitive in nature and has been passed only by way of punishment on the grounds of misconduct said to have been committed by the petitioner, petitioner has filed this petition.

2. Shri N.S.Ruprah, learned counsel for the petitioner inviting attention to this Court to the impugned order dated 13.3.2008 points out that in the transfer order the reasons for transfer is indicated to be non payment of salary to the employees within time, misappropriation and financial irregularities and other allegations. It is stated that without holding any enquiry or show cause notice and in violation to the principles of natural justice petitioner is punished by the order of transfer and as the allegations of mis conduct indicated in the order of transfer are held to be substantiated by the respondents it amounts to casting stigma and therefore the order of transfer is assailed mainly on the aforesaid ground. That apart, Shri N.S.Ruprah, learned counsel for the petitioner points out that in directing the petitioner to hand over the charge to respondent no.4 who is to hold the aforesaid post on officiating basis respondents have committed breach of the circular dated 23.12.2002 which prevents giving the charge on temporary basis to a junior employee. Accordingly, on these grounds petitioner resists the order of transfer and prays for quashing the same.

3. Shri Shailesh Mishra, learned Govt. Advocate for the respondent nos. 1 to 3 refutes the aforesaid and points out that the allegations of misappropriation indicated in the order of transfer are the reasons for transfer which is indication of the public interest and the administrative exigency which warrants transfer and does not cast any stigma nor does it involve any penal consequences. Petitioner's service conditions are not adversely effected because of the order of transfer and therefore it is argued by Shri Mishra, learned counsel that the order of transfer does not suffer any illegality warranting interference.

4. In support of his contention Shri Mishra, learned counsel inviting attention to this court in the matter of *Union of India Vs. Janardhan Debanath* (2004 AIR SCW 955) contends that the allegations made even if serious in nature and the conduct attributed therein does not warrant holding of a enquiry before effecting the transfer.

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

6. Petitioner has been transferred by the impugned order and the order of transfer does make allegations against the petitioner. According to the respondents, the allegations and reasons are the administrative requirement which warrants transfer of the petitioner and the same as indicated hereinabove is the public interest involved in transferring the petitioner. The question as to whether such indications of misconduct made in the order of transfer amounts to casting stigma

R.B. DUBEY Vs. STATE OF M.P.

and warrants hold an enquiry or grant of opportunity of hearing to the petitioner, is considered by the Supreme Court in the case of *Union of India Vs. Janardhan Debanath* (supra) and in paragraph 15 of the aforesaid judgment it is so held by the Supreme Court:

"15. The allegations made against the respondents are of serious nature and the conduct attributed is certainly unbecoming. Whether there was any misbehaviour is a question which can be gone into in a departmental proceeding. For the purposes of effecting a transfer, the question of holding any enquiry to find out whether there was misbehaviour or conduct unbecoming of an employee is unnecessary and what is needed is the prima facie satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and if the requirement, as submitted by learned counsel for the respondents, of holding an elaborate enquiry is to be insisted upon the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity would get frustrated. The question whether respondents could be transferred to a different division is a matter for the employer to consider depending upon the administrative necessities and the extent of solution for the problems faced by the administration. It is not for this Court to direct one way or the other. The judgment of the High Court is clearly indefensible and is set aside."

(emphasis supplied)

7. Even though during the course of hearing Shri N.S. Ruprah, learned counsel for the petitioner tried to distinguish the aforesaid judgment by pointing out that in the case before the Supreme Court the expression used in the transfer order was only a word 'undesirable' whereas in the present case serious allegations are made and the guilt is said to be proved therefore, the principal laid down in the case of *Union of India Vs. Janardhan Debanath* (supra) will not apply. The said contention is unsustainable.

8. It is crystal clear from the principles laid down by the Supreme Court that if the order of transfer contains certain facts which amount to allegations or misconduct committed by the employee the same are the administrative reasons which compelled the employer to transfer and in doing so the order of transfer cannot be termed as punitive or stigmatic. In the present case also respondents have only indicated the reasons which compelled them to transfer the petitioner and for doing so they are not required to hear the petitioner this will be required only when action is taken for punishing the petitioner for the aforesaid act of commission or omission. When only transfer is effected and when the same has no adverse effect on the terms and conditions of appointment of the employee

RAJESH GUPTA Vs. BHARAT SANCHAR NIGAM LTD.

and when transfer itself is a condition of employee, interference into the matter on the grounds raised in this petition is not warranted.

9. Accordingly, finding no merit in the claim made by the petitioner and finding the order of transfer to be passed on administrative consideration, this petition is dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 103

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

11 August, 2008*

RAJESH GUPTA

... Petitioner

Vs.

BHARAT SANCHAR NIGAM LTD. & ors.

... Respondents

Service Law - Transfer - Malafide - Petitioner General Manager in BSNL - Transfer before completion of 3 years at location - Transferred out of M.P. circle when he was nearing completion of eight years in circle - Alleged that to accommodate private respondents he has been transferred - Held - Clause of transfer policy providing for minimum period of 3 years at location is not applicable as policy provides for tenure of 8 years in a circle - Posting of private respondent after considering his representation to avoid inconvenience to him - Petitioner failed to establish malafide or breach of statutory rule - No interference in transfer order - Petition dismissed. (Paras 7, 8 & 9)

सेवा विधि - स्थानांतरण - असदभाव - याची बीएसएनएल में महामंडल - स्थान पर 3 वर्ष पूर्ण होने के पूर्व स्थानांतरण - म.प्र. वृत्त के बाहर स्थानांतरित किया गया जब वह वृत्त में आठ वर्ष पूर्ण करने के निकट था - यह अभिकथित किया गया कि प्रायवेत प्रत्यर्थियों को उपकृत करने के लिए उसे स्थानांतरित किया गया है - अभिनिर्धारित - स्थान पर न्यूनतम 3 वर्ष का उपबंध करने वाली स्थानांतरण पॉलिसी का खण्ड लागू नहीं होता क्योंकि पॉलिसी एक वृत्त में 8 वर्ष की अवधि का उपबंध करती है - प्रायवेत प्रत्यर्थी की नियुक्ति उसके अभ्यावेदन पर विचार करने के बाद उसे होने वाली असुविधा का परिहार करने के लिए - याची असदभाव या कानूनी नियम का भंग स्थापित करने में असफल हुआ - स्थानांतरण आदेश में कोई हस्तक्षेप नहीं - याचिका खारिज।

Cases referred :

AIR 1993 SC 2444, AIR 1991 SC 532, AIR 2001 SC 3310.

A.K. Sethi with Anand Singh, for the petitioner.

Girish Patwardhan, for the respondent No.1 & 2.

L.C. Patne, for the respondent No.3.

ORDER

SHANTANU KEMKAR, J. :-The petitioner is holding the post of General Manager (Telecom) in the respondent Bharat Sanchar Nigam Limited (for short

RAJESH GUPTA Vs. BHARAT SANCHARNIGAM LTD.

'BSNL'). He has been transferred from Ujjain (MP Circle) to Shilong (NE-1 Circle) vide order dated 30.06.08 (Annexure P/1) and relieved vide order dated 30.06.08 (Annexure P/-2A). On 30.06.08 itself the third respondent who was posted in place of petitioner assumed the charge of the post held by the petitioner. Feeling aggrieved the petitioner filed a representation (Annexure P-2) and has filed this petition.

2. According to the petitioner he has been transferred only to accommodate the third respondent. He stated that the third respondent who was posted at Shajapur was promoted and was posted at Jabalpur but he got his posting at Jabalpur cancelled and managed his posting at Ujjain. He alleges malafides in his transfer on the ground that on 30.06.08 the impugned transfer order was issued from Delhi. On 30.06.08 itself he has been ordered to be relieved and on the same day the third respondent was relieved from Shajapur and joined at Ujjain. He therefore alleges that every action was already set in favour of the third respondent so that he can immediately join at Ujjain. The petitioner further alleges that his transfer order is contrary to the transfer policy of the BSNL dated 07.05.08 (Annexure P/5). His case is that he has not completed minimum period of three years at Ujjain location and circle tenure of eight years in M.P. Circle. In the circumstances there is violation of clause 11 (a) and (b) of the Transfer policy. He has also stated that other officers of the same cadre have not been transferred even though they have completed the Circle tenure of eight years.

3. The respondent nos.1 & 2 in their reply have denied the allegation of the petitioner that he has been transferred to accommodate the third respondent. It is stated that the petitioner has been working in M.P. Circle for more than seven years and as such he has been transferred. According to the respondents the observance of condition of minimum period of three years at a location will not be applicable in the case of the petitioner in view of the fact that he is nearing completion of eight years in M.P. Circle and therefore location tenure of three years has no application and will not come in the way of petitioner's transfer out of circle. As regards allegation of malafide the respondents have stated that merely because on the day of transfer the petitioner has been relieved and the third respondent has joined the office at Ujjain after his relieving from Shajapur the same cannot be a ground to hold that there is any malafide on the part of the respondents. According to them in view of the short distance between Ujjain, Dewas and Shajapur and also the fast modes of communication and transportation it cannot be said to be impossible or impracticable event. As regards the instances shown by the petitioner in regard to other officers that even after completion of the circle tenure they have not been transferred. It has been stated by the respondents that if other officers have been retained beyond the normal period of Circle tenure it will not give any right to the petitioner to claim his retention in MP Circle. According to them it is for the management to consider and decide as to

RAJESH GUPTA Vs BHARAT SANCHARNIGAM LTD.

who has to be retained and who has to be transferred. It is stated in the absence of malafide or breach of statutory rule the Court will not interfere into such administrative decision.

4. The third respondent filed reply and has stated that he was promoted from Junior Administrative Grade of ITS Group 'A' to Senior Administrative Grade of ITS Group 'A' vide order dated 30.05.08 (Annexure R/3-1) and was posted from Shajapur to Jabalpur. According to him prior to his posting at Shajapur he was posted at Jamnagar and Nadiad in Gujarat Circle. Before completion of his tenure posting at Gujarat Circle and even before his promotion order dated 30.05.08 he had submitted representation on 05.05.06 (Annexure R/3-2) seeking his transfer in MP Circle giving preference of places seeking his posting at Indore, Dewas, Ujjain or Ratlam stating therein his personal grounds for posting on either of these places. Again on 11.08.06 (Annexure R/3-3) the prayer for his transfer to the aforesaid places was reiterated. Thereafter when he was transferred and posted at Shajapur he submitted a representation (Annexure R/3-4) claiming that on his promotion he be posted either to Ujjain, Indore or Bhopal for the personal grounds. However, on his promotion vide order dated 30.05.08 (Annexure R/3-5) he was not posted at the places which he was demanding since long but at Jabalpur. In the circumstances he submitted another representation on 12.06.08 (Annexure R/3-7) to change his place of posting on promotion from Jabalpur to either Indore, Ujjain to Ratlam enabling him to look after his family on the ground stated by him in the representation. According to him considering the aforesaid representations including the representation (Annexure R/3-7) the BSNL has acceded to his request and changed the place of his posting from Jabalpur to Ujjain. Thus according to the third respondent his place of posting has been modified on account of his persistent demand for posting at either Indore, Ujjain, Bhopal or Ratlam on account of his family problems and for not any other reasons. It is also stated that apart from a representation dated 30.06.08 (Annexure P/2) the petitioner has again submitted a representation (Annexure R/3-12) on 04.07.08 before the BSNL but without waiting for the decision on it has rushed to this Court by filing this petition.

5. The petitioner has filed rejoinder and has stated that he has not completed eight years in M.P. Circle and would be completing eight years only in September 2008 and before completion of Circle tenure he could not have been transferred to Shilong (NE-1 Circle) in view of Clause 11 (a) of the transfer policy.

6. Heard learned counsel for the parties and considered the averments made in the petition, returns and rejoinder.

7. The petitioner is holding the post of General Manager (Telecom) and has been posted in the M.P. Circle since the year 2000. For a continuous period of seven years he was stationed at Bhopal and from 19.07.07 he was at Ujjain. In the circumstances when only few months prior to the completion of eight years of

RAJESH GUPTA Vs. BHARAT SANCHARNIGAM LTD.

Circle tenure he has been transferred out of Circle he cannot come forward with a plea that he has not completed three years at location Ujjain. In order to successfully challenge the transfer order the petitioner was required to establish malafide or breach of statutory rule. In the present case neither of the two grounds are existing. The challenge of the petitioner on the ground that his transfer is in violation of the transfer policy is of no merit. Clause 11 (a) of Section-B of transfer policy (Annexure P/5) provides that transfer of SAG or equivalent level Executives shall be on the basis of circle tenure of eight years. Clause 11(b) provides for minimum period of three years at a location shall be maintained as far as possible in order to avoid hardship to the employees. On conjoint reading of clause 11 (a) and (b) of the transfer policy the petitioner's contention that even though he is nearing completion of circle tenure of eight years he cannot be transferred, since he has not completed three years at location Ujjain, to my mind is wholly misconceived and cannot be accepted. Even otherwise the conditions of the policy will not give any right to the petitioner to claim that he cannot be transferred before completion of eight years of tenure service. The Supreme Court in case of *Union of India and others v. S.L. Abbas* (AIR 1993 SC 2444) has held that guidelines issued by the Government in regard to the transfer do not confer upon employees legally enforceable right. In case order of transfer made without following guidelines the same cannot be interfered with by the Court unless it is vitiated by malafides or is passed in violation of statutory provision.

8. As regards the posting of the third respondent in place of the petitioner, I find that the same has been ordered after consideration of his representation to avoid inconvenience to him. The petitioner having only few months to complete the circle tenure if has been transferred he cannot make any grievance about the posting of the third respondent which has been made considering his personal difficulties. The Supreme Court in case of *Ms. Shilpi Bose and Others v. State of Bihar and others* (AIR 1991 SC 532) has held that where a competent authority issues transfer order with a view to accommodate a public servant to avoid hardship the same cannot and should not be interfered with by the Court merely because the transfer orders were passed on the request of employees concerned. It is further observed by the Supreme Court that the Court should not interfere with transfer orders which are made in public interest and for administrative reasons, unless the same are made in violation of any mandatory statutory rule or on the ground of malafide. A Government servant holding a transferable post has no vested right to remain posted at one place or other. He is liable to be transferred from one place to other. Transfer orders issued by the competent authority do not violate any legal right. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead the affected party should approach the higher authority in the department. In case of *National Hydroelectric Power Corporation Limited v. Shri Bhagwan*

NANHE BHAI RAIKWAR Vs. DISTRICT & SESSIONS JUDGE

and another (AIR 2001 SC 3310) it has been held by the Supreme Court that any government servant or employee or public undertaking has no legal right to be posted forever at any one particular place. Transfer is not only an incident but a condition of service in case of an employee who is appointed on a transferable post.

9. Having regard to the aforesaid legal position and the fact that the petitioner has been transferred out of M.P. circle only when he is nearing completion of eight years in M.P. Circle and the fact that the petitioner could not establish malafide or breach of statutory rule in my considered view no case is made out warranting interference by this Court in a petition under Article 226 of the Constitution of India.

10. Accordingly, for the reasons stated above the petition is having no merit and the same deserves to be and is hereby dismissed. The interim ex-parte order dated 17.07.08 is vacated. No order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 107

WRIT PETITION

Before Mr. Justice R.S. Jha

21 August, 2008*

NANHE BHAI RAIKWAR

Vs.

DISTRICT & SESSIONS JUDGE & anr.

... Petitioner

... Respondents

A. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rules 14(5) & 30 - Departmental Enquiry - Copy of charge sheet with documents supplied by enquiry officer - Petitioner repeatedly sought time but did not file any reply nor adduce any evidence in defence - Held - Petitioner did not object to proceedings and accepted notice of charge sheet - Contention of petitioner regarding Rules 14(5) & 30 cannot be considered.

(Para 5)

क. सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 14(5) व 30 - विभागीय जाँच - जाँच अधिकारी द्वारा आरोप पत्र की प्रतिलिपि दस्तावेजों सहित प्रदाय की गई - याची ने पुनरावृत्त रूप से समय चाहा किन्तु कोई जवाब पेश नहीं किया और न प्रतिरक्षा में कोई साक्ष्य प्रस्तुत की - अभिनिर्धारित - याची ने कार्यवाहियों पर आपत्ति नहीं की और आरोप पत्र का सूचनापत्र स्वीकार कर लिया - नियम 14(5) व 30 के सम्बन्ध में याची के प्रतिवाद पर विचार नहीं किया जा सकता।

B. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 15 - Punishment - 48 hours notice given by

NANHE BHAI RAIKWAR Vs. DISTRICT & SESSIONS JUDGE

disciplinary authority to file reply to findings recorded by enquiry officer - Charges which were neither stated in charge sheet nor communicated to petitioner also taken into consideration while imposing punishment of dismissal - Held - Order of punishment violates principle of natural justice - Matter remitted back to disciplinary authority for reconsidering the order of punishment after giving due and proper opportunity of filing reply to inquiry report - Petition partly allowed. (Para 11)

ख. सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966, नियम 15 - दण्ड - जाँच अधिकारी द्वारा अभिलिखित निष्कर्षों का जवाब पेश करने के लिए अनुशासनिक प्राधिकारी ने 48 घण्टे का सूचनापत्र दिया - आरोप, जो न तो आरोप पत्र में कथित किये गये और न याची को संसूचित किये गये, भी पदच्युति का दण्ड अधिरोपित करते समय विचार में लिये गये - अभिनिर्धारित - दण्ड का आदेश नैसर्गिक न्याय के सिद्धांतों का उल्लंघन करता है - मामला, जाँच रिपोर्ट का जवाब पेश करने का सम्यक् और उचित अवसर देने के बाद दण्ड का आदेश पुनर्विचारित करने के लिए, अनुशासनिक प्राधिकारी को वापस भेजा गया - याचिका अंशतः मंजूर।

Cases referred :

(1991) 1 SCC 588, (1993) 4 SCC 727, (1976) 3 SCC 69, (1972) 4 SCC 730.

A.D. Deoras with Sanjay Sarwate, for the petitioner.

P.R. Bhawe with Bhanu Yadav, for the respondents.

ORDER

R.S. JHA, J. :- The petitioner has filed this petition assailing the legal validity of order dated 4-10-1997 by which a punishment of dismissal from service has been imposed upon him as well as orders dated 22-1-1999 and 19-11-1999 by which the appeal filed by him and review application filed by him were dismissed.

2. The brief facts, necessary for adjudication of this petition, are that the petitioner was working as a peon in the Court of the District & Sessions Judge, Damoh and at the relevant time was posted at Hata. On 3-7-1997, Civil Judge, Class II, Hata made a written complaint in respect of the conduct of the petitioner to the District & Sessions Judge, Damoh alleging that the petitioner was in the habit of refusing orders, misbehaving and remaining absent from his duties. Pursuant to the complaint a charge-sheet was issued to the petitioner on 7-7-1997 and a departmental enquiry was instituted against him. On 27-9-1997, the Civil Judge, Class II, Hata submitted a written application before the enquiry officer that the date mentioned in the written complaint be changed and, therefore, an amended charge-sheet was issued to the petitioner on 8-8-1997. On completion of the enquiry, in which all the charges were found to be proved, a notice on the enquiry report was issued to the petitioner on 2-10-1997 and, thereafter, by order dated 4-10-1997 a punishment of dismissal from service was imposed upon the petitioner. The appeal filed by the petitioner was rejected on 22-1-1999 and the review application filed by the petitioner also suffered the same fate by the impugned order dated 19-1-1999.

NANHE BHAI RAIKWAR Vs. DISTRICT & SESSIONS JUDGE

3. The petitioner being aggrieved by the impugned orders and the punishment imposed upon him, has filed the present petition challenging the impugned orders on the grounds that the enquiry conducted against him is not in conformity with rule 14 of the M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 inasmuch as the petitioner was asked to submit a written submissions by the enquiry officer and not by the disciplinary authority, notices were not issued in accordance with rule 30 of the Rules 1966, that the disciplinary authority while passing the impugned order dated 4-10-1997, has travelled beyond the charge-sheet levelled against the petitioner and that the petitioner was not given due and proper opportunity to defend himself by adducing evidence as provided by rule 14(17) of the Rules, 1966. The petitioner has also contended that there is no evidence on record to establish the charges against him and, therefore, the present case is one of no evidence and there is perversity on the part of the disciplinary authority while imposing the punishment and on the aforesaid grounds has prayed for quashing the impugned orders.

4. Per contra, the learned counsel, appearing on behalf of the respondents, submits that the departmental enquiry was initiated against the petitioner on a written complaint made by the Civil Judge, Class II against the petitioner. It is further submitted that the procedure prescribed by the Rules 1966 was meticulously followed and the petitioner was given due and proper opportunity of hearing during the enquiry which is evident from the perusal of the order sheets of the enquiry dated 9-9-97, 16-9-97, 19-9-97 and 1-10-97 wherein it has been specifically recorded that the petitioner himself appeared before the enquiry officer and a copy of the charge-sheet along with the supporting documents was supplied to him. It is further submitted that from a perusal of order sheet, which is filed as Annexure P-5, it is clear that inspite of being given several opportunities to the petitioner on his own volition did not file any reply nor did he produce any witness in his defence. The learned senior counsel appearing for the respondents submits that the petitioner was also given due and proper opportunity to file his submissions on the enquiry report submitted by the enquiry officer but the petitioner failed to do so. It is further submitted that each and every charge levelled against the petitioner was found to be proved on the basis of the oral and documentary evidence adduced during the enquiry and, therefore, the present case is not one of no evidence and as the disciplinary authority has recorded the finding against the petitioner on the basis of the aforesaid evidence on record, the impugned orders do not warrant any interference by this Court in exercise of its extra ordinary jurisdiction as this Court does not sit over the matter as an appellate authority nor is it required to reappreciate the evidence.

5. I have heard the learned counsel for the parties at length. From a perusal of the documents filed by the petitioner and the respondents, it is evident that the petitioner personally appeared before the enquiry officer and was handed over a copy of the charge-sheet and all supporting documents and affixed his signatures in

NANHE BHAI RAIKWAR Vs. DISTRICT & SESSIONS JUDGE

acknowledgment of receipt.. It is also clear that the petitioner repeatedly sought time but did not file any reply or adduce any evidence in his defence. In the aforesaid facts and circumstances, the contentions of the petitioner regarding rule 14(5) and rule 30 of the Rules 1966 do not deserve consideration inasmuch as the petitioner did not at any point of time object to the proceedings taken by the enquiry officer and himself appeared and accepted notice of the charge sheet and all supporting documents as is evident from a perusal of the order sheet dated 9-9-97. From a perusal of the statements of the witnesses, which have also been filed along with the petition, it is also apparent that no fault can be found with the finding recorded by the enquiry officer as there is adequate evidence to indicate that the charges levelled against the petitioner stood proved beyond preponderance of probabilities.

6. In view of the above, I do not find any illegality or irregularity in finding recorded by the authorities in respect of the charges leveled against the petitioner, however, on a perusal of the document Annexure P-10, it is clear that a show cause notice with a copy of the enquiry report was issued to the petitioner on 2-10-97 and he was asked to submit a reply by 11.30 a. m. on 4-10-97 and, therefore, the petitioner was hardly given 24 hours to file his response against the enquiry report. That apart, a perusal of the impugned order dated 4-10-97 indicates that the disciplinary authority while imposing the extreme penalty of dismissal from service upon the petitioner has taken into consideration the fact that the petitioner was in the habit of disobeying orders and remaining absent from his duties by making false excuses and that he had also disobeyed oral orders of the disciplinary authority. The disciplinary authority has also stated that taking into consideration the fact that the petitioner was orally warned several times on previous occasions but there was no improvement in his conduct his continuance in service is intolerable and not in public interest. The disciplinary authority has also stated in the impugned order that the petitioner is missing from headquarters without permission and, therefore, he need not be given an opportunity of hearing and has thereupon imposed the punishment of dismissal from service upon him.

7. On perusal of the aforesaid, it is clear that the authority while imposing punishment on the petitioner has not given him adequate and sufficient notice along with the copy of the inquiry report to enable him to file his reply and state his contentions in respect of the finding recorded by the inquiry officer in the inquiry report as only a 48 hours' notice was given to him and the disciplinary authority has passed orders specifically stating therein that there was no need of giving any opportunity of hearing to the petitioner as he was absent from headquarters.

8. In my considered opinion, the authority was required to give the petitioner adequate and sufficient notice along with the copy of the inquiry report so that he could go through the same and file his response thereto as the opportunity required to be given to the petitioner in that respect is not illusory and meaningless but is a real and substantial opportunity in view of the law laid down by the Supreme

NANHE BHAI RAIKWAR Vs. DISTRICT & SESSIONS JUDGE

Court in the case of *Union of India v. Mohd. Ramzan Khan* (1991) 1 SCC 588 and *Managing Director, ECIL v. B. Karunakar* (1993) 4 SCC 727.

9. It is also apparent from the perusal of the impugned order that the disciplinary authority has repeatedly stated that the petitioner had in the past disobeyed oral orders on several occasions and has thereafter gone on to narrate in detail an incident based upon his personal knowledge, alleging that the petitioner had disobeyed his oral orders and on the pretext of illness absented from duty although no charge to this effect was either levelled against the petitioner or stated in the charge-sheet nor was the petitioner given any opportunity to defend himself in respect of the aforesaid allegations or given any indication that the aforesaid incidents would be considered by the authority for the purposes of imposing a punishment of dismissal upon the petitioner.

10. In the case of *Remington Rand of India Ltd. v. Tahir Ali Saifi and another* (1976) 3 SCC 69, the Supreme Court has held that an order of dismissal from service cannot be based on a ground not stated in the charge-sheet. Similarly, in the case of *State of Punjab v. Bakhtawar Singh* (1972) 4 SCC 730, the Supreme Court has again stated that a charge in respect of which an employee is not given any opportunity to defend himself cannot be taken into consideration and has observed in para 11:

“11. It may be noted that Shri Bakhtawar Singh was not charged with having not discharged his duties impartially. None of the charges levelled against him accused him of not discharging his duties impartially. Hence the Minister was not justified in taking into consideration a charge in respect of which the member was not given any opportunity to explain his position.”

11. In view of the aforesaid, I am of the considered opinion that the impugned order of punishment violates the principles of natural justice on both counts, i. e., on account of not giving the petitioner adequate and sufficient notice and on account of taking into consideration charges which were neither stated in the charge sheet nor communicated to the petitioner to enable him to defend himself in that respect and, therefore, in view of the law laid down by the Supreme Court in the case of *Managing Director, ECIL* (Supra), the matter is remitted back to the disciplinary authority for the limited purpose of reconsidering the order of punishment after giving the petitioner due and proper opportunity of filing his reply to the inquiry report and thereafter passing fresh orders in that respect. As the matter is being remitted back for reconsidering the order of punishment, I do not propose to nullify the impugned order dated 4-10-1997. However, it is made clear that the authority after giving opportunity to the petitioner as aforesaid, would take a fresh decision taking into consideration and applying its mind only to the charges levelled against the petitioner and the evidence adduced during the enquiry in respect of the charges and either affirm or modify the impugned order and may

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

also pass any other consequential order if so required. Looking to the fact that the incident relates to the year 1997, it is directed that the authority would complete the aforesaid exercise expeditiously, as far as possible, preferably, within a period of three months from the date of furnishing a copy of the order passed in this petition subject to the fact that the petitioner renders all assistance and co-operation.

12. The petition is accordingly remitted back to the disciplinary authority with the aforesaid direction. In the facts and circumstances of the case, there shall be no order as to costs.

Order accordingly.

I.L.R. [2009] M. P., 112

WRIT PETITION

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

21 August, 2008*

NARMADA BACHAO ANDOLAN

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 21 & 226 - Public Interest Litigation - Right to livelihood - Maintainability - Large scale corruption alleged in distribution of compensation in Sardar Sarovar Project - Respondents stated that single man commission appointed to look into the grievance and thus PIL was not maintainable - Held - If a large number of Project Affected Families (PAFs) whose 25% or more land was submerged has not actually been able to get a minimum of two hectares of cultivable land and the civic amenities in the Resettlement & Rehabilitation (R&R) sites are of substandard quality because of large scale corruption, then the High Court, whose duty is to ensure enforcement of fundamental right in exercise of powers under Article 226 cannot remain indifferent - The High Court will have to find out through a Commission on which it has confidence and trust that the oustees have not been duped by fake registrations of sale - Deeds for purchase of land for cultivation and the public money spent for construction of civic amenities in the R&R sites have not been misused for extraneous purposes. (Para 17)

क. संविधान, अनुच्छेद 21 व 226 - लोकहित वाद - जीविकोपार्जन का अधिकार - पोषणीयता - सरदार सरोवर परियोजना में प्रतिकर का वितरण करने में बड़े पैमाने पर भ्रष्टाचार अभिकथित - प्रत्यर्थियों ने कथन किया कि शिकायत की जाँच पड़ताल करने के लिए एक संदस्थीय आयोग नियुक्त किया गया और इस प्रकार लोकहित वाद पोषणीय नहीं था - अभिनिर्धारित - यदि बड़ी संख्या में परियोजना प्रभावित परिवार, जिनकी 25 प्रतिशत या उससे अधिक भूमि जलमग्न हो गई थी, वास्तव में न्यूनतम दो हेक्टेयर कृषि योग्य भूमि भी प्राप्त करने में समर्थ नहीं हैं और पुनर्व्यवस्थापन एवं पुनर्वास स्थलों में नागरिक सुख सुविधाएँ बड़े पैमाने पर भ्रष्टाचार के कारण

NARMADA BACHAO ANDOLAN V. STATE OF M.P.

अवमानक किस्म की हैं, तब उच्च न्यायालय, जिसका कर्तव्य अनुच्छेद 226 के अन्तर्गत शक्तियों के प्रयोग में मूलभूत अधिकार का प्रवर्तन सुनिश्चित करना है, उदासीन नहीं रह सकता — उच्च न्यायालय को आयोग, जिस पर उसे विश्वास और भरोसा हो, के माध्यम से यह पता लगाना होगा कि बेदखल व्यक्ति नकली विक्रय के रजिस्ट्रेशनों द्वारा प्रवंचित न हो गये हों — कृषि के लिए भूमि क्रय करने के विलेखों और पुनर्व्यवस्थापन एवं पुनर्वास स्थलों में नागरिक सुख सुविधाओं के निर्माण के लिए खर्च लोकधन का असंगत प्रयोजनों के लिए दुरुपयोग न किया गया हो।

B. Commission of Inquiry Act (60 of 1952), Section 3, Constitution, Article 226 - Enforcement of fundamental right - Apex Court treating a letter to be a PIL passed certain observations and appointed panel of advocates as Commissioner - Held - These observations of Shri P.N. Bhagwati, J. of the Supreme Court equally apply to the exercise of jurisdiction of the High Court under Article 226 for enforcement of fundamental rights - Therefore, Shri Justice S.S. Jha, retired Judge of High Court of M.P., has been appointed as a Commission to inquire into and submit a report. (Paras 18 & 19)

खा. जाँच आयोग अधिनियम (1952 का 60), धारा 3, संविधान, अनुच्छेद 226 — मूलभूत अधिकारों का प्रवर्तन — शीर्ष न्यायालय ने एक पत्र को लोक हित वाद मानकर कतिपय टीका-टिप्पणीयों की और कमिशनर के रूप में वकीलों का पैनल नियुक्त किया — अभिनिर्धारित — उच्चतम न्यायालय के न्यायमूर्ति श्री पी.एन. भगवती की ये टीका-टिप्पणीयों मूलभूत अधिकारों के प्रवर्तन के लिए अनुच्छेद 226 के अन्तर्गत उच्च न्यायालय की अधिकारिता के प्रयोग को समान रूप से लागू होती हैं — इसलिए, जाँच कर रिपोर्ट पेश करने के लिए म.प्र. उच्च न्यायालय के सेवानिवृत्त न्यायाधीश न्यायमूर्ति श्री एस.एस. झा को आयोग के रूप में नियुक्त किया गया।

Cases referred :

(2000) 10 SCC 664, (2005) 4 SCC 32, AIR 2000 SC 411, (1984) 3 SCC 161.

Medha Patkar with Raghvendra Kumar, for the petitioner.

R.N. Singh, A.G. with Vijay Kumar Shukla, Dy.A.G., for the respondents/ State.

Dharmendra Sharma, for the respondent/Union of India.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, C. J. :- The petitioner is an organization of farmers, adivasis, labourers, fish workers and other people from the Narmada Valley affected by the construction of the Sardar Sarovar Project on Narmada River and has filed this writ petition as a Public Interest Litigation alleging various irregularities and corruption in implementation of measures for resettlement and rehabilitation of the project affected persons of the Sardar Sarovar Project in the State of Madhya Pradesh and has prayed for an investigation into the allegations by an independent agency such as the Central Bureau of Investigation (CBI).

2. The facts briefly are that the Sardar Sarovar Project is an Interstate Project involving the States of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan and

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

to resolve the disputes between these States, the Narmada Water Disputes Tribunal (for short the Tribunal) was set up in the year 1969 under the Interstate Water Disputes Act, 1956. In year 1979, the Tribunal made an award (hereinafter referred to as the Narmada Award) which inter-alia stipulated measures for resettlement and rehabilitation (R&R) of the project affected persons (for short the PAPs) of the Sardar Sarovar Project in Gujarat, Madhya Pradesh and Maharashtra. The R&R measures inter-alia stipulated that (i) every Project Affected Family (PAF) whose 25% or more land was submerged by the Project would be offered a minimum of two hectares of cultivable land; (ii) every house of PAP likely to be affected by submergence will be acquired under the Land Acquisition Act, 1894, and compensation will be awarded to the concerned PAPs; (iii) every PAP of the age of 18 years on the date of notification under Section 4 of the Land Acquisition Act, 1894 will be eligible to receive all the R&R benefits; and (iv) the Government shall establish rehabilitation villages for R&R of the PAPs with civic amenities including roads, drainage, Panchayat Bhawan, Schools, Dispensaries, Seed Stores etc. besides the land for cultivation by the PAPs. The Narmada Control Authority (for short the NCA) was constituted to monitor inter-alia the implementation of the R&R measures stipulated in the Narmada Award for the benefit of 40,000 PAFs residing in 193 villages in Madhya Pradesh in terms of the Narmada Award. In the judgment dated 18.10.2000 in the first *Narmada Bachao* case reported in 2000(10) SCC 664 and in the judgment dated 15.3.2006 in the second *Narmada Bachao* case reported in 2005(4) SCC 32, the Supreme Court has held that R&R measures must ensure that PAPs/PAFs were better off even after their displacement and their rights to life under Article 21 of the Constitution of India were not violated.

3. The petitioner has alleged in the writ petition that although crores of rupees have been spent by the State Government through the Narmada Valley Development Authority (for short the 'NVDA') to implement the aforesaid R&R stipulations in the Narmada Award, the benefits of the R&R stipulations in the Narmada Award have not been actually received by the PAPs/PAFs on account of large scale irregularities and corruption as detailed in the writ petition. The irregularities and corruption as detailed in the writ petition broadly can be categorised under the following heads :

(A) Fake Registration of sale-deeds. -

The Narmada Award stipulates that each and every cultivator and his adult son whose more than 25% of land holding is submerged, will be entitled to a minimum five acres cultivable and irrigable land which will be made available by the State of Madhya Pradesh. The State of Madhya Pradesh however introduced a Special Rehabilitation Package (for short 'SRP') whereunder each PAF was to receive Rs.5,58,000/- in two installments in cash for

NARMADA BACHAO ANDOLAN V. STATE OF M.P.

purchase of this five acres of land. The first instalment was to be received by the PAF before registration of sale-deed and the second installment was to be received by the PAF only after registration of the sale-deed. The petitioner has alleged that fake registrations of sale-deeds have taken place under the SRP during the last one & half years which would show that in some cases land is not in existence, in some cases land has been sold by persons who do not exist, in some cases Government land has been shown to have been sold, in some cases land already acquired by the Government for some other project is shown to have been sold, in some cases land has been sold not by the real owners but some other persons without the knowledge of the real owners and in some cases the same area of land has been sold to more than one PAF. The petitioner has stated that the Tehsildar Manwar Tehsil, District Dhar, has submitted a report dated 14.9.2007 to the Land Acquisition Officer, Narmada Valley Development Authority (for short 'NVDA') providing details of 57 instances of fake registration of sale-deeds under the SRP and has recommended that the NVDA should file FIRs against the accused persons. Similarly, the Naib Tehsildar, Badwani district, has submitted a report dated 25.5.2007 about a number of fake registration of sale-deeds for the purpose of receiving the second installment under the SRP.

(B) Rampant corruption in payment of compensation for houses acquired under the Land Acquisition Act, 1894.-

Under the Narmada Award, every house likely to be affected by submergence was to be acquired under the Land Acquisition Act, 1894 and compensation was to be awarded to the PAPs/PAFs, but because of rampant corruption by land acquisition officials, middlemen and officials of the NVDA crores of public money have been siphoned off in the name of compensation. After the notification issued under Section 4 of the Land Acquisition Act, 1894, some houses were constructed and were included in the list of houses likely to be submerged only for the purpose of receiving compensation. The same houses were listed as two separate houses and the compensation disbursed twice. Even persons from outside submergence areas have constructed houses in submergence villages only with the intention to get some compensation. The petitioner has alleged that all this was possible with the help of corrupt officials and middlemen. The petitioner has also alleged that in village Chotta Barda, 135 houses have

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

been included for compensation even though these houses were constructed after the issuance of notification under Section 4 of the Land Acquisition Act, 1894 and the houses were constructed only for the purposes of receiving compensation and although the residents of the village made complaints to the District Collector, Badwani, no action was taken because the corrupt officials have received their shares of compensation as well.

(C) Corruption in the process of declaration of PAPs

Under the Narmada Award, every affected person above the age of 18 years on the date of notification under Section 4 of the Land Acquisition Act, 1894, was eligible to receive the rehabilitation benefits as per entitlement. The petitioner has alleged that several ineligible persons have been declared as PAPs and given R&R entitlement and the benefits have been shared between the corrupt officials and the ineligible persons. The petitioner has alleged that this kind of corruption has taken place mainly in villages Khedi and Piplud in Tehsil and District Badwani where lakhs of rupees have been disbursed to ineligible persons and minors.

(D) Corruption at R & R sites

The petitioner has alleged that in the R&R sites, civic amenities including roads, drainage, Panchayat Bhavan, Schools, Dispensaries, Seed Stores etc. were to be constructed and crores of rupees were spent on such civic amenities but on account of an unholy nexus between the contractors and the officials, the quality of construction of the amenities has been very poor and crores of rupees have been siphoned off in the bargain. The petitioner has further alleged that house-plots once allotted to the poor in R&R sites have been re-allotted to the rich and powerful in alliance with the corrupt officials. The petitioner has stated that the Comptroller Auditor General (for short the CAG) in the audit report for the State Government for the year ending 31st March 2004 has confirmed such corruption by the NVDA in rehabilitation works in the Madhya Pradesh.

4. The respondents have filed a common return stating that the issue of fake registrations has been discussed by the R&R Sub Group of NCA in its 68th meeting held on 13.2.2007 and 69th meeting held on 16.4.2007 at New Delhi and it was decided that all the registrations so submitted by the project affected families (PAFs) in reference to SRP must be examined. The respondents have further stated in return that again in the 78th meeting of NCA held on 3.5.2007 at New

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

Delhi, the issue was discussed in detail and the Government of Madhya Pradesh has instructed the Collectors to verify the genuineness of all the registrations submitted by the PAFs and on 24.7.2007 the Chief Secretary of the Madhya Pradesh took a meeting of NVDA Officials and the Collectors and instructed them to expedite the ongoing process of verification of all the registrations and also to take strict action against the persons found guilty with a strict caution and alertness in new registrations. The respondents have stated in the return that on 11.9.2007 the Divisional Commissioner, Indore, issued detail instructions to Collectors and Superintendents of Police on the procedure to be followed for inquiry including filing of FIRs, submitting challan before the competent Courts and taking action against Government Officials/Stamp Vendors etc. Examples of action taken by the State Government so far have also been detailed in the return and it is contended in the return that all these actions taken by the State Government confirm the commitment of the State Government to tackle the issue legally and administratively with utmost seriousness and to punish all guilty persons. In the return, it is thus contended that there is therefore no need of an inquiry by an independent agency.

5. Regarding allegations of corruption, the respondents have contended that these allegations are sweeping allegations and have been made without any cogent evidence and on the basis of only newspaper reports which may not have any truth. The respondents have also contended in the return that the allegations, which are not factual and false, have also been raised in the writ petition using strong language without any factual basis whatsoever.

6 The respondents have also stated in the return that the Grievance Redressal Authority (for short the GRA) under the Chairmanship of Retired Justice Shri N.G. Karambelkar is functioning and the GRA is organizing hearing camps even at tehsil headquarters and so far 12674 complaints have been registered in the GRA and out of these, 10251 complaints have been redressed and hence it is not correct to say that the GRA is not functioning well. The respondents have further contended in the return that the Supreme Court in its order dated 9.9.2002 in WP No. 328/2002 has held that the GRA having been put in place, there is no reason for the Court to interfere and if an oustee or a person affected by the project has any grievances, it is open to him to approach the GRA. The respondents have accordingly contended that the present Writ Petition No. 14765/2007 which covers not only corruption but also the implementation of R&R stipulations under the Narmada Award, should be returned to the petitioner to agitate the matter before the GRA as per the order dated 9.9.2002 of the Apex Court in W.P. No.328/2002.

7. The respondents have stated in the return that for making an analysis of 686 complaints of fake registration, informations were sought from the PAFs. 23% PAFs replied that they have been cheated, 35% PAFs did not reply or were not available in the concerned villages, 20% PAFs said that they have done the fake

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

registration for personal reasons and 5% PAFs said that they did it to purchase residential houses and/or utilize the money for adopting new occupation/business whereas 13% PAFs stated that they were still in search of genuine land to purchase whereas 4% PAFs said that they did so because prices of land in the vicinity were high. The respondents have further stated in the return that in each and every case of fake registration, payment has been made to the PAFs through account payee cheque or Intra-Bank money and it is for this reason that the Government decided in filing FIRs against all the accused including PAFs, but thereafter the Government decided that before filing FIR against a PAF, the PAF must be given an opportunity of hearing so that he may submit his defence/claim.

8. The respondents have filed an additional return stating that considering the number of complaints which were received from the representatives of the petitioner organization and considering that 686 fake registrations have been alleged under the SRP, the State Government has by notification dated 18.7.2008 issued under Section 3 of the Commissions of Inquiry Act, 1952, appointed Shri N.C. Nagraj, a Retired District & Sessions Judge as a single man Commission of Inquiry, to make an inquiry into the allegations of preparation and submission of fake registrations in Badwani, Dhar, Khargone and Dewas districts mainly in the year 2006-07 under the SRP for PAFs/PAPs of Sardar Sarovar Project. Respondents have further stated in the additional return that the headquarters of the Commission has been fixed at Indore and the Commission has been asked to complete the enquiry and submit the report to the State Government within a period of six months from the date of publication of notification.

9. When the case was taken up for hearing on 22.7.2008, Ms. Medha Patkar appearing for the petitioner submitted that in Writ Petition (c) No.328/2002 pending before the Supreme Court, the question of fake registration of sale deeds under SRP, corruption in payment of compensation for houses acquired under the Land Acquisition Act, 1894, corruption in the process of declaration of PAPs and corruption at R&R sites have not been raised and it will be clear from the order dated 10.3.2005 of the Supreme Court in IA No. 18-35/2006 in WP No.328/2002 that the Supreme Court has taken note of the fact that the present writ petition is pending before this Court on the question of fake registration of sale of land. She submitted relying on the rejoinder filed by the petitioner that the GRA has not taken any action on the complaints made by the petitioner with regard to fake registrations and other corruption and irregularities in the implementation of R&R stipulations of the Narmada Award because the GRA was of the view that these are matters outside its authority. She submitted that in the first *Narmada Bachao case* (supra), the Supreme Court has held that persons who are displaced by the construction of the dam must be rehabilitated and resettled in a manner which will make them better off so that their fundamental right to life

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

guaranteed by Article 21 of the Constitution, is not affected and therefore, this Court should direct an independent investigation by the CBI to find out whether the benefits as per the Narmada Award have actually been received by the PAPs/PAFs. She submitted that the one man Commission of Shri N.C. Nagraj retired District & Sessions Judge, has been appointed by the Government with undue haste ignoring the provisions of Section 3 of the Commissions of Inquiry Act, 1952, under which the Commission can be appointed only by a resolution passed by the State Legislature. She submitted that the State Government has appointed Shri N.C. Nagraj, a Retired District & Sessions Judge, during the pendency of the writ petition only to derail the purpose of this PIL. She argued that since serious allegations against very powerful persons of the Government have been made in this writ petition, the Court should direct the CBI to investigate into the allegations and in case there are legal barriers in directing the CBI investigation, the Court should direct appointment of a Multi Member Judicial Commission under the Chairmanship of a Retired Supreme Court Judge or at least a High Court Judge and a special investigation team for unearthing hidden evidence and assisting the Multi Member Judicial Commission should be constituted. She further argued that the Court should specify the terms of reference elaborately for the Commission and should fix a time limit within which the Commission should submit the report. She submitted that the petitioner has filed IA No.4447/2008 for directing suspension of all cash disbursements except in accordance with the Narmada Award, Supreme Court judgments and the State Policy.

10. Mr. R.N. Singh learned Advocate General appearing on behalf of the respondents, on the other hand, submitted that in the return the respondents have stated that there are serious allegations of fake registrations of sale-deeds and a number of FIRs have been lodged and the authorities have been instructed to take strict action in the matter. He very fairly submitted that the State Government does not want to shield anybody and is determined to take action against whoever is found guilty. He further submitted that since the investigations are being carried out pursuant to the FIRs already lodged and the one man Commission of inquiry under the Commissions of Inquiry Act, 1952 has been appointed by the State Government, the Court should not direct an investigation by the CBI.

11. Mr. Dharmendra Sharma learned counsel appearing for the NCA, submitted that no relief whatsoever has been claimed against the NCA. He further submitted that the minutes of the various meetings of the NCA annexed to the writ petition would show that there are complaints of large number of fake registration of land in Kukshi and Manawar tehsils of district Dhar and Barwani and Thikri tehsils of district Barwani. He also referred to the said minutes of the meetings of NCA to show that the Government of Madhya Pradesh has been asked to inform the latest progress of an investigation done and legal action taken into the various cases of fake registration.

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

12. We are unable to accept the contention of the respondent raised in the return of the respondents that the remedy of the petitioner is to approach the GRA and not this Court under Article 226 of the Constitution because we find that despite the fact that the GRA under the Chairmanship of a retired High Court Judge has been functioning, there are more than 600 complaints of fake registrations of sale-deeds under the SRP and also allegations of other irregularities committed at the time of implementation of R & R measures stipulated in the Narmada Award and these complaints have also been brought to the notice of the NCA and the NCA has asked the Government of Madhya Pradesh to look into the complaints. Had the GRA been dealing with these complaints, it would not have been necessary for the NCA to ask the State Government to look into the complaints and take necessary action in accordance with law. Presumably, the GRA may not have entertained the complaints with regard to fake registrations and corruption and irregularities on the ground that these complaints are outside its authority and it does not have the powers to deal with such complaints.

13. We do not however think that on the materials placed before us, we can direct an investigation by the CBI as prayed for in the writ petition because as rightly apprehended by the petitioner there are legal barriers to an investigation by the CBI. A plain reading of Section 157 of the Code of Criminal Procedure, 1973 shows that if, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers to proceed, to the spot, to investigate the facts and circumstances of the case. Unless, therefore, the information received or otherwise discloses commission of offences, the CBI should not be directed to investigate. In the instant case, we find that there are references to a number of complaints of fake registration as well as to the statistics of FIRs filed in different police stations alleging fake registration and there are also references to allegations of other irregularities and corruption, but the FIRs or the complaints are not before the Court. On the basis of the information furnished in the writ petition, replies and rejoinder along with annexures thereto, it is difficult for us to hold that there is reason to suspect the commission of offences under the Indian Penal Code or any other law. It is only when more facts and more materials come to light through a fact finding inquiry that the Court can take a view whether there is reason to suspect the commission of offences under the Indian Penal Code or any other law. At this stage, therefore, we cannot direct investigation by the CBI as prayed for in the writ petition.

14. In *State of Karnataka vs. Arun Kumar Agarwal and others*, AIR 2000 SC 411 various allegations were made in the writ petition in respect of allotment

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

of power project by the Karnataka Electricity Board to Mangalore Power Corporation and a prayer was also made by the petitioners seeking investigation by appropriate agencies into the allegations and seeking initiation of criminal proceedings against the guilty persons as per law and the High Court of Karnataka directed the State of Karnataka to get an FIR registered with the CBI under the provisions of Delhi Special Police Establishment Act for various cognizable offences without naming any person or group of persons as accused and further directed that the Director General of the CBI shall direct the investigation to be conducted by an officer under the supervision and control of an officer not below the rank of Deputy Director General of the CBI. The State Government of Karnataka carried the matter to Supreme Court in a Special Leave Petition and the Supreme Court while setting aside the order made by the High Court and allowing the appeal observed:

“The acts of persons will not be subject of criminal investigation unless a crime is reported to have been committed or reasonable suspicion thereto arises. On mere conjecture or surmise as a flight of fancy that some crime might have been committed, somewhere, by somebody but the crime is not known, the persons involved in it or the place of crime unknown, cannot be termed to be reasonable basis at all for starting a criminal investigation. However, condemnable be the nature or extent of corruption in the country, not all acts could be said to fall in that category. The attempt made by the High Court in this case appears to us to be in the nature of blind shot fired in the dark without even knowing whether there is a prey at all. That may create sound and fury but not result in hunting down the prey.”

15. The respondents have however stated in their additional return that the General Administration Department has already issued a notification dated 18.7.2008 appointing Shri N.C. Nagraj, a Retired District & Sessions Judge, as a single man Commission of Inquiry to inquire into the allegation of preparation and submission of fake registration in Badwani, Dhar, Dewas and Khargone districts in the year 2006-07 under the SRP for PAFs/PAPs of Sardar Sarovar Project in exercise of powers under Section 3 of the Commissions of Inquiry Act, 1952. The contention of Ms. Patkar that an appointment of the Commission under Section 3 of the Commissions of Inquiry Act, 1952, can only be pursuant to the resolution of the Legislature of the State, is not correct. Section 3 of the Commissions of Inquiry Act, 1952 (for short the 1952 Act), is quoted hereinbelow:

“S.3. Appointment of Commission.—(1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by each House of Parliament or as the case may be, the Legislature of the State by

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making any inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry perform the functions accordingly :

Provided that where any such Commission been appointed to inquire into any matter –

(a) by the Central Government, no State Government shall, except with the approval of the Central Government, appoint another Commission to inquire into the same matter for so law as the Commission appointed by the Central Government is functioning;

(b) by a State Government, the Central Government shall not appoint the Commission appointed, by the State Government is functioning, unless the Central Government is of opinion that the scope of the inquiry should be extended to two or more States.

(2) The Commission may consist of one or more members appointed by the appropriate Government, and where the Commission consists of more than one member, one of them may be appointed as the Chairman thereof.

(3) The appropriate Government may, at any stage of an inquiry by the Commission fill any vacancy which may have arisen in the office of a member of the Commission (whether consisting of one or more than one member).

(4) The appropriate Government shall cause to be laid before each House of Parliament or, as the case may be, the Legislature of the State; the report, if any, of the Commission on the inquiry made by the Commission under sub-section (1) together with a memorandum of the action taken thereon, within a period of six months of the submission of the report by the Commission to the appropriate Government."

It will be clear from sub-section (1) of Section 3 of the 1952 Act that the Government may, if it is of opinion that it is necessary so to do, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and the Government shall, if a resolution in this behalf is passed by each house of the Legislature of the State, also appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance. Hence, even where a resolution is not passed by each house of the State Legislature for appointment of a Commission, the Government may

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

appointment a Commission if it is of opinion that it is necessary to do so for the purpose of making an inquiry into any definite matter of public importance, but where a resolution is passed in that behalf in each house of the State Legislature, the Government shall appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance.

16. Sub-section (4) of Section 3 of the 1952 Act, however, would show that after the inquiry is made, the Government shall cause to be laid before each House of Legislature of the State, the report, if any, of the Commission of Inquiry altogether with a memorandum of the action taken thereon within a period of six months of the submission of report by the Commission to the Government. Thus, the report, if any, submitted by the one man Commission of Inquiry Shri N.C. Nagraj, a Retired District & Sessions Judge, will have to be placed before the Legislature of the State along with memorandum of action taken on the report. The facts found by the Commission appointed under Section 3 of the 1952 Act in other words, are for information of and action by the State Government and for information of the houses of the State Legislature. Hence, the High Court will have virtually no role to play on the report of the one-man Commission appointed by the State Government under Section 3 of the 1952 Act by the notification dated 18.7.2008 if and when submitted.

17. By the two judgments of the Supreme Court in the first and second *Narmada Bachao* cases (supra), the Supreme Court has held that rehabilitation and resettlement of oustees of the Sardar Sarovar Project is part of their fundamental right to life guaranteed under Article 21 of the Constitution of India, and through the R&R measures, the oustees must be better off after displacement. For this reason, the R&R measures in the Narmada Award inter alia stipulate that (i) every affected family whose 25% or more land is submerged by the Project would be offered a minimum of two hectares of cultivable land; and (ii) the Government shall establish rehabilitation villages for R&R of the PAPs with civic amenities including roads, drainage, Panchayat Bhawan, Schools, Dispensaries, Seed Stores etc., besides the land for cultivation by the PAPs. If a large number of PAPs whose 25% or more land was submerged has not actually been able to get a minimum of two hectares of cultivable land and the civic amenities in the R&R sites are of substandard quality because of large scale corruption, then the High Court whose duty is to ensure enforcement of fundamental right in exercise of powers under Article 226 of the Constitution cannot remain indifferent. The High Court will have to find out through a Commission on which it has confidence and trust that the oustees have not been duped by fake registrations of sale-deeds for purchase of land for cultivation and the public money spent for construction of civic amenities in the R&R sites have not been misused for extraneous purposes.

18. In *Bandhua Mukti Morcha vs. Union of India and others*, 1984 (3) SCC 161, an organisation motivated to release bonded labourers in the country

NARMADA BACHAO ANDOLAN V. STATE OF M.P.

addressed a letter to a Judge of the Supreme Court complaining that in two named stone quarries in Faridabad District there were a large number of labourers from different States working under inhuman conditions and many of whom were bonded labourers and prayed for issuing a writ for proper implementation of constitutional and statutory provisions. The Supreme Court treated the letter as a writ petition under Article 32 of the Constitution and issued notice and appointed two advocates as Commissioners to visit the stone quarries and to interview each of the persons whose names were mentioned in the letter of the petitioner as also a cross section of the other workers with a view to finding out whether they were willing to work in those stone quarries and also to inquire about the conditions in which they were working. One of the preliminary objections raised by the respondents Union of India was that in the proceedings under Article 32, the Court was not empowered to appoint any commission or an investigating body to inquire into the allegations made and make a report to the Court on the basis of inquiry to enable the Court to exercise its power and jurisdiction under Article 32 of the Constitution. Rejecting the preliminary objections, P.N. Bhagwati, J, as he then was, observed:

"Now it is obvious that the poor and the disadvantaged cannot possible produce relevant material before the Court in support of their case and equally where an action is brought on their behalf by a citizen acting pro bono publico, it would be almost impossible for him to gather the relevant material and place it before the Court. What is the Supreme Court to do in such a case? Would the Supreme Court not be failing in discharge of its constitutional duty of enforcing, fundamental right if it refuses to intervene because the petitioner belonging to the underprivileged segment of society or a public spirited citizen espousing his cause is unable to produce the relevant material before the Court. If the Supreme Court were to adopt a passive approach and decline to intervene in such a case because relevant material has not been produced before it by the party seeking intervention, the fundamental rights would remain merely a teasing illusion so far as the poor and disadvantaged sections of the community are concerned. It is for this reason that the Supreme Court has evolved the practice of appointing commissions for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of the society."

These observations of P.N. Bhagwati, J of the Supreme Court equally apply to the exercise of jurisdiction of the High Court under Article 226 of the Constitution for enforcement of fundamental rights.

19. We therefore appoint Shri Justice S.S. Jha, a retired Judge of this Court,

NARMADA BACHAO ANDOLAN Vs. STATE OF M.P.

as a Commission to inquire into and submit a report on the following matters:

(i) Whether there have been fake registrations of sale-deeds under the SRP for rehabilitation and resettlement of PAFs/PAPs of the Sardar Sarovar Project in the districts of Badwani, Dhar, Jhabua, Khargone and Dewas and, if so, the details of such fake registrations of sale-deeds and the persons responsible for such fake registrations of sale deeds ?

(ii) Whether the civic amenities in the R&R sites such as road, drainage, panchayat bhawan, schools, dispensaries, seeds stores, etc. are of substandard quality as compared to the expenditure incurred by the State Government or the NVDA and, if so, the persons responsible for such constructions of substandard quality.

Though the petitioner has alleged that persons who are not entitled to receive compensation for houses under the R&R stipulations of the Narmada Award and the Policy of the State Government have received compensation and persons who are not eligible as PAP's of the Sardar Sarovar Project have received benefits under the R&R stipulations of the Narmada Award and the Policy of the State Government, we do not think that the Commission should inquire into these matters because the disputes in such matters are likely to be very complex and the findings of the Commission on such disputes may affect a large number of persons who have received the compensation and other R&R benefits and who may not be now available to be heard by the Commission. It may not also be practically feasible for the Commission to inquire into these matters as compensation must have been paid for houses and other R&R benefits must have been given in as many as 193 villages of Madhya Pradesh affected by the Sardar Sarovar Project. Moreover, in such matters, there is no violation of the fundamental rights of persons as such which need to be enforced by the High Court.

20. In the course of hearing, Ms. Medha Patkar submitted that considering the large number of complaints of fake registrations of sale-deeds, the Court should direct suspension of cash disbursements under the SRP so that there are no more fake registrations of sale-deeds, but we are not inclined to direct such suspension of cash disbursements under the SRP as it will affect the R&R process and delay the rehabilitation and resettlement of the PAFs/PAPs. We however direct that all fresh registrations of sale-deeds will only be made after clearance from the Commission to be appointed pursuant to this order.

21. The Commission will by public notice fix the time and place of its sittings. The Commission will afford opportunity of hearing to all persons against whom the Commission is likely to record a finding including an opportunity to produce any evidence in his defence. The Commission may allow witnesses to be examined

NARMADA BACHAO ANDOLAN V. STATE OF M.P.

before it and will afford an opportunity for cross-examination of such witnesses to persons against whom the witnesses make statement. The Commission may regulate the procedure of inquiry on all other matters consistent with the principles of natural justice.

22. It is the responsibility of the respondent No. 1 to ensure implementation of the R&R measures for the oustees of the Sardar Sarovar Project in Madhya Pradesh and therefore the respondent No. 1 will bear the costs and expenses of the inquiry by the Commission. Hence, the respondent No. 1 will issue an order appointing Shri Justice S.S. Jha as Commission initially for a period of six months on the pay and allowances as are admissible to a High Court Judge less pension received by Shri Justice Jha. The respondent No. 1 will provide a full time Secretary and two full time English Stenographers to the Commission. The respondent No. 1 will also provide to the Commission the assistance of such Police Officers, Revenue Officers and P.W.D. Engineers as the Commission may approve for the inquiry. The respondent No. 1 will ofcourse provide office space, infrastructure and transport for the work of the Commission. The respondents No. 1, 2,4,5,6 and 7 will produce all the records before the Commission and will cooperate with the Commission in all respects. The Commission will try and complete the inquiry within six months from the date of issue of the order by the respondent No. 1 appointing the Commission and submit a report to this Court. The Registry will forthwith send copies of this order, the writ petition, replies filed by the respondents, rejoinder filed by the petitioner and all other applications and affidavits filed by the parties and all the annexures to the pleadings to Shri Justice S.S. Jha within a week from today.

23. Since we have appointed Shri Justice S.S. Jha as Commission to inquire into the matter, the State Government may, if it is of the opinion that the one man Commission of Inquiry of Shri N.C. Nagraj, retired District & Sessions Judge constituted by the State Government by notification dated 18.7.2008 is now unnecessary, issue a notification under Section- 7(1) of the 1952 Act specifying that the one man Commission of Shri N.C. Nagraj has ceased to exist.

List the matter after the report of the Commission is received or after six months whichever is earlier.

Order accordingly.

I.L.R. [2009] M. P., 127

WRIT PETITION

Before Mr. Justice Abhay M. Naik

22 August, 2008*

ANAND KUMAR CHOUKSEY

... Petitioner

Vs.

M.P. BOARD OF MIDDLE EDUCATION & ors.

... Respondents

M.P. Board of Secondary Education Directions for Academic Session 2006-07, Clause 2 - Admission - Regular student - In earlier petition, High Court had merely directed to admit the petitioner in the school as a special case - Board accepted examination form of the petitioner and allowed to appear in the examination as a regular student, but withheld the result/mark-list - Held - The school as well as the Board having treated the petitioner at their own as a regular student cannot be permitted to deny the status of regular student - More so, for the reason that petitioner did not earn any disqualification even under clause 2 of directions issued by the Board for academic session 2006-07 - Petitioner is entitled to the status of regular student and his result is liable to be declared with the status of regular student - Petition allowed. (Paras 14 & 15)

म.प्र. माध्यमिक शिक्षा मण्डल के शैक्षणिक सत्र 2006-07 के लिए निदेश, खण्ड 2 - प्रवेश - नियमित छात्र - पूर्ववर्ती याचिका में उच्च न्यायालय ने विशेष मामले के रूप में याची को केवल विद्यालय में प्रवेश देने का निदेश दिया था - मण्डल ने याची का परीक्षा आवेदन स्वीकार किया और नियमित छात्र के रूप में परीक्षा में बैठने की अनुमति दी, किन्तु परीक्षा परिणाम/अंकसूची रोक ली - अभिनिर्धारित - विद्यालय और मण्डल को, याची को नियमित छात्र के रूप में मानने से, नियमित छात्र की प्रस्थिति से इंकार करने की अनुमति नहीं दी जा सकती - इसके अतिरिक्त इस कारण से भी कि याची ने मण्डल द्वारा शैक्षणिक सत्र 2006-07 के लिए जारी निदेशों के खण्ड 2 के अन्तर्गत भी कोई अयोग्यता प्राप्त नहीं की - याची नियमित छात्र की प्रस्थिति का हकदार है और उसका परीक्षा परिणाम नियमित छात्र की प्रस्थिति के साथ घोषित किये जाने योग्य है - याचिका मंजूर।

S.B. Agnihotri, for the petitioner.

Harmeet Singh, for the respondent No.1.

Vinod Mehta, G.A., for the respondent No.2 & 3.

O R D E R

ABHAY M. NAIK, J. :-Petition involves the power of Board of Secondary Education under which it withheld the result/mark list of a student appearing in the High School Examination conducted by the Board.

2. Petitioner was a student of Class 9 of Govt. Middle and Higher Secondary School Dhanpuri Tahsil and District Jabalpur (respondent no. 2) in the academic session 2003-04. After passing the examination of 9th standard, he was admitted in class 10th standard of the same school in the academic session 2004-05. He

ANAND KUMAR CHOUKSEY Vs. M.P. BOARD OF MIDDLE EDUCATION

appeared in the High School Examination held in the year 2005 as a regular student. Case of mass copying was reported and consequently, the entire examination of the centre was cancelled. In the next academic year 2005-06, the petitioner developed double vision problem in his eyes with the result that he could not prosecute his studies and failed to get admission in Class 10th in the said academic session. Consequently, he did not appear in the High School Examination of year 2005-06.

3. Thereafter, the petitioner submitted application for his admission in class 10th standard in the same school as a regular student but the same was denied by respondent no. 2, although the petitioner had produced the relevant medical papers. This denial forced him to approach this court under Article 226 of the Constitution of India for seeking issuance of appropriate writ, order or direction commanding the respondents to admit him in class 10th standard as a regular student in the academic year 2006-07 in respondent no.2-School.

4. Board of Secondary Education M.P. Bhopal submitted its return contending thereby that the petitioner appeared in the High School Examination conducted by the Board in the academic session 2004-05 but his result was cancelled because the entire centre was found to be involved in mass copying. It is, thus submitted that the petitioner failed in the examination of High School in the academic session 2004-05 because examination of the entire centre was cancelled due to mass copying. Failure students are not admitted as regular students, if there is gap of a year. Petitioner did not appear in the academic session 2005-06 and admission to him in the year 2006-07 as a regular student is not permissible under the rules and regulation. Accordingly, a prayer for dismissal of writ petition has been made.

5. Respondents no. 2 and 3 submitted their short return that the petitioner is not eligible for being admitted as a regular student in the academic session 2006-07 and the same has been rightly denied.

6. It is pertinent to mention here that this court on 20th of September, 2006 passed an interim order that respondent no. 2 shall give admission to the petitioner as a special case, which shall be subject to the further/final order in this petition.

7. Pursuant to the aforesaid order, respondent no. 2 admitted the petitioner and Board of Secondary Education permitted him to appear in the High School Examination of the academic session 2006-07. It is not out of place to mention here that although there was no direction by this court to admit the petitioner in the school as a regular student, the school i.e respondent no. 2 admitted him as a regular student and recovered the fees from him of a regular student for the entire academic session 2006-07. Further, the Board of Secondary Education despite there being no direction of the court, accepted at its own the examination form of the petitioner as a regular student and further allowed him to appear in the examination as a regular student after realizing the examination fee from him of a regular student.

ANAND KUMAR CHOUKSEY Vs. M.P. BOARD OF MIDDLE EDUCATION

8. Result of High School Examination was declared in routine manner, however, the petitioner's result was not declared by respondent no. 1. He made an application for issuance of duplicate mark sheet which was issued vide Annexure P/9. However, his result was not officially declared and original mark list was not issued. His result and original mark sheet were withheld, therefore, the petitioner submitted I.A. No. 6987/07 for seeking direction to declare the result of the petitioner and issue the original mark sheet. Thereafter, the Board of Secondary Education submitted additional return stating thereby that the petitioner was permitted to appear on the strength of interim order and High School Examination has been passed by him. Copy of mark sheet is annexed to the additional return as Annexure R/1. It has been contended that on account of pendency of the writ petition, result and mark sheet were withheld.

9. Respondents have justified the action on their part in not admitting the petitioner as a regular student in class-10th in the academic session 2006-07 on the strength of clause-2 of directions issued by the Board of Secondary Education for academic session 2006-07 which is reproduced below for convenience:-

अनुत्तीर्ण	“(2) इस मण्डल की वर्ष 2006 में हाईस्कूल
विद्यार्थियों	एवम् हायर सेकेंडरी परीक्षा में नियमित
को नियमित	रूप से प्रविष्ट होकर प्रथम बार अनुत्तीर्ण
प्रवेश	विद्यार्थी उसी कक्षा में सत्र 2006-2007 में
	नियमित रूप से प्रवेश के पात्र होंगे । वर्ष
	2006 से पूर्व वर्ष के अनुत्तीर्ण छात्रों को
	नियमित प्रवेश कदापि नहीं दिया जाएँ ।”

10. Perusal of the aforesaid clause makes it clear that a student who failed in the High School or Higher Secondary Examination conducted in the year 2006 would be eligible for seeking admission as a regular student in the same class in the academic session 2006-07. A student who failed in the previous year (in the examination of the year prior to the year 2006) was not to be admitted as a regular student in the year 2006-07.

11. It is to be examined in the light of the aforesaid clause that whether the petitioner could be treated as a student having failed in the High School (10th standard) examination of the year 2006 or before, so as to make himself ineligible for admission as a regular student in the year 2006.

12. It is an admitted position that the petitioner was not declared as having failed in the examination of the year 2005. It is true that he was admitted as a regular student of 10th standard in the academic session 2004-05 and he did appear in the High school examination held in the 2005. It is expressly admitted in the return submitted by the Board that the examination of the entire centre wherefrom the petitioner appeared in the examination of High School was cancelled because

ANAND KUMAR CHOUKSEY Vs M.P. BOARD OF MIDDLE EDUCATION

of allegation of mass copying. Learned counsel for the Board was unable to point out any provision in the rules and regulations where under a student appearing from such centre would be treated as having failed in the examination. The specific stand of the Board is that the examination of the entire centre was cancelled. Thus, the result of the examination centre wherefrom the petitioner appeared in the High School Examination was not declared at all on account of cancellation of the examination of the entire centre. This being so, the petitioner cannot be treated as having failed in the examination of the year 2005. Thereafter, the petitioner on account of problem of double vision in his eyes could not seek admission in the next academic session 2005-06 and failed to prosecute his studies. He did not appear in the examination of High School of the year 2005-06 and was not a failure student of the said academic session.

13. Contention of the learned counsel for the Board is that the last line of clause would be construed so as to mean that the students who passed in the High School Examination before 2006 would alone be admitted as regular students in the year 2006-07. This contention is highly misconceived as the same would make violence to the language of clause 2. The first sentence of clause 2 made a student eligible for seeking admission as a regular student in the High School Examination of the year 2006-07 if he failed in High School Examination conducted in the year 2006. Latter portion of clause 2 debars a failure student from seeking admission as regular student if he has failed in the examination prior to the year 2006. By no stretch of imagination the latter portion debars a student from seeking regular admission, if he has not failed at all in the High School Examination. Petitioner was not declared as having failed in the examination of the year 2005 and could not be treated as failure student of the year prior to the year 2006. It is observed that if the result of the examination conducted at a particular centre is not declared at all, the students appearing from that centre cannot be treated as having failed in the examination in the absence of any specific provision in the rules and regulations of the Board of Secondary Education. In the present case, learned counsel for the Board has been unable to point out any provision in the rules and regulations of the Board whereby such students may be treated as having failed in the examination. This being so, the contention of the Board about ineligibility of the petitioner for being admitted as a regular student is not acceptable.

14. Apart from the aforesaid, it may be seen that this court had merely directed to admit the petitioner in the school of respondent no. 2 as a special case. He was never directed to be admitted as regular student by this court. Respondent/School at its own admitted the petitioner as a regular student in 10th standard and recovered the fees for the entire academic session as a regular student. The Board of the Secondary Education accepted examination form of the petitioner as a regular student and recovered the fees payable by regular student from the petitioner. He was further allowed to appear in the High School Examination as a regular student. Thus, the school as well as the Board having treated the petitioner at their own as

PAWAS SHRIVASTAVA Vs. STATE OF M.P.

a regular student cannot be permitted to deny the status of regular student to the petitioner, moreso, for the reason that petitioner did not earn any disqualification even under clause 2 (supra) for being admitted as a regular student.

15. In view of the aforesaid discussion, this court has no hesitation in holding that the petitioner is entitled to the status of regular student in 10th standard during the academic session 2006-07 and his result of High School Examination is liable to be declared with the status of regular student.

16. Resultantly, the writ petition deserves to be allowed and is hereby allowed. Respondents are directed to treat the petitioner as a regular student for the academic session 2006-07. Respondent no. 1 (Board of Secondary Education) is further directed to declare officially the result of petitioner and to issue original mark sheet within a period of one week from today in the aforesaid manner.

Parties to bear their own cost.

Petition allowed.

I.L.R. [2009] M. P., 131

WRIT PETITION

Before Mr. Justice R.S. Jha

26 August, 2008*

PAWAS SHRIVASTAVA

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Service Law, Fundamental Rules, Rules 24 & 26 - Compassionate appointment - Grant of annual increments - Entitlement - Petitioner appointed on compassionate ground and was not granted annual increments on account of not passing the Hindi typing examination - Held - FR 24 provides that increment would be granted as a matter of course unless they are withheld - It deals with case of a regular employee who has been appointed after following the due procedure prescribed by law - FR 24 & 26 would not be attracted to the petitioner's case as he was not a regular member of the service and as his increments were deemed to be withheld in view of the policy and the specific condition in his appointment order which clearly makes a stipulation to that effect. (Para 12)

क. सेवा विधि, मूलभूत नियम, नियम 24 व 26 - अनुकंपा नियुक्ति - वार्षिक वेतन वृद्धियाँ प्रदान करना - हकदारी - याची को अनुकंपा के आधार पर नियुक्त किया गया और हिन्दी मुद्रलेखन परीक्षा उत्तीर्ण न करने के कारण वार्षिक वेतन वृद्धियाँ प्रदान नहीं की गई - अभिनिर्धारित - मूलभूत नियम 24 उपबंधित करता है कि वेतन वृद्धियाँ स्वभावतया प्रदान की जाएंगी जब तक कि उन्हें रोका नहीं जाता - यह कार्यवाही नियमित कर्मचारी के मामले में है जो विधि द्वारा विहित सम्यक् प्रक्रिया का पालन करने के बाद नियुक्त किये गये हैं - मूलभूत नियम

PAWAS SHRIVASTAVA Vs. STATE OF M.P.

24 व 26 याची के मामले में आकृष्ट नहीं होंगे क्योंकि वह सेवा का नियमित सदस्य नहीं था और पॉलिसी और उसके नियुक्ति आदेश में विनिर्दिष्ट शर्त जो स्पष्ट रूप से ऐसा प्रभाव अनुबंधित करती है, को दृष्टिगत रखते हुए उसकी वेतन वृद्धियाँ रोकी गई ऐसा माना जाएगा।

B. Service Law - Compassionate appointment - Grant of annual increments - Entitlement - The petitioner having obtained advantage of the special benefit under the compassionate appointment scheme and having accepted appointment subject to the condition of passing the typing examination - Held - The petitioner cannot be permitted to turn around and assail the clauses of the scheme for compassionate appointment or the condition in his appointment order as he is prohibited from doing so on the principle of acquiescence and estoppel. (Para 14)

ख. सेवा विधि - अनुकंपा नियुक्ति - वार्षिक वेतन वृद्धियाँ प्रदान करना - हकदारी - याची ने अनुकंपा नियुक्ति स्कीम के अन्तर्गत विशेष लाभ का फायदा प्राप्त करने के बाद मुद्रलेखन परीक्षा उत्तीर्ण करने की शर्त के अध्यधीन नियुक्ति स्वीकार की - अभिनिर्धारित - याची को अनुकंपा नियुक्ति की स्कीम के खण्डों या उसके नियुक्ति आदेश की शर्त से मुकरने या उन्हें चुनौती देने की अनुमति नहीं दी जा सकती क्योंकि उपमति और विबंध के सिद्धांत पर वह ऐसा करने से प्रतिषिद्ध है।

Sudha Pandit, for the petitioner.

Om Namdeo, G.A., for the respondents.

ORDER

R.S. JHA, J. :-The petitioner has filed this petition being aggrieved by the non-grant of annual increments to him on account of not passing the Hindi typing examination.

2. The case put forth by the petitioner, in brief, is that the petitioner was initially appointed on compassionate grounds in accordance with the policy dated 10-6-1994 on the post of Lower Division Clerk by order dated 1-9-1994. It is submitted that thereafter the petitioner successfully completed training but was not granted increments and was continued on the basic pay scale admissible to a Lower Division Clerk. The petitioner filed a representation claiming increments which was rejected by order dated 23-7-1999 on the ground that the petitioner being a compassionate appointee was required to pass the Hindi Typing Examination within one and a half years of his appointment or to claim exemption therefrom on attaining 40 years of age and as the petitioner did not fulfill either of the requirements, he was not entitled to annual increments. Being aggrieved by the aforesaid, the petitioner filed an original application before the M.P. State Administrative Tribunal in 2000 which has been transferred to this Court and is now being decided by this order.

3. It is submitted by the learned counsel for the petitioner that the petitioner having been appointed as a Lower Division Clerk and having rendered satisfactory

PAWAS SHRIVASTAVA Vs. STATE OF M.P.

service on that post till date, is entitled to regular increments as granted to all other Lower Division Clerks, in view of the provisions of the M.P. Fundamental Rules and denial of the same amounts to discrimination and violates the petitioner's fundamental rights under Article 14 and 16 of the Constitution of India.

4. The learned Government Advocate appearing for the respondents, per contra, submits that the petitioner was appointed in view of the policy for compassionate appointment of the State issued on 10-6-1994 on account of the fact that the petitioner's father, while working as an Accountant at Primary Health Centre, Lalbarra, died while in service on 28-6-1993. It is submitted that condition No.1 of the order of appointment of the petitioner dated 1-9-1994 clearly stipulates that the petitioner was compulsorily required to clear the Hindi Typing Examination within one and half years but as the petitioner failed to clear the Hindi Typing Examination within one and half years, he was not given annual increments and the representation filed by him claiming the same was rejected by order dated 23-7-1999. It is submitted that in the facts and circumstances of the case, the impugned action does not suffer with any infirmity and the petition deserves to be dismissed.

5. I have heard the learned counsel for the parties at length. Admittedly, the petitioner's father died in 1993 and he was given compassionate appointment by order dated 1-9-1994 as a Lower Division Clerk. A perusal of Condition No.1 of the appointment order clearly indicates that there is a specific stipulation therein to the effect that the petitioner was compulsorily required to pass the Hindi Typing Examination within one and half years of the appointment. Admittedly, the petitioner did not clear the Hindi Typing Examination within the stipulated period.

6. At this stage, it is pertinent to take into consideration the mandatory statutory qualifications prescribed by the recruitment rules as well as the policy relating to the compassionate appointment. The appointment on the post of Lower Division Clerk in the Health Department is governed by the provisions of the M.P. Public Health and Family Welfare (Directorate of Health Services) Class-III Ministerial Service Recruitment Rules, 1989. Schedule III (a), framed under rule 8 and appended to the Rules, prescribes the minimum qualifications necessary for appointment of various posts in the Health services. Item No.2 lays down the qualifications necessary for appointment on the post of L.D.C. The minimum qualification prescribed under the aforesaid Schedule is Higher Secondary Examination or High School Pass under 10 +2 Education System and passing of the Hindi Typing Examination from the M.P. Board of Shorthand and Typing. The relevant part of the Schedule reads as under:-

"SCHEDULE III (a)

(See rule 8)

Age and qualifications of the Persons to be recruited directly
Ministerial Directors of Health Services, M.P.

PAWAS SHRIVASTAVA Vs. STATE OF M.P.

S. No.	Name of Service	Mini- age limit	Maxi- age limit	Prescribed Edu- cational quali- fications and experience	Remark
(1)	(2)	(3)	(4)	(5)	(6)

Category-I**Selection Committee**

1.
2. L.D.C./Assistant 1 30 Higher Secondary Examination or High School Passed under 10+2 Education System. Establishment - Member.
2. Passed Hindi typing Examination from M.P. Board of the Shorthand and typing."

7. In view of the aforesaid provision of the rule, it is clear that a person has to possess the qualification of passing the Hindi typing Examination from the M.P. Board of the Shorthand and Typing for being eligible for appointment on the post of Lower Division Clerk. Admittedly the petitioner did not possess the said qualification at the time of appointment on 1-9-1994.

8. The policy relating to compassionate appointment dated 10-6-1994, under which the petitioner's case was considered and he was granted compassionate appointment, has been filed along with the return as Annexure R-1. Para 20 of the aforesaid policy stipulates that except for the widow of a deceased Government employee, all others who are appointed on compassionate ground as Lower Division Clerk and who do not possess the requisite qualification can be given regular appointment only from the date of their passing the Hindi Typing Examination or on their attaining the age of 40 years. It is also apparent that it was in view of the provisions of recruitment rules and paragraph 20 of the Policy relating to compassionate appointment dated 10-6-1994 that condition No.1 was included in the order of appointment of the petitioner.

9. It is settled law that compassionate appointment is not a right but is granted to a surviving member of the family of a Government employee who dies while in service in specific circumstances as a special case. In view of the aforesaid circumstances, when the aforementioned recruitment rules, the policy relating to compassionate appointment and the condition in the petitioner's appointment order are read in justa position, it becomes abundantly clear that though the petitioner

PAWAS SHRIVASTAVA V. STATE OF M. P.

did not possess the mandatory qualification as prescribed by the recruitment rules, he was given compassionate appointment as a special case under the policy relating to compassionate appointment subject to a specific condition that the petitioner would have to pass the Hindi Typing Examination within one and half years from the date of appointment only then he would be granted regular appointment. It is an undenied fact that the petitioner did not clear the Hindi Typing Examination within the aforesaid period.

10. In view of the above, it is clear that the petitioner could have been given regular appointment only on his passing of the Hindi Typing Examination or on his failure to do so, on his attaining 40 years of age as specified in the policy relating to compassionate appointment as well as the order of appointment dated 1-9-1994. From the above, it follows as a natural corollary that until and unless he becomes a regular employee of the department, he is not entitled to claim increment as a regular employee.

11. It is submitted by the learned counsel for the petitioner that inspite of the provisions of the recruitment rules and the policy relating to compassionate appointment, the petitioner is entitled to grant of annual increments under the provisions of Fundamental Rules 24 & 26 which prescribe that every employee would be entitled to annual increments as a matter of course unless it is withheld and that an increment may be withheld only in case the employee's conduct has not been good or his work has not been satisfactory. It is submitted that in the instant case the petitioner's work was good and was to the satisfaction of his superior authorities and, therefore, in accordance with the provisions of FR 24 & 26, the petitioner was entitled to annual increment from the date of his appointment.

12. I am of the considered opinion that the aforesaid submission made by the learned counsel for the petitioner cannot be accepted in view of the fact that FR24 itself provides that increments would be granted as a matter of course unless they are withheld. The argument fails to take into consideration that FR 24 deals with the case of a regular employee who has been appointed after following the due procedure prescribed by law and who possesses the required statutory qualification prescribed by the rules. In the instant case, the petitioner was not appointed after following the procedure prescribed by the rules and admittedly he did not possess the requisite qualifications prescribed therein for the post of Lower Division Clerk but was given appointment on compassionate ground under the policy of the State dated 10-6-1994 which clearly stipulates that a person appointed in such circumstances would become a regular member of the service only on his passing of the Hindi Typing Examination or on attaining the age of 40 years and on being given regular appointment thereafter. In the aforesaid circumstances, FR 24 & 26 would not be attracted to the petitioner's case as he was not a regular member of the service and as his increments were deemed to be withheld in view of the policy and the specific condition in his appointment order which clearly makes a stipulation to that effect.

GOMTI BAITAMRAKAR(SMT.) V& STATE OF M.P.

13. From the analysis of the aforesaid facts and the provisions of law I have no hesitation in arriving at the conclusion that the petitioner, who does not possess the statutory eligibility qualification, but was appointed under the scheme of compassionate appointment subject to the condition that he passes the typing examination within a stipulated period, cannot be granted the relief as claimed by him as he has not fulfilled the condition subject to which he was appointed under the scheme of compassionate appointment.

14. There is yet another reason for denying the relief sought by the petitioner and that is that the petitioner sought for and obtained appointment under the scheme of compassionate appointment without going through the procedure prescribed by the statutory rules and in spite of his not possessing the requisite eligibility qualifications and, therefore, once having obtained advantage of the special benefit under the compassionate appointment scheme and having accepted appointment subject to the condition of passing the typing examination which was specifically stated in the order of appointment, the petitioner cannot be permitted to turn around and assail the clauses of the scheme for compassionate appointment or the condition in his appointment order as he is prohibited from doing so on the principles of acquiescence and estoppel. The petitioner having obtained advantage and benefit of the compassionate appointment scheme is required to fulfill all the conditions prescribed therein and in the order of his appointment.

15. In view of the aforesaid legal position, I am of the considered opinion that no fault can be found with the impugned order dated 23-7-1999 rejecting the petitioner's representation for grant of regular annual increments on the ground that he has not fulfilled the condition prescribed in the order of appointment and has neither passed the Hindi Typing Examination nor attained 40 years of age.

16. The petition filed by the petitioner being meritless is accordingly dismissed. In the peculiar facts and circumstances of the case, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 136

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

28 August, 2008*

GOMTI BAI TAMRAKAR (SMT.) & ors.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

A. Land Acquisition Act (1 of 1894), Sections 4(1) & 6 - Acquisition of Land - Notification challenged on the ground of it being vague and not

GOMTI BAITAMRAKAR (SMT.) Vs. STATE OF M.P.

specific in respect of the public purpose - Held - Land acquired for Khirhani Railway Over-bridge - Such a purpose is covered within the meaning of expression "public purpose" contained in Section 3(f) of the Act - Thus, public purpose has been disclosed in Section 4(1) notification with sufficient clarity - Petition is without any substance. (Para 14)

क. भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1) व 6 - भूमि का अर्जन - अधिसूचना को अस्पष्ट और लोक प्रयोजन की दृष्टि से विनिर्दिष्ट न होने के आधार पर चुनौती - अभिनिर्धारित - भूमि खिरहानी रेलवे ओवर ब्रिज के लिए अर्जित की गई - ऐसा प्रयोजन अधिनियम की धारा 3(एफ) में अन्तर्विष्ट शब्द "लोक प्रयोजन" के अर्थ के अन्तर्गत आच्छादित होता है - इस प्रकार अधिसूचना की धारा 4(1) में लोक प्रयोजन स्पष्टता के साथ प्रकट किया गया है - याचिका सारहीन है।

B. Land Acquisition Act (1 of 1894), Sections 4(1) & 6 - Delay in Challenge - Held - The land is being acquired for constructing a railway over-bridge which itself is a public purpose - Petitioners were aware of the acquisition proceedings and before filing of the writ petition substantially progress had taken place in the acquisition proceedings - Petitioners were not prompt in approaching the court - No other person has approached this court challenging the acquisition proceedings except for the petitioners - No interference can be made. (Para 17)

ख. भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1) व 6 - चुनौती देने में विलम्ब - अभिनिर्धारित - भूमि रेलवे ओवर ब्रिज का निर्माण करने के लिए अर्जित की जा रही है, जो स्वमेव एक लोक प्रयोजन है - याची को अर्जन कार्यवाहियों का ज्ञान था और रिट याचिका पेश करने के पूर्व अर्जन कार्यवाहियों में सारवान प्रगति हो चुकी थी - याची न्यायालय में पहुँचने में तत्पर नहीं थे - याचियों के अतिरिक्त कोई अन्य व्यक्ति अर्जन कार्यवाहियों को चुनौती देते हुए इस न्यायालय में नहीं पहुँचा है - कोई हस्तक्षेप नहीं किया जा सकता।

Cases referred :

Order dated 08.08.2007 passed by High Court of M.P. in W.A. No.1145/2007, (1970) 1 SCC 125, (1992) 2 SCC 168, 2002 MPLJ 378.

H.K. Upadhyay, for the petitioners.

P.N. Dubey, for the respondent No.1 & 2.

Mohd. Nasir, for the respondent No.3.

ORDER

PRAKASH SHRIVASTAVA, J.:-This writ petition has been filed challenging the notification dated 28th March, 2008 issued under section 4 (Annexure-P/1) and the notification dated 15th May, 2008 (Annexure-P/2) issued under section 6 of the Land Acquisition Act.

2. The case of the petitioners is that the petitioner No.1 is owner of the house situated on Hiraganj Tiraha and the petitioner No.2 is the owner of the house situated on Garg Chowk, Malviya Ganj, Katni. The notification dated 28th March, 2008 issued under section 4(1) of the Land Acquisition Act was published in the

GOMTIBAITAMRAKAR (SMT.) Vs. STATE OF M. P.

M.P. State Gazette dated 25.4.2008. Thereafter the declaration under section 6 was published on 15.5.2008. In the present petition, the notifications under section 4(1) of the Act as well as declaration under section 6 are under challenge.

3. Learned counsel appearing for the petitioners submitted that the notification under section 4(1) of the Act is vague inasmuch as it does not contain the full details of the land proposed to be acquired and also the public purpose is not specific. The notification is so vague that the petitioners have been deprived of their right under section 5-A of the Act. He further submitted that by the impugned notification approximately 4763.229 sq.mt. of land of Patwari Halka No.43 and number Bandobast 493 was proposed to be acquired which is part of larger piece of land. He further submitted that invocation of urgency clause under section 17 of the Act is bad and unsustainable.

4. Learned counsel for the respondents submitted that section 4 notification contains sufficient details of the land as required by law and the notification is not vague in any manner. He further submitted that the acquisition proceedings have been taken up strictly in accordance with law and there is no flaw in the proceedings.

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

6. The question, which arises for consideration, is whether the impugned section 4 notification contains the sufficient details of land proposed to be acquired and the public purpose to save it from the challenge on the ground of vagueness?

7. Section 4 requires the appropriate Government to publish the notification when land in any locality is needed or likely to be needed for any public purpose. On the issuance of section 4(1) notification, under section 4(2) it becomes lawful for any officer authorised by Government to enter upon and survey any land in such locality and ascertain if the land is adapted for such purpose and also set out the boundaries of the land proposed to be taken. Division Bench of this court in the order dated 8.8.2008 passed in W.A.No.1145/2007 in the matter of *Executive Engineer, M.P. Housing Board and anr. vs. Shri Kant Mishra and others* and connected writ appeals, while considering the object of notification under section 4, has held that:-

"It is apparent from sub-section (1) of section 4 of the Act that only locality in which the land was likely to be needed for any public purpose, is required to be mentioned. Sub-section (2) of section 4 provides that thereupon after issuance of notification under sub-section (1) of section 4, it shall be lawful for any officer to enter upon and survey and take levels of any land in such locality; to dig or bore into the sub-soil; to do all other acts necessary to ascertain whether the land is adapted for such purpose; to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon; to mark

GOMTIBAI TAMRAKAR (SMT.) Vs. STATE OF M. P.

such levels, boundaries and line, by placing marks and cutting trenches; and where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crops, fence or jungle. Thus, section 4 provides a first step towards acquisition of land. The main purpose of the notification is to take the preliminary proceedings. The notification is of exploratory character and discloses tentative intention. After discharging the functions under section 4, the authorised officer is required to make report under sub-section 4 of Section 4. At the stage of section 4 Govt. may not in fact possessing all the necessary details which are dependent upon the survey on which it can decide which land in the locality would be suitable for the public purpose. Investigation into necessary data provided under section 4(2) empowered the entry to carry out various operations mentioned therein on any land in such locality. Only after such survey is made, Govt. can decide, which particular land in the locality is adapted or suitable for the public purpose.

8. The issue about the particulars of the land which are required to be disclosed in section 4 notification to save it from vagueness came before the Supreme Court on earlier occasion. In the matter of *Narendrajit Singh vs. State of U.P.* reported in 1970(1) SCC 125, the Supreme Court opined that section 4(1) does not require the identity of the proposed land to be specified with too many details but it requires to "specify the locality in which the land is needed". It is held that: -

8. Section 4(1) does not require that the identity of the lands which may ultimately be acquired should be specified but it enjoins upon the Government the duty to specify the locality in which the land is needed. In the instant cases the notifications suffer from a very serious defect in that the locality where the lands were needed was not specified. The notification merely showed that lands mentioned in the schedule were needed. The schedule in its turn though it contained the headings District, Pargana, Mauza and approximate area, gave no particulars of the same and all that was mentioned by way of a note was that the plan of the land might be inspected in the office of the Collector of Rampur. As no details were given, the only indication about the locality of the lands was possibly the District of Rampur inasmuch as the plan of the land was to be found in the office of the Collector of the same district. Certainly the Act did not intend that all the persons owning land in a district should rush to the Collector's office to find out whether his lands were covered by the notification.

GOMTIBAITAMRAKAR (SMT.) V & STATE OF M.P.

9. The Supreme Court in the matter of *Madhya Pradesh Housing Board vs. Mohd. Shafi and others* reported in (1992) 2 SCC 168 while considering section 4(1) notification which only contained the name of the District and approximate area proposed to be acquired without any other further details such as Khasra number Patwari Halka number or locality etc. held that:-

8. It is settled law that the process of acquisition has to start with a notification issued under section 4 of the Act, which is mandatory, and even in cases of urgency, the issuance of notification under section 4 is a condition precedent to the exercise of any further powers under the Act. Any notification which is aimed at depriving a man of his property, issued under section 4 of the Land Acquisition Act has to be strictly construed and any serious lapse on the part of the acquiring authority would vitiate the proceedings and cannot be ignored by the courts. The object of issuing a notification under section 4 of the Act is twofold. First, it is a public announcement by the Government and a public notice by the Collector to the effect that the land, as specified therein, is needed or is likely to be needed by the government for the "public purpose" mentioned therein; and secondly, it authorises the departmental officers or officers of the local authority, as the case may be to do all such acts as are mentioned in section 4(2) of the Act. The notification has to be published in the locality and particularly persons likely to be affected by the proposal have to be put on notice that such an activity is afoot. The notification is thus, required to give with sufficient clarity not only the "public purpose", for which the acquisition proceedings are being commenced but also the "locality" where the land is situate with as full a description as possible of the land proposed to be acquired to enable the "interested" persons to know as to which land is being acquired and for what purpose and to take further steps under the Act by filing objections etc., since it is open to such persons to canvass the non-suitability of the land for the alleged "public purpose" also. If a notification under section 4(1) of the Act is defective and does not comply with the requirements of the Act, it not only vitiates the notification, but also renders all subsequent proceedings connected with the acquisition, bad.

Thus, in view of the aforesaid judgment, by section 4(1) notification the locality where land is situated is required to be disclosed with as full possible description of the land proposed to be acquired to enable the interested persons to know as to which land is being acquired and for what purpose.

10. Division Bench of this court also in the matter of *Executive Engineer, M.P. Housing Board and another* (supra) has considered the same issue and held as follows: -

GOMTIBAITAMRAKAR(SMT.) Vs. STATE OF M.P.

14. Thus the ratio of the decisions of the Apex Court consistently is that locality should be mentioned with precision not the precise identity of the locality at the stage of notification under section 4 of the Act. Similar is the view expressed by several High Courts. In *Abdul Jabbar v. State of West Bengal*, ILR (1967) 1 Calcutta 157, it was laid down that the notification under section 4 is merely exploratory or preliminary in nature and the exact area to be acquired need not be particularized at that stage, but it is otherwise with the declaration under section 6 which is issued after the Government has applied its mind to the exact area and location of the lands which are needed for the purpose of and are, therefore, acquired. Delhi High Court in *Rajkumar and another v. The Union of India and ors.* - ILR (1974) II Delhi 81 has laid down that at the stage of notification under section 4(1) it is not absolutely necessary that Government should have particularized the land. In *Bahadur Singh v. Union of India*, ILR (1976) I Delhi 375, it was laid down in para 68 that it is not necessary that each and every items of the land should be mentioned in the notification under section 4 which means that survey numbers are not required to be mentioned. A Division Bench of Allahabad High Court in *Chandan Singh Gosain v. State of U.P. and anr.* -AIR 1980 Allahabad 106 following the decision of *Narendrajit Singh's case* held that plot numbers and other details are not necessary to be mentioned in the notification issued u/s 4 of the Act. Only the locality is to be mentioned which by very purpose of section 4 can be mentioned. A Division Bench of Calcutta High Court in *Jogendra Nath Chatterjee and ors. V. State of West Bengal*, AIR 1971 Calcutta 458 held that neither the plots nor their boundary has to be specified in notification u/s 4(1), but, the locality must be stated. In *Nagar Mahapalika, Varanasi v. Durga Shankar and others* - AIR 1975 Allahabad 9, Allahabad High Court held that when the notification u/s 4(1) did not mention the details about the purpose of the plots or their boundaries, the notification could not be held to be vague as other sufficient particulars were mentioned.

11. Thus, the law is settled that section 4(1) does not require the identity of the land with too many details to be disclosed in the notification but the notification must specify the locality in which the land is needed.

12. The impugned section 4 notification in the present case needs to be considered in the light of the aforesaid settled legal position. The section 4 notification dated 28th March, 2008 (Annexure-P/1) which is under challenge

GOMTIBAITAMRAKAR (SMT.) Vs. STATE OF M.P.

was issued containing the following details of the land proposed to be acquired:-

भूमि का वर्णन			धारा 4 (2) के अन्तर्गत सार्वजनिक प्रयोजन का वर्णन		
जिला	तहसील	नगर/ग्राम नं.बं.	लगभग क्षेत्रफल (अर्जित रकबा) (वर्ग मी.)	प्राधिकृत अधिकारी	
(1)	(2)	(3)	(4)	(5)	(6)
कटनी	कटनी	कटनी	1. निजी स्वत्व 2647.366	कार्यपालन यंत्री, (लो.नि.वि.)	खिरहनी रेल्वे
		प.ह.नं.43	2. आबादी नजूल 247.982	सेतु निर्माण संभाग, जबलपुर	ओव्हर ब्रिज हेतु
		नं.बं.493	3. रामजानकी मंदिर 749.561		अधिग्रहित
			प्रबंधक कलेक्टर		
			4. केन्द्रीय सरकार 779.450		
			रेल्वे		
			5. आबादी नजूल स. 39.750		
			ट्राफिक थाना.		
			6. आबादी नजूल 299.120		
			फारेस्ट आफिस.		

योग : 4763.229

A perusal of the aforesaid details indicates that in the notification Patwari Halka number and number Bandobast of the land, which was proposed to be acquired, has been disclosed.

13. Learned counsel for the petitioners has argued that Patwari Halka No.43 and number Bandobast 493 which is mentioned in section 4 notification admeasures thousands of hectares out of which only 4763.229 sq.mt. is proposed to be acquired, therefore, the locality is not specified. Such an argument is devoid of merit since along with Patwari Halka number and number Bandobast, the notification also discloses that the land is proposed to be acquired for constructing Khirhani Railway over-bridge which makes the location and the locality of the land proposed to be acquired explicit. Thus, petitioners' challenge to the impugned notification on the ground of vagueness for want of requisite particulars of land is meritless and is hereby rejected.

14. The petitioners have also raised the challenge on the ground that the notification is vague since it does not specify the public purpose. Such a challenge is also meritless since the notification in clear terms provides the public purpose

GOMTIBAITAMRAKAR (SMT) V. STATE OF M. P.

as "acquired for Khirhani Railway over bridge". Such a purpose is covered within the meaning of expression "public purpose" contained in section 3(f) of the Act. Thus, public purpose has been disclosed in section 4(1) notification with sufficient clarity, therefore, it is found that the challenge of the petitioner to the notification under section 4(1) is without any substance.

15. The learned counsel for the petitioners has also argued that the order for invoking the urgency clause was passed subsequent to section 6 declaration dated 15.5.2008. A perusal of the writ petition indicates that no such ground has been raised by the petitioners in the writ petition questioning the legality and correctness of the invocation of the urgency clause. Therefore, such an argument raised at the time of final hearing can not be considered since State had no opportunity to respond to the same.

16. It has also been pointed out by the respondents that the award has already been passed in the matter on 14.7.2008, therefore, writ petition is liable to be dismissed in view of the judgment of this Court in the matter of *Rambharose and others vs. State of M.P. and others* reported in (2002) 3 MPLJ 378 holding that once the award is passed challenge to section 4 & 6 notification can not be entertained.

17. Even otherwise, it is found that the petitioner has challenged the notification dated 28th March, 2008 (Annexure-P/1) after elapse of almost 3 months by filing the writ petition sometime in July, 2008 whereas Annexure-P/3 indicates that the petitioner was aware of the acquisition proceedings and before filing of the writ petition substantial progress had taken place in the acquisition proceedings. Therefore, no interference can be made also for the reason that the petitioner was not prompt in approaching the court. It is also worth noting that no other person has approached this court challenging the acquisition proceedings except for the petitioners and also that the land is being acquired for constructing a Railway over-bridge to ease the traffic problem at Katni Railway crossing as the Railway line going towards Allahabad and Calcutta is busy Railway line, which results into traffic jam at Khirhani Railway crossing and causes suffering to the public at large and also loss of lives due to the accidents while crossing the Railway line. Considering the eminent public purpose and considering the fact that section 4 notification is not vague as alleged by the petitioners and that land is being acquired after following the due procedure prescribed under the Land Acquisition Act no interference is required in this writ petition and the writ petition is, accordingly, dismissed. No orders as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 144
WRIT PETITION
Before Mr. Justice S.C. Sharma
 11 September, 2008*

SANT KUMAR AGRAWAL

... Petitioner

Vs.

**LAXMIBAI NATIONAL INSTITUTE OF PHYSICAL
EDUCATION & ors.**

... Respondents

A. Service Law - Recovery - *Petitioner's date of birth in mark-sheet was 20.02.1942 - But, it was entered as 15.01.1948 in the service-book - Petitioner continued in service on the strength of judgment passed by the High Court in earlier writ petition - Pay and allowances already drawn by the petitioner shall not be recovered from the petitioner as he has worked for respondents during the aforesaid period - However, terminal dues of the petitioner shall be calculated treating 28.02.2002 as the date of retirement for all purposes.* (Paras 6 & 7)

क. सेवा विधि - वसूली - अंकसूची में याची की जन्मतिथि 20.02.1942 थी - किन्तु सेवा-पुस्तिका में यह 15.01.1948 प्रविष्ट कर दी गई - याची उच्च न्यायालय द्वारा पूर्ववर्ती रिट याचिका में पारित निर्णय के आधार पर सेवा में बना रहा - याची द्वारा पहले से निकाले जा चुके वेतन और भत्ते याची से वसूल नहीं किये जायेंगे क्योंकि उसने उपर्युक्त कालावधि के दौरान प्रत्यर्थियों के लिए कार्य किया है - तथापि, याची के सेवांत बकाया की गणना सभी प्रयोजनों के लिए सेवानिवृत्ति की तारीख 28.02.2002 मानकर की जायेगी।

B. Service Law - Charge-sheet - Quashment - *Merely because, a charge-sheet has been issued that does not give rise to any cause of action, until and unless a final order has been passed in the matter after evaluating the material established on record by the competent disciplinary authority - However, if any adverse order is passed by the competent disciplinary authority, the petitioner shall be at a liberty to challenge the same in accordance with law - Resultantly, no case for interference with the charge-sheet is made out.* (Paras 7 & 8)

ख. सेवा विधि - आरोप-पत्र - अभिखण्डन - केवल इसलिए कि आरोप-पत्र जारी किया गया है जो कोई बाद कारण उत्पन्न नहीं करता है, जब तक कि सक्षम अनुशासनिक प्राधिकारी द्वारा अभिलेख पर स्थापित सामग्री का मूल्यांकन करने के बाद मामले में अंतिम आदेश पारित न कर दिया गया हो - तथापि, यदि सक्षम अनुशासनिक प्राधिकारी द्वारा कोई प्रतिकूल आदेश पारित किया जाता है, तो याची को इसे विधि अनुसार चुनौती देने की स्वतंत्रता होगी - परिणामस्वरूप आरोप-पत्र में हस्तक्षेप के लिए कोई मामला नहीं बनता।

Cases referred :

2001(2) MPLJ 155, 2003(5) MPLJ 383, 2003(4) MPLJ 319, (2002) 7 SCC 710, (2006) 12 SCC 128.

**SANT KUMAR AGRAWAL V. LAXMIBAI NATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

Ankur Modi, for the petitioner.

Anil Sharma, for the respondents.

ORDER

S.C. SHARMA, J. :- The petitioner before this Court a retired employee has filed a writ petition i.e. W.P. No. 1991/2006(S) challenging the decision of the Board of Management of Lakshmibai National Institute of Physical Education, Gwalior by which he has been retired w.e.f. 28-02-2002 and has also filed another writ petition i.e. W.P. No. 108/2006(S) challenging the charge Sheet dated 05-10-2005 issued by the competent authority and also the further disciplinary proceedings, arising out of the same issue relating to correction of date of birth in his service book and therefore, both the writ petitions were heard analogously together and disposed of by this singular order. For the sake of convenience, the facts in Writ Petition No. 1991 of 2006(S) are exposited herein.

2. The petitioner before this Court in W.P. No. 1991/2006(S) being aggrieved by a decision dated 12th January, 2006 taken by the Board of Management of Lakshmibai National Institute of Physical Education, Gwalior has filed this present petition challenging his retirement w.e.f. 28-02-2002. It has been contended in the writ petition that he was initially appointed as Personal Assistant to the Dean and was promoted to the post of Assistant Director in August 1991 and a show-cause notice was issued on 02-09-2005 in which it was stated that he has wrongly intimated his date of birth as 15-01-1948, whereas his correct date of birth is 20th February 1942. After the show-cause notice the matter was placed before the Board of Directors and the Board of Directors have passed a resolution on 12th January 2006 resolving to retire the petitioner w.e.f. 28-02-2002 and subsequently an order has been passed on 20-02-2006 retiring the petitioner and the respondents has further passed an order dated 14-03-2006 for recovery of the salary and subsistence allowance paid to the petitioner w.e.f. 28-02-2002. It has been further stated in the writ petition that the date of birth of the petitioner as reflected in the extract of birth register is 15-01-1948, however, on account of a mistake in the Higher Secondary School Certificate, the date of birth of the petitioner was mentioned as 20-02-1942. The petitioner has also submitted that as there was a mistake in the higher secondary school certificate a Civil Suit was preferred by the petitioner and the Civil Court vide judgment and decree dated 13-10-1976 directed the Board of Secondary Education to correct the date of birth from 20-02-1942 to 15-01-1948. It has also been stated by the petitioner that efforts were made by the petitioner for correction of date of birth by submitting representation as well as the judgment and decree to the Board of Secondary Education and while all this was going on he was appointed as Personal Assistant to Dean at Lakshmibai National Institute of Physical Education, Gwalior in the year 1986. The petitioner while entering into the service has stated his date of

SANT KUMAR AGRAWAL V. LAXMIBAI NATIONAL INSTITUTE OF PHYSICAL EDUCATION

birth to be 15-01-1948 and it has also been reflected in the service book that the aforesaid date of birth is mentioned as per the judgment and decree passed in case No. 165/A/1974 dated 13th October, 1976. It has been further stated by the petitioner that the respondents have earlier also retired the petitioner from service on 28th February 2002 treating the date of birth of the petitioner to be 20th February 1942 ignoring the entry in the extract of birth register and the retirement of the petitioner in the year 2002 was subjected to judicial scrutiny before this Court. A writ petition was filed by the petitioner which was registered as W.P. No. 1822/2001 and after hearing the parties at length, this Court has allowed the writ petition filed by the present petitioner on various grounds. It has also been contended by the petitioner that a review petition was filed by the management and it was stated in the review petition that the judgment and decree delivered in the civil suit was set-aside subsequently by the Appellate Court on 27-07-1977 and this fact was suppressed by the petitioner. This Court has dismissed the review petition filed by the respondents. The contention of the petitioner is that once a writ petition filed against his retirement in the year 2002 has been allowed and the review petition filed by the respondents has been dismissed, subsequent action could not have been taken by the respondents again retiring the petitioner w.e.f. 28-02-2002. The petitioner has raised various grounds before this Court and has contended that the order of retirement dated 20-02-2006 and the subsequent order of recovery of salary is bad in law. The petitioner has also contended that the entry relating to birth register should have been taken into account and the Board of Management has erroneously taken a decision to retire the petitioner w.e.f. 28-02-2002 and has also erroneously taken a decision to change date of birth of the petitioner from 15-01-1948 to 20-02-1942, he could not have been retired with retrospective effect and therefore, the decision is illegal.

3. Respondents have filed a reply and it has been stated by the respondents that they have rightly passed an order retiring the petitioner w.e.f. 28-02-2002 as the petitioner was also in service of other department prior to his appointment at Lakshmibai National Institute of Physical Education, Gwalior and he has incorrectly declared his date of birth to be 15-01-1948, and the date of birth of the petitioner as reflected in the Higher Secondary Certificate is 20-02-1942. The petitioner has also disclosed 20-02-1942 as his date of birth while serving other organizations. It is also stated by the respondents that the petitioner has filed a civil suit for correction of his date of birth in the mark sheet of higher secondary certificate and vide judgment and decree dated 13-01-1976, the Civil Court had directed correction of date of birth from 20th February 1942 to 15th January 1948. It has also been stated by the respondents that an appeal was preferred by the State of Madhya Pradesh against the judgment and decree and the Appellate Court has set-aside the said judgment and decree on 27th July 1977 and this fact was concealed by

SANT KUMAR AGRAWAL Vs. LAXMI BAINATIONAL INSTITUTE OF PHYSICAL EDUCATION

the petitioner. The petitioner at the time of entry into the service in the year 1986 has incorrectly mentioned his date of birth as 15th January 1948 knowing fully well that the judgment and decree of the Civil Court has been set-aside. It has also been stated by the respondents that Second Appeal was also preferred against the judgment and decree delivered by the Additional District Judge, Gwalior in Appeal No. 7A/1977 and the second appeal was also dismissed by this Court vide order dated 3rd April 2006. The respondents have further stated that a SLP was also preferred before the Apex Court, however, the same has also been dismissed. It has been contended by the respondents that earlier also they have passed an order of retirement in respect of the petitioner and the same was set-aside by this Court, however, in review petition filed by the institution liberty was given to the employer to take action after hearing the petitioner and after granting due opportunity of hearing in accordance with law. The respondents have further stated that a show cause notice was issued to the petitioner and after considering the reply of the petitioner it has been resolved by the competent authority to correct the date of birth of the petitioner from 15-01-1948 to 20-02-1942 and the same has been corrected in the service book, consequentially action for retiring him w.e.f 28-02-2002 has been taken in the matter and also for lodging of a FIR with the Police. The contention of the respondents is that the order passed by them does not suffers from any illegality and it is the petitioner who has played fraud with the employer while entering into the service.

- 4. Heard learned counsel for the parties at length and perused the record.
- 5. In the present case it is not in dispute that the date of birth of the petitioner as reflected in the Higher Secondary School leaving certificate is 20-02-1942. The petitioner while joining the service as Personal Assistant to Dean in the year 1986 has stated his date of birth to be 15-01-1948 and an endorsement has been made in the service book that his date of birth is 15-01-1948 as per the judgment and decree passed by the Civil Court on 13-10-1976. It is also not in dispute that the judgment and decree passed by the Civil Court on 13-10-1976 was set-aside by the First Additional District Judge in Appeal No. 7-A/1977 dated 27th July 1977 against this a second appeal was preferred before this Court and the same has also been dismissed by this Court on 3rd April 2006. A Special Leave Petition was also preferred by the petitioner and same has also been dismissed, meaning thereby the order passed by the Appellate Court has become final and the judgment and decree directing the correction of date of birth to be 15-01-1948 stands set-aside, thus the date of birth of the petitioner as reflected in the higher secondary school leaving certificate i.e. 20-02-1942 is correct. The petitioner at the time of entry into the service has not stated his date of birth 15-01-1948 on the basis of birth register. The contention of the petitioner that he was not aware of the order passed by the Appellate Court is very difficult to believe. The petitioner has engaged

January-09 (First)

**SANT KUMAR AGRAWAL V. LAXMIBAINATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

a counsel to represent him in the civil suit and it was the same counsel who has defend him before Appellate Court and therefore, the statement of the petitioner that he was not aware of the order passed by the Appellate Court cannot be believed. The fact remains that in the higher secondary school certificate the date of birth of the petitioner was 20-02-1942. It is true that the petitioner was earlier also retired from service by treating his date of birth to be 20-02-1942 and the same was subjected to judicial scrutiny before this Court, the writ petition filed by the petitioner was allowed. This Court while allowing the writ petition has held as under:-

“8. Considering the same in the back drop of the statutory requirement as per FR 56 and Note-5, it was not at all just and reasonable on the part of the respondents to insist upon producing the Higher Secondary Certificate when the rule contemplate production of some confirmatory documentary evidence, the judgment and decree issued by a Competent Court of law will also come within the said category of confirmatory documentary evidence. The words “as far as possible” before the confirmatory document and “such as” appearing before High School or Higher Secondary School clearly indicates that High School or Higher Secondary School Certificate were one of the document contemplated as confirmatory documents but cannot be construed to mean that no other document is admissible. In the present case, the confirmatory document evidencing the date of birth available i.e. judgment and decree passed 10 years prior to appointment of the petitioner, certificate issued by the statutory authority, who maintained the birth register and the finding recorded in the judgment and decree which was accepted by the employer cannot be brushed aside and ignored only on the ground that the Higher Secondary Certificate and mark-sheet in original have not been produced. It is the considered opinion of this Court, that the respondents in the present case have not acted in a just and reasonable manner in changing the date of birth declared by the petitioner at the time of his appointment and the change made unilaterally is not sustainable.

9. Apart from the above if the statutory rules which is applicable to an employee for claiming change in date of birth within 5 years is made applicable vice-versa on the employer also, there is no reason, why the employer did not take action within the 5 years period for changing the date of birth. Having accepted the same and permitted it to be acceptable for more than 10 years, there is no reason for the employer to make a change in the date

**SANT KUMAR AGRAWAL V. LAXMI BAINATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

of birth. This action, if viewed in the backdrop of the allegation made by the petitioner that it has been done malafidely by the Registrar only to harass him because he was agitating and claiming promotion and other benefit, seems to be prima-facie tenable.

10. That apart the change having being done without giving proper opportunity of hearing to the employee concerned and without considering the implications of Fundamental Rule 56 and Note 5, appended thereof seems to be totally unjustified and unsustainable. The judgment relied upon by the learned counsel for the respondents is clearly distinguishable not only on the facts but also on the ground of the interpretation of the rule in question. On the contrary, the judgment of Supreme Court in the case of *Sarjoo Prasad* (supra) wherein change in date of birth already recorded by the employer without complying with principle of natural justice and hearing of employee has been declared to be illegal.

11. Considering the totality of the facts and circumstances of the case and the discussions made hereinabove, the action of the respondents in retiring the petitioner seems to be unsustainable. As the change in date of birth entered in the service record made by the respondents employer without considering the rule in question properly and without giving due opportunity of hearing and recording reasons thereof is unsustainable. Apart from the above the respondents have not replied to the objection made by the petitioner that the Registrar is not competent to take action. The appointment of the petitioner having being made by the Board of Directors, it is not known as to under what authority the Registrar has changed the date of birth of the employee. Even FR 56 and Note-5, contemplates alteration after sanction of the Ministry and Department of the Central Government. This requirement also seems to have been ignored while passing the impugned order.

12. Considering the aforesaid, totality of the facts and circumstances of the case and the findings recorded hereinabove, I have no hesitation in holding that the order impugned Annexure P/31(C) dated 28-02-2002 retiring the petitioner from the said date is unsustainable."

The respondents institute has preferred a review petition against the order passed by this Court and it was specifically pleaded in the review petition that the judgment and decree of the Civil Court has been set-aside on an appeal preferred by the State Government vide judgment and dated 27-07-1977 passed by the Appellate Court and therefore, a prayer was made to review the earlier order

**SANT KUMAR AGRAWAL V. LAXMIBAINATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

passed by this Court in W.P. No. 1822/2001. The Review Petition was dismissed and the following order was passed:-

“Having heard learned counsel for the petitioner and on perusal of perusal of the record, it is seen that the findings recorded in the Judgment and order dated 08-07-2003 in W.P. No. 1822 of 2001, interference made in the matter was not based solely on the judgment of the learned trial Court. This Court had interfered in the matter as there was non-observance of FR 56 and Note 5 with regard to non-grant of opportunity in the matter of changing the date of birth in the service book of the petitioner (S.K. Agrawal) so also action taken by the Registrar with regard to change of the date of birth as the petitioner was appointed by the Board of Directors, this Court had only observed in paragraph 11 that action taken for changing the date of birth without recording reasons is not correct. Under such circumstances, the respondents were only required to take action after hearing the petitioner and they were at liberty to proceed in the matter after giving due opportunity of hearing to the petitioner and under the provisions of law. If, subsequently, certain facts have come on record, the applicant should give reasonable opportunity to the employee and then take action. For this review or recall of the order passed by this Court is not necessary.

This Court having decided the petition in question on the basis of other grounds and not merely on the basis of the judgment passed by the learned trial Court, no case is made out for review or recall of the order. However, it is clarified that keeping in view the observations made by this Court in paragraph 11 of the order dated 08-07-2003 passed in W.P. No. 1822 of 2001, the employer/applicant shall take action after complying with the requirements of law.”

6. Thus, it is evident that while dismissing the review petition liberty was granted to the employer to pass appropriate orders in accordance with law i.e. to correct the date of birth of the petitioner as per the provision of fundamental rules 56 after granting due opportunity of hearing to the petitioner in accordance with the law. The respondents thereafter, have granted opportunity of hearing to the petitioner and have corrected the date of birth of the petitioner and the competent authority i.e. Board of Management has taken a decision to correct the date of birth of the petitioner and to retire the petitioner w.e.f. 28-02-2002, a show-cause notice is very much on record dated 02-04-2005 and it reflects all minute details of the matter. The petitioner has also submitted a reply to the show-cause notice

**SANTKUMARAGRAWAL Vs. LAXMIBAINATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

and therefore, principle of natural justice and fair play have been followed in the matter. In the present case the date of birth of the petitioner as reflected in the higher secondary school certificate was 20-02-1942 and there is categorical statement made in the return that the petitioner while doing other government service has mentioned the same date of birth prior to joining at Lakshmibai National Institute of Physical Education, Gwalior. The petitioner has entered his date of birth as 15-01-1948 as per the judgment and decree passed by the Civil Court which is no longer in existence and therefore, the entry which was made on the basis of the judgment and decree of Civil Court has rightly been corrected by the employer on the basis of higher secondary school certificate. The respondents have also enclosed Annexure R/5 which is an application submitted by the petitioner for the post of Personal Assistant. In this application the date of birth mentioned as 15-01-1948. The birth certificate which has been filed by the petitioner along with an application for taking documents on record is dated 26-03-2007, however, keeping in view the totality of the circumstances of the case, this Court is of the Considered view that the management has rightly changed the date of birth of the petitioner from 15-01-1948 to 20-02-1942 which is based upon higher secondary school mark-sheet. This Court does not have any sympathy in the matter in favour of the petitioner. A Division Bench of this Court in the case of *S.C. Verma Vs. Union of India and another* 2001(2) M.P.L.J. 155 has held that in respect of an educated person, the best evidence as to age is matriculation certificate and the date of birth stated on the basis of matriculation certificate was held to be in order. In the case of *Mahendra Kumar Soni Vs. State of M.P. and others* 2003(5) M.P.L.J. 383, this Court in para 7 has held as under:-

"7. To appreciate the first submission of Mr. Ruprah, learned counsel for the petitioner it is apposite to refer to Rule 84 of the Code. It is relevant to state here the Rule which has been brought on record is in Hindi, translation of the same, in essence, would be as under:

"Every appointee, at the time of his appointment, under the Government service on any designation, shall declare his date of birth in Christian Era supporting documents thereto, viz. matriculation certificate and birth certificate issued by the Municipality etc. If the exact of date of birth is not known then an approximate date of birth shall be mentioned. Service description, service book or other documents pertaining to the date of birth which are kept on record, shall mention/state the exact date of birth of an employee or a date of birth determined under Rules 85 of the Code shall be mentioned therein. As such the noted date of birth shall be treated as final. Except, clerical error, no other modification/correction shall be made later on."

**SANT KUMAR AGRAWAL V. LAXMI BAINATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

On a perusal of the aforesaid rule it becomes graphically clear that the said Rule postulates that how a clerical error can be rectified in the date of birth. But to say so that the Rule does alone govern the field and the employer does not have any authority to rectify the situation despite any mischief coming to the knowledge, would be travesty of justice. Reliance on the Rule can be made to some extent but that cannot be the summum bonum of the entire action conceivable at the instance of an employer. In the instant case, the notice sent by the Sub-Divisional Officer clearly shows that the factum of interpolation came to the knowledge of State Government, when there was a scrutiny with regard to some other aspects. If any interpolation is noticed, definitely, in our considered opinion, the Rule would not be the governing factor but principle of inherent power has to be invoked and it can be exercised after following the principles of natural justice. In the present case as interpolation was noticed, action could have been initiated despite the language couched in the Rule 84 of the Code. We have no hesitation to say that Rule 84 of the Code is not the only power conferred on the authority, the employer, to correct the date of birth if circumstances otherwise so warrant. It does not limit the power. On the contrary, it only enables the authority to rectify a clerical error. Thus Rule 84 of the Code is in a different realm whereas taking action after following due procedure by law meaning thereby the principles of *audi alteram* for curing any kind of mischief or put the controversy to rest is in another compartment. This in fact is a part of general power which ordinarily rests with the employer.

It was held in the present case that the employer does have the power to correct the date of birth if circumstances so warrant by invoking inherent powers after following principle of natural justice. In the present case this Court has already granted liberty to the employer to take action after compliance with the requirement of law and the employer has certainly taken action after complying with the requirement of law and therefore, the decision taken by the Management dated 12 January, 2006 does not warrant any interference.

The matter relating to correction of date of birth recorded in the service book was subjected to judicial scrutiny in the case of *Phool Chand Rathore Vs. Nagar Palika Parishad, Betul and others* reported in 2003(4) M.P.L.J. 319 and this Court while deciding the aforesaid case has held that in case of exceptional circumstances where there is clinching and irrefutable evidence that the date of birth entered in the service book is wrong, the same can be corrected. It has also been observed that a mistake or fraud cannot be perpetuated. In the present case the petitioner has entered his date of birth at the time of recruitment to be 15-01-1948 based upon a judgment and decree passed in Civil Suit No. 165-A/1974 dated 13th October, 1976. At the time the entry was made the aforesaid judgment and decree was no longer in existence as the judgment and decree was set-aside

**SANT KUMAR AGRAWAL Vs. LAXMIBAINATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

by the appellate Court on 27-07-1977 and therefore, the respondents are justified in passing the order dated 12th January, 2006 in the matter. The decision taken by the Board of Management dated 12th January 2006 is therefore, upheld. The petitioner has also prayed for quashing of the order dated 14-03-2006 by which the respondents have ordered for recovery of salary and allowances w.e.f. 01-03-2002. The learned counsel appearing for the petitioner has relied upon a judgment delivered by the Hon'ble Supreme Court in the case of *State of M.P. & others Vs. Mohanlal Sharma* 2002(7) SCC 719. In the aforesaid case the question of correction of date of birth was involved and the employee therein has received salary even for the period for which he was not lawfully entitled. The Appeal was filed by the State of M.P. was allowed, the order passed by the Tribunal was set-aside, however, the payment of salary to the petitioner therein for the extended period was protected by the Apex Court. The Apex Court in para 3 has observed as under:-

(3) IN that view of the matter, the appeal deserves to be allowed and the order under challenge is set aside. Before we part with the case, we would like to observe that since the respondent has served on the basis of the judgment under challenge for six months, the appellants shall not recover the salary which has already been paid to the respondent during that period.

7. In the present case earlier also the date of birth of the petitioner therein was corrected by the respondents from 15-01-1948 to 20-02-1942 and he was retired from service on 28th February, 2002 treating his date of birth as 20-02-1942. His retirement in the year 2002 was challenged before this Court and the order of retirement was quashed by this Court in W.P. No. 1822/2001 and the petitioner has continued in service by virtue of the judgment delivered by this Court. The respondents have again corrected the date of birth as liberty was granted to them by this Court in MCC No. 543/2005 and the respondents have taken a decision on 12 January 2006 to retire the petitioner w.e.f. 28-02-2002 treating his date of birth to be 20-02-1942. As the petitioner has continued on account of an order passed by this Court the pay and allowances already drawn by the petitioner shall not be recovered from the petitioner as he has worked for respondents during the aforesaid period, however, while calculating his pensionary dues, the respondents shall take into account the date of retirement as 28-02-2002 only. Terminal dues of the petitioner shall be calculated treating 28-02-2002 as the date of his retirement for all purpose. The question of payment of further subsistence allowance or arrears of salary does not arise. The petitioner has also been charge-sheeted by the respondents by issuing the charge sheet dated 05-10-2005 and various charges have been levelled against the petitioner. The petitioner has sought quashing of suspension, charge-sheet dated 05-10-2005 and

**SANT KUMAR AGRAWAL Vs. LAXMI BAINATIONAL INSTITUTE OF PHYSICAL
EDUCATION**

other consequential relief in a separate writ petition i.e. W.P. No. 108/2006(S). The scope of interference of quashing the charge sheet is quite limited and the Apex Court while considering the question of quashing a charge sheet in the case of *Union of India vs. Kunisetty Satyanarayana* (2006) 12 SCC 28 has held in paragraphs 13, 14, 15 and 16 as under:-

“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 Vs. Ramesh Kumar Singh* (1996) 1 SCC 327, *Special Director vs. Mohd. Ghulam Ghouse*, (2004) 3 SCC 440, *Ulagappa Vs. Divisional Commissioner, Mysore* (2001) 10 SCC 639, *State of U.P. vs. Brahm Datt Sharma* AIR 1987 SC 943.

The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at the 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.

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.

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.”

In the present case, the petitioner has not been able to make out a case for interference and the petitioner certainly has a liberty to raise all such grounds in his defence while facing the departmental enquiry. The case of the petitioner is not at all covered under the parameters laid down by the Apex Court in catena of

KANCHAN UPADHYAY (KU.) Vs. STATE OF M.P.

judgment relating to quashing of the charge sheet. Merely because, a charge sheet has been issued that does not give rise to any cause of action, until and unless a final order has been passed in the matter after evaluating the material established on record by the competent disciplinary authority. However, if any adverse order is passed by the competent disciplinary authority, the petitioner shall be at a liberty to challenge the same in accordance with law.

8. Resultantly, no case for interference with the charge sheet dated 05-10-2005 is made out in the facts and circumstances of the case. The respondents while taking decision dated 12th January 2006 has also observed that they shall be taking further appropriate action against the petitioner in the matter. It is needless to mention that the power of taking action against an employee lies with the appointing authority and in the facts and circumstance of the case. The appointing authority shall be free to take appropriate action as required under the law against the petitioner. Resultantly, the decision taken by the Management dated 12th January 2006 is upheld, and the subsequent order of retirement dated 20-02-2006 is also upheld, however, the order dated 14-03-2006 to the extent recovery has been ordered in respect of salary and subsistence allowance already paid to the petitioner since first March 2002 is set-aside.

9. For the reasons detailed in this order the other writ petition filed by the petitioner i.e. W.P. No. 108/2006(S) wherein the petitioner has assailed the charge-sheet dated 15-10-2005 is also dismissed.

10. This order shall also governs the disposal of W.P. No. 108/2006(S) filed by the petitioner.

11. Resultantly, the present writ petition stands dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 155

WRIT PETITION

Before Mr. Justice Rajendra Menon

23 September, 2008*

KANCHAN UPADHYAY (KU.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Service Law - Panchayat Samvida Shala Shikshak (Employment and Condition and Contract) Rules, M.P. 2005, Rules 9, 10 & 11 - Appointment of Shiksha Karmi - Termination - Natural Justice - Petitioner applied for being appointed as Shiksha Karmi - Even being more meritorious not selected - Action challenged - Mass irregularities found in the entire selection process - Held - It is well settled principle of law that when the entire selection is

*W.P. No.7299/2008(S) (Jabalpur)

KANCHAN UPADHYAY (KU.) Vs. STATE OF M.P.

being cancelled due to writ large irregularities hearing to individually candidates is not necessary - Respondents directed to conduct fresh recruitment process in pursuance to the aforesaid order shall be limited to on such candidates who had applied and participated in the previous selection process and the same be completed within a period of 3 months.

(Paras 13 & 15)

सेवा विधि - पंचायत संविदा शाला शिक्षक (रोजगार और शर्तें और संविदा) नियम, म.प्र. 2005, नियम 9, 10, 11 - शिक्षा कर्मी की नियुक्ति - समाप्ति - नैसर्गिक न्याय - याची ने शिक्षा कर्मी के रूप में नियुक्त किये जाने के लिए आवेदन पेश किया - अधिक योग्यताधारी होकर भी चयनित नहीं हुआ - कृत्य को चुनौती दी गई - सम्पूर्ण चयन प्रक्रिया में बड़े पैमाने पर अनियमितताएँ पायी गई - अभिनिर्धारित - विधि का यह सुस्थापित सिद्धांत है कि जब स्पष्ट रूप से बड़ी अनियमितताओं के कारण सम्पूर्ण चयन रद्द किया जा रहा हो अभ्यर्थियों की वैयक्तिक रूप से सुनवाई आवश्यक नहीं है - प्रत्यर्थियों को निदेश दिया गया कि पूर्वोक्त आदेश के अनुपालन में नवीन भर्ती प्रक्रिया संचालित की जाए जो ऐसे अभ्यर्थियों तक सीमित होगी जिन्होंने पूर्व चयन प्रक्रिया में आवेदन किया और भाग लिया और यह 3 माह के भीतर पूरी की जाए।

Cases referred :

(1994) 4 SCC 165, (2002) 3 SCC 146, (2007) 1 SCC (L&S) 444, 2003(4) MPLJ 78.

R.L. Gupta, for the petitioner.

Shailesh Mishra, G.A., for the State.

B.P. Nema, for the Janpad Panchayat, Shahpura.

V.K. Shukla, Satyendra Jyotshi and Devesh Khatri, for the interveners.

ORDER

RAJENDRA MENON, J. :-An advertisement dated 29-04-2006 was issued by the Janpad Panchayat Shahpura, District Jabalpur calling applications from eligible candidates for appointments on the post of Samvida Shala Shikshak Grade-II and Grade-III.

2. Selection process was conducted and after the recruitment was done litigations started cropping up, allegations were made with regard to granting appointment contrary to the statutory rules, making selections beyond the advertised posts and selecting unqualified candidates. Records indicate that various appeals were filed before the Collector and orders passed by the Collector in these appeals are under challenge in connected writ petitions bearing W.P. No. 6241/08(S), W.P. No. 6433/08(S), W.P. No. 6465/08(S) and W.P. No. 6700/08(S).

3. In the present petition, petitioner Ku. Kanchan Upadhyay has come out with a grievance that she had appeared in the selection process, examination for which was held in the year 2005, her Roll No. was 21210094 and in the said examination she had secured 61.95 marks out of 130. It was her case that she has obtained 47.65% marks in the selection process and inspite thereof she has

KANCHAN UPADHYAY (KU.) Vs. STATE OF M.P.

not been appointed whereas the persons having received less marks have been appointed. In para 5.5 she has given the instances with regard to appointment of Ku.Jyoti Dubey, who has received 30.47% marks, Ku. Hemlata Sarose, 29.45% marks, Ku. Priya Nanda Garg, 28.44% marks, Ku. Laxmi Thakur, 27.42% marks and Darshika Jain who had received 29.96 marks. It is her case before this court that even though she has received more marks in the selection process she has not been appointed, whereas persons as indicated hereinabove who have received less marks have been appointed.

4. Considering the aforesaid grievance made by the petitioner notice was issued to the Collector, District Jabalpur on 27-06-2008, to show cause as to why the petitioner should not be appointed, considering the fact that she has received 47.65% marks and persons have received less marks as indicated herein above have been appointed. In all fairness to the Collector, it is seen that the Collector has filed a detailed reply before this court on 06-08-2008, supported by an affidavit of the Chief Executive Officer, Janpad Panchat Shahpura, Smt. Bharti Dixit alongwith photocopies of various documents. A perusal of the reply filed by the respondents indicates that the advertisement in question was issued on 29-04-2006 to fill up the posts of Samvida Shala Shikshak Grade-II and Grade-III in various schools situated under the jurisdiction of various Janpad Panchayats in Jabalpur district. As far as the present petition is concerned the dispute pertains to appointment in Janpad Panchayat Shahpura. In the said Janpad Panchayat 46 posts of Samvida Shala Shikshak Grade-II in the subject of Mathematics, 65 in Social Science and 12 in Science, totaling 123 posts were advertised. That apart 160 posts of Samvida Shala Shiksha Grade-III were also advertised.

5. It is further seen from the return filed by the Collector that for the aforesaid posts, 1511 candidates applied with regard to appointment on the post of Samvida Shala Shikshak Grade-II and 2090 candidates submitted their applications for appointment on the post of Samvida Shala Shikshak Grade-III. The applications were submitted to the respondent no.5, Chief Executive Officer, Janpad Panchayat Shahpura, District Jabalpur. It is stated that the respondent no.5 prepared the merit list, which was subsequently revised and on the basis of the revised merit list, the final select list was prepared by the respondent no.5 and he issued appointment letters to the candidates.

6. It is averred by the Collector in the return that the respondent no.5 was bound to fill up only 123 posts of Samvida Shala Shikshak Grade-II and 160 posts of Samvida Shala Shikshak Grade-III as per advertisement but the respondent no.3 issued appointment letters to 156 candidates for appointment to the post of Samvida Shala Shikshak Grade-II and 218 for the post of Samvida Shala Shikshak Grade-III. Accordingly, it is stated by the Collector that the respondent no.5 appointed 33 Samvida Shala Shikshak Grade-II and 58 Samvida Shikla Shikshak Grade-III in excess of the posts advertised. It is averred in the return that the

KANCHAN UPADHYAY (KU.) Vs. STATE OF M.P.

respondent no.3 Collector issued a letter dated 29-10-2007 to respondent no.5 Shri A.S.Naik and Block Education Officer, Shahpura Shri R.K.Badhan to cancel the excess appointments totaling 91 in all, in pursuance to the same, the respondent no.5 issued orders dated 30-10-2007 and 15-11-2007 terminating the services of 91 Samvida Shala Shikshak Grade-II and Grade-III respectively. Annexure R-2 is copy of the letter in this regard issued by the respondent no.3.

7. It is further pointed out by the Collector that the 91 terminated Samvida Shala Shikshak Grade-II and Grade-III filed appeals under the provisions of M.P. Panchayat (Appeals & Revision) Rules, 1993 against the orders of termination dated 30-10-2007 and 15-11-2007. While hearing the appeals filed, respondent no.3 found that in all 9 irregularities were committed by the respondent no.5 and the Block Education Officer in the selection process. The recruitment was done without complying with the rules of reservation. It was also found that the merit list was not prepared as per rules and circulars issued, the three members committee did not examine the unified and category wise merit list, respondent no.5 did not publish the provisional select list and waiting list category wise, objections were not invited and the appeal committee did not dispose of the objections filed and instead thereof appointment letters were issued as per merit list prepared without following the prescribed procedure. It was also found that the appointment letters were not issued subject wise and respondent no.5 did not take prior permission of the competent authority for the additional/excess appointments or for issuing the orders of appointment.

8. In paras 11 and 12 of the return, it is so stated by the respondent no.3 :

"11. The respondents submit that the respondent no.3 Collector examined all these irregularities very carefully on the basis of documents/record available with him and as produced by the appellants/ terminated Samvida Shala Shikshak Grade-II & Grade-III, and the Collector found that in the selection, these aforementioned irregularities committed by the respondent no.5 and Block Education Officer. It is pertinent to note that respondent no.5, Chief Executive Officer, Janpad Panchayat Shahpura, respondent no.4 District Education Officer Jabalpur and District Panchayat Jabalpur have not produced any documents relating to the selection except unified merit list, it is further pertinent to note that records of selection are not available in these offices except the unified merit list. Annexure R-3 is the unified merit list.

12. The respondents submit that on the basis of unified merit list the respondent no.3 Collector decided appeals of the appellants and prepared the provisional merit list and invited objections.

KANCHAN UPADHYAY (KU.) V. STATE OF M.P.

The respondent no.3 Collector Jabalpur specifically directed to submit the objections on or before 17-05-2008 in the office of District Education Officer Jabalpur. Annexure R-4 is the copy of order of respondent no.3 Collector, Jabalpur."

As far as petitioner Ku. Kanchan Upadhyay is concerned, it is pointed out that her name appeared in the revised merit list but for the reasons which remained undisclosed her name was not included in the select list and no appointment order was issued to her even though she was eligible for appointment and persons having received less marks were appointed. However, it is pointed out that the petitioner did not file any appeal and has directly approached this court.

9. Thereafter in paras 14 and 15 of the return, the Collector has so stated :

"14. The respondents submit that Collector found that there are 9 irregularities committed by the respondent no.5 in the matter of selection of Samvida Shala Shikshak Grade-II and Grade-III. From the perusal of the order of Collector, it is very clear that selection made by the respondent no. 5 is contrary to the provisions of rule 9, 10, 11 of the M.P. Panchayat Samvida Shala Shikshak (Employment and Conditions and Contract) Rules, 2005. It is pertinent to note and as already submitted above that no provisional merit list, provisional and final selection list and proceeding/note sheet of the respondent no.5 and Block Education Officer are available. All these documents have been misplaced and not traceable. It is submitted that looking to the serious irregularities committed by the respondent no.5 and Block Education Officer, the Commissioner Jabalpur suspended to the then Chief Executive Officer, Janpad Panchayat Shahpura Shri A.S.Naik and then Block Education Officer R.K.Badhan. Annexure R-6 is the suspension order of respondent no.5 and Annexure R-7 is the copy of suspension order of Shri Badhan Block Education Officer. It is further submitted that charge sheet has already been issued to Shri Naik and Shri Badhan which are filed with the orders of suspension i.e. Annexure R-6 and R-7.

15. The respondents submit that under these circumstances it is not possible for the answering respondent to make distinction between the tainted and non tainted candidates. This is a case/selection in which large scale irregularities have been committed by the respondent no.5 and Block Education Officer and the entire selection is liable to be nullify. All the appointments made by the respondent no.5 and Block Education Officer are void-ab-initio as the whole selection is contrary to the recruitment rules. The respondents further submit that no relevant records are available

KANCHAN UPADHYAY (KU.) V. STATE OF M.P.

relating to selected candidates who are working as Samvida Shala Shikshak Grade-II and III in pursuance to the advertisement dated 29-04-2006."

Finally, it is pointed out in the return that in view of the facts that have come on record, it is not possible to point out the irregularities committed in the case of each candidate and to pin point the person who is properly appointed and the persons who are not appointed in accordance to the rules. It is said in the return that in the light of irregularities that have come on record, the respondents are going to cancel the whole selection made in pursuance to the advertisement dated 29-04-2006 so far as it relates to Janpad Panchayat Shahpura and for cancellation of the appointment, it is indicated that they are seeking permission of this court to do so.

10. From the facts that have come on record and on a perusal of the return filed by the Collector, it is crystal clear that in the process of selection conducted in Janpad Panchayat Shahpura in pursuance to the advertisement dated 29-04-2006 various irregularities have come to light, the irregularities have been committed by the then Chief Executive Officer Shri A.S.Naik and Block Education Officer, Shahpura Shri R.K.Badhan and for the irregularities committed they have been suspended vide Annexures R-6 and R-7 respectively and charge sheets have also been issued to them. From the facts that have come on record it is also established that petitioner Ku.Kanchan Upadhyay was meritorious, she was eligible to be included in the merit list, this was not done and the persons who had received less marks i.e. even 27.42% marks were appointed ignoring her candidature. In the light of the large scale irregularities that have come on record and considering the submissions made by the Collector before this court this court has no option but to hold that the entire selection conducted in the matter of recruitment of Samvida Shala Shikshak Grade-II and Grade-III in Janpad Panchayat, Shahpura stands vitiated and the entire selection is liable to be quashed and the Collector should be directed to proceed in the matter for making fresh appointment in accordance to the rules.

11. At this stage it may be appropriate to take note of the inquiry conducted and the report which is available at page no.110 of the return filed by the State Government. This report is dated 13-02-2008, which is submitted by Shri Om Prakash Shrivastava, Chief Executive Officer, Zila Panchayat Jabalpur. It is indicated in the report that most of the records pertaining to the selection have been misplaced and not traceable and serious allegations are made against Shri A.S.Naik, the then Chief Executive Officer Janpad Panchayat Shahpura and Block Education Officer, Shahpura Shri R.K.Badhan. Recommendation made is to cancel the entire selection. The Collector has also indicated before this court his intention to cancel the entire selection in the light of the large scale irregularities that have come on record as is evident from the report dated 13-02-2008 submitted

KANCHAN UPADHYAY (KU.) Vs. STATE OF M.P.

by Shri Om Prakash Shrivastava , Chief Executive Officer, Zila Panchayat Jabalpur.

12. This report submitted by Shri Om Prakash Shrivastava, which is available on record indicates that the Inquiry Officer found 11 points which warranted consideration. The 11 irregularities in the selection process and considered by the Inquiry Officer are:-

- (1) Whether the rules of reservation have been followed.
- (2) Whether the merit list is prepared properly in accordance to the application received and eligibility of the candidates.
- (3) Whether the integrated merit list and the category wise merit list is scrutinized by the three members committee in accordance to the policy of the State Government.
- (4) Whether the competent authority has approved the category wise merit list and thereafter the final merit list and waiting list published and objections were invited to the same.
- (5) Whether the objections received were placed before appeal committee for consideration, whether they were considered by the appeal committee and the final list published in the local news paper.
- (6) Whether the orders of appointment have been issued as per merit list and in proper serial number.
- (7) Whether the appointment letters have been issued subject wise.
- (8) Whether the appointments have been made as per vacancies existing in the different schools.
- (9) Whether before issuing the appointment letters, approval of the competent authority has been obtained.

(10) In the entire episode who are officials responsible for illegalities if any.

(11) Recommendation.

Thereafter each of the aforesaid points are taken up for consideration and it is recorded by the Inquiry Officer that there are large scale irregularities, the merit list is not properly prepared, objections were not considered, there is nothing to show that the appeal committee considered the objections and decided them or that the merit list was published in the news paper after considering the objections, issuance of appointment letters is not as per merit list nor is subject

KANCHAN UPADHYAY (KU.) Vs. STATE OF M.P.

wise. and Shri A.S. Naik, the then Chief Executive Officer and Shri R.K. Badhan, Block Education Officer have been held responsible for the illegalities. The report a detailed one has finally recommended for cancellation of the entire merit list in conducting the selection process afresh. I have gone through the finding of the Inquiry Officer and the finding indicates glaring irregularities committed in the matter of selection. The illegalities are such that the entire selection stands vitiated, and it is not possible to differentiate between properly selected candidates and illegally selected candidates on the basis of the material that have come on record.

13. That being so, this court has no hesitation in directing the Collector to proceed in the matter to cancel the entire selection and to conduct the recruitment process afresh in accordance to law. At this stage the question arises as to whether opportunity of hearing has to be extended to the selected candidates, most of whom are not before this court. It is well settled principle of law that when the entire selection is being cancelled due to writ large scale irregularities hearing to individually candidates is not necessary.

14. Reference in this regard may be made to the following judgments of the Hon. Supreme Court and of this court:

Krishan Yadav Vs. State of Haryana (1994) 4 SCC 165, *Union of India and others Vs. O. Chakradhar*, (2002) 3 SCC 146, *Inderpreet Singh Kahlon and others Vs. State of Punjab and others*, (2007) 1 SCC (L&S) 444 and a judgment of this court in the case of *Nalini Chavhan and others Vs. State of M.P. and others*, 2003(4) M.P.L.J. page 78

In the case of *O. Chakradhar* (supra) after taking note of the principles laid down in the case of *Krishna Yadav* (Supra), it is so held by the Supreme Court :

".... In the case of *Krishan Yadav* the allegation of favoritism and arbitrariness in holding the selection for the post of Taxation Inspectors by Subordinate Selection Board were made. Those candidates whose performance was excellent were not selected. An inquiry was ordered by the Supreme Court to be held by CBI. The report revealed acts of favoritism, selection without interview even on the basis of fake or ghost interview, tampering with the records and fabrication of documents etc. In such circumstance it was held that entire selection was vitiated even in respect of those who had already been appointed and had been working for a past few years. It was further observed that individual cases of innocence have no relevance in such circumstances..."

In our view the nature and the extent of illegalities and

KANCHAN UPADHYAY (KU.) V. STATE OF M.P.

irregularities committed in conducting a selection will have to be scrutinized in each case so as to come to a conclusion about future course of action to be adopted in the matter. If the mischief played is so widespread and all- pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, in such cases it will neither be possible nor necessary to issue individual show cause notices to each selectee. The only way out would be to cancel the whole selection. Motive behind the irregularities committed also has its relevance." (Emphasis supplied).

Thereafter in the same case the Supreme Court has observed as under:

" As per the report of CBI the whole selection smacks of mala fides and arbitrariness. All norms are said to have violated with impunity at each stage viz. right from the stage of entertaining applications with answer sheets while in the custody of Chairman, in holding typing test, in interview and in the end while preparing the final result. In such circumstances it may not be possible to pick out or choose a few persons in respect of whom alone the selection could be cancelled and their services in pursuance thereof could be terminated. The illegality and irregularity are so intermixed with the whole process of the selection that it becomes impossible to sort out the right from the wrong or vice versa. The result of such a selection cannot be relied or acted upon. It is not a case where a question of misconduct on the part of a candidate is to be gone into but a case where those who conducted the selection have rendered it wholly unacceptable. Guilt of those who have been selected is not the question under consideration but the question is, could such selection be acted upon in the matter of public employment ? We are therefore of the view that it is not one of those cases where it may have been possible to issue any individual notice of misconduct to each selectee and seek his explanation in regard to the large-scale widespread and all-pervasive illegalities and irregularities committed by those who conducted the selection which may of course possibly be for the benefit of those who have been selected but there may be a few who may have deserved selection otherwise, but it is difficult to separate the cases of some of the candidates from the rest even if there may be some. The decision in the case of Krishan Yadav applied to the facts of the present case. The Railway Board's decision to cancel the selection cannot be faulted with. The appeal therefore deserves to be allowed."

KANCHAN UPADHYAY (KU.) Vs. STATE OF M.P.

In the case of *Inderpreet Singh Kahlon* (Supra) in para-40 it is so held by the Supreme Court :

"40. We at the outset would furthermore notice that having regard to the submissions made before us by Mr. Dwivedi and Mr. Rao that the services of the appellants before us were terminated not in terms of the rules but in view of the commission of the illegality in the selection process involved, we need not consider the applicability of the relevant provisions of the statutes as also the effect of the provisions of Article 311 of the Constitution of India. An appointment made in violation of Articles 14 and 16 of the Constitution of India would be void. It would be a nullity. (See. *Secy., State of Karnataka V. Umadevi* (3). But before such a finding can be arrived at, the appointing authority must take into consideration the foundational facts. Only when such foundational facts are established, the legal principles can be applied."

14. Keeping in view the aforesaid principles, the facts and circumstances of the present case and the large scale irregularities which are apparent from the records, this court has no other option but to hold that the entire selection conducted for appointment on the post of Samvida Shala Shikshak Grade-II and Grade-III in Janpad Panchayat Shahpura in pursuance to the advertisement Annexure R-1 dated 29-04-2006 stands vitiated. Accordingly, Collector is directed to take action for canceling the entire selection and to conduct selection afresh in accordance to law. While conducting selection process afresh, all such candidates who are eligible and had appeared in the selection process held in pursuance to the advertisement Annexure R-1 dated 29-04-2006 shall be permitted to participate and no new candidates who had not applied will be permitted to participate in the selection process. It is clarified that the selection being conducted now shall be limited only to such of the candidates who had applied, were found eligible and had participated in the previous selection.

15. Fresh recruitment process Respondents directed to conduct in pursuance to the aforesaid order shall be limited to on such candidates who had applied and participated in the previous selection process and the same be completed within a period of 3 months from the date of receipt of certified copy of this order.

16. Accordingly this petition stands allowed with the aforesaid without any order so as to cost.

Petition allowed.

I.L.R. [2009] M. P., 165

WRIT PETITION

Before Mr. Justice Abhay M. Naik

25 September, 2009*

ABDUL HASAN QURESHI

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69(1), 70, 91 & 95, Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - *Appeal - Appointment of Panchayat Karmi by resolution of majority of votes of Panchas - Appointment challenged in appeal - An objection was raised that against a resolution no appeal lies - Held - If the resolution is followed by an order of appointment then validity of minutes of such a resolution can be challenged in an appeal and not otherwise.*

(Paras 13 & 22)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69(1), 70, 91 व 95, पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 - अपील - पंचों के बहुमत के प्रस्ताव द्वारा पंचायत कर्मों की नियुक्ति - नियुक्ति को अपील में चुनौती दी गई - यह आपत्ति उठाई गई कि प्रस्ताव के विरुद्ध कोई अपील नहीं की जा सकती - अभिनिर्धारित - यदि प्रस्ताव के अनुसरण में नियुक्ति का आदेश पारित किया जाता है तब ऐसे प्रस्ताव के कार्यवृत्त की वैधता को अपील में चुनौती दी जा सकती है अन्यथा नहीं।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69(1), 70, 91 & 95, Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 5 - *Revision - Whether the proceeding of Gram Panchayat in matter of appointment of Panchayat Karmi can directly be challenged in revision u/r 5 - Held - Gram Panchayat is an authority within the meaning of Rule 5, it not an authority subordinate to any of the revisional authorities within the meaning of this rule - A resolution merely selecting thereby a person as Panchayat Karmi would not be revisable u/r 5 despite being proceedings of Gram Panchayat.*

(Paras 15 & 22)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69(1), 70, 91 व 95, पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5 - पुनरीक्षण - क्या पंचायत कर्मों की नियुक्ति के मामले में ग्राम पंचायत की कार्यवाही को नियम 5 के अन्तर्गत पुनरीक्षण में सीधे चुनौती दी जा सकती है - अभिनिर्धारित - ग्राम पंचायत नियम 5 के अर्थान्तर्गत एक प्राधिकारी है, यह इस नियम के अर्थान्तर्गत पुनरीक्षण प्राधिकारियों में से किसी के अधीनस्थ प्राधिकारी नहीं है - एक प्रस्ताव जिससे केवल पंचायत कर्मों के रूप में एक व्यक्ति का चयन किया गया वह पंचायत की कार्यवाही होने के बावजूद नियम 5 के अन्तर्गत पुनरीक्षित नहीं किया जा सकेगा।

C. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of

ABDUL HASAN QURESHI Vs. STATE OF M. P.

1994), Sections 69(1), 70, 91 & 95, Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 5 - *Second Revision - A second revision before the State Government against the revisional order of the officers mentioned in Rule 5 would lie after final disposal by such officers by virtue of clause (ii) of sub-rule (2) of Rule 5.* (Paras 19, 20 & 22)

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1). धाराएँ 69(1), 70, 91 व 95, पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 5 - द्वितीय पुनरीक्षण - नियम 5 में उल्लिखित अधिकारियों के पुनरीक्षण आदेश के विरुद्ध राज्य सरकार के समक्ष द्वितीय पुनरीक्षण ऐसे अधिकारियों द्वारा नियम 5 के उपनियम (2) के खण्ड (ii) के आधार पर अंतिम निपटारा किये जाने के बाद की जा सकेगी।

Cases referred :

Order dated 08.04.2008 in W.A. No.360/2008, 2002(2) MPLJ 176, 2002(4) MPLJ 196, 2006(3) MPLJ 38, 1972 JLJ 934, 1975 JLJ 48, 2008(1) MPHT 254.

K.K. Trivedi, for the petitioner.

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

Sanjay Patel, for the respondent No.3.

ORDER

ABHAY M. NAIK, J. :- This order disposes of W.P.No.7007/08 and W.P.No.7163/08. Reference to annexures is taken from Writ Petition No.7163/2008 unless otherwise mentioned. Petitioner of Writ Petition No.7163/08 is hereinafter described as 'A' and of Writ Petition No.7007/08 is hereinafter described as 'R'.

2. Short facts involved in the petitions are that an advertisement marked as Annx.P/4 was issued on 5.8.2007 by Gram Panchayat Magron, Block Batiyagarh, District Damoh, inviting applications thereby for the post of Panchayat Karmi in the said Gram Panchayat. Petitioners of both the writ petitions and certain other applicants made their respective applications pursuant to the said advertisement. A meeting of the Gram Panchayat was convened and after considering the applications, 'A' was selected and appointed by majority of Panchas for the post of Panchayat Karmi and a resolution to this effect was passed on 29.8.2007 vide Annx.P/5. An order of appointment was, accordingly, issued in favour of 'A' on 29.8.2007 vide Annx.P/6. Pursuant thereto 'A' gave his joining on 31.8.2007. Collector Damoh issued necessary Notification declaring 'A' as Panchayat Karmi vide his order dated 12.10.2007 vide Annx.P/10. 'R' challenged the appointment of 'A' before the Sub Divisional Officer Hata, District Damoh, by way of filing an appeal on the ground that she was more meritorious in comparison to 'A'. Appeal was rejected on 8.10.2007 vide Annx.P/11.

3. Aggrieved by it, 'R' preferred a revision wherein learned Additional Collector Damoh granted stay on 5.10.2007 in her favour. 'A' submitted an application under Order 7 Rule 11 of Code of Civil Procedure before the Addl. Collector that

ABDUL HASAN QURESHI v. STATE OF M.P.

no appeal was provided before the Sub Divisional Officer against the resolution and, therefore, the order passed by the Sub Divisional Officer on 8.10.2007 vide Annx.P/11 is without jurisdiction and hence not revisable. However, the learned Addl. Collector rejected this objection and maintained the stay order on 4.12.2007 vide Annx.P/12. This was further challenged by 'A' before this Court in Writ Petition No.17225/07. Learned Single Judge on 18.1.2008 directed for maintenance of status-quo. From the record, it seems that ultimately this writ petition bearing W.P.No.17225/07 was disposed of by the Division Bench of this Court on 9.4.2008 with a direction that 'A' will be allowed to continue as Panchayat Karmi/Secretary of Gram Panchayat Magron subject to the result of the revision pending before the revisional authority. The revisional authority (Addl. Collector Damoh), ultimately, vide order dated 28.5.2008 marked as Annx.P/15, allowed the revision holding that 'R' was the most meritorious amongst the applicants and was entitled to be appointed on the post of Panchayat karmi of Gram Panchayat Magron. Accordingly, the appointment of 'A' was held illegal and was cancelled. 'R' was directed to be appointed on the said post and the Chief Executive Officer Janpad Panchayat Batiyagarh was directed to issue the appointment order in her favour. Aggrieved by the same, 'A' preferred second revision before the State Minister for Panchayat and Rural Development Department, Govt. of Madhya Pradesh, who vide her order dated 9.6.2008 marked as Annx.P/18, stayed the order of the Addl. Collector dated 28.5.2008 (Annx.P/15) and remitted the matter for final adjudication to the Commissioner Sagar division.

4. Aggrieved by the aforesaid 'R' submitted Writ Petition No.7007/08 on the ground that the order of the State Minister contained in Annx.P/18 (Annx.P/2 in Writ Petition No.7007/08) is without jurisdiction because second revision is not maintainable in law.

5. Faced with the aforesaid situation, 'A' preferred Writ Petition No.7163/08 on the ground that the resolution of Gram Panchayat marked as Annx.P/5, was not appealable before the Sub Divisional Officer and, consequently, the order of the Sub Divisional Officer dated 8.10.2007 (Annx.P/11) is nullity for want of jurisdiction and further proceedings pursuant thereto are vitiated in law.

6. Learned Counsel Shri K. K. Trivedi, Shri Sanjay Patel and Shri Vinod Mehta, learned Govt. Advocate advanced their arguments at length which have been duly considered in the light of various provisions of law and the judgments of this Court dealing with the situation.

7. Following crucial questions are involved in these two writ petitions :-

- (i) Whether resolution of Gram Panchayat about selection/ appointment of Panchayat Karmi may be challenged by way of appeal under the provisions of Madhya Pradesh Panchayats (Appeal & Revision) Rules, 1995 ?

ABDUL HASAN QURESHI v. STATE OF M.P.

(ii) Whether a resolution of Gram Panchayat in the matter of selection/appointment of Panchayat Karmi may be challenged directly in revision under rule 5 ?

(iii) Whether second revision in the aforesaid matter is maintainable under the said Rules ?

8. Section 91 of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as Panchayat Adhiniyam for brevity) provides that an appeal or revision against the orders or proceedings of a Panchayat and other authorities under this Act shall lie to such authority and in such manner as may be prescribed. Section 95 of Panchayat Adhiniyam empowers the State Government to make rules for carrying out the purposes of the said Act. In exercise of powers conferred by sub-section (1) of Section 95 read with Section 91 of Panchayat Adhiniyam, the Madhya Pradesh Panchayats (Appeal & Revision) Rules, 1995, have been made which were published in the Madhya Pradesh Rajpatra (Extraordinary) dated 29.3.1995. Rule 3 thereof provides for an appeal and further specifies the appellate authorities in the following manner :-

“3. Appeal and appellate authorities- Save where it has been otherwise provided in the Act or rules or bye-laws made thereunder, an appeal shall lie,-

(a) in the case of an order passed by the Sub Divisional Officer under any provision of the Act or rules or bye laws made thereunder-to the Collector.

(b) in the case of an order passed by the Collector under any provision of the Act or rules or bye laws made thereunder-to the Commissioner.

(c) in the case of an order passed by the Commissioner or Director of Panchayats-to the State Government.

(d) in the case of an order passed by the Panchayat specified in Column (1) of the Table below-to the authority specified in the corresponding entry in column (2) thereto.”

TABLE.

(1)	(2)
(a) Gram Panchayat	Sub-Divisional Officer.
(b) Janpad Panchayat	Collector.
(c) Zila Panchayat	Commissioner.

9. A bare perusal of the aforesaid rule makes it clear that appeal under rule 3 is provided only against an order and not against the proceedings of Panchayat. Although, Section 91 provides for an appeal or revision against the order or proceedings of a Panchayat, but the same has been qualified by the latter portion

ABDUL HASAN QURESHI V. STATE OF M.P.

of the Section which lays down that the appeal or revision shall lie to such authority and in such manner as may be prescribed. While making prescription in the nature of rules, the right of appeal against proceedings of the Panchayat and other authorities seems to have been not conferred or taken away. Section 91 is not couched in absolute form, but has been qualified with regard to the authority and manner as may be prescribed. Since in Rule 3, the words 'proceedings of a Panchayat and other authorities' do not find place, it may be safely held that the law did not intend to provide appeal against the proceedings of a Panchayat and other authorities.

10. As per Collins Cobuild Dictionary, resolution is a formal decision, usually by means of a vote, taken by a group of people at a meeting.

11. According to Black's Law Dictionary (Sixth Edition), the word 'resolution' has various meanings, which read as follows :

“Resolution : A formal expression of the opinion or will of an official body or a public assembly, adopted by vote; as a legislative resolution. Such may be either a simple, joint or concurrent resolution.

The term is usually employed to denote the adoption of a motion, the subject-matter of which would not properly constitute a statute, such as a mere expression of opinion; an alteration of the rules; a vote of thanks or of censure, etc. Such is not law but merely a form in which a legislative body expresses an opinion.

The chief distinction between a “resolution” and a “law” is that the former is used whenever the legislative body passing it wishes merely to express an opinion as to some given matter or thing and is only to have a temporary effect on such particular thing, while by a “law” it is intended to permanently direct and control matters applying to persons or things in general.

Concurrent resolution. An action of Congress passed in the form of a resolution of one house, the other concurring, which expresses the sense of Congress on a particular subject.

Corporate resolution. Formal documentation of action taken by board of directors of corporation (e.g. Declaration of stock dividend).

Joint resolution. A resolution adopted by both houses of congress or a legislature. When such a resolution has been approved by the president or passed with his approval, it has the effect of a law.

The distinction between a joint resolution and a concurrent

ABDUL HASAN QURESHI Vs STATE OF M.P.

resolution of congress, is that the former requires the approval of the president while the latter does not.

Ordinance distinguished. "Resolution" denotes something less formal than "ordinance", generally, it is mere expression of opinion or mind of council concerning some matter of administration, within its official cognizance, and provides for disposition of particular item of administrative business of a municipality; it is not a law, and in substance there is no difference between resolution, order and motion."

(underlined by this Court)

11. In view of the aforesaid, a resolution in substance may amount to an order, if, it is intended to permanently direct and control the matters dealt by it. It cannot be said that a resolution in no case may amount to an order. It is a trite law that while examining a document its substance is to be seen and not merely its form. This Court is here concerned with the resolution relating to selection or appointment or both in respect of Panchayat Karmi. All the resolutions of Gram Panchayat cannot be treated uniformly, but in order to ascertain appealability nature of a particular resolution with reference to 'Panchayat Karmi Yojna' is to be examined.

12. In the present case, this Court is required to examine the appealability of the resolution in question keeping into consideration the Panchayat Karmi Yozna under which Gram Panchayat is required to pass a resolution in the matter of selection and appointment of Panchayat Karmi. Panchayat Karmi Yozna was introduced by the Ministry of Panchayat and Rural Development Department of Government of Madhya Pradesh vide No.F2/12/22/Pa-1/95 dated 12.9.1995 with an object to make a provision for minimum one employee, who would discharge the functions of administrative work and other work entrusted to him by the Gram Panchayat. Necessary directions were issued in exercise of powers under sub-section (1) of Section 70 read with Section 69(1) of the Panchayat Adhiniyam. Earlier to it, Gram Sahayak were functioning as Secretary of Gram Panchayat. It was declared as dying cadre. Under this Yozna, Gram Panchayats were given power to make appointment of Panchayat Karmi in accordance with the guiding principles. Qualifications for Panchayat Karmi were prescribed. Additionally, Gram Panchayats were empowered to add other suitable/desirable qualifications by passing a resolution. Process of selection was prescribed under the Panchayat Karmi Yozna and, accordingly, the Gram Panchayat was empowered to select and appoint a Panchayat Karmi on full time/part time/contractual basis. Sarpanch of the Gram Panchayat has been empowered to issue order of appointment of Panchayat Karmi in accordance with the resolution of the Gram Panchayat. He has no independent say in the matter and is rather bound to act in accordance with the resolution. Issuance of an order of appointment by Sarpanch would be merely a formal act and will not denude the resolution of its substance regarding

ABDUL HASAN QURESHI V. STATE OF M.P.

selecting and appointing a person as Panchayat Karmi. Panchayat Karmi has been kept under the total administrative control of the concerning Gram Panchayat. Gram Panchayat has also been empowered to initiate disciplinary proceedings against him and to remove from his post after issuing a show cause notice. From the Panchayat Karmi Yozna, it is clear that a resolution of Gram Panchayat regarding appointment of Panchayat Karmi, does not require any kind of approval from the prescribed authority or any other authority. Thus, it may be safely held that a Gram Panchayat is the wholesome authority in the matter of appointment of Panchayat Karmi.

13. In this view of the matter, if, Gram Panchayat passes a resolution to select a person on the post of Panchayat Karmi, it would amount to resolution not amounting to an order, but if it passes a resolution selecting and appointing a person thereby on the post of Panchayat Karmi such kind of resolution may amount to an order in substance and not merely a proceeding of Gram Panchayat and an appeal against it may be preferred before the Sub Divisional Officer. On the other hand, if, a resolution is passed, merely selecting a person on the post of Panchayat Karmi and not appointing thereby, it would be merely a resolution (i.e. proceedings of Gram Panchayat) under the Panchayat Adhiniyam and the rules made thereunder and no appeal may be preferred against it unless, it is followed by an order of appointment of such Panchayat Karmi. In such a situation, an appeal would lie against the order of appointment and the validity of the resolution may be examined in such appeal as held by learned Division Bench of this Court in paragraph 16 of the order dated 8.4.2008 passed in Writ Appeal No.360/08 (*Devi Dayal Raikwar Vs. State of M.P. and others*). Contrary view taken by the single Judge of this Court in *Ram Lakhan Rawat Vs. State of Madhya Pradesh* [2000(2) MPLJ 176], is not a correct law, as already held by learned Division Bench in *Devi Dayal Raikwar's case* (supra).

14. Coming to the next question that whether a resolution of Gram Panchayat in the matter of selection/appointment of Panchayat Karmi would be amenable to revisional jurisdiction under Rule 5 of the Madhya Pradesh Panchayats (Appeal & Revision) Rules, 1995, it may be seen that this Court has already held that a resolution selecting and appointing thereby a person as Panchayat Karmi would amount to an order of Gram Panchayat and would be appealable under Rule 3. A resolution merely selecting thereby a person as Panchayat Karmi, but not appointing him would, obviously, not be an order, but would be proceedings of Gram Panchayat. Rule 5 which provides for revision reads as follows :

“Revision.-(1) (a) The State Government, the Commissioner, the Director of Panchayat, the Collector may on its/his own motion or on the application by any party, at any time for the purpose of satisfying itself/himself as to the legality or propriety of any order passed by or as to the regularity of the proceeding of, the authority subordinate to it/him call for and examine the record of any case

ABDUL HASAN QURESHI V. STATE OF M.P.

pending before, or disposed of by, such authority and may pass such order in reference thereto as it/he may think fit:

(underlined by this Court)

Provided that it/he shall not vary or reverse any order unless notice has been served on the parties interested and opportunity given to them for being heard:

Provided further that no application for revision shall be entertained against an order appealable under the Act.

(b) An application for revision by any party shall only be entertained if it is on the point of law and not on facts.

(2) Notwithstanding anything contained in sub-rule (1), -

(i) Where proceedings in respect of any case have been commenced by the State Government under sub-rule (1) no action shall be taken by other Officer mentioned in the said sub-rule in respect thereof, and

(ii) Where proceedings in respect of any such case have been commenced by the Officer mentioned in sub-rule (1), the State Government may either refrain from taking any action under this rule in respect of such case until the final disposal of such proceeding by such officer or may withdraw such proceeding and pass such order as it may deem fit."

(underlined by this court)

Aforesaid rule empowers the State Government, the Commissioner, the Director of Panchayat, the Collector on its/his own motion or on the application by any party to call for and examine the regularity of the proceedings of the authority sub-ordinate to it and further to pass such order in reference thereto as it/he may think fit. A question pertinently before this Court is whether the Gram Panchayat may be considered as an authority subordinate to the revisional authority in the matter of appointment of Panchayat Karmi. This Court has already considered various provisions of the Panchayat Karmi Yozna in the preceding paragraphs and has found that a Gram Panchayat has a full autonomy in the matter of appointment of Panchayat Karmi. Since the selection as well as appointment of a Panchayat Karmi by the Gram Panchayat does not need approval under law from any of the revisional authorities, Gram Panchayat cannot be treated as an authority subordinate to the revisional authority. No provision could be pointed out by the learned Govt. Advocate which may demonstrate that any of the revisional authorities enjoys or exercises any power over the Gram Panchayat in the matter of selection and appointment of a Panchayat Karmi.

15. In this view of the matter, this Court is of the considered opinion that though

AEDUL HASAN QURESHI Vs. STATE OF M.P.

a Gram Panchayat is an authority within the meaning of rule 5, it is not subordinate to any of the revisional authorities in the matter of appointment of Panchayat Karmi, within the meaning of this rule, and, therefore, a resolution merely selecting thereby a person as Panchayat Karmi would not be revisable under rule 5 despite being proceedings of Gram Panchayat.

16. Third and last legal question before this Court is whether a second revision would lie under the provisions of Madhya Pradesh Panchayats (Appeal & Revision) Rules, 1995 ?

17. Rule 5 has already been quoted above. Second proviso to rule 5 makes it clear that no application for revision shall be entertained against an order appealable under the Act. It is thus clear that an appealable order has been excluded from the jurisdiction of revision. Sub-rule (2) is to be taken note of. Powers of revision under rule 5 may be exercised by any of the revisional authorities at first instance. However, sub-rule (2) makes it clear that, if, the revisional powers are exercised by the State Government (obviously at first instance of revision), no interference shall be made by other officer mentioned in sub-rule (1) of rule 5. Sub-rule (2) begins with a non obstante clause. It further provides that where revisional proceedings have been commenced by the officer mentioned in sub-rule (1), the State Government may either refrain from taking any action under this rule in respect of such case until the final disposal of such proceedings by such officer or may withdraw such proceedings and pass such order as it may deem fit. It goes to suggest that if the revisional power is exercised by any of the officers out of the Commissioner, the Director of Panchayats or the Collector, the State Government may withdraw such proceedings or to wait until final disposal of such proceedings by such officer. This is clearly suggestive of the fact that after final disposal of such proceedings by any of the aforesaid officers, the State Government may entertain the matter. Any other interpretation would make the words 'until the final disposal of such proceedings by such officer' redundant and meaningless. Thus, the State Government is not debarred from exercising revisional jurisdiction against the order of final disposal by the Commissioner, the Director of Panchayats or the Collector made in the exercise of revisional jurisdiction at first instance.

18. This Court earlier in the case of *Smt. Mamta Pateriya Vs. State of Madhya Pradesh* [2002 (4) MPLJ 196] had taken a view that only one revision would lie. Reliance was placed on the decision of this Court in the case of *Ram Laxhan Rawat* (supra) which has already been held to be not a correct law by the Division Bench in the case of *Devi Dayal Raikwar* (supra).

19. This Court in the case of *Smt. Mamta Pateriya* (supra) was dealing with the second revision preferred before the Commissioner. To this extent, I do agree that a second revision before the Commissioner against the revisional order of Collector would not lie according to the Madhya Pradesh Panchayats (Appeal & Revision) Rules, 1995. In the case of *Mamta Pateria* (supra), there was no

ABDUL HASAN QURESHI Vs. STATE OF M.P.

occasion for this Court to consider the tenability of revision before the State Minister and the decision in the case of *Mamta Pateriya's case* is not a precedent while deciding the maintainability of second revision before the State Minister. Further, I find that words occurring in clause (ii) of sub-rule 2 of rule 5 "until the final disposal of such proceedings by such officer" do not seem to have been brought into the notice of this Court. It resulted into the observations of this Court that clause (ii) of sub-rule (2) of rule 5 provides that the State may refrain from taking any action or may withdraw such proceeding. Reliance in the decision of *Mamta Pateriya's case* is placed on the decision of this Court in Writ Petition No. 1195/01 (*Smt. Geeta Bai Vs. State of M.P. and others*) and on decision in the case of *Ram Lakhan Rawat Vs. State of Madhya Pradesh* (supra). In Geeta Bai's case, the second revision was preferred before the Commissioner and there was no occasion to consider the maintainability of revision before the State Minister. As regards Ram Lakhan Rawat's decision, it is no more a good law in view of the Division Bench decision of this Court in *Devi Dayal Raikwar's case* (supra). Words 'until the final decision of proceedings by such officer' make it clear that the refrain against the exercise of powers of the State Government is not unqualified or absolute, but is qualified during pendency of proceedings before such officer. If any of the officers (i.e. Commissioner/Director of Panchayat/ Collector) finally disposes of the revision proceedings, the State Government by virtue of clause (ii) would be empowered to exercise the powers after such final disposal. Thus, a second revision before the State Minister after final disposal of the first revision by the Commissioner/Director of Panchayat/Collector would be quite maintainable.

20. I am fortified in my this view by decision of this Court in the case of *Dilip Kumar Suryawanshi Vs. State of Madhya Pradesh* [2006 (3) MPLJ 38], that a second revision before the State Government would lie under the Rules.

21. It is not a trite law that revision against revisional order does not lie at all. Revision against revisional order is not unknown. Two relevant Full bench judgments may be successfully cited below :-

Ravishanker Dube & others V. Board of Revenue & others (1972 JLJ 934) and *Municipal Council Khandwa Vs. Santosh Kumar & others* (1975 JLJ 48).

Aforesaid cases do not relate to the revision under Panchayat Adhiniyam, therefore, I do not feel it necessary to dwell upon them any more. Reference has also been made to the Division Bench decision of this Court in the case of *S.M.Sahkari Samiti Vs. CEO Janpad Panchayat* [2008(1) M.P.H.T.254], wherein it has been held that there can be no doubt that a resolution can be challenged in an appeal or revision as per substantive provision of the Panchayat Adhiniyam. However, the case of *S.M.Sahkari Samiti* (supra) relates to a resolution of Janpad Panchayat granting thereby a contract for fisheries. It was not in relation to selection/appointment of Panchayat Karmi and was not governed by the provisions of Panchayat Karmi Yojna. Grant of contract for fisheries and

ABDUL HASAN QURESHI v. STATE OF M.P.

appointment of Panchayat Karmi are distinct matters and are governed by distinct provisions. There was no occasion in the case of *S.M. Sahkari Samiti* (supra) to examine the scope and forum for a challenge to the resolution with reference to the provisions of Panchayat Karmi Yojna. Therefore, no further valuable assistance would be available to the parties in the present case from the decision of *S.M. Sahkari Samiti* (supra).

22. On the basis of the aforesaid discussions, it is held :-

(i) Resolution of Gram Panchayat selecting and appointing thereby a Panchayat Karmi amounts to an order in substance of Gram Panchayat and would be appealable under rule 3 of the Madhya Pradesh Panchayats (Appeal and Revision) Rules, 1995 before the prescribed authority.

(ii) Resolution of Gram Panchayat merely selecting thereby a Panchayat Karmi and not appointing thereby would not amount to an order, but would amount to merely a proceedings of Gram Panchayat and would not be appealable as an order under rule 3. Such a proceeding would not be open to challenge in revision under rule 5 because the Gram Panchayat cannot be said to be subordinate to any of the revisional authorities within the meaning of provisions of Panchayat Karmi Yojna.

(iii) Second revision before the State Govt. against the revisional order of the officers mentioned in rule 5 would lie after final disposal by such officers by virtue of clause (ii) of sub-rule (2) of rule 5.

23. Now coming to the facts of the case, it may be seen that the resolution dated 29.8.2007 of Gram Panchayat Magron is on record as Annx.P/5, wherein it is mentioned that the Gram Panchayat has appointed/selected the petitioner on the post of Panchayat Karmi. Thus, the resolution contained in Annx.P/5 amounts to an order of Gram Panchayat in substance and the appeal against it before the Sub Divisional Officer Hata cum prescribed authority was rightly preferred by 'R'. Being aggrieved by the rejection of the appeal, the revision was also correctly preferred by 'R' before the Court of Additional Collector Damoh. Revisional authority vide his order dated 28.5.2008 marked as Annx.P/15 allowed the revision holding that 'R' was the most meritorious amongst the applicants and was entitled to be appointed on the post of Panchayat Karmi of Gram Panchayat Magron. Accordingly, 'R' was directed to be appointed on the said post and the Chief Executive Officer of Janpad Panchayat Batiyagarh was directed to issue appointment order in her favour. Aggrieved by it, second revision was preferred before the State Minister by 'A' who vide the impugned order dated 9.6.2008 (Annx.P/18) stayed the order of the Additional Collector dated 28.5.2008 (Annx.

P/15) and remitted the matter for final adjudication to the Commissioner, Sagar division. Since it has already been held that the second revision to the Court of Commissioner against the revisional order of the Collector is not maintainable, the impugned order to the extent of remittance of second revision to the Court of Commissioner Sagar division is without jurisdiction and is, hereby, set aside. The State Minister is, hereby, directed to decide the revision pending before her in an expeditious manner, preferably, within a period of three months from the date of receipt of certified copy of this order. To this extent, Writ Petition No. 7007/08 is, hereby, allowed. Since it has already been held that selection as well as appointment has been made by the resolution of Gram Panchayat Magaron contained in Annex. P/5, the resolution is found to be amounting to an order and is found appealable. Accordingly, the order of Sub Divisional Officer Hata cum prescribed authority is not without jurisdiction. Accordingly, Writ Petition No. 7163/08 containing challenge to the order of Sub Divisional Officer for want of jurisdiction is, hereby, dismissed. Parties to appear before the State Minister on 6.10.2008.

No order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 176

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

13 October, 2008*

SHIV DAYAL SINGH

Vs.

GENERAL MANAGER, INDIAN OIL CORPORATION

& ORS.

... Respondents

A. Constitution, Article 226 - Appointment of operator -

Appointment of operator of Kisan Seva Kendra to sell diesel and lubricating oils - Petitioner applied but was not selected as he had not submitted attested copies of the documents along with the application form - Action challenged on the ground that in the policy, there was no requirement of submitting attested copies of the documents and such a requirement could not have been incorporated in the advertisement - Held - The incorporation of condition of submission of attested copies of the documents is not contrary to but in addition to the policy documents - Corporation was competent to incorporate the additional condition while issuing the advertisement - Application was submitted by the petitioner in response to the advertisement - Petitioner was required to fulfill the conditions mentioned in the advertisement. (Para 12)

फ. शिवदायल, अग्रसेवा केंद्र की नियुक्ति - विधान संघ फ. फ.

SHIV DAYAL SINGH V. GENERAL MANAGER, INDIAN OIL CORPORATION

संचालक की डीजल और ल्यूब्रीकेटिंग ऑयल विक्रय करने के लिए नियुक्ति — याची ने आवेदन किया किन्तु चयनित नहीं हुआ क्योंकि उसने आवेदन पत्र के साथ दस्तावेजों की अनुप्रमाणित प्रतिलिपियाँ पेश नहीं की थीं — कृत्य को इस आधार पर चुनौती दी गई कि पॉलिसी में दस्तावेजों की अनुप्रमाणित प्रतिलिपियाँ पेश करने की कोई अपेक्षा नहीं थी और ऐसी अपेक्षा विज्ञापन में समाविष्ट नहीं की जा सकती थी — अभिनिर्धारित — दस्तावेजों की अनुप्रमाणित प्रतिलिपियाँ पेश करने की शर्त समाविष्ट करना पॉलिसी दस्तावेजों के प्रतिकूल नहीं है बल्कि उनके अतिरिक्त है — निगम विज्ञापन जारी करते समय अतिरिक्त शर्त समाविष्ट करने के लिए सक्षम था — याची द्वारा आवेदन विज्ञापन के प्रत्युत्तर में पेश किया गया था — याची को विज्ञापन में उल्लिखित शर्तें पूरी करना आवश्यक था।

B. Constitution, Article 226 - Scope - *It is settled law that High Court, while exercising the jurisdiction under Article 226 of the Constitution, does not sit in appeal while examining challenge to administrative or quasi-judicial decisions and interference is required only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action - In the case, no such unreasonableness of action is found in the action of the respondents.* (Para 24)

ख. संविधान, अनुच्छेद 226 — विषयक्षेत्र — यह स्थापित विधि है कि उच्च न्यायालय, संविधान के अनुच्छेद 226 के अन्तर्गत अधिकारिता का प्रयोग करते समय, जब चुनौती दिये हुए प्रशासनिक या अर्ध-न्यायिक विनिश्चयों की परीक्षा कर रहा हो, अपील प्राधिकारी के रूप में कार्य नहीं करता और हस्तक्षेप केवल तब अपेक्षित है जब प्रशासनिक प्राधिकारी का कृत्य इतना अनुचित या अयुक्तियुक्त हो कि कोई युक्तियुक्त व्यक्ति वह कार्य नहीं करता — मामले में प्रत्यर्थियों के कृत्य में ऐसी कोई अयुक्तियुक्तता नहीं पायी गयी।

C. Constitution, Article 226 - Delay in filing a writ petition - *Respondent No.3 got appointment as operator of Kisan Seva Kendra to sell diesel and lubricating oils - Taking loan and spending huge amount over the project - Petitioner challenging his appointment after a period of 5 months - Held - As the position of respondent No.3 has altered after grant of appointment in his favour - In the facts of the case, no relief can be granted to the petitioner for making a delay in filing the writ petition.* (Para 25)

ग. संविधान, अनुच्छेद 226 — रिट याचिका पेश करने में विलम्ब — प्रत्यर्थी क्रमांक 3 को डीजल और ल्यूब्रीकेटिंग ऑयल विक्रय करने के लिए किसान सेवा केन्द्र के संचालक के रूप में नियुक्त किया — ऋण लेकर और परियोजना पर बड़ी रकम खर्च की — याची ने 5 माह पश्चात् उसकी नियुक्ति को चुनौती दी — अभिनिर्धारित — चूंकि प्रत्यर्थी क्रमांक 3 की स्थिति उसके पक्ष में नियुक्ति दिये जाने के बाद परिवर्तित हो गई है — मामले के तथ्यों में, रिट याचिका पेश करने में विलम्ब करने के कारण याची को कोई अनुतोष प्रदान नहीं किया जा सकता।

Cases referred :

W.P. No.4336/2007 decided on 16.01.2008, W.A. No.695/2007 decided on 10.11.2007, W.P. No.3773/2007 decided on 10.01.2008, W.P. No.9246/2006 decided on 17.10.2006, W.P. No.7738/2006 decided on 09.04.2007, (2003) 10 SCC 681, (2002) 3 SCC 496, AIR 1979 SC 1628.

SHIV DAYAL SINGH Vs. GENERAL MANAGER, INDIAN OIL CORPORATION

Satish Agarwal, for the petitioner.

Alok Aradhe with Siddharth Gulati, for the respondent Nos.1 & 2.

R.K. Sanghi, for the respondent No.3.

O R D E R

PRAKASH SHRIVASTAVA, J. :- This writ petition has been filed challenging the selection of the respondent no.3 as Operator of Kisan Sewa Kendra (K.S.K.) of Indian Oil Corporation at Jawa, district Rewa.

2. The case of the petitioner is that an advertisement dated 25.2.2007 was published by the Indian Oil Corporation Limited for appointment of Operator of K.S.K. to sell diesel and lubricating oils. The advertisement inter alia includes the location of Jawa, Block Jawa, district Rewa, in the open category at s.no.192. The petitioner had made an application in the prescribed form. The documents, which were enclosed by the petitioner along with the application, have been placed on record. The procedure for selection of the dealers is prescribed in the policy document issued by the Indian Oil Corporation, annexure P/1.

3. The petitioner and other eligible candidates were called for the interview and after the interview the respondent no.3 was selected for allotment of KSK and the petitioner was placed at s.no.6 in the merit list. The petitioner made a representation dated 12.7.07 to the Senior Divisional Retail Sales Manager of the Indian Oil Corporation raising his grievance against the selection. That representation was not decided, therefore, the petitioner filed W.P.No.9030/2007 before this court which was disposed of by order dated 1.8.2007 with a direction that the petitioner may file a complaint to the Grievance Redressal Cell and such a complaint if filed would be decided within four weeks. Thereafter, the petitioner filed the complaint annexure P/9 before the Grievance Redressal Cell, which was rejected by the order dated 20.12.2007, annexure P/10. Aggrieved with these orders, the petitioner filed the present writ petition.

4. Learned counsel for the petitioner submitted that the findings of the Grievance Redressal Cell annexure R/1-2 show that the petitioner got less marks during the evaluation since number of documents filed by him were not attested but at the same time the petitioner's application was not rejected in the initial screening and he was called for interview which shows that the documents filed alongwith the application were found to be in order. He further submitted that in the policy there was no requirement of submitting attested copies of documents and such a requirement could not have been incorporated in the advertisement. He has also challenged the order of the Grievance Redressal Cell on the ground that it was passed without giving an opportunity of hearing to the petitioner and it is a non-speaking order. He has further challenged the award of less marks under the heading 'Availability of Land' on the ground that the land available with him which includes the land of his brother was more suitable. He further submitted

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

SHIV DAYAL SINGH Vs. GENERAL MANAGER, INDIAN OIL CORPORATION

that improper evaluation of marks was done by the Committee under different heads and the process which was adopted in the award of the public largess was not fair and transparent.

5. Learned counsel appearing for respondents no.1 and 2 submitted that the respondents had adopted fair and transparent process in the selection of KSK operators. Since the documents submitted by the petitioner were not attested as per the requirements of the advertisement, therefore, the same could not be considered while awarding marks. He further submitted that the marks under the heading 'Availability of Land' have been awarded keeping in view the nature of land offered by the respective parties and there is no flaw in the evaluation and award of marks under different heads. He has supported the order of the Grievance Redressal Cell on the ground that it was passed after giving an opportunity of hearing to the petitioner and after following the requisite procedure.

6. Learned counsel appearing for the respondent no.3 submitted that there is delay on the part of the petitioner in approaching this court inasmuch as the order of the Grievance Redressal Cell is dated 20.12.2007 whereas the writ petition was filed on 27.2.2008 and in the meanwhile the respondent no.3 had started the work at the site. She took loan and considerable progress was made by her, therefore, interference at this stage would cause serious prejudice to the respondent no.3. She had filed caveat before this court but the petitioner obtained the interim order from this court suppressing the caveat.

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

8. A policy document relating to the eligibility conditions and procedure for selection and appointment of dealers has been placed on record as annexure P/1. Clause 10(d) of the policy requires submission of application forms along with the relevant enclosures complete in all respects before the due date. Clause 10(e) requires the submission of original of the Affidavits and health certificate and copies of the other supporting documents with the application form. Clause 10(i) provides that the application not accompanying valid documents, affidavits, etc. or incomplete in any respect will not be considered. In terms of clause 16 a candidate was required to produce the originals of the documents submitted by him with the application at the time of interview. Clause 17 of the policy deals with norms of evaluating the candidates and provides different heads and the marks assigned under those heads.

9. The advertisement issued by the Indian Oil Corporation, annexure P/2, contained the general conditions and required the candidate to enclose the attested copies of all the papers / certificates along with the application form and to bring the originals of the papers / certificates at the time of interview. Clause 15 of the application form also required the candidates to submit certified photo-copy / attested copies of the certificates / documents along with the application form. It

SHIV DAYAL SINGH Vs GENERAL MANAGER, INDIAN OIL CORPORATION

is not in dispute that the documents, which were submitted by the petitioner along with the application form, were not the attested documents. Annexure R/1-2, which contains the findings of the Grievance Redressal Cell, shows that the petitioner was not awarded marks on the basis of the documents which were unattested.

10. Counsel for the petitioner has submitted that the petitioner was called for interview after screening of the application, which shows that no flaw was found in the application and the documents submitted by the petitioner.

11. There were certain documents which relate to the fulfillment of the eligibility conditions and other which were relevant for evaluation of the marks under different heads at level 1. The petitioner's application was not rejected under clause 10j of the policy since the application was complete in respect of eligibility conditions, but that would not absolve him from complying with the mandatory condition of submitting the attested documents.

12. Learned counsel for the petitioner has further argued that the policy, annexure P/1, does not require submission of attested copies of the documents, therefore, additional condition could not have been imposed in the advertisement de hors the policy document. Such an argument cannot be accepted. The policy, annexure P/1, and the advertisement, annexure P/2, both have been issued by the Indian Oil Corporation. The incorporation of condition of submission of attested copies of the documents is not contrary to but in addition to the policy documents. The same Corporation, which had issued policy document, was competent to incorporate the additional condition while issuing the advertisement. It is worth noting that the application was submitted by the petitioner in response to the advertisement, therefore, the petitioner was required to fulfill the conditions mentioned in the advertisement.

13. Such an argument cannot be accepted also for the reason that the process of selection and award of marks disclosed in the reply shows that in level 1 selection marks are awarded out of the total 88 marks and level 2 selection which is the stage of interview marks are awarded out of 12 marks. The Screening at level 1 as well as at level 2 takes place by a Committee comprising of three officers. At level 1 the marks are awarded under the different heads mainly on the basis of the documents submitted by the candidates along with the application form. Therefore, the attestation of documents by the candidate becomes relevant. The issue relating to the compliance of condition concerning submission of the documents along with the application and the attestation of such documents and the mandatory nature of such condition had come up before this court at earlier occasion.

14. This court while considering similar issue in respect of the advertisement issued by the *Indian Oil Corporation in Manoj Joshi V. Indian Oil Corporation*

SHIV DAYAL SINGH Vs. GENERAL MANAGER, INDIAN OIL CORPORATION

Ltd. and others, W.P.No.4336/2007, in the order dated 16.1.2008 has taken the view that

"The pleadings of the writ petitioner contained in the writ petition would show that the factum of the petitioner having appended unattested copies of the document had not been disputed. As a matter of fact, the petitioner has maintained that he had attached the unattested copies (though signed by himself) with an undertaking that he will produce the original at the time of interview. The reply of the respondent-Corporation also depicts that the only reason given by the corporation to reject the application of the petitioner was that the documents appended with the application were not attested. In these circumstances when the factum of appending the unattested documents is not even in dispute, then the petitioner cannot be heard to claim that no reasons have been given to reject his application".

15. This court while considering the issue of unattested photocopy of the medical certificate in the light of paragraphs 10(e) and 10(h) in the order dated 10.11.2007 in *Manish Kumar Shukla V. Indian Oil Corporation Ltd. and another*, passed in W.A.No.695/2007 took the view that :

"In our considered opinion, this arguments can not be accepted. Paragraph 10(e) and 10(h) operate in different fields. Paragraph 10(h) refers to rejection of the application on availability of certain grounds, while paragraph 10(e) says that any application, which is incomplete etc. would not be considered, which would mean that such application would not be entertained. Undisputedly, the medical certificate filed by the present appellant, though was a photo stat copy of the original, but was not duly attested and if that be so, not wrong can be found with the order passed by the authority and by the learned Single Judge. The appeal deserves to be and is accordingly dismissed. Consequently, I.A.No.16737/07 is also rejected".

16. This court in *Pradeep Sharma V. Indian Oil Corporation and another*, W.P.No.3773/2007, considering the similar advertisement by order dated 10.1.2008 took the view that no fault can be found if the mandate of advertisement is strictly followed and held that :

"8. A perusal of the advertisement indicates that the requirement of the advertisement is to give a demand draft or pay order in the name of Indian Oil Corporation Ltd. and the Senior Divisional Manager is only authorized to receive the applications. There is nothing in the advertisement to indicate that demand draft

SHIV DAYAL SINGH V. GENERAL MANAGER, INDIAN OIL CORPORATION

is also to be drawn in the name of Senior Divisional Manager. Petitioner may be right in contending that it was a mistake committed by him but the mistake has resulted in non-compliance with the requirement of the advertisement which entitles the respondent to reject the application. That being so, this court cannot interfere with the action of the respondent as respondent have strictly followed the mandate of the advertisement and has rejected the application of the petitioner finding non-compliance of the requirement prescribed in the advertisement".

17. Similarly, in the writ petitions W.P.No.9246/2006 and W.P.No.7838/2006 while considering the similar advertisement this court has taken the view that submission of attested copies of documents along with the application form was a mandatory requirement. This court vide order dated 17.10.2006 passed in *Krishna Shekhar Singh V. Union of India and others*, W.P.No.9246/2006 took the view that :

"It is thus, apparent that Gajendra Singh, infact, did not enclose attested copies of educational qualification certificate as proof along with his application form, which was a mandatory requirement".

18. Similarly, this court in order dated 9.4.2007 passed in *Manoj Tarwala V. Indian Oil Corporation Ltd. and another*, W.P.No.7738/2006, took the view that :

"It is thus apparent that petitioner did not enclose the attested copies of educational certificates as proof along with his application form, which was a mandatory requirement".

Thus, while considering the similar advertisement this court has consistently taken the view that submission of the attested copies of the documents along with the application form is necessary and it is a mandatory requirement.

19. Thus no error has been committed by the respondents no.1 and 2 in denying marks to the petitioner on the basis of unattested documents.

20. Counsel for the petitioner has further submitted that the land, which is available with the petitioner though includes the land of his brothers, but it is better suited then the land available with the respondent no.3, therefore, error has been committed in awarding less marks under the heading 'Capability to provide Land'. Under this heading 35 marks are there for Own Land and 25 marks in case of Firm Offer. It is the admitted position that the land offered by the petitioner was not own land, therefore, it would fall under firm offer and no error was committed in awarding less marks under the heading Capability to provide Land.

21. The petitioner has also challenged the order of the Grievance Redressal Cell on the ground that no opportunity of hearing was given to the petitioner by the Grievance Redressal Cell. Annexure R/1-1 filed by respondents no.1 and 2

SHIV DAYAL SINGH Vs. GENERAL MANAGER, INDIAN OIL CORPORATION

shows that, on receipt of the petitioner's complaint the Grievance Redressal Cell had sent a letter to the petitioner through the registered post asking him to submit details of the allegations and to substantiate the allegation with supporting documents within 30 days. Thus, apparently, that Grievance Redressal Cell had passed the order after giving an opportunity to the petitioner.

22. The grievance of the petitioner that the order of the Grievance Redressal Cell is a non-speaking order is also not correct since the annexure R/1-2 filed by the respondents no.1 and 2 along with the return contains the details of the allegations, findings and remarks of the Grievance Redressal Cell. Adequate reasons have been assigned by the Grievance Redressal Cell for considering each of the nine allegations, which were made by the petitioner in the complaint before the Grievance Redressal Cell.

23. The petitioner has also raised a challenge to the evaluation and award of marks by the respondents under the different heads. It is found that the evaluation was done and the marks were awarded under different heads by a Three Member Committee. It is the settled law that the judicial review of the administrative action is limited to the decision-making process and merits of the decision fall outside the scope of judicial review. It is worth noting that no malafides have been alleged against the members of the selection committee. The Supreme Court in the matter of *K. Vinod Kumar V. S. Palanisamy and others*, (2003)10 SCC 681, has held that :

7. The proceedings of the Dealer Selection Board must satisfy the requirements of a bona fide administrative decision arrived at in a fair manner. There are no mala fides alleged against the Dealer Selection Board or the President or any Member thereof. There is no specific plea raised impugning the manner of marking. It appears that all the three members of the Board including the president conducted the proceedings, and each one of them gave marks expressing his own assessment of the merits of the applicants. The marks given by the three were then totalled and arranged in the order of merit. The appellant herein topped the list. In the absence of a particular procedure or formula having been prescribed for the Board to follow, no fault can be found with the manner in which the proceedings were conducted by the Board. The Board is entrusted with the task of finding out the best suitable candidate and, so long as the power is exercised bona fide, the Board is free to devise and adopt its own procedure subject to satisfying the test of reasonableness and fairness. There is no averment that the procedure adopted by the Board was arbitrary, unfair or unreasonable.

24. It is also settled law that this court while exercising the jurisdiction under section 226 of the Constitution does not sit in appeal while examining challenge to

SHIV DAYAL SINGH Vs. GENERAL MANAGER, INDIAN OIL CORPORATION

administrative or quasi judicial decisions and interference is required only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action. In the present case no such unreasonableness of action is found in the action of the respondents. Supreme Court in the matter of *Haryana Financial Corporation and another v Jagdamba Oil Mills and another*, (2002) 3 SCC 496, has held that the obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice, which the quasi-judicial authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in *A.K. Kraipak v. Union of India* [1969 (2) SCC 262]. Even so the extent of judicial scrutiny in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the

administrative authorities: they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". (As per Lord Diplock in *Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside* (1977 AC 1014). The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene.

In the present case, the decision of the dealer Selection Board is neither unfair or unreasonable.

25. There is also some delay on the part of the petitioner in filing the writ petition. The Grievance Redressal Cell had passed the order dated 20.12.2007. Thereafter, the letter of intent was issued to the respondent no.3 on 5.2.2008 and the work of setting up the KSK was started by the respondent no.3. It has also been stated by the respondent no.3 that he took a loan of Rs.4 Lacs at the rate of 10.25% per annum from the Bank for setting up of the KSK but since the petitioner in the meanwhile approached this court and obtained an interim order dated 14.3.2008 restraining the respondent no.3 from commencing the work of KSK, therefore, no

SHIV DAYAL SINGH V. GENERAL MANAGER, INDIAN OIL CORPORATION

further action could be taken by the respondents. The question of delay needs consideration keeping in mind facts of the case.

26. Supreme court in the matter of *Ramana Dayaram Shetty V. International Airport Authority of India*, AIR 1979 SC 1628, had refused to interfere after lapse of five month since the concerned respondent had in the meanwhile altered his position. The Supreme Court had held that :

35. It is difficult to understand why the appellant should have waited until 8th November, 1977 to file the writ petition when the tender of the 4th respondents was accepted as far back as 19th April, 1977. The explanation given by the appellant is that he was not aware of the acceptance of the tender of the 4th respondents but that is a rather naive explanation which cannot be easily accepted. It is not possible to believe that the appellant who was so well connected with A. S. Irani and G. S. Irani did not know that A. S. Irani had failed to obtain the contract for running the restaurant and the snacks bars and that this contract had been awarded to the 4th respondents as a result of which A. S. Irani was being pressed to close down his restaurant and snack bars. We have grave doubts whether this writ petition was commenced by the appellant bona fide with a view to protecting his own interest. Moreover, the writ petition was filed by the appellant more than five months after the acceptance of the tender of the 4th respondents and during this period, the 4th respondents incurred considerable expenditure aggregating to about Rs. 1,25,000/- in making arrangements for putting up the restaurant and the snack bars and in fact setup the snack bars and started running the same. It would now be most inequitable to set aside the contract of the 4th respondents at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of the 4th respondents but the appellant allowed a period of over five months to elapse during which the 4th respondents altered their position. We are, therefore, of the view that this is not the fit case in which we should interfere and grant relief to the appellant in the exercise of our discretion under the Article 226 of the constitution.

27. In the present case also respondent no.3 had altered his position before the petitioner had approached this court.

28. In view of the aforesaid I do not find any merit in the writ petition and the same is accordingly dismissed. No orders as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 186
WRIT PETITION
Before Mr. Justice S.C. Sharma
 15 October, 2008*

RAHUL SINGH

... Petitioner

Vs.

... Respondents

STATE OF M.P. & ors.

A. Service Law - Compassionate appointment - Deceased Government Servant was a Hindu and has contracted second marriage during subsistence of first marriage - Children born out of second marriage - They were legitimate though the marriage itself was void - Legitimate children were entitled for family pension and compassionate appointment. (Para 9)

क. सेवा विधि - अनुकम्पा नियुक्ति - मृतक शासकीय सेवक हिन्दू था और पहले विवाह के बने रहने के दौरान उसने दूसरा विवाह कर लिया - दूसरे विवाह से संतान पैदा हुई - वे धर्मज संतान हैं यद्यपि विवाह स्वमेव शून्य था - धर्मज संतान परिवार पेंशन और अनुकम्पा नियुक्ति पाने की हकदार।

B. Service Law - Natural Justice - Petitioner granted compassionate appointment as child constable on 29.08.2001 but by the order dated 06.11.2002 the order has been withdrawn - While issuing the order, the respondents have not granted any opportunity of hearing to the petitioner - Held - In case an order is passed recalling another administrative order, an opportunity of show cause to the adversely affected person has to be given in the matter - Petition allowed. (Paras 6 & 7)

ख. सेवा विधि - नैसर्गिक न्याय - याची को बालक आरक्षक के रूप में अनुकम्पा नियुक्ति तारीख 29.08.2001 को दी गई किन्तु तारीख 06.11.2002 के आदेश द्वारा उसे वापस ले लिया गया - प्रत्यर्थियों ने आदेश जारी करने के पूर्व याची को सुनवाई का कोई अवसर नहीं दिया - अभिनिर्धारित - यदि कोई आदेश पारित किया जाता है और उस आदेश को वापस लेकर कोई अन्य प्रशासनिक आदेश दिया जाता है तो प्रतिकूल रूप से प्रभावित होने वाले व्यक्ति को उस विषय में कारण दर्शाने का अवसर दिया जाना चाहिए - याचिका मंजूर।

Cases referred :

(1999) 8 SCC 378, (2007) 1 SCC 331, (2003) 12 SCC 408, (1994) 5 SCC 180, 1995(1) Cal.LT 462, 2006(10) SCALE 86, (2000) 2 SCC 431, (2000) 2 SCC 238.

Jitendra Sharma, for the petitioner.

Brijesh Sharma, G.A., for the respondent/State.

O R D E R

S.C. SHARMA, J. :-The petitioner before this Court is a Child Constable working at 5th Battalion, Special Armed Force, Morena has filed this present writ petition through his guardian mother Munnidevi assailing the legality and validity

RAHUL SINGH Vs. STATE OF M.P.

of the order dated 06-11-2002 by which the compassionate appointment granted to the petitioner has been cancelled.

2. The contention of the petitioner is that the father of the petitioner was serving the Special Armed Force and died in harness while in service. The petitioner has submitted an application for grant of compassionate appointment and the competent authority by an order dated 29-08-2001 has granted compassionate appointment to the petitioner as Child Constable. It is also pertinent to note that petitioner while submitting an application for grant of compassionate appointment on 06-08-1997 has categorically informed the Deputy Inspector General S.A.F. Gwalior that he is son of Smt. Munnidevi who is second wife of the deceased government servant namely Shri Rishav Dev Singh. An affidavit of Smt. Kamlesh first wife of Shri Rishav Dev Singh is also on record wherein she has stated that the petitioner's mother was married to late Shri Rishav Dev Singh and she does not have any objection in case compassionate appointment is granted to the petitioner. This fact was very much within the knowledge of authorities and the Commandant, 5th Battalion S.A.F. Morena has acknowledged this fact in his letter dated 06-08-1997 thereafter, the matter was again examined and on 29-08-1997 the petitioner was informed that his name has been kept in waiting list at serial No. 32-A and as per his turn, he will be granted compassionate appointment, thereafter, the petitioner was medically examined and finally an order has been passed granting him compassionate appointment on 29-08-2001 appointing the petitioner as Child Constable. The petitioner is aggrieved by the order dated 06-11-2002 by which the compassionate appointment granted to him has been withdrawn. The contention of the petitioner is that the aforesaid order has been passed in violation of the principle of natural justice and fair play and there is no dispute that he is son of deceased government servant.

3. The respondent State has filed a detailed reply and it has been stated in the reply that the name of the petitioner does not find place in the service book of the deceased government servant. Moreover, the mother of the petitioner is second wife of the deceased government servant and therefore, the petitioner cannot be treated to be son of the deceased government servant. The respondents have therefore, justified their action in cancelling the compassionate appointment granted to the petitioner. The respondents at the same time have admitted that this information regarding second wife was very much disclosed by the petitioner while submitting an application for grant of compassionate appointment. The respondents have further stated that Smt. Munnidevi, mother of the petitioner is not a legally wedded wife and the name of petitioner and his mother has not been entered in the service book of the deceased government servant, therefore, the order of compassionate appointment has rightly been withdrawn.

4. In the present case succession certificate has also been brought on record wherein the Court of competent jurisdiction has directed the payment of dues of the deceased government servant to the petitioner, petitioner's mother as well as first wife of deceased government servant being the legal heirs.

RAHUL SINGH Vs. STATE OF M.P.

5. Heard learned counsel for the parties at length and perused the record.
6. In the present case the petitioner was appointed by an order dated 29-08-2001 and services have been put to an end by an order dated 06-11-2002. This court while issuing notice to the respondents has granted an interim order on 14-11-2002 and the petitioner is very much continuing in service till date. There is no other counter claim nor any person stating himself to be legal heir of the deceased government servant has applied for compassionate appointment in the matter. It is also undisputed that the petitioner is son of the deceased government servant. The only controversy is that he is son of second wife. The first wife of the deceased government servant has also submitted an affidavit to the department stating that she does not have any objection regarding appointment of the petitioner on compassionate ground and therefore, there appears to be no justification in throwing out the petitioner who is in fact looking after his mother as well as his step-mother as stated by the learned counsel for the petitioner. In the present case while issuing the impugned order the respondents have not granted any opportunity of hearing to the petitioner.

The Apex Court in the case of *Gajanan L. Pernekar Vs. State of Goa and another* (1999) 8 SCC 378 has held that in case an order is passed recalling another administrative order, an opportunity of show cause to adversely affected person has to be given in the matter. The Apex Court was dealing with a case of recall of absorption and it was held that opportunity of hearing should have been provided to the employees before recalling the order of absorption.

7. Similarly, the Apex Court in the case of *Shekhar Ghosh Vs. Union of India and another* (2007) 1 SCC 331 has held that an opportunity of hearing has to be granted to an employee in those cases where civil consequences are involved. The Apex Court has held in paragraphs 18, 19, 20, 21 and 22 as under:-

"18. Curiously Respondents in their counter-affidavits filed before the Tribunal and the High Court did not raise any plea of rectification of any mistake. It was also not stated in the show cause notice issued to the appellant. Only a plea of mistake was taken for the first time before the Tribunal, but no plea was taken that it was entitled to rectify the same or his order impugned before it was capable of being rectified. Thus, it was not a case where an opportunity of hearing was given to Appellant on the premise that a mistake had been committed by the authorities of the first respondent and the same was required to be rectified.

19. If a mistake is to be rectified the same should be done as expeditiously as possible. [See *Board of Secondary Education, Assam v. Mohd. Sarjumma* (2003) 12 SCC 408]

20. We are not oblivious that in *Ram Chandra Tripathi v.*

RAHUL SINGH Vs. STATE OF M. P.

U.P. Public Services Tribunal IV and Others [(1994) 5 SCC 180], an order passed by way of a mistake was permitted to be corrected as the same was done in violation of the order of injunction. In such a situation only, this Court held that an opportunity of being heard for correcting such mistake would not arise because there would not have been any occasion to take one view or the other in the matter on the basis of representation to be made by the affected employee.

21. It is also not a case where a mistake was apparent on the face of the records and, thus, compliance of the principles of natural justice would not have made any difference as was in the case of *Smt. Ratna Sen nee Roy v. The State of West Bengal & Ors.* [1995 (1) Cal. LT 462].

22. Requirements to comply with the principles of natural justice would, therefore, vary from case to case. If upon giving an opportunity of hearing to an affected employee, it is possible to arrive at a different finding, the principles of natural justice must be complied with. We may notice that recently in *Union of India & Ors. v. Bikash Kuanar* [2006 (10) SCALE 86], a Division Bench of this Court opined:-

"It is now trite that if a mistake is committed in passing an administrative order, the same may be rectified. Rectification of a mistake, however, may in a given situation require compliance of the principles of natural justice. It is only in a case where the mistake is apparent on the face of the records, a rectification thereof is permissible without giving any hearing to the aggrieved party.

8. The respondents have cancelled the petitioner's appointment as he is son of second wife and the deceased government servant has married Smt. Munni Devi in spite of the fact that he was married earlier to Smt. Kamlesh (First Wife). The question involved in the present writ petition is whether a child born out of second marriage by a Hindu is entitled for compassionate appointment or not. The General Administration Department of the State of Madhya Pradesh has issued executive instructions for grant of compassionate appointment to the State Government employee on 01-05-2000 and the aforesaid executive instruction was modified from time to time. Recently the State Government has issued fresh executive instructions dated 22nd January, 2007 and the earlier executive instructions as well as the executive instruction dated 22-01-2007 provides for grant of compassionate appointment to the following category of persons (translated by this Court).

RAHUL SINGH Vs. STATE OF M.P.

A) wife of the deceased government servant or solēly dependent husband.

B) son of a deceased government servant, un-married daughter, widowed daughter, divorced daughter who was fully depending upon a government servant at the time of the death of a government servant.

C) unmarried brother and sister of the deceased government servant subject to recommendation of the parents of the deceased government servant.

D) In case number of claimants are more, based upon the recommendations by husband/wife or other members of the family.

From a bare perusal of the aforesaid executive instructions, it is evident that a child of a government servant is entitled for consideration for grant of compassionate appointment.

The Apex Court in the case of *Rameshwari Devi Vs. State of Bihar and others* (2000) 2 SCC 431 has held as under:-

"9. Now, when first order was cancelled by the State Government and second passed depriving Yogmaya Devi and her children of any right in the pensionary benefits of Narain Lal, she filed writ petition in the High Court, which as noted above, was allowed by the learned single Judge and later appeal filed by Rameshwari Devi against that was dismissed by the Division Bench of the High Court which is impugned. Learned single Judge referred to Section 16 of the Hindu Marriage Act, 1955 holding that even though the marriage of Narain Lal with Yogmaya Devi was void their children would be legitimate and thus would be entitled to claim share in the family pension and death-cum-retirement gratuity of Narain Lal but only till they attained majority. Learned single Judge accordingly issued direction to the State Government to issue fresh sanction order for payment of arrears of family pension and death-cum-retirement gratuity to the minor children born from the wedlock between Yogmaya Devi and Narain Lal till they attain majority but nothing would be payable to Yogmaya Devi.

13. But then it is not necessary for us to consider if Narain Lal could have been charged of misconduct having contracted a second marriage when his first wife was living as no disciplinary proceedings were held against him during his lifetime. In the present case, we are concerned only with the question as to who is entitled to the family pension and death-cum-retirement gratuity on the

RAHUL SINGH Vs. STATE OF M.P.

death of Narain Lal. When there are two claimants to the pensionary benefits of a deceased employee and there is no nomination wherever required State Government has to hold an inquiry as to the rightful claimant. Disbursement of pension cannot wait till a civil Court pronounces upon the respective rights of the parties. That would certainly be a long drawn affair. Doors of civil Courts are always open to any party after and even before a decision is reached by the State Government as to who is entitled to pensionary benefits. Of course, inquiry conducted by the State Government cannot be a sham affair and it could also not be arbitrary. Decision has to be taken in a bona fide reasonable and rational manner. In the present case an inquiry was held which cannot be termed as sham. Result of the inquiry was that Yogmaya Devi and Narain Lal lived as husband and wife since 1963. A presumption does arise, therefore, that marriage of Yogmaya Devi with Narain Lal was in accordance with Hindu rites and all ceremonies connected with a valid Hindu marriage were performed. This presumption Rameshwari Devi has been unable to rebut. Nevertheless, that, however, does not make the marriage between Yogmaya Devi and Narain Lal as legal. Of course, when there is a charge of bigamy under Section 494, IPC strict proof of solemnisation of the second marriage with due observance of rituals and ceremonies has been insisted upon.

15. Rameshwari Devi has raised two principal objections : (1) marriage between Yogmaya Devi and Narain Lal has not been proved, meaning thereby that there is no witness to the actual performance of the marriage in accordance with the religious ceremonies required for a valid Hindu marriage and (2) without a civil Court having pronounced upon the marriage between Yogmaya Devi and Narain Lal in accordance with Hindu rights, it cannot be held that the children of Yogmaya Devi with her marriage with Narain Lal would be legitimate under Section 16 of the Hindu Marriage Act. First objection we have discussed above and there is nothing said by Rameshwari Devi to rebut the presumption in favour of marriage duly performed between Yogmaya Devi and Narain Lal. On the second objection, it is correct that no civil Court has pronounced if there was a marriage between Yogmaya Devi and Narain Lal in accordance with Hindu rights. That would, however, not debar the State Government from making an inquiry about the existence of such a marriage and act on that in order to grant pensionary and other benefits to the children of Yogmaya

RAHULSINGH Vs. STATE OF M.P.

Devi. On this aspect we have already adverted to above. After the death of Narain Lal, inquiry was made by the State Government as to which of the wives of Narain Lal was his legal wife. This was on the basis of claims filed by Rameshwari Devi. Inquiry was quite detailed one and there are in fact two witnesses examined during the course of inquiry being (1) Sant Prasad Sharma, teacher, DAV High School, Danapur and (2) Sri Basukinath Sharma, Shahpur Maner who testified to the marriage between Yogmaya Devi and Narain Lal having witnessed the same. That both Narain Lal and Yogmaya Devi were living as husband and wife and four sons were born to Yogmaya Devi from this wedlock has also been testified during the course of inquiry by Chandra Shekhar Singh, Rtd. District Judge, Bhagalpur, Smt. (Dr.) Arun Prasad, Sheohar, Smt. S. N. Sinha, w/o Sri S. N. Sinha, ADM and others. Other documentary evidence were also collected which showed Yogmaya Devi and Narain Lal were living as husband and wife. Further, the sons of the marriage between Yogmaya Devi and Narain Lal were shown in records as sons of Narain Lal.

In the present case it was held that children born out of second marriage, though the deceased government servant is a Hindu contracted second marriage during subsistence of his first marriage, were legitimate though the marriage itself was void and therefore, the legitimate children were entitled for family pension.

The Apex Court relying upon the earlier judgment delivered in the case of Rameshwari Devi has decided the case of *Vidhyadhari and others Vs. Sukhrana Bai and others* (2008) 2 SCC 238 once again holding that the children born out of such marriage will be entitled for terminal benefits arising out of the employment of the deceased government servant. The Apex Court in paragraph No. 12, 13 and 14 has held as under:-

“12. However, unfortunately, the High Court stopped there only and did not consider the question as to whether in spite of this factual scenario Vidhyadhari could be rendered the succession certificate. The High Court almost presumed that succession certificate can be applied for only by the legally wedded wife to the exclusion of anybody else. The High Court completely ignored the admitted situation that this succession certificate was for the purposes of collecting the provident fund, Life Cover Scheme, pension and amount of list insurance and amount of other dues in the nature of death benefits of Sheetaldeen. That Vidhyadhari was a nominee is not disputed by anyone and is, therefore proved. Vidhyadhari had claimed that succession certificate mentioning

RAHUL SINGH Vs. STATE OF M.P.

therein the names of four children whose status as legitimate children of Sheetaldeen could not and cannot be disputed.

13. This Court in Rameshwari Devi case has held that even if a government servant had contracted second marriage during the subsistence of his first marriage, children born out of such second marriage would still be legitimate though the second marriage itself would be void. The Court, therefore, went on to hold that such children would be entitled to the pension but not the second wife. It was, therefore, bound to be considered by the High Court as to whether Vidhyadhari being the nominee of Sheetaldeen could legitimately file an application for succession certificate and could be granted the same. The law is clear on this issue that a nominee like Vidhyadhari who was claiming the death benefits arising out of the employment can always file an application under Section 372 of the Succession act as there is nothing in that section to prevent such a nominee from claiming the certificate on the basis of nomination. The High Court should have realised that Vidhyadhari was not only a nominee but also was the mother of four children of Sheetaldeen who were the legal heirs of Sheetaldeen and whose names were also found in Form A which was the declaration of Sheetaldeen during his lifetime. In her application Vidhyadhari candidly pointed out the names of the four children as the legal heirs of Sheetaldeen. No doubt that she herself has claimed to be a legal heir which status she could not claim but besides that she had the status of a nominee of Sheetaldeen. She continued to stay with Sheetaldeen as his wife for long time and was a person of confidence for Sheetaldeen who had nominated her for his provident fund, Life Cover Scheme, pension and amount of life insurance and amount of other dues. Under such circumstances she was always preferable even to the legally wedded wife like Sukhrana Bai who had never stayed with Sheetaldeen as his wife and who had gone to the extent of claiming the succession certificate to the exclusion of legal heirs of Sheetaldeen. In the grant of succession certificate the Court has to use its discretion where the rival claims, as in this case, are made for the succession certificate for the properties of the deceased. The High Court should have taken into consideration these crucial circumstances. Merely because Sukhrana Bai was the legally wedded wife that by itself did not entitle her to a succession certificate in comparison to Vidhyadhari who all though had stayed as the wife of Sheetaldeen had borne his four children

RAHUL SINGH Vs. STATE OF M.P.

and had claimed a succession certificate on behalf of children also. In our opinion, the High Court was not justified in granting the claim of Sukhrana Bai to the exclusion not only of the nominee of Sheetaldeen but also to the exclusion of his legitimate legal heirs.

14. Therefore, though we agree with the High Court that Sukhrana Bai was the only legitimate wife yet, we would choose to grant the certificate in favour of Vidhyadhari who was his nominee and the mother of his four children. However, we must balance the equities as Sukhrana Bai is also one of the legal heirs and besides the four children she would have the equal share in Sheetaldeen's estate which would be 1/5th. To balance the equities we would, therefore, choose to grant succession certificate to Vidhyadhari but with a rider that she would protect the 1/5th share of Sukhrana Bai in Sheetaldeen's properties and would hand over the same to her. As the nominee she would hold the 1/5th share of Sukhrana Bai in trust and would be responsible to pay the same to Sukhrana Bai. We direct that for this purpose she would give a security in the trial court to the satisfaction of the trial court."

9. Keeping in view law laid down by the Apex Court in the aforesaid case and also scheme of grant of compassionate appointment which provides that children of a deceased government servant shall be entitled for grant of compassionate appointment subject to conditions enumerated in the policy relating to grant of compassionate appointment there remains no doubt that children born out of second marriage even though the deceased employee is a Hindu and has contracted second marriage during subsistence of his first marriage shall be entitled for consideration for grant of compassionate appointment. In the present case it is not in dispute that the petitioner is son of a deceased government servant though he was born out of second marriage during the subsistence of the first marriage and the first wife has also given an affidavit that she does not have any objection in case the petitioner is appointed on compassionate ground and therefore, there appears to be no justification on the part of the respondents in cancelling the appointment already granted to the petitioner by an impugned order dated 06-11-2002. Resultantly, the petition stands allowed and disposed of.

10. With the aforesaid observation, the present writ petition stands allowed and disposed of. No order as to costs.

Certified copy as per rules.

Petition allowed.

I.L.R. [2009] M. P., 195
WRIT PETITION
Before Mr. Justice Ajit Singh
 21 October, 2008*

SHRINIVAS VERMA
 Vs.

... Petitioner

STATE OF M.P. & ors.

... Respondents

Service Law - Recovery - Petitioner granted pay scale as per salary mentioned in the appointment order - Order of recovery issued on the ground that petitioner appointed in the work charged and contingent establishment and thus would be entitled to salary as per the rates fixed by the Collector - Held - Petitioner was given compassionate appointment on the regular pay scale without any misrepresentation on his part - The recovery of excess payment would cause grave hardship to him - Therefore, it is directed that no steps be taken against the petitioner to recover or to adjust any excess amount paid to him due to the fault of respondents. (Para 5)

सेवा विधि - वसूली - याची को नियुक्ति आदेश में उल्लिखित वेतन अनुसार वेतनमान प्रदान किया गया - वसूली का आदेश इस आधार पर जारी किया गया कि याची को कार्यभारित तथा आकस्मिक स्थापना में नियुक्त किया गया और इस प्रकार कलेक्टर द्वारा नियत दरों के अनुसार वेतन के लिए हकदार होगा - अभिनिर्धारित - याची को अनुकंपा नियुक्ति नियमित वेतनमान पर उसकी ओर से बिना किसी दुर्व्यपदेशन के दी गई - अतिरिक्त अदायगी की वसूली उसे गंभीर कठिनाई कारित करेगी - इसलिए, यह निदेश दिया गया कि याची के विरुद्ध उसे प्रत्यर्थियों की त्रुटि के कारण अदा गई किसी अतिरिक्त राशि को वसूल करने या समायोजित करने की कोई कार्यवाही न की जाए।

Case referred :

(2006) 11 SCC 709.

Amrit Ruprah, for the petitioner.

Harish Agnihotri, G.A., for the respondents.

O R D E R

AJIT SINGH, J. :- This petition was originally filed as Original Application No. 538/1999 before the Madhya Pradesh Administrative Tribunal, Jabalpur. The Tribunal has been abolished by the State Government and as such the petition has reached this court for its adjudication.

2. By this petition, the petitioner has prayed for quashing of order dated 2.2.1999, Annexure A4, whereby the recovery of excess payment of salary from him has been directed by the Superintending Engineer (respondent no. 3).

3. Briefly stated the facts giving rise to this petition are that petitioner's father and brother were serving under the respondents in the Ban Sagar Project, Rewa, and after their death the Chief Engineer (respondent no. 2) by order dated 22.4.1995, Annexure A2, approved the appointment of petitioner on compassionate

SHRINIVAS VERMA Vs. STATE OF M. P.

grounds in the Work Charged and Contingent Establishment on the post of Conductor in the pay scale of Rs.750-945. The Executive Engineer (respondent no. 4) thereupon issued the appointment order dated 1.6.1995, Annexure A3, of the petitioner in the aforesaid pay scale. On receiving the appointment order, the petitioner immediately joined the services whereupon the respondents paid him the monthly salary mentioned in the appointment order. After having worked for almost four years, the Superintending Engineer (respondent no. 3) issued the impugned order dated 2.2.1999, Annexure A4, stating therein that the appointment of petitioner in the Work Charged and Contingent Establishment should have been made on the fixed Collector's rate for three years and only thereafter he became entitled for the salary in the regular pay scale. On this ground the Superintending Engineer (respondent no. 3) directed for the recovery of excess amount of salary from the petitioner. The submission of petitioner is that the respondents have paid him the same salary, which was mentioned in the appointment order, and therefore after more than three years the order of recovery on the pretext of excess payment of salary from him is illegal.

4. The respondents, in their return, have stated that the appointment of petitioner in the Work Charged and Contingent Establishment as per the Government Circular dated 10.5.1984, Annexure 2, could have been made on the fixed Collector's rate for a period of three years and only thereafter he was entitled for the regular pay scale. According to the respondents, the appointment order of petitioner in the regular pay scale was, therefore, issued by mistake and as such the impugned order of recovery of excess payment from him is fully justified.

5. It is true that Government Circular dated 10.5.1984 provides that the appointment in the Work Charged and Contingent Establishment should be made on the fixed Collector's rate for a period of three years and only thereafter the salary of the appointee be fixed in the regular revised pay scale but the fact remains that the salary of petitioner was fixed in the regular pay scale at the time of his appointment without any misrepresentation on his part. It appears that even the Chief Engineer, who appointed the petitioner, was not aware about the Circular dated 10.5.1984 of the State Government and it is only when the matter was placed for consideration before the Engineer-in-Chief the mistake was pointed out. Recently, in *Col. B. J. Akkara Vs. Government of India and others* (2006) 11 SCC 709 the Supreme Court has held that the relief against the recovery of excess payment from a lower rank Government employee who has not misrepresented is granted by the courts on equity to relieve him from the hardship that will be caused if recovery is implemented. The Supreme Court has also observed that such an employee spends the entire amount which he receives for the upkeep of his family genuinely believing that he is entitled to it and any subsequent action to recover the excess payment would cause undue hardship to him. In the present case also, the petitioner was given compassionate appointment

KANTA RAIKWAR (SMT.) Vs. KAILASH CHANDRA VERMA

on the regular pay scale without any misrepresentation on his part and the recovery of excess payment would cause grave hardship to him. I, therefore, direct that no steps be taken against the petitioner to recover or to adjust any excess amount paid to him due to the fault of respondents. The impugned order dated 2.2.1999, Annexure A4, is accordingly quashed as not justified on equitable grounds.

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

Petition allowed.

I.L.R. [2009] M. P., 197

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

29 July, 2008*

KANTA RAIKWAR (SMT.)

... Appellant

Vs.

KAILASH CHANDRA VERMA

... Respondent

A. Hindu Marriage Act (25 of 1955), Sections (13)(1)(i-a) & (i-b) - Cruelty - Desertion - Pleadings - Evidence - Trial court dismissed the suit of divorce for lack of proper evidence - Held - The grounds of cruelty and desertion are specifically pleaded and in support of the same the elaborate evidence has been adduced at trial by the wife - As per settled proposition, the material facts are required to be pleaded and not the evidence - Appeal allowed.

(Para 7)

क. हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ (13)(1)(i-a) व (i-b) - क्रूरता - अभित्यजन - अभिवचन - साक्ष्य - विचारण न्यायालय ने विवाह विच्छेद का वाद समुचित साक्ष्य के अभाव के कारण खारिज किया - अभिनिर्धारित - क्रूरता और अभित्यजन के आधार विनिर्दिष्ट रूप से अभिवचित किये गये और उसके समर्थन में पत्नी द्वारा विचारण में विस्तृत साक्ष्य पेश की गई - स्थापित प्रतिपादना के अनुसार, महत्वपूर्ण तथ्यों का अभिवचन किया जाना अपेक्षित है साक्ष्य का नहीं - अपील मंजूर।

B. Hindu Marriage Act (25 of 1955), Sections (13)(1)(i-a) & (i-b) - Pleadings & Proof - Facts pleaded by the wife are denied by the husband in his WS - On recording the deposition of wife, wife and her witnesses have neither been cross-examined by the husband nor any evidence in support of the objection taken in the WS was adduced by the husband - Mere pleadings of the parties are not sufficient to draw any inference unless the same is supported by adducing the evidence - In the lack of ocular evidence, the husband was not entitled to get any relief merely on the basis of pleadings - Appeal allowed.

(Para 7)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ (13)(1)(i-a) व (i-b)-

KANTA RAIKWAR (SMT.) Vs. KAILASH CHANDRA VERMA

अभिवचन और सबूत – पत्नी द्वारा अभिवचित किये गये तथ्यों से पति द्वारा अपने लिखित कथन में इंकार किया गया – पत्नी के बयान अभिलिखित करने पर, न तो पति द्वारा पत्नी और उसके साक्षियों का प्रतिपरीक्षण किया गया और न ही पति द्वारा लिखित कथन में उठायी गई आपत्ति के समर्थन में कोई साक्ष्य पेश की गई – पक्षकारों के मात्र अभिवचन कोई अनुमान निकालने के लिए पर्याप्त नहीं हैं जब तक उनका समर्थन साक्ष्य पेश करके न किया गया हो – प्रत्यक्ष साक्ष्य के अभाव में मात्र अभिवचनों के आधार पर पति कोई अनुतोष प्राप्त करने का हकदार नहीं – अपील मंजूर।

Case referred :

(2007) 4 SCC 511.

A.M. Trivedi with *D.K. Mishra*, for the appellant.

K.S. Baghel, for the respondent.

J U D G M E N T

U.C. MAHESHWARI, J. :- This appeal is preferred by the plaintiff under Section 28 of the Hindu Marriage Act 1956, (in short the Act) being aggrieved by the judgment and decree dated 12.5.2000 passed by IIInd, Add. District Judge, Bhopal in Regular Civil Suit No. 47-A/99 dismissing her application filed against the respondent under Section (13) (1) (i-a) and (i-b) of the Act for decree of divorce.

2. The facts giving rise to this appeal in short are that the appellant got married with the respondent on dated 24.11.1995 as per rites and ritual of the Hindu Community. Thereafter she resided in the matrimonial home with the respondent and performed her pious duties as wife. A huge amount was spent by her parents in the marriage as mentioned in the petition. As per further pleadings from the very beginning of the marriage the behaviour of the respondent with her was remained very cruel and on various occasions she was beaten with abuses by him, stating that he does not have any relation with her. She was not provided proper food in the matrimonial home. As per further averments on demand of the respondent on second day of the marriage Rs.20,000/- was given by her parents to him in respect of the expenses to get the posting order of Law Officer in some Government Department. The same was never returned. In the year 1997 she was intimated by the father of the respondent taking away her articles from the matrimonial home. In response of it she brought the same in the month of June 1998. On account of the cruel treatment of the respondent she is residing with her parents since 2nd March 1996. Subsequent to it respondent neither took her care nor paid any expenses for livelihood or the maintenance. In addition it is pleaded that the appellant being a clever person is having some affairs with a girl and wants to reside with her, that is why he has deserted the appellant. In this regard she gave a notice to the respondent. The same was replied with false averments stating that the respondent does not want to keep her with him. In such premises, the petition for divorce on the ground of cruelty and desertion alongwith the prayer directing the respondent to return her Shtridhan articles and pay the the permanent alimony was filed.

KANTA RAIKWAR (SMT.) Vs. KAILASH CHANDRA VERMA

3. In written statement of the respondent by denying the averments of the petition, it is stated, that the appellant being in service of Central School, Hoshangabad is earning Rs.8,000/- per month and she used to spend the same on her parents and the sister and under their pressure and influence the petition is preferred on the false averments. She is residing at her service place on her own wish. It is also pleaded that he was forced by the appellant to live at Bhopal with her parents. But the same was not possible for him in the family circumstance as after demise of his brother no other competent person was in the family to look after his old aged parents. In spite of it under pressure of the appellant he went and reside with her for some time but she herself was not interested to reside with him. In such premises, they could not reside together. He has been deprived by the appellant from the enjoyment of marital life. In order to bring the appellant on various occasions he went to her service place but there he was insulted by her and the members of her parental family. Thereafter, on false averments this petition has been filed. In such premises, the prayer for dismissal of the petition is made.

4. After framing the issues the evidence was recorded. On appreciation of the same the petition of the appellant was dismissed by the trial court holding that she has failed to prove the grounds of divorce stated in the petition. Being aggrieved by such judgment and decree of the trial court the appellant has come forward to this court with the prayer to allow her petition of divorce by allowing this appeal.

5. Shri A.M. Trivedi, learned Sr. Adv assisted by Shri D.K. Mishra by referring the pleadings of the petition said that the ground of cruelty as well as desertion for getting the decree of divorce are specifically pleaded by the appellant. Besides this the prayer for returning the Stridhan articles and permanent alimony are also made in the petition. At trial in support of the aforesaid pleadings the appellant has recorded her own deposition by stating all relevant facts. The same is further supported by her father. Their testimonies were not challenged on behalf of the respondent in any manner. The same being unrebutted evidence there was no occasion before the trial court to discard the same but contrary to it her petition has been dismissed by the trial court. He further said that it is apparent and undisputed fact on record that the parties are residing separately since 14.6.1998, i.e. more than ten years. Virtually in such circumstances there is no chance to reconcile the marital relations between them as such their marital relationship have become dead mentally and practically both. In such premises, there is no chance between the party to reconcile the matter. In such circumstances the decree of divorce ought to have been passed by the trial court but contrary to it the petition has been dismissed. In support of this contention he placed reliance on decision of the Apex Court in the matter of *Samar Ghosh Vs. Jaya Ghosh* reported in (2007) 4 SCC 511 and prayed for setting aside the impugned judgment and decree with allowing her petition for divorce by allowing the appeal.

6. Shri K.S. Baghel, learned counsel of the respondent while responding the

KANTA RAIKWAR (SMT.) Vs. KAILASH CHANDRA VERMA

aforesaid arguments by referring the pleadings and said that in the lack of specific proper pleadings in the petition with particulars regarding grounds of divorce, merely on the basis of deposition of the appellant and her witness the decree of divorce could not be passed as there is settled proposition of law that in the lack of pleadings the evidence even if adduced can not be looked into. According to him the requisites particulars for the alleged ground are not pleaded in the petition. He fairly conceded that inspite filing the written statement, the witnesses of the appellant were neither cross examined on behalf of the respondent nor any evidence was adduced by him in the rebuttal but according to him the evidence adduced by the appellant was neither sufficient nor conclusive to draw any inference against the respondent for allowing the petition. In such premises, the trial court has not committed any error in dismissing the petition of the appellant and prayed for dismissal of the appeal.

7. Having heard the counsel, in order to consider the rival contention of the parties, I have carefully examined the record and also perused the impugned judgment. In petition of the appellant the ground of cruelty and desertion are specifically pleaded and in support of the same the elaborate evidence has been adduced at trial by the appellant. As per settled proposition the material facts are required to be pleaded and not the evidence. The facts pleaded by the the appellant are denied by the respondent in his written statement, on recording the deposition of appellant, she has neither been cross examined by the respondent nor any evidence in support of the objection taken in the written statement was adduced by him. It is settled proposition of law that mere pleadings of the parties are not sufficient to draw any inference unless the same is supported by adducing the evidence, hence it is held that in the lack of ocular evidence the respondent was not entitled to get any relief merely on the basis of pleadings of his written statements.

8. Now coming to consider the ground of cruelty is concerned, in the deposition of the appellant Smt. Kanta Raikwar (AW-1), she categorically stated that she got married with the respondent on dated 24.11.1995. As per further deposition some cash amount, ornaments, other articles and gifts were given to her by the parental family on the different occasions and the ceremonies of the marriage. In order to prove the ground of cruelty she categorically stated in para 8 and 9 of her deposition that since the time of marriage the behaviour of the respondent with her was very cruel and she was subjected to physical and mental harassment with abuses and beating in the matrimonial home. On some occasion, she was also dragged during the course of beating. The proper food was not given to her while residing in matrimonial home. She was kept hungry by tiding her limb. She further deposed that the respondent used to perform the intercourse with her with cruel manner by tiding her limbs. She was also used by the respondent to satisfy his unnatural lust and on some occasions she was compelled to take the

KANTA RAIKWAR (SMT) Vs. KAILASH CHANDRA VERMA

penis of respondent in her mouth, on account of which she suffered with vomiting and could not take her meals for three – four days. Accordingly, the description of cruelty was explained by her.

9. Her father Ganpatlal Raikwar (AW-2) whom she stated the aforesaid Act of respondent also deposed the same in para 4 of his deposition. Such testimonies have not been rebutted either by cross examination or adducing the evidence on behalf of the respondent. In such situation the court has no option except to hold that the respondent in order to satisfy his unnatural lust committed cruelty with the appellant in the aforesaid manner. In such premises, it is held that the ground of cruelty has been proved by the appellant with all probability but the trial court has committed grave error in drawing the inference against her. Such findings of the impugned judgment, being contrary to record is not sustainable. Hence the same is hereby set aside.

10. So far ground of desertion is concerned as per available record and the evidence the appellant was deserted by the respondent on 2.3.1996. Since then she is residing with her parents. During this period the respondent neither took her care nor paid any sum for her livelihood. The appellant Smt. Kanta Raikwar (AW-1) categorically deposed in para 7 of her deposition that she had been deserted by the respondent on 2.3.1996. Since then she is residing at Bhopal with her parents. Since the date of desertion no physical and marital relation took place between her and the respondent. Accordingly, the desertion has also been proved by the appellant and there is no circumstance to discard her in this regard. As the same has neither been challenged by cross examining her or adducing any evidence in its rebuttal. Her testimony is further supported by her father Shri Ganpat Lal Ahirwar (AW-2) who categorically stated that the appellant is residing with her from March 1996. Since then no meeting took place in any manner between her and the respondent and no one has turned up to his home from the family of respondent to bring the appellant. Such testimony is also unrebutted as he was also not cross examined on behalf of the respondent. In such premises, there is sufficient evidence to draw the inference that the appellant after deserting her by the respondent on 2nd March 1996 is residing with her parents and no cohabitation took place between them. I have not found any sufficient cause for desertion of the appellant by the respondent. In such situation it is held that the appellant has been deserted by the respondent without any sufficient cause since 2nd March 1996. Apart the above, in the available circumstances as discussed above, it is apparent that since March 1996 the parties are residing separately. Since then no cohabitation took place between them and looking to the allegation alleged and proved by the appellant against the respondent regarding cruelty and desertion are sufficient circumstance to draw an inference that the matrimonial relationship between the parties has been ruptured beyond repair because of the act of respondent. In such premises, such act of the respondent could be held to

KANTARAIKWAR (SMT.) Vs. KAILASH CHANDRA VERMA

be a mental cruelty against the respondent which could be a foundation for desertion of marriage as observed by the Apex Court in the matter of *SAMAR GHOSH Vs. JAYA GHOSH* reported in (2007) 4 SCC 511 as under:-

“101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i)

(ii)

(iii)

(iv)

(v)

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii).....

(viii)

(ix)

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi).....

(xii)

(xiii)

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

KANTA RAIKWAR (SMT.) Vs. KAILASH CHANDRA VERMA

102. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent."

11. In view of the aforesaid discussion of the facts of the case at hand, the guidelines provided by the Apex Court in cited case is helping to the appellant to draw inference that the respondent has committed mental cruelty with her and in such premises also the appellant deserves for decree of divorce on the ground of cruelty and desertion.

12. According to the pleadings of herself the Shtridhan articles were brought by her from matrimonial home on receiving the letter dated 14.6.1998 from the father of the respondent. Besides this I have not found any evidence or the circumstance showing that any such article is laying with the respondent. Hence, it is held that the prayer of the appellant in this regard has been rightly refused by the trial court. So far awarding the permanent alimony is concerned, the appellant being in service of Central School had sufficient source of income. Thus, she does not deserve for any permanent alimony. In such premises, the appellant was rightly refused by the trial court.

13. Under the aforesaid premises it is held that the trial court has committed grave error and perversity in dismissing the petition of the appellant.

14. Therefore, this appeal is allowed in part and by setting aside the findings of the impugned judgment and decree given in respect of the grounds of dissolution of marriage and the petition filed by the appellant under Section 13-(i) (i-a) & (i-b) of the Act for divorce on the ground of cruelty and desertion is allowed. In pursuance of it, the marriage solemnized between the parties on dated 24.11.1995 is hereby dissolved and decree of divorce is ordered, while the other findings of the same regarding permanent alimony and returning the Shtridhan property is hereby affirmed. The respondent shall bear his cost and pay the cost of appellant throughout. The cost of this appeal is quantified at Rs.7,500/-. The decree be drawn up accordingly.

Appeal allowed in part.

I.L.R. [2009] M. P., 204
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
 29 July, 2008*

SAROJA (SMT.)

... Appellant

Vs.

SUPERSONIC PLASTIC PVT. LTD.

... Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a)
- Suit for eviction - Tenant failed to deposit arrears of rent and monthly rent despite receipt of demand notice - But, suit filed within 2 months from date of receipt of notice - Held - Suit was premature - Decree u/s 12(1)(a) can not be granted. (Para 15)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) - बेदखली के लिए वाद - किरायेदार माँग का सूचनापत्र प्राप्त करने के बावजूद बकाया भाड़ा और मासिक भाड़ा जमा करने में असफल - किन्तु, वाद सूचनापत्र की प्राप्ति की तारीख से 2 माह के भीतर पेश किया गया - अभिनिर्धारित - वाद समयपूर्व था - धारा 12(1)(ए) के अन्तर्गत डिक्री प्रदान नहीं की जा सकती।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e)
- Landlady, a NRI doctor required suit property to settle in India - Landlady did not come in witness box but her power of attorney was examined - Held - Landlady herself was not required to prove bonafide - Long persuasion of 18 years for getting the possession of suit accommodation itself shows that landlady requires suit accommodation bonafidely - There is no justification in denying decree of eviction - Appeal allowed. (Para 21)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ई) - एनआरआई चिकित्सक भूस्वामिनी को भारत में बसने के लिए वादग्रस्त सम्पत्ति की आवश्यकता - भूस्वामिनी ने बयान नहीं दिया बल्कि उसके मुख्यालय की परीक्षा करायी गई - अभिनिर्धारित - स्वयं भूस्वामिनी को वास्तविकता साबित करना अपेक्षित नहीं था - वादग्रस्त स्थान का कब्जा प्राप्त करने के लिए 18 वर्ष का लम्बा आग्रह स्वतः यह दर्शाता है कि भूस्वामिनी को वादग्रस्त स्थान की वास्तविक आवश्यकता है - बेदखली की डिक्री से इंकार करना न्यायोचित नहीं - अपील मंजूर।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c)
- Suit for eviction filed by NRI landlady - Tenant alleging that landlady entered into agreement to sell suit accommodation with him - Tenant failed to prove agreement - Held - The act of tenant in claiming an agreement to sell in his favour and failed to prove, itself adversely affects the interest of landlady - Trial court erred in dismissing suit for eviction u/s 12(1)(c) - Appeal allowed. (Para 23)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) - एनआरआई भूस्वामिनी द्वारा बेदखली का वाद पेश - किरायेदार ने यह अभिकथन किया कि भूस्वामिनी ने उसके साथ

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

वादग्रस्त स्थान विक्रय करने का करार किया — किरायेदार करार साबित करने में विफल रहा — अभिनिर्धारित — किरायेदार का अपने पक्ष में विक्रय करार का दावा करने और साबित करने में विफल रहने का कृत्य स्वमेव भूस्वामिनी के हित को प्रतिकूल रूप से प्रभावित करता है — विचारण न्यायालय ने धारा 12(1)(सी) के अन्तर्गत बेदखली का वाद खारिज करने में त्रुटि की — अपील मंजूर।

Cases referred :

2000 (2) MPLJ 385, (2005) 7 SCC 211, AIR 1999 SC 3089, 2005 (2) MPLJ 230, 1997(1) VB 280, 1994 (1) MPJR 144.

B.L. Pavecha with N.K. Dave & Ajit Jain, for the appellant.

G.M. Chapekar with Vandana Kasrekar, for the respondent.

J U D G M E N T

N.K. Mody, J. :-Being aggrieved by the judgment and decree dated 28.02.2001 passed by First Additional District Judge, Indore in Civil Suit No.4-A/2000, whereby the suit filed by the appellant for eviction under Section 12 (1) (a) (c) and (e) of the M.P. Accommodation Control Act, 1961 (which shall be referred hereinafter as "Act") was dismissed, the present appeal has been filed.

2. Short facts of the case are that the appellant land-lady Smt. Saroja Thawani filed a suit for eviction, arrears of rent and mesne profit on 08.06.1992 alleging that the appellant is owner of a house No.E-25, LIG Colony, Indore (which shall be referred hereinafter as "Suit Property"). It was alleged that the suit property was let out by the appellant to the respondent vide rent note dated 07.10.1976 on rent @ Rs.601/- per month. It was alleged that the purpose of tenancy was residential and the tenancy commenced w.e.f. 15.10.1976. Further case of the appellant was that the respondent is in arrears of rent w.e.f 15.01.1990 and a habitual defaulter. It was alleged that a false FIR was lodged by Shri B.T.Agrawal, Director of the respondent against Jaiprakash Thawani (brother in law of the appellant) in July 1991. It was alleged that because of the false complaint Jaiprakash Thawani was required to run from pillar to post to save himself from the arrest by the police. It was alleged that the respondent prepared an agreement to sell the suit property in its favour and demanded execution of the sale deed. It was alleged that appellant never entered into an agreement to sell the suit property to the respondent. Further case of the appellant was that appellant requires the suit property bonafide for her residence. It was alleged that appellant is residing in United States of America and has decided to come back and settle at Indore with her family. It was also alleged that appellant has no other reasonably suitable accommodation of her own in the city of Indore. It was alleged that vide notice dated 08.03.1992 respondent was asked to vacate the suit accommodation, which was duly served on the respondent on 13.04.1992. On the basis of these allegations, it was prayed that a decree of eviction be passed.

3. The suit was contested by the respondent by filing the written statement

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

wherein, it was not disputed that the appellant is the owner of the suit accommodation. It was also not disputed that the status of respondent is tenant @ of Rs.601/- per month. However, it was denied that the tenancy of the respondent was for residential purposes. It was alleged that the respondent is also running its office in the suit accommodation. Thus the tenancy of the respondent is composite in nature i.e. residential cum nonresidential. It was denied that the respondent was in arrears of rent and the respondent is habitual defaulter. So far as lodging of FIR is concerned it was alleged that Jaiprakash Thawani (brother in law of the appellant) who happens to be an officer of the Bank came to the suit accommodation where the respondent is residing in the month of July 1991 alongwith unsocial elements to get the suit accommodation vacated. It was alleged that in the circumstances FIR was lodged by the respondent which has not caused any nuisance.

4. It was denied that the appellant requires the suit accommodation for her residence. It was denied that the appellant wants to settle down at Indore. It was alleged that appellant entered into an agreement with the respondent to sell the suit accommodation and in that connection only the notice dated 17.08.1991 was issued by the respondent. It was further alleged that appellant has no intention to come back to India. It was alleged that appellant is permanent resident of USA and is carrying on her business there only. It was further alleged that since the appellant has become the citizen of USA and has seized to be the citizen of India, therefore, appellant cannot live in India. It was prayed that suit filed by the appellant be dismissed. On the basis of pleadings of the parties, learned Trial Court framed the issues, recorded the evidence and dismissed the suit against which the present appeal has been filed.

5. Respondent was duly represented by Shri S.S.Garg, Advocate. On 09.01.2008 the case was fixed for hearing in the month of March 2008. Vide order dated 11.03.2008 the case was fixed for final hearing on 25.03.2008 in presence of Shri S.S. Garg, advocate. On 25.03.2008 Shri Rakesh Sharma, advocate on behalf of respondent prayed time on the ground that Shri S.S.Garg is not well and case be adjourned. This prayer of adjournment was allowed and case was adjourned for 01.04.2008. On that date respondent himself was present and again sought time on account of sickness of the counsel. Again the case was fixed for arguments for 23.04.2008. In spite of taking repeated adjournments neither the respondent nor his counsel was present. In the circumstances, this Court was left with no option except to hear and decide the appeal in absence of respondent. After hearing the appeal, case was reserved for orders. Thereafter Miss Vandana, Kasrekar, advocate mentioned before this Court that she has been engaged by the respondent. It was also requested that the appeal shall be argued by Shri G. M. Chapekar, Senior Advocate, therefore, the case be listed for rehearing. This is how the case was again listed for hearing.

6. Shri B. L. Pavecha, senior advocate and Shri N.K.Dave, learned counsel for the appellant argued at length and submitted that the learned Court below

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

committed error in holding that the appellant does not require the suit accommodation for her residence. It is submitted that to prove the case appellant has examined her brother-in-law and power of attorney who has stated on oath that the appellant is interested to settle down at Indore. It is submitted that in the facts and circumstances of the case learned Court below committed error in disbelieving the evidence adduced by the appellant. Learned counsel further submits that learned court below committed error in not passing the decree against the appellant under Section 12 (1) (c) of the Act. It is submitted that the respondent had set-up an agreement to sell of the suit accommodation. Ultimately it was found that no agreement to sell was never executed by the appellant. It is submitted that this itself was sufficient for granting the decree under Section 12 (1) (c) of the Act, which has wrongly been refused. Leaned counsel submits that the findings of the learned Court below in refusing the decree of eviction under Section 12 (1) (c) and (e) of the Act is contrary to law and facts on record.

7. Learned counsel for the appellant further submits that learned Court below also committed error in dismissing the suit filed under Section 12 (1) (a) of the Act. It is submitted that the respondent was in arrears of rent w.e.f. 15.1.1990. Demand notice was issued on 8.3.1992 which was replied by the respondent on 18.6.1992 in which rate of rent and arrears of rent were not disputed. Prior to it, the suit for eviction was filed by the appellant on 8.6.92. It is submitted that in the written statement, filed by the respondent, also the rate of rent and arrears of rent were not disputed. Learned counsel submits that leaned Court below also found that the appellant has proved the ground for eviction under Section 12 (1) (a) of the Act. It is submitted that learned Court below committed error in refusing the decree of eviction on the ground of arrears of rent, inspite of giving the finding that ground under Section 12 (1) (a) of the Act is made out. Learned counsel submits that the written statement was filed by the respondent on 11.2.1994. The respondent has filed the statement of amount deposited by the respondent towards arrears of rent and also towards current months. It is submitted that no arrears of rent was deposited by the respondent within one month from the date of receipt of summons by the learned Trial Court. It is also submitted that from perusal of the chart it is evident that the respondent was defaulter in payment of rent. Learned counsel placed reliance on the decision passed by the Hon'ble Apex Court in the matter of *Jamnalal and others Vs. Radheshyam* - 2000 (2) MPLJ 385, wherein the Hon'ble Apex Court has observed as under:-

“Where the rate of rent payable by the tenant for the accommodation is not in dispute and the quantum of arrears of rent is not paid/deposited either because the tenant pleads that he has paid the arrears of rent or adjusted the same towards the amounts payable by the landlord or in the discharge of his liability, the tenant succeeds or fails on his plea being accepted or rejected

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

in that behalf by the court, in such a case sub-section (2) is not attracted because the plea taken by the tenant has to be adjudicated by a full-fledged trial and not in a summary inquiry postulated for fixing a reasonable provisional rent in relation to the accommodation in question. This being the position a tenant takes the risk of suffering an order of eviction by raising a dispute in regard to the amount of rent payable by him while admitting the rate of rent and not making payment or deposit under sub-section (1) because where the dispute raised by the tenant is outside the ambit of sub-section (2), sub-section (1) of section 13 of the Act does not become inoperative. There can be no debate on the proposition that the tenant is relieved of the consequences of default in payment of rent on his paying/depositing the rent under sub-section (1) at the rate last paid or at the rate fixed provisionally under sub-section (2) of section 13 of the Act but if the tenant takes a false or frivolous plea in regard to the amount of rent payable by him, which does not involve fixation of provisional rent under section 13 (2), he runs the risk of suffering an order of eviction either under sub-section (6) of section 13 or after trial under section 12 (1) (a) of the Act. It was held that 1977 MPLJ 822, and 446, 1970 MPLJ 902, 1972 MPLJ 785, 1975 MPLJ 657 (F.B.), and 1977 MPLJ 446 does not lay down correct law insofar as answer to question No. 1. The Division Bench is also not correct in holding "The key to the problem is found in the word 'thereafter' (i.e. after that) which necessarily refers to the tenants' liability becoming operative under the first part of section 13 (1). If that liability is arrested, the liability under the second part does not commence, because the liability under the second part commences only 'thereafter' which means when the liability of the tenant under the first part is ripe for performance."

8. Learned counsel further placed reliance on decision of the Apex Court in the matter of *Atma Ram Vs. Shakuntala Rani* - (2005) 7 SCC 211, wherein the Hon'ble Apex Court has observed as under:-

"It will thus appear that this Court has consistently taken the view that in the Rent Control legislations if the tenant wishes to take advantage of the beneficial provisions of the Act, he must strictly comply with the requirements of the Act. If any condition precedent is to be fulfilled before the benefit can be claimed, he must strictly comply with that condition. If he fails to do so he cannot take advantage of the benefit conferred by such a provision."

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

9. From perusal of the record, it appears that to prove the case appellant has filed the registered power of attorney Ex.P/1 which has been executed by the appellant at Indore on 17.02.1997. Ex.P/2 rent note dated 07.10.1976, whereby the suit accommodation was taken on rent by the respondent @ of 601/- per month. Ex.P/3 is the copy of letter which has been issued by Shri Jaiprakash Thawani to the police station HIG, Indore, wherein it is stated that appellant has come to know that B.T. Agrawal has lodged a complaint against him. It was alleged that the complaint is baseless. Ex.P/4 is notice dated 08.03.1992, whereby the appellant asked the respondent to vacate the suit accommodation as the appellant requires the same for her residence. By this notice arrears of rent were also demanded. Ex.P/5 is the reply notice dated 18.06.1992, which was given by the respondent. Ex.P/6 is the notice issued by the respondent dated 17.08.1991 wherein, it was stated that father-in-law of the appellant was a close friend of respondent. It was further alleged that father-in-law of the appellant persuaded the respondent to purchase the suit property as it is, for a sum of Rs.51,101/-. It was alleged that respondent has paid a sum of Rs.11,101/- as token. It was further alleged that since appellant is a respected lady, therefore, respondent does not wish to drag her in civil or criminal litigation. However, if the suit accommodation is not transferred, respondent shall be constrained to initiate legal proceedings against the appellant. Ex.P/7 is the rent receipt whereby the rent has been paid to the appellant. Apart from these documentary evidence appellant has examined Rajkumar Thawani, Power of Attorney, of the appellant as PW/1, while respondent has examined Dillram DW/1, Bhagatram DW/2, Tuljaram DW/3, Ramesh Vishvakarma DW/4 and Ramdayal Sharma DW/5.

10. So far as decree for eviction on the ground of arrears of rent under Section 12(1) (a) of the Act is concerned in the matter of *Jamnial Vs. Raheshyam*, reported in 2000 (2) MPLJ 385, Hon'ble apex Court has held that where the rate of rent payable by the tenant for the accommodation is not in dispute and the quantum of arrears of rent is not paid/deposited either because the tenant pleads that he has paid the arrears of rent or adjusted the same towards the amounts payable by the landlord or in the discharge of his liability, the tenant succeeds or fails on his plea being accepted or rejected in that behalf by the court, in such a case sub-section (2) is not attracted because that plea taken by the tenant has to be adjudicated by a full-fledged trial and not in a summary inquiry postulated for fixing a reasonable provisional rent in relation to the accommodation in question. This being the position a tenant takes the risk of suffering an order of eviction by raising a dispute in regard to the amount of rent payable by him while admitting the rate of rent and not making payment or deposit under sub-section (1) because where the dispute raised by the tenant is outside the ambit of sub-section (2), sub-section (1) of section 13 of the Act does not become inoperative.

11. From perusal of the record it appears that as per landlord who is appellant herein, respondent was in arrears of rent w.e.f. 15.1.1990, the demand notice

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

Ex.P-4 was issued on behalf of the appellant on 8.3.1992. No compliance of the notice was made by the respondent within two months as neither the notice was replied nor the rent was tendered/paid within two months, which is evident by the reply notice Ex.P-5 dated 18.6.1992 i.e. after two months. Learned Court below also found that ground for eviction under Section 12 (1) (a) of the Act was made out. Before the learned Court below appearance was made by the respondent on 3.12.1992, while the written statement was filed on 1.2.1994. Statement of arrears of rent was filed by the respondent. In the written statement also there is no dispute regarding arrears of rent and the rate of rent. As per chart submitted by the respondent the rent was deposited by the respondent from time to time, of which details are:-

S.No	Date	Amount	Period	Receipt No.	Book No.
1.	4.1.1993	15,000.00	15.1.90 to 14.1.92	84	1091
2.	22.1.1993	7,738.00	15.1.92 to 14.1.93	34	1144
3.	11.3.1993	601.00	15.1.93 to 14.2.93	---	1197
4.	6.4.1993	1,202.00	15.2.93 to 14.4.93	69	1240
5.	14.6.1993	1,202.00	15.4.93 to 14.6.93	2	1286
6.	14.9.1993	1,803.00	15.6.93 to 14.9.93	97	1404
7.	16.11.1993	1,202.00	15.9.93 to 14.11.93	25	6008
8.	15.3.1994	1,202.00	15.11.93 to 14.2.94	71	6195
9.	28.6.1994	1,202.00	15.2.94 to 14.4.94	38	6401
10.	22.8.1994	1,202.00	15.4.94 to 14.6.94	80	6477
11.	10.10.1997	4,908.00	15.6.94 to 14.2.95	29	6565
12.	21.12.1998	27,045.00	15.6.95 to 14.6.99	6	8342
13.	22.12.1998	1,202.00	15.6.99 to 14.8.99	33	3346
14.	8.2.1999	1,202.00	15.8.99 to 14.10.99	3	3431
15.	19.4.1999	6,010.00	15.10.99 to 14.8.00	71	3558
16.	17.12.1999	1,803.00	15.8.00 to 14.11.00	85	2002
17.	15.2.2000	1,803.00	15.11.00 to 14.3.01	69	2079
18.	28.4.2000	1,202.00	15.3.01 to 14.5.01	22	12842
19.	12.7.2000	1,803.00	15.5.01 to 14.8.01	47	12443
20.	10.8.2000	3,005.00	15.8.01 to 14.1.02	8	12996
21.	16.11.2000	1,803.00	15.1.02 to 14.3.02	20	13181
22.	15.1.2001	1,803.00	15.3.02 to 14.5.02	37	13282-00

SAROJA (SMT.) V. SUPERSONIC PLASTIC PVT. LTD.

12. After perusal of the aforesaid statement it can safely be said that the respondent was defaulter right from the beginning, as the respondent did not comply any part of Section 13 (1) of the Act. Initially respondent failed to deposit the arrears of rent within one month. Subsequently, respondent failed to deposit rent in time for the month of January 1994, April 1994, June and July 1994. From 1994 to 1997 no rent was deposited by the respondent month to month. On 10.10.1997 also only Rs. 4,908/- was deposited by the respondent, which is hardly a rent of eight months, while the respondent was in arrears of rent from August 1994.

13. The impugned judgment and decree was passed by learned Court below on 28.2.2001, thereafter an application was filed by the respondent on 26.3.2001 under Section 151 of CPC, wherein full particulars of depositing the rent were given by the respondent and in the application it was prayed that the same be kept on record. This application was registered separately as Misc. Judicial Case. Vide order dated 27.3.2001 learned Court below in absence of appellant passed an order whereby the record was called from the record room and case was fixed on 30.3.2001. On the fixed date behind the appellant, application filed by the respondent was allowed and without giving any opportunity of hearing to the appellant, it was held that respondent shall not be treated as defaulter on the ground that respondent has not deposited the arrears of rent within one month which was not the prayer of respondent.

14. Since by the impugned judgment learned trial Court disposed of the suit and no review application was filed by the respondent, therefore, there was no justification on the part of learned Trial Court to pass further order on 30.3.2001 holding that the respondent shall not be treated as defaulter. This act of the respondent in filing the application and allowing the application by the learned Trial Court itself speaks in volume that the respondent was defaulter and to come out from peril of eviction an effort was made by the respondent/tenant, which was also supported by the learned trial Court by passing the order dated 30.3.2001 in absence of appellant.

15. It is true that strict compliance of Section 13 (1) of the Act was not made by the respondent in depositing the arrears of rent and also the rent which was payable month to month and the respondent is not entitled to protect its eviction under Section 12 (3) and 13 (5) of the Act. But inspite of that no decree of eviction can be passed in favour of appellant because of the default on the part of appellant herself as no ground under Section 12 (1) (a) of the Act is made out because the suit was filed by the appellant within two months from the date of receipt of demand notice by the respondent. As per the plaint demand notice dated 8.3.92 was served on respondent on 13.4.92 and the suit was filed on 8.6.92. Since the suit was filed within two months from the date of notice, therefore, the same was premature. In view of this the learned Court below committed error in holding that a ground under Section 12 (1) (a) of the Act is made out.

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

16. So far as the decree of eviction under Section 12 (1) (e) of the Act is concerned, it is true that the appellant who is landlady has not come in witness box. However, appellant has examined her Power of Attorney holder Rajkumar who is none else but the brother of the husband of the appellant.

17. From perusal of the judgment impugned herein it is evident that learned court below has disbelieved the evidence adduced by the appellant on the ground that appellant is living at USA since last 15 to 20 years and is doctor by profession and also appellant is having two daughters in the age group of 15 to 18 years, who were born in USA and are living there, therefore, in the circumstances it cannot be said that appellant shall settle down in India.

18. From the evidence on record it is amply proved that appellant is well settled and is doctor by profession. Learned Court below has also found that it is always not necessary for the landlord to enter into the witness box for proving the requirement and the same can be proved by examining the Power of Attorney holder. Learned Court below has dismissed the suit on the ground that the appellant has lost citizenship of India, therefore, appellant is not entitled for a decree of eviction. The suit was also dismissed on the ground that the appellant has settled at USA and appellant is also having grownup daughters who have been born and brought up at USA. Learned Court below also dismissed the suit on the ground that the respondent has proved that the Power of Attorney holder of the appellant has made an effort to sale the suit property.

19. In the matter of *Ramkubai Vs. Hajarimal*, reported in AIR 1999 SC 3089, Hon'ble Supreme Court has held that in a suit for eviction filed on the ground of bonafide requirement, it is not essential that landlord must enter witness box to support his case. Bonafide requirement is not a fact which could be established only by landlord. In the matter of *Bashir Vs. Smt. Hussain Bani*, reported in 2005 (2) MPLJ 230, in a case where the suit for eviction was filed by a landlady aged 80 years and examined the power of attorney holder who was the member of her family it was held that power of attorney holder can prove the requirement on her behalf. In the matter of *Shiv Narain Soni Vs. Parwati Bai*, reported in 1997 {1} Vidhi Bhasvar 280, it has been held that landlady herself is not required to prove bona fide. This can be deposed by her holder of power of attorney. In the matter of *Vimladevi Vs. Dulichand*, reported in 19+94 (1) MPJR 144, wherein owner/landlady a house wife did not enter witness box. Her husband, also a power of attorney holder appeared and deposed to all relevant facts from his personal knowledge. It was held that in a eviction suit non examination of plaintiff is not fatal.

20. Undoubtedly, appellant is a non resident Indian who born in India. There is no law which prevents NRI to keep his property in India. Similarly no law prohibits a landlord from obtaining a decree of eviction on the ground that landlord is not the citizen. Brother-in-law of the appellant is residing in India. Appellant is having

SAROJA (SMT.) Vs. SUPERSONIC PLASTIC PVT. LTD.

the accommodation in India. Appellant is pursuing the suit since 1992. It is not expected from the appellant to pursue the suit of eviction at India, herself which has taken 18 years to reach the final adjudication that too, up to this Court. Appellant has executed the Power of Attorney Ex.P-1 which is dated 17.2.1997 which has been executed by the appellant in the office of sub-Registrar at Indore, which goes to show that the appellant is visiting India from time to time.

21. Appellant is not after money. Appellant has inducted the respondent as tenant vide rent note Ex.P-2 dated 14.11.1976, on payment of rent @ Rs. 601/- per month. No efforts were made by the appellant to enhance the rent from 1976 to 1992 when the suit was filed. From 1992 to 2008 appellant continues to be the owner of the suit property and did not sell the suit accommodation, which itself shows that the evidence adduced by the respondent that the appellant wants to sell the suit accommodation is without any basis. The long persuasion of 18 years of the appellant for getting the possession of the suit accommodation itself shows that the appellant requires suit accommodation bona fide. The bona fide need of the appellant has been further proved by the statement of PW-1, who is not only the Power of Attorney holder, but also the brother-in-law of the appellant. India is a developing country. In the era of globalization when the government is trying to attract the foreigners and NRI to invest money in India, there is no justification to deny a decree of eviction to a landlady who was born and brought up and is having deep roots in India, and wants to settle in India in her old age. Denial of decree to such a landlady who has proved her worth as doctor in foreign country will mean to cease her relation with India for all times to come..

22. In the facts and circumstances of the case this Court is of the opinion that appellant has proved her bonafide requirement and has also proved that appellant is having no alternative accommodation of her own to meet her requirement. In the circumstances learned Court below committed error in dismissing the suit under Section 12 (1) (e) of the Act.

23. So far as the decree of eviction under Section 12 (1) (c) of the Act is concerned the act of nuisance is based on the complaint filed by the respondent with the police and also the notice issued by the respondent, wherein respondent alleged that appellant entered into an agreement to sell the suit property with the respondent. The complaint lodged by the Power of Attorney holder of the appellant is on record. No efforts were made by the appellant to ask the respondent to produce the FIR lodged by the respondent. So far as agreement to sell is concerned, it is true that the respondent has failed to prove the said agreement. A tenant who is in occupation of suit accommodation, whose landlord is residing abroad, is claiming agreement to sell in his favour alleged to have been executed by the landlord is itself sufficient to disturb the peace of landlord. This act of the respondent itself was likely to affect adversely and substantially the interest of the appellant. The act of respondent in claiming an agreement to sell in his favour and failed to

YUVRAJ Vs. STATE OF M.P.

prove itself adversely affects the interest of appellant. In the opinion of this Court learned trial Court committed error in dismissing the suit for eviction under Section 12 (1) (c) of the Act.

24. In view of this the appeal filed by the appellant is allowed. Impugned judgment and decree passed by the learned trial Court is set aside and a decree of eviction is passed in favour of appellant and against the respondent under Section 12 (1) (c) and (e) of the Act with a direction to respondent to vacate the suit accommodation forthwith and to pay arrears of rent @ Rs. 601/- per month w.e.f. 15.1.1990, in which the amount deposited by the respondent from time to time shall be adjusted. It is further made clear that to remove the apprehension of the respondent that the appellant wants to sale the suit accommodation, it is further directed that in case the appellant is compelled to file the execution for satisfaction of the decree of eviction, the appellant and her POA/brother shall submit an affidavit before Executing Authority to the effect that the appellant shall not transfer suit accommodation for a period of five years from the date of getting possession. In case the suit accommodation is not vacated within a period of two months, the respondent shall be further liable for payment of mesne profits from the date of judgment @ Rs. 5,000/- per month.

25. With the aforesaid directions this appeal stands allowed. With costs through out.

Appeal allowed.

I.L.R. [2009] M. P., 214

APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
3 July, 2008*

YUVRAJ & anr.

.... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Sections 449 & 302, Evidence Act, 1872, Section 32(1) - Dying declaration - Reliability - Prosecution relying on three dying declarations - Defence plea that there are material contradictions in dying declarations - Deceased was not sure and was changing her version time to time - Not be safe to rely upon dying declarations - Held - On reading of all the three dying declarations conjointly, do not find any contradictions much less substantial one - Appellant Yuvraj came to the spot, deceased went inside the house to save herself - Yuvraj followed her, poured kerosene oil on her and set her ablaze - The role of Yuvraj is consistent in all the three dying declarations - No iota of doubt that the facts mentioned in dying declarations are correct and can be acted upon. (Para 7)

YUVRAJ Vs. STATE OF M.P.

क. दण्ड संहिता (1860 का 45), धाराएँ 449 व 302, साक्ष्य अधिनियम, 1872, धारा 32(1) - मृत्युकालिक कथन - विश्वसनीयता - अभियोजन तीन मृत्युकालिक कथनों पर निर्भर - प्रतिरक्षा का अभिवचन कि मृत्युकालिक कथनों में तात्त्विक विरोधाभास है - मृतक को विश्वास नहीं था और वह समय-समय पर अपना बयान बदल रही थी - मृत्युकालिक कथनों पर निर्भर करना सुरक्षित नहीं होगा - अभिनिर्धारित - तीनों मृत्युकालिक कथनों को संयुक्त रूप से पढ़ने पर कोई तात्त्विक विरोधाभास नहीं पाया गया - अपीलार्थी युवराज घटना स्थल पर आया, मृतक स्वयं को बचाने के लिए घर के अन्दर गयी - युवराज ने उसका पीछा किया, उसपर मिट्टी का तेल डाला और उसे आग लगा दी - युवराज की भूमिका तीनों मृत्युकालिक कथनों में संगत है - इसमें रत्ती भर भी संदेह नहीं है कि मृत्युकालिक कथनों में उल्लिखित तथ्य सही हैं और उन पर कार्यवाही की जा सकती है।

B. Evidence Act (1 of 1872), Section 3 - Appreciation of evidence - Husband of deceased declared hostile - Husband was not in the house, he was not an eye witness of incident and was summoned by his daughter - No dent was caused in the dying declaration of the deceased - Held - Hostility of husband of deceased is of no consequence. (Para 7)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्ष्य का अधिमूल्यन - मृतक का पति पक्षद्रोही घोषित - पति घटना के समय घर के अन्दर नहीं था और उसे तो उसकी पुत्री ने बुलाया था, वह घटना का प्रत्यक्षदर्शी साक्षी नहीं - मृतक के मृत्युकालिक कथन को कोई क्षति कारित नहीं - अभिनिर्धारित - मृतक के पति के पक्षद्रोही होने का कोई परिणाम नहीं।

L.N. Sakle, for the appellants.

Aseem Dixit, G.A., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **ARUN MISHRA, J.** :-The appeal has been preferred by the appellants Yuvraj and Sumanbai aggrieved by judgment dated 29.10.1999 passed by Second Additional Sessions Judge, Burhanpur in S.T. No. 154/98. Appellant No. 1 Yuvraj has been convicted for the offence punishable under section 302 IPC and sentenced to imprisonment for life and fine of Rs. 10,000/- and in default of payment of fine, additional RI for one year. He has also been convicted for the offence punishable under section 449 IPC and sentenced to R.I. for 5 years and fine of Rs. 10,000/- and in default of payment of fine, additional RI for one year. Appellant No. 2 has been convicted for the offence punishable under section 323 IPC and sentenced to R.I. for 3 months and fine of Rs. 1000/- and in default of payment of fine, additional imprisonment for one month.

2. Briefly stated the prosecution case is that on 28.11.1997 at about 6 am Suman Bai and Rekha Bai were answering the call of nature in the drainage near the house of Indu Bai, which was objected to by deceased Indu Bai. On that Suman Bai, Rekha Bai and Indu Bai quarreled. Deceased Indu Bai was beaten upon and thrown in the drainage by Suman Bai. After sometime Yuvraj son of

YUVRAJ Vs. STATE OF M.P.

Suman Bai came on the spot, deceased Indu Bai went inside the house to save herself, Yuvraj followed her, poured kerosene oil on her and set her ablaze with the help of match-stick. Indu Bai raised hue and cry, several persons assembled, her husband was not in the house, daughter was sent to summon her. She was taken to the hospital at Shahpur by her husband Bhagwat and Vijay. Dr. R.C.Dalal attended her in the hospital at Shahpur and sent intimation to concerned police station. As condition of Indu Bai was precarious, she was referred to hospital at Burhanpur. She was taken to Burhanpur. On the basis of intimation entry was made in the general diary of police station Shahpur, investigation was set in, dying declaration was recorded by Kashinath Patil (PW-7), Nayab Tehsildar cum Executive Magistrate. During marg investigation, the statement (P-20) was recorded by Gopi Chand, head constable of police whereas after registration of first information report, statement (P-4) under section 161 Cr.P.C. of the deceased Indu Bai was recorded by Shri B.S.Sisodiya (PW-12), investigating officer. After completion of investigation accused was charge sheeted.

3. The accused abjured the guilt and contended that they have been falsely implicated in the case. No quarrel took place. In all three persons were put to trial. Yuvraj and Suman Bai have been convicted as mentioned above. Aggrieved by the sentence and conviction imposed, the appeal has been preferred by Yuvraj and Suman Bai.

4. Shri L.N.Sakle, learned counsel for appellant has submitted that dying declaration could not have been relied upon. Even the husband of the deceased has not supported the prosecution case. He was declared hostile. Other witness examined in the case have also not supported the prosecution case. There are contradictions, in the dying declaration (P-11), five persons were implicated whereas in the statement (P-4) recorded under section 161 Cr.P.C. only 3 persons were implicated, thus the deceased was not sure and was changing her version time to time and it would not be safe to rely upon the dying declarations on the basis of which conviction has been recorded by the court below.

5. Shri Aseem Dixit, learned Govt. Advocate for State has supported the conviction and the sentence imposed upon the appellants. He has submitted that factum of recording the dying declaration has been proved and in the material facts mentioned in the dying declaration there is no material contradictions. With respect to role of the accused Yuvraj, the statement of deceased is consistent that he has entered the house, poured kerosene oil on her and set her ablaze. Dying declarations were recorded with promptitude. Dying declarations have been proved by Kashinath Patil (PW-7), Dr. Lata V. Patil (PW-2) and B.S.Sisodiya (PW-12). Thus no case for interference in the appeal is made out.

6. It appears that there was no eye witness of the incident. Only the daughter aged 3 years of the deceased was in the house at the time when Yuvraj entered the house and poured Kerosene oil and set the deceased ablaze. When incident

YUVRAJ Vs. STATE OF M. P.

has taken place inside the house obviously the incident could not have been witnessed by the outsiders. The neighbour and husband were not present on the spot they came later on, for one reason or other have not supported the prosecution case.

7. We are left in the instant case with three dying declarations. One of the dying declaration (P-11) was recorded by Kashinath Patil (PW-7), Nayab Tehsildar cum Executive Magistrate. The factum of recording of dying declaration has been proved by Kashinath Patil (PW-7). Dr. Ramesh Chandra Dalal (PW-1) has stated that deceased was brought to the Primary Health Center, Shahpur at about 8.50 am, smell of kerosene oil was coming from the body and hairs of the deceased. Her clothes were burnt. She was having 35% burns. The incident was caused within 2-3 hours. He has referred her to Nehru Hospital, Burhanpur. He has proved the report (P-1). There is absolutely nothing to doubt the correctness of statement of Kashinath Patil (PW-7) with respect to recording of dying declaration (P-11). He has stated that deceased was in fit condition to give her statement. Doctor had made the endorsement to that effect on the dying declaration. At the time of recording of statement (P-11) no one else was present, it took 20 min. to record the dying declaration. On being asked by the police and as per request of Tehsildar, he had gone to record the statement of the deceased at Nehru Hospital, Burhanpur. He started recording of the dying declaration at 1.25 pm on the date of incident itself and concluded it at 1.45 pm. During the course of investigation of marginal intimation under section 174 Cr.P.C. statement (P-20) of the deceased Indu Bai was recorded by Gopi Chand (DW-2), headconstable of the police. Gopichand has proved that he has recorded statement (P-20) which has to be treated as dying declaration. Yet another statement of deceased (Ex.D-4) of Indu Bai was recorded under section 161 Cr.P.C. by investigating officer B.S.Sisodiya (PW-12). When we read all the three dying declarations conjointly, we do not find any contradictions much less substantial one, Incident has taken place in two parts, it started on the road which was outside the house in which 4-5 persons were present and deceased Indu Bai was beaten upon by Suman Bai, later on Yuvraj came to the spot, Indu Bai went inside the house to save herself, Yuvraj followed her, poured kerosene oil on her and set her ablaze. The role of Yuvraj is consistent in all the three dying declarations (P-11, P-20 & D-4). There is absolutely nothing to doubt the facts mentioned therein. Dying declaration (P-11) and (P-20) were recorded on the same date with promptitude. Statement (D-4) under section 161 Cr.P.C. was also recorded on 1.12.1997. In the statement (P-11) as several persons were present outside the house, name of five persons were mentioned but as per statement Yuvraj was the only person who had entered the house and set the deceased ablaze after pouring Kerosene oil on her. Similar is the position in dying declarations (P-20) and (D-4) respectively recorded by Gopi Chand, Head Constable and B.S.Sisodiya (PW-12) Investigating Officer. Merely by the fact that name of three persons were mentioned in the dying declaration (D-4), as

RAMESH Vs. STATE OF M.P.

additional names related to incident which took place outside the house as deceased Indu Bai objected to the answering of call of nature in drainage by Suman Bai and Rekha Bai. We find that no dent is caused with respect to role of Yuvraj poured kerosene oil and Suman Bai who caused marpeet in outside incident. Statement (P-20) has been proved by Gopi Chand and (D-4) has been proved by B.S.Sisodiya (PW-12). With respect to truthfulness of the dying declarations, we have no iota of doubt that the facts mentioned in dying declarations are correct and can be acted upon. Deceased was set ablaze in the house as apparent from the various documents on record. Husband of deceased Indu Bai namely Bhagwat (PW-4) was declared hostile, still no dent was caused in the dying declaration of the deceased. Bhagwat was not in the house, he was not an eye witness of incident, he was summoned by her daughter aged 3 years, Bhagwat was not present in the house, obviously he could not have stated the fact who was responsible for setting the deceased ablaze. He appears to have been won over apart from other neighbours, they also did not support the prosecution. In the facts and circumstances of the case as factum of recording of dying declaration has been proved, truthfulness of the facts mentioned therein is also beyond periphery of doubt. We find that conviction and sentence of the appellatant Yuvraj under section 302 of IPC read with section 449 of IPC calls for no interference.

8. On answering the call of nature quarrel took place between Suman Bai and the deceased Indu Bai, Indu Bai has been thrown in the drainage by Suman Bai, she has been sentenced to undergo 3 months RI and fine of Rs. 1000/-. She has undergone 9 days imprisonment. We convict her for the period already undergone and maintain the fine imposed and reduce the sentence imposed on Suman Bai under section 323 of IPC.

9. Resultantly, appeal filed by Yuvraj is hereby dismissed and the appeal preferred by Suman Bai is allowed in part to the aforesaid extent.

Appeal allowed in part.

I.L.R. [2009] M. P., 218
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
 14 July, 2008*

RAMESH

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 366 - Abduction - Appellant took a 10 years old girl with consent of her guardian for purchasing something for her from the shop - Appellant instead of taking her to shop,

RAMESH V& STATE OF M.P.

threatened and took her to forest for commission of illicit intercourse - No offence for kidnapping made out - Offence u/s 366 for abduction made out.

(Para 7)

क. दण्ड संहिता (1860 का 45), धारा 366 - अपहरण - अपीलार्थी एक 10 वर्ष की बालिका को उसके लिए दुकान से कुछ खरीदने के लिए उसके माता-पिता की सहमति से ले गया - अपीलार्थी ने उसे दुकान ले जाने के बजाय धमकाया और अयुक्त संमोग करने के लिए उसे जंगल ले गया - व्यपहरण का कोई अपराध नहीं बनता - धारा 366 के अन्तर्गत अपहरण का अपराध बनता है।

B. Penal Code (45 of 1860), Section 376/511 - Attempt to commit rape - Appellant did not remove the cloth of prosecutrix - Did not expose his male organ - Did not try to penetrate his male organ - He sat on her chest and stood up the moment she raised cry - No offence u/s 376/511 made out - Appellant guilty of committing offence u/s 354. (Para 8)

ख. दण्ड संहिता (1860 का 45), धारा 376/511 - बलात्संग करने का प्रयत्न - अपीलार्थी ने अभियोक्त्री के कपड़े नहीं हटाये - अपना नर अंग अभिदर्शित नहीं किया - अपने नर अंग को प्रवेश कराने का प्रयत्न नहीं किया - वह उसके सीने पर बैठा और वह चिल्लाई उसी समय खड़ा हो गया - धारा 376/511 के अन्तर्गत कोई अपराध नहीं बनता - अपीलार्थी धारा 354 के अन्तर्गत अपराध करने का दोषी।

Case referred :

(2004) 4 SCC 37.

N.S. Karada, for the appellant.

R.S. Chouhan, Dy.G.A., for the respondent/State.

J U D G M E N T (ORAL)

S.L. KOCHAR, J. :-THE appellant has preferred this appeal against his conviction under sections 363, 366 and 376 read with section 511 of the Indian Penal Code and sentence of R.I. for seven years and fine of Rs.500/- on each count and in default of payment of fine to suffer additional R.I. for three months on each count passed by the learned Special Judge, Dewas in Special Case No. 02/2003 by judgment dated 05.07.2003.

2. According to the prosecution case on 28.02.2002, in village Siroliya Bujurg in the evening the appellant took the prosecutrix aged 8 to 9 years for purchasing some thing for her from the shop and instead of taking to the shop, he took her inside the forest. Appellant threatened the prosecutrix at the point of knife for lying down on the ground and thereafter, removed his clothes and sat on her body. Prosecutrix started weeping upon which the appellant got up and went away. While weeping the prosecutrix returned back to her house and disclosed about the incident to her mother and father. The incident was also informed to village Chowkidar Chhitar and Sarpanch Rambharose. Report of the incident Ex.P/1 was lodged on the next day. Police prepared the spot map Ex.P/2 and sent the

RAMESH Vs. STATE OF M.P.

prosecutrix for medical examination and was examined by PW2 Dr Namita Thakur. Her MLC report is Ex.P/3. The prosecutrix belonged to the Scheduled Tribe community. A certificate to this effect was collected by the Investigating Officer and on completion of investigation, charge-sheet was filed against the appellant for the above mentioned offences as also under section 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

3. The appellant refuted the charges, therefore, put to trial. He did not examine any witness in defence. Learned trial Court, while acquitting the appellant from the charge under section 3(2)(v) of the SC & ST (Prevention of Atrocities) Act, finding him guilty for the remaining offences, convicted and sentenced as mentioned herein-above.

4. Having heard learned counsel for the parties and after perusing the entire record, this Court is of the view that the offences punishable under sections 363 and 376/511 of the Indian Penal Code would not be made out against the appellant, even if the complete prosecution case is accepted.

5. The prosecutrix aged ten years has admitted in cross-examination para 3 that her clothes were not removed by the appellant. She has also no-where stated in her entire statement that the appellant tried to penetrate his male organ into her... She has specifically stated that the appellant sat on her chest and on her raising cry, got up and went away. Regarding incident, only evidence available is the statement of the prosecutrix alone. There is no dispute that if the prosecutrix is a minor girl and taken away from the lawful guardianship without consent of her guardian or parents, that would amount to commission of offence of kidnapping as defined under section 361 of the Indian Penal Code, which reads thus -

361. Kidnapping from lawful guardian-ship.- Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation- The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose. "

6. The prosecutrix in para 4 has specifically stated that she was taken by the appellant for purchasing some thing for her in presence of mother and father and

RAMESH Vs STATE OF M.P.

after giving information to them of this fact. In this state of evidence, the offence under section 363 of the Indian Penal Code punishment for kidnapping as defined under section 361 of the Indian Penal Code would not be made out against the appellant. The appellant took the prosecutrix with the consent of her mother and father, but, the offence under section 366 of the Indian Penal Code is clearly made out against the appellant, because he took away the prosecutrix by deceitful means. Abduction is defined under section 362 of the Indian Penal Code in the following terms:-

362. "Abduction. Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

7. In the instant case, the appellant took the prosecutrix with the consent of her guardian for purchasing some thing for her from the shop and after going up to some distance, instead of taking her to the shop, threatened and took her to the forest for commission of illicit intercourse. Therefore, the offence under section 366 of the Indian Penal Code is clearly made out against the appellant.

8. The offence punishable under section 376 read with section 511 of the Indian Penal Code, attempt to commit rape, Would not be made out against the appellant, because he did not remove the clothes of the prosecutrix and also did not expose his male organ. He had not tried to penetrate his male organ into her private part. He sat on the chest of the prosecutrix and stood up the moment she raised cry. The supreme Court in the case of *Aman KJumar V/s State of Haryana* [2004]4 SCC 379] in paras 11, 12 and 13 has observed thus-

"In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

Though the prosecutrix's version in court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by the police during investigation. The evidence of PW 11, the father who according to the prosecution made a departure from what he allegedly stated during investigation is to the effect that

RAMESH Vs. STATE OF M.P.

his wife PW 9 told her (sic him) that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get affected. Significantly, the evidence of the prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape.

There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Sections 376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354 IPC are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge, that modest is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word "modesty" is not defined in IPC. The shorter Oxford Dictionary (3rd Edn) defines the word "modesty" in relation to a woman as follows:

"Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste".

8. Medical evidence of PW-3 Dr Namita Thakur is also not sufficient to support constitution of offence of attempt to commit rape. She found one scratch near right eye of the prosecutrix. Prosecutrix nowhere stated that she was beaten or assaulted by the appellant. The prosecutrix has also not stated that she sustained this injury at the time of incident. The injury appears to be superficial one. Her hymen was intact and no injury was found any where on her body as well as her private parts. There was no sign of presence of semen, blood or any suspicious marks of stains on her underwear. Dr Thakur has given specific opinion that there was absolutely no evidence of commission of intercourse on the prosecutrix. In these circumstances, the requisite ingredients for attempt to commit rape punishable under section 376 read with Section 511 of the Indian Penal Code

RAMESH Vs. STATE OF M. P.

are not available in the instant case. The conduct of the accused was not showing full determination to gratify his passion at all events and in spite of all intervening factors and resistance as he tried his level best to commit sexual intercourse, but failed to make penetration.

9. Looking to the statement of the prosecutrix, medical evidence and statements of hostile witnesses PW-3 Harisingh father of the prosecutrix, and PW-4 Chhitarisingh Village Chowkidar, in the considered opinion of this Court, at the most offence punishable under section 354 of the Indian Penal Code would be made out against the appellant for use of assault or criminal force to outrage the modesty of the prosecutrix.

10. In view of the foregoing discussion, this appeal is allowed in part. The conviction and sentences of the appellants under sections 363 and 376/511 of the Indian Penal Code are hereby set aside. His conviction under section 366 of the Indian Penal Code is maintained. He is also convicted under section 354 of the Indian Penal Code. On the question of sentence, learned counsel for the appellant has submitted that the appellant is a first offender, a young married person having responsibility to maintain his family consisting of wife, children and old parents and for the offence punishable under section 366 of the Indian Penal Code no minimum jail sentence is prescribed.. At the time of incident, he was 36 years of age and is facing this prosecution since February, 2002, therefore, he may be sentenced to the period already undergone (five years and seven months). Looking to the totality of circumstances in the opinion of this Court, ends of justice would be served to sentence the appellant for the offence under section 366 of the Indian Penal Code to the period already undergone and fine of Rs. 500/-, in default of payment of fine, to suffer additional S.I. for three months and under sec.354 of the Indian Penal Code R.I. for two years and fine of Rs. 500/-, in default of payment of fine to suffer additional S.I. for three months. Both these substantive jail sentences are directed to run concurrently. Learned trial Court is directed to release the appellant forthwith on his depositing the amount of fine as aforesaid and if not wanted in any other criminal case. Office is directed to send a copy of this judgment together with the record to the trial Court for immediate compliance.

Appeal allowed in part.

I.L.R. [2009] M. P., 224
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
 31 July, 2008*

BHANU SINGH

... Appellant

Vs.

... Respondent

STATE OF M.P.

A. Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Appreciation of evidence - Rape - Held - It does not appear to reason that rustic villagers like prosecutrix, her husband and his brother would concoct or manipulate the story of rape against the appellant within short span of two hours - Even otherwise, upon close scrutiny of entire evidence on record, the incident of rape as narrated by the prosecutrix does not appear to be false and concocted. (Paras 13 & 14)

क. दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 - साक्ष्य का अधिमूल्यन - बलात्संग - अभिनिर्धारित - यह मानने योग्य नहीं है कि अभियोक्त्री, उसके पति और उसके भाई के समान सीधे-सादे ग्रामीण, दो घण्टे की अल्प अवधि में अपीलार्थी के विरुद्ध बलात्संग की कहानी गढ़ेंगे या हेरफेर करेंगे - अन्यथा भी अभिलेख की सम्पूर्ण साक्ष्य की सूक्ष्म जाँच करने पर, अभियोक्त्री द्वारा बतायी गई बलात्संग की घटना मिथ्या और मनगढ़ंत होना प्रतीत नहीं होती है।

B. Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Appreciation of evidence - Rape - Prosecutrix was meticulously cross-examined, but nothing has been elicited so as to distrust her version - The mere fact that she had gone to police station with her husband, his brother and two other prominent persons of the village, does not vitiate her testimony. (Para 14)

ख. दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 - साक्ष्य का अधिमूल्यन - बलात्संग - अभियोक्त्री की प्रतिपरीक्षा पूरी बारीकी से की गई, किन्तु उसके बयान पर अविश्वास करने के लिए कुछ भी प्राप्त नहीं हुआ - केवल यह तथ्य कि वह पुलिस थाने अपने पति, उसके भाई और गाँव के दो अन्य प्रतिष्ठित व्यक्तियों के साथ गयी थी, उसके अभिसाक्ष्य को दूषित नहीं करता है।

C. Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - Appreciation of evidence - Rape - Absence of injuries - Absence of visible marks of the injuries of the prosecutrix would not necessarily mean that she had not suffered any injury or that she had not offered any resistance at the time of commission of rape - Absence of injury is not necessarily an evidence of falsity of allegations or an evidence of consent on the part of the prosecutrix. (Para 15)

ग. दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 - साक्ष्य का अधिमूल्यन - बलात्संग - क्षतियों का अभाव - अभियोक्त्री की क्षतियों के

RAMESH Vs. STATE OF M. P.

स्पष्ट निशानों के अभाव का अर्थ अनिवार्य रूप से यह नहीं होगा कि उसे कोई क्षति नहीं हुई या यह कि उसने बलात्संग करने के समय कोई प्रतिरोध नहीं किया था – क्षतियों का अभाव अनिवार्य रूप से आरोपों की असत्यता का या अभियोक्त्री की ओर से सहमति का साक्ष्य नहीं है।

Case referred :

AIR 2000 SC 1812.

Satyam Agrawal, for the appellant.

L.D.S. Baghel, G.A., for the respondent/State.

J U D G M E N T

SUSHMA SHRIVASTAVA, J. :-Appellant has preferred this appeal challenging his conviction and order of sentence passed by First Additional Sessions Judge, Teekamgarh in S.T. No.137/91, decided on 25.2.94.

2. Appellant has been convicted under Section 376, 506-B & 323 of IPC and sentenced to rigorous imprisonment for four years, six months and three months respectively by the impugned judgment. All the sentences were to run concurrently.

3. According to prosecution, on 24.5.91 about 10 'O'clock in the morning, when prosecutrix had gone to her 'Beda' (an enclosure) to collect the logs, appellant Bhanu Singh came inside her 'Beda', finding her alone, fell her on the ground and forcibly committed sexual intercourse with her. When prosecutrix shouted for help, appellant gagged her mouth and threatened to kill her if she shouted. On being informed of the incident, prosecutrix's husband Heeralal and his brothers Bansilal & Parikshat reached there. Then appellant left the prosecutrix and fled away from 'Beda'. While fleeing he assaulted her husband Heeralal and his brothers by farsa and caused hurt to them. The FIR of the incident was lodged by the prosecutrix at Police Station, Lidhora. On the basis of her report, an offence was registered against the appellant and was investigated. Prosecutrix, her husband and his brothers were sent for medical examination. On being arrested, appellant was also medically examined and found competent to perform the sexual act. The petticoat of the prosecutrix and her vaginal slide prepared during her medical examination as well as underwear of the appellant and his semen slide were seized by the Police and were sent for chemical examination. After due investigation, appellant was prosecuted under Section 376, 323, 324 & 506-B of IPC and was put to trial.

4. Appellant denied the various charges framed against him and pleaded false implication due to old enmity and land dispute. According to appellant, Heeralal, the husband of the prosecutrix alongwith his brothers had quarrelled with him, assaulted and caused hurt to him and lodged a false report of rape against him through his wife.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellant guilty of committing the offences

BHANU SINGH Vs. STATE OF M.P.

under Section 376, 506-B and 323 of IPC, convicted and sentenced him as aforesaid. Hence, this appeal.

6. Learned counsel for the appellant submitted that the trial court gravely erred in convicting the appellant on the basis of false and concocted testimony of the interested witnesses despite negative medical evidence and erroneously rejected the defence evidence.

7. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant.

8. Perused the evidence on record. Prosecutrix (P.W-8) categorically deposed in her evidence that at the relevant time about 10'O'clock in the morning when she had gone to her 'Beda' (enclosure) to pick up the logs, appellant Bhanu Singh came there, caught hold of her, threw her on the ground and committed sexual intercourse with her. Prosecutrix shouted for help, but the appellant gagged her mouth and also intimidated and threatened to kill her in case she shouted. According to prosecutrix (P.W-8), when her husband Heeralal and his brothers Bansilal and Parikshat came there appellant fled away causing hurt to her husband Heeralal and his brothers Bansilal and Parikshat. Prosecutrix then went to the Police Station Lidhora alongwith her husband Heeralal and his brother Bansilal and lodged the FIR (Ex.P-12), which was recorded by Sub-Inspector S.K. Goswami (P.W-11).

9. The evidence of the prosecutrix (P.W-8) also stood corroborated by the testimony of Heeralal (P.W-5) and his brother Bansilal (P.W-9). P.W-5 Heeralal also deposed in his evidence that on being informed by Khanju (P.W-6), he had gone to his 'Beda' and found appellant coming out from his house and his wife weeping, who told him that appellant had ravished her. When Heeralal (P.W-5) asked the appellant why did he do so, appellant assaulted him by blunt side of farsa. On his shouting, his brothers Bansilal and Parikshat came there. Then appellant assaulted his brother Bansilal and Parikshat too.

10. Bansilal (P.W-9) also corroborated this fact that when he saw appellant assaulting his brother Heeralal and tried to rescue him, appellant Bhanu Singh assaulted him and by that time his brother's wife (prosecutrix) also came there and informed him that appellant had spoiled her; then they had gone to the Police Station to lodge the report. Although Parikshat (P.W-1) turned hostile to prosecution, yet he supported the fact that appellant had assaulted him and his brothers Heeralal and Bansilal. It is also borne out from the evidence of Jagbhan Singh (P.W-7) that he had seen appellant Bhanu Singh following Heeralal and they had a quarrel and he had seen injuries on the person of Heeralal, Parikshat and Bansilal. It is also evident from the testimony of Dr. R.K. Jain (P.W-3) that certain injuries were found on the person of Heeralal (P.W-5), Bansilal (P.W-9) and Parikshat (P.W-1).

11. The main submission of the learned counsel for the appellant has been that

RAMESH Vs. STATE OF M.P.

the husband of the prosecutrix, namely, Heeralal and his brothers had assaulted the appellant and caused him head injury and had lodged a false report of rape against the appellant in order to save their own skin. However, the evidence of Dr. V.K. Jain (D.W-2), examined as a defence witness, indicates that upon medical examination of the appellant on 28.5.91, one abrasion with clotted blood over his nose and another abrasion over his cheek were found and no head injury was found on his person. There was also no suggestion to Dr. V.K. Jain (D.W-2) that he omitted to mention his head injury or overlooked it.

12. On the other hand, P.W-8 Prosecutrix as well as her husband Heeralal (P.W-5) and his brother Bansilal (P.W-9) have denied the suggestion given in their cross-examination that they had assaulted the appellant causing him hurt and lodged a false report of rape against the appellant.

13. It is also borne out from the testimony of S.K. Goswami (P.W-11) coupled with the evidence of prosecutrix (P.W-8) that the FIR of the incident of rape was lodged at Police Station Lidhora on 24.5.91 itself shortly after the incident. It does not appeal to reason that rustic villagers like prosecutrix (P.W-8) and her husband Heeralal (P.W-5) and his brother Bansilal (P.W-9) would concoct or manipulate the story of rape against the appellant within short span of two hours. Had there been a simple incident of marpeet over land dispute in which the three persons of the complainant side received injuries, they could have lodged the report of assault and causing hurt against the appellant and there was no need to take the prosecutrix to the Police Station. It also does not appeal to reason, that the prosecutrix or her husband would lodge a false report of rape against appellant at the cost of her modesty, honour and reputation in a case of assault and marpeet.

14. Even otherwise, upon close scrutiny of entire evidence on record, the incident of rape as narrated by the prosecutrix (P.W-8) does not appear to be false and concocted. Prosecutrix (P.W-8) was meticulously cross-examined, but nothing has been elicited so as to distrust her version. The mere fact that she had gone to the Police Station with her husband, his brother and two other prominent persons of the village, does not vitiate her testimony. There was nothing concrete on record to indicate that these two persons had any enmity with the appellant and would persuade the prosecutrix to lodge a false report.

15. Similarly, the fact that Dr. Madhu Jain (P.W-10), who examined the prosecutrix (P.W-8) next day on 25.5.91, did not find any external or internal injury over her body, also does not create any doubt on the testimony of the prosecutrix (P.W-8). Dr. Madhu Jain (P.W-10) had opined that as the prosecutrix was a married woman, it was not possible to give any definite opinion about commission of rape with her. The Apex Court in the case of *State of Rajasthan Vs. N.K.* reported in AIR 2000 Supreme Court page 1812 has also held that the absence of visible marks of the injuries of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any

BHANU SINGH Vs. STATE OF M.P.

injury or that she had not offered any resistance at the time of commission of rape and absence of injury on the person of the prosecutrix is not necessarily an evidence of falsity of allegations or an evidence of consent on the part of the prosecutrix.

16. The statement made by the prosecutrix in her cross-examination that she sustained injuries on her back, appears to have been obtained on the suggestions given during cross-examination, because obviously it would not have been possible for her to have seen the injuries caused on her back. Such type of improvements are natural even in the statement of a truthful witness and do not vitiate her entire evidence.

17. In fact, after careful scanning, the evidence of the prosecutrix (P.W-8) is found to be natural, clear, cogent and trustworthy. The statement of an independent witness Khanju Singh (P.W-6) that about 10 'O'clock in the morning he heard the cries of the prosecutrix from her 'Beda', also lend assurance to the truthfulness of the version made by the prosecutrix (P.W-8). The injuries found by Dr. R.K. Jain (P.W-3) on the person of Heeralal (P.W-5) and his brother Bansilal (P.W-9) also supports her version that after the incident appellant had chased her husband and caused hurt to him and his brother Bansilal.

18. In view of the aforesaid facts and the prompt lodging of the FIR, the incident of rape as narrated by the prosecutrix (P.W-8) is not found to be false or concocted. On the other hand, her evidence is found natural, truthful and trustworthy and it inspires confidence and does not create any doubt or suspicion as to its credibility. The description of the incident, as given by the prosecutrix (P.W-8) in para 1 of her deposition, clearly indicates that she was subjected to forcible sexual intercourse by the appellant against her will.

19. In view of the aforesaid discussion, the conviction of the appellant, as recorded by the trial court, for the offence under Section 376 of IPC after discarding the defence evidence for cogent reasons, does not suffer from any infirmity and deserves to be affirmed.

20. In view of the testimony of prosecutrix (P.W-8), her husband Heeralal (P.W-5) and his brother Bansilal (P.W-9) coupled with the medical evidence of Dr. R.K. Jain (P.W.-3), as on record, the conviction of the appellant for the offences under Section 506-B and under Section 323 of IPC for causing hurt to Heeralal and Bansilal also does not suffer from any infirmity so as to warrant any interference in appeal.

21. There are also no special or adequate reasons to reduce the various sentences imposed on the appellant. Appeal has no merit.

22. Appeal, therefore, fails and is dismissed. Appellant is on bail. He shall forthwith surrender to his bail bonds to serve out the remaining part of his sentence.

Appeal dismissed.

I.L.R. [2009] M. P., 229

APPELLATE CRIMINAL

Before Mr. Justice R.S. Garg & Mr. Justice R.C. Mishra

1 August, 2008*

SHARAD KUMAR

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Interpretation of Statutes - Illustration - Unlike marginal note, an illustration is to be considered as part of Section itself - It is to be accepted as being both relevant and valuable for construction of section. (Para 10)

क. कानूनों का निर्वचन - दृष्टांत - पार्श्व टिप्पणी के असदृश एक दृष्टांत को स्वयं धारा के भाग के रूप में विचारित करना होता है - इसे धारा के निर्माण के लिए सुसंगत और मूल्यवान होने के रूप में स्वीकार करना होता है।

B. Prevention of Corruption Act (49 of 1988), Sections 7, 11 & 12, Penal Code, 1860, Section 116-Illustration (a) -Sections 161, 165 and 165-A of IPC replaced by Sections 7, 11 and 12 of Act - No implied repeal of illustration (a) to Section 116 IPC - Cases falling u/s 7, 11 and 12 of Act may be decided by taking aid of illustration (a) of 116 IPC - Case of Rajaram Vs. State rightly decided - Reference answered accordingly. (Paras 14 to 16)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 11 व 12, दण्ड संहिता, 1860, धारा 116, दृष्टांत (ए) - भा.द.सं. की धाराएँ 161, 165 व 165-ए अधिनियम की धाराओं 7, 11 व 12 द्वारा प्रतिस्थापित कर दी गई हैं - भा.द.सं. की धारा 116 के दृष्टांत (ए) का कोई विवक्षित निरसन नहीं - अधिनियम की धारा 7, 11 व 12 के अन्तर्गत आने वाले मामले भा.द.सं. की धारा 116 के दृष्टांत (ए) की सहायता लेकर विनिश्चित किये जा सकते हैं - राजाराम वि. राज्य का मामला उचित रूप से विनिश्चित - निर्देश तदनुसार उत्तरित।

Cases referred :

2001(1) MPLJ 624, AIR 1959 SC 8, AIR 1963 SC 1561, AIR 1999 SC 2556, (1922) 24 BomLR 534, (1927) 53 MLJ 723, (1928) 29 CrLJ 601, AIR 1916 PC 242, AIR 1938 PC 67, AIR 1956 SC 404.

S.C. Datt with G.P. Patel, for the appellant.

T.K. Modh, Dy.A.G., for the respondent/State.

ORDER

The Order of the Court was delivered by R.C. MISHRA, J. :-The learned Single Judge, before whom this appeal against conviction under Section 12 of the Prevention of Corruption Act, 1988 (for short 'the Act') came up for consideration, has referred the following question for decision by a larger Bench : -

"Whether the offences under sections 7 and 12 of the Prevention of Corruption Act, 1988 are substantive offences, if

SHARAD KUMAR Vs. STATE OF M.P.

yes, being totally independent, the cases falling under it are required to be decided without taking aid of illustration (a) of section 116 of the Penal Code ? If yes, whether by taking the aid of Illustration (a) of section 116 of the Penal Code holding that the offence under section 12 of the Act is proved, the case of *Rajaram vs. State of M.P.* (2001 (1) MPLJ 624), has been correctly decided ?"

2. For a proper appreciation of the rival contentions, it is necessary to refer briefly to the legislative history leading to creation of the offence punishable under Section 12 of the Act. This section that is merely a restatement of Section 165-A of the Indian Penal Code (hereinafter referred to as 'the Code') punishes abetment of offences defined in Sections 7 and 11 of the Act, which respectively correspond to Sections 161 and 165 of the Code. Originally, there was no provision in the Code for punishing abetment of the offence under Section 161 or 165 thereof. The Prevention of Corruption Act, 1947 also did not contain any punishing Section for the offence of abetment of acceptance of illegal gratification or bribe by a public servant in respect of an official act, that was dealt with by Section 161 of the Code or the offence of obtaining of valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant, that was falling under Section 165 thereof. It was the Criminal Law Amendment Act, 1952 (XLVI of 1952) that inserted Section 165-A in the Code as the penal provision for abetment of these offences. Ultimately, the entire Chapter IX of the Code that comprised the offences by or relating to public servants including the one under Section 165-A was omitted by the Act. However, as pointed out already, Sections 7, 11 and 12 of the Act are virtually the verbatim reproductions of Sections 161, 165 and 165-A of the Code (since omitted).

3. After tracing this legislative history, the learned Senior Counsel appearing on behalf of the appellant has strenuously contended that after coming into force of the Act, illustration (a) appended to Section 116 of the Code (for short 'the illustration') cannot be utilized for deciding guilt of an accused charged with the offence under Section 12 of the Act. To buttress the contention, primal reliance has been placed on a decision of the Apex Court in *Bhajahari Mondal vs. State of W.B.* (AIR 1959 SC 8). However, learned Deputy Advocate General is of the view that omission of the illustration cannot be assumed, as the legislature has preferred to retain the same in the Code and that too, in the Chapter V titled as "of abetment".

4. For a ready reference, the followings excerpts from the judgment in *Rajaram's case* (supra), the correctness of which is at issue, may be reproduced : -

"7. Section 116 Indian Penal Code relates to abetment of offence punishable with imprisonment. Section 116 of Code is reproduced below :-

SHARAD KUMAR Vs. STATE OF M.P.

.....
Illustration (a) of the section is reproduced below : -

A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section."

Thus, it is clear that bribe is offered to a public servant as a reward for showing some favour in discharge of his official function. On refusal of public servant, to accept bribe, the person-offering bribe is punishable under this section. The language of section 165-A of Code and that of section 12 of the Act are identical in nature. Since the definition of abetment is not given in the Act, therefore, considering the provisions of illustration (a) of section 116 of the Code, it is established that person offering bribe which is refused by public servant, is also guilty of abetting offence and is liable to be punished under section 12 of the Act. Thus, in the facts and circumstances of the case, prosecution has established that the appellant has offered bribe to a public servant therefore, there is no force in the arguments of appellant that conviction section under 12 of the Act is not maintainable.

8. On going through the evidence on record, concurrent finding is recorded by the Trial Court and the Appellate Court that the appellant has offered bribe to a public servant. Thus, considering the illustration (a) of section 116 of Code, offence under section 12 of the Act is proved against appellant. No infirmity is committed by the trial Court in framing charges under Section 12 of the Act. The appellant has rightly been punished under Section 12 of the Act. The appeal has no merit and is dismissed".

5. In *Bhajahari Mondal's case* (supra), conviction under Section 165-A of the Code was set aside for want of jurisdiction as the Government notification allotting the case to the Special Court for trial did not contain any reference thereto. It was, in this context, that the Supreme Court proceeded to observe that Section 165-A of the Code creates a specific offence of abetment of offence under Sections 161 and 165, which is distinct and separate from the offence under Section 116 of the Code. But, the question, in essence, that we are faced with is as to whether, in absence of an express repeal, the illustration has to be regarded as redundant or nugatory consequent to the deletion of Sections 161, 165 and 165-A of the Code.

6. There is always a presumption against a repeal by implication and the reason of this rule is based on the theory that the legislature while enacting a law has a complete knowledge of the existing laws on the same subject-matter and therefore

SHARAD KUMAR Vs. STATE OF M. P.

when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. The presumption is, however, rebutted and a repeal is inferred by necessary implication only when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act "that the two cannot stand together" (*Municipal Council, Palai vs. T. J. Joseph* (AIR 1963 SC 1561 referred to). In that case, the Supreme Court had the occasion to deal with the question as to whether the offences under Sections 272 and 273 of the Code dealing with adulteration of food or drink intended for sale or sale of noxious food or drink stood impliedly repealed by the Prevention of Food Adulteration Act. The Court reaffirmed the principle that repugnancy only exists when -

(1) there is a direct conflict between the two provisions.

(2) When the legislature intended to lay down an exhaustive code in respect of the same subject-matter replacing the earlier law.

(3) When the two laws occupy the same field.

7. The relevant extracts of the statement of objects and reasons for bringing the Act on the statute book read as under: -

1. The bill is intended to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions.

2. The Prevention of Corruption Act, 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in the Criminal Law Amendment Ordinance, 1944, to enable attachment of ill-gotten wealth obtained through corrupt means, including from transferees of such wealth. The bill seeks to incorporate all these provisions with modifications so as to make the provisions more effective in combating corruption among public servants.

3. The bill, inter alia, envisages widening the scope of the definition of the expression 'public servant', incorporation of offences under sections 161 to 165A of the Indian Penal Code, enhancement of penalties provided for these offences and

4.

5.

8. The Apex Court in *P. Nallammal vs. State rep. by Inspector of Police* (AIR 1999 SC 2556), while taking note of the fact that the Act does not contemplate abetment of any of the offences specified in Section 13 thereof, proceeded to hold that the abettor of any such offence could also be prosecuted

SHARAD KUMAR Vs. STATE OF M.P.

along with the delinquent public servant for the offences read with Section 109 of the Code. Accordingly, the general provisions of Chapter V of the Code still serve as supplemental provisions for the offence of abetment punishable under the Act.

9. It is, therefore, apparent that the legislature did not intend to make the illustration a mere surplusage or otiose. Further, the illustration is not, in any way, repugnant to Section 12 of the Act. It only serves as an example of abetment of an offence punishable under Section 7 of the Act. There are many other ways of instigating a public servant to commit this offence besides by means of a direct offer of bribe (See. *Amiruddin Salebhoy Tyabjee*, (1922) 24 Bom. L. R. 534; *Vanu Ramchandriah*, (1927) 53 M.L.J. 723; *Puran Singh*, (1928) 29 Cr.L.J. 601).

10. There is yet another aspect of the matter. An illustration to a section, unlike marginal note, is to be considered as part of the section itself and is to be accepted as being both relevant and valuable for the construction of the section.

11. The Judicial Committee of the Privy Council in *Mohd. Syedol Ariffin v. Yeoh Ooi Gark* AIR 1916 PC 242, explained the significance to be attached to an illustration appended to a section in the following words : -

"It is the duty of a court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the next. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired."

(Quoted with approval by the Apex Court in *Jumma Masjid. Mercara v. Kodimaniandra Deviah* AIR 1962 SC 847)

12. However, as further elucidated in *Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji* (AIR 1938 PC 67), illustration cannot have the effect of modifying the language and cannot curtail or expand the ambit of the Section, which alone forms the enactment. This rule of construction was affirmed by the Apex Court in *Shambhu Nath Mehra vs. State of Ajmer* (AIR 1956 SC 404) wherein Vivian Bose, J., while referring to illustration to Section 106 of the Indian Evidence Act, 1872, stated the principle in the following terms : -

"We recognise that an illustration does not exhaust the full content of the section which it illustrate but equally it can neither

SADHAN NAYAK @ DEEPAK Vs. STATE OF M.P.

curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose exercise due diligence, as to the accused, the facts cannot be said to be especially" within the knowledge of the accused".

13. Thus, viewed from any angle, implied repeal of the illustration as suggested by the learned Senior Counsel can not be inferred.

14. Adverting to the decision in *Rajaram's case* (above), it may be seen that the learned Judge has not taken any view inconsistent with the ratio propounded in *Bhajahari Mondal's case* (supra). He has nowhere laid down that any legal or mandatory presumption can be drawn from the facts mentioned in the illustration. What the learned Single Judge meant to say was that in absence of any definition of abetment in the Special Act and any illustration to exemplify the same, reference may be made to the provisions of general Act viz. the I.P.C. including the illustration so as to understand as to what the word 'abetment' means and includes ? In other words, learned Single Judge has simply referred to the illustration to arrive at the conclusion that on the fact as found proved from the evidence the offence of abetment was made out.

15. For these reasons, we are of the considered view that the decision in *Rajaram's case* (above) does not suffer from any incorrectness.

16. To sum up, our answers are :-

(i) that the cases falling under Sections 7 and 12 of the Act may be decided by taking aid of illustration (a) to section 116 of the Code.

(ii) The case of *Rajaram* (supra) was correctly decided. .

17. The matter shall now be placed before learned Single Judge for proceeding further in accordance with the aforesaid opinion expressed by us.

Reference answered accordingly.

Order accordingly.

I.L.R. [2009] M. P., 234
APPELLATE CRIMINAL

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

13 August, 2008*

SADHAN NAYAK @ DEEPAK

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 394 r/w 397, 302 - Murder - Circumstantial Evidence - Complainant was in her office on 13.05.1998 - Her domestic servant deceased was murdered at her house and her cash and

SADHANNAYAK@DEEPAK Vs. STATE OF M.P.

valuables were robbed - On the date of occurrence, deceased was last seen in the company of the appellant at the house of complainant and the appellant was also found going towards the house of complainant and thereafter seen with black bag, a suitcase and other things - On the same day, appellant gave Rs.2000 on credit to PW3 - And PW3 escorted the appellant to the railway station - Appellant had boarded in train for Howrah - On the morning of 14.05.1998, appellant was apprehended from Howrah coach and was found in possession of various items robbed from the place of complainant, which were identified by the complainant at the identification parade - These circumstances formed a complete chain and were sufficient to conclude that it was the appellant and none else, who committed robbery and murder - Appeal dismissed. (Paras 25 & 26)

दण्ड संहिता (1860 का 45), धारा 394 सहपठित धारा 397, 302 - हत्या - परिस्थितिजन्य साक्ष्य - परिवादी 13.05.1998 को अपने कार्यालय में थी - उसके घरेलू नौकर मृतक की उसके घर पर हत्या कर दी गई और उसकी नगदी और मूल्यवान वस्तुएँ लूट ली गई - घटना तारीख को मृतक को आखिरी बार अपीलार्थी के साथ परिवादी के घर पर देखा गया और अपीलार्थी परिवादी के घर की ओर जाता हुआ भी पाया गया और उसके बाद काले थैले, एक सूटकेस और अन्य वस्तुओं के साथ देखा गया - उसी दिन अपीलार्थी ने 2000 रुपये अ.सा. 3 को उधार दिये - और अ.सा. 3 अपीलार्थी के साथ रैलवे स्टेशन गया - अपीलार्थी हावड़ा के लिए ट्रेन में सवार हुआ - 14.05.1998 की सुबह, अपीलार्थी को हावड़ा बोगी से गिरतार किया गया और वह परिवादी के यहाँ से लूटी गई विभिन्न वस्तुओं के कब्जे में पाया गया, जिनकी शिनाख्त परिवादी द्वारा शिनाख्त परेड में की गई - इन परिस्थितियों से एक पूरी कड़ी तैयार होती है और यह निष्कर्ष निकालने के लिए पर्याप्त हैं कि वह अपीलार्थी ही था न कि अन्य कोई जिसने लूट व हत्या कारित की - अपील खारिज।

Cases referred :

2008 AIR SCW 4669, (1998) 7 SCC 177, AIR 1991 SC 1853.

Alok Tapikar, for the appellant.

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 **Mrs. SUSHIMA SHRIVASTAVA, J.** :- Appellant has preferred this appeal challenging his conviction and order of sentence passed by IXth Additional Sessions Judge, Bhopal in S.T. No. 228/98 decided on 27.10.99.

2. Appellant has been convicted under Section 394/397, 302 of IPC and sentenced to rigorous imprisonment for seven years with fine of Rs.500/-, in default rigorous imprisonment for three months, and to imprisonment for life with fine of Rs.500/-, in default rigorous imprisonment for three months, for the respective offences by the impugned judgment. The sentences were to run concurrently.

3. According to prosecution, on 13.5.98 about 9 'O'clock in the morning, complainant Sarla Rao left for her office leaving her servant named Vijay at her

SADHAN NAYAK @ DEEPAK Vs. STATE OF M.P.

house No. 542, Arvind Bihar, Bag-Sevaniya, Bhopal. When she came back about 7 'O'clock in the evening, she did not find her servant Vijay, then she opened the door of her house by duplicate key. On going inside the house, she found that her things were lying scattered, her suitcase, a black bag, VCR, blood pressure instrument, her gold chain, diamond set, alarm watch and cash rupees four thousand etc. were missing. The FIR of the incident was lodged by her at Police Station Bag-Sevaniya on the same day at 20.45 P.M., on the basis of which an offence was registered under Section 454, 380 of IPC and was investigated. Police came to the spot and searched for her servant Vijay, whose dead body was found in an almirah of pooja-room in the upper storey of the house. Dehati merg was recorded by the Police at the instance of complainant Sarla Rao and merg inquest report was prepared. The dead body of Vijay was sent for postmortem examination. On postmortem examination, ligature marks around the neck of deceased and other injuries caused by sharp object were found. In the opinion of autopsy surgeon, his death occurred due to asphyxia as a result of ligature strangulation.

4. During investigation, it was revealed that deceased Vijay was last seen with appellant Sadhan Nayak @ Deepak on 13.5.98 at about 12 'O'clock in the noon at the house of complainant Sarla Rao and the appellant had left for Calcutta by Indore-Bilaspur Express same evening. On suspicion, Jabalpur Police was informed and appellant was apprehended next morning at Jabalpur Railway Station from Howrah coach of Indore-Bilaspur Express and the looted property and a knife was seized from his possession. A string used in the commission of offence and the looted cash was also seized at the instance of the appellant. The cash amount worth rupees two thousand and fifteen hundred was seized from Dilip Jana & Ram Prasad Rathore respectively on the information of the appellant. The seized articles were put to test identification parade. After due investigation, appellant was prosecuted under Section 454, 380, 397, 302 of IPC and was put to trial.

5. Appellant denied the charges framed against him under Section 394/397, 302 of IPC and pleaded innocence. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case found the appellant guilty under Section 394/397, 302 of IPC, convicted and sentenced him as aforesaid by the impugned judgment, which has been challenged in this appeal.

6. Learned counsel for the appellant submitted that the appellant was erroneously convicted without any cogent and clinching evidence and no circumstances pointing out the guilt of the appellant were established from the evidence on record. Learned counsel for the State, on the other hand, supported the impugned judgment.

7. We have perused the impugned judgment and the entire evidence on record.

8. The conviction of the appellant rests upon the circumstantial evidence. The trial court relied upon the following circumstances to draw the conclusion of the

SADHAN NAYAK @ DEEPAK Vs. STATE OF M.P.

guilt against the appellant:-

(i) the seized articles were robbed from the house of complainant Sarla Rao on the date of occurrence;

(ii) during commission of the robbery, hurt was caused to deceased Vijay resulting into his homicidal death;

(iii) deceased was last seen in the company of the appellant at the house of complainant Sarla Rao prior to the occurrence;

(iv) appellant was seen with stolen/robbed articles, which were recovered and seized from him.

9. Learned counsel for the appellant, however, submitted that none of the aforesaid circumstances were established from the evidence on record and the chain of circumstances was not complete so as to fasten the guilt upon the appellant.

10. The law relating to the conviction on the basis of circumstantial evidence is well settled and has been reiterated by the Apex Court in the case of *Kusuma Ankama Rao Vs. State of A.P.* reported in 2008 AIR SCW 4669 (para 12) as under:-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

11. In the light of aforesaid legal principles, we proceed to examine the evidence on record. It is clearly borne out from the evidence of complainant Sarla Rao (P.W-1), her driver Gulab Singh Parmar (P.W-4) coupled with the evidence of Imal Bai (P.W-6), A.S.I. R.R. Gautam (P.W-8) and the medical evidence of Dr. D.S. Badkur (P.W-2) that house burglary at the place of complainant Sarla Rao (P.W-1) and the murder of her domestic servant Vijay aged about fourteen years was committed in her house on 13.5.98 when she was away in her office. Complainant Sarla Rao (P.W-1) deposed in her evidence that on 13.5.98 when

SADHAN NAYAK @ DEEPAK Vs. STATE OF M.P.

she came back from her office at 6 'O'clock in the evening and pressed the call bell, her servant Vijay did not open the door. Then she opened it by duplicate key and found that her things were scattered and many things like watch, blood pressure instrument, VCR, gold chain, bangles and diamond topse etc. were missing and her servant Vijay was not there. She then asked her driver to search for the servant Vijay in the house and sent for his mother, but Vijay could not be found. She went to Police Station and lodged the FIR (Ex.P-1) at Police Station Bag Sevaniya. When the police came on the spot and searched for Vijay, his dead body was found in an almirah in the room of the first floor of her house.

12. P.W-4 Gulab Singh Parmar, the driver of complainant Sarla Rao, also corroborated the aforesaid facts that when madam Rao came back from the office in the evening by the car driven by him, her servant Vijay did not respond despite repeated call-bells; the door was then opened by her by a duplicate key, but Vijay was not found inside. P.W-4 Gulab Singh Parmar also searched for the servant, but he could not find him and he came to know that theft was committed in the house, the report of which was lodged with the Police, and thereafter the dead body of Vijay was found in the house. P.W-6 Imal Bai, the mother of deceased Vijay also deposed in her evidence that her son used to work at the place of complainant Sarla Rao and she had seen him alive at 12 'O'clock, but in the evening about 6 'O'clock the driver came to her and inquired about Vijay and the key of the house. She also deposed that on search, the dead body of her son Vijay was found in the upper storey of the house of complainant Sarla Rao.

13. A.S.I. R.R. Gautam (P.W-8) also stated in his evidence that on 13.5.98 Sarla Rao had lodged the FIR (Ex.P-1) and after recording the same, he reached the place of occurrence and on search, saw the dead body of servant Vijay lying in the pooja-room of complainant's house. According to Sub-Inspector G.L. Ahirwal (P.W-9), on receiving information that the dead body of servant Vijay was found in the house of complainant Sarla Rao, he reached there and found that the dead body of servant Vijay was lying in the shelf of complainant's pooja-room, having ligature marks in the neck and injuries in the stomach. He then recorded Dehati merg (Ex.P-2) at the instance of complainant Sarla Rao and prepared merg inquest report (Ex.P-9) and sent the dead body for postmortem examination.

14. Dr. D.S. Badkur (P.W-2) performed the autopsy on the dead body of deceased Vijay and found a ligature mark of 5-6 cm broad present transversely all around the neck covering hyoid bone, thyroid bone and cartilage, which was slightly depressed and obliquely transverse, the base of mark showing slightly depressed and elevated ridges. There was also an incised wound 3 x 1 cm transverse x skin deep in right iliac fossa, tapering medially and an abrasion 1.5 x .2 cm transverse on medial border of lower 1/3rd and upper 2/3rd of right forearm and a contusion of 3 cm diameter on right frontal eminence were also found. In the opinion of Dr. D.S. Badkur (P.W-2), injuries were fresh and antemortem in

SADHAN NAYAK @ DEEPAK Vs. STATE OF M.P.

nature and death was due to asphyxia as a result of ligature strangulation.

15. The evidence discussed above remained virtually unshattered and unrebutted despite extensive cross-examination. The evidence of Dr. D.S. Badkur (P.W-2) clearly revealed that Vijay met a homicidal death due to asphyxia as a result of strangulation and injuries were also caused to him by sharp weapon.

16. It was thus clearly established from the evidence mentioned above that when complainant Sarla Rao (P.W-1) was in her office on 13.5.98, her domestic servant Vijay Kumar was murdered at her house and her valuables and other properties were robbed.

17. We also find the evidence of Balvant Rai (P.W-5) on record that he had seen the appellant going towards the house of Sarla Rao on the date of occurrence at about 12 'O'clock in the noon and after sometime he had seen the appellant standing with a black bag, a suitcase and some packet wrapped in red coloured cloth on the road outside the house of madam Rao. He had also seen the appellant with her servant Vijay Kumar at her house and he had also noticed the appellant starting a small vehicle of madam Rao. P.W-5 Balwant Rai also deposed that on the same day when madam Rao came back, she gave repeated calls to her servant Vijay, but he was not found and afterwards it was discovered that Vijay had died.

18. P.W-5 Balvant Rai was cross-examined at length, but he remained firm and his evidence could not be dislodged in any manner. Learned counsel for the appellant submitted that P.W-5 Balvant Rai was a child witness, who could be easily tutored; but the evidence of a child witness cannot be outright rejected on such a ground if it is found to be reliable. As held by the Apex Court in the case of *Panchhi and Others Vs. State of U.P.* reported in 1998(7) Supreme Court Cases page 177 it is not the law that if a witness is child, his evidence should be rejected even if it is found reliable, though the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is an easy prey to tutoring.

19. In the instant case P.W-5 Balvant Rai is not a small child, but a boy of eleven years of age, who has sufficient maturity of understanding, as is also evident from the note appended by trial court before recording of his evidence. Upon close and careful scrutiny of the evidence of P.W-5 Balvant Rai, his evidence is found to be cogent and credible and he does not appear to be a tutored witness. His evidence clearly indicated that deceased Vijay was last seen in the company of the appellant at the house of Sarla Rao on the date of occurrence and the appellant was also found going towards the house of Sarla Rao and thereafter seen with black bag, a suitcase and other things, which is a strong and clinching incriminating circumstance established against the appellant.

20. It is also evident from the testimony of Dilip Kumar Jana (P.W-3) that on 13.5.98 appellant had gone to him with a handbag, a suitcase and also gave him

SADHAN NAYAK @ DEEPAK Vs. STATE OF M.P.

two thousand rupees on his asking and P.W-3 escorted the appellant to the Railway Station Bhopal, where he purchased a ticket for the appellant for Howrah and appellant had also boarded Indore-Bilaspur Express for Howrah before him.

21. Although, P.W-3 Dilip Kumar Jana was declared hostile and cross-examined by the prosecution and the aforesaid facts were revealed in his cross-examination, but the facts elicited in his evidence remained uncontroverted in cross-examination by the appellant. Needless to emphasize that the testimony of a hostile witness cannot be simply brushed aside. As observed by the Apex Court in the case of *Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh* reported in AIR 1991 S.C. Pg. 1853, the evidence of a hostile witness cannot be treated as effaced or washed off from the record altogether and the dependable part of evidence of such a witness can be accepted.

22. It is also borne out from the testimony of A.S.I. Sukant Kumar Benerjee (P.W-14) coupled with evidence of O.P. Tiwari (P.W-20), Rajendra Shukla (P.W-15) and Kishorilal Rajat (P.W-16) that upon receiving a telephonic information by Jabalpur Police from Addl. S.P. Bhopal, appellant was apprehended from Howrah coach of Indore-Bilaspur Express on the morning of 14.5.98 and a large number of items including VCR, B.P. instrument, gold chain, bangles, diamond topse and other things stolen from the place of Sarla Rao were found in the handbag and suitcase carried by the appellant, which were seized from him vide seizure memo Ex.P-19. The seized articles were also identified by Sarla Rao (P.W-1) at the identification parade held on 18.5.98 before Smt. Usha Chaturvedi (P.W-13), Parshad, Municipal Corp. vide identification memo (Ex.P-4).

23. The various documents like seizure memo (Ex.P-19) and the identification memo (Ex.P-4), FIR (Ex.P-1) lodged by complainant Sarla Rao (P.W-1) and the additional list of stolen articles (Ex.P-5) submitted by her, proved by the prosecution, also lend substantial corroboration to the fact that appellant was found in possession of the various items stolen and robbed from the place of Smt. Sarla Rao (P.W-1) on 13.5.98, which were seized from him next morning after the incident of robbery and murder committed at the house of complainant Sarla Rao a day earlier. There are no reasons to doubt the recovery of aforesaid articles from the appellant at Jabalpur Railway Station on 14.5.98, which remained duly corroborated by the evidence of independent witnesses like Rajendra Shukla (P.W-15) and Kishorial Rajat (P.W-16). There are also no reasons to doubt or discard the other evidence discussed above.

24. It was thus clearly established from the evidence of aforesaid witnesses that appellant was napped at Jabalpur Railway Station early in the morning on 14.5.98 when he was travelling in the Howrah coach of Indore-Bilaspur Express and was found in possession of various items stolen from the place of Smt. Sarla Rao (P.W-1), which were also identified by her at the identification parade held on 18.5.98 at B.S. College before Smt. Usha Chaturvedi (P.W-13).

SANTOSH Vs. STATE OF M.P.

25. Thus, we find that a series of circumstances connecting the appellant with the commission of crime were firmly and cogently established from the evidence on record. To recapitulate, on the day of occurrence on 13.5.98 at 12 'O'clock in the noon, appellant was seen going towards the house of complainant Sarla Rao and her domestic servant Vijay (deceased) was also last seen in the company of the appellant in the noon time and thereafter appellant was seen with a suitcase and handbag standing on the road outside the house of the complainant; on the same day he went to P.W-3 Dilip Kumar Jana with a suitcase and a handbag in his hand, gave him two thousand rupees on credit and thereafter he boarded the Howrah coach of Indore-Bilaspur Express before him. On the same day i.e. 13.5.98 the incident of theft/robbery and murder of servant Vijay was discovered at the place of complainant Sarla Rao; the next morning appellant was napped at Jabalpur Railway Station in the Howrah coach of Indore-Bilaspur Express with a suitcase and handbag and a large number of items stolen from the place of Smt. Sarla Rao (P.W-1) were recovered from him at Jabalpur Railway Station.

26. The aforesaid circumstances well established from the evidence on record coupled with other evidence available on record unerringly point out to the guilt of the appellant and are totally incompatible with his innocence. These circumstances formed a complete chain and were sufficient to conclude that it was the appellant and none else, who committed robbery and murder of Vijay at the place of complainant Sarla Rao on 13.5.98.

27. In view of the aforesaid discussion, we are of the considered opinion, that the conviction of the appellant recorded by the trial court under Section 394/397 and 302 of IPC and the sentences awarded to him do not warrant any interference in appeal.

28. Thus, we find no merit in this appeal. Appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2009] M. P., 241

APPELLATE CRIMINAL

Before Mrs. Justice Sushma Shrivastava

22 August, 2008*

SANTOSH

Vs.

STATE OF M.P.

... Appellant

... Respondent

A. Penal Code (45 of 1860), Section 376(2)(f) - Rape of a minor girl - Appellant alleged to have committed offence of rape on a minor girl aged 8 years old - Trial court convicted the appellant - A defence was raised that there was no offence of rape as there was no rupture of hymen - Held -

SANTOSH Vs. STATE OF M.P.

Rupture of hymen is not necessary, penetration, however slight, is sufficient to constitute the offence of rape - Appeal dismissed. (Paras 17 to 20)

क. दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) - अवयस्क बालिका का बलात्संग - अपीलार्थी ने कथित रूप से 8 वर्ष की अवयस्क बालिका के साथ बलात्संग करने का अपराध किया - विचारण न्यायालय ने अपीलार्थी को दोषसिद्ध किया - यह बचाव लिया गया कि बलात्संग का कोई अपराध नहीं हुआ क्योंकि हायमन नहीं फटा था - अभिनिर्धारित - बलात्संग का अपराध गठित करने के लिए हायमन फटना आवश्यक नहीं, अल्प प्रवेशन ही पर्याप्त है - अपील खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - Delay in F.I.R. - Delay explained - Not fatal to the case of prosecution - The delay in lodging the F.I.R. was explained by the facts brought on record that when the matter came to light and was discovered, it was reported to the police - The delay of 5 days in lodging the F.I.R. in the case does not cause any doubt on the prosecution case. (Para 16)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 - एफ.आई.आर. में विलम्ब - विलम्ब स्पष्ट किया गया - अभियोजन के मामले के लिए घातक नहीं - एफ.आई.आर. दर्ज कराने में विलम्ब अभिलेख पर लाये गये तथ्यों से स्पष्ट किया गया कि जब मामला प्रकाश में आया और पता चला, इसकी रिपोर्ट पुलिस को की गई - मामले में एफ.आई.आर. दर्ज कराने में 5 दिन का विलम्ब अभियोजन के मामले पर कोई संदेह कारित नहीं करता।

Cases referred :

(1998) 7 SCC 177, AIR 2007 SC 155, 2006 AIR SCW 4550, 1992 JLJ 377, AIR 2008 SC 572, (1998) 8 SCC 635, 1987 CrLJ 605 (Orissa), MPWN 1989 SN 79 para 1.

B.R. Vijaywar, for the appellant.

Gitesh Singh Thakur, Panel Lawyer, for the respondent/State.

J U D G M E N T

Mrs. SUSHMA SHRIVASTAVA, J. :-Appellant has preferred this appeal challenging his conviction and order of sentence passed by Vth Additional Sessions Judge, Bhopal in S.T. No.36/93, decided on 5.4.94.

2. Appellant has been convicted under Section 376 of IPC for committing rape on a minor girl aged about eight years and sentenced to rigorous imprisonment for seven years by the impugned judgment.

3. According to prosecution, on 21.11.92 in the evening at Motinagar, Bhopal, when complainant's daughter aged about eight years (hereinafter referred to as 'victim') was playing outside her house, appellant came there and took her to cattle-shed and committed sexual intercourse with her. When she shouted, appellant intimidated and threatened her not to disclose the incident to anyone at her house. When the mother of the girl discovered the injuries on her private part while giving bath to her, she enquired from her. The girl then narrated the incident of

SANTOSH Vs. STATE OF M. P.

rape to her mother. The matter was then reported to Police by the father of the victim. On the basis of FIR lodged by her father, Sheikh Peeru at Police Station Govindpura, Bhopal, an offence was registered against the appellant and was investigated. The victim was sent for medical examination and her vaginal smear was taken. Her underwear was also seized. On being arrested, appellant was also sent for medical examination and was found competent to commit the sexual act. After due investigation, appellant was prosecuted under Section 376 of IPC and put to trial.

4. Appellant abjured the guilt and pleaded innocence.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellant guilty under Section 376 of IPC; convicted and sentenced him as aforesaid by the impugned judgment. Hence, this appeal.

6. Learned counsel for the appellant submitted that the trial court gravely erred in convicting the appellant, though no offence under Section 376 of IPC was proved against him. He further submitted that the learned trial judge failed to consider that there was delay of five days in lodging the FIR and the appellant was falsely implicated. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant.

7. Perused the evidence on record.

8. The victim in the instant case is eight years' old female child examined as P.W-3. The victim (P.W-3) categorically deposed in her evidence that in the evening time when she was playing outside her house, appellant took her to the cattle-shed, undressed her and inserted his male organ into her vagina ('मेरी पेशाब की जगह में अपनी पेशाब डाली थी') and intimidated her not to disclose it to anybody.

9. The mother of the victim, namely, Shahnaz Bi (P.W-2) also stated in her evidence that when she was giving bath to the girl in the morning, she discovered some injuries and redness around her vagina and white stains in her underwear. Then she enquired from her daughter, who told her that appellant had committed rape on her in the cattle shed. She narrated the incident to her neighbour Salma Bi (P.W-5) and to her sister-in-law Jameela Bi (P.W.6), who informed Sheikh Peeru when he came back from duty. The father of the victim, Sheikh Peeru then took the girl to the Police Station and lodged the FIR.

10. P.W-5 Salma Bi also corroborated the fact that on being called by Shahnaz Bi (P.W.-2), she had seen the vagina of the victim, which had redness. Jameela Bi (P.W-6) also deposed in her evidence that on being informed by Shahnaz Bi (P.W-2), she had enquired from the victim, who told her that appellant committed rape on her. Then she had gone to Police Station alongwith the victim and her father Sheikh Peeru to lodge the report. Sheikh Peeru (P.W-1) also supported the factum of lodging of the FIR (Ex.P-1), which was recorded by A.S.I. S.P. Shrivastava (P.W-9) at Police Station, Govindpura.

SANTOSH Vs. STATE OF M. P.

11. Medical evidence also lends corroboration to the version made by victim (P.W-3) that she was subjected to rape. Dr. Minakshi Patel (P.W-11), who examined the victim (P.W-3) on 26.11.92, found redness and bruising present on her labia majora and labia minora and redness over vestibule. Dr. B.K. Athwal (P.W-7), who also examined the victim (P.W-3) on 28.11.92 at Medico Legal Institute, Bhopal also found her vagina inflamed and severely stained with whitish discharge, labia majora and labia minora on lower 2/3rd of perineum eroded having thick mucoid covering, severely inflamed and bruised; the introitus was also inflamed and tender, on slight cleaning blood was oozing. In the opinion of Dr. Athwal (P.W-7), the girl was sexually violated.

12. Learned counsel for the appellant submitted that the victim (P.W-3) was a child witness tutored by her parents and she admitted in her cross-examination that she had named the appellant at the instance of her father and aunt Jameela Bi, her evidence, therefore, could not be relied upon.

13. The law relating to evidence of child witness is well settled. As held by the Apex Court in the case of *Panchhi and Others Vs. State of U.P.* reported in 1998(7) Supreme Court Cases page 177 it is not the law that if a witness is child, his evidence shall be rejected even it is found reliable, though the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is an easy prey to tutoring.

14. No doubt, the victim (P.W-3) admitted the suggestion given in cross-examination that while going to the Police she was told by her father and aunt Jameela Bi to give the name of the appellant, but there was no such suggestion or whisper that she was asked to name the appellant falsely. On the other hand, the victim (P.W-3) clearly stated in last paragraph of her evidence that she already knew the name of the appellant. She refuted the suggestion that some other Santosh had committed the offence of rape. In second paragraph of her deposition, she categorically stated and identified the appellant as the person who committed rape on her, which virtually remained unshattered and un rebutted. In fact, the evidence of the victim (P.W-3) on the whole does not reveal that she was tutored witness or gave a tutored version of the incident. Upon close and careful scrutiny of her entire evidence it is found to be natural and reliable.

15. Learned counsel for the appellant also submitted that the mother of the victim, namely, Shahnaz Bi (P.W-2) and her aunt Jameela Bi (P.W-6) made inconsistent statements regarding time when the incident of rape was disclosed and narrated to them by the victim. However, that does not dilute the act of the appellant, nor does it render their statements unreliable. Such discrepancy could also occur due to lapse of memory and passage of time. The fact remained that their basic version was the same that the victim narrated the incident to them after her mother discovered the redness and injury over her private part. The fact that the girl (P.W-3) suffered redness and swelling around her vagina was also clearly established from the medical evidence.

SANTOSH Vs. STATE OF M.P.

16. The delay in lodging the FIR (Ex.P-1) was also explained by the facts brought on record that when the matter came to light and was discovered, it was reported to the Police. The delay of five days in lodging the FIR in the instant case does not cause any doubt on the prosecution case. It does not appeal to reason, as suggested in the cross-examination of some of the prosecution witnesses, that for a petty sum of money due to appellant's father for the small quantity of milk taken from him, the family members of the victim would falsely implicate his son, the appellant at the stake and risk of the honour and modesty of their female child of tender years. It has also been held by the Apex Court in the case of *Ramdas & Ors Vs. State of Maharashtra* reported in AIR 2007 Supreme Court page 155 (para 23); which has been relied upon by learned counsel for the appellant, that mere delay in lodging of the report may not by itself fatal to the case of prosecution and the delay has to be considered in the background of the facts and circumstances of the case. Delay in FIR has been justified in the instant case.

17. Learned counsel for the appellant next submitted that as per the evidence of both Dr. B.K. Athwal (P.W-7) and Dr. Minakshi Patel (P.W-11), the hymen of the victim was found intact. Therefore, it could not be said that the offence of rape was committed, as also opined by Dr. Minakshi Patel (P.W-11), and at the most, it could be an attempt to commit rape. The identical question was considered by the Apex Court in the case of *Madan Gopal Kakkad Vs. Naval Dubey and another* reported in 1992 J.L.J. page 377 (Supreme Court), and *Santosh Vs. State of M.P.* reported in 2006 AIR Supreme Court Weekly page 4550 and then again in the case of *Rajendra Datta Zarekar Vs. State of Goa* reported in AIR 2008 Supreme Court page 572 and the following extract from Modi's Medical Jurisprudence and Toxicology 21 Edition at page 369 was reproduced in this behalf.

"Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva of pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

MOHAMMAD YUNUS @ ANNU Vs. STATE OF M.P.

18. It was also held in the case of *Ranjit Hazarika Vs. State of Assam* reported in 1998 (8) SCC page 635 that to constitute an offence of rape penetration, however, slight is sufficient and non-rupture of hymen or absence of injuries on the private part of victim would not belie the testimony of the prosecutrix.

19. In view of the legal position, as emerging from the aforesaid decisions of the Apex Court, the submission of the learned counsel for the appellant that due to non-rupture of hymen no offence of rape was committed, has no merit. The citations referred to by learned counsel for the appellant, as reported in 1987 Cri.L.J. page 605 (ORISSA HIGH COURT) *State of Orissa Vs. Sukadev Pradhan & MPWN* 1989 para 1 Short Note 79 have turned on different facts of those cases and are of no avail to the appellant in the instant case.

20. In view of the clear and cogent evidence of the victim (P.W-3), in para 2 of her deposition coupled with the medical evidence of Dr. Minakshi Patel (P.W-11) and Dr. B.K. Athwal (P.W-7) that swelling, bruise and redness were found around labia majora and labia minora of the girl, it was clearly evident and established that there was penetration sufficient to constitute the offence of rape.

21. In view of the aforesaid discussion, it was established from the evidence on record that the appellant committed rape on the victim, a minor girl aged eight years. Thus, the conviction of the appellant under Section 376 of IPC, as recorded by the trial court, does not suffer from any infirmity so as to warrant any interference in this appeal.

22. As regards the sentence, appellant was already awarded lesser sentence than required under Section 376(2)(f) of IPC for committing rape on a girl aged eight years. There are no special or adequate reasons for reducing the impugned sentence of seven years' rigorous imprisonment awarded to the appellant.

23. Appeal being bereft of any merit is dismissed. Appellant is on bail. He shall forthwith surrender to his bail bonds to serve out the remaining part of his sentence.

Appeal dismissed.

I.L.R. [2009] M. P., 246

APPELLATE CRIMINAL

Before Mr. Justice K.S. Chauhan

4 September, 2008*

MOHAMMAD YUNUS @ ANNU

Vs.

STATE OF M.P.

... Appellant

... Respondent

Penal Code (45 of 1860), Sections 323 & 304 Part II - *Punishment - Parity* - All other accused convicted u/s 323 IPC - Appellant convicted u/s

MOHAMMAD YUNUS @ ANNU Vs. STATE OF M.P.

304 Part II on the same set of evidence - Ground raised in appeal that on the same set of evidence appellant alone cannot be convicted u/s 304 Part II - Held - Appellant gave the fatal blow by Gupti - Keeping in view the part played by appellant in committing this offence he has been so convicted. (Para 16)

दण्ड संहिता (1860 का 45), धाराएँ 323 व 304 भाग II - दण्ड - समानता - अन्य सभी अभियुक्तों को भा.द.सं. की धारा 323 के अन्तर्गत दोषसिद्ध किया गया - अपीलार्थी को धारा 304 भाग II के अन्तर्गत समान साक्ष्य पर दोषसिद्ध किया गया - अपील में यह आधार उठाया गया कि समान साक्ष्य पर केवल अपीलार्थी को धारा 304 भाग II के अन्तर्गत दोषसिद्ध नहीं किया जा सकता - अभिनिर्धारित - अपीलार्थी ने गुप्ती से घातक प्रहार किया - अपराध करने में अपीलार्थी की भूमिका को दृष्टिगत रखते हुए उसे इस प्रकार दण्डित किया गया।

Imtiaz Hussain, for the appellant.

Deepak Awasthy, G.A., for the respondent/State.

JUDGMENT

K.S. CHAUHAN, J. :- This criminal appeal under Section 374(2) of the Code of Criminal Procedure has been filed being aggrieved by the judgment, finding and sentence dated 22.01.1994 passed by First Additional Sessions Judge, Sehore in Sessions Trial No.7/93, whereby the appellant has been convicted under Section 304 Part-II of IPC and sentenced to R.I. for four years with fine of Rs.5,000/- in default of payment of fine to suffer S.I. for one year.

2. Prosecution case in short is that Tohrab Khan lodged the report at Police Station, Jawar on 25.04.1992 at about 22.35 PM to the effect that at about 10 PM his daughter Parveen informed that family members of Mukhtyar Khan and Raffu Khan are beating to Najeer Khan. Therefore, he reached at his house and saw that accused persons were causing marpeet of Najeer Khan by Lathi, Lohangi, Gupti and Sword etc. He intervened but he was also beaten by them. Chhote Khan, Mahboob Khan and Iqbal Khan also came there but they were also beaten. This appellant inflicted sword blow to Najeer Khan on account of which he fell down and became unconscious and died. On the basis of this report Crime No.92/92 under Sections 302, 147, 148, 149 and 323 of I.P.C. was registered. Panchanama of dead body of Najeer Khan was prepared. His dead body was sent for postmortem examination which was conducted by Dr.Krishnakant Chaturvedi. According to him, death was caused due to hemorrhagic shock resulting from stab injury to the chest. The death was homicidal in nature. Clothes of deceased were seized. Other injured persons were also got medically examined. The accused persons were arrested. Their disclosure statements under Section 27 of Indian Evidence Act were recorded and in pursuance thereto the weapons of offence were recovered. Blood stained and controlled soil were also seized from the spot. Map was prepared. Statements of the witnesses under Section 161 of Cr.P.C. were recorded. After completing the usual investigation, charge sheet was filed in the Court of C.J.M., Sehore who committed the case to Sessions Court for trial.

MOHAMMAD YUNUS @ ANNU Vs. STATE OF M.P.

3. Accused persons were charged under Sections 147, 302/149, and 323/149 of I.P.C. They denied the guilt and claimed to be tried mainly contending that they have been falsely implicated. Prosecution examined as many as 13 witnesses but the accused persons did not examine any witness in his defence. After appreciating the evidence trial Court acquitted them from the charge under Sections 147, 302/149 and 323/149 of I.P.C. but convicted this appellant under Section 304 Part-II of I.P.C. and other accused persons under Section 323 of I.P.C. and sentenced as stated in impugned judgment. Being aggrieved by the impugned judgment, finding and sentence the instant appeal has been preferred by this appellant on the grounds mentioned in the memo of appeal.

4. Learned counsel for the appellant submitted that trial Court has not appreciated the evidence in proper perspective. According to F.I.R., this appellant inflicted sword blow but the gupti was seized from him vide seizure memo Ex. P/19. The witnesses developed the theory regarding causing of marpeet with gupti by this appellant in order to make consistent their statements with medical evidence. Learned counsel further submitted that when other accused persons were convicted under Section 323 of I.P.C. from the same set of evidence then it was not obligatory to convict this appellant under Section 304 Part-II of I.P.C. Therefore, finding of guilt is erroneous which deserves to be set aside and the appellant is entitled for acquittal.

5. On the contrary Shri. Deepak Awasthy, learned Govt. Advocate appearing on behalf of the respondent/State supported the impugned judgment, finding and sentence mainly contending that prosecution has proved the case beyond reasonable doubt against the appellant. Therefore, the finding of guilt is proper hence does not call for any interference.

6. The main point for consideration in this appeal is that whether the trial Court has committed an illegality in convicting and sentencing the appellant under Section 304 Part-II of IPC?

7. The genesis of the crime is that Najeer Khan was sleeping with his family members in his house and Kaleem showed the light of torch for which he objected saying that the privacy of the ladies are being disturbed. Some altercation took place in between them and Chhote Khan subsided the matter. Thereafter Kaleem came along with other accused persons armed with Lathi, Lohangi, Gupti and sword and started assaulting Najeer Khan, Mahboob Khan and Iqbal Khan. Parveen (PW-4) aged 10 years informed her father Tohrab Khan (PW-1) who came there and saw the incident.

8. Tohrab Khan (PW-1), Mehboob Khan (PW-2), Iqbal Khan (PW-4), Chhote Khan (PW-5) and Babu Khan (PW-6) have unequivocally deposed in one voice that five accused persons were assaulting Najeer Khan with Lohangi, Dharia, Patti, Gupti etc. and rest accused persons were assaulting Mehboob Khan (PW-2)

MOHAMMAD YUNUS @ ANNU Vs. STATE OF M. P.

and Iqbal Khan (PW-4). Tohrab Khan (PW-1) was also assaulted. Najeer Khan sustained injuries on the different parts of his body. He became unconscious and thereafter he died. The injured persons sustained injuries. Tohrab Khan (PW-1) has lodged the report Ex.P-1 at police station Jawar which was written by Vishnu Prasad Pandey (PW-12). Marg intimation Ex.P-2 was also recorded by him. Panchanama of dead body Ex.P-32 was prepared and dead body was sent for postmortem examination which was conducted by Dr. Krishnakant Chaturvedi (PW-8) who found the following external injuries on his dead body.

(i) One stab wound over the left side chest at the level of 6th I/c space 2" medial to mid axillary line. The wound having clean cut edges (parallel reverted) having sharp angle, obliquely placed size $\frac{3}{4}$ " x $\frac{1}{2}$ " depth 2 $\frac{1}{2}$ " direction below upward medially and obliquely.

(ii) Abrasion over the right shine tibia 1" x 1" x 2" below knee joint.

(iii) Bruise over forehead left side $\frac{1}{2}$ " x $\frac{1}{4}$ ".

(iv) Bruise over the right forearm reddish 2" x $\frac{3}{4}$ " just 1" above wrist joint.

All injuries are ante mortem in nature.

(v) Abrasion $\frac{1}{2}$ " x $\frac{1}{4}$ " over the left ear pinna clotted blood.

According to his opinion death was due to hemorrhagic shock resulting from stab injury. This injury was caused by hard, sharp and penetrating instrument and homicidal in nature and sufficient to cause death in normal course of life. Duration is within 24 hours since postmortem examination.

9. According to his opinion, injury could have been caused by the instrument like Gupti but not by sword. However, he has admitted that no instrument was sent for examination. Thus from the analysis of medical evidence it is evident that the death of Najeer Khan was homicidal in nature.

10. Tohrab Khan (PW-1) has stated that Mukhtyar Khan, Annu, Kaleem, Jallu and Anis were beating his father in law. Annu was having Gupti. He has explained that in F.I.R. it was mentioned that Annu was having sword but it was mentioned due to his being perplexed at that time. In fact he was having Gupti and was causing marpeet to Najeer Khan by Gupti. The contradictions and omissions have been brought in his evidence from F.I.R. (Ex.P-2) and police statement Ex.D-1 as to what weapon this appellant was at that time carrying on.

11. No doubt there is discrepancy regarding the weapon which he has already explained. He evidence is intact regarding inflicting Gupti blow to Nazeer Khan by this appellant. The discrepancy is not so serious as to discard the testimony of this witness.

MOHAMMAD YUNUS@ANNU Vs. STATE OF M.P.

12. Likewise Mahboob Khan (PW-2), Iqbal Khan (PW-4), Chhote Khan (PW-5) and Babu Khan (PW-6) have also supported the version of Tohrab Khan (PW-1) by deposing that only five accused persons were assaulting Najeer Khan and rest were assaulting to Mehboob Khan and Iqbal Khan. This appellant Annu was having Gupti and inflicted its blow at the chest of Najir Khan. The similar contradictions have been brought on record from their police statement Ex.D-2, Ex.D-4, Ex.D-5 and Ex.D-6 but the same are not sufficient to discredit their testimony. These witnesses are said to be an eyewitnesses. Out of them Mehboob Khan (PW-2) and Iqbal Khan (PW-4) have sustained injuries as is evident from the evidence of Dr. Hiralal Dalodriya (PW-13) and the medical reports Ex.P-40 and P-41. This incident is of night of the house of Najir Khan where the presence of his sons Mehboob Khan and Iqbal Khan can not be doubted. Chhote Khan (PW-5) is the brother of Najeer Khan hence his presence at the spot also cannot be doubted. Tohrab Khan (PW-1) was also residing at some distance from the house of Najeer Khan who immediately came to the spot when his daughter informed him and saw the incident.

13. Thus all these eyewitnesses have stated in one voice that appellant was having Gupti and caused marpeet to Nazeer Khan. It is also borne out from the evidence of some witnesses that this appellant inflicted the gupti blow at the chaste region of Nazeer Khan and Dr. Krishnakant Chaturvedi (PW-8) found injury of chest fatal to the life of Nazeer Khan.

14. Learned counsel for the appellant submitted that these eye-witnesses are not independent witnesses therefore no reliance can be placed on their testimony. But the contention of the learned counsel is not acceptable for the simple reason that the presence of these witnesses at the spot is not doubtful. They have witnessed the incident. Out of them two persons have also sustained the injuries in the same incident. In such situation on account of relationship only their testimony cannot be discarded. Furthermore, their evidence finds support from the medical evidence also.

15. The next contention of the learned counsel for the appellant is that there is inconsistency in evidence regarding the weapon which the appellant was having at that time. As mentioned earlier there is discrepancy in their evidence as to whether he was having sword or Gupti at that time. But all the witnesses have unequivocally stated that he was having Gupti at that time by which he inflicted the injuries to Nazeer Khan. Thus Tohrab Khan (PW-1) has explained the discrepancy in this regard and such explanation may be accepted in the facts and circumstances of this case. Thus such inconsistency is not so serious as to throw the entire prosecution case over board.

16. The next contention of the learned counsel for the appellant is that the trial Court has convicted other accused persons under Section 323 of I.P.C. and from

RATAN KUMAR BANJARA Vs. KANTABAI

the same set of evidence the conviction of this appellant under Section 304 Part-II is unwarranted. But this contention is also not acceptable for the simple reason that this appellant is the author of the crime. Nazeer Khan sustained fatal injury of Gupti inflicted by this appellant, therefore, keeping in view the part played by this appellant in committing this offence he has been so convicted.

17. Further the prosecution has also based its case on the disclosure statements given by the accused persons and seizure of the weapon of offence recovered in pursuance thereof Gupti has been seized from this appellant. This gupti was sent for chemical examination to F.S.L. Sagar from where the report Ex.P/38 has been received it was found containing blood stains. The clothes of Nazeer Khan were also seized and on examination they were also found containing blood stains. Thus, F.S.L. report supports the prosecution case.

18. On appreciation of entire evidence adduced in the case it can be said that the trial Court has rightly found him guilty under Section 304 Part-II of I.P.C. I found no illegality, infirmity and perversity in such finding hence the same is hereby affirmed.

19. Learned counsel for the appellant submitted that the appellant has suffered the jail sentence of 18 months, therefore, he be released on the period already undergone. But this contention of the learned counsel for the appellant is not acceptable keeping in view the seriousness of the act committed by this appellant. The sentence awarded is not excessive hence the same is hereby affirmed. The appeal is devoid of merit and deserves to be dismissed.

20. Consequently, the appeal fails and is dismissed accordingly. The appellant is on bail. His bail bonds are cancelled. He be directed to appear before C.J.M., Sehore on 04.10.2008 for serving out the remaining part of the sentence.

Appeal dismissed.

I.L.R. [2009] M. P., 251

CIVIL REVISION

Before Mr. Justice S.K. Seth

23 September, 2008*

RATAN KUMAR BANJARA

... Applicant

Vs.

KANTABAI & ors.

... Non-applicants

Civil Procedure Code (5 of 1908), Order 6 Rule 4 - Executing court held that the eviction decree is tainted with fraud and is unexecutable - Alleging fraud has grave consequences and when relied upon as a cause of action or defence, fraud must be specifically alleged with all material particulars - Objectors knew about the execution and registration of the

RATAN KUMAR BANJARA Vs KANTABAI

sale deed but they did not take any steps to challenge the sale deed - There is no foundation in the pleadings or evidence to sustain the charge of fraud - Executing court acted beyond jurisdiction - Revision allowed. S.P. Chengalvaraya Naidu's case (AIR 1994 SC 853) distinguished.

(Paras 8 & 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 4 - निष्पादन न्यायालय ने अभिनिर्धारित किया कि बंदखली की डिक्री कपट से दूषित और निष्पादन योग्य नहीं - कपट का अभिकथन करने के गंभीर परिणाम और जब वाद कारण या प्रतिरक्षा के रूप में इस पर विश्वास किया जाता है तो कपट का सभी तात्त्विक विशिष्टियों के साथ विनिर्दिष्ट रूप से अभिकथन करना चाहिये - आपत्तिकर्ताओं को विक्रयपत्र के निष्पादन और रजिस्ट्रेशन के बारे में जानकारी थी परन्तु उनके द्वारा विक्रयपत्र को चुनौती देने के लिए कोई कदम नहीं उठाये गये - अभिवचनों या साक्ष्य में ऐसा कोई आधार नहीं है जिससे कपट का आरोप कायम रखा जाए - निष्पादन न्यायालय ने क्षेत्राधिकार से परे कार्य किया - पुनरीक्षण मंजूर। एस.पी. चेंगलवराया नायडू का मामला (AIR 1994 SC 853) विभेदित।

Cases referred :

AIR 1994 SC 853.

M.L. Agarwal with Mukesh Tare, for the applicant.

M.A. Bohra, for the non-applicant Nos.1 to 5.

A.S. Garg with J. Verma, for the non-applicant No.6.

W.A. Khan, for the non-applicant No.7.

O R D E R

S.K. SETH, J. :- Was the Executing Court, justified in holding that the eviction decree passed in favour of applicant (decree-holder) stood vitiated by fraud? That is the point for determination in this revision.

2. Applicant had filed a suit for eviction of respondents No.1 to 5 (judgment-debtors) from the suit house. The suit was decreed by the trial Court. Eviction decree of the trial Court was maintained up to the second appeal by this Court. Since, the judgment-debtors failed to hand over vacant possession, applicant put the decree in execution.

3. In execution proceedings, respondent No. 6 and 7 both filed separate applications under Order XXI Rule- 97 of the Code of Civil Procedure to resist the execution of the eviction decree and delivery of possession of the suit house. Each objector set up his/her own title over the suit property and claimed that decree holder could not obtain possession from the judgment-debtors, they being tenants of the objectors.

4. Applicant opposed the applications under Order XXI Rule 97 of the Code. After enquiry, executing Court rejected applications of respondent 6 and 7 as is clear from the findings recorded in paragraph 14 to 16 and 19 to 21 of the impugned order. But the Court below went on further and held that the

RATAN KUMAR BANJARA V. KANTABAI

applicant obtained the eviction decree by playing fraud, therefore, in view of the law laid down by the Supreme Court in *S. P. Chengalvaraya Naidu v. Jagannath* AIR 1994 S.C.853, it was unexecutable and the Court below refused to deliver possession of the tenanted premises to the applicant. Hence this revision by the decree-holder as stated above.

5. It is pertinent to point out that the objectors did not challenge the order of rejection of their application under Order XXI Rule 97 CPC but they opposed the revision petition filed by the decree-holder. Judgment-debtors chose to remain silent spectators, no arguments were advanced on their behalf. After hearing rival submissions and going through the record, in the opinion of this Court while passing the impugned order, the Court below exceeded the jurisdiction vested in it by law.

6. It is undisputed that applicant purchased the suit property from Smt. Aulia Begum through a registered sale deed dated 14.8.1997. Thereafter, applicant filed eviction suit against respondent No. 1 to 5. Respondents No. 6 and 7, Smt. Rashida Begum and Ashfaq Bahadur are close relations of Smt. Aulia Begum and were aware of earlier litigation including execution of sale deed as aforesaid. Judgment-debtors contested the eviction suit right up to this Court without any avail. The eviction decree passed against them under M.P. Accommodation Control Act, 1961, was maintained and became final upon dismissal of the second appeal preferred by judgment-debtors. Since the judgment-debtors failed to hand over vacant possession of the suit premises, the decree was put in execution. No objection was raised by the judgment-debtors. On the other hand respondent No. 6 and 7 came forward with applications under Order XXI Rule 97 of the Code. The executing Court while rejecting their applications, held that the applicant/decreet-holder could not execute the eviction decree and obtain possession of the suit house because the decree was tainted with fraud.

7. Was the eviction decree passed -in favour of applicant vitiated by fraud and as such a nullity?

8. Broadly speaking, fraud embraces all means which human ingenuity can devise to gain an advantage over another. In its general or generic sense, it comprises all acts, omissions involving breach of legal duty and resultant damage to another or violation of a trust or confidence which such person had a right to repose in him. Amongst other things, fraud consists of deception practiced in order to induce another to part with property or to surrender some rights and which accomplishes the end designed. In other words, some deceitful practice or willful device resorted to, with intention to deprive another of his right, or in some manner to do him an injury may amount to or result in fraud unless there is delictum i.e. there is no fraud in reaching the desired end by legal means. Alleging fraud has grave consequences and when relied upon as

RATAN KUMAR BANJARA Vs. KANTABAI

cause of action or defense, fraud must be specifically alleged with all material particulars. In alleging fraud, a general averment without setting out the facts and circumstances constituting the fraud, is insufficient. It is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer and enable the court to determine on the facts pleaded, is there any foundation, prima facie for the charge of fraud, in the case in hand, it is difficult to hold that the appellant fraudulently obtained an eviction decree against the judgment-debtors. From the material available on record, it is clear, both respondents No. 6 and 7 knew of the registered sale deed in favour of the applicant and hence, they can not be heard to say that the eviction decree is tainted with fraud. Once this is clear, then there was no justification for the executing Court to go behind the decree and set it at naught. The general rule is that the executing court must execute the decree as it is except when it is without jurisdiction or obtained by fraud, which is the not case here. In a suit for eviction of a tenant under the provisions of the M.P. Accommodation Control Act, 1961, proof of relationship of landlord and tenant is most essential and not the title which is only incidental. In the case in hand, pleadings do not conform to the legal requirement of fraud. Except for bald assertion that does not take the allegation anywhere, there is no foundation in pleadings or evidence to sustain the charge of fraud either on the Court or on the judgment-debtors. Surprisingly the executing Court goes behind the decree on such vague allegations and holds the decree a nullity. Thus, the executing court clearly acted beyond jurisdiction or at any rate with material irregularity and illegality.

9. Now coming to the case of *S. P. Chengalvaraya Naidu* (supra), wherein it is held, that a judgment 'or decree obtained by playing a fraud on the court is non-est, in the eyes of law. In that case, the facts were thus. One Jagannath was working as a clerk with one Chunilal Sowcar. Jagannath purchased the properties in dispute at the court auction on behalf of Chunilal. By a registered deed, Jagannath had relinquished all his rights in the property in favour of Chunilal. Meanwhile judgment-debtors had paid the total decretal amount to Chunilal. Without disclosing these material facts, Jagannath filed a suit for partition of property and obtained a preliminary decree. It was when Jagannath had put the preliminary decree for partition, possession and mesne-profits, appellants, came to know these facts and they opposed the application contending that Jagannath obtained the preliminary decree by playing fraud on the court and, as such, it was a nullity. It was in this factual backdrop, their Lordship of the Supreme Court sustained the contention and held non-disclosure of relinquishment deed at the trial tantamount to playing fraud, on the court. Facts of the case in hand, as stated above, are clearly distinguishable because

RAMESH CHANDRA Vs. STATE OF M.P.

objectors knew about the execution and registration of the sale deed but they did not take any steps to challenge the sale-deed. The decision of the Supreme Court in *S. P. Chengalvaraya. Naidu* supra was considered in a subsequent decision in *Gayatri Devi vs. Shashi Pal Singh* (2005) 5 SCC 527 and it was held that fraud must necessarily be pleaded and proved before it unravels everything.

10. In view of the foregoing discussion, it is clear that executing court: acted illegally touching its jurisdiction. Accordingly this revision is allowed and the impugned order so far as it relates to and holds that the eviction decree is tainted with fraud and is unexecutable is hereby set-aside with costs throughout. Counsel's Rs. 2,500/- (Rupees two thousand five hundred only) payable jointly or severally by non-applicants.

11 Order accordingly.

Revision allowed.

I.L.R. [2009] M. P., 255

CRIMINAL REVISION

Before Mr. Justice N.K. Mody

15 July, 2008*

RAMESH CHANDRA

Vs.

STATE OF M.P.

... Applicant

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 197, Penal Code, 1860, Section 420 - Sanction for prosecution - Applicant availed the money of LTC without traveling - No sanction for prosecution necessary as act of applicant was not in discharge of his official duties. (Para 2 & 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197, दण्ड संहिता, 1860, धारा 420 - अभियोजन के लिए मंजूरी - आवेदक ने बिना यात्रा के एल.टी.सी. के धन का उपभोग किया - अभियोजन के लिए कोई मंजूरी आवश्यक नहीं क्योंकि आवेदक का कृत्य उसके पदीय कर्तव्यों के निर्वहन में नहीं था।

Cases referred :

2004 CrLJ 2011, AIR 2006 SC 1599.

A. Sirpurkar, for the applicant.

Viney Zelawat, A.S.G., for the non-applicant.

ORDER

N.K. Mody, J. :-Being aggrieved by the judgment dated 29.11.2004 passed by 6th Additional Sessions Judge, Indore in Cr. A. No. 95/2004, whereby the judgment dated 30.9.2002 passed by Special Judicial Magistrate (C.B.I.), Indore

RAMESH CHANDRA Vs. STATE OF M.P.

in Criminal Case No. 8/96, whereby the petitioner was convicted under Section 420 of IPC for a period of two years with fine of Rs.20,000/-, was confirmed, present revision petition has been filed.

2. In short the case of the prosecution was that the petitioner was posted as Station Engineer at All India Radio, Gwalior. Petitioner applied for grant of Leave Travel Concession (hereinafter referred to as the LTC) on 6.10.94 for going to Kanyakumari along with his family. Along with the application petitioner submitted the reservation tickets on the basis of which a sum of Rs.19,176 were credited to the account of the petitioner. Later on upon an complaint lodged by one Navrang, the matter was investigated by CBI and it was found that the tickets which were submitted by the petitioner were got cancelled on 7.11.94 and in fact petitioner did not travel and availed the money of LTC. On the basis of these allegations charge sheet was filed against the petitioner u/S 420 of IPC, on the ground that the petitioner submitted false bills of Rs.20,070/-, wherein the date of journey of the petitioner was w.e.f. 14.11.94 to 21.11.94. The case was contested by the petitioner. After framing of the charges and recording of the evidence, learned Tribunal convicted the petitioner under Section 420 of IPC and sentenced for a period of two years and fine of Rs.20,000/-. An appeal was preferred against that order which was dismissed, hence this revision petition.

3. Learned counsel for the petitioner argued at length and submits that complaint was filed by Navrang (PW-4), who was having inimical relations with the petitioner and one G. P. Ojha, but the prosecution was filed only against petitioner. Learned counsel for the petitioner submits that in fact the petitioner travelled for a period of six days of which all the particulars and tickets were submitted by the petitioner with the department, but all these documents were missing from the record. It is submitted that before filing of the prosecution no sanction was taken by the respondent under Section 197 of Cr.P.C. It is submitted that since the sanction was mandatory, therefore, the prosecution of the petitioner was itself illegal, which deserves to be quashed. For this contention reliance is placed on a decision in the matter of *State of Orissa Vs. Ganesh Chandra Jew* - 2004 Cri.L.J. 2011, wherein the Hon'ble Apex Court has observed as under:-

“So far public servants are concerned the cognizance of any offence, by any Court, is barred by S. 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no Court shall take cognizance of such offence except

RAMESH CHANDRA Vs. STATE OF M.P.

with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power by the Court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to the Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance it means taking notice of. A Court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty."

It was further held that :-

"Use of the expression, 'official duty' implies that the act or omission must have been done by the public in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official Duty, therefore, implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties while are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant."

4. Reliance was also placed on decision in the matter of *Sanikaran Moitra Vs. Sadha Das and another* – (AIR 2006 SC 1599), wherein the Hon'ble Apex Court has held that the prosecution cannot be launched without sanction.

RAMESH CHANDRA Vs. STATE OF M.P.

5. In the alternative learned counsel submits that petitioner is aged 64 years and has been retired as Station Director, All India Radio. It is submitted that petitioner was in jail for sometime. Learned counsel submits that keeping in view the fact that the petitioner is a senior citizen and was also in jail, petitioner be released on probation by giving benefit of Probation of Offenders Act and the amount of fine may reasonably be enhanced.
6. Learned counsel for the respondent submits that so far as the sanction is concerned none of the authorities submitted by the petitioner is applicable in the present case. Learned counsel submits that since the act of the petitioner was in discharge of official duties, therefore, no sanction was necessary. So far as conviction and sentence is concerned, learned counsel submits that after due appreciation of evidence both the Courts below have found the petitioner guilty for the aforesaid offence. Looking to the nature of the offence the sentence which has been awarded by the learned Courts below is just and reasonable, which requires no interference.
7. From perusal of the record, it appears that the act of the petitioner was not in discharge of his official duties, therefore, no sanction was necessary for prosecuting the petitioner.
8. So far as the conviction of the petitioner under Section 420 of IPC is concerned, sufficient evidence is on record, whereby it is amply proved that the petitioner has committed an offence which is punishable under Section 420 of IPC. However, since the petitioner is aged 64 years and is a senior citizen and the alleged offence is of the year 1994 and keeping in view all the facts and circumstances of the case and also keeping in view the period which has already been undergone by the petitioner this Court deems it fit to give the benefit of provisions of Probation of Offenders Act as the purpose would be served in case the jail sentence awarded to the petitioner is reduced to the period already undergone, subject to further depositing a sum of Rs.1,00,000/- as fine within a period of six weeks. In default the petitioner shall suffer jail sentence awarded by the learned Courts below.
9. In the result the revision petition is partly allowed. The findings of conviction is hereby maintained with the modification to the extent that the jail sentence awarded to the petitioner is reduced to the period already undergone subject to depositing further fine of Rs.1,00,000/- within a period of six weeks. In default the petitioner shall suffer jail sentence awarded by the trial Court and confirmed by the Sessions Court. Petitioner is on bail. His bail bonds stands discharged.

Petition partly allowed.

I.L.R. [2009] M. P., 259
CRIMINAL REVISION
Before Mr. Justice N.K. Mody
 22 July, 2008*

PRAKASH KANTHED
 Vs.

... Applicant

M/S MAHESHWARI PROTINS LTD. & ors.

... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 216, Penal Code, 1860, Section 420, Negotiable Instruments Act, 1881, Section 138 - A private complaint filed u/s 138 of the Act and Police Challan u/s 420 IPC was also filed on the basis of complaint for dishonour of cheques - Both cases merged by order of magistrate - No charge was framed u/s 138 of Act - Oral prayer for framing additional charge rejected - After recording of evidence of complainant, application u/s 216 Cr.P.C. for framing additional charge filed - Rejection - Held - Because the prayer was rejected once, the right to approach the court again u/s 216 of the Cr.P.C., is not curtailed as court can alter or add any charge at any time before judgment is pronounced - Court below erred in rejecting application - Revision allowed. (Paras 10 & 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216, दण्ड संहिता, 1860, धारा 420, परक्राम्य लिखत अधिनियम, 1881, धारा 138 - चेक अनादृत होने के परिवाद के आधार पर एक परिवाद अधिनियम की धारा 138 के अन्तर्गत पेश और पुलिस चालान भी भा.द. सं. की धारा 420 के अन्तर्गत पेश - दोनों मामले मजिस्ट्रेट के आदेश से विलीन - अधिनियम की धारा 138 के अन्तर्गत कोई आरोप विरचित नहीं - अतिरिक्त आरोप विरचित करने के लिए मौखिक प्रार्थना भी नामंजूर - परिवादी का साक्ष्य अभिलिखित किये जाने के बाद अतिरिक्त आरोप विरचित करने के लिए द.प्र.सं. की धारा 216 के अन्तर्गत आवेदन पेश - नामंजूर - अभिनिर्धारित - क्योंकि एक बार प्रार्थना नामंजूर कर दी गई, द.प्र.सं. की धारा 216 के अन्तर्गत न्यायालय से पुनः निवेदन का अधिकार कम नहीं होता है क्योंकि न्यायालय निर्णय सुनाये जाने के पूर्व किसी भी समय कोई आरोप परिवर्तित या परिवर्धित कर सकता है - अधीनस्थ न्यायालयों ने आवेदन नामंजूर करने में त्रुटि की - पुनरीक्षण मंजूर।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 397 - Scope of powers of revision - Since applicant is also prosecuting the non-applicant u/s 138 of the Act and no charge has been framed by the trial court, under that section - Therefore, even High Court can direct to frame the charge while exercising the jurisdiction u/s 397 of the Code. (Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 - पुनरीक्षण की शक्तियों का क्षेत्र - चूंकि आवेदक अनावेदकों को अधिनियम की धारा 138 के अन्तर्गत भी अभियोजित कर रहा है और विचारण न्यायालय द्वारा इस धारा के अन्तर्गत कोई आरोप विरचित नहीं किया गया है - इसलिए, उच्च न्यायालय भी संहिता की धारा 397 के अन्तर्गत अधिकारिता का प्रयोग करते समय आरोप विरचित करने का निदेश दे सकता है।

PRAKASH KANTHED Vs. M/S MAHESHWARI PROTINS LTD.**Cases referred :**

AIR 1970 CrLJ 510, AIR 2004 SCW 2063, AIR 2004 SCW 5174; 2000 (2) MPLJ 184.

Subodh Abhyankar, for the applicant.

N. Sharma, for the non-applicant Nos.2 to 4.

G.S. Chouhan, G.A., for the non-applicant No.5/State.

O R D E R

N.K. Mody, J. :-Being aggrieved by the order dated 31.1.2006 passed by ACJM, Khachhrod in Cr. C. No. 1813/05, whereby the application filed by the petitioner under Section 216 of Cr.P.C., for framing of additional charge under Section 138 of Negotiable Instruments Act (hereinafter referred to as the Act) was dismissed, present revision petition has been filed.

2. Short facts of the case that the petitioner filed complaint with Police Station Nagda to the effect that petitioner is engaged in the business of cereals, oilseeds etc. and carrying on the business in the name and style of M/s Devendra Traders at Nagda. It was alleged that Respondent No. 1 M/s Maheshwari Proticns Ltd., Ratlam and its sister concern M/s Marble Agrex Limited were doing business at the relevant time in the year 1996-97 at Ratlam and Mahidpur respectively and Respondent No. 3 and 4 are the authorized signatories of the Respondent Nos. 1 and 2. It was alleged that Respondent Nos. 1 and 2 purchased Soyabeen from the petitioner from time to time and against the price of the Soyabeen five post dated cheques duly signed by Respondent Nos. 3 and 4 were given to the petitioner by Respondent Nos. 1 and 2 of which details are as under :-

S. No.	Cheque No.	Amount	Date
1.	0334325	Rs.2,50,000/-	15.09.1996
2.	0334326	Rs.2,50,000/-	30.09.1996
3.	0334327	Rs.2,50,000/-	15.10.1996
4.	0334328	Rs.2,50,000/-	30.10.1996
5.	0351067	Rs.4,51,000/-	08.01.1997

3. In the complaint it was alleged that the total value of the cheques were Rs.14,51,000/- and it was further alleged that the cheques were submitted by the petitioner for collection, but the cheque amount could not be credited to the account of the petitioner, because of insufficient funds and dishonest intention on the part of Respondent Nos. 1 to 4, hence it was prayed that the respondents be prosecuted for the offence punishable under Section 420 of IPC and also under Section 138/140 of the Act. Upon the complaint lodged by the petitioner on 3.4.97, Police Station Nagda registered a case against respondents at Crime No. 119/97. However, the petitioner also filed a private complaint on 5.5.97 under Section 138 of the Act before the learned JMFC, Khachhrod, Ujjain which was registered as

PRAKASH KANTHED V. M/S MAHESHWARI PROTEINS LTD.

Criminal Complaint No. 1026/97. Further case of the petitioner was that the criminal case which was registered at Crime No. 119/97 at Police Station Nagda, charge sheet was filed by the Respondent No. 5 before JMFC on 16.1.1998 and the case was registered against the Respondent Nos. 1 to 4 as Cr. Case No. 1813/2005. It was alleged that since there were two cases, one registered under the Negotiable Instruments Act as criminal case No. 1026/07 and another under Section 420 of the IPC as Criminal Case No. 1813/05, therefore, vide order dated 27.4.1998 learned Judicial Magistrate, First Class directed that both the cases be merged on the ground that in both the cases the facts which are constituting and the parties are one and the same.

4. On 16.4.99 the charges were framed by the learned JMFC against Respondent Nos. 3 and 4 under Section 420 of IPC and no charge was framed under Section 138/140 of the Act. On 29.1.2000 an oral prayer was made by the counsel for the petitioner to frame charge under Section 138/140 of the Act. Learned Trial Court vide its order dated 21.2.2000 held that in the facts and circumstances of the case the only offence under Section 420 of IPC is made out against the respondents and thus the prayer to frame the charge under Section 138 of the Act was rejected. Thereafter the case proceeded and the evidence was adduced by the petitioner which was recorded. After recording of evidence again an application was filed by the petitioner on 12.12.2005 under Section 216 of the Cr.P.C., wherein it was prayed that the petitioner has already adduced the evidence from which it is proved that respondents have also committed the offence punishable under Section 138 of the Act. It was prayed that the charge be framed against the respondents under Section 138 of the Act as well. The prayer was opposed by the Respondent Nos. 1 to 4 on various grounds, including on the ground that since earlier prayer made by the petitioner has been rejected, the petitioner cannot renew the prayer in the same litigation again. After hearing the parties learned trial Court dismissed the application filed by the petitioner, against which present revision petition has been filed.

5. Leaned counsel for the petitioner argued at length and submits that the learned trial Court committed error in not considering the fact that the charges under the provision of IPC as well as the Negotiable Instruments Act are distinct in nature and it cannot be presumed that the charge under Section 420 of IPC would also cover the ingredients of the offence punishable under Section 138 of the Act. Learned counsel further submits that under Section 216 of the Cr.P.C. petitioner can request the Court to frame/alter the charge at any point of time before pronouncement of the judgment. For this contention reliance was placed by the counsel for the petitioner on a decision in the matter of *Kantila Chandulal Mehta Vs. State of Maharashtra* – AIR 1970 Cri.L.J. 510, wherein the Hon'ble Apex Court has held that "the Code gives ample power to the Courts to alter or amend a charge whether by the trial Court or by the Appellate Court provided

PRAKASH KANTHED Vs. M/S MAHESHWARI PROTINS LTD.

that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about the charge or in not giving him a full opportunity of meeting it by putting forward any defence open to him on the charge finally preferred against him. Section 217 deals with recall, if necessary of witnesses when the charge is altered." Further reliance is placed in the matter of *Hasanbhai alibhai Qureshi Vs. State of Gujarat and others* – AIR 2004 SCW 2063, wherein the Hon'ble Apex Court has held that "therefore, if during trial the trial Court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate."

6. Learned counsel for the petitioner further submits that by not framing the charge under Section 138 of the Act, impliedly learned Court below has rejected the complaint filed by the petitioner under Section 138 of the Act. It is submitted that the prosecution under Section 138 of the Act is a summons case and once the complaint is registered and after recording the statements under Sections 202 and 203 of the Cr.P.C., learned JMFC is bound to go further and cannot review its order. Learned counsel submits that by not framing the charge under Section 138 of the Act, learned Court below has made the complaint of the petitioner, filed under Section 138 of the Act, infructuous. For this contention reliance is placed on a decision of the Hon'ble Apex Court in the matter of *Adalat Prasad Vs. Rooplal Jindal and other* – AIR 2004 SCW 5174, wherein the Hon'ble Apex Court has observed as under:-

"After taking cognizance of the complaint and examining the complainant and the witnesses if Magistrate is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under S. 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under S. 202 that there is sufficient ground for proceeding with the complaint to issue process under S. 204 of Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Ss. 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accuse

PRAKASH KANTHED Vs. M/S MAHESHWARI PROTINS LTD.

can obtain at that stage is not by invoking S. 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate Criminal Courts, the remedy lies in invoking S. 482 of Code.”

7. Learned counsel for the petitioner submits that in the facts and circumstances of the case, the impugned order passed by learned Court below be set aside with a direction to frame the charge under Section 138 of the Act.

8. Learned counsel for Respondent Nos. 2 to 4 submits that the oral prayer was made by the petitioner on 29.1.2000 for framing of charge under Section 138 of the Act. Vide order dated 21.2.2000 the same was rejected and order dated 21.2.2000 attained finality. It is submitted that since the order dated 21.2.2000 holds the field, therefore, the petitioner cannot be permitted to raise the same issue under the garb of the application filed under Section 216 of Cr.P.C., which has already been decided by the learned Court below. For this contention reliance is placed on a decision in the matter of *Arun Kumar Bodhilal Kashyap and others Vs. State of M.P.* – 2000 (2) MPLJ 184, wherein this Court has held that “the order of trial Court framing charge not challenged by filing revision under Section 397 of Cr.P.C., prayer for quashing charges in exercise of powers under Section 482 cannot be entertained.

9. Learned counsel for Respondent Nos. 1 to 4 further submits that the private complaint filed under Section 138 of the Act was filed on 5.5.97 while the Challan under Section 420 of IPC was filed by Respondent No. 5 on 16.1.98, which was based on the complaint filed by the petitioner on 3.4.97. Learned counsel submits that vide order dated 24.7.98 learned Court below merged both the cases. It is submitted that since no charge was framed under Section 138 of the Act and no action was taken by the petitioner immediately thereafter, therefore, at this juncture learned Court below committed no error in rejecting the application.

10. From perusal of the record it appears that the private complaint was filed under Section 138 of the Act in which after proving certain facts the burden to prove that in what circumstances the cheque was dishonoured shifts on the person who issued the cheque. While for making out an offence under Section 420 of IPC, the prosecution has to prove that the accused dishonestly induced the complainant to deliver any property or valuable security. In the present case no doubt the facts in both the cases are one and the same, therefore, learned Court below rightly merged both the cases vide order dated 24.7.98. It is also true that the oral prayer to frame the charge under Section 138 of the Act was rejected on 29.1.2000, but only because the prayer was rejected once, the right of the petitioner to approach the Court again, after recording of the evidence of the complainant under Section 216 of the Cr.P.C. is not curtailed as the Section 216 of the Cr.P.C

IN REFERENCE Vs. ALOK SINGHAI

lays down that the Court can alter or add any charge at any time before judgment is pronounced. Since the petitioner is also prosecuting the respondents under Section 138 of the Act and no charge has been framed by the learned Court below under that section, therefore, even this Court can direct to frame the charge while exercise the jurisdiction under Section 397 of the Cr.P.C.

11. In the facts and circumstances of the case and keeping in view the law laid down by the Hon'ble Apex Court, this Court is of the opinion that learned Court below committed error in dismissing the application filed by the petitioner under Section 216 of Cr.P.C.

12. In view of this the revision petition filed by the petitioner stands allowed and the impugned order dated 31.1.2006 passed by JMFC, Khachhrod is set aside, with a further direction to the learned Court below to frame charge under Section 138 of the Act also against the Respondent No. 1 to 4. However, it is made clear that respondents shall be at liberty to demonstrate that no offence has been committed by them under Section 138 of the Act for which the respondents can also avail the remedy available under Section 217 of Cr.P.C. for recalling of the witnesses. It is also made clear that any observation made by this Court will not affect the case of either of the parties. Since the case is of the year 1996, therefore, learned Court below is directed to conclude the trial within a period of six months from the date of receipt of this order. Office is directed to send a copy of this order to the concerning trial Court for compliance. With the aforesaid modification, the revision petition stands disposed of.

Petition disposed of.

I.L.R. [2009] M. P., 264

CRIMINAL REVISION

Before Mr. Justice Rakesh Saxena

18 August, 2008*

IN REFERENCE

Vs.

ALOK SINGHAI & anr.

A. Criminal Procedure Code, 1973 (2 of 1974), Section 200 - Complaint - Magistrate has to proceed and pass orders in a case on the basis of material on record of that particular case - Magistrate is not supposed to remember and pass orders on the basis of facts of any other case. (Para 7)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 - परिवाद - मजिस्ट्रेट को किसी मामले में उसी विशिष्ट मामले के अभिलेख पर उपलब्ध सामग्री के आधार पर कार्यवाही करनी चाहिए और आदेश पारित करने चाहिए - मजिस्ट्रेट से यह उम्मीद नहीं की जा सकती है कि वह किसी अन्य मामले के तथ्यों को याद रखे और उस आधार पर आदेश पारित करे।

IN REFERENCE V. ALOKSINGHAI

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 200 & 201 - Second/subsequent complaint - Magistrate returned the first complaint on the ground that he had no jurisdiction to entertain as commission of offence u/s 13(1)(d) of Prevention of Corruption Act alleged - Does not debar magistrate to entertain complaint again, if those allegations are omitted by complainants in second complaint. (Para 8)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 200 व 201 - द्वितीय/पश्चात्पूर्ति-परिवाद - मजिस्ट्रेट ने प्रथम परिवाद इस आधार पर लौटाया कि उसे ग्रहण करने की अधिकारिता नहीं थी क्योंकि भ्रष्टाचार निवारण अधिनियम के अन्तर्गत अपराध करना कथित किया गया - मजिस्ट्रेट को पुनः परिवाद ग्रहण करने से विवर्जित नहीं करती है, यदि परिवादियों द्वारा द्वितीय परिवाद में उन अभिकथनों का लोप कर दिया जाता है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - Cognizable offence - Magistrate directed the police station to register F.I.R. if cognizable offence is found to have been committed - Held - Magistrate ought to have expressed in the order, if he prima facie found the complaint disclosing cognizable offence - However, every mistake does not necessarily call for correction. (Para 11),

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) - संज्ञेय अपराध - मजिस्ट्रेट ने पुलिस थाने को निदेश दिया कि यदि संज्ञेय अपराध किया जाना पाया जाता है तो एफ. आई.आर. दर्ज की जाए - अमिनिघारित - मजिस्ट्रेट को आदेश में अभिव्यक्त करना चाहिए था यदि वह प्रथम दृष्ट्या परिवाद को संज्ञेय अपराध प्रकट करने वाला पाता - तथापि, प्रत्येक मूल में आवश्यक सुधार की माँग नहीं की जा सकती।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 407 - Transfer of case - Where even allegation of nexus between magistrate and complainant appears to be baseless and unfounded, yet in peculiar circumstances it is appropriate for High Court to transfer case from that court to some other court. (Para 14)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 407 - मामले का अंतरण - जहाँ मजिस्ट्रेट और परिवादी के मध्य सम्बन्ध का अभिकथन बेबुनियाद और निराधार भी प्रतीत हो, तो भी विशिष्ट परिस्थितियों में उच्च न्यायालय के लिए यह समुचित है कि मामला उस न्यायालय से किसी अन्य न्यायालय में अंतरित कर दिया जाए।

Case referred :

(2005) 11 SCC 195, AIR 1997 SC 3104.

ORDER

RAKESH SAKSENA, J. :- This revision has been registered as suo-motu criminal revision by the orders of the Hon'ble the Chief Justice in the matter of order dated 19.06.2008 passed by Shri D.K.Singh, J.M.F.C., Bhopal in an unregistered complaint filed by Alok Singhai and Narendra Bhavsar against Shri Justice

IN REFERENCE Vs. ALOK SINGHAI

Ripusudan Dayal, Lokayukta, M.P. and his wife Smt. Usha Dayal under Sections 420, 465, 467 and 471/34 of the Indian Penal Code making allegation that they with a view to obtain illegal benefit committed forgery in the land acquisition and development scheme lease deed executed by the Housing Commissioner of M.P. Housing Board, Bhopal. Along with the complaint, an application under Section 156(3) of the Code of Criminal Procedure was also filed.

2. Learned Magistrate after perusal of the material on record, on 19.06.2008 passed an order under Section 156(3) of the Code of Criminal Procedure directing the Officer Incharge of Police Station Kohefiza, Bhopal to register the First Information Report, if from the complaint any cognizable offence appeared to have been committed. The documents filed by the complainants were also sent along with the aforesaid order. The case was fixed on 20.08.2008.

3. On 25.06.2008, the Station Officer of Police Station Kohefiza filed its report before the Court of Magistrate. Learned Magistrate ordered it to be put up for consideration on 20.08.2008, the date on which the case was already fixed.

4. The action for taking up this matter as suo-motu revision arose when the Deputy Secretary of Lokayukta Office sent a letter dated 27.06.2008 to the Registrar General of High Court on the direction of Lokayukta with a view to inform the real state of affairs of the case. In the said letter; it was mentioned that the Director General of Special Police Establishment had filed a complaint against Alok Singhai and Narendra Bhavasar on 12.06.2008 under Sections 182, 193, 199 and 211 of the Indian Penal Code in the Court of Shri D.K. Singh, J.M.F.C., Bhopal. After hearing the arguments on the said complaint, on 16.06.2008 learned Magistrate fixed the case for orders on 26.06.2008. Thereafter, Alok Singhai and Narendra Bhavasar filed a complaint against Lokayukta and his wife before Shri D.K. Singh, J.M.F.C., Bhopal on 18.06.2008. Learned Magistrate finding that he had no jurisdiction to entertain the complaint, returned it to the complainants under Section 201, of the Code of Criminal Procedure for its presentation to the proper Court. On 19.06.2008, Alok Singhai and Narendra Bhavasar then filed the present complaint against Lokayukta and his wife under Sections 420, 465, 467 and 471/34 of the Indian Penal Code in the Court of Shri D.K. Singh, whereupon he passed an order under Section 156(3) of the Code of Criminal Procedure directing the Officer Incharge of Police Station Kohefiza to register the First Information Report if a cognizable offence is found and to file report in this regard. On 25.06.2008, Police Kohefiza presented its report to the effect that from the facts stated in the complaint no cognizable offence was found to have been committed. It was further mentioned in the aforesaid letter that another complaint filed by the Special Police Establishment against the complainants was fixed for hearing on 26.06.2008, but Magistrate Shri D.K. Singh went on leave.

5. Another paper which addressed to nobody and purports to be signed by R. Dayal, is also on record, in which it has been stressed that in the present

IN REFERENCE V. ALOK SINGHAI

complaint the learned Magistrate passed the order dated 19.06.2008 without applying mind and without even ascertaining whether the allegation discloses commission of any cognizable offence. According to it, on bare perusal of the complaint no offence was disclosed on the basis of allegations contained therein. It has also been mentioned that two complaints containing similar allegations were also filed by the same complainants before the Director General, S.P.E.. The facts of those complaints were verified by the Special Police Establishment and it was found that the allegations made in complaints were not only false, but also actuated with malafides. It was also found that both the complainants had committed offences under Sections 182, 193, 199 and 211 of the Indian Penal Code, as such, a complaint was filed by the Director General, S.P.E. before the Magistrate for prosecuting them on 12.06.2008 and all the evidence which was collected to show that the complaints were false and motivated, had been annexed. The complaints filed earlier before the Director General, S.P.E. were similar to that which was filed before the same Magistrate. The only difference was that in the complaint which had been filed before the S.P.E. the offences under Section 13(1)(d) of the Prevention of Corruption Act and under Section 120-B of the Indian Penal Code were also mentioned, whereas the complainants omitted this part in the complaints filed before Magistrate Shri D.K.Singh. This was done because otherwise the Magistrate could not have jurisdiction to entertain the complaint and the case could have been entertained only by the Special Judge designated under the provisions of the Prevention of Corruption Act. It has been stated that this fact was within the knowledge of the Magistrate as he himself had heard the matter relating to the complaint filed by the Director General, S.P.E.. It has further been stated that palpably false statements were made with a view that Shri D.K.Singh, Magistrate might have jurisdiction to hear the case. In the end, it has been mentioned that all this suggests a nexus between the Magistrate and complainants.

6. On examining the order dated 19.06.2008, the documents and the record of the complaint, I am of the view that no case for interference in the impugned order, in the revisional jurisdiction of this Court is made out.

7. It is well settled that the Magistrate has to proceed and pass the orders in a case on the basis of material on record of that particular case. He is not supposed to remember and pass the orders in a case on the basis of facts of any other case much less on his personal memory. Even if another complaint was filed by the Director General, S.P.E. against the complainants alleging that the allegations made by the complainants against Lokayukta and his wife were false and were actuated with malafides, the complainants were not debarred from filing the complaint before the Magistrate. In *Anandwardhan and another vs. Pandurang and others*, (2005) 11 SCC 195, the Apex Court observed "We do not wish to make any comments about the investigation of the case or the result of the

IN REFERENCE VS. ALOKSINGHAI

investigation. The law provides that if the police fails to investigate a case arising from a first information report lodged before it disclosing commission of a cognizable offence, it is open to the informant/ complainant to move the Magistrate concerned for appropriate order under Section 156 CrPC, or may file a complaint and obtain appropriate orders from him for issuance of process against the accused for trial. If the grievance of the respondent was that the police was not properly investigating his case, or that the report made by the police was wrong or based on no investigation whatsoever, it was open to him to move the Magistrate concerned."

8. Even if the first complaint filed by the complainants was returned by the Magistrate to the complainants on the ground that he had no jurisdiction to entertain the same as commission of offence under Section 13(1)(d) of the Prevention of Corruption Act was alleged, it did not debar the Magistrate to entertain the complaint again, if those allegations were omitted by the complainants in the second complaint.

9. On perusal of the order dated 19.06.2008, it is apparent that learned Magistrate instead of taking recourse to examine the complainants and record their evidence, simply passed an order under Section 156(3) of the Code of Criminal Procedure with a direction to the Police to register the First Information Report if a cognizable offence is found to have been committed on the facts alleged in the complaint. The learned Magistrate even did not direct the Police to register the First Information Report. Section 156 of the Code of Criminal Procedure 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."

It is clear that any officer in charge of a police station may without the order of a Magistrate investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter-XIII and any Magistrate empowered under Section 190 may order such an investigation as mentioned in sub-section (1) of Section 156 of the Code of Criminal Procedure.

IN REFERENCE V. ALOKSINGHAI

10. In *Madhu Bala Vs. Suresh Kumar and others*, AIR 1997 SC 3104, the Apex Court held that "Whenever a Magistrate directs an investigation on a 'complaint' the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the Police Rules. Therefore, the direction of a Magistrate asking the police to 'register a case' makes an order of investigation under Section 156(3) cannot be said to be legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the Police to investigate into a cognizable 'case' and the Rules framed under the Police Act, 1861 it (the Police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of Magistrate to direct the police to register a case at the police station and then investigate into the same." "When a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190(1)(a) of the Code and proceed with the same in accordance with the provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate Police Station under Section 156(3) for investigation. Once such a direction is given under sub section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a 'police report' in accordance with Section 173(2) on which a Magistrate may take cognizance under Section 190(1)(b) but not under 190(1)(a)."

11. It is true that the learned Magistrate ought to have expressed in the order if he prima facie found the complaint disclosing a cognizable case, before passing the order under Section 156(3) of the Code of Criminal Procedure, but he left it on the police to register the First Information Report if it found the commission of a cognizable offence on the facts alleged in the complaint, but every mistake does not necessarily call for correction.

12. Officer Incharge of Police Station Kohefiza, Bhopal submitted its report before the learned Magistrate on 25.06.2008 stating that the facts mentioned in the complaint did not constitute a cognizable offence, therefore, it would not be in accordance with law to register the First Information Report under Section 154 of the Code of Criminal Procedure or a report even under Section 155 of the Code of Criminal Procedure for a non-cognizable offence.

13. In view of the above, in my opinion it would not be appropriate to interfere in the order dated 19.06.2008 passed by the learned Magistrate and direct him to reconsider the material on record and pass a fresh order.

14. Though the allegation made against the learned Magistrate that there had been a nexus between him and the complainants appears to be baseless and unfounded, yet in the peculiar circumstances of the case it would be appropriate, in order to put the matter beyond the pale of slightest suspicion, in the interest of

RAM KISHOR SAKET Vs. STATE OF M.P.

justice that it may also appear to have been accorded, to exercise the power vested in this Court under Section 407(2) of the Code of Criminal Procedure, to transfer the present case from the Court of Shri D.K. Singh, J.M.F.C., Bhopal to the Court of Chief Judicial Magistrate, Bhopal for hearing it himself or to make it over to some other competent Magistrate for proceeding according to law.

15. For the reasons stated above, I find no ground for interference in the impugned order in the revisional jurisdiction of this Court. This revision is accordingly, disposed of subject to the aforesaid direction of transfer of the case to the Chief Judicial Magistrate, Bhopal.

16. Record of the lower Court be sent back immediately.

Revision disposed of.

I.L.R. [2009] M. P., 270

CRIMINAL REVISION

Before Mr. Justice Rakesh Saxena

9 September, 2008*

RAM KISHOR SAKET

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439, Penal Code, 1860, Sections 409 & 465 - Regular Bail - Competent Court - Applicant granted anticipatory bail for offences punishable u/s 409 & 465 of IPC with direction that applicant may move application for regular bail before competent court - Held - Offence u/s 409 IPC is punishable with life therefore, court of Sessions would be competent court for the purposes of regular bail - A.S.J. should not have dismissed application for regular bail as not maintainable. (Paras 7 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439, दण्ड संहिता, 1860, धाराएँ 409 व 465 - नियमित जमानत - सक्षम न्यायालय - आवेदक को भा.द.सं. की धारा 409 व 465 के अन्तर्गत दण्डनीय अपराधों के लिए अग्रिम जमानत इस निदेश के साथ प्रदान की गई कि आवेदक सक्षम न्यायालय के समक्ष नियमित जमानत के लिए आवेदन पेश कर सकेगा - अभिनिर्धारित - भा.द.सं. की धारा 409 के अन्तर्गत अपराध आजीवन कारावास से दण्डनीय है, इसलिए सेशन न्यायालय नियमित जमानत के प्रयोजन के लिए सक्षम न्यायालय होगा - अपर सेशन न्यायाधीश को नियमित जमानत का आवेदन पोषणीय न होना मानते हुए उसे खारिज नहीं करना चाहिए था।

Case referred :

AIR 1978 SC 179.

S.K. Tiwari, for the applicant.

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

RAMKISHOR SAKET Vs. STATE OF M.P.

O R D E R

RAKESH SAKSENA, J. :-Applicant has filed this revision against the order dated 13.06.2006 passed by the Additional Sessions Judge, Umariya, rejecting his regular bail application No.1013/2006, holding it not maintainable.

2. Applicant apprehending arrest in Crime No.112/2005 registered under Sections 409 and 465 of the Indian Penal Code by Police Station Chandia of district Umariya, moved an application under Section 438 of the Code of Criminal Procedure before the High Court which was registered as M.Cr.C. No.374/2006. By order dated 12.04.2006, the aforesaid application was allowed. He was directed to be released on bail on his furnishing a personal bond in the sum of Rs.20,000/- and a surety bond in the like amount to the satisfaction of the Arresting Officer. It was, however, directed that the bail order shall remain in force for a period of 60 days. During this period, if the applicant so desires, may move an application for regular bail before the Competent Court, which shall be considered by that Court in accordance with law.

3. When applicant moved the regular bail application before the Court of Sessions, learned Additional Sessions Judge, placing reliance on *Gurcharan Singh Vs. State (Delhi Admn.)*, AIR 1978 SC 179, dismissed the application holding that the said regular bail application was not maintainable under Section 439, Cr.P.C. as the applicant did not first move the Court of Magistrate under Section 437 of the Code of Criminal Procedure.

4. Learned counsel for the applicant submits that since the High Court while granting bail under Section 438 of the Code of Criminal Procedure observed that the applicant may move an application for regular bail before the competent court which shall be considered by that Court; learned Additional Sessions Judge was not justified in dismissing his application holding it not maintainable.

5. Learned counsel for the State submits that the applicant was required to move his regular bail application before the Court of Magistrate before filing the same before the Court of Sessions.

6. In case of *Gurcharan Singh* (supra), the Apex Court observed as under :-

"Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under S.437(1) there is no ban imposed under S.439(1), Cr.P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to

IN REFERENCE V. DEEPAK AGRAWAL

exercise its judicial discretion in considering the question of granting of bail under S.439(1), Cr.P.C. of the new Code."

7. The decision of the Apex Court while observing about the course of a bail application which is to take generally, it appears to me, did not intend to confer jurisdiction on a Court without jurisdiction under the Statute. Naturally, therefore, the Apex Court made it clear that "The High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr.P.C. of the new Code." In the context, the observation that "it is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate....." appears to be words of caution and warning against the abuse of the provision of the bail, without intending to compel an accused to first necessarily go before a Court (Magistrate) without jurisdiction before approaching one endowed with jurisdiction.

8. Since the Police had registered the case under Sections 409 and 465 of the Indian Penal Code, the applicant was justified in supposing that his bail application under Section 437(1) of the Code of Criminal Procedure before the Magistrate would be an entirely futile exercise for want of jurisdiction. In the present case, while granting bail to the applicant under Section 438 of the Code of Criminal Procedure, this Court observed that the applicant may move an application for regular bail before the competent court, then the learned Additional Sessions Judge ought not to have dismissed the application filed by the applicant as not maintainable. Since the offence under Section 409, I.P.C. is punishable with imprisonment for life, *prima facie*, the Court of Sessions would be the competent Court for the purpose of regular bail application.

9. For the reasons stated above, this revision is allowed. The impugned order passed by the Additional Sessions Judge is set aside. Bail Application No.1013/2006 is restored and the learned Additional Sessions Judge is directed to hear and dispose of the said bail application on merits according to law.

Revision allowed.

I.L.R. [2009] M. P., 272

CRIMINAL REVISION

Before Mr. Justice R.C. Mishra

16 September, 2008*

IN REFERENCE

Vs.

DEEPAK AGRAWAL

**A. Criminal Procedure Code, 1973 (2 of 1974), Section 190 -
Cognizance - Complaint presented on 06.10.2007 - Magistrate fixed the case,**

IN REFERENCE VS. DEEPAK AGRAWAL

on 06.11.2007 and further, for recording preliminary evidence - Held - Magistrate had taken cognizance of offences on 06.10.2007 itself by applying his mind and fixing a date for recording of preliminary evidence. (Para 5)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 190 - संज्ञान - परिवाद 06.10.2007 को पेश किया गया - मजिस्ट्रेट न प्रारम्भिक साक्ष्य अभिलिखित करने के लिए मामला 06.11.2007 को और उसके आगे नियत किया - अभिनिर्धारित - मजिस्ट्रेट अपने मस्तिष्क का प्रयोग कर और प्रारम्भिक साक्ष्य अभिलिखित करने के लिए तारीख नियत कर अपराध का संज्ञान 06.10.2007 को ले चुका था।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) & 190 - Investigation - Magistrate can direct investigation u/s 156(3) only at pre-cognizance stage. (Para 6)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) व 190 - अनुसंधान - मजिस्ट्रेट धारा 156(3) के अन्तर्गत केवल संज्ञान से पहले के प्रक्रम पर अनुसंधान के लिए निदेश दे सकता है।

C. Penal Code (45 of 1860), Section 295A - Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs - Cognizance cannot be taken except with sanction of Central or State Government. (Para 8)

ग. दण्ड संहिता (1860 का 45), धारा 295ए - विमर्शित और विद्वेषपूर्ण कार्य जो किसी वर्ग के धर्म या धार्मिक विश्वासों का अपमान करके उसकी भावनाओं को आहत करने के आशय से किये गये हों - केन्द्र और राज्य सरकार की मंजूरी के सिवाय संज्ञान नहीं लिया जा सकता।

Cases referred :

AIR 1976 SC 1672, AIR 2005 SC 4284, (2008) 2 SCC 492, AIR 1963 SC 765, AIR 1961 SC 986, 1995 CrLJ 1486, (2001) 7 SCC 679, (2006) 9 SCC 601.

ORDER

R.C. MISHRA, J. :- This is a *suo motu* revision under Section 397 read with 401 of the Code of Criminal Procedure (for short 'the Code').

2. The orders in question are passed by Shri P.L. Dinkar, Judicial Magistrate First Class, Itarsi Distt. Hoshangabad with regard to the complaint made by the noticee Deepak Agrawal against Smt. Soniya Gandhi, President, Sanyukta Pragatisheel Gathbandhan, Shri Manmohan Singh, Prime Minister, Govt. of India, Shri Hansraj Bhardwaj, Minister, Ministry of Law & Justice, Govt. of India, Sushri Ambika Soni, Minister, Culture and Tourism Ministry, Govt. of India, Shri S.T. Raghwan, Additional Secretary to Ministry of Road, Transport Rajmarg & Shipping Corporation and C. Dor. Ji, Director Indian Archeological Survey, New Delhi, in respect of the offences punishable under Sections 120-B, 124-A, 295 and 295A of the IPC. According to the complainant/noticee, all the six accused persons were involved in a conspiracy in pursuance of which, they had managed to submit

IN REFERENCE VS. DEEPAK AGRAWAL

affidavits sworn in by the accused nos. 5 and 6 before the Supreme Court in respect of the SETHUSAMUDRAM PROJECT, with intent to outrage religious feelings of Hindus who believe that SETHUSAMUDRAM, popularly known as Ramsethu or Rama's bridge was built by Lord Rama.

3. The facts giving rise to this revision may be summed up as under :-

(a) The complaint was presented on 06.10.2007. However, instead of examining the complainant at once as per the mandate of Section 200 of the Code, the learned Magistrate proceeded to fix 06.11.2007 as the date for recording of the preliminary evidence. The matter was further adjourned for the purpose to 27.12.2007 and 28.01.2008 respectively.

(b) On 28.01.2008, the learned Magistrate, upon the request made by the complainant, forwarded the complaint to the SHO, Itarsi for investigation under Section 156(3) of the Code with a direction to submit report on 18.03.2008.

(c) On 06.02.2008, in view of the fact that the consequent registration of case by the police had received wide publicity through media, the learned Magistrate recorded an explanation that he had neither taken cognizance of the offence, under S.190 of the Code nor instructed the SHO to register a case. He also directed the SHO to submit report.

(d) On 07.02.2008, the SHO reported that he had not received any order to conduct investigation in to the matter,

4. Taking note of the palpable jurisdictional errors committed by the Magistrate, this revision was entertained and notice was issued to the complainant to show cause as to why the order-dated 06.10.2007 and subsequent proceedings initiated upon his complaint should not be quashed. In response, the complainant/noticee, instead of filing a reply, has preferred to submit written arguments. With reference to these arguments, I have also heard learned panel lawyer at length.

5. The declaration made by the learned Magistrate, in the order-dated 06.02.2008, that he had not taken cognizance of the offences, is apparently misconceived as he had taken cognizance of the offences on 06.10.2007 only by applying his mind and fixing a date for recording of the preliminary evidence of the complainant (*Devarapalli Lakshmi- Narayana Reddy vs. V. Narayana Reddy* AIR 1976 SC 1672 referred to). Further, in *CREF Finance Ltd. vs. Shree Shanthy Homes Pvt. Ltd.* AIR 2005 SC 4284 and again in *Chief Enforcement Officer vs. Videocon International Ltd.* (2008) 2 SCC 492, while reaffirming the view taken in *Ajit Kumar Palit vs. State of W.B.* AIR 1963 SC 765 that the words "cognizance taken" need not be mentioned in the corresponding order, the Supreme Court proceeded to quote the following illuminating observations :-

IN REFERENCE VS. DEEPAK AGRAWAL

"The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means become aware of and when used with reference to a Court or Judge, to take notice of judicially. It was stated in *Gopal Marwari v. Emperor* (AIR 1943 Pat 245) by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in *R.R. Chari v. State of Uttar Pradesh* (1951 SCR 312, 320) that the word, 'cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in *Emperor v. Sourindra Mohan Chuckerbutty* (1910 ILR 37 Cal 412, 416), 'taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.'"

6. As explained in *Gopal Das Sindhi vs. State of Assam* AIR 1961 SC 986, the provisions of S. 190 do not mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. However, a Magistrate can order investigation under S.156(3) of the Code only at the pre-cognizance stage even if the offence complained of is exclusively triable by Court of Session. This point has been elucidated in his inimitable style by S. Murtaza Fazal Ali, J. in the following terms :-

While Chapter 14 (under which S.190 falls) deals with post-cognizance stage, Chapter 12 (under which S.156 falls), so far as the Magistrate is concerned, deals with pre-cognizance stage. Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. A Magistrate can order investigation under S.156(3) only before taking cognizance under Ss.190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under S.156(3) though in cases not falling within the proviso to S.202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by S.202 of the Code (See. *Tula Ram vs. Kishore Singh* AIR 1977 SC 2401).

7. Accordingly, in the factual scenario of the present case, the learned Magistrate committed a serious error of jurisdiction by ordering investigation under S.156(3) of the Code. The corresponding order passed on 28.01.2008, therefore, deserves to be set aside.

8. There are some other aspects of the matter. The offences were allegedly committed at New Delhi. The offence under Section 124-A of the IPC is exclusively triable by the Court of Session whereas, by virtue of Section 196(1) of

SHABANA BANO (SMT.) Vs. IMRAN KHAN

the Code, cognizance of the offence punishable under Section 295A of the IPC can not be taken except with the previous sanction of the Central Government or of the State Government. But, copies of corresponding order-sheets reflect that the matter could not be viewed from these angles as even the complainant has not been examined by the Magistrate before taking cognizance of the offences. In the words of *Termes delaley*, Jurisdiction is a DIGNITY which a man hath by a power to do justice in causes of complaint made before him" (quoted with approval in *Brij Kishore Singh v. Nutan Singh* 1995 CRI. L. J. 1486). Nevertheless, under S. 201 of the Code, a Magistrate, who is not competent to take cognizance of the offence for want of territorial jurisdiction or for any other reason, may return the complaint for presentation to the proper Court. However, even this can only be done because the Court has competence to deal with the matter (*State of M.P. v. Bhooraji* (2001) 7 SCC 679 relied on).

9. For the foregoing reasons, the order-dated 28.01.2008 deserves to be interfered with. However, a wrong procedure adopted by the Magistrate for directing investigation under Section 156(3) of the Code would not be sufficient to quash the entire proceedings initiated on the complaint. This view is fortified by the decision of the Apex court in *Narmada Prasad Sonkar @ Ramu vs. Sardar Avtar Singh Chabara* (2006) 9 SCC 601).

10. Consequently, the order-dated 28.01.2008 is set-aside and all subsequent proceedings pertaining to the complaint are hereby quashed. However, the Magistrate shall be at liberty to proceed with the complaint in accordance with law from the stage that was in existence prior to passing of the order directing investigation under Section 156(3) of the Code. Needless to say that while doing so, he would take into account all the material aspects of the matter as highlighted hereinabove.

11. Record of the complaint case be returned forthwith.

Order accordingly.

I.L.R. [2009] M. P., 276

CRIMINAL REVISION

Before Mr. Justice B.M. Gupta

26 September, 2008*

SHABANA BANO (SMT.)

... Applicant

Vs.

IMRAN KHAN

... Non-applicant

A. Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3 - Divorce - Effective date - If pronouncement of Talaq on a particular date is disputed - Then proof is required to establish this fact and once it is proved it will be effective from the actual date of Talaq and not from the date of its establishment in court.

(Para 6)

SHABANA BANO (SMT.) V. IMRAN KHAN

क. मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3 — विवाह विच्छेद — प्रभावित होने की तारीख — यदि किसी विशिष्ट तारीख पर तलाक दिया जाना विवादित है — इस तथ्य को साबित करने के लिए सबूत अपेक्षित है और एक बार जब यह साबित हो जाता है तब तलाक की वास्तविक तारीख से यह प्रभावी होगा तलाक को न्यायालय में साबित करने की तारीख से नहीं।

B. Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Sections 3 & 4, Criminal Procedure Code, 1973, Section 125 - Maintenance - After coming into force of the Act, the provisions of Section 125 of Code are available to a Muslim wife, but not available to a divorced Muslim wife. (Para 9.A)

ख. मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धाराएँ 3 व 4, दण्ड प्रक्रिया संहिता, 1973, धारा 125 — भरण-पोषण — अधिनियम के प्रवृत्त होने के बाद संहिता की धारा 125 के उपबंध मुस्लिम पत्नी को उपलब्ध हैं, किन्तु तलाकशुदा मुस्लिम पत्नी को उपलब्ध नहीं।

C. Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Sections 3 & 4, Criminal Procedure Code, 1973, Section 125 - Right of maintenance after the expiry of period of Iddat - The liability of the Muslim husband to his divorced wife arising u/s 3(1)(a) of the Act to pay maintenance is not confined to Iddat period only - He has to make reasonable and fair provisions within the period of Iddat for the future of the divorced wife i.e. even for post Iddat period also, which obviously includes her maintenance as well. (Para 8.A)

ग. मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धाराएँ 3 व 4, दण्ड प्रक्रिया संहिता, 1973, धारा 125 — इदत की अवधि के समाप्त हो जाने के बाद भरण-पोषण का अधिकार — मुस्लिम पति का उसकी तलाकशुदा पत्नी के प्रति अधिनियम की धारा 3(1)(ए) के अन्तर्गत उद्भूत भरण-पोषण अदा करने का दायित्व केवल इदत की अवधि तक सीमित नहीं है — उसे इदत की अवधि के भीतर तलाकशुदा पत्नी के भविष्य के लिए अर्थात् इदत के बाद की अवधि के लिए भी युक्तियुक्त और उचित उपबंध करना पड़ते हैं, जिसके अन्तर्गत स्पष्टतः उसका भरण-पोषण भी शामिल है।

D. Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Sections 3 & 4, Family Courts Act, 1984, Section 7(1)(f) - Jurisdiction - The cases u/s 3 & 4 of the Act of 1986 are required to be decided by a Magistrate alone and not by the Family Court.

(Paras 9.E & 10)

घ. मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धाराएँ 3 व 4 कुटुंब न्यायालय अधिनियम, 1984, धारा 7(1)(एफ) — अधिकारिता — अधिनियम 1986 की धारा 3 व 4 के अन्तर्गत मामले केवल मजिस्ट्रेट द्वारा विनिश्चित किया जाना अपेक्षित है, कुटुंब न्यायालय द्वारा नहीं।

SHABANA BANO (SMT.) Vs IMRAN KHAN

E. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Order for maintenance of children - Divorced Muslim wife can file maintenance application u/s 125 of the Code before the Magistrate for maintenance of children. (Para 8.B)

इ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - संतान के भरण-पोषण के लिए आदेश - तलाकशुदा मुस्लिम पत्नी संतान के भरण-पोषण के लिए संहिता की धारा 125 के अन्तर्गत मजिस्ट्रेट के समक्ष भरण-पोषण का आवेदन पेश कर सकती है।

F. Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3, Criminal Procedure Code, 1973, Section 125 - Muslim wife can file the application under both the provisions before Magistrate for maintenance against the husband - If the claim of the husband about divorcing the wife is accepted, then after the date of divorce, the rights of the wife can be considered by the Magistrate in the same application - In that case the Magistrate can decide the rights of the divorced wife on the basis of provisions of the Act - Thus, filing of a new application by the wife under the provisions of the Act is not required. (Para 9.A)

च. मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3, दण्ड प्रक्रिया संहिता, 1973, धारा 125 - मुस्लिम पत्नी पति के विरुद्ध भरण-पोषण के लिए मजिस्ट्रेट के समक्ष दोनों उपबंधों के अन्तर्गत आवेदन पेश कर सकती है - यदि पति का पत्नी को तलाक देने का दावा स्वीकार कर लिया जाता है, तब तलाक की तारीख के बाद पत्नी के अधिकारों पर मजिस्ट्रेट द्वारा उसी आवेदन में विचार किया जा सकता है - उस मामले में मजिस्ट्रेट अधिनियम के उपबंधों के आधार पर तलाकशुदा पत्नी के अधिकारों का विनिश्चय कर सकता है - इस प्रकार अधिनियम के उपबंधों के अन्तर्गत पत्नी द्वारा नवीन आवेदन पेश करना अपेक्षित नहीं है।

Cases referred :

(2002) 7 SCC 518, (2001) 7 SCC 740, (2004) 9 SCC 616, 2002(2) MPLJ 340, 1999(2) MPLJ 64, 2002(5) MPHT 585, AIR 1997 SC 3280, (2007) 6 SCC 785.

S.M.A. Naqvi, for the applicant.

Aijaz Gauri, for the non-applicant.

ORDER

B.M. GUPTA, J. :- Feeling aggrieved with an order dated 11/3/2008 passed by Additional Principal Judge of Family Court, Gwalior in Miscellaneous Criminal Case No. 286/2006, this revision has been preferred by the petitioner/wife against the respondent/husband.

2. The facts of the case in brief are that the petitioner filed one application under Section 125 of Cr.P.C. on 26/4/2004 against the respondent alleging therein that she has been married with the respondent on 26/11/2001 in Gwalior. At the time of marriage, necessary items for the use of family were given by her father,

SHABANA BANO (SMT.) Vs. IMRAN KHAN

as per the list enclosed Annexure A/2. After marriage, respondent and his family members played cruelty on her on demand of dowry. At the time when she was pregnant she was left by the respondent at her parental home with a threat that unless the demand about the dowry is fulfilled she will remain in the parental home. There is no source of income of the petitioner while respondent is earning Rs. 12,000/- per month, hence, an amount of Rs. 3,000/- per month as maintenance is to be ordered in favour of her to be paid by the respondent.

3.A On 27/7/2005 the respondent gave his appearance in the Court below and filed his reply on 16/8/2005. As per the reply of the respondent he admitted the fact of marriage, but denied the gifts given in the marriage and also the alleged cruelty. It is submitted by him that the petitioner left his house on 30/11/2003 with all the ornaments and Rs. 1,000/- on the ground that- 'she has to attend marriage'. Despite notices dated 5/2/2004 and 29/3/2004 and thereafter filing of the application (case No. 8/2004) for restitution of conjugal rights, the petitioner did not come to live with him. On 15/6/2004 during proceeding of the case No. 8/2004 when petitioner put false allegations and refused to live with the respondent, he gave divorce to her while uttering the word- 'talaq' three times. He has denied his income as alleged and has mentioned that he is dependent on other persons. It is mentioned by him that the petitioner is earning Rs. 6,000/- per month by doing tuition. The respondent has given divorce in writing on 20/8/2004 and thereafter as per the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 (the Act in short), this application is not maintainable.

3.B On the same date, on which the reply was filed i.e. 16/8/2005, one application under Order 7 Rule 11 of CPC was also filed enclosing a divorce deed dated 20.8.04 praying therein that on the basis of divorce, the application for maintenance be dismissed. But, vide order dated 30/9/2005 it was directed that, the point will be decided after taking evidence.

4. Vide impugned order, the learned Judge has observed in para-29 that the petitioner is unable to maintain herself and in para-28 it is observed that the respondent is having sufficient means and can maintain the petitioner for the period of Iddat. It is also observed in para-26 that on 20/8/2004 divorce has been given by the respondent to the petitioner and thereafter as per the provisions of the Act, she is not entitled to claim maintenance beyond the period of Iddat. The application was partly allowed for the period of Iddat directing that Rs. 2,000/- per month to be paid by the respondent to the petitioner for that period. Being unsatisfied this revision by the petitioner.

5. During the course of arguments, as agreed to by both the parties, the following questions for determination by this Court have been framed-

- (a) From which date the divorce will be deemed to be operative.

SHABANA BANO (SMT.) V. IMRAN KHAN.

(b) Whether after the period of Iddat, a divorced Muslim wife, the petitioner herein, can claim maintenance for herself and her child from her former husband.

(c) If yes, then under what provision.

(d) The liability of the respondent towards the petitioner in this case after the period of Iddat.

6. The factum of divorce as alleged on behalf of the respondent, has not been countered on behalf of the petitioner during the course of arguments. Hence, there appears no dispute on this point. The dispute between the parties is that whether the date of divorce is 20th August, 2004 as per the deed of divorce (Ex.NA4), as submitted on behalf of the respondent or it is 6th December, 2006 as has been submitted on behalf of the petitioner when the same has been proved in the evidence. The above deed of divorce has not been disputed, but only because it is proved on 6th December, 2006, on this ground, the petitioner's claim is that the date of divorce will be 6th December, 2006. In support, he has drawn attention at para 16 of the judgment of Apex Court in the case of *Shamim Ara Vs. State of U.P. & another*, 2002 (7) SCC 518, which goes as under :-

“16. We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p. 1030). There is no proof of talaq having taken place on 11-7-1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5-12-1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effecting talaq on the date of delivery of the copy of the written statement to the wife. The respondent No. 2 ought to have adduced evidence and proved the pronouncement of talaq on 11-7-1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed.....”

(Emphasis supplied)

Upon perusal of the above quoted observations of the Apex Court, the proof of the divorce is required. It is not observed that from the date of proof, the divorce will be treated to be effective. Hence, in this case, if the learned Judge has observed that the petitioner has been divorced by the respondent on 20th August 2004, on the basis of the aforementioned divorce deed, no error appears therein.

7.A With regard to the second and third points, a Constitution Bench of the Apex Court in *Danial Latifi & another Vs. Union of India*, (2001) 7 SCC 740,

SHABANA BANO (SMT) V& IMRANKHAN

while hearing the petition challenging the vires of the Act and observing that it is not ultra vires, has interpreted the scope of Section 3 of the Act. Upon considering in detail the Hon'ble Court in para 36 has summed up its conclusion as-under -

“36. While upholding the validity of the Act, we may sum up our conclusions:

1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.”

(Emphasis supplied)

Sub-paragraphs 1 and 2 give interpretation of Section 3(1)(a) of the Act while sub-para 3 gives interpretation of Section 4 of the Act. It is observed that even after divorce and the period of Iddat, the former husband is not exonerated from his liability of making reasonable and fair provision for the future of the divorced wife and also for her maintenance. But these provisions are to be made by husband within the period of Iddat. This liability of former husband has been considered under the Act itself and not beyond that including under Section 125 of Cr.P.C. This view of the Apex Court has further been followed in another pronouncement in *Sabra Shamim Vs. Maqsood Ansari*, (2004) 9 SCC 616.

7.B Thus, now it is settled that the liability of a Muslim husband to his divorced wife arising under Section 3 (1) (a) of the Act to pay maintenance is not confined to Iddat period only. He has to make reasonable and fair provision for future of the divorced wife, which obviously includes her maintenance as well. It is obligatory for the husband to make these provisions within the period of Iddat. After divorce

SHABANA BANO (SMT.) Vs. IMRAN KHAN

that liability of the Muslim husband is under Section 3 of the Act and not under Section 125 of the Cr.P.C. Accordingly, these two questions are decided.

8.A With regard to fourth point, the learned counsel for the respondent relied upon the judgment in the case of *Munni @ Mubarik Vs. Shahbaz Khan* 2002 (2) MPLJ 340, *Julekha Bi Vs. Mohammad Fazal* 1999 (2) MPLJ 64, and *Mohammad Juber Adil Vs. Smt. Taj Nazar* 2002 (5) MPHT 585, and has submitted that in these cases it is observed by different Benches of this Court that after divorce and coming into force of the Act, application under Section 125 of Cr.P.C. is not maintainable. It is true that after divorce, a claim u/S 125 of Cr.P.C. can not be maintained by a divorced Muslim wife, but in the light of the aforementioned observations in the case of *Danial Latifi* (supra), it can not be accepted that Muslim husband is totally exonerated after giving divorce to his wife. As observed in the aforementioned judgment of the Apex Court, the liability of the Muslim husband to his divorced wife arising under Section 3 (1)(a) of the Act to pay maintenance is not confined to Iddat period only. He has to make reasonable and fair provisions within the period of Iddat for the future of the divorced wife i.e. even for post Iddat period also, which obviously includes her maintenance as well. Hence the contention of Shri Gauri that after the divorce, the respondent is not responsible for the maintenance of his wife, can not be sustained.

8.B Vide revision petition, impugned order has been assailed on the ground that the learned Judge has committed an error by refusing the future maintenance after the period of Iddat to the petitioner under Section 125 of Cr.P.C. This claim of the petitioner being erroneous in the light of the decision of the Apex Court in the case of *Danial Latifi* (supra). After the period of divorce i.e. 20th August 2004, in this case the petitioner is not entitled for maintenance under Section 125 of Cr.P.C. As observed in the case of *Saba Khatum Vs. Mohd. Quasim* AIR 1997 SC 3280 for the child, she can file maintenance petition under Section 125 of the Cr.P.C. in the competent court, but unfortunately in the present application, no maintenance has been claimed for the child. If deemed fit, she can separately file a claim for the maintenance of the child under Section 125 of Cr.P.C., but so far as her rights are concerned, after the date of divorce, she can not claim maintenance under Section 125 Cr.P.C., but her rights for reasonable and fair provisions and maintenance for future are saved under Section 3 of the Act. For the sake of repetition, the respondent has to make reasonable and fair provision for the future of the petitioner including maintenance even for the period after the date of Iddat, but before she gets remarried. The respondent is obliged to make these provisions for her future maintenance before the expiry of the period of Iddat. In case he does not make arrangements, court can direct him to make reasonable provisions and if the respondent fails to comply the direction, coercive steps under sub section (4) of Section 3 of the Act, can be taken against him. Thus, this fourth point is disposed of.

SHABANA BANO (SMT) Vs. IMRAN KHAN

9.A Now the next controversy between both the parties is that for such provision, whether separate application is required or in the same application filed under Section 125 of Cr.P.C., right of the divorced wife under Section 3 of the Act can be considered ? This dispute has been decided by the Hon'ble Apex Court in its recent judgment having more or less similar facts in *Iqbal Bano Vs. State of U.P. and another* 2007 (6) SCC 785. In this case, an application under Section 125 was filed by the appellant wife on 21st February 1992. On 28th May 1992, written statement was filed by the respondent husband stating therein that long back he has divorced his wife by addressing "Talaq, Talaq, Talaq". It was further stated that there was severance of marital ties between them for years as the divorce was over by the utterance of the word "talaq" thrice and he had also paid mehr and as the iddat period was over the claim was not acceptable. Learned Magistrate negated the factum of divorce and allowed application for maintenance. In revision, the learned Additional Sessions Judge accepted the plea of divorce and held that after coming into force of the Act, petition under Section 125 of Cr.P.C. filed by the Muslim wife is not maintainable. The High Court upheld the order of learned A.S.J. When the matter went before the Apex Court in para 7 and 10, following has been observed :-

"7. The view expressed by the First Revisional Court that no Muslim woman can maintain petition under Section 125 Cr.P.C. is clearly unsustainable. The act only applies to divorced women and not to a women who is not divorced....."

10. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 CrPC and claims made under the Act are tried by the same court....."

Thus, it appears that Muslim wife can file an application under Section 125 of Cr.P.C. for maintenance against the husband. If the claim of the husband about divorcing the wife is accepted, then after the date of divorce, the rights of the petitioner wife can be considered by the learned Magistrate in the same petition if petition/application under both the provisions is to be filed before the Magistrate and in that case the learned Magistrate can decide the rights of the divorced wife on the basis of provisions of the Act. Thus, filing of a new application by the applicant under the provisions of the Act is not required if her rights can be ascertained by the same court in the same petition, but in the present case the application under Section 125 of Cr.P.C. was not filed before a Magistrate, instead it was filed and decided by Additional Principal Judge of Family Court Gwalior. Hence, now it is to be seen, as to whether the Family Court is having jurisdiction to decide this matter related to the maintenance or not ?

SHABANA BANO (SMT.) Vs IMRAN KHAN

9.B The relevant part of the relevant provisions of the Family Courts Act 1984 (hereinafter referred to as the Act of 1984) are available in Section 7 and 8 of this Act, which are as under :-

7. Jurisdiction.-(1) Subject to the other provisions of this Act, a Family Court shall - (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely :-

(a) to (e) -----
(f) a suit or proceeding for maintenance;

(g) -----

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise -

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment;

8. Exclusion of jurisdiction and pending proceedings.

Where a Family Court has been established for any area,-

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974).

(c) -----

9.C While drawing attention at these provisions, the contention of Shri Naqvi on behalf of the petitioner is that Family Court is having jurisdiction to decide a dispute/application under Section 3 and 4 of the Act. Except drawing attention at these provisions, he could not cite any judgment.

SHABANA BANO (SMT) Vs. IMRAN KHAN

9.D Shri Gauri the learned Advocate for the respondent does not counter the aforesaid submissions of Shri Naqvi.

9.E However, upon perusal of these provisions, a different situation appears. Although clause (f) of explanation of sub section (1) of Section 7 provides that a suit or proceeding for maintenance will be heard by Family Court, yet upon perusal of Section 7 (1)(a) of the Act of 1984, it appears that the cases mentioned in Clause (f) are required to be heard by a district court or any subordinate civil court. Admittedly, the cases arising out of Sections 3 and 4 of the Act are to be heard by a Magistrate and not by a district court or any other subordinate civil court. The court of Magistrate can not be said to be a subordinate civil court, hence the term mentioned in clause (f) (supra) – 'on a suit or proceeding for maintenance' – relates with the jurisdiction of a district court and of a subordinate civil court. It does not relate with the court of a Magistrate. This observation gets further support from sub section (2) of Section 7 of the Act of 1984. It provides that a Family Court shall also have and exercise - (a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure, 1973. Enacting sub section (2) also supports the aforementioned observation. In clause (b) of sub section (2), it is further provided that a Family Court shall also have and exercise, such other jurisdiction as may be conferred on it by any other enactment. By enacting this general provision, the intention of legislature is very clear, that unless by the provisions of any other enactment no jurisdiction has been conferred to the Family Court, the cases arising from such other enactment will not be heard by the Family Court. The Act is another enactment, which has been enacted after two years of the Act of 1984. Had there been any intention of the legislature to provide jurisdiction to the Family Court over Sections 3 and 4 of this Act, in addition to the word 'Magistrate', the words – 'or the Family Court as the case may be' would have also been inserted. By not inserting such words or not separately providing in the Act, it appears that the cases under Sections 3 and 4 of the Act are required to be decided by a Magistrate alone and not by the Family Court. It is true that the dispute and the case in hand is a family dispute and relates with the maintenance. In principle such disputes are to be heard and decided by the Family Courts, but unless the law provides, it can not be concluded that only being a family dispute and related to the maintenance, it is to be heard by the Family Court. In my considered view, in this regard, the law framers are to make necessary provisions, so that such types of family disputes can also be heard by the Family Courts. However, for the present, in absence of such provisions, present case can not be remanded to the Family Court for concluding the rights of the petitioner under Sections 3 and 4 of the Act, as the same has no jurisdiction to hear and decide such dispute under Sections 3 and 4 of the Act.

10. Upon perusal of the revision petition, the prayer clause goes as under :-

MAHAVEER TRADERS (M/S) Vs. M/S GANGADHAR SHARMA & SONS

“It is therefore most humbly prayed that this Hon'ble Court be pleased to accept this revision petition and set aside the order of learned court below and directions may be issued to grant the maintenance to the petitioner as per the provisions of Section 125 of Cr.P.C.”

As observed herein above, after divorce maintenance can not be claimed by a divorced Muslim wife under Section 125 of Cr.P.C. Hence this prayer can not be allowed. It is true that the petitioner's claim for fair and reasonable provision for future and maintenance is still surviving as observed by the Apex Court in the case of *Danial Latifi* (supra). It is also true that had the impugned order been passed by a Magistrate, the case would have been remanded for deciding the rights of the petitioner under Sections 3 and 4 of the Act, as observed by the Apex Court in the case of *Iqbal Bano* (supra), but as observed herein above, the impugned order has not been passed by a Magistrate, but instead it has been passed by Family Court, which has no jurisdiction to hear the dispute under Sections 3 and 4 of the Act. Hence, the case can not be remanded. In these circumstances, liberty can be given to the petitioner to file an application under Sections 3 and 4 of the Act before the court of competent Magistrate, if so chooses by her. As such, looking to the provisions of both the acts, unanimous submission of the learned Advocates of both the parties can not be sustained that the dispute arising under Sections 3 and 4 of the Act can also be heard and decided by a Family Court.

11. Consequently, the revision is dismissed.

Revision dismissed.

I.L.R. [2009] M. P., 286

CRIMINAL REVISION

Before Mr. Justice Rakesh Saxena

14 October, 2008*

MAHAVEER TRADERS (M/S)

... Applicant

Vs.

M/S GANGADHAR SHARMA & SONS & ors.

... Non-applicants

Evidence Act (1 of 1872), Section 106, Negotiable Instruments Act, 1881, Sections 138 & 141 - Dishonour of cheque - Partnership firm - In charge of and were responsible to the firm - Burden of proving fact especially within knowledge - Partner of the firm who signed the cheque died - No notice issued to other partners - Complaint filed against the other partners - Maintainability - Held - Other partners were in charge of and were responsible to the firm for the conduct of it's business in the context of Sec. 141 of the Act of 1881 could be decided only during the trial - On perusal of Ss. 138 &

MAHAVEER TRADERS (M/S) Vs M/S GANGADHARSHARMA & SONS

141 of the Act of 1881 it is revealed that if other elements of the offence u/s 138 are satisfied - The burden would be on the partners of the firm to show that they were not liable to be convicted - Any restriction on their power or existence of any special circumstance exonerating them would be the fact exclusively within their knowledge, therefore, it would be for them to establish at the trial that at the relevant time they were not in charge of the affairs of the firm.

(Para 14)

साक्ष्य अधिनियम (1872 का 1), धारा 106, परक्राम्य लिखत अधिनियम, 1881, धाराएँ 138 व 141 - चेक का अनादरण - भागीदारी फर्म - फर्म का भारसाधक और उसके लिए उत्तरदायी - विशेषतः ज्ञात तथ्य को साबित करने का भार - फर्म के भागीदार, जिसने चेक हस्ताक्षरित किया, की मृत्यु हो गई - अन्य भागीदारों को कोई सूचनापत्र जारी नहीं किया गया - परिवाद अन्य भागीदारों के विरुद्ध पेश किया - पोषणीयता - अभिनिर्धारित - 1881 के अधिनियम की धारा 141 के संदर्भ में अन्य भागीदार फर्म के कारोबार के संचालन के लिए फर्म के भारसाधक और उसके लिए उत्तरदायी थे, यह केवल विचारण के दौरान विनिश्चित किया जा सकता है - 1881 के अधिनियम की धारा 138 व 141 के परिशीलन पर यह प्रकट होता है कि यदि धारा 138 के अन्तर्गत अपराध के अन्य तत्त्व पूरे हो जाते हैं - यह दर्शित करने का भार फर्म के भागीदारों पर होगा कि वे दोषसिद्ध किये जाने योग्य नहीं थे - उनकी शक्ति पर कोई रोक या उन्हें दोषमुक्त करने वाली किसी विशेष परिस्थिति के अस्तित्व का तथ्य, अनन्य रूप से उनके ज्ञान में होगा, इसलिए उन्हें विचारण पर यह स्थापित करना होगा कि वे सुसंगत समय पर फर्म के कार्यों के भारसाधक नहीं थे।

Cases referred :

(2007) 5 SCC 108, (2005) 8 SCC 89, (2004) 7 SCC 15.

*A.K. Jain, for the applicant.**Naman Nagrath with Siddhartha Sen, for the non-applicants.***ORDER****RAKESH SAKSENA, J. :-** Heard on admission. Revision is admitted.

2. With the consent of both the parties, this revision is heard finally today.
3. Applicant has filed this revision against the order dated 22.05.2007 passed by the XIth Additional Sessions Judge, Bhopal in Criminal Revision No.43/2007 setting aside the order dated 11.12.2006 passed by the Judicial Magistrate First Class, Bhopal in R.T.A. No.11172/2006 whereby he took cognizance of the offence under Section 138 of the Negotiable Instruments Act and issued process against the respondents.
4. In short, the facts of the case are that the applicant/complainant filed a private complaint against the respondents under Section 138 of the Negotiable Instruments Act stating that Dilip Sharma, partner of firm M/s Gangadhar Sharma & Sons, on behalf of the firm purchased iron worth Rs.1,15,200/- from him. He paid Rs.5200/- in cash and issued a cheque on 19.09.2006 for the remaining amount

MAHAVEER TRADERS (M/S) Vs. M/S GANGADHAR SHARMA & SONS

of Rs.1,10,000/-, drawn on the Bank of India, Bhopal. Similarly, Dilip Sharma purchased cement bags from him worth Rs.2,19,600/-. He made cash payment of Rs.19,600/- and issued a cheque for Rs.2,00,000/- on 27.09.2006. When the aforesaid cheques were presented in the Bank for encashment, same were dishonoured and returned with endorsement of insufficient fund. He gave notice to partner Dilip Sharma on 11.10.2006. Despite receipt of notice, the aforesaid amount was not paid.

5. It is to be noted that on 18.10.2006, unfortunately, Dilip Sharma expired.

6. The complainant then filed the complaint under Section 138 of the Negotiable Instruments Act against the respondent firm as well as against remaining partners Ritesh Sharma and Yashoda Bai Sharma and also against Tarun Sharma.

7. Learned Magistrate on the basis of allegations made in the complaint and the evidence on record, took cognizance of the offence and issued process against the respondents. Challenging the aforesaid order, the respondents filed Criminal Revision before the Court of 11th Additional Sessions Judge, Bhopal on the ground that the respondents did not sign the cheques, no notice was issued to them and that they were not in charge of and were not responsible to the firm for the conduct of business of the firm. It was also contended that accused Tarun Sharma was not the partner of the firm. Learned Additional Sessions Judge placing reliance on *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla*, (2005) 8 SCC 89, allowed the revision holding that it was not made clear in the complaint that the accused persons were in charge of and were responsible for the conduct of business of the firm; and set aside the order of taking cognizance and issuance of process.

8. Being aggrieved, the applicant/complainant has filed this revision against the order passed by the lower Revisional Court.

9. Learned counsel for the applicant/complainant submits that this case is squarely covered by the law laid down by the Apex Court in *N.Rangachari Vs. Bharat Sanchar Nigam Ltd.*, (2007) 5 SCC 108, therefore, the lower Revisional Court committed serious illegality in setting aside the order passed by the Magistrate. He submits that in business transactions with the company or firm, a person is supposed to presume that the partners of the firm or directors of the company would be in charge of the affairs of the company/firm, therefore, the complaint filed against commission of any offence for the acts of a partner, acting on behalf of the firm cannot be nipped in the bud. The partners of the firm or directors of the company should establish in the trial that there were restrictions on their power under the partnership agreement. He further submits that the objection raised by the accused/partners could be considered and dealt with only after commencement of the trial.

10. Learned counsel for the respondents, on the other hand, submits that since no specific allegation was made in the complaint to show that the accused/partners

MAHAVEER TRADERS (M/S) Vs M/S GANGADHAR SHARMA & SONS

were in charge and responsible to the conduct of business of the firm, they are not liable to be prosecuted and the proceedings against them deserve to be quashed. He submits that there is nothing on record to indicate that Tarun Sharma was the partner of the firm, therefore, the prosecution against him is not maintainable.

11. I have heard the learned counsel for both the parties and perused the impugned order and record. In case of *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla*, (2005) 8 SCC 89, the Apex Court has held that :-

"4. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable." "It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence."

12. In case of *N.Rangachari Vs. Bharat Sanchar Nigam Ltd.*, (2007) 5 SCC 108, the Apex Court observed that :-

"16. The scope of Section 141 has been authoritatively discussed in the decision in *S.M.S. Pharmaceuticals Ltd.* binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company."

MAHAVEER TRADERS (M/S) Vs. M/S GANGADHAR SHARMA & SONS

In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Sub-section (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance."

"19. Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the Directors of the company are in charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the Directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are Directors of the company itself would usher in the element of their acting for and on behalf of the company and of their being in charge of the company....."

"21. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc.. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position."

13. On perusal of the record it is revealed that the respondents/accused Ritesh

MAHAVEER TRADERS (M/S) Vs. M/S GANGADHARSHARMA & SONS

Sharma and Yashoda Bai Sharma had executed a power of attorney authorizing partner Dilip Sharma to act on their behalf and represent them in the dealings of the firm. Therefore, in my opinion at the initial stage of the prosecution it was not possible to hold that they were not liable to be prosecuted for dishonour of cheque issued by partner Dilip Sharma on behalf of the firm. On perusal of the cheques itself it is clear that the cheques were issued by him as a partner of firm M/s Gangadhar Sharma & Sons.

14. The question as to whether the accused persons were in charge of and were responsible to the firm for the conduct of its business in the context of Section 141 of the Negotiable Instruments Act could be decided only during the trial at appropriate stage. On perusal of Sections 138 and 141 of the Negotiable Instruments Act it is revealed that if other elements of the offence under Section 138 are satisfied, the burden would be on the partners of the firm to show that they were not liable to be convicted. Any restriction on their power or existence of any special circumstance exonerating them would be the fact exclusively within their knowledge, therefore, it would be for them to establish at the trial that at the relevant time they were not in charge of the affairs of the firm.

15. On perusal of the complaint wherein it has been specifically mentioned that the accused/partners were responsible for the acts done by Dilip Sharma on behalf of the firm. It is also peculiar in this case that after service of notice on partner Dilip Sharma, he expired. In this view of the matter also, other partners of the firm cannot avoid their liability at least at the initial stage of taking cognizance.

16. In *Monaben Ketanbhai Shah and another Vs. State of Gujarat and Others*, (2004) 7 SCC 15, it has been observed that it is not necessary to reproduce the language of Section 141 of the Negotiable Instruments Act verbatim in the complaint as the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfill the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hyper-technical approach should not be adopted so as to quash the same. It is duty of the Court to discharge the accused persons if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant. The ingredients of the offence are altogether lacking. In the present case, on perusal of the allegations made in the complaint, at this stage it cannot be said that there are no averments made against the accused persons.

17. On perusal of the partnership deed as well as the power of attorney executed by the partners in favour of Dilip Sharma, it is revealed that Tarun Sharma was not the partner of the firm, therefore, the learned Additional Sessions Judge rightly quashed the proceedings against him. Probably because of this reason, the applicant/complainant deleted his name from the array of respondents in this revision.

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

18. For the reasons stated above, this revision is allowed. The impugned order dated 22.05.2007 passed by the 11th Additional Sessions Judge, Bhopal in Criminal Revision No.43/2007, but for Tarun Sharma, is set aside and the order dated 11.12.2006 passed by the Judicial Magistrate First Class, Bhopal in R.T.A. No.11172/2006 is restored.

19. Revision allowed.

Revision allowed.

I.L.R. [2009] M. P., 292

CRIMINAL REFERENCE

Before Mr. Justice A.K. Shrivastava & Mr. Justice K.S. Chauhan

3 July, 2008*

STATE OF M.P.

... Applicant

Vs.

KOUSHAL PRASAD JAISWAL

... Non-applicant

A. Evidence Act (1 of 1872), Section 32 - Dying declaration - Evidentiary value - Deceased had suffered 70-80% burns however was in a position to speak - No motive on part of deceased to falsely implicate accused - Difference of 5-10 minutes interval between Dehati Nalishi and dying declaration not sufficient ground to hold the dying declaration to be suspicious. (Para 24)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - साक्ष्यिक मूल्य - मृतक 70-80 प्रतिशत जल गया था तथापि बोलने की स्थिति में था - मृतक द्वारा अभियुक्त को मिथ्या आलिप्त करने का कोई हेतु नहीं - देहाती नालिशी और मृत्युकालिक कथन के मध्य 5-10 मिनट का अंतर मृत्युकालिक कथन को शंकास्पद होना अभिनिर्धारित करने के लिए पर्याप्त आधार नहीं।

B. Evidence Act (1 of 1872), Sections 3 & 9 - Test identification parade - Failure to hold - Effect - Incident took place in broad day - One of eye witness actually chased accused for some distance - Accused named in dying declaration and Dehati Nalishi - There was no necessity to hold identification parade. (Para 27)

ख. साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 9 - शिनाख्त परेड - करने में विफलता - प्रभाव - घटना दिन में खुले रूप से हुई - एक प्रत्यक्षदर्शी साक्षी ने कुछ दूरी तक वास्तविक रूप से अभियुक्त का पीछा किया - मृत्युकालिक कथन और देहाती नालिशी में अभियुक्त नामित - शिनाख्त परेड करने की कोई आवश्यकता नहीं थी।

C. Penal Code (45 of 1860), Section 302 - Murder - Accused was insisting the deceased, who was a counsellor in Medical College, again and again to provide medicines of HIV - Every time deceased was refusing because

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

the accused was not the patient of HIV - On date of incident accused threw kerosene on deceased when he was sitting in his chamber and then threw a burning match stick and thus set him on fire - Death occurred due to septicemia on account of burn injuries after 6 days of incident - Held - Septicemia may occur from various causes including burn injuries - Act of setting another person on fire is so imminently dangerous on act that the wrong doer must be credited with knowledge that he was in all probability likely to cause death of another person - Act of accused would fall within clause fourthly to Section 300 and not u/s 326 IPC. (Paras 31 to 33)

ग. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - अभियुक्त ने एचआईवी की दवाईयाँ देने के लिए मृतक, जो चिकित्सा महाविद्यालय में परामर्शदाता था, से बार-बार आग्रह किया है - प्रत्येक बार मृतक ने मना कर दिया क्योंकि अभियुक्त एचआईवी का रोगी नहीं था - घटना की तारीख को अभियुक्त ने मृतक पर, जब वह अपने कक्ष में बैठा हुआ था, केरोसीन फेंका और तब एक जलती हुई माचिस की तीली फेंकी और इस प्रकार उसको आग लगा दी - जलने से हुई क्षतियों के कारण सेप्टिसीमिया होने से घटना के 6 दिन बाद मृत्यु हुई - अभिनिर्धारित - सेप्टिसीमिया जलने से हुई क्षतियों सहित विभिन्न कारणों से हो सकता है - दूसरे व्यक्ति को आग लगाना इतना आसन्न रूप से खतरनाक कृत्य है कि दोषकर्ता को इस ज्ञान का आकलन अवश्य होना चाहिए कि उसके कृत्य से दूसरे व्यक्ति की मृत्यु कारित होने की पूरी अधिसंभाव्यता थी - अभियुक्त का कृत्य भा.द. सं. की धारा 300 के चौथे खण्ड में आवेगा धारा 326 के अन्तर्गत नहीं।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 328 - Procedure at time of trial in the case of person of unsound mind - Act, conduct and conversation which accused had with trial judge on the date he was produced and on two subsequent dates showed that accused was a normal man - Application u/ss 328 & 335 was moved when the case was fixed for evidence - Held - Application was rightly rejected by trial judge as no medical record in respect of mental condition was produced and behavior of accused was quite normal. (Para 34)

द. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 328 - विकृत-चित्त व्यक्ति के मामले में विचारण के समय प्रक्रिया - कृत्य, आचरण और बार्तालाप जो अभियुक्त का उसको पेश करने की तारीख पर और दो पश्चात्तवर्ती तारीखों पर विचारण न्यायाधीश के साथ था, दर्शाता है कि अभियुक्त एक सामान्य पुरुष था - जब मामला सहाय के लिए नियत किया गया, धारा 328 व 335 के अन्तर्गत आवेदन पेश किया गया - अभिनिर्धारित - विचारण न्यायाधीश ने आवेदन उचित रूप से नामंजूर किया क्योंकि मानसिक दशा के सम्बन्ध में कोई चिकित्सीय अभिलेख पेश नहीं किया गया और अभियुक्त का आचरण बिल्कुल सामान्य था।

E. Criminal Procedure Code, 1973 (2 of 1974), Sections 354(3) & 366 - Death reference - Offence was committed under influence of extreme mental or emotional disturbances - Accused offered no such traumatic threat to the survival of social order - Present case also not rarest of rare cases - Death reference rejected - Accused sentenced to imprisonment to life. (Para 38)

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

ई. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 354(3) व 366 – मृत्यु निर्देश – अपराध नितांत मानसिक या संवेगात्मक विक्षोभ के प्रभाव के अधीन किया गया – अभियुक्त ने सामाजिक व्यवस्था के बने रहने के लिए ऐसी कोई अभिघातजन्य आशंका प्रस्तावित नहीं की – वर्तमान मामला विरल से विलरतम मामला भी नहीं – मृत्यु निर्देश नामंजूर – अभियुक्त आजीवन कारावास से दण्डादिष्ट।

Cases referred :

1994 Supp (1) SCC 304, AIR 1968 SC 881, AIR 2006 SC 3056, (2007) 10 SCC 371, (1992) 2 SCC 474, 1993 Supp (1) SCC 327, AIR 1981 SC 1160.

Aseem Dixit, P.P., for the applicant/State.

H.S. Dubey, for the Non-applicant.

J U D G M E N T

The Judgment of the Court was delivered by **A.K. SHRIVASTAVA, J.** :- This judgment shall also govern the disposal of connected Criminal Appeal No.138 of 2008 (Koushal Prasad Jaiswal v. The State of M.P.) filed on behalf of the accused.

2. The accused has been convicted under section 302 IPC and has been sentenced to death by the impugned judgment dated 19/12/2007 hence this reference has been made by learned 12th Additional Sessions Judge, Fast Track Court, Jabalpur under section 366 of the Code of Criminal Procedure for confirmation of the sentence of death sentence awarded to the accused. Simultaneously the accused has also filed Criminal Appeal No. 138/2008 assailing the impugned judgment of conviction and order of sentence passed against him in Sessions Trial No.167/2007. Both the matters are being disposed of by this common judgment.

3. In brief the case of prosecution is that Sanjay Shrivastava (hereinafter referred to as 'the deceased') was serving on the post of Councilor in the Department of Micro-Biology of Medical College, Jabalpur. His duty was to test the blood of patients suffering from HIV disease as well as to distribute requisite medicines to those patients. The blood of the accused was examined by the deceased on 4/1/2007 in order to ascertain whether he is a patient of HIV, however, on examining his blood, the result was found to be negative. The blood of the accused was also tested on 27/2/2007 in the Laboratory, namely, Regional Medical Research Centre for Tribals and according to the report of said laboratory also, the accused was not found to be the patient of HIV, even then, the accused was approaching, contacting and insisting the deceased again and again to provide medicines of HIV, but every time deceased was refusing because the accused was not the patient of HIV.

4. On the date of incident, viz., 6/3/2007 the deceased was discharging his duty and was in his chamber in the Medical College, Jabalpur, nearby him Rama Swamy Naidu alias David, who is a Technician and was serving under the deceased

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

was also sitting adjoining to the chamber of the deceased. One retired doctor S.R. Dubey was also sitting nearby the deceased as he brought a sample of blood of one patient for its examination. It is said that at 11.30 A.M. one Constable, namely, Mohanlal Yadav also came to the office of the deceased with a sample of blood of one prisoner and was consulting the deceased. At that juncture it is said that accused carrying a plastic container having kerosene in it arrived there and by pouring kerosene threw the burning matchstick on the deceased, as a result of which the deceased received burn injuries. The accused thereafter ran away from the place of occurrence although he was chased by the deceased up to some distance in burning condition. Thereafter the employees of the hospital doused the water on the deceased to extinguish the fire. Immediately the deceased was shifted to Ward no. 11 of the Medical College where he was examined by Dr. Mukesh Agrawal, who found the deceased 70 to 80% burnt. On the same date at 11.50 hrs. Sub-Inspector S.L. Chandrol of Police Station Garha received a telephonic message from Medical College, Jabalpur that a person has been ablaze as a result of which Sub-Inspector rushed to the Medical College where he was informed about the incident and was told that the deceased is undergoing treatment in Ward no. 11.

5. Sub-Inspector S.L. Chandrol thereafter wrote Dehati Nalishi which was lodged by the deceased and his case-diary statement was also recorded by the Investigating Officer. Immediately, the Executive Magistrate was informed and was directed to arrive at Medical College to record the dying declaration of the deceased, as a result of which Executive Magistrate R.L. Vansh came and recorded the dying declaration of the deceased in the hospital.

6. In furtherance to its investigation the investigating agency prepared spot map; seized burnt articles from the place of occurrence; arrested the accused and registered a case against him under section 307 IPC. Since the burn injury was found on the thumb of the hand of the accused, he was sent to Medical College where he was examined by Dr. Manju Agrawal. The place of occurrence was examined by Scientific Officer of Scene of Crime Unit, FSL, Jabalpur and photographs were taken by said Scientific Officer.

7. During the course of treatment, when Dr. Nityanand Pandey found that the condition of the deceased is deteriorating, he advised to refer the deceased to Higher Centre, as a result of which the deceased was sent to Delhi on 8/3/2007 where he was treated at Safdarjang Hospital and where ultimately deceased breathed his last on 12/3/2007. On account of death of the deceased the case was altered to section 302 IPC. The investigating agency also recorded the statement of the witnesses. After the investigation was over, a charge sheet was submitted in the competent Court, which on its turn committed the case to the Court of Session, from where the case was received by the trial Court for its trial.

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

8. Learned Trial Judge on going through the averments made in the charge-sheet framed charge punishable under section 302 IPC against the accused. Needless to emphasis, the accused abjured his guilt and pleaded complete innocence.

9. In order to prove its case prosecution examined as many as 15 witnesses and placed Exs.P-1 to P-30, the documents on record.

10. The defence of the accused is of false implication and the same defence he set-forth during the cross-examination of the prosecution witnesses as well as in his statement recorded under section 313, Cr.P.C.

11. Learned trial Judge after appreciating and marshalling the evidence placed on record came to hold that the accused did commit the offence for which he was charged and eventually convicted him and passed the capital sentence by the impugned judgment.

12. In this manner the present reference has been referred by learned Trial Judge to this Court. The accused has also simultaneously preferred appeal under section 374 (2) Cr.P.C. assailing the impugned judgment of conviction and order of sentence passed against him by the Trial Court.

13. The contention of Shri H.S. Dubey, learned counsel appearing for the accused is that the prosecution has failed to prove its case beyond reasonable doubt and, therefore, learned trial Court has erred in convicting the accused for the offence punishable under section 302 IPC. Learned counsel further submits that an application under sections 54, 328 and 335 Cr.P.C. was filed on behalf of the accused on 22/6/2007 praying therein that accused be examined by Medical Board in order to ascertain whether he is of unsound mind and if that is the position, according to learned counsel, it was incumbent upon the Trial Court to get the accused examined by Medical Board in order to ascertain whether he is of unsound mind or not. Since this has not been done, the conviction of accused is bad in law. His next contention is that since the accused was not known to the eye-witnesses earlier to the incident, it was incumbent upon the investigating agency to hold a test identification parade and since admittedly no test identification parade has been conducted, the case of prosecution becomes highly suspicious. It has also been propounded by the learned counsel that looking to the testimony of Investigating Officer S.L. Chandrol (PW-13), the arrest of the accused is highly suspicious. Lastly and in the alternative, it has been submitted by the learned counsel that as per the testimony of Autopsy Surgeon Dr. Yogesh Tyagi (PW-6) the deceased died due to septicemic shock, and therefore, the case would not rest under the ambit and sweep of section 302 IPC and at the most it would be under section 326 IPC. In support of his contention, learned counsel has placed reliance on the decision of the Supreme Court *B.N. Kavatakar and another v. State of Karnataka* 1994 Supp (1) SCC 304.

STATE OF M.P. Vs. Koushal Prasad Jaiswal

14. On the other hand, Shri Aseem Dixit, learned Public Prosecutor has argued in support of the impugned judgment and has submitted that the accused, despite he was not a patient of HIV, was making demand again and again to the deceased to provide him medicine of HIV and when repeatedly it was refused by the deceased, on the fateful day he threw kerosene and ablaze the deceased. Thus for no rhyme or reason it can be said that the accused has not committed the offence punishable under section 302 IPC or has committed some lesser offence. In support of his contention learned Public Prosecutor has placed heavy reliance on the decision of the Supreme Court *State of Madhya Pradesh v. Ram Prasad* AIR 1968 SC 881.

15. By putting a deep dent on the contention of learned counsel for the accused that without holding any inquiry in respect to the unsoundness of mind of the accused, it has been submitted that such a request was never made on behalf of the accused when he was brought before the Magistrate for remand purpose, further, when the charge was framed against him and also on several other dates during the trial, no such application was filed. It has also been contended by learned Public Prosecutor that when the case was fixed for recording the evidence of prosecution witnesses on 22/6/2007, on that date such an application was submitted which has been rightly rejected by the learned Trial Court on 25/6/2007. The contention of learned Public Prosecutor is that the learned Trial Court did not notice the accused to be of unsound mind from his behaviour and he was found to be a normal man, therefore, if the application would have been allowed, the same would be a futile exercise.

16. By inviting our attention to para 69 of the impugned judgment it has been submitted by learned Public Prosecutor that earlier to the present incident a case under sections 302 and 307 IPC at Crime No.157/2007 was also registered against the accused at Police Station Churhat, District Sidhi with the allegation that he ablaze one Vishwanath Kevat, son of Parmeshwardeen Kevat by sprinkling petrol on him. Since the accused was absconding as a result of which during the trial of present case his arrest was also formally made for the offence registered against him at Crime No.157/2007 of Police Station Churhat, District Sidhi.

17. On the point of quantum of sentence it has been submitted by the learned Public Prosecutor that in the present case one innocent public servant who was enjoying high position of Councilor in the Medical College was ablaze by the accused in brutal manner, therefore, the act of accused would come under the purview of rarest of rare case. In this context our attention has been drawn to the decision of the Supreme Court *Remuka Bai @ Rinku @ Ratan and Anr. v. State of Maharashtra* AIR 2006 SC 3056. On these premised submissions, it has been argued and prayed by the learned Public Prosecutor that death reference be accepted by dismissing the appeal filed on behalf of the accused.

STATE OF M.P. Vs. Koushal Prasad Jaiswal

18. Having heard learned counsel for the parties, we are of the view that the death sentence awarded to the accused, in the peculiar facts and circumstances is not at all warranted and the sentence of life imprisonment would be the appropriate punishment.

19. In the present case there is dying declaration Ex.P-2 of the deceased recorded by Executive Magistrate R.L. Vansh (PW-2) on the date of incident at 12-05 P.M. without any delay and within 30 to 40 minutes of the incident. Apart from the written dying declaration, a Dehati Nalishi Ex.P-21 was lodged by the deceased in Ward No.11 of the Medical College when he was admitted after the incident and this Dehati Nalishi was registered at 12 hrs. Thereafter 161 Cr.P.C. statement of the deceased was also recorded vide Ex.P-22. According to us, these two documents would also come under the ambit and sweep of dying declaration of the deceased as envisaged under section 32 (1) of the Evidence Act. We shall now examine hallmark of these dying declarations.

20. The dying declaration has been recognized by the law as a relevant piece of evidence under Section 32 of the Evidence Act. The doctrine of dying declaration is based on maxim "nemo moriturus praesumitur mentire" which would mean that a person would not like to meet with his Maker having lie in his mouth. Section 32(1) of the Evidence Act has been scanned for several times by the Supreme Court and now it has become a firm law that if the dying declaration is clear, cogent and trustworthy, no corroboration of it is required. The dying declaration in itself is having high credential value and having its own weightage. True, the accused has no opportunity to cross-examine the maker of the dying declaration, therefore, before placing reliance on it, the Court is required to see whether the same is worth reliable and if there is any suspicion, as a rule of prudence corroboration is needed. At the same time, we may mention here that if the dying declaration inspires full confidence of the Court in its correctness, there is no bar in the eye of law not to convict a guilty person solely on the basis of dying declaration. In the latest pronouncement of the Supreme Court *Sunder Lal vs State of Rajasthan*, (2007) 10 SCC 371 Dr. Arijit Pasayat, J who spoke for the Bench, placed reliance on the earlier decision of Supreme Court *Paniben vs. State of Gujarat*, (1992) 2 SCC 474 and has summed up the principles in para - 12 on page 376 as under:-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munnu Raja v. State of M.P.* (1976)3 SCC 104]

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of U.P. v. Ram Sagar Yadav* (1985)1 SCC 552 and *Ramawati Devi v. State of Bihar* (1983)1 SCC 211]

STATE OF M.P. Vs. Koushal Prasad Jaiswal

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy v. Public Prosecutor* ((1976) 3 SCC 618]

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg v. State of M.P.* (1974) 4 SCC 264]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kake Singh v. State of M.P.* 1981 Supp SCC 25]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See *Ram Manorath v. State of U.P.* (1981) 2 SCC 654]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [See *State of Maharashtra v. Krishnamurti Laxmipati Naidu* 1980 Supp SCC 455]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See *Surajdeo Ojha v. State of Bihar* 1980 Supp SCC 769]

(ix) Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See *Nanhau Ram v. State of M.P.* 1988 Supp SCC 152]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See *State of U.P. v. Madan Mohan* (1989) 3 SCC 390]

(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See *Mohanlal Gangaram Gehani v. State of Maharashtra* (1982) 1 SCC 700]

The Supreme Court thereafter in para 13 has laid down the law of law that the dying declaration is only a piece of untested evidence and must, like any other

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no local impediment to make it the basis of conviction, even if there is no corroboration. The Supreme Court placed reliance on its earlier decision *Gangotri vs State of U.P.* 1993 Supp (1) SCC 327.

21. On the basis of above said elucidated principles of law on the point laid down by the Supreme Court, we shall now examine the credibility of the alleged dying declaration in the present factual scenario.

22. Executive Magistrate R.L. Vansh (PW-2) has specifically stated that he arrived at Ward no. 11 of the Medical College, Jabalpur where the deceased was undergoing the treatment and after obtaining certificate of the doctor, who certified that the deceased is fit to give dying declaration, he started writing the dying declaration at 12-05 hrs and the same was over at 12.35 P.M. The Executive Magistrate specifically stated that deceased told that he is serving on the post of Medical Councilor in the Medical College in HIV Testing Department. The accused who is resident of Sidhi and who often make demand of medicines of HIV and also C.D.4, (a medicine of HIV) came to him and poured the kerosene and thereafter threw a burning matchstick on him as a result of which he received burn injuries. The deceased also stated that up-to certain distance he tried to catch the accused, but failed. On receiving burn injuries the deceased was screaming as a result of which staff members arrived there and they doused the water in order to extinguish the fire and thereafter the deceased was shifted to Ward no. 11 for the treatment. On being asked by the Executive Magistrate on the point of enmity, deceased firmly said that he is not having any enmity with the accused. This witness proved the dying declaration of the deceased Ex.P-2 which was recorded by him. On close scrutiny of the testimony of Executive Magistrate R.L. Vansh (PW-2) as well as the dying declaration of the deceased Ex.P-2 it is revealed that earlier to the incident the deceased examined the accused and did not find him to be a patient of HIV, though the accused was insisting him to provide C.D.-4, medicine but, the same was not being provided to the accused by the deceased. Because accused often met to the deceased earlier to the incident, therefore, the deceased has not only named the accused but has also stated about the vile act of throwing kerosene and setting the fire.

23. Executive Magistrate R.L. Vansh (PW-2) was cross-examined at length but despite there being a roving cross-examination over him he remain firm in his statement and nothing crept out from his testimony in order to disbelieve his evidence or the dying declaration Ex.P-2 recorded by him. The testimony of this witness is clear, cogent and trustworthy. In para 2 of his testimony, this witness has categorically stated that on being asked by this witness to the deceased whether

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

the deceased is having any enmity with the appellant, specifically the deceased answered that he had no enmity with him, but, the appellant is known to him. Hence, it can safely be said that the deceased will not say untrue statement against the accused. The deceased himself was serving on the post of Councilor for last several years in the Medical College and must be knowing that he is at the verge of the death and must not be having any hope that he would survive, therefore, even if he was not having any enmity with the deceased, he was having opportunity to implicate appellant falsely by saying that he is having enmity with him, but, he spoke the truth why ? Because he was anticipating that he has to meet the Maker of human being and he should not meet with him with a lie in his mouth and, therefore, for this reason from the very beginning much weightage is being given to the maxim "*nemo moriturus praesumitur mentire*". The deceased clearly stated that appellant is well known to him as he often used to visit him to provide medicine CD-4 which is being given to HIV patient, but, specifically he stated in the dying declaration that he is not having any enmity with the accused and, therefore, this version of the deceased in his dying declaration is the strongest link against the accused that he threw kerosene on the deceased and ablaze him. The dying declaration Ex.P/2 has been duly proved by the testimony of this witness.

24. Apart from the above said dying declaration (Ex.P/2), there are two more dying declarations of the deceased, they are in the form of Dehati Nalishi (Ex.P/21) and the statement of the deceased recorded under Section 161 Cr.P.C. which is Ex.P/22. These two documents have been proved by Investigating Officer S.L.Chandroul (PW-13). Specifically this witness in para 2 has stated that when he arrived in Ward No.11, he found the deceased lying on the bed having burn injuries. The doctors were nearby him. On being asked to the deceased, specifically it was told to him by the deceased that in between 11.30 -11.45 a.m. appellant came in his office carrying a plastic container, he threw the kerosene and set the fire by throwing burning matchstick on him. Further deceased told to this witness that at the time of incident, one Constable Mohanlal Yadav of Central jail was also present as he brought a sample of blood of some prisoner. Indeed, at that juncture the said constable was sitting there and the deceased was having interaction with him. This fact also finds place in the testimony of Mohanlal Yadav (PW-4) as well as in the dying declaration (Ex.P-2). Thus, the presence of Mohanlal Yadav at the time of incident has been proved. The Investigating Officer has proved Dehati Nalishi (Ex.P/21) which was lodged by the deceased and the case diary statement of the deceased (Ex.P/22). In the cross-examination para 20, this witness has admitted that he found deceased burnt severally, thereafter he wrote Dehati Nalishi. Further in the cross-examination this witness has stated that the deceased was speaking in low tone. After noting down Dehati Nalishi which took 10-15 minutes to write, he rang to Tehsildar. Learned counsel for the appellant, tried to convince us that the distance between the Collectorate Office

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

where Tehsildar was on duty, is 10 kms far away from the Medical College and the road is throughout busy and because the Investigating Officer has admitted that one would reach to the Medical College from the Collectorate within 15-20 minutes and therefore, according to learned counsel Dehati Nalishi Ex.P/21 and the dying declaration Ex.P/2 of the deceased are suspicious documents. True, the difference of 5-10 minutes is there because the dying declaration Ex.D/2 was written at 12.05 P.M. and Dehati Nalishi Ex.P/21 was written at 12.00 hours, but, this itself would not be a ground to hold the dying declaration and the Dehati Nalishi to be suspicious documents which are otherwise proved.

25. We also do not find any merit in the contention of learned counsel for the appellant that merely because the deceased was severally burnt, he was not in a position to speak. At this juncture we would like to examine the testimony of Dr.Mukesh Agrawal (PW-1) who first examined the deceased and found him 70-80% burnt, but, firmly this witness has denied the suggestion put to him that the patient having 70-80% burn injuries would not be in position to speak. It has been stated by Executive Magistrate R.L.Vansh (PW-2) that in between 11-11.30 a.m. he received information about the incident from Police Station Garha and immediately he proceeded to the Medical College where he reached within 15-20 minutes. In para 9 of his cross-examination Executive Magistrate has stated that before recording the dying declaration he directed all the persons except the doctors to go away. According to this witness, the doctor gave certificate on the dying declaration prior to and after recording to the statement. In very specific words in para 11 the Executive Magistrate is saying that the deceased was giving answer in normal condition. Hence, from the testimony of S.L.Chandroul (PW-13) as well as from the evidence of Executive Magistrate R.L.Vansh (PW-2) it is proved that at the time of recording of the dying declaration, Dehati Nalishi and 161 Cr.P.C. statement, the deceased was in a position to speak.

26. We have already held hereinabove that if the dying declaration is clear, cogent and trustworthy, without any independent corroboration, the conviction can be accorded but in the present case there are eye witnesses also and the prosecution has examined three eye witnesses they are Mohanlal Yadav (PW-4), Ramaswamy Naidu @ David (PW-5) and Dr.S.R.Dubey (PW-9). Before we x-ray the testimony of these eye-witnesses, it would be relevant to mention here that constable Mohanlal Yadav (PW-4) was present at the time of incident because he brought the sample of blood of a prisoner which was required to be tested by the deceased. Ramaswamy Naidu @ David (PW-5) is a Technician serving under the deceased and, therefore, his presence at the time of occurrence is quite natural and Dr.S.R.Dubey (PW-9) was present there as he also brought the sample of blood of one of his patient.

27. On going through the testimony of PW-4, Mohanlal Yadav, it is revealed that when this witness was sitting in the chamber of the deceased and was having

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

interaction with him at that juncture accused came there and took out a bottle, thereafter he threw the kerosene on the person of the deceased and threw the burning matchstick on the person of the deceased. This witness also tried to catch hold the appellant and chased him up to certain distance but could not succeed on account of crowd. Thereafter, this witness has stated that the persons who were present there, doused water in order to extinguish the fire. The deceased was thereafter transmitted to Ward No.11 where he was admitted. In cross-examination, this witness has stated that after the incident, he is seeing the appellant in the Court only. We do not find any substance in the submission of learned counsel for the appellant that on account of not holding the test identification parade, no reliance can be placed on the statement of this witness as well as the statement of Dr. S.R. Dubey (PW-9). The incident had taken place in broad day light and these eye witnesses were having sufficient opportunity not only to see the appellant but to observe his act also. According to PW-4, Mohanlal Yadav, he also chased the appellant up to certain distance and thus he had sufficient time to see the face of the appellant. Therefore, even if the test identification parade was not conducted by the investigating agency, that in itself is no ground, in the peculiar facts and circumstances of the case, to hold that this witness is not worth reliable. Apart from this, in the dying declaration as well as in Dehati Nalishi, the appellant has been named and, therefore, there was no necessity to hold the test identification parade. The test identification parade is generally conducted in order to get the clue to the investigating agency in identifying the accused. In the present case, when the appellant was sufficiently identified by his name, to us, in the peculiar facts and circumstances there was no necessity to conduct the test identification parade. After close scrutiny of the evidence of PW-4, Mohanlal Yadav, we do not find any infirmity in his testimony.

28. The other eye witness is Ramaswamy Naidu @ David (PW-5) who on the date of incident was serving on the post of Technician under the deceased. This witness was sitting adjacent to the chamber of the deceased, at that juncture, according to this witness one S.R. Dubey (PW-9) came and sat nearby him as he (Dr.S.R. Dubey) brought a sample of blood which was to be tested. This witness has also stated that one police constable came there having blood sample of a prisoner and as soon as the said constable came out from the chamber, at that juncture accused arrived there and took out a Can containing some liquid and threw it on the deceased and thereafter set the fire. The accused immediately fled from the place of occurrence although this witness chased to catch hold him, thereafter the employees of his department doused the water on the person of the deceased. This witness has further stated that he failed in catching hold the accused and because the deceased was ablaze, he came back in order to save the deceased. In para 4 of his testimony this witness has stated that earlier to the incident also, the accused came to get his blood tested and he is acquainted with appellant by

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

his face. This witness was cross-examined at length but despite there being a roving cross-examination over him, he remain embedded in his version. Learned counsel for the appellant could not point out that how and in what manner the statement of this witness should be disbelieved. In para 10 this witness has firmly denied the suggestion that the deceased was not in a position to speak although he was severally burnt.

29. The last eye witness is Dr. S.R.Dubey (PW-9) who had categorically stated that on the fateful day, he along with his one HIV patient, namely, Muneem Driver came to the deceased to get the blood of his patient examined. According to this witness accused came there and took out a "Kuppi" (flask) containing kerosene in it and threw the kerosene on the person of the deceased and thereafter lit the fire. Even for the sake of argument, the evidence of PW-4, Mohanlal Yadav and S.R.Dubey (PW-9) is ignored (though it cannot be ignored since it is worth reliable), the evidence of Technician Ramaswamy Naidu @ David (PW-5) is very much relevant and it has been carved out from his testimony that earlier to the incident also, this witness has seen the accused since he came repeatedly for the treatment as the accused was having certain doubts of the disease of HIV.

30. The incident had taken place on 6.3.2007, firstly the deceased was treated at Medical College at Jabalpur, however, when it was found that his condition is deteriorating he was shifted to Safdarjung Hospital, New Delhi where he succumbed to burn injuries on 12.3.2007. The postmortem of the deceased was conducted by Dr.Yogesh Tyagi (PW-6). During the postmortem, the autopsy surgeon noticed the presence of smell of kerosene in the hair of the deceased. The autopsy surgeon found head, neck, face, chest, back, abdomen, both palms, private part and both the thighs to be burnt. The burn injuries were deep and the deceased was 80% burnt. Except the burn injuries, no other injury was found on the person of the deceased by the autopsy surgeon. The doctor opined that the death was due to septicemic shock on account of burn injuries.

31. Much emphasis has been put by Shri Dubey, learned counsel for the appellant by placing reliance on the decision of Supreme Court *B.N. Kavatakar* (supra) and has argued that if the death has occurred on account of septicemia after six days of the incident, the offence would fall under the ambit and scope of Section 326 of IPC. The argument though at the first blush appears to be quite attractive, however, on deeper scrutiny found it to be devoid of any substance. In the case of *B.N. Kavatakar* (supra) the injuries were caused by lethal weapons by the accused of that case and on account of receiving injuries the deceased developed "septicemia" as a result of which he died and in that context it was held by the Supreme Court that the offence would come under the ambit and sweep of Section 326 of IPC. In the present case, the deceased was infected by septicemia on account of burn injuries. We shall now examine what is "septicemia" and how it occurs.

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

Septicemia is a systemic infection, usually caused by bacteria of various types contaminating a person's blood. When septicemia is not treated with the appropriate antibiotics, the infected blood can then contaminate other organs or tissues of the body, creating life-threatening infections. There are many things that can cause septicemia, most notably, cuts that have become infected.

Infections of the mouth or teeth, when untreated by antibiotics, can cause septicemia. One serious complication can occur if a dentist initiates treatment of affected teeth, and there is an additional development of bacterial endocarditis (BE), which is a strep infection. The strep enters the blood stream and then cultivates inside the cardiac tissues creating blockages. Anyone with a heart condition is slightly more vulnerable to BE and needs to take antibiotics prior to dental procedures. In most cases, where infection of the mouth, like an abscess is clearly evident, dentists will treat the infection prior to performing any type of oral surgery.

Infections of cuts or surgical wounds both carry a risk or developing septicemia. These wounds that begin to feel hot, look red, have red streaks coming out from them, or that seem to be draining pus should all be examined by a doctor. Since many people who have surgery now go home within a day or two, self-examination is important to rule out possible infection. With a large cut or surgical wound, one has a slightly increased risk of septicemia, because blood loss lowers the body's natural immunities.

Burns are another major causal factor in septicemia. Third degree burns are particularly vulnerable to infection, and the larger the burn, the greater the chance of infection. Often third degree burns damage the nerve endings of skin, causing people not to initially feel pain at the site of the burn. People may not notice initial infection of burns without visual inspection.

Another possible cause of septicemia is internal injury, such as a stomach injury after a car accident. Intestinal rupture, gall bladder disease and rupture of the appendix or spleen are indicated in septicemia as well. These ruptures very often are treated with antibiotics from the onset, since the blood is immediately exposed to high and dangerous bacteria levels. This is particularly of issue with intestinal perforations, which spill bowel contents into other parts of the body, causing almost immediate septicemia.

A partial miscarriage, or missed miscarriage can also result

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

in septicemia, if pregnancy remains stay in the uterus and become infected. Virtually any internal infection more readily can become septicemia because of direct contact with blood cells.

Thus, it is as clear like a noon day that septicemia is an infection which can be caused by cuts or surgical wounds, infections of mouth or teeth when untreated by antibiotics, internal injury on account of accident, rupture of intestinal, gall bladder, disease and rupture of spleen or appendix etc. partial miscarriage or miscarriage and also on account of burn injuries. Thus the decision of Supreme Court *B.N.Kavatakar* (supra) placed reliance by learned counsel for the appellant is tangentially off the point and is not applicable in the case of burn injuries.

32. According to us no special knowledge is needed to know that one may cause death by burning if he sets fire to the clothes of a person it is obvious that the appellant must have known that he was running the risk of causing the death of the victim or such bodily injury as was likely to cause the death and, therefore, as he had no excuse for incurring that risk, the offence must be taken to fall within fourth clause to Section 300 Penal Code in other words the act of appellant was culpable homicide amounting to murder even if he did not intend to cause the death. The appellant has committed an act so imminently dangerous that it was in all probability likely to cause death or result in an injury that was likely to cause death. [See decision of Supreme Court *Ram Prasad* (supra)] placed reliance by learned Public Prosecutor.

33. Thus there is overwhelming material on record in order to hold that accused threw the kerosene on the person of the deceased thereafter lit the matchstick and threw the burning matchstick on the person of the deceased as a result of which the deceased received burn injuries and he succumbed after six days viz. on 12.3.2007. Hence according to us, the act of appellant is culpable homicide amounting to murder.

34. We do not find any merit in the contention of learned counsel for the appellant that accused was of unsound mind at the time of trial and, therefore by not examining the appellant not only the conviction is bad in law but the trial is also vitiated. On going through the application dated 22.6.2007 filed on behalf of accused by his counsel, it is revealed that as per the averments made in the application the accused is of unsound mind and is not in position to defend himself. Hence, the prayer was made to get him examined by the Medical Board. To us, this argument is nothing but an unsuccessful attempt to construct a mountain of sand having no base. On going through the order sheet dated 5.5.2007 it is revealed that the accused was produced before the learned Trial Judge from the jail and he expressed his inability to get himself represented through a counsel from his own expense as he was not having sufficient means to pay the fee to a counsel as a result of which a prayer was made by him to learned Trial Judge that legal aid be

STATE OF M.P. Vs. Koushal Prasad Jaiswal

provided to him. Not only this, appellant also stated to learned Trial Judge that the copies of the charge sheet which was provided to him in the committal court has not been bought by him from the jail. This act, conduct and conversation with the learned Trial Judge indicates and proves that he is not a person of unsound mind but is a normal man. The case was listed before the learned Trial Judge on 5.5.2007, 10/5/2007 and 5/6/2007, but nowhere it was complained about the mental condition of the accused. First time on 22.6.2007 when the case was fixed for evidence, on that date, the application under Section 328 and 335 of Cr.P.C. was filed, the learned Trial Judge vide order dated 25.6.2007 rightly rejected the said application. The learned Trial Judge has assigned reasons that no medical record in respect to mental condition of the appellant has been placed in order to ascertain that he was earlier unsound mind. The learned Trial Judge also observed that the behaviour of the appellant is quite normal and it cannot be said that he is of unsound mind and, therefore, according to us the application was rightly rejected by the Trial Court.

35. We do not find any substance in the statement of learned counsel for the appellant that the manner in which the accused has been arrested, the same is doubtful. The Investigating Officer S.L.Chandraul (PW-10) has specifically stated that the accused was arrested vide arrest memo Ex.P/24 on the date of incident from the Medical College area. He was also hiding his presence and was arrested behind the building of Medical College. We failed to understand that how and in what manner the arrest of accused is suspicious and even if the same is suspicious how it will dilute the case of the prosecution.

36. It would be relevant to mention here that in 313 Cr.P.C. statement, while answering question No.50 as to whether the accused was arrested behind the Medical College Campus vide Ex.P/24, the accused answered in affirmative and thus there remains no doubt in respect to the arrest of accused which was made behind the Medical College campus and this argument of learned counsel for the appellant is also found to be meritless.

37. We have given our anxious and bestowed consideration to the reasonings assigned by trial Judge holding accused to be guilty of the offence under Section 302 of IPC. According to us, the reasons assigned by learned Trial Judge are based on correct appreciation of oral and documentary evidence placed on record and no interference is warranted. Thus, we hereby affirm the finding of learned Trial Judge holding the appellant to be guilty of offence under Section 302 of IPC.

38. The question now require for consideration is to whether the learned Trial Judge was right in passing the capital sentence to the accused. The learned Trial Judge has passed the death sentence to the accused holding the present case to be the rarest of the rare case. According to learned trial Judge, the deceased was ablaze in his office when he was discharging his official duty as a public servant. He was brutally killed by the accused by pouring kerosene and setting the fire

STATE OF M.P. Vs. KOUSHAL PRASAD JAISWAL

of no fault of his. The deceased was an innocent person and there was no enmity with the accused and therefore by placing reliance on the decision of Supreme Court *Gayasi v. State of U.P.* AIR 1981 SC 1160, the learned trial Judge has come to the conclusion that the present case comes under the ambit and sweep of rarest of the rare case. According to us, if the offence under Section 302 IPC is proved, normal law is to award life imprisonment and passing of death sentence is an exception. There are several factors and the mitigating circumstances not to award the death sentence. It is difficult to frame any straightjacket formula indicating therein that in a particular type of cases capital punishment should be passed and in other cases passing of sentence of life imprisonment would be sufficient. Each case should be tested on its facts, circumstances and the evidence. Some of the mitigating factors and reasons for not awarding the death sentence are that there having been no intention to commit murder the offence falling under the Fourth clause of Section 300 IPC; the offence was committed under the influence of extreme mental or emotional disturbance; if the facts and circumstances of the case indicate that the accused believed that he was morally justified in committing the offence etc. In the present case, the incident had taken place because accused was under the impression that he is a patient of HIV and the deceased did not find him to be the patient of HIV. However, the accused was not agreeing with the opinion of the deceased and was insisting repeatedly to provide CD-4 medicine which is being provided to the HIV patient and the demand of the accused was negated by the deceased and thus it can be inferred that in the influence of mental or emotional disturbance the accused committed the offence. Thus the facts of the case in hand are totally different from the facts of the decision of *Gayasi* (supra) which has been placed reliance by learned Trial Judge. One should not forget that the Judges are never blood thirsty. One of the tests for imposition of death sentence is to find out whether the offender offers such traumatic threat to the survival of social order. Looking to the entire factual scenario, according to us, the present case being not a case of rarest of rare case and, therefore, we hereby alter the capital punishment of the accused to life imprisonment. The accused/appellant is hereby directed to suffer life imprisonment.

39. Resultantly, Criminal Appeal No.138/2008 filed on behalf of appellant is hereby allowed in part. The capital sentence awarded to him by the learned Trial Judge is hereby altered to life imprisonment. The death reference referred by learned Trial Judge is hereby accordingly disposed of.

Appeal disposed of.

I.L.R. [2009] M. P., 309
CRIMINAL REFERENCE

Before Mr. Justice A.K. Shrivastava & Mr. Justice S.A. Naqvi

21 July, 2008*

STATE OF M.P.

... Applicant

Vs.

DILIP BANKAR

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 329 & 331 - Resumption of enquiry or trial - Trial of accused postponed on account of his unsoundness of mind u/s 329 - Trial can be resumed by trial court only if accused ceases to be of unsound mind - It is incumbent upon trial court to record its satisfaction that accused is ceased to be insane and is capable of making his defence - Charges were framed without recording such finding by trial court - Entire trial vitiated - Judgment of conviction set-aside - Matter remitted back to trial court to record its satisfaction that accused is of sound mind and then to put to trial - Appeal allowed. (Para 24)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 329 व 331 - जाँच या विचारण को पुनः चालू करना - अभियुक्त का विचारण धारा 329 के अन्तर्गत उसकी चित्त-विकृति के कारण मुल्तवी किया गया - विचारण न्यायालय द्वारा विचारण केवल तभी पुनः चालू किया जा सकता है जब अभियुक्त विकृतचित्त नहीं रह जाता है - विचारण न्यायालय पर यह बाध्यता है कि वह अपना समाधान अभिलिखित करे कि अभियुक्त उन्मत्त नहीं रहा है और अपना बचाव करने में सक्षम है - विचारण न्यायालय द्वारा ऐसे निष्कर्ष अभिलिखित किये बिना आरोप विरचित किये गये - सम्पूर्ण विचारण दूषित - दोषसिद्धि का निर्णय अपास्त - मामला विचारण न्यायालय को अपना यह समाधान अभिलिखित करने कि अभियुक्त स्वस्थचित्त का है और तब विचारण करने वापस भेजा गया - अपील मंजूर।

Cases referred :

AIR 1972 SC 2267, 1982 CrLJ 1546, 1983 CrLJ 1769, (2007) 8 SCC 66.

T.K. Modh, Dy.A.G., for the applicant/State.

S.C. Datt with Siddhartha Datt, for the non-applicant.

J U D G M E N T

The Judgment of the Court was delivered by A.K. SHRIVASTAVA, J. :- This judgment shall also govern the disposal of connected Criminal Appeal No.1274 of 2007 (Dilip Bankar v. The State of M.P.) filed on behalf of the accused.

2. By exercising the power conferred to it under Section 366 of the Code of Criminal Procedure, 1973, this reference has been submitted to this Court by learned Sessions Judge, Bhopal in Sessions Trial No.28/2006 for confirmation of the death sentence awarded to the accused for the offence punishable under Section 302 IPC. The learned Sessions Judge has also convicted the accused for the offences punishable

*Criminal Reference No.2/2007 (Jabalpur)

STATE OF M. P. Vs. DILIP BANKAR

under Sections 363, 366, 376 (2) (f) IPC and has sentenced him to suffer 7 years rigorous imprisonment and fine of Rs.500/-, in default of payment of fine, further S.I. for six months; 10 years rigorous imprisonment and fine of Rs.500, in default, S.I. for six months and life imprisonment and fine of Rs.1000/- respectively.

3. In brief the case of prosecution is that Naina alias Gurmeet (hereinafter referred to as 'the deceased prosecutrix') who was a minor daughter of Satnam Singh was playing along with her brother Chhutu@ Jagmohan nearby a temple which is located nearby her house, when she did not return to her home till evening, her father Satnam Singh lodged the missing report which was written on Roznamcha (Ex.P/20). The Station Officer Incharge S.M.Zaidi arrived at Roshanpura and made enquiry from the residents of that locality. In the said enquiry it came to know to the investigating officer that one person whose appearance resembled with that of the accused was seen last along with the deceased prosecutrix. The investigating officer thereafter went to the hut of the accused but he was not found there. The relatives and the friends of the accused were also interrogated and it came into the knowledge of the investigating officer that one brother of the accused resides in a hut in Sai Baba Nagar, eventually, the Investigating Officer also went to search the accused at that place, but, neither accused nor his brother was found. Thereafter, when the Investigating Officer was going to the residential place of the third brother of the accused, on the main road accused was seen and he was identified by Chhutu alias Jagmohan. It is said that on the interrogation the accused admitted that by enticing to give biscuit to her, the deceased prosecutrix was firstly kidnapped and thereafter she was raped and killed. The accused also showed the place of occurrence where the prosecutrix was lying dead. A Panchanama of the dead body was prepared and it was seized. The spot map was also prepared.

4. In furtherance to its investigation, the investigating agency called the FSL team to get the spot inspected; the photographs of the place of occurrence were taken, seized ordinary earth of the place of occurrence; grass pieces; an empty quarter of liquor; one bottle; cap of the bottle; half burnt Bidi, a wrapper of Parle-G "Biscuit" and a blue coloured panty lying on the dead body was seized.

5. From the possession of accused, his shirt was seized in which the dust particles were found on the sleeves where the elbow rests, some hairs were found on the sleeve of the shirt. The dust particles were also found on that place of the trouser where the knee rests. One pair of sleeper of the accused having dust on the sole was also seized. The dead body of the deceased was sent for postmortem; the statements of witnesses were recorded; and the accused was arrested.

6. After the investigation was over, a charge sheet was submitted in the committal Court and thereafter the committal Court committed the case to learned Sessions Judge where accused was tried.

STATE OF M. P. Vs. DILIP BANKAR

7. The learned Sessions Judge after going through the charge sheet framed charges punishable under Sections 363, 366, 376 and 302 of IPC. Needless to emphasize the accused abjured his guilt and pleaded complete innocence as well as maladroitness implication.

8. In order to prove the charges, the prosecution examined as many as 13 witnesses and placed Ex.P/1 to P/59 the documents on record. The defence of accused is of maladroitness implication and the same defence he set forth in his statement recorded under Section 313 Cr.P.C. He also stated that he was not in fit mental condition.

9. The learned Sessions Judge on the basis of evidence placed on record came to hold that accused did commit the offence for which he was charged and eventually convicted him and passed the sentences including the capital sentence which we have already mentioned hereinabove.

10. In this manner this reference has been referred to this Court to pass appropriate order in respect to the confirmation of the death sentence. Simultaneously the accused has also preferred an appeal (Cr.A. No.1274/2007) against the impugned judgment of conviction and order of sentence.

11. Apart from merit of the case, it has been contended by Shri Datt, learned senior counsel that on going through the order sheets of the Trial court it would reveal that the accused was of unsound mind during the trial and he was treated at Mental Hospital at Gwalior. In this context, learned senior counsel has invited our attention to the order sheet dated 30.5.2006 and 18.8.2006. By inviting our attention to the order sheet dated 13.10.2006, it has been argued that report of Mental Hospital, Gwalior was submitted before the learned Trial Court and according to the said report the accused was only partially cured. Our invitation has also been drawn to the order sheet dated 13.12.2006 of Trial Court and it has been submitted that a letter was directed to be sent to the Superintendent Central Jail, Gwalior to the send the mental report of the accused. The contention of learned senior counsel is that neither any report from Mental Hospital at Gwalior in original is on record nor in pursuance to the direction given by learned Sessions Judge dated 13.12.2006 the accused was mentally examined at Bhopal and without holding any enquiry under Section 329 Cr.P.C. in order to ascertain whether the accused is of sound mind or not, the trial was commenced and the accused has been convicted. The contention of learned senior counsel is that the procedure so adopted by the learned Sessions Judge is wholly unwarranted under the law and dehors to the mandatory provision and hence not only the conviction and sentence awarded to the accused but the trial is also vitiated. To bolster his contention, learned senior counsel has placed reliance on *Dr. Jai Shankar (Lunatic) through Vijay Shankar brother guardian v. State of Himachal Pradesh*, AIR 1972 SC 2267; decision of *Himachal High Court Dhani Ram v. State of Himachal Pradesh*, 1982 CRI.L.J. 1546; decision of *Karnataka High Court Pujappa v.*

STATE OF M. P. Vs. DILIP BANKAR

The State, 1991 C.R.I.L.J. 1189; and decision of Bombay High Court *Balu Ganpat Koshire v State of Maharashtra*, 1983 C.R.I.L.J. 1769.

12. On the other hand Shri Modh, learned Deputy Advocate General argued in support of the impugned judgment and has submitted that a photocopy of a certificate of Mental Hospital, Gwalior certifying that the accused has now ceased to be of unsound mind is in the record of learned Trial Court. The learned Dy. Advocate General has also placed reliance on the photocopy of the observation report of Central Jail, Gwalior Psychiatric Ward in which the Psychiatrist of the Mental Hospital had certified that the accused is able to defend himself in a Court of law and, therefore, according to learned State counsel, it appears that the learned trial Court by placing reliance on these reports have tried the accused by assuming that he has ceased to be of unsound mind and, therefore, no illegality has been committed by the learned Sessions Judge. In support of his contention, learned State counsel has placed heavy reliance on the decision of Supreme Court *Bapu alias Gujraj Singh vs State of Rajasthan* (2007) 8 SCC 66. It has also been put forth by learned Dy. Advocate General that looking to the genesis of the occurrence and the evidence placed on record, since the deceased prosecutrix was firstly raped and thereafter she was killed in gruesome manner by the accused, apart from the sentences awarded to the appellant convicting him under Section 363, 366 and 376 (2)(f) of IPC, rightly he had been convicted under Section 302 of IPC by awarding capital punishment to him.

13. Before entering into the merit of the case, it is to be ascertained whether the accused who was found to be of unsound mind became in fit mental condition and ceased to be unsound mind during the trial. This is very much essential in the facts and circumstances of the case, because under Section 329 Cr.P.C. the Court is duty bound if it appears to it that accused is of unsound mind and consequently incapable of making of his defence. In that situation the Court shall try the facts of such unsoundness and incapacity and if the Court after considering the material placed on record and other evidence as may be produced before it is satisfied of the fact, it shall record a finding to that effect and would also postpone further proceedings in the case. The provisions of Section 329 Cr.P.C. are mandatory and there cannot be any deviation. Since this provision is mandatory in character therefore omission to decide the preliminary issue would vitiate the entire trial when there is no proper enquiry and the Trial Court has failed to record a finding with respect to insanity of the accused. It is mandatory on the part of the Court to first consider the fact of innocence of mind, incapacity of the accused to make defence after taking such evidence including medical evidence that may be necessary for the purpose. We may further add that mere report of the Superintendent of Jail that the accused is capable of understanding is no compliance to Section 329 and 332 Cr.P.C. unless the Court record its satisfaction that accused has ceased to be unsound mind.

STATE OF M. P. Vs. DILIP BANKAR

14. Section 331 Cr.P.C. speaks about resumption of enquiry or trial and according to this section whenever an enquiry or trial is postponed under Section 328 or 329 Cr.P.C., the Magistrate or the Court as the case may be, may at any time after the person concerned has ceased to be unsound mind resumed enquiry or trial and requires the accused to appear or be brought before such Magistrate or Court. Section 332 throw light on the procedure when the accused appears again before the Magistrate or Court and according to this section if when the accused appears or is again brought before the Magistrate or court as the case may be, the Magistrate or Court considers him capable of making of his defence, it shall proceed with the enquiry or trial.

15. If the provisions contained in Section 329, 331 and 332 are read conjointly, it would reveal that during the trial of any person it appears to the Court that such person is of unsound mind the said fact should be tried and on reaching to the conclusion that the insanity of the accused has been ceased, the trial will be resumed on the satisfaction of the Court that the accused now can defend himself and is not unsound person.

16. By testing the above said provisions in the present factual scenario it would reveal that Constable Man Singh of Gwalior Central Jail appeared before the learned Sessions Judge on 20.2.2006 and made request that the accused has been brought in a case pending before First Additional Sessions Judge, Bhopal in Sessions Trial No.253/2005 and also submitted the committal warrant of the accused and the letter issued by Sessions Judge as a result of which the matter was taken up for hearing on 20.2.2006 and fixed 21.3.2006 the date of hearing. In the order sheet it has also been mentioned that constable also submitted certificate of hospital. The learned Sessions Judge directed to issue notice to relative of the accused. In the record of learned Sessions Judge, there is a letter dated 19.2.2006 written by Superintendent of Central Jail, Gwalior addressed to Sessions Judge, Bhopal informing the mental condition of accused. According to this letter, the accused is undergoing treatment/ examination in the Mental Hospital, Gwalior. The observation report, in original, written by Doctor of Mental Hospital Gwalior has been enclosed. In the said report, it has been mentioned that patient/ accused is receiving treatment and he is not able to defend himself in Court of law. The learned Trial Court took the case for hearing on 21.3.2006 and 21.4.2006 but the report of Mental Hospital, Gwalior was not produced. The order sheet of the Trial Court dated 23.5.2006 also indicates that the report from Mental Hospital, Gwalior in respect to the mental condition of the accused has not been received and the learned Trial Court directed to send letter to Superintendent of Central Jail, Gwalior to send requisite information and 18.8.2006 the date was fixed. On 18.8.2006 no report was filed nor accused was produced from Central Jail Gwalior and 13.10.2006 the date was fixed. On 13.10.2006 Constable Narendra Singh of Gwalior Central Jail, Produced the accused along with the observation report of the accused who was undergoing treatment in Psychiatrist Ward Central Jail, Gwalior. Doctor

STATE OF M. P. Vs. DILIP BANKAR

of the Mental Hospital, Gwalior on 12.10.2006 observed the accused for the period 5.9.2005 to 12.10.2006 and it was observed that the accused is still revealing psychotic symptoms mainly asleep and appetite, dullness, fearfulness, persecutory, ideations and idiatory, hallucinations. The doctor specifically opined that the patient (accused) is not able to defend himself in the Court of law. The learned Sessions Judge on 13.10.2006 recorded this fact in the order sheet that the accused is not mentally fit and adjourned the case for 13.12.2006. On 13.12.2006 the accused was brought from the jail and the learned trial Judge directed to send the letter to jail authorities supplying information about the mental condition of the accused from the mental hospital, Gwalior and further directed that the accused shall also be examined at Bhopal and the reports be submitted prior to 27.12.2006. On 27.12.2006 the counsel of the accused who was appointed through State Legal Service Authority did not remain present as such it was directed to issue letter to the Secretary State Legal Authority and the case was fixed for 15.1.2007.

17. Although the case was fixed on 15.1.2007, but it was taken up for hearing on 11.1.2007 and straightway the charges were framed under Section 363, 366, 376(f) and 302 of IPC and thereafter the case was fixed for recording the evidence.

18. On going through the above said order sheets of learned trial Court, it is revealed that the accused was of unsound mind and he was sent to Gwalior Central Jail where he was being treated by the doctor of the Mental Hospital, Gwalior. The observation report dated 18.2.2006 given by the doctor of the Mental Hospital, Gwalior indicates that the accused was examined in Psychiatric Ward at Central Jail, Gwalior. In the report it has been specifically mentioned that the patient is still showing psychiatric symptoms mainly poor personal care, poor sleep, social interaction, no talking, fearful perplexed, hallucinatory behaviour. According to the report, the accused was receiving treatment accordingly and he was not found fit to defend himself in the Court of law. This report was given by the doctor of the Mental Hospital, Gwalior after observing the accused from 5.9.2005 to 18.2.2006.

19. Another observation report of Psychiatric Ward Central Jail Gwalior is on record of learned trial Court. According to this report, the accused was observed for the period 5.9.2005 to 12.10.2006 and again it was found by the doctor of the Mental Hospital, Gwalior that accused is still revealing psychiatric symptoms mainly ? sleep, appetite, dullness, fearfulness, persecutory, ideations and ideatory hallucinations and again it was opined by the doctor of the mental hospital that the accused is unable to defend himself in Court of law. The learned Sessions Judge also mentioned this fact in the order sheet dated 13.10.2006 that medical report of the accused indicates that he is not mentally fit. On 13.12.2006 also the Court directed to send letter to Superintendent Central Jail with a direction to send the medical report about the mental status of the accused from Mental Hospital, Gwalior as well as accused be examined in Bhopal also, but, the report of any of the Medical Institute of Bhopal is not on record in order to indicate that accused has ceased to be insane.

STATE OF M.P. Vs. DILIP BANKAR

20. According to us, if the trial of the accused was postponed on account of his unsoundness mind under Section 329 Cr.P.C., the same could be resumed by the Trial Court only if the accused has ceased to be of unsound mind. In this regard Section 331 is very much clear. Under Section 332 Cr.P.C. if the accused appears again before the Court and the Court finds him capable of making his defence it shall proceed with the trial. Thus, the satisfaction of the Court on the basis of material placed on record is paramount consideration. The purpose of referring the several order sheets of Trial Court is that there was overwhelming material before the learned Trial Court that accused was of unsound mind and he was undergoing treatment in Central Jail, Gwalior in Psychiatric Ward. The doctor of the Mental Hospital, Gwalior from time to time opined that accused is not fit to defend himself and, therefore, it was incumbent upon the learned Sessions Judge before proceeding with the trial before 11.1.2007 to record its satisfaction under Section 332 Cr.P.C. that accused is ceased to be insane and is capable of making his defence. This satisfaction has not at all be recorded by learned Sessions Judge.

21. The word "considers" appearing in Section 332 Cr.P.C. empowers the Court not only to examine the Medical Certificate and also the doctor, if necessary, but, also should consider other factors and the accused should also be interrogated by the Court and only after due application of mind the Court should come to the conclusion that accused is capable of making of his defence. This power should be strictly complied with because it relates to the defence of the accused which is his valuable right and also relates to personal liberty of accused. The aim and object of the provisions as to accused persons of unsound mind (Section 328 to 332 Cr.P.C.) is that the accused who is of unsound mind should not be put to trial because he is unable to defend himself and, therefore, there must be a specific order of the Court recording a finding that insanity of the accused has been ceased and he is in fit mental condition to defend himself. In absence of any such finding, if the accused is put to trial, according to our firm view not only the conviction but the trial is also vitiated.

22. True at the time of the passing of the judgment, when the learned trial Court was at the stage that what punishment should be awarded to the accused, there is some indication that accused is mentally fit, but, no finding was recorded by the learned trial Court in regard to the mental status of the accused when he was put to trial and there is no order of learned trial Court holding that accused has now become sound mind and has been ceased to be insane. Indeed, this finding ought to have been recorded by the learned trial Court on or before 11.1.2007, the date on which the charges were framed against the accused and case was put for trial. In the record of the learned trial Court a photocopy of observation report of Central Jail, Gwalior Psychiatric Ward has been tagged which appears to be of 25.10.2006 and in which it has been mentioned that at present patient (accused) is improved but he is under maintenance phase, with the treatment currently patient is free

STATE OF M. P. Vs. DILIP BANKAR

from active psycho pathology, so he is able to defend himself in the Court of law. Further it has been opined that patient (accused) is discharged with the advice of continous medication and regular follow up, but, this alone could not be a ground in order to hold that accused has ceased to be unsound mind particularly when it has been opined by the doctor of the Mental Hospital that continuous medication and regular follow up is necessary. There is nothing on record that continuous medication was provided to the accused and he was regularly observed and by whom. We have already held hereinabove that the learned trial Judge did not interact with the accused in order to form an opinion that he is capable of making of his defence and ceased to be an insane. According to us, the learned Trial Court should not have acted mechanically only on the basis of the photocopy of the medical report of the accused by taking it to be a gospel truth. According to us, the learned trial Court after recording its satisfaction by putting questions to the accused in order to ascertain that he is now ceased to be of unsound mind, a finding should have been recorded in that record. If necessary, the doctor should have also been examined. At this juncture we may profitably place reliance on the decision of Supreme Court *Dr. Jai Shankar* (supra). The view taken up by us has also been taken by Himachal Pradesh High Court in *Dhani Ram* (supra), Bombay High Court in para 7 of *Balu Ganpat Koshire* (supra) and Karnata High Court in *Pujappa* (supra).

23. The decision of *Bapu alias Gujraj Singh* (supra) placed reliance by learned State counsel is not applicable in the present case because in that case plea of unsoundness of mind and a protection given under Section 84 of the IPC to the accused was point in issued. In the present case, the point involved is altogether different and it is to be considered whether during the trial appellant was of unsound mind or not and, therefore, the decision of *Bapu alias Gujraj Singh* (supra) placed reliance by learned State counsel is not at all applicable in the present factual scenario.

24. For the reasons stated hereinabove, we are of the view that since no finding has been recorded by learned Trial Court before putting the accused to trial that he is not of unsound mind and the insanity has been ceased, therefore, not only the conviction but the trial is also vitiated. Accordingly we set aside the impugned judgment of conviction and order of sentence and remand the case to learned trial Court to record first its satisfaction that the accused is of sound mind, in the light of the observations made hereinabove and after recording the finding that accused is in fit mental condition to defend himself, he may put to trial.

25. The reference is accordingly answered and the appeal of the accused is allowed in part. The Trial Court is hereby directed to pass an order to produce the accused before it on 4th August, 2008. The Registry is hereby directed to send the record posthaste to learned trial Court so as to reach much before 4.8.2008.

Order accordingly.

I.L.R. [2009] M. P., 317
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice P.K. Jaiswal

25 September, 2008*

VINOD DIXIT

Vs.

SATISH MISHRA & ors.

... Applicant

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 173 & 210, Penal Code, 1860, Section 394, Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. 1981, Section 11/13 - Conditions for invoking powers u/s 210 of Code - Held - (1) There must be a complaint pending for inquiry or trial; (2) Investigation by the police must be in progress in relation to the same offence; (3) A report must have been made by the police officer u/s 173 of Code; and (4) The Magistrate must have taken cognizance of an offence against a person who is accused in the complaint case - Petition allowed with the direction to consider the application and on being satisfied that above conditions are fulfilled then passed a reasoned order. (Para 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 173 व 210, दण्ड संहिता, 1860 धारा 394, डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. 1981, धारा 11/13 - संहिता की धारा 210 के अन्तर्गत शक्तियों का अवलंब लेने के लिए शर्तें - अभिनिर्धारित- (1) जाँच या विचारण के लिए कोई परिवाद लम्बित होना चाहिए; (2) उस अपराध के सम्बन्ध में पुलिस द्वारा अन्वेषण प्रगति पर होना चाहिए; (3) पुलिस अधिकारी द्वारा धारा 173 के अन्तर्गत एक रिपोर्ट की जाना चाहिए; और (4) मजिस्ट्रेट को किसी व्यक्ति, जो परिवाद मामले में अभियुक्त है, के विरुद्ध अपराध का संज्ञान लेना चाहिए - याचिका इस निदेश के साथ मंजूर की गई कि आवेदन पर विचार किया जाए और यह समाधान हो जाने पर कि उपरोक्त शर्तें पूरी कर दी गई हैं संकारण आदेश पारित किया जाए।

Case referred :

AIR 2000 SC 637.

R.K. Sharma, for the applicant.

D.R. Sharma, for the non-applicant No.1 .

V.S. Chaturvedi, P.P., for the non-applicant No.3/State.

ORDER

P.K. JAISWAL, J. :-Heard.

Petitioner-complainant filed this petition under Section 482, Cr.P.C. challenging the order dated 7.7.08 passed by the Special Judge (Dakaiti), Bhind, in private complaint by which the learned Sessions Judge stayed the private complaint on the ground that in respect of the same offence Crime No-43/08 is pending prior to the date of filing of the complaint and directed to submit the report under Section 173, Cr.P.C.

2. The undisputed fact in this case is that on 2.4.08 at about 9.30 p.m., the wife

*M.Cr.C. No.4992/2008 (Gwalior)

VINOD DIXIT Vs. SATISH MISHRA

of the petitioner was murdered. The petitioner on the same day, i.e., 2.4.08, lodged a report at Police Station Lahar. The report was lodged on the same night at 12.45 a.m. which was registered vide crime No-43/08 on 3.4.08 (Annexure P/2) against the respondents no. 1 and two other unidentified persons.

3. The petitioner on 7.7.08 filed a private complaint under Sections 302 and 394 of IPC read with Sections 11/13 of the MPDVPK Adhinyam, 1981. In para 4 of the private complaint it is averred that the accused are related with the resourceful person and therefore no action has been taken against them. Trial Court by the impugned order stayed the proceedings of the private complaint in exercise of the power conferred under Section 210 of Cr.P.C. As per Section 210 of Cr.P.C. where a private complaint is filed and the Magistrate receives information that the Police is also investigating the same case, he shall stay the proceedings before him (whether it is at the stage of enquiry or trial) and call for a report of the Police Officer. He may then deal with the private complaint and the case which arises out of the Police report together.

4. Here in the present case, the trial Court has not taken cognizance of the offence nor Final Report has been filed. It is not the case of the petitioner that no investigation is pending before the Police Station, Lahar and in the private complaint cognizance is taken by the said Judge.

5. In order to attract Section 210, there must be a complaint case pending inquiry or trial. During the course of such inquiry or trial in the complaint case, it must be made to appear to the Special Judge that an investigation by the Police is in progress in relation to the offence which is the subject matter of the enquiry or trial held by the Special Judge in the complaint case. It is under these circumstances that the Special Judge has to stay the proceedings in the Inquiry or trial and call for a report from the Police Officer conducting the investigation.

6. On perusal of the impugned order, it is clear that the learned Special Judge directed the Investigating Officer to submit report under Section 173 of Cr.P.C. Provision for stay of the proceedings of the complaint case is only for the purpose of calling for a report in the matter from the Police Officer conducting the investigation to examine whether or not to proceed with the complaint case. If the said report is not submitted within a reasonable time, then only the petitioner can assail the impugned order on the ground that the concerned Police Officer does not act exclusively in the matter and or does not submit his report to the Court at an early date. In the present case, learned Special Court while staying the proceedings of the complaint case directed the Investigating Officer to submit report under sub-section (1). In case the report is not submitted by the Investigating Officer within reasonable time, the Court can proceed with the complaint case.

7. Section 210 requires procedure to be followed when there is a complaint case and police investigation in respect of the same offence and reads thus:

VINOD DIXIT Vs. SATISH MISHRA

“210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him in accordance with the provision of this Code.

8. Bare reading of the above provision makes it clear that during an inquiry or trial relating to a complaint case, if it is brought to the notice of the Magistrate that an investigation by the police is in progress in respect of the same offence, he shall stay the proceedings of the complaint case and call for the record of the police officer conducting the investigation.

9. The object of enacting Section 210 of the Code is three fold:

- (i) it is intended to ensure that private complaints do not interfere with the course of justice;
- (ii) it prevents harassment to the accused twice; and
- (iii) it obviates anomalies which might arise from taking cognizance of the same offence more than once.

The Joint Committee of Parliament observed:

“It has been brought to the notice of the committee that sometimes when serious case is under investigation by the police, some of the persons file complaint and quickly get an order of acquittal either by cancellation or otherwise. Thereupon the investigation of the case becomes infructuous leading to miscarriage of justice in some cases. To avoid this, the Committee has provided that where a complaint is filed and the Magistrate has information

VINOD DIXIT Vs. SATISH MISHRA

that the police is also investigating the same offence, the Magistrate shall stay the complaint case. If the police report (under Section 173) is received in the case, the Magistrate should try together the complaint case and the case arising out of the police report. But if no such case is received the Magistrate would be free to dispose of the complaint case. This new provision is intended to secure that private complainants do not interfere with the course of justice.” (emphasis supplied)

10. It is thus clear that before Section 210 can be invoked, the following conditions must be satisfied:-

- (i) There must be a complaint pending for inquiry or trial;
- (ii) Investigation by the police must be in progress in relation to the same offence;
- (iii) A report must have been made by the police officer under Section 173, and
- (iv) The magistrate must have taken cognizance of an offence against a person who is accused in the complaint case.

11. In the impugned order passed by the Special Judge, no such contention appears to have been raised by the petitioner, no such finding is recorded by the Special Judge.

12. For the above mentioned reasons, I am of the considered view that the learned Special Judge has committed legal error in passing the impugned order, staying the private complaint and directing the Investigating Officer to submit report under Section 173, Cr.P.C. The decision cited by the learned counsel for the petitioner in the case of *Rosy and another v. State of Kerala and others*, AIR 2000 SC 637 will not be application in the present facts and circumstances of the case. Learned counsel for the parties are not in a position to make any positive statement whether the report under Section 173, Cr.P.C. has been filed or not. If it is found that no report is filed by the Investigating Officer as directed vide order dated 7.7.08, the learned Special Judge is directed to consider the application and on being satisfied with the conditions as mentioned in Para 10 of the impugned order, on the basis of the material placed on record, passed a reasoned order staying the proceedings of the complaint case and direct the Investigating Officer to submit the report to the court at an early date within a particular time and on failure to file a report within a reasonable time, the Court can proceed with the complaint case.

With the aforesaid, this petition is allowed and disposed of.

Petition allowed.

I.L.R. [2009] M. P., 321
MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice Indrani Datta

26 November, 2008*

RAMPAL SINGH

Vs.

STATE OF M.P. & anr.

... Applicant

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 457 - Seizure - Procedure - Applicant's vehicle seized by the financier for default of non-payment of instalments - Court releasing the vehicle with one of the conditions for payment of loan amount - Action challenged - Held - While deciding application u/s 457 of Code with respect to interim custody of vehicle, the court has to pass appropriate orders and custody is to be given to the registered owner of the vehicle on furnishing requisite security or bond/Supurdginama - While dealing with such application, it is not necessary at all to impose any condition for payment of instalments alleged to be due from the applicant as it is purely a civil matter - If the instalments are due, then the financier can take civil recourse for recovery of same. (Paras 9 & 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 457 - अभिग्रहण - प्रक्रिया - आवेदक का वाहन किरतों की अदायगी न करने के व्यतिक्रम के लिए फायनेंसर द्वारा अभिग्रहीत किया गया - न्यायालय ने ऋण राशि की अदायगी की शर्त के साथ वाहन को मुक्त किया - कार्यवाही को चुनौती दी गई - अभिनिर्धारित - वाहन की अंतरिम अभिरक्षा के सम्बन्ध में संहिता की धारा 457 के अन्तर्गत आवेदन का विनिश्चय करते समय, न्यायालय को समुचित आदेश पारित करना चाहिए और अभिरक्षा अपेक्षित प्रतिभूति या मुचलका/सुपुर्दगीनामा दे देने पर वाहन के रजिस्टर्ड स्वामी को दी जाना चाहिए - ऐसे आवेदन का निराकरण करते समय, यह बिल्कुल आवश्यक नहीं है कि आवेदक की ओर कथित रूप से बकाया किरतों की अदायगी की कोई शर्त अधिरोपित की जाए क्योंकि यह बिल्कुल सिविल मामला है - यदि किरतें बकाया हैं, तब फायनेंसर उनकी वसूली के लिए सिविल कार्यवाही का आश्रय ले सकता है।

Cases referred :

(2007) 2 SCC 711, 2008(III) MPJR (SC) 346.

J.D. Suryavanshi, for the applicant.

Mohd. Irshad, Panel Lawyer, for the non-applicant No.1/State.

Suresh Agrawal, for the non-applicant No.2.

ORDER

MRS. INDRANI DATTA, J. :- Petitioner has filed this petition under Section 482 of Cr.P.C for relaxation of condition no.1 imposed in the order dated 20.8.2008 passed by Vth Special Session Judge, Gwalior in Case no.15 of 2008 by which, the petitioner is directed to deposit the amount of entire arrear within a period of one month.

RAMPAL SINGH Vs. STATE OF M. P.

2. Subject matter of this petition is that the petitioner is registered owner of the truck bearing No. MP07 HB 0816. The truck was financed by respondent no.1 Tata Motors. Loan amount was to be paid by the petitioner by way of instalments. Notice viz Ex.P/3 was issued by the respondent no.1 then last instalment of Rs.20,000/- was deposited by the petitioner on 24.1.2008 viz. Annexure P/4 and only Rs.46570/- remained to be deposited. Thereafter, the truck was seized when it was in transit by some agents of respondent no.2. Petitioner then filed a complaint in the court of Vth Special Session Court who directed for investigation under Section 156 (3) of Cr.P.C. Police Bahodapura, registered Crime no.77 of 2008 for offenses punishable under Section 392, 323, 406, 420, 468 and 471 of IPC and U/s.11,13 of MPDVPK Act Viz Annexure P/2 against Yatish Tripathi Collection Manager of Tata Finance and another. The truck was seized by the police then petitioner and respondent no.2 both filed an application in the Court of Special Sessions Judge for delivery of possession of the truck. Special Sessions Judge, Gwalior repelled the claim of the respondent no.2 and directed release of truck in favour of the petitioner imposing certain conditions as under :

(i). Petitioner Rampal Singh should deposit all remaining arrears of instalments due up to 20.8.2008 and in future, he will regularly deposit due instalments;

(ii). He will not make any change or variation in vehicle. Nor transfer or hand over it's possession to any one else;

(iii). Whenever required, he will produce vehicle with relevant documents,

(iv). All the conditions shall be fulfilled by the petitioner within one month in default of which, respondent no.2 Tata Motors Ltd. Will be entitled to file application for delivery of possession;

3. Learned counsel for the petitioner contended that procedure adopted by the bank for removing truck from possession of the petitioner is deprecated. The bank should have resorted to the procedure recognized in law to take possession of the vehicle in case, the petitioner may have committed default in payment of instalments.

4. Learned counsel for the petitioner drew my attention to the decision in case of *ICICI Bank Ltd. Vs. Prakash Kaur and Others* (2007) 2 SCC 711 in that case, it is held that for recovery of loan/credit card dues/security, etc existing system of engaging thugs/hooligans/gangsters on contract, for such recovery by banks strongly deprecated. Practice of hiring recovery agents, who are muscle man, is deprecated and needs to be discouraged. Banks should resort to procedure recognized by law to take possession of vehicles in cases where borrower has committed default instead of resorting to strong arm tactics.

RAMPAL SINGH Vs. STATE OF M.P.

5. Relying on above citation, it is further contended by learned counsel for the petitioner that the truck was seized by police on his report when respondent no.2's hired agents robbed his truck. Then he has to follow the long legal procedure to get the possession of truck from court. After furnishing necessary surety and bond as directed by the court, possession of the truck was delivered to him. At that time, truck was in worst condition. Petitioner has spent near about Rs.1,80,000/- towards maintenance, battery and tyre etc, therefore, he is not liable to pay instalments due and interest for the period commencing from 28.1.2008 to 2.9.2008 during which, he was not in possession of the truck. So necessary direction in this respect be issued because, the respondent no.2 is wholly responsible for all this because of respondent no.1's hired agent, the truck was forcibly taken from lawful possession of the petitioner and therefore, criminal proceedings were to be initiated and he was dispossessed from the possession of the truck.

6. Learned counsel for the respondent no.2 on the other hand submitted that all the amount of arrears due up to 20.8.2008 was to be deposited by the petitioner. The petitioner has committed breach of court's direction, petitioner has submitted supurdginama in the court that he will deposit all the due arrears in respondent company and future instalments will be deposited by him regularly. It is submitted by learned counsel for the respondent no.2 that the petitioner is bound by his undertaking and direction of the court. This petition is not maintainable unless condition imposed by the court in order dated 20.8.2008 is complied with.

7. Considered the rival contentions of learned counsel for the parties. Recently, Hon. Apex Court made following observations in the case of *ICICI Bank vs. Shanti Devi Sharma and Others* 2008 (III) MPJR (SC) 346 (Paras 11 to 14) as under :

“The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and the Security Interest (Enforcement) Rules, 2002 (SIER)” framed thereunder provide some of the procedures by which security interests may be recovered. In addition to SARFAESI and SIER, the Reserve Bank of India (“RBI”) has promulgated guidelines on the subject. The RBI Guidelines on Fair Practices Code for Lenders dated 5.5.2003 provides at (v) © that: “In the matter of recovery of loans, the lenders should not resort to undue harassment viz. Persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc.”.

A more comprehending version of these Guidelines was recently released on April 24 2008. The Guidelines expressly reference the 5.5.2003 Guidelines at (i) (x) with regd to the methods by which recovery agents collect or security interests. In addition, the April, 24 2008 guidelines further referred paragraphs

RAMPAL SINGH Vs. STATE OF M.P.

6 of the "Code of Bank's Commitment to Customers" (BCSBI Code) pertaining to collection of dues. The BCSBI Code at para 6 inter alia provides :

"All the members of the staff or any person authorized to represent our bank in collection or/and security repossession would follow the guidelines set out below :

(1). You would be contracted ordinarily at the place of your choice and in the absence of any specified place at the place of your residence and if unavailable at your residence, at the place of business/occupation.

(2). Identity and authority to represent would be made known to you at the first instance.

(3). Your privacy would be respected.

(4). Interaction with you would be in a civil manner.

(5). Normally our representatives will contact you between 0700 hours and 1900 hrs, unless the special circumstances of your business or occupation require otherwise.

(6). Your requests to avoid calls at a particular time or at a particular place would be honored as far as possible.

(7). Time and number of calls and contents of conversation would be documented.

(8). All assistance would be given to resolve disputes or differences regarding dues in mutually acceptable and in an ordering manner.

(9). During visits to your place for dues collection, decency and decorum would be maintained.

(10). Inappropriate occasions such as bereavement in the family or such other calamitous occasions would be avoided for making calls/visits to collect dues.

As noted above, this Code as well as others has been incorporated in to the April, 24, 2008 guidelines:

"(ix) A reference is invited to (a) Circular DBOD. Leg. No. BC.104/9.7.2007/2002-03 dated May 5, 2003 regarding guidelines on Fair Practices Code for Lenders (b) Circular DBOD. No.BP.40/21.4.158/2006-07 dated November, 3, 2006 regarding outsourcing of financial services and © Master Circular DBOD.FSD.BC.17/24.1.011/2007- 08 dated July, 2, 2007 on Credit Card Operations. Further, a reference is also invited to paragraph 6 of the 'Code of Bank's Commitment to Customers' (BCSBI Code) pertaining to

RAMPAL SINGH Vs. STATE OF M.P.

collection of dues. Banks are advised to strictly adhere to the guidelines/code mentioned above during the loan recovery process."

RBI has expressed its concern about the number of litigations filed against the banks in the recent past for engaging recovery agents who have purportedly violated the law. In the letter accompanying its April, 24th, 2008 Guidelines on Engagement of Recovery Agents, RBI stated: "In view of the rise in the number of disputes and litigations against banks for engaging recovery agents in the recent past, it is felt that adverse publicity would result in serious reputational risk for the banking sector as a whole." RBI has taken this issue seriously, as evidenced by the penalty that banks could face if they fail to comply with the Guidelines. The relevant portion of the Guidelines formulated by RBI is set out as under :

"Banks, as principals, are responsible for the actions of their agents. Hence, they should ensure that their agents engaged for recovery of their dues should strictly adhere to the above guidelines and instructions, including the BCSBI Code, while engaged in the process of recovery of dues.

Complaints received by Reserve Bank regarding violation of the above guidelines and adoption of abusive practices followed by banks' recovery agents would be viewed seriously. Reserve Bank may consider imposing a ban on a bank from engaging recovery agents in a particular area, either jurisdictional or functional, for a limited period. In case of persistent breach of above guidelines, Reserve Bank may consider extending the period of ban or the area of ban. Similar supervisory action could be attracted when the High Courts or the Supreme Court pass strictures or impose penalties against any bank or its Directors/Officers/agents with regard to policy, practice and procedure related to the recovery process.

It is expected that bank would, in the normal course ensure that their employees or agents also adhere to the above guidelines during the loan recovery process".

We deem it appropriate to remind the banks and other financial institutions that we live in a civilized country and are governed by the rule of law".

In the above observation of law, contention of learned counsel for the petitioner cannot be said to be improper and cannot be

RAMPALSINGH Vs. STATE OF M.P.

ignored and that even though instalment so made by the petitioner, it is not appropriate on the part of respondent no.2 to take forcible possession of vehicle.

9. So far as delivery of possession of vehicle is concerned in this regard, reading of Section 457 of Cr.P.C would also be relevant which reads as under :

“457. Procedure by police upon seizure of property : (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2). If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appeal before him and establish his claim within six months from the date of such proclamation”.

In this way, plain reading of Section 457 of Cr.P.C it is apparent that while deciding application under Section 457 of Cr.P.C with respect to interim custody of vehicle, considering the facts and circumstances of the case, the court has to pass appropriate orders and custody is to be given to the registered owner of the vehicle on furnishing requisite security or bond/supurdginama. Whether any amount of instalment or interest is due or not, is not to be decided.

10. Considering the observations of Hon. Apex Court in various citations and also considering the facts and circumstances of the case, so far as condition no.1 imposed by Special Judge in order dated 20.8.2008 in Case no.15 of 2008 is concerned, while dealing with the application under Section 457 of Cr.P.C, it was not necessary at all to impose condition no.1 whether any instalments are due from petitioner or not as it is purely a civil matter. If the instalments are due, then the respondent no.2 can take civil recourse for recovery of same. Therefore, imposition of condition no.1 is totally improper and depreciable.

11. For the foregoing reasons, condition no.1 as imposed by learned Vth Special Session Judge, is improper and it is hereby deleted. In this way, petition of the petitioner is disposed of.

Petition disposed of.